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THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

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Conclusion

This historical perspective has served a dual purpose. First, by presenting the transformations that the juridical distinction between employees and independent contractors has undergone in its accommodation to radically different socioeconomic and political contexts over the past six centuries, this study has underscored the fact that the currently prevailing versions are neither new nor self-explanatory. by tracing the transitions from the punitive to the restrictive to the expansive ends that the distinction has been designed to implement, a historical account prompts inquiry into whether the ongoing disintegration of that distinction calls for reconsideration of the appropriateness of tying socioeconomic protections to the existence of an employment relationship however The question arises, in other words, as to defined. whether advanced capitalist societies, rather than administering these labor-protective benefits programs through private, profit-driven employers-whose raison d'être is tangential if not antagonistic to such protections -- have not accumulated sufficient wealth to enable them to confer such protections on all their fundamental of their members as a component social rights.

I. THE INCOHERENCE OF THE ECONOMIC REALITY OF DEPENDENCE TEST

Striking differences mark off the modern economic reality of dependence test developed by the Supreme Court in the 1940s from the de facto economic reality



of class poverty test used by Anglo-American courts in the nineteenth century under certain protective labor statutes (e.g., truck and bankruptcy laws). Even mid-Victorian judges had little difficulty recognizing a proletarian when they saw one--provided that he earned his bread by the sweat of his brow and did not employ or exploit anyone else. Viewed against this paradigm, the Supreme Court's guidelines are, paradoxically, both more technical and more amorphous. The six-factor test (control, opportunity for profit or loss, capital investment, permanency, skill, and integration) distilled by the Court, has, by virtue of delving into superfluous detail, in effect invited employers to manipulate legal forms in order to simulate a non-existent independence. On the other hand, because these factors were designed to serve as the means for identifying those who, for the purposes of modern social legislation, "as a matter of economic reality are dependent upon the business to which they render service," they raise a question as to whether they are precise enough for the task.

This formulation of the definition of "employee," in turn, raises two other crucial questions. First: What does "dependent upon the business" mean? And second: Why should this dependence be the ultimate test of the employment relationship?

That ambiguity attaches to this notion of "dependence" emerges from the Supreme Court's discussion of the parallel notion of unequal bargaining power as the underlying (and threshold) evil it was the purpose of the NLRA to remedy. Although it recognized that many "intermediate" categories existed partaking of the incidents of employment and of independent contracting, by the same token it reasoned that:

Inequality of bargaining power controversies over wages, hours and working conditions may as well characterize the [technically of the one status group independent contractors] as of the other [employees]. The former, when acting alone, may be as "helpless in dealing with an employer," as "dependent...on his daily wage" and as "unable to leave the employ and to resist arbitrary and unfair treatment" as the For each, "union...[may latter. essential to give...opportunity to deal on equality with their employer."

Although, understood in this way, the economic reality of dependence test incorporates workers not subject to classical capitalist core control, it has no



operationally useful stopping point. Thus where a trial court sought to ground the requisite employment relationship in the fact that "there is economic pressure on him to work since a horseshoer works to support himself and his family and not simply for his own amusement, " the appellate court held that "[i]t goes without saying that independent contractors, as well as employees, must work to support themselves and their families and must make themselves available to render services at such times as they are needed." Although this criticism of the lack of rigor inherent in the economic reality test is well founded, conclusion to be drawn from it is that, because juridical distinction between employees and independent contractors is inherently lacking in socioeconomic reality, at the very least a constructive category of "dependent contractors" is called for. But it precisely this step that the Supreme Court has been politically and/or intellectually unwilling and/or unable to take.

Although acutely aware of the existence of such "intermediate" categories, the Court failed to situate historically the cause of the diminishing viability of many sectors of the manually self-employed acceleration of corporate-sector economic concentration in the wake of World War II; this unequal accumulation of capital intensified the subordination of marginal (non-employing) quasi-contractors to entities for which they worked, even where they were not necessarily subject to the latter's daily physical commands. By acknowledging that such dependent contractors also needed the protections of the New Deal legislation, the Court could have lent greater rigor and robustness to the notion of the economic reality of dependence. It could then at least have outlined for Congress (and the public) a debate that required systematic rethinking of the relationship between the (employees--selftripartite socioeconomic system employed--employers) 11 fledgling socialand the event, the Court interventionist state. In the succeeded in provoking congressional reaction--but not on self-framed terms.

