What's Black and White and Red All Over? The Blood Tax on Newspapers--or, How Publishers Exclude Newscarriers from Workers’ Compensation

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Marc Linder*

MR. GALVIN: Mr. Grubel, do you know of any other industry or business wherein minors operate as independent contractors for the purpose of producing profit for the principal?

MR. EHMCKE: Objection as not relevant to any issue in this case. And subject to that, I'll let you answer, if you know.

THE WITNESS: None that I can think of.

MR. GALVIN: It's a pretty neat way to run a business, with child labor, isn't it?

MR. EHMCKE: Objection. Argumentative. And I'm going to direct you not to answer that question.1

From its inception, the guiding principle of workers' compensation insurance has been that the production and distribution of every commodity takes an actuarially foreseeable toll on the health and lives of the workers involved. At the turn of the century, attention was focused on the number of miners who had to die for so many tons of coal, or the number of construction workers who would be killed for every story of a skyscraper. Today's examples would include the number of poultry processors who must suffer crippling hand or wrist injuries for every ton of deboned chicken, or the number of farmworkers per ton of vegetables who will be poisoned by pesticides.

* Professor of Law, University of Iowa. Arthur Bonfield, Bruce Goldstein, Larry Norton, and Judy Polumbaum massively criticized drafts.

1. LaFleur v. LaFleur, 452 N.W.2d 406 (Iowa 1990). (Record at 56. Deposition of carrier supervisor of newspaper company sued by a child who was 10 years old at the time he was severely injured while delivering its papers).
Although this literal "blood tax" cannot be shifted to or shared by the uninjured, society can redistribute resources to relieve the injured and/or their families of the burdens of medical expenses and lost wages. Redistribution systems could include universal medical insurance and disability pensions financed by general government tax revenues, but workers' compensation systems in the United States specifically target the consumers of the products that give rise to injuries by imposing the costs on the employing firms, which can recapture their insurance premiums through product pricing. In the formulation by E. H. Downey, at the time of his death in the 1920s "the highest American authority on . . . Workmen's Compensation:"2

the principle of compensation is most conveniently and effectually applied by treating the economic cost of industrial injuries as a direct expense of production, in the same category with wages, machinery and materials. The employer . . . is the keeper of the purse; it is his function to assemble the instrumentalities of production and to cover the expenses thereof into the price of the product. If, then, the employer is held legally responsible for death or disability in the course of employment, he will protect himself by insurance against unusual loss and will incorporate the prevalent cost of industrial injuries in the price of the vended goods and services. This method secures the widest, the least burdensome, and perhaps on the whole the most equitable distribution of the cost of industrial accidents and disease. It is what is meant by the principle sometimes formulated into statute law, that each industry shall bear the cost of personal injuries actually arising therein. In the last analysis it comes to saying that the consumers of any given commodity shall make good the wage loss incurred, as well as the wages expended, in the course of production.3

The one method of distributing the financial consequences of work-related injuries, however, that "no civilized community can afford to tolerate" is to impose them on workers who have

3. Downey, supra note 2, at 15-16. For the view that where demand for the product is not infinitely inelastic, firms may choose to absorb rather than pass on some of the workers' compensation costs, as a result of which relative prices would depend only in part on such costs, see National Commission on State Workmen's Compensation Laws, Compendium on Workmen's Compensation 21 (1973).
already paid the blood tax. Revulsion against this blatant inequity underlay the enactment of workers' compensation statutes. The unfairness, inefficiency, and senselessness of nonintervention were obvious at the turn of the century because the workers who sustained such injuries were "substantially propertyless as a matter of course" and received wages too low to enable them to accumulate significant savings or to buy their own insurance policies. Before the advent of workers' compensation laws, "'industrial accident' was always one of the 'causes of destitution' listed in the reports of relief agencies . . . ." Workers' compensation then significantly reduced the number of families of injured workers who were forced to seek poor relief.

The view that industrial injuries were an "element of the cost of production to be charged to the industry rather than to the individual employer, and liquidated in the steps ending with consumption" was not some outsider's idiosyncratic notion, but formed the overwhelming consensus among judges and early legal treatise writers on workers' compensation. For example, in his 1914 treatise, Bradbury observed: "The amount paid in compensation to injured workmen will be added to the cost of the article produced and in the readjustment, which is inevitable, the expense will be borne by the community generally." Courts could be brutal in reducing human beings to factors of production, but they unambiguously enunciated the principle of trade risk: "Where machinery is destroyed or injured in industry, it is a part of the burden of industry to supply or repair such machinery. Why should the same theory not apply to as far as practicable, where human machinery is injured in carrying on


5. Grace Abbott, From Relief to Social Security: The Development of the New Public Welfare Services and Their Administration 17, 70 (1966 [1939]).

6. 1 Arthur Honnold, A Treatise on the American and English Workmen's Compensation Laws 6-8 (1917).

the work? There is economic loss in both cases."8 The ultimate consumer, in the words of another judge, paid for these losses "just as he pays for the raw materials."9

Nor is this consensus as to the underlying economic and moral principles of workers' compensation confined to the past. Since workers' compensation programs are predicated on the principle that consumers should bear the cost of injuries sustained by the workers who produce the products they buy, "[i]t follows," according to Arthur Larson, author of today's leading workers' compensation treatise, "that any worker whose services form a regular and continuing part of the cost of that product, and whose method of operation is not such an independent business that it forms in itself a separate route through which his own costs of industrial accident can be channeled, is within the area of intended protection."10 And even the U.S. Chamber of Commerce still reports that under these programs, "economic losses are considered costs of production — chargeable, to the extent possible, as a price factor."11

Despite this almost century-long agreement that run-of-the-mill workers must be included in workers' compensation programs because they lack the leverage or organizational means to charge the ultimate consumers of their products or services for the cost of their industrially inflicted wounds and fatalities, employers of one group of workers have succeeded stupendously well in convincing legislatures, courts, and administrative agencies to exclude their low-wage employees from workers' compensation systems on the grounds that they are really self-employed independent businesspeople — although many are only 10 years old or even younger.

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8. Kansas City Fibre Box Co. v. Connell, 5 F.2d 398, 399 (8th Cir. 1925).
CIRCULATION REQUIRES A LITTLE BLOOD

I do not mean . . . to disparage the newsboy. He occupies in Chicago a legal position superior to that of the president of a railway company. The president of a railway company is only an employee. He receives a weekly, a monthly, or at least a yearly salary. The newsboy does not receive a salary. He is not an employee. He is a merchant. He buys his papers and then resells them. He occupies the same legal position as Marshall Field & Co. Therefore he does not fall within the scope of the child-labor law. Therefore no rascally paternalistic factory inspector may vex him in his pursuit of an independent commercial career.¹²

If the inspection departments wait for the philanthropists, hospitals may be built for the repair of newsboys who have been run over, but never a proposition urged that unemployed men should sell the papers and the boys go to school . . . .¹³

Newspapers, like steaks, chicken breasts, coal, underwear, washing machines, and automobiles, also demand their blood tax. Subscribers know that bagged newspapers do not fall on their porches like manna from heaven, but few are aware that each year a certain number of deliverers, including young children, must be severely injured or die, many as a result of being struck by vehicles, so that they may read their morning newspaper at breakfast (or their afternoon paper after dinner). Fewer still realize that the owners and managers of those newspapers, ably assisted by well-paid attorneys, have devoted considerable sums to making sure that their profits remain insulated from the costs associated with any such injuries.

One of the reasons that readers rarely think about the employment relationships of those who hand-deliver their newspapers is that the parties with the most to gain by public ignorance occupy a uniquely favorable position among employers for withholding information altogether or spreading misinformation.


In 1990, for example, when the children who delivered the *Providence Journal* pressed the publisher for better terms and conditions of employment, the Rhode Island legislature passed a resolution rebuking the state's largest newspaper for having "turned a deaf corporate ear upon the serious grievances . . . of its youngest employees,"14 but *The New York Times*, a not entirely disinterested observer of this arena of capital-labor struggles, dogmatically but erroneously reported: "As independent contractors rather than employees, they do not have the power to form a labor union under Federal law."15

One manifestation of publishers' ideological supremacy has been their ability to impose their perspective not only on legislators and judges, but on journalism scholars as well. That perspective is blinkered cost reduction. The kind of justification that the executive director of the Wisconsin Newspaper Association offers for publishers' opposition to workers' compensation coverage — "every penny counts"16 — has succeeded in blinding analysts to the fact that every cost that newspaper owners save corresponds to a benefit such as workers' compensation, unemployment insurance, or the minimum wage that is withheld from a worker.17 As a recent journalism school text puts it: "The primary disadvantage of the employee carrier system is its cost. Employee wages and fringe benefits become newspaper operating costs, whereas independent contract or contract delivery agent systems incur few employee-related costs for home delivery. In addition . . . the newspaper, rather than the individual

16. Telephone interview with Sandra George, Madison, WI (July 1, 1997).
17. See, e.g., ROBERT PICARD & JEFFREY BRODY, THE NEWSPAPER PUBLISHING INDUSTRY 171, 175-76 (1997). This type of obfuscation reached a new frontier when Representative Jon Christensen, the chief sponsor of the leading congressional bill in the 104th and 105th Congress seeking to make it easier for workers to be classified as nonemployees for employment tax purposes, told the Ways and Means Committee that the distinction between independent contractors and employees "is important because it determines whether the payor or the payee is responsible for . . . the payment of FICA and unemployment. In other words, it has little to do with how much tax gets paid, but everything to do with who pays." *Employment Classification Issues: Hearings before the Subcommit-tee on Oversight of the House Committee on Ways and Means*, 104th Cong., 2d Sess. 13 (1996). In fact, workers classified as nonemployees cannot pay unemployment insurance taxes for themselves: as self-employed they simply become ineligible for unemployment compensation, which presupposes an employer-employee relationship.
carrier, bears the bad debt from uncollectible subscriptions . . . .”

If the “circulation of a newspaper is its lifeblood,” then child circulators are spilling much of that blood as essential links in newspaper owners' great chain of profit. Precisely because few newspaper delivery workers have ever been in a position to impose on their deliverees the costs of insuring themselves against work-related injuries, Larson observed that it was “incongruous that a technicality of payment . . . should sweep out from under compensation protection this vast category of essential participants in the newspaper's business, many of whom are adults or, even if not, have persons dependent on their earnings.”

Accordingly, no economic or moral rationale justifies privileging newspaper owners and depriving carriers of the entitlements that other workers take for granted. As one law review noted 30 years ago:

The relationship of the distribution of papers to the publication of the paper is so closely allied that any risk of injury by or to the carrier should be placed on the publisher. Any economic loss to the publisher occasioned by this policy can be distributed among the readers in the form of a slightly higher subscription price or daily rate. This would comport with one of the most widely recognized justifications for vicarious liability, the distribution of risk theory, which is based on the belief that it is better to spread inevitable losses among a group than to let such losses fall on a few.