Instead, the Supreme Court created a doubly flawed foundation by half-heartedly advancing a model without limits or precision that neither covered all those in need of protection nor convinced its opponents that it would not ultimately expand to engulf the universe of independent contractors. Presumably the Court anticipated that consistent and rigorous application of the economic reality of dependence test would generate protests from several affected groups: by employers who would oppose liability for economic reasons; by workers

would resist the formal unveiling of heteronomy for ideological reasons; and by freemarketeers who both rejected any intimation that monopolization was undermining the vitality of the American self-employed yeomanry and feared that attenuating the insecurities of the marketplace would dry up the supply of rugged individualists reputedly necessary for the risk taking that sustains a profit-Consequently, the Court inserted driven economy. enough weasel words into its formulations to support strategic withdrawals back into the control test where It was this original built-in ambiguity necessary. that not only made possible but virtually preordained the subsequent becomes express hollowing out of the economic reality of dependence test, which deprives it of all internal consistency and distinct significance.

Both historically and categorically, the lack of ownership of the means that would enable workers to work for their own account constitutes the dependence and inequality that compelled them to subordinate themselves to those who did own those means. latter--that is, capital--assumes two forms: (the money to buy) the means of subsistence on which to live until the results of the labor process are realized; and the tools, machines, raw materials, and so on, specifically required by that process in conformity with the standards enforced by competition. The common-law control test16 reflects both aspects: Those with no capital are subject to the authority of those who attach them to their capital; and the lack of capital in turn prevents workers from accumulating the capital that would enable them to be independent, that is, to capital other capitals qua to contradistinguished from relating qua labor to capital.

In other words, the control test identified classical proletarians exposed to the full brunt of capitalist exploitation. But the control test situated that relationship on the individual level of exchange (labor power for wage) between worker and capitalist as well as on the level of the latter's authoritative disposition over the transformation of his newly purchased commodity into living labor. obviously did not embed these individual phenomena in a compulsory class structure. Ironically, the nineteenth-century economic reality of class poverty test did just that--by in effect inferring control from the (implicitly judicially noticed) categorical class differences in specific assets and income. The modern economic reality of dependence test, on the other hand, by resisting the conceptualization of a binary class system, has diluted the robustness of both This refusal is so much the more predecessors.



unwarranted because the social security system collective bargaining are by their very collective-compulsory class institutions, which cannot be adequately conceptualized within the framework of individual exchange. To bar admission to these systems because of adventitious contingencies relating to the technical details of the forms of exchange exploitation is self-contradictory. Making protected employee status hinge on whether a worker is economically dependent on a particular business or employer -- rather than on the employing class as a whole monopolist of the means of production existence -- is not only inappropriate to the Context, but self-defeating. For, ironically, by seeking to avoid association with a dogmatic approach, the modern economic reality test has made itself vulnerable to the charge that it does "not...encompass limits." The economic realists reasonable The economic reality of dependence test lays this trap for itself by virtue of its inability to

conceptualize "dependence" rigorously.

Employers have--thus far with mixed sought to exploit this weakness in FLSA cases. one federal appeals court overturned a lower court ruling that, where employees used their wages only as secondary source of income, they were economically dependent on their employer. Rather, the appellate court reasoned, the proper test is whether workers are dependent on the particular business or organization for their continued employment. Impelling the court to this version of the test was the perception that, if carried to its logical conclusion, the lower court's opinion would lead to the senseless or anomalous result, for example, that coverage under the minimum wage and overtime provisions of workers performing identical work would depend on whether they had spouses with primary income. In another variant of the same defense, an employer argued that because the worker received more in certain government payments and from other work, she was not economically dependent on the employer within the meaning of FLSA. circuit court of appeals, plausibly seeking to preempt employers' efforts to "avoid liability to workers simply by paying them so low a wage that the workers are forced to live on other sources of income," held that: "Essentially, this is an argument that they paid could not possibly established the requisite economic dependence under the FLSA."22 Although the practical thrust of the court's motivation and the practical thrust of the court's so little that she motivation may be laudable, its reasoning is emblematic of the conceptual gap in the test itself. Thus the Fifth Circuit was a factor of the conceptual gap in the test itself. Fifth Circuit reasoned that the dependence at issue is the plaintiff's dependence on that job for that income to be continued and not necessarily for complete sustenance or the necessities of life. 23