Nevertheless, some injured carriers, including preteen children, fail to receive the medical and rehabilitative treatment that they require — and that employees covered by workers' compensation receive as a matter of course — while others (or their parents) are faced with large hospital bills that injured employees in most industries never see because those costs are borne collectively by the industry and consumers. (A quarter-

20. LARSON, supra note 10, § 42.23(f) 8-231 (1995).
century ago the National Commission on State Workmen's Compensation Laws recommended extending coverage to all occupations and industries and defining "employee" as broadly as possible; yet the proportion of wage and salary employees covered has risen from 83 percent to only 87 percent in the intervening years.)

In spite, or perhaps precisely on account of, the child carriers' unprotected status, newspaper owners and managers have long opposed restraints on their access to and use of child labor. They resisted early-twentieth-century state street trades statutes that regulated the employment of children in the distribution and sale of newspapers. Publishers, perhaps the most recalcitrant group of employers with regard to protective provisions for children under the Depression-era National Recovery Administration codes, succeeded in adopting the laxest codes. In particular, they objected to a provision that would have deemed those younger than 16 to be employed by the newspapers for fear that the precedent would carry over to liability suits. After the National Industrial Recovery Act was held unconstitutional, the Newspaper Boy Committee of the American Newspaper Publishers Committee urged publishers to pledge not to employ boys under the age of 12 because such action would "minimize the unfair and untruthful attacks against the delivery and sale of newspapers by boys."

An earlier article detailed how publishers had succeeded in inducing Congress in the 1930s and 1940s to exclude all child and many adult newspaper carriers from the old-age and unemployment compensation titles of the Social Security Act, and to

23. Linder, supra note 15, at 832-34. Newspapers were not the only products that "little merchants" sold. In the early twentieth century, "little salesmen and sales-girls" with pushcarts sold vegetables that their families grew in vacant lots in Philadelphia three to five hours daily. BOLTON HALL, THREE ACRES AND LIBERTY 54 (1914 [1907]).
write out of the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA) all employees delivering newspapers to consumers.\textsuperscript{27} If the congressional right wing's insistence on sparing pseudo-entrepreneurs the demeaning fate of collective protection from the consequences of unemployment and old-age found any resonance during the early post-World War II era's anti-Communist campaigns, it later became ideologically obsolete. Little wonder, then, that when the Arkansas legislature, for example, decided to expel adult newspaper carriers from the state's unemployment insurance system in 1995, it did not even try to portray its amendment as in any way benefiting the workers. Instead, it brazenly "determined" that the act was so "immediately necessary in order to . . . avoid unnecessary harm to newspaper companies" that it declared an "emergency," triggering the immediate effectiveness of the act "for the immediate preservation of the public peace, health and safety . . . ."\textsuperscript{28}

How publishers have managed to persuade decision-makers that children and, increasingly, low-paid adults who risk their lives delivering newspapers door-to-door are not run-of-the-mill workers, but rather rugged-individualist entrepreneurs undeserving of societal protection and should be forced to fend for themselves if they are disabled by on-the-job injuries, is the subject of this article. The drive to escape from the obligations imposed by collectively organized standards of labor protection is hardly unique to the newspaper industry. Indeed, in recent years, nationally and internationally, firms have succeeded in growing numbers in evading the social wage by pretending and persuading adjudicators that workers who were once employees have become self-employees. To be sure, vertical disintegration is sometimes real: the deepening division of labor and specialization give rise to new firms and industries that, using scale economies and specialized capital equipment unavailable to non-specialized companies that produce a particular commodity or service in small runs, can produce more efficiently. But where firms merely transfer work to employers who pay lower wages and no benefits or, more pertinently, to former payroll employees who do the same work as alleged self-employees but without any benefits, income, as \textit{Business Week} observed, "is merely

\textsuperscript{27} Linder, \textit{supra} note 15 at 839-49.

transferred from employees and shareholders" and the workers are just "Outsourced — And Out of Luck."²⁹

Theoretically it is conceivable that the production and distribution of newspapers could become completely disintegrated, with large, well-financed corporations assuming responsibility for sales to readers. Whatever empirical plausibility might attach to such a bifurcated structure, the notion that an individual carrier, whether child or adult, is a retailer whose solidity could convert producers of mass-circulation newspapers into mere wholesalers to whom it would be a matter of indifference whether the carriers threw the papers down the sewer so long as they paid for them is grotesque. Both publishers, who carefully research and cultivate subscribers, and advertisers are critically interested in their readers' identities and socioeconomic characteristics. The most that the so-called little merchant system, which has been traced back to the rise of the penny daily in 1833,³⁰ achieves is to "put all the commercial advantages on the side of the publisher, which, [b]y demanding advance payment from middlemen . . . solved the delinquent subscriber problem and assured regular cashflow."³¹

What makes the newspaper industry unusual is its successful propagation of the myth of the "Little Merchant." Publishers have inscribed in popular consciousness the image that the industry is vertically disintegrated on the grounds that distribution to subscribers is an entirely separate trade dominated by precocious teen-age and pre-teen-age entrepreneurs going through a rite of passage that justifiably stands outside of the domain of state regulated labor standards. Now, as they transfer the bulk of distribution from children to adults, publishers are taking great pains to insure that legislators and adjudicators preserve the carriers' unprotected status; as a result, these low-paid workers face the prospect of occupational injuries without the specialized insurance designed to provide the appropriate medical, rehabilitative, and wage-loss benefits.

³¹. Thorn, supra note 18, at 45. As early as the 1840s, a carrier sold his New York Herald route for $575, which transaction the publisher, much to the buyer's chagrin, was under no legal obligation to recognize. Hathaway v. Bennett, 10 N.Y. 108 (1854).
The significant shift from child to adult carriers that publishers have been implementing in recent years has not been a reaction to legal regulation of the employment relationship: since adult carriers are excluded from almost all the statutory benefits that are also denied children, employers' desire to avoid the reach of government-enforced labor standards does not drive this change. The reasons underlying this reversal will be treated below, but it is crucial here to underscore that the recognition of child carriers' status as employees for purposes of workers' compensation is in no way inconsistent with whatever character-building virtues that parents ascribe to their children's conscientious tending to a paper route. As a court noted recently in a case involving a severely injured 12-year-old girl whose entitlement to workers' compensation coverage the publisher contested: "The concept of 'little merchant' is often accompanied by notions of self-reliance, independence, responsibility and perseverance. These admirable qualities can be inculcated to an employee as well as to an independent contractor." Even the ritual of door-to-door collection (whether in its obsequious or confrontational mode) could be performed by Little Employees if circulation managers continued to regard that extremely time-consuming (but unpaid) method as superior to billing by mail.

Indeed, "the invaluable and intangible remuneration in the form of experience that children employed in the newspaper field are in a unique position to enjoy" is reputedly so great that children arguably should be grateful that they are paid at all. After all, as a publisher at the 1934 hearings on developing a code for the newspaper industry under the National Recovery Act declared: "There is a question as to whether the work of the newspaper boy is child labor or play . . . . I say it is play." The Minimum Wage Study Commission reported in 1980 that children engaged in home delivery of daily newspapers earned considerably less than the minimum wage.

33. This Week, 82 NEW REPUBLIC 295, 297 (1935).
The point of the reform proposed here — mandatory workers' compensation coverage for all newspaper carriers — is not, indirectly, to banish children from delivering newspapers by making it too expensive for publishers to employ them. Working a few hours per week may be an appropriate activity for 12-year-olds — if they are not exposed to unreasonable risks. Whether riding a bicycle on a shoulderless rural road or crossing streets with a heavy sack before dawn or after dark falls within the range of acceptable activity is a question that child labor regulators and injury investigators should answer. What is clearly irrational public policy, however, is the willingness to sacrifice the medical and vocational rehabilitation of occupationally injured children on the altar of the Little Merchant ideology. The most conspicuous example of this orientation emerged from a dissent from a decision by the Supreme Court of Mississippi awarding workers' compensation benefits to a fifteen-year-old carrier who had suffered serious and permanent injuries as a result of having been struck by a car:

There are hundreds, if not thousands, of boys carrying newspapers in this State. These boys are learning something of business; they are learning self-reliance; they are developing the ability to meet and deal with people; they are observing that there are people who are kind and considerate, and those who are not; they are learning to earn and handle money; they are gaining experience that will make them more useful citizens of the future; they are in many cases contributing substantially to the support of themselves and families; they are learning many lessons that cannot be valued in money or expressed in words. The newspaper boy is a familiar and storied part of the American scene. Now that the Court has held him to be an employee instead of a merchant on his own, there is the question of liability insurance, deductions for social security and other such things . . . possibly even minimum wages under the Federal law. All this will add to the cost of delivering the papers. [T]he situation is likely to become so complicated and involved that the newspaper publishers may abandon the time-honored method of delivery by paper boys . . . . Nor am I willing to say that the benefits that this appellee, and a few others who may be injured, may receive, would justify the ultimate effect of the decision.36

36. Laurel Daily Leader, Inc. v. James, 80 So.2d 770, 781-82 (Miss. 1955) (Gillespie, J., spec. op.).
This position, misguided as it may be in its unbalanced emphasis on the positive aspects of the lessons that children can learn from work with possibly lethal consequences, raises another issue that might trouble some who would accept the appropriateness of workers' compensation for child carriers: must they also receive the minimum wage and be covered by unemployment insurance (especially since as students they would never be entitled to unemployment compensation)? Agreement with the view that children should be covered by workers' compensation does not necessarily entail any particular position on coverage under the minimum wage or unemployment insurance. Where this article alludes to publishers' efforts to exclude or to maintain and expand exclusions of carriers from statutes other than workers' compensation, the point is not to urge coverage by analogy, but to stress that the newspaper industry has adopted the lobbying position that it is, for reasons nowhere explicated, entitled to a generalized exemption from labor standards laws unavailable to other industries. By the same token, not only is there no rationale for excluding adult carriers from any of these protections, but requiring them to compete with unprotected children debases their own working conditions.

The analysis and reform proposals operate here on two distinct but related and intertwined levels. One engages the distinction between employees and independent contractors, which lies at the threshold of coverage under workers' compensation statutes, and the so-called control test, which adjudicators have traditionally applied to determine whether the putative employer controlled the putative employee sufficiently to trigger the conclusion that an employment relationship existed between them. On this first level discussion takes place in the litigation trenches, as it were, where publishers have sought to convince administrative agencies and courts that they do not control those who deliver their newspapers, who are therefore in business for themselves and should thus be on their own as far as providing for accident insurance is concerned.

On this practical level the article takes the position that no child is or can be an independent contractor vis-à-vis a commercial entity, and that publishers control even adult carriers sufficiently to create an employment relationship. The notion that an industry with billions of dollars of invested capital to valorize would entrust a crucial link in the circulation and sales
processes to a bunch of unsupervised 12- or 13-year-old businessgirls and businessboys (or to judgment-proof carriers of any age) is too preposterous to credit. As the managing editor of the *St. Petersburg Times*, which does not employ children to deliver, noted: if the company relied on 12- or 13-year-olds to deliver 300,000 to 350,000 copies of a newspaper that comes off the presses at 3:00 a.m. to five counties by 6:00 a.m., “it would be an operational mess.”\(^{37}\) The framework that circulation managers establish for distribution to subscribers creates all the control that publishers require over the distributors regardless of whether they are called employees or independent contractors. Publishers are, as one human resources director put it, able to put as much control as they need into their contracts without having to control carriers overtly.\(^{38}\) The counter-argument that the company does not exercise control because it does not constantly repeat commands (although some do) misses the point: the carriers have to perform a well-established ritual that gets communicated in a variety of ways — virtually everyone knows what carriers are expected to do and not to do — and the publisher has the power to terminate the contract if the workers violate the understanding. Although the power to terminate a contract may not by itself create an employment relationship, in this instance the deliverer does not have the right or opportunity to improvise. Moreover, carriers perform an unskilled job that does not require much instruction or even exercise of judgment — a point that is underscored by the very fact that ten-year-olds, who are otherwise encyclopedically lacking in skills, can perform the work adequately.

As a more realistic approach to circumvent judicial (and, increasingly, legislative) pro-employer bias, the second or higher-level discussion culminates in the proposal to confer the medical and income-replacement benefits of workers’ compensation on all newspaper carriers. This approach is justified by the dysfunctionality of the control test as the gatekeeper to a medical care entitlement. Because workers’ compensation programs are all no-fault based, it is irrelevant whether publishers control

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37. Telephone interview with Neil Brown, St. Petersburg, FL (June 16, 1997).
38. Telephone interview with Debbie Reed, human resources manager, Wisconsin State Journal/Capitol Times, Madison, WI (July 1, 1997).
their carriers and thus could reduce or prevent injuries by exer-
cising their power to create safer working conditions. These sys-
tems theoretically offer employers financial incentives to elimi-
nate sources of workplace injuries, but they also treat
employers in a frankly instrumental manner: firms are merely
convenient conduits for extracting from consumers the resources
for repairing, rehabilitating, and assisting workers disabled in
the course of producing and transporting the commodities those
consumers have demanded and bought and the full costs of
which include those injuries.

THE SIZE AND COMPOSITION OF THE NEWSPAPER
CARRIER FORCE

[T]he whole theory of child-labor legislation was to stop the ex-
ploration of children. Everyone knows that the ordinary newsboy
is not exploited labor in any sense at all.40

Home delivery of newspapers may seem like a trivial activ-
ity engaged in by a small group of youngsters — "little purvey-
ors of mental refreshment ... these waifs and strays of a
great civilization"41 — but in fact the work force is large and its
composition is undergoing rapid change. Exactly how many peo-
ple deliver newspapers is unknown. One major reason for this
information gap is directly connected to the problem under re-
view: the most accurate counts of workers derive from data col-
lection generated by compulsory social insurance and employ-
ment tax programs such as Social Security and Unemployment
Insurance. Precisely because publishers have succeeded so well
in excluding newscarriers from such programs and thus
marginalizing them occupationally, they are frequently
undercounted.

The figures from the decennial Census of Population and
the Current Population Survey (CPS) are also suspect: they
presumptively miss most child newspaper carriers because
many of the adults who answer on behalf of the household fail

39. On the increasing unreality of that approach, see Emily Spieler, Perpetuating
Risk? Workers' Compensation and the Persistence of Occupational Injuries, 31 HOUSTON
40. 95 CONG. REC. 12,439 (1949) (statement of Sen. Thomas, Utah).
41. Emil Garmard, Evenings with the Newsboys, BROOKLYN DAILY EAGLE, Apr. 7,
1873, at 1, col. 8.
to mention children's employment, and may also miss many adults who deliver papers as a second job or whose earnings are too marginal to mention. The figures from these two sources amount to only a fraction of publishers' estimates. The 1990 Census returned 91,909 persons as engaged as "newspaper vendors," 78,989 in the printing and publishing industry and 12,921 in direct sales establishments. An Equal Employment Opportunity file based on the 1990 Census publication counted 113,849 news vendors, of whom exactly half were non-Hispanic white males; women accounted for 39 percent of all news vendors. The CPS estimate for 1996 was 121,000 news vendors, 45 percent of whom were female; for 1977 it had estimated 110,000 newscarriers and vendors, of whom 26 percent were female. The movement for the intervening years was trendless.

Publishers' estimates of the number of newspaper deliverers are much higher. In 1988, 425,000 minors accounted for almost three-quarters of all persons who delivered papers. Of those, 86 per cent were classified by publishers as non-employee "little merchants." According to a 1994 Newspaper Association of American (NAA) survey, publishers treated only 5.9 percent of 451,378 (child and adult) newspaper carriers as employees. A few years earlier, publishers acknowledged fewer than two per cent of their child-carriers (and seven per cent of adults, who are not called "big merchants," but "buy-sell" operators) as employees.


45. International Circulation Managers Association, ICMA Update, January 1989, at 1, 2. Children accounted for eighty-five per cent of all evening newspaper deliverers, but only fifty-six per cent of those delivering in the morning. An earlier study using a different data base enumerated about 916,000 carriers for 1979, of whom ninety per cent were below eighteen. Won-Chang and Joseph Forsee, A Study of Circulation Distribution and Collection Systems: United States and Canadian Daily Newspapers 3 (1980).

46. 387,385 carriers were treated as independent contractors, 37,582 as agents, and 26,411 as employees. NAA, 1995 Circulation Facts, Figures, and Logic 13 (1995) (Data provided telephonically by NAA, Apr. 8, 1997).

47. ICMA, supra note 45, at 2.
A diminished reliance on children, however, is underway, promoted by the proliferation of single-copy sales through coin-operated racks, the growing heft and weight of larger newspapers, significant numbers of which children cannot carry at one time, and the trend towards morning editions, which make "a convenient after-school job into a more difficult pre-dawn chore." An even more important force is replacing thousands of children with a much smaller number of adults: their automobility enables them to deliver four to six times as many papers. Between 1980 and 1990, the number of child carriers fell by 60 percent while their adult counterparts rose by 112 percent. According to estimates by the International Circulation Managers Association, a crucial shift must have occurred during the early 1990s: whereas adults accounted for 34 percent and children 66 percent of 551,356 carriers in 1990, just four years later, adults accounted for 57.5 percent of 451,378 daily carriers and children for only 42.5 percent. Just from 1989 to 1994, children as a share of carriers in California fell from 77 percent to 43 percent. Indeed, the Providence Journal-Bulletin, a newspaper that child carriers sued, recently ceased hiring any deliverers under the age of 18. Some newspapers have relegated children to their former role as street-corner hawkers.

This shift itself toward adults has made publishers even more aggressive in asserting that carriers are not employees because, counter-intuitively, the lack of a long tradition of little

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50. Stein, supra note 48, at 17. The share was an understatement since the L.A. Times, which employed no children carriers, was not included in the survey.

51. Telephone interview with Henry Shelton, Providence, R.I. (Mar. 23, 1997) (Shelton, a community activist and father of a carrier, was the guiding spirit of the R.I. Newscarriers Association).

merchantry for big people makes “the independent contractor issue a bit more unclear.”53 In any event, publishers suspect that the turn to adults has reinvigorated Internal Revenue Service (IRS) scrutiny of carriers’ employment status for employment tax purposes.54

Replacing children with adult carriers largely drawn from and/or incorporated into a contingent workforce of retired, part-time, student workers, “folks like that”55 — whom “the recession . . . pushed . . . into the business of delivering newspapers, a job once dominated by 12-year-olds”56 — upon whom the publishers can impose essentially the same unprotected status now characteristic of the children, scarcely benefits workers.57 A sense of the overreaching that has become so endemic to the industry that publishers are no longer even embarrassed by disclosures can be gleaned from facts that a newspaper executive shared with the NAA’s official magazine in 1991. He bemoaned that if his firm had to pay the statutory minimum wage (at the time $4.25) to 100 carriers working two hours a day, six days a week, it would cost $132,000.58 Arithmetic reveals that the company must have been paying half of the then federal minimum wage — $2.13 per hour. (Figures from two decades earlier showed that child carriers were averaging 84 cents an hour or about half of the then minimum wage.)59 No wonder, then, that

56. Foderaro, supra note 49.
57. Securing employee status is obviously no panacea: even where a newspaper acknowledged its carriers as employees and paid them $4.50/hour plus mileage, fast food restaurants in the area paid higher wages. Mark Fitzgerald, Independent Agency v. Independent Contractor System, EDITOR & PUBLISHER, July 2, 1988, at 13, 35.
newspapers experience annual turnover rates of 300 to 400 per­
cent among adult carriers.60 Such low wages together with the
deprivation of workers' compensation for workers injured in the
course of circulating the industry's lifeblood make a mockery of
publishers' cynical smokescreen argument that government
agencies have targeted newspapers merely because state trea­
suries are “broke” and are “inexorably in pursuit of the revenue”
they want.61

NEWSPAPER CARRIERS' EXPOSURE TO INJURY AND
DEATH

In the trade it was said that newsboys were the statesmen and
financiers and railroad magnates of the future. But no publisher
wanted to admit that his weighty estate was carried on the small,
rounded shoulders of an eight-year-old boy.62

The substantial contribution by workplaces in recent years
to the “epidemic of childhood injury”63 has made expulsion of
newscarriers from workers' compensation programs the most
pervasive and irrational exclusions from labor-protective statutes.
Newspaper owners have rigidly opposed coverage under work­
ners' compensation statutes not because it would be a superfluous
expenditure for children who are rarely injured and would
scarcely benefit, but, on the contrary, because the “hazard to
which newsboys are exposed is great” and premiums would be
high.64 Even fatalities are not unusual among child newspaper
carriers.65 The 11-year-old girl who was shot and killed deliver­
ing papers for the Detroit Free Press by a man who mistook her
for a burglar in 1996 was not the first to die in this precise
manner.66 Numerous children — including one as young as 11
years old “[d]uring his first day on the job” — have been killed

60. Selwyn Feinstein, Labor Letter, WALL ST. J., Mar. 6, 1990, at 1, col. 5.
63. Philip Landrigan & Renate Belville, The Dangers of Illegal Child Labor, 147
64. Jane Whitbread, What's a Leg to a Newsboy? 54 CHRISTIAN CENTURY 13 (1937).
65. The fatalities mentioned in the text were identified by a newspaper search in
Lexis-Nexis restricted to the search terms “newspaper carrier and killed.”
66. Newspaper Carrier Is Killed by Man Who Feared Vandals, N.Y. TIMES, Sept. 26,
while delivering newspapers; commonly they are struck by vehicles while riding their bicycles. In Massachusetts, a 12-year-old girl and 14-year-old boy — both reputedly independent contractors — were killed in this manner within six months of each other. Young as well as elderly deliverers have been murdered or killed in automobile accidents. Despite the fact that newspaper carriers were “killed on the job” and “in the line of duty,” regardless of how long or exclusively they worked for the newspaper, press reports typically emphasize that the deceased had been an “independent contractor.” The Orlando Sentinel, for example, inconsistently recalled Erie Rogers as “an independent contractor who had delivered the Sentinel for 14 years” and yet offered a $10,000 reward for information concerning the killing of a worker for whom newspapers abjure any responsibility.