This notion that economic dependence does not require reliance on the employer for the employee's necessities deviates from the nineteenth-century economic reality of class poverty test according to which laws such as the truck acts were designed to protect those who were so impoverished, atomized, and vulnerable that they could not protect themselves. The modern problem to which the Supreme Court in the 1940s and the circuit courts in the recent cases are reacting is that, once the wage-form and the capital-labor relation come to encompass non-classically proletarian workers, the protective statutes no longer serve their original purpose vis-à-vis the latter; 24 yet it would open a breach in the scheme of categorical protection to base coverage on this criterion. But this criterion is also incapable of distinguishing the runof-the-mill independent contractor from the employee. For with the exception of extremely wealthy independent contractors who could afford to live on their capital for extended periods, it is also true of independent contractors that they are dependent on their customers for their daily wage (especially those who exclusively but seriatim for short periods different customers).

The only characteristic that could then distinguish such independent contractors from employees would be the permanency or exclusivity of their relationships. But since formal freedom of mobility is hallmark par excellence of capitalist labor--enshrined in the United States since 1865 in the Thirteenth Amendment to the Constitution -- that factor would be the slimmest of reeds on which to seek to rest the entire edifice of the distinction between "wage slaves" and entrepreneurs. The factor of permanency or exclusivity, precisely because it serves to occlude rather than to illuminate what dependence means, operates as a virtual invitation to a request for an exemption by employers. For although a grain of plausibility may attach to this argument in the context of highly skilled and scarce workers with specialized physical capital, fungible workers whose low wages dictate a perpetual life of vulnerability on the margin are no less dependent on an employer for the fact that they are formally free to work in quick succession--or simultaneously on different shifts or days of the week--for several employers under the same conditions.

II. FROM CONTRACT TO STATUS TO UNIVERSAL SOCIAL RIGHT

The most striking aspect of the various protective programs, entitlement to the benefits of which is contingent on being an "employee," is the variation in the interpretations of the statutory coverage definitions. This characteristic clashes with their uniform purpose of conferring benefits on No logic or policy appears to undergird the workers. Why, for example, should coverage be variations. narrower under the Employers' Liability Act or the Age Discrimination in Employment Act than under Occupational Safety and Health Act?

Neither the legislature nor the judiciary has the hodgepodge of systematic thought to definitions that clutter the threshold to protection under these statutes. Enacted and amended piecemeal over a period extending back into the century, these laws are bound to reflect nineteenth the very different societal conditions and Zeitgeister that gave rise to them. But they are all in force now, when their common purpose is to intervene into the free play of market forces shaping the conflict between the two dominant socioeconomic classes in order to impose on both certain civilized standards. Ιf it makes no sense, for example, for the same worker to be an employee for the purpose of unemployment compensation that of workers compensation, the not for aforementioned common purpose would be best served by a common definition of "employee."

But which definition? The control test is the most widespread standard for coverage in legislatures and the courts; yet its narrow scope makes dysfunctional. Moreover, whereas in nineteenth-century vicarious liability cases the presence of control served to negate a claim of independent contracting, under twentieth-century protective statutes the absence of control has illogically been transformed into a identifying independent criterion dispositively This inversion has invited contractual contractors. manipulation by employers designed to waive their "right to direct the performance of routine duties."

In spite of the aforementioned critical weaknesses of the economic reality of dependence test, it does have the virtue of starkly posing the choices. For if the chief purpose of that test is to extend benefits to those not subject to traditional employer control, then: either (1) a case-by-case factual determination would have to be made as to whether uncontrolled workers who seek state-sponsored and state-enforced measures of economic security display the requisite

indicia of dependence; or--if that process appears so fraught with uncertainty and costs that the game is no longer worth the candle--(2) the entitlements should be decoupled from the existence of an employment relationship.