On a less anecdotal level, it is now clear that children face an above-average incidence of work-related injuries. According to incomplete national data, from 1992 to 1995, 67 news vendors were killed on the job, 10 of whom were under 18 years old. Statistical reporting of nonfatal injuries is even more fragmentary and understated. The U.S. Bureau of Labor Statistics (BLS) has, since 1972, published an annual, Occupational Injuries and Illnesses in the United States, which includes injury incidence

73. Center for Disease Control, NIOSH ALERT: REQUEST ASSISTANCE IN PREVENTING DEATHS AND INJURIES OF ADOLESCENT WORKERS (DHHS (NIOSH) Pub. No. 95-125, 1995).
rates based on the number of hours of work reported by surveyed establishments. Unfortunately, the two Standard Industrial Classification (SIC) codes which cover newspaper carriers are so broad that the carriers form only a small proportion of those employed in the industry groupings: newspaper publishing (2711) and direct selling establishments (5963). Whereas the former includes occupations as disparate as journalists and typographers, the latter includes newspaper home delivery (except newspaper printers or publishers) only as one among many house-to-house peddling operations.75

Although the BLS does collect data on the occupational level — surveyed employers must report the occupations of injured workers — it does not collect the data on hours worked that would permit the calculation of injury incident rates for any occupations including newspaper carriers.76 And since the BLS bases its survey on the universe of establishments covered by unemployment insurance programs, the number of sampled newspaper carriers is "wildly understated" precisely because the vast majority of publishers do not pay employment taxes for these workers on the grounds that they are not employees.77 Thus, the 500 and 606 occupational injuries and illnesses involving days away from work estimated for news vendors in 1992 and 1993 respectively may bear little relation to reality.78

It has been known for many decades that child newspaper carriers are disproportionately exposed to workplace hazards. As far back as 1932, they accounted for more than one-ninth of all occupational injuries sustained by minors in California — the largest contingent after farmworkers — as well as two-thirds of occupationally related deaths.79 Despite the serious underreporting of the number of working and injured children, workers'
compensation award data in New York — which makes statutory employees of all carriers under 18 years old — for the years 1980 through 1987 also singled out newspaper delivery as a crucial site of adolescent injury and death. On an industry level, in manufacturing, which employed only 6 percent of children but experienced the highest rate of injury awards, almost half (48 percent) of the injury awards were reported in the newspaper industry. On an occupational level, more than one-fourth of the 14- to 17-year-olds worked in sales and administrative jobs; newspaper deliverers accounted for 43 percent of injured adolescents in this group. Newspaper delivery recorded the second-highest number of deaths (five) after farm labor (six), and newspaper carriers accounted for three of the five 15-year-olds killed on the job, all of whom were struck by motor vehicles.80

State workers’ compensation boards — confirming the argument that the programs they administer are designed to be merely compensatory and not to prevent injuries81 — fail to collect the data on the number of people employed in occupations needed to calculate injury incidence rates. In California, for example, the state agency collects data that help insurance companies calculate the hazardousness to employers’ profits but not to workers’ health. Thus, from 1990 through 1993, 48 serious and 471 non-serious injuries, which are not set in relation to the universe of relevant workers, triggered workers’ compensation medical and disability payments on behalf of and to newspaper deliverers in California totaling $9.4 million in relation to an aggregate payroll of $177.4 million.82 The Workers’ Compensation Insurance Rating Bureau calculated, as of January 1997, the loss cost or pure premium component of the rate for newspaper deliverers as $6.67 per $100 of payroll — almost twice as high as in an average industry such as retail stores ($3.75) and only marginally lower than such a hazardous occupation as truck farming or fruit and vegetable harvesting ($7.33).83 One major industrial accident insurance carrier in California charges a rate

81. Spieler, supra note 39.
82. Workers’ Compensation Insurance Rating Bureau of California, INSURANCE RATE FILING FOR 1997 at 37 (provided by California Dept. of Industrial Relations, Div. of Workers’ Compensation, Research & Evaluation Unit (Apr. 2, 1997).
83. Telephonic communication by Workers’ Compensation Insurance Rating Bureau of California (San Francisco, Mar. 31, 1997).
of $9.14 per $100 of payroll for this occupational classification, considerably higher than the rates for many manufacturing industries such as oil refining ($7.33).\(^84\)

Such rates underscore the dangerousness of newspaper delivery work. But even in places where much lower rates are available, publishers still refuse to recognize their workers as employees and to include them in their workers' compensation insurance programs. In Iowa City, Iowa, for example, one newspaper treats all of its more than one hundred carriers as employees and provides them with workers' compensation insurance, which costs the employer only 62 cents per $100 of payroll or about one-fifteenth of the California rate.\(^85\) Yet another newspaper in the same city, a link in the Gannett chain, treats all of its carriers as self-employed and excludes them from workers' compensation coverage.\(^86\)

**THE PUBLISHERS' MANTRA: LITTLE MERCHANT**

How do you visualize a 10 year old being an independent contractor? I have 12 grandchildren and I have trouble visualizing one of my 10 year olds being an independent contractor. I visualize him as a child. We can call him a rear admiral but that doesn't make him a rear admiral.\(^87\)

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\(^84\) Information furnished by Boldis Insurance Brokerage, San Rafael (Mar. 28, 1997).

\(^85\) Telephone interview with Bill Casey, publisher, Daily Iowan (Apr. 9, 1997).

\(^86\) Telephone interview with unidentified carrier supervisor of the Iowa City Press-Citizen (Apr. 1, 1997). In New York State, where all carriers under 18 are mandatorily covered, the premium per $100 of payroll for newspaper carriers (including the use of bicycles) was $8.50 in October 1993. Telephone interview with Prof. John F. Burton, Jr., Dean, School of Management and Labor Relations, Rutgers University, and former chair of the National Commission on State Workmen's Compensation Laws, New Brunswick, N.J. (June 20, 1997). In Wisconsin, which covers all carriers, the premium per $100 of payroll, according to the Wisconsin Compensation Rating Bureau, is $3.48 for carriers without a vehicle and $4.76 for those with a vehicle. Telephone interview with unidentified official, Wisconsin Compensation Rating Bureau, Milwaukee, WI (June 30, 1997). The Wisconsin State Journal pays $3.58 and $5.09 respectively based on the circulation department’s computation of carriers’ “profits” (a calculation that assumes that all subscriptions have actually been collected). Telephone interview with Debbie Reed (July 2, 1997). According to Burton, only four states appear to have a separate classification for newspaper carriers: California, Minnesota, New York, and Oklahoma. Three of these are listed in National Council on Compensation Insurance, Classification Codes and Statistical Codes for Workers Compensation and Employers Liability Insurance 16 (1996) (omitting Minnesota).

\(^87\) Children at Risk in the Workplace: Hearings Before the Employment and Housing Subcommittee of the House Committee on Government Operations, 101st Cong., 2d
When the director of employee relations at the NAA, the leading newspaper publishers organization, was asked how fighting workers’ compensation coverage for tragically injured child carriers in high-profile litigation could possibly produce anything but a public relations disaster for newspaper owners, she replied, without expressing a word of sympathy for the children, with the mantra that publishers have been rehearsing for a century: “But they’re not our employees, they’re independent contractors, and we’re not responsible for them.”

That absolutely nothing has changed in employers’ tactics is clear from a letter that Theodore Dreiser wrote to Eleanor Roosevelt in 1942 requesting her help in galvanizing public interest in the problems of child labor. Dreiser related that when he asked “‘the little merchant’ of 12” who had sold him a newspaper in Hollywood what would happen if he were hit by a car, the boy responded that “he was too barefooted to get hurt”:

So I called the publishers. “What happens when your little employees get run down by a car?” The answer: “They are not employees — they are independent contractors.” A boy of ten an independent contractor! The newspapers will not assume responsibility for these most defenseless of all employees. What an indictment of our opinion makers.

I ask the Industrial Accident Commission, . . . “Other employers pay compensation when an employee is injured, why not the newspapers?” . . . The Industrial Accident Commission says that the newspapers have fought responsibility so strenuously that it is only in rare cases that they pay damages.