The logic underlying the first approach was articulated by Justice Douglas in a solo dissent at the height of the Warren Court. Glossing the Hearst case, he stated that the Supreme Court had "pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions." Especially where the formally self-employed "'had no established places of business; no employees...; no capital investment except a small skill in truck; no or а qualifications,'" both employees and contractors were "in the same boat."31 independent

This approach recognizes that significant numbers of so-called self-employed workers are not in a position, either in terms of their "factor endowments" (namely, capital and skill) or of the supply and demand of the labor market, to bargain successfully qua individuals for the levels of compensation and the whole array of private and public security benefits that employees have obtained through either collective bargaining or state intervention. Douglas's approach could be operationalized or codified by creating a category of statutory or constructive employees—that of "dependent contractors," "uncontrolled employees," or "employee-like persons." Models abound in the legal systems of other societies that have sought to equalize the social conditions of traditional employees and dependent contractors.

In the alternative approach, which expands the concept of the social wage, irrationally invidious universal entitlement to various benefits protections, which would be document. treatment would be eliminated by establishing a protections, 36 which would be decoupled from the employment relationship. 3 A number of Western European countries have already achieved this end with respect invalidity, to health, invalidity, old-age, and maternity benefits. Such a system would for practical purposes render the independent contractor problem academic. At the same time the universality of a guaranteed basic income would remove the stigma of passive dependency that has always attached to the receipt of quasicharitable welfare. Recipients would be no more stigmatized than those who currently are entitled to state funded and organized education. Such a system, combined with a program of community-building public works that could provide useful and therefore



meaningful work for all those whom capital cannot employ, would be a step toward creating a society in which social and labor law would tendentially coalesce because the right to socially useful work and to adequate income and security would be emphatically linked.

this income security program Finally, Would corrode the coercive character of the labor market; for labor tendential decommodification of power attendant upon the weakening of the necessity for its sale under any and all conditions would make available a qualitatively different range of choices to a society of significantly more autonomous individuals resulting democratic restructuring of capital-labor relations would also contribute to subverting dichotomous domains of freedom and unfreedom underlying the original Roman-law distinction between independent contractors and employees.

NOTES

- 1. No less suspect a contemporary than Karl Marx agreed that where the exploitation of workers by capital is realized by means of the exploitation of worker by worker, the phenomenal forms of capital-labor relations could be modified. See 1 Karl Marx, Das Kapital ch. 21 (1867).
- 2. The enumeration of longer lists of indicia of economic dependence in order to thwart efforts by employers to manipulate the forms of control may prove to be more effective than using fewer indicia, but is still subject to the fundamental criticism formulated in the text. For an example of one such recent enumeration, see Minn. Code Agency R. §§ 5200.0221, 5222.0300, 5222.0340 (1987).
- 3. Even before the Supreme Court dealt with the issue, a state supreme court judge, frustrated by his failure to convince a majority of his own court of the pitfalls of applying the control test in workers' compensation cases, conjectured in a law review article that the nineteenth-century judges who shaped the control test would have been shocked by their twentieth-century counterparts, who, by losing sight of the real basis of the test, would exclude "a salesman or a truck driver or a Negro cotton-picker, in continuous employment daily for a single employer...from employee status by terming his work an independent calling, created by an employer expressly foregoing the right of control over in was, where supervision details



impracticable or impossible." Wolfe, "Determination of Employer-Employee Relationships in Social Legislation," 41 Colum. L. Rev. 1015, 1025 (1941). For a more recent example of published advice to employers as to how they may avoid various types of liability by contracting away the right to control even menial workers, see Frazier and Goldberg, "Twenty-four ways to protect independent contractor status of a client's workers," 20 Tax'n for Accountants 260 (1978).

- 4. Bartels v. Birmingham, 332 U.S. 126, 130 (1947).
- 5. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 127 (1944) (quoting American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209 [1921]).
- 6. Taylor v. Local No. 7. International Union of Journeymen Horseshoers, 353 F.2d 593, 597 (4th Cir. 1965) (adjudicating Norris-La Guardia Act, 29 U.S.C. § 113[c], which defines a "labor dispute" as including "any controversy concerning terms or conditions of employment...regardless of whether or not the disputants stand in the proximate relation of employer and employee").
- 7. Similarly, Drake, "Wage-Slave or Entrepreneur?" 31 Mod. L. Rev. 408, 415 (1967), has--for different but historically inaccurate reasons--noted that the control test has been overtaken by time.
- 8. See infra ch. 7 § II.
- 9. <u>See</u> Report of Smaller War Plants Corporation to the Special Committee to Study Problems of American Small Business, <u>Economic Concentration and World War II</u>, S. Doc. No. 206, 79th Cong., 1st Sess. chart 12 at 41 and <u>passim</u> (1946).
- 10. The primary issue in coverage cases under social-protective laws is whether there is an employer at all to which liability attaches. Where an intermediate employer is involved and the question is which employer is liable, the doctrines of joint employment or employer-of-last-resort are sufficiently robust to be dispositive. An economic reality of dependence test is not, strictly speaking, called for.
- This tripartite structure is conceptually and empirically complicated by the fact that certain individuals and groups partake of the characteristics of two or of all three classes. See Erik Wright, 37-57 (1985).Political-economic Classes of "contradictory sociological analysis class locations" has not been adequately brought to bear in legal discussions of the restrictive criteria that the Taft-Hartley Act established to govern coverage and independent appropriate bargaining units for



contractors, supervisors, professional employees, craft workers. 29 U.S.C. §§ 152(3), (11), (12), 159(b), 164(a) (1973 & 1978). Even within the bounds of the realistically applied control test, the IRS advises taxpayers that "[t]here is no employee class difference." Internal Revenue Service, Circular E: Employer's Tax Guide 3 (Pub. 15 rev. Jan. 1987).

- 12. See supra ch. 6.
- 13. Only later, with the advent of Keogh plans, etc. did it become true that some--if not "[m]ost"-- "independent contractors do not wish to give up their favorable tax status..." Teubner and Sheppard, "Independent Contractors' Status Questionable," 34 Tax Notes 7, 7 (1987).
- 14. A man...has to make a fundamental decision. He is either going to take that security he can get out of being an employee, with whatever certainty there is of getting a wage envelope at the end of the week, or he is going to take his chances as an employer or as an independent contractor, with the benefits that accompany that, when there are any, and takes the losses when they accrue.

Social Security Revision: Hearings before the Senate Committee on Finance on H.R. 6000, 81st Cong., 2d Sess. 491-92 (1950) (statement of Marion Folsom, Treasurer, Eastman Kodak [and later Secretary of Health, Education and Welfare in Eisenhower Administration]).

- 15. The Supreme Court itself had, even before the Hearst case, displayed a very cribbed understanding of the employee-like dependence--pregnant with the evils inferior bargaining power--that the Norris-La Guardia Act was designed to cure. See. e.g., Columbia River Packers Ass'n v. Hinton, 315 U.S. 143, 145-47 Telling criticism of this decision from the perspective of the actual conditions of employment is in Comment, "Labor--Trade Regulation-available Application of Sherman Act to Entrepreneurs in a Position Similar to Laborers," 42 Colum. L. Rev. 702, 703-4 (1942); and Gottesman, "Restraint of Trade-Employees or Enterprisers?" 15 U. Chi. L. Rev. 638, 651-57 (1948).
- 16. "A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of services is subject to the other's control or right to control." Restatement (Second) of Agency § 220(1) (1957). As long ago as the nineteenth century this formulation was modified to include cases in which the employer

"reserved the right to control" even where he did not exercise it. This version thus applies to such anomalous instances as the inability of the Philadelphia Electric Company to prevent the control room operators of its nuclear plant from sleeping on the job. See "Reactor Blocked from Starting," New York Times, Oct. 10, 1987, at 13 col. 6. For another variation of the control test, see 26 C.F.R. § 31.3121(d)-1(c)(2).

Against the historical kaleidoscope medieval serfdom, guild system, statutory regulation and industrial proletariat (providing a "reserve army of labour"), control was legally significant because it was, either as an incident of status or of contract, a social reality. Victorians, commanding the productive forces liberated by the new machinery and the new forms of association, control was the secular corollary of the Pauline precept to servants that they should be submissive to their masters....