Perhaps employers’ tactics have changed in one respect. In the 1930s, at least some newspapers sometimes broke ranks with their co-conspirators and competitors and admitted what the game was all about. At the time of the debates over child labor provisions in the newspaper codes under the National Industrial Recovery Act, the New York Daily News said it all: “When our fellow-publishers talk of freedom of the press they mean freedom to hire children to deliver newspapers before light

88. Telephone interview with Mary Sepucha, Vienna, VA (Mar. 26, 1997).
on winter mornings, because children are cheaper.\textsuperscript{90} The same year the \textit{St. Louis Star-Times} editorialized that "when the term 'little merchants' is applied to children 12 years old, that is enough to stamp the phrase with the opprobrium it merits as a device for sidestepping the moral responsibility of dealing with problems created by the use of children in industry \ldots \textsuperscript{91}"

Today, in contrast, as a growing proportion of newspapers become controlled by giant corporate communications empires, profitability compels coordinated silence.\textsuperscript{92} At the beginning of the century Jacob Riis, a reformer with ambivalent feelings about the newsboy, noted that: "Like all business in our day, he is being concentrated and capitalized."\textsuperscript{93} But at century's end, paid propagandists of multibillion-dollar publishing conglomerates can, without an audible smirk, still speak of "little entrepreneurs" in referring to their child deliverers.\textsuperscript{94}

Why have legislatures and courts exacerbated children's vulnerability by depriving them of the protections to which most adult workers are entitled? The original linchpin for exempting publishers from child labor laws was the claim that the children were neither their employees nor anyone else's.\textsuperscript{95} The unprotected status of child carriers has, throughout the twentieth century, been defended on the grounds that a paper route is a rite of passage providing valuable experience toward future entrepreneurial independence. Billionaire H. Ross Perot, for example, who reputedly threw papers from his horse in a neighborhood where streets were made of sand, called a paper route "'just good, basic business principles.'"\textsuperscript{96}

\textsuperscript{90.} Quoted in Dorothy Bromley, \textit{The Newspapers and Child Labor}, 140 \textit{NATION} 131 (Jan. 30, 1935).
\textsuperscript{91.} Reprinted in \textit{Editor & Publisher}, May 25, 1935, at 26.
\textsuperscript{92.} See generally Ben Bagdikian, \textit{The Media Monopoly} (5th ed. 1997). That newspapers have in fact conspired is clear from a post-World War II program implemented by the American Newspaper Publishers Association (ANPA), under which it obtained clippings of "all material appearing in newspapers pertaining to newspaper boys and their activities" and immediately made written suggestions to the papers about material that was, in ANPA's opinion, harmful or misleading to the public. See \textit{Code Proposed to Guard Carriers}, \textit{Editor & Publisher}, Apr. 24, 1948, at 58.
\textsuperscript{93.} Jacob Riis, \textit{The New York Newsboy}, 85 \textit{CENTURY} 247, 248-49 (1912).
\textsuperscript{94.} Sepucha, \textit{supra} note 88.
\textsuperscript{95.} See generally Charles Rohleder, \textit{The Newspaper Boy: Merchant or Employee?} (1937).
\textsuperscript{96.} Slud, \textit{supra} note 49.
Newspapers use the "little merchant" trope to suggest that the children are embedded in "[a]n independent contractual relationship in which newspapers are purchased at wholesale and resold to subscribers to produce a profit. A 'little merchant' operation is essentially buy-sell.\textsuperscript{97} The fact that the publisher unilaterally sets both of these prices and thus deprives the children of all entrepreneurial freedom with regard to per unit income does not faze the classifiers.\textsuperscript{98} (Where carriers actually charged subscribers "whatever they wanted for the papers they delivered . . . subscribers became dissatisfied . . . since prices varied from carrier to carrier," and the publisher prohibited the practice.)\textsuperscript{99}

Despite the Iowa Supreme Court's ruling that "[t]o expect these child carriers, the majority of whom are between the ages of ten and twelve, to correctly figure, collect, and remit the proper amount of tax due is ludicrous,"\textsuperscript{100} at least one major newspaper in Iowa recruits children as young as 10 years old with flyers calling carriers managers of a newspaper route, "independent businespersons, buying newspapers at wholesale, selling them at retail and pocketing the profits."\textsuperscript{101}

A older genre of manual written by circulation managers for their colleagues, district managers, and carrier "advisors" unintentionally sheds amusing light on these precociously entrepreneurial children's alleged independence.\textsuperscript{102} It also demonstrates that today's pricey legal counsel are merely recycling ancient lay wisdom. One manager, for example, wrote in the 1950s that "[s]ince boys are an important cog of the newspaper delivery system, it behooves us as circulation men to seek a better understanding of boys."\textsuperscript{103} Although no business seeks to plumb the depths of its plumber's soul, the author devoted almost half of his book to a discussion of boys' psyches, delving

\textsuperscript{97} ICMA, \textit{supra} note 45, at 2.
\textsuperscript{98} \textsc{Frank Rucker}, \textsc{Newspaper Circulation . . . What, . . . Why and How} 63-64 (1958).
\textsuperscript{100} \textit{Hearst} v. \textit{Iowa Dept. of Revenue & Finance}, 461 N.W.2d 295, 306 (Iowa 1990).
\textsuperscript{101} \textit{Iowa City Press-Citizen, Routes Available and Money Ahead} (undated [ca. 1990-91]).
\textsuperscript{102} \textit{E.g.,} C. Jefferson, \textsc{Carrier Leadership} (1955).
\textsuperscript{103} \textsc{R. Earle Gregory}, \textsc{Newspaperboys . . . Understand, Influence, Train Them} 46, 5 (1959).
even into their masturbatory habits. Similarly, he was oblivious of the contradictions inherent in the necessity of publishers' disciplining children engaged in achieving "self-realization" through "managing [their] own business." The self-serving nature of the unilaterally imposed designation as independent contractor emerges clearly from the following directive, which recalls the auto-suggestion that publishers' attorneys propagate today:

First it must be understood that newspaperboys, although an important and integral part of the circulation department, are not employees of the newspaper. They are independent contractors operating under the "Little Merchant" plan. This "Little Merchant" plan means simply that the boy has contracted to serve a group of subscribers in a specified area, that he is to buy papers for his subscribers at a wholesale rate, charging his subscribers at the retail rate. The difference between the wholesale charge and his collections each week represent [sic] his profit.

The independent contractual relationship between boy and newspaper should be maintained at all times.

Although the boy does agree to certain conditions in signing his contract, still we, as circulation men, cannot exercise control over the boy's route activities. That this is true simply highlights our need for knowledge of boy psychology and how to influence and motivate boys. Too, because of this contractual relationship, we must remember that we never "hire" boys, we never "fire" boys, we never put boys to "work." We do not "require" boys to perform duties, we avoid such words as "insist," "must," and other words which indicate control or coercion. Instead, we "place" boys on routes, we "terminate" contracts, we "train" boys, we "advise," we "suggest," we "point out." Regardless of what a carrier contract may state, it is actual practice, actual control which might determine our liability for a newspaperboy's actions should we be drawn into a lawsuit.

This stern admonition notwithstanding, the author promptly proceeded to detail twelve pages of instructions to be impressed upon the carriers. Indeed, the points that "should be taught each carrier" were so comprehensive and elementary that

104. *Id.* at 15.
105. *Id.* at 43, 48.
106. *Id.* at 67.
they both deprived the children of any discretion and glaringly confirmed that they could not be trusted to possess the slightest capacity for independent judgment. Thus not only were the children told in what order to deliver, but how to fold and to throw the newspaper; the boy who “should be anxious to go out on his route and reap the profits for his delivery activities” must be taught not only to take along a pencil, but even to “stand erect and smile” and never to “peek in the door.”

Today, publishers who are quick to designate a 10-year-old “an independent business person” apparently see no self-contradiction in interfering with this entrepreneur’s independence by commanding: “If you collect from your customers, NEVER enter the home of someone who is not a personal friend of your family. If the person asks you to come inside while getting a check or money, refuse. Also, refuse if you are asked to come inside to get warm, have something to eat or drink . . . .” Although the commandment is obviously meant to protect the child, publishers cannot have it both ways: customers do not show such solicitude for their plumbers. If publishers cared about the children’s welfare, they would include them in their workers’ compensation policies or not expose them at all to such dangers.

Although the non-intentional work-related injuries suffered by newscarriers are none of publishers’ business, even they seem to be embarrassed by rapes and murders. The NAA boasts that after a young carrier had been raped and murdered by a former adult carrier in Binghamton, New York, “the newspaper realized that it had to deal with carrier safety.” As a result, district managers “are ‘always out and visible’ during collection times. They have two-way radios and can respond quickly if a problem occurs.” Newspaper management should, by all means, lavish attention on the safety of its deliverers, but how can all this concern and care be reconciled with the never-

107. Gregory, supra note 103, at 81-82, 85-86.
108. Iowa City Press-Citizen Independent Carrier Agreement (current contract provided by publisher in April 1997).
109. Iowa City Press-Citizen, CARRIER GUIDE 20 (no date [furnished by publisher in April 1997]).
ending claim that they are in business for themselves? If manage-
ment is the better and more efficient risk supervisor, why
does it reject all responsibility for run-of-the-mill injuries? And
finally, since management wisdom is that the publisher must
vigilantly avoid exercising any control over carriers lest agencies
or courts find it to be an employer, newspapers are caught in an
inescapable self-contradiction of their own making.

These semantic gymnastics — because the control associ-
ated with safety programs might jeopardize children's status as
independent contractors, one lawyer cautioned publishers
against implementing them, instead recommending that they be
"'informational' rather than 'instructional'" — reflect publish-
ers' efforts to attain the best of all possible worlds without hav-
ing to pay for any of them, that is, to find a "solution to the en-
during newspaper circulation dilemma: the desire to control
subscription lists, home delivery prices, and carrier performance
standards while at the same time avoiding the taxes, salaries
and benefits involved in actually employing the carriers." Because the publishers' association admits that "[t]he thrust of
competition to improve service and attain a greater degree of
cost effectiveness often magnifies the amount of control actually
exercised over the individual alleged to be an independent con-
tactor," it faces the "danger" that adjudicators may find those
workers to be employees covered under a range of protective
statutes.

The use of "little merchants," however, is designed to make
the distinction moot inasmuch as publishers need not renounce
any of their goals. As one trade author concluded from a litany
of "rules" promulgated by a publisher, "[t]hese carriers own their
own routes in a certain sense, that is . . . under conditions
which give The News absolute control at all times." "The real ef-
fact" of exercising such "'benevolent despotism'" has been to

111. George Garneau, Carriers as Employees, Editor & Publisher, July 29, 1989,
at 9, 10.
112. Mark Fitzgerald, Independent Agency vs. Independent Contractor System, Edi-
tor & Publisher, July 2, 1988, at 13. For judicial denial of a publisher's effort, for retail
sales tax purposes, to "have it both ways" — that is, creating the appearance of selling
newspapers wholesale to independent contractors while "retaining sufficient control to
ensure that the carriers give satisfactory service to the ultimate retail customers"—see
113. ANPA, Preserving the Independent Contractor Status of Newspaper Dis-
give the publisher "all the control over the carrier it would have if he were on salary, and yet to secure all the benefits of the independent . . . basis of employment, in such things as shifting the losses in bad accounts to the carrier . . . ." Or as a modern text delicately phrases it: "With youth carriers such recommendations usually have the effect of an order." By the time of the Depression, the U.S. Children's Bureau reported the imposition of blatantly one-sided adhesion contracts — prohibiting carriers, for example, from canceling subscriptions even though subscribers did not pay — the inequities of which were exacerbated by publishers' ability to avoid internalizing the costs of the high accident and fatality rates endemic to child carriers and newsboys by resisting workers' compensation claims on the ground that the children were uncovered independent contractors.

The director of the California Newspaper Carrier Foundation articulated the special advantages that have accrued to newspaper owners by virtue of official government acceptance of the little merchant fiction: "There is no question that youth carriers as independent contractors with the various exemptions, both state and federal, that were granted for taxes, work rules, etc., were an unbeatable and mutually beneficial arrangement for all concerned. However, with adult carriers the rules change and therefore . . . their status as independent contractors becomes critically important."

So far few courts have mustered the intellectual and moral fortitude to challenge the myth of the little merchant. Sixty years ago, the editors of the Christian Century, leading opponents of child labor, prematurely warned publishers that the end was near: "Gentlemen, you have great power over the minds of our people. You may so muddle those minds as to win this immediate battle. But, gentlemen, this is blood money for which you are grasping. The blood is the blood of children. And if you

115. Thorn, supra note 18, at 243.
117. New York Indemnity Co. v. Industrial Accident Comm'n, 213 Cal. 43 (1931); but see Globe Indemnity Co. v. Industrial Accident Comm'n, 208 Cal. 715 (1930).
succeed, be assured that the day will come when it will be re­quired at your hands." In view of the long tradition of judicial socioeconomic blindness it comes as no surprise that it has taken almost a century of struggles over child news carriers before a judge was able to summon the common sense to declare that the emperor has nothing on: "It is beyond sophistry and closer to outright dishonesty to characterize a 10-year-old party to a contract as a 'little merchant' and thus an independent contractor." It apparently took Jennifer Larson's permanent vegetative state to trigger this reaction. Ironically, as recently as 1971 an article on newsboys stated that newsgirls were rare in the United States because the dangers were "too great."

Despite overwhelming economic and moral policy considerations militating in favor of coverage, Wisconsin's 1935 act making all newspaper delivery workers per se employees under its workers' compensation statute is, to be sure, not unique, but nevertheless the vanguard of a small and stunted movement. In 1953, New York made all child carriers statutory employees, and in 1971 and 1972 Maryland and Kentucky, in almost identical worded provisions, adopted almost verbatim from the model Comprehensive Workmen's Compensation and Rehabilitation Law proposed by the Council of State Governments as early 1963, statutorily included everyone regularly selling or distributing newspapers on the street or to customers at homes or in businesses. Significantly, the Kentucky legislature acted in the wake of a carrier's death. The trend, however, has always run in the opposite direction. As early as 1931 California, for example, amended its statute to exclude from coverage anyone "offering for sale, or delivery directly to the public, any newspaper . . . where the title to such newspaper . . . has passed to the

121. Tebbel, *supra* note 59, at 56, 57.
124. Telephone interview with David Thompson, executive director, Kentucky Press Association, Frankfort, KY (July 1, 1997).
person so engaged." The enactment was opportune: under the provision a number of the 74 newsboys injured or killed in 1932 were held ineligible for compensation. In 1932, the New Jersey legislature followed suit, excluding those delivering or selling newspaper to the general public "in all cases."

More recently legislatures in Arkansas, Montana, and Washington have, in response to requests by publishers, directly excluded all persons delivering newspapers from their workers' compensation statutes. Oregon excludes all persons older than 18 who distribute newspapers to the general public. Oregon also excludes those 18 and younger so long as the publisher provides accident insurance coverage amounting to $250,000 of hospital and medical benefits, and $10 per week of income replacement for one year. Although the employer must explain to the worker that such coverage is in lieu of workers' compensation, the legislature did not see fit to require the publisher to mention that this coverage is far inferior to that of workers' compensation. Other states have defined excluded carriers by reference to such easily manipulable criteria that publishers can virtually avoid all coverage. North Dakota, for example, excludes all newspaper deliverers substantially all of whose remuneration is directly related to sales and/or who have a written agreement labeling them independent contractors. Georgia excludes newspaper

125. 1931 Cal. Stat. ch. 1021, § 1 at 2068.
126. Stone, supra note 79, at 1080.
127. 1932 N.J. Laws ch. 64, at 111. A quarter-century later, the New Jersey Supreme Court struck down the exclusion of carriers as unconstitutional because it lacked any reasonable relationship to the general object of the state workers' compensation statute. DeMonaco v. Renton, 113 A.2d 782 (N.J. 1955).
deliverers as independent contractors if: (1) they have a written contract as an independent contractor; (2) they are paid according to the number of deliveries; (3) the employer does not control them except with respect to specifying the routes and providing materials for packaging or assembling the papers; and (4) the contract does not prohibit the carriers from distributing other newspapers. In Mississippi, carriers are excluded even if they are guaranteed a minimum compensation or are entitled to credit for unsold newspapers.

In other states, judges have held that children as young as 12 or 14 years old were independently in business for themselves, and hence not covered by workers’ compensation, on the ground that the publishers did not control them because they did not instruct them as to how to dress or carry, throw, or porch the papers. Another court has accommodated publishers by creating a special meta-control rule according to which they do not control their carriers even where they control them: "In the newspaper industry, however, restrictions over the time, place, and manner of delivery generally do not create a master-servant relationship because they reflect only the publisher's insistence that the carrier supply what the publisher has promised to the customer: a dry newspaper, delivered in a timely and convenient fashion on a relatively consistent schedule." By magically transmogrifying the quintessential control factors of how to perform the work into "the definition of [the] task and not . . . the means of accomplishing it," the Minnesota Court of Appeals made it virtually impossible for deliverers to be employees for purposes of unemployment compensation. Finding this circular reasoning persuasive, the Minnesota Workers' Compensation Court of Appeals has established the same virtually insuperable barrier for newscarriers who are injured on the job and apply for workers' compensation benefits. This administrative tribunal was tacitly giving literal effect to the Minnesota legislature's retrograde 1983 amendment declaring its "specific intent . . .

that the common law of 'liberal construction' based on the sup­posed 'remedial' basis of workers' compensation legislation shall not apply . . . .” On the contrary, the legislators declared that the statute is “not remedial in any sense . . . .”136

Two recent court decisions illustrate the legal obstacles that injured children face. In 1986, 13-year-old Stephen Johnson, who had taken over his sister's newspaper route, was seriously injured when he was hit by a car while delivering the Dubois Courier. After the Pennsylvania Workmen's Compensation Appeal Board denied the boy workers' compensation benefits on the grounds that he was not the publisher's employee, he appealed to the Commonwealth Court of Pennsylvania. Despite the facts that the defendant paid the 13-year-old a flat five cents for each paper he delivered, subscribers paid the newspaper company directly so that the boy handled no money, and he had no right to increase or decrease the price of the paper, the appellate judges held that the boy was a self-employed businessman and thus unprotected by the state workers' compensation program. The court, without irony, accepted the publisher's claim that the 13-year-old “was essentially acting as a delivery service such as UPS or Federal Express . . . .” Without stopping to ask why, then, the publisher did not just go ahead and contract with UPS or Federal Express for delivery services, the court based this mind-boggling conclusion on the employer's contention that it did not control Stephen (Fedex) Johnson's work because it did not direct him “as to the time or mode of delivery or the route traveled” — despite the fact that he was bereft of discretion because the firm instructed him to deliver by 6:00 p.m. 50 newspapers that he could not pick up until after school ended at 3:00 p.m.137

In the other case, 12-year-old Jennifer Larson was struck by an automobile in 1991 while delivering the Fremont Tribune in Nebraska, as a result of which she is “in a persistent vegetative state.”138 After resisting the girl's parents' plea for workers' compensation benefits before the Workers' Compensation Court and the Nebraska Court of Appeals, the publisher was supported in

its noble but unsuccessful quest before the Nebraska Supreme Court by the Nebraska Press Association, Nebraska Daily Publishers Association, Midwest Circulation Management Association, Lincoln Journal Star, and Omaha World-Herald as friends of the court. Despite the fact that the employer instructed the carriers when to deliver and how to band and porch the paper, required the carriers to deliver advertisements, mandated procedures for dealing with customers who stopped subscribing, and prescribed collection methods and appearance standards, the publisher was still able to secure counsel willing to assert to the state supreme court that Larson as well as carriers as young as 10 years old were "merely subscribers of the newspaper" who happened to resell the newspaper.\textsuperscript{139} Not even the lawyers, however, were willing to be as brazen as the executive director of another state newspaper association who had formerly worked in Nebraska: she justified the Fremont Tribune’s dogged litigation on the grounds that it “had nothing to do with” Jennifer Larson’s injury.\textsuperscript{140}

Remarkably, despite the sharp differences in outcomes, the definitions of “employee” in the workers’ compensation statutes of Minnesota, Nebraska, and Pennsylvania are virtually identical and fail to mention control, let alone prescribe it as the decisive criterion. A covered employee in Minnesota is “any person who performs services for another for hire,” in Nebraska, “every person in the service of an employer . . . under contract of hire,” and in Pennsylvania, one “performing service for another for valuable consideration.”\textsuperscript{141} Indeed, from the outset at the beginning of the twentieth century, no state legislature imposed the control test as the touchstone of employee status under a workers’ compensation statute. Common to all the laws was an empty or circular definition, which, to be sure, state courts promptly interpreted as subject to a test as to whether the employer controlled how the worker worked. The control test was originally judge-made although some state legislatures later adopted it.\textsuperscript{142}

\textsuperscript{139} Larson, 540 N.W.2d at 348.

\textsuperscript{140} George, \textit{supra} note 16.


The nineteenth-century control test — which was forged not to address employer-employee disputes but to resolve liability claims by third parties against the alleged employer of the person who had injured them — asked whether the servant was subject to a master’s commands with regard to the manner in which he performed his work. The virtue of the test is the relatively bright lines it lays down; its drawback is its irrelevance to the purposes of workers’ compensation. Why, for example, should workers be excluded from the collective provision for medical, rehabilitative, and income-replacement benefits merely because their employer does not or cannot look over their shoulders and issue commands?143 The control test, Judge Smith of the Michigan Supreme Court noted more than 40 years ago, “reaches its lowest level of futility” when it is applied to employers whose relinquishment of the right to control has no factual significance whatever . . . . Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their “services” but only contracted for the “result,” an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other . . . . Or a typist is employed to type mailing stickers from a list of customers. Again the employer argues that he has no control over the way the work is done, meaning, presumably, that the typist can type the letters of the words she must copy in any order she chooses. The administration of an act designed to relieve human want should not be made to depend upon our resolution of such verbal antics.144

These strictures remain fully applicable to judges who deny workers’ compensation coverage to injured newspaper carriers by reference to their reputed freedom to fling papers with either


hand from a bicycle or on foot onto porches chosen in any order. Only rarely has a court been realistic enough to find that an absence of control over the manner in which vendors offered newspapers for sale was not significant because there was no need for such control.