Drake, "Wage-Slave or Entrepreneur?" 31 Mod. L. Rev. 408, 413 (1967).

- Hence the post-Taft-Hartley adjudications of employee status: "Even if the stronger party may dictate the terms of a contract, the weaker party does not become an employee unless those terms create of his substantial control over the details performance." NLRB v. Duie Pyle, Inc., 606 F.2d 379, 386 (3rd Cir. 1979).
- 19. Wheeler v. Hurdman, 825 F.2d 257, 272 (10th Cir. 1987) (adjudicating Title VII/Age Discrimination in Employment Act). For an overview of the various strands of precedent, see Note, "The Definition of 'Employee' under Title VII: Distinguishing Between Employees and Independent Contractors, 53 U. Cin. L. Rev. 203 (1984).
- 20. <u>Donovan v. Dialamerica Marketing, Inc.</u>, 757 F.2d 1376, 1385 (3rd Cir. 1985).
- 21. Id. at 1385 n.11.
- 22. Halferty v. Pulse Drug Co. Inc., 821 F.2d 261, 267-68 (5th Cir.), modified on other grounds 826 F.2d 2 (1987).
- 23. Halferty v. Pulse Drug Co. Inc., 821 F.2d 261, 267-68 (5th Cir. 1987). Building on the Third Circuit's opinion, it added that the proper test is whether the worker is dependent on a particular business or



organization for continued employment in that line of business. Id. This latter condition would, if taken seriously, be so restrictive that most workers would be disqualified as "employees" under FLSA; for would many workers is it empirically the case that without this employer they would be unemployable in that line of business? Alternatively, unlike the semifeudal Statute of Artificers, it is not the purpose of the New employment immobility.

- 24. FLSA in part resolves this problem by excluding executive, administrative, and professional employees. 29 U.S.C. § 213(a)(1). See also Peter Drucker, The Concept of the Corporation 59 (1964 [1946]) (General Motors managerial employees whose stock holdings have made them economically independent of their employment relationship with the company).
- 25. To use an extreme and absurd example: a millionaire working at a fast-food restaurant to discover how the other half lives would not be entitled to the minimum wage because he would not be "dependent ordinarily on his daily wage for the maintenance of himself and his family." American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. at 209.
- 26. McLaughlin v. Seafoods, Inc., 861 F.2d 450, 452 (5th Cir. 1988).
- 27. See infra Appendix.
- 28. See EEOC v. Zippo Mfg. Co., 713 F.2d 32, 35-36 (3d Cir. 1983).
- 29. Cox, "Some Aspects of the Labor Management Relations Act, 1947," 61 Harv. L. Rev. 1, 7 (1947).
- 30. NLRB v. Hearst Publications. Inc., 322 U.S. 111 (1944). For discussion of this case, see supra ch. 6.
- 31. Los Angeles Meat and Provision Drivers Union, Local 626 v. United States, 371 U.S. 94, 109, 110, 111 (1962). Douglas was quoting from the stipulated facts in the case.
- 32. Although efforts by workers to self-organize and to bargain collectively should reasonably constitute prima facie evidence of an employee-employer relationship, courts have nevertheless held such workers to be self-employed. See, e.g., Saiki v. United States, 306 F.2d 642, 648 n. 3 (8th Cir. 1962) (skilled chick sexersabsent control--not employees for employment tax purposes).
- 33. As formulated by the chief architect of the modern British system of social insurance: "Many persons working on their own account are poorer and more in

need of State insurance than employees...." Beveridge, Social Insurance and Allied Services para. 4 at 6 (1942). See also id. para. 118 at 53 and para. 314 at 126. Similarly, in the context of federal contracts subject to the Davis-Bacon Act, Congress has recently recognized that:

Whether any business succeeds depends on a number of important factors. At the very least, however, it should not require the sacrifice of one's labor without adequate obligation remuneration. The prevailing wages to all laborers...is not mitigated or eliminated by legal gambits which disquise a laborer or mechanic as a business enterprise.

H.R. Rep. No. 504, 100th Cong., 2d Sess. 18 (1988).

34. Thus, for example, the Ontario Labour Relations Act, in including the "dependent contractor" within the definition of a covered "employee," defines a dependent contractor as "a person...whether or not furnishing his vehicles, equipment, machinery, own tools, material...who performs work or services another...on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person, more closely resembling the relationship of an employee than that of an independent contractor." Ont. Rev. Stat., ch. 228, § 1(1)(ga), (gb) (1980). More capaciously still, the Saskatchewan Trade Union Act granted the provincial labor relations board discretion to treat as employees those performing services for others provided that "the relationship between those persons is such that the terms of the contract between them can be the subject of collective bargaining" even if they may be held to be independent contractors for purposes of vicarious liability. Sask. Stat., ch. 137, § 2(f) In the Federal Republic of Germany, (1972)."arbeiterähnliche Personen" ("employee-like persons") have secured collective bargaining and vacation rights. Tarifvertragsgesetz § 12a (Aug. 25, 1969, BGBl. I, 1323 BGB1. I, 2879, Oct. 29, 1974]); amended Bundesurlaubsgesetz § 2 (8 Jan. 1963, BGBl. I, 2, as amended 27 July 1969, BGBl. I, 946). On the hybrid of "dependent contractors" and categories controlled employees" in Sweden, see Statens Offentliga Utredningar, No. 59: Betänkande med Forslag till Ändrad Semesterlagstiftning 200-9 (1944); Statens Offentliga Utredningar, No. 14: Beroende Uppdragstagare (1957); Statens Offentliga Utredningar,



Sociallagstiftningen och de Uppdragstagarna (1961); Adlercreutz, "De s.k. beroende uppdragstagarna och arbetstagarbegreppets utveckling," 1956 Sociala Meddelanden 370; Folke Schmidt, The Law of Labour Relations in Sweden ch. 3 (1962) (written by Adlercreutz); Axel Adlercreutz, Arbetstagarbegreppet 20, 78, and passim (1964). This approach raises the question as to the purpose of the significant aggregate public and private litigation costs consumed by this exercise in line drawing: what countervailing social value is vindicated when a court determines would-be employee is really an entrepreneur? If the outcome is that the injured worker will be deprived of some income security or in-kind medical benefit, as a consequence of which he will become a public charge and/or a less productive worker, the result is too shabby to merit discussion at this late date in the development of civilization. If, however, issue at stake is which of the litigants • the only insurance account will be charged, this is a technical problem The virtual abolition with a technical solution. common-law tort by the New Zealand Accident Compensation Act 1972 merged employees and the selfemployed in the category of "earners." 1 New Zealand Stat. 521 et seq. 1972. See also Geoffrey Palmer. Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (1979).

Exactly what the social wage encompasses confused even such an astute left-wing critic as Samuel Bowles, who asserts that in the U.S. in 1979 twentynine per cent "of the standard of living of workers is acquired through the exercise of citizen rights rather than through the exchange of labor power for a wage." Bowles, "The Post-Keynesian Capital-Labor Samuel Stalemate, " 18 No. 5 [No. 65] Socialist Rev. 45, 52-53 (1982).See also John Myles, Old Age in the Welfare State (1984). In point of fact, the vast bulk of the components of the social wage is tied to the existence of an employment relationship and no entitlement to citizenship. them exists as a right of mere examination of the results of a detailed and careful reworking of the data for 1980 indicates that even the less than one-tenth of 390 billion dollars comprising the so-called secondary consumer income cash benefits receipt of which was not so tied was largely subject to means testing (e.g., Supplemental Security Income for AFDC, and the aged, blind, and disabled, assistance) rather than classifiable as entitlements of Welfare See Robert Lampman, Social citizenship. Medicaid 175-77 (1984). Spending, Table A.1 at accounted for ca. one-sixth of the corresponding health