Other courts are mesmerized by publishers' adhesion contracts which require young children to "acknowledge[]" that they are independent contractors and impose various risks on the children. Similarly, many courts have permitted injured third parties to remain without a remedy by finding that judgment-proof newspaper carriers who drove vehicles into them or negligently left uncoiled newspaper wire wrapping in places where such persons tripped and fell over it were not employees of the companies whose papers they delivered. A lawyer's plea on behalf of an injured 14-year-old that classifying carriers as independent contractors was "an antiquated and purposeful device by publishers to avoid their responsibilities to minors in violation of the public policy" of Connecticut, and that the boy's minor status prevented him from understanding the consequences of being a non-employee, recently met with judicial hostility. The state court of appeals not only refused to disturb the legislature's discretion to define public policy, but based its rejection on this non sequitur: if the court accepted the argument that the child's incapacity to form an independent contractor's contract compelled protection under the workers' compensation statute, the consequence would be a finding that he also lacked capacity to enter into an employment contract.

Publishers' stubborn efforts to avoid liability for the grievous injuries that their carriers suffer are not a new phenomenon. In the 1960s and 1970s one newspaper litigated a case for twelve years before inducing the Supreme Court of Michigan to hold that a five-year-old child, who had been hit by a car while

146. DeMonaco v. Renton, 113 A.2d at 785 (newsboy sold papers on street).
147. *LaFleur*, 452 N.W.2d at 409-10.
helping an older child, who had been substituting for the regular child carrier, was not entitled to workers’ compensation benefits from the newspaper despite the fact that the state statute provided for coverage where the principal contracts out work to an exempt or uninsured employer. The majority ruled that the relationship between the plaintiff and the substitute carrier was “a social relationship” based on a “gratuitous” promise, not an employment relationship.150

Nevertheless, in recent years, publishers’ challenges to workers’ compensation coverage have become more coordinated and unabashed. For example, while Jennifer Larson’s case was making its way though the judicial system, the Nebraska Press Association three times prevailed upon the state legislature to kill proposed amendments to the state workers’ compensation statute to extend benefits to newspaper carriers.151 Combining travesty with absurdity, publishers and their representatives testified to the Nebraska legislature that imposition of such coverage would lead to the “injustice” of eliminating child carriers altogether. Since adult carriers would also have been covered, it is unclear whether publishers were implicitly threatening to institute delivery by uncovered non-humans such as St. Bernards.152

What the Nebraska Press Association’s lobbyist did make clear was that children (and parents and legislators) had to choose between full workers’ compensation coverage on the one hand and the convenience of being permitted to ask friends or parents to substitute for them on days when they could not or did not want to deliver.153 This allegedly tragic Hobson’s choice, however, makes no sense. Presumably the point of the threat is that if the children insist on being treated as employees, then they would either be required to work even on days which they

152. The Maryland code revisor explained the legislature’s substitution of “individual” for “person” in the provision making statutory employees of newspaper distributors by reference to the fact that “this title covers only a human being.” MD. ANN. CODE § 9-208 (1991) (code revisor’s note).
153. Boellstorff, supra note 151.
preferred to take off or they would be fired. But many employees can take days off without being fired: employers rearrange the workforce to cover for the absentees. Not only is there is no reason why publishers could not furnish substitutes, but given extremely high turnover rates among carriers, the labor market would seem to put employers in the weaker position, thus requiring them to offer such accommodations.

The publishers' baseless position was crystallized in the post-mortem interview that the lawyer for the Nebraska publishers-amici gave the publishers' national magazine, *Editor & Publisher*. Despite admitting that the publisher had indeed prescribed the details of the children's performance and had judicially conceded that they were an integral part of its business, L. Michael Zinser was audibly distraught that Larson's "emotional facts" had "caused the court to ignore the law. The facts, as tragic as they are, do not excuse the failure to apply the law and find an independent contractor status . . . ." In Zinser's opinion, the publisher's power to impose an adhesion contract on children that called them independent contractors should have overridden all indicia of control by the publisher and all policy reasons in favor of using publishers as agents for making consumers pay for the injuries sustained by workers who produce and distribute the products they consume. Publishers' convenient belief in the sacrosanctity of a unilaterally imposed waiver of rights by children is widespread. As the vice president-circulation for the *Chicago Tribune* said, the carriers "are truly independent contractors, it's even in their contract." He would have captured the reality of their self-employed status more accurately had he instead said: 'it's only in their contract.'

Despite the setback in Larson, Zinser, who received the Ohio Circulation Managers Association Presidential Award for his contributions, continues to advise publishers to fill their contracts with "'as many indicators of independent contractor

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status as possible,’ ”157 Zinser has published a unique insider’s account of the legal profession’s stunningly cynical contribution to disentitling workers to various statutory protections. Entitled, “I Believe in Independent Contractors,” and appearing in the Newspaper Financial Executives Quarterly just as Zinser and his clients were seeking to insure that Jennifer Larson did not receive the medical care financing she required, it debases law in a refreshingly frank manner:

Newspaper publishers have a civil right to structure their business to deliver a product via a network of independent contractors. It is your freedom to choose. Do not feel guilty, embarrassed, or defensive about it!

Newspaper circulation managers sell newspapers. Lawyers sell ideas and concepts to judges. Maintaining this [independent contractor] status is an on-going marketing or promotion campaign. If the marketing plan is in place, selling the concept will be much easier in the courthouse.

Your contract can be your most positive marketing tool . . . . Build into this agreement as many indicators of independent contractor status as possible. The written contract will be read by the judge or hearing officer. It creates an impression.

The courthouse is where we “close the deal.” If we have done our marketing homework, this is where the ultimate sale is made . . . . If you know and believe in the independent contractor concept, you can sell it to the judge!

I believe in independent contractors!

That is also part of the marketing plan. Your lawyer must believe.158

The principal theme of this particular version of opportunism is, as the lawyer for another publishers association put it, that: “‘It’s a game and you have to approach it with that attitude.’” This particular game has some amusing rules. Despite the admission that publishers have lost “the benefit of a lot of presumption that carriers” are self-employed, Mark Anfinson,

general counsel of the Minnesota Newspaper Association, is quick to add that employers can nevertheless “cover themselves surprisingly easily.” Although publishers portray their carriers as in business for themselves, Anfinson has to concede that “the type of person who ends up being an independent contractor, they’re typically not Ph.D.’s.” Consequently, he urges publishers not to hand them lengthy contracts that they cannot understand and the use of which would look like overreaching; instead, he recommends one that fits on both sides of a sheet of paper. Ultimately, Anfinson can boil down the rules of the game he prefers to one simple rule of thumb: “Would you require this of your plumber? . . . Would you care who [sic] your plumber hired? or whether he wears a beard?”159 The allusion to a homeowner’s relationship with a plumber, everyone’s paradigm of an independent contractor who knows infinitely more about his business than any of his customers, seems like a brilliant end-game move — except for one minor point: no one yet has ever foisted on his plumber a one-page or even one-line contract spelling out in detail the desired results and some of the work methods in fixing a broken toilet. The tenacity with which Minnesota newspaper publishers litigate against injured carriers who claim workers’ compensation benefits is all the more remarkable in light of the minuscule insurance premium for carriers in that state: only 89 cents per $100 of payroll.160

This rule of thumb may be bereft of logic, but its point, like that of all the legal tactics deployed by publishers’ representatives, is to blind participants in the game to the fact that, although firms may otherwise be free to “structure their dealings as ‘employment’ or ‘independent contracting’ to maximize the efficiency of incentives to work, monitor, and take precautions,” a compulsory labor protective regime “is designed to defeat rather than implement contractual agreements.”161 An employer, as one appellate court noted with regard to workers’ compensation coverage, “cannot by contrivance force an employee to work outside the protection of the Act, even if the employee acquiesces in the

Publishers should not be permitted to manipulate forms to transmogrify dependent employees into autonomous entrepreneurs. When an employment practice reveals itself to be merely a "[r]acket," "a clever scheme for a very cheap method of distributing the wares of a gigantic business,"163 it should be struck down as a "subterfuge."164 Occasional eruptions of such economic realism,165 however, have failed to loosen the tenacious hold that the ideology of "junior independent merchants"166 has on entrepreneurially minded legislators and judges.

The real reason for publishers' distress over the decision in Jennifer Larson's case was not difficult to divine. As their lobbyist himself admitted: "newspapers, including the Fremont Tribune, offer insurance to their carriers. The cost of workers' compensation is much higher than that of carrier insurance."167 The accident insurance that some newspaper companies enable their carriers to buy at group rates (but for which the employers themselves do not pay) costs less because, unlike workers' compensation, it is not comprehensive. Under all state workers' compensation programs, in contrast, there is no limit on medical coverage: the insurance covers all medical treatment necessary to cure or relieve the effects of work-related injuries.168 Jennifer Larson's medical bills, which had already exceeded $1.7 million during the four years of litigation, would never have been covered by the kind of accident insurance that publishers offer. The

162. Evansville Printing Corp. v. Sugg, 817 S.W.2d at 457.
164. "Permitting the minor under fourteen years of age to buy the papers . . . and sell them entirely on his own, either under contract or not, is merely a subterfuge to evade the statute." Op. Att'y Gen'l Indiana 437, 439-40 (1938).
167. Boellstorff, supra note 151.
policy, for example, that the Gannett chain makes available provides a maximum payment of $11,700 for 90 days in the hospital per injury and an additional $250,000 for expenses incurred within one year of the injury. In contrast, all of the Larsons' medical expenses, as the Fremont Tribune's attorney conceded, would be covered under workers' compensation.

Even if a carrier was not legally at fault and the driver of the car that injured her was (or if the state had enacted no-fault insurance), thus triggering some coverage by the driver's insurance policy, such payments, unlike workers' compensation, are far from open-ended. In an Iowa case, for example, the parents of an injured carrier, whose publisher-employer successfully contested the carrier's employee status, were unable to provide him with all the rehabilitative care he needed because the automobile insurance was capped. Where carriers covered by such accident policies do receive medical treatment, they may be burdened with huge hospital bills. In Connecticut, a 14-year-old boy sustained an on-the-job eye injury that required seven operations over 10 years. After the policy limits of the policy were exhausted and the insurance carrier refused to pay for the boy's further necessary treatment, he and his family suddenly owed $35,000 for medical care including two operations for which workers' compensation would indisputably have paid if the owners of the Danbury News-Times had not successfully contested coverage on the grounds that he had been an independent contractor.