- Id. Table A.2 at 178-79. Only in the area benefits. of in-kind food and housing and other benefits did general poor-law type of benefits (such as food stamps) account for more than one-quarter of the total benefits. Id. Table A.4 at 181. Since much of this income flow serves to support children, questionable whether it should be classified as part of the social wage.
- This proposal does not prejudge the method of financing.
- 37. Britain already accomplished this uncoupling in the original Old Age Pensions Act, 8 Edw. 7, c. 40, §§ 1-2 (1908), although it reintroduced the tie to employment relationship in the National Health Insurance Act, 1 & 2 Geo. 5, c. 55, Part I, § 1 (1911).
- 38. Within the European Community Denmark has been a leader in this regard; the United Kingdom, Netherlands, and Italy have also taken significant steps. For an overview, see Commission of the European Communities, Comparative Tables of the Social Security Schemes in the Member States of the European (13th Communities ed. 1985). The Scandinavian countries have also incorporated the self-employed into the unemployment insurance system. See also Council of Europe, Comparative Tables of the Social Security System in Council of Europe member states not belonging to the European Communities (2d ed. 1985).
- 39. See, e.g., André Gorz, Les Chemins du paradis 91-For a discussion from the distinctive 92 (1983). perspective of poor-law-like welfare stigmatization, see American Enterprise Institute, Should the Federal Government Guarantee a Minimum Cash Income to All Citizens? (1967). On the conservative origins of the negative income tax, see Booker, "Lady Rhys Williams' Proposals for the Amalgamation of Direct Taxation with Social Insurance, 56 Economic Journal 230 (1946); Lady [Juliette] Rhys-Williams, <u>Taxation and Incentives</u> (1953).
- 40. See McDonald, "Our Invisible Poor," 38 The New Yorker 82, 131 (Jan. 19, 1963).
- 41. Although a vital truth lies in the argument that a society as wealthy as the United States needs less work rather than more, it is only a partial truth, which, presented absolutely, effectively propagates See, e.g., Block, "Rethinking the demoralization. Political Economy of the Welfare State," in Fred Block et al., The Mean Season 109, 134 (1987). That is to say, it may be true that a reorganization of production and a redistribution of income could sustain the current standard of living with a shorter work week.



- same token, that standard of living, particularly with regard to the quality of housing, child care, the environment, and transportation, is so inadequate that the work required to raise it to acceptable levels would presumably occupy several generations. But see Kesselman, "Work Relief Programs in the Great Depression," Creating Jobs: Public Employment Programs and Wage Subsidies 153, 222 n.236 and 227 (John Palmer ed. 1978) . Finally, the notion that those who have been discriminatorily from income-generating work out should relegated to the role of welfare consumers perpetuity is calculated to consolidate the existence of a divisive lumpen proletariat. This position must be distinguished from the authoritarian-restorationist lamentations embodied Lawrence Mead, in Entitlement: The Social Obligations of Citizenship (1985).
- 42. From the perspective of Jürgen Habermas, such a "step would be revolutionary, but not revolutionary enough." Habermas, "Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien," in Jürgen Habermas, <u>Die Neue Unübersichtlichkeit</u> 141, 157—62 (1985 [originally delivered as a speech before the Spanish Parliament in 1984]).
- developed by This theme was many contributors to The Guaranteed Income (Robert Theobald ed. 1967 [1966]). On the surprisingly small negative impact of an experimental negative income tax on the supply of labor, see Work Incentives and Income The New Jersey Negative **Guarantees:** Income Experiment (Joseph Pechman and P. Michael Timpane ed. 1975); Burtless, "The Work Response to a Guaranteed Income: A Survey of Experimental Evidence," in <u>Lessons</u> from the Income Maintenance Experiments 22, Table 2 at 26 (Alice Munnell ed. 1986)
- 44. On this distinction between <u>locatio conductio</u> operis and <u>locatio conductio operarum</u>, see Francesco De Robertis, <u>Lavoro e lavoratori nel mundo romano</u> (1963); Dieter Norr, "Zur sozialen und rechtlichen Behandlung der freien Arbeit in Rom," 82 <u>Zeitschrift der Savigny-Stiftung für Rechtsgeschichte</u> (Romanistische Abteilung) 69, 90-91 (1965); Max Kaser, <u>Das römische Privatrecht</u>, 1. Abschnitt: <u>Das altrömische</u>, <u>das vorklassische und klassische Recht</u> 562-72 (2d ed. 1971); <u>idem</u>, <u>Das römische Privatrecht</u>. 2. Abschnitt: <u>Die nachklassischen Entwicklungen</u> 400-7 (2d ed. 1975).

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