Finally, the insurance policy that publishers offer carriers to buy provides only minimal disability (income replacement) benefits of $20 per week, whereas in California, for example, covered employees are entitled to weekly benefits equal to two-thirds of their weekly salary up to a maximum of $490 in addition to significant vocational rehabilitation benefits and transportation reimbursement during treatment, examination, and rehabilit-

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169. William Mercer, Inc. CARRIER ACCIDENT PROTECTION (undated brochure furnished by Iowa City Press Citizen).
170. Leslie Boellstorff, Top Court Backs Girl in Appeal, Omaha World-Herald, Dec. 8, 1995, at 17SF.
171. LAFLEUR, 452 N.W.2d 406 at (record at 132-33).
172. DaSilva v. Danbury Publishing Co., 666 A.2d 440 (Conn. App. Ct. 1995 ) (Brief for Appellant at 1). It is emblematic of the literally bloodless abstractions that courts deploy in deciding these cases that the appeals court never mentioned this debt.
The meager benefits offered by these private policies may explain why so few newspaper carriers choose to buy them. At one midwestern newspaper (the Iowa City Press-Citizen), for example, no adult and only three of 300 child carriers elect to pay for insurance. The fact that the average child delivers 30 newspapers per day (for which she is paid 8.33 cents per paper) six days per week, thus receiving a $60 “profit check” per month, may explain why she, encouraged to think of herself as an entrepreneur, does not care to channel $3.80 or 6.33 percent of her income into an insurance policy. That some parents do not insist on buying the insurance may in part be explained by already existing coverage under their medical policies. Yet litigated cases in which child carriers whose publisher-employers denied workers’ compensation coverage have failed to receive all the medical treatment they need underscore what is otherwise known from the debate over national health care — namely, that millions of parents do not have coverage for themselves let alone for their children.

That child carriers do care about their insurance was highlighted by those who formed the Rhode Island Newscarriers Association, complaining that they were “underpaid, overworked, and being taken advantage of.” They sued the Providence Journal Company on behalf of a class of 2,500 past and present carriers — including adults — for violating their rights under various federal and state labor laws including workers’ compensation. When, in 1995, a merger of the morning and afternoon newspapers prompted the employer to fire several hundred carriers, it refused to provide them with any financial compensation on the grounds that they were independent contractors.

176. R. I. Newscarrier’s Association v. Providence Journal Co., No. 92-6589 (Super. Ct. Providence, filed Nov. 16, 1992). In case the court ruled that they were not employees, the carriers, in alternative counts, also sued for tortious interference with a business relationship and antitrust violations. For a similar suit by adult carriers in which the employee-minimum wage claims were pled in the alternative, see Budd v. Freedom Communications, Inc., N. 96D238 (D. Colo. 1996).
who "get no benefits, have no security, and need their own liability insurance for accidents that happen on the job . . . ."\textsuperscript{177}

The fact that no adult carriers at the Iowa City newspaper pay for insurance raises an even more troubling prospect: that many workers, freed from compulsory insurance systems, short-sightedly opt for a maximum take-home income now, suppressing concerns about how they will take care of themselves if they are disabled later. It is precisely such temptation, lack of foresight, or financial incapacity that prompted the creation of compulsory social security systems, which workers are barred from leaving. The entire employer-driven independent contractor movement undermines such social solidarity and pushes workers back into nineteenth-century rugged individualism.\textsuperscript{178}

Interestingly, the legislature in Iowa amended its workers' compensation statute in 1986 to permit "proprietors" to elect coverage under workers' compensation.\textsuperscript{179} This provision would authorize any worker treated as a non-employee, even if rejected by an insurance company, to purchase coverage in the assigned risk pool.\textsuperscript{180} Even at the 20-percent higher premium rate that insurance companies are permitted to charge for premiums under those circumstances, the cost to a newspaper carrier would be lower than the 6.33 percent of wages for the much inferior policy that the newspapers are offering carriers to buy. It is at the very least negligent and, given the quasi-fiduciary relationship that a corporation has with the children working for it, certainly unethical and perhaps even fraudulent, for publishers to be hawking a more expensive inferior insurance while withholding information about access to real workers' compensation coverage — especially when publishers caused the child workers' expulsion from the workers' compensation system in the first place. Unfortunately for child carriers, the minimum annual premiums


\textsuperscript{179} IOWA CODE § 85.1A (1996). Iowa is not the only state to have amended its statute in this manner. E.g., MINN. STAT. § 176.041(1a)(a) (Supp. 1997).

\textsuperscript{180} Telephone interviews with Keith Barnes, casualty actuary, and Angela Burke-Boston, attorney, Iowa Div. of Insurance, Des Moines, IA (Apr. 28, 1997).
demanded by insurance companies, which themselves concede that workers' compensation policies are "great insurance," are so high that they would absorb almost the entire annual income of a $60 per month carrier.181

CONCLUSION: THE PUBLISHERS HAVE NO CLOTHING ON

[T]he court's conclusion that newspaper delivery boys are presumptively independent contractors was colored by a turn of the twentieth-century stereotype of a young capitalist making a fortune, after starting out selling newspapers à la Horatio Alger.

181. Iowa is one of 35 states in which a monopoly organization of insurance companies, the National Council on Compensation Insurance (NCCI), files proposed per-$100 of payroll premium rates with the state regulatory agency. According to the NCCI, SCOPES OF BASIC MANUAL CLASSIFICATIONS § 1 at 56: "Newscarriers shall be assigned to the governing classification of the risk by which they are employed except that newscarriers using motor vehicles or bicycles in connection with their operations shall be separately rated as 7380." Thus newscarriers delivering on foot are classified under the newspaper publishing industry (4304), whereas those driving and riding are classified under a ragbag category, "drivers, chauffeurs, and their helpers not elsewhere classified." The final rate authorized by the Iowa Division of Insurance for 4304 is $4.27 and $3.64 for 7380. Insurance companies are permitted to reduce these rates by as much as 15 percent. Thus even at the 20-percent higher assigned risk premium, pedestrian carriers should be charged no more than $5.12 per $100 of wages and those using bicycles no more than $4.37. Both of these figures are lower than the 6.13 percent mentioned in the text. The catch, however, is that even under the assigned risk pool approach, the minimum annual premium is $550; the insured must also pay a so-called "expense constant," which is a $180 tribute to NCCI. Thus only if a newspaper carrier's annual income exceeded $9,168.08 would his rate fall below 6.33 percent of "payroll" (x= $91.6808 where (4.37x 180) +100x=0633). According to the NCCI's own rules and rate filings, the $180 "expense constant is included in the minimum premium . . . and shall not be added if the minimum premium becomes the final premium for the policy." NCCI, BASIC MANUAL FOR WORKERS COMPENSATION AND EMPLOYERS LIABILITY, Rule VI D.5 at R28 (July 1, 1997). (In most states until about 1980 the expense constant was assessed only to employers whose premium fell below $500; thereafter it was generally assessed for all policies. John Burton Jr. & Alan Krueger, Interstate Variations in Employers' Costs of Workers' Compensation Policies, with Particular Reference to Connecticut, New Jersey, and New York, CURRENT ISSUES IN WORKERS' COMPENSATION 111, 204 n.32 (James Chelius ed., 1986)). By this reckoning, the carrier's annual income would have to exceed $8,688.78 in order for the premium rate to fall below 6.33 percent. Under 7380, the so-called pure premium for Iowa is $2.65 and $2.79 nationally; under 4304, the rates are $3.29 and $3.20 respectively. Most of the information in this footnote, including the quotation from the NCCI manual, was provided by Keith Barnes. Telephone interview with Keith Barnes (April 28 and 29, 1997). The information concerning the minimum premium and the "expense constant" was provided by Tom Lidd, A.W. Insurance Group, Iowa City, IA (June 10, 1997), who also characterized workers' compensation as "great insurance." The NCCI treats all rate information as proprietary and refuses to divulge any of it without payment. Randy Bloom, a technical support leader at NCCI, did explain how NCCI classifies newspaper carriers into the two classifications.) Telephone interview with Randy Bloom, Boca Raton, FL (Apr. 28, 1997).
Such a scenario was dated when written, and it has not aged well since.182

Publishers’ resistance to paying the social wage is not confined to workers’ compensation. Some in the newspaper business have argued that government enforcement of employment tax laws,183 for example, could contribute to the inevitable demise of the “little-merchant” system.184 Such rhetoric culminated in the preposterous claim that “federal and state tax authorities, in their search for revenues, have all but made it impossible for publishers to continue their paternalistic attitude towards their little local entrepreneurs or ‘Little Merchants.’ ”185 All that the IRS had done to trigger such denunciations was to rule that some adult news carriers whose method of compensation failed to meet the statutory standard for exclusion from the federal social security and unemployment insurance tax systems were engaged in covered employment whereas others were not.186 Indeed, after the IRS issued several Letter Rulings holding that some adult newspaper carriers were employees for employment tax purposes because they failed to meet the statutory requirement that their service be performed “in, and at the time of, the sale of newspapers . . . to ultimate consumers”187 — the IRS found that the sale occurred when the subscriber contacted the publisher, not when the carrier delivered the newspaper188 — publishers trumped the administrative-adjudicatory process by successfully lobbying Congress to amend the Internal Revenue Code (IRC) in their favor.189

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183. In the 1980s state unemployment insurance agencies and the Internal Revenue Service began to investigate carriers’ status for employment tax purposes. See, e.g., Mark Fitzgerald, Circulation Managers Irked by IRS Adult Carrier Rule, EDITOR & PUBLISHER, Feb. 25, 1984, at 18; Fitzgerald, supra note 155, at 27; Garneau, supra, note 111, at 9.


189. Newspaper Association of America, Independent Carriers and Distributors
Publishers had unsuccessfully sought to persuade the IRS that carriers fell under a Reagan-era amendment to the tax code that permitted employers to treat as non-employees direct sellers (on a buy-sell or deposit-commission basis) of their products to consumers if substantially all of their remuneration was directly related to sales rather than the number of hours they worked, and the parties entered into a written agreement stating that the seller was not an employee.\textsuperscript{190} Accepting the publishers' position, Congress in 1996 wrote newspaper carriers into the category of direct sellers even where they work under a so-called agency distribution system under which they are paid on the basis of the number of papers they deliver.\textsuperscript{191}

Publishers could scarcely contain themselves. The president of the NAA was exhilarated: "in terms of the bottom-line, immediate effect, this is probably the best things that has happened to the industry from a legislative standpoint in anyone's memory . . . . There is no downside to all of this. This is really a biggie." Alluding, presumably, to the small amount of lobbying money that publishers had to shell out to effect this legislation, he bragged: "On a cost-benefit basis, this is like going to the moon for a thousand bucks."\textsuperscript{192}

The NAA's claim that requiring publishers to include unemployment insurance taxes and the employer's share of the social security tax (not to mention workers' compensation premiums) in the cost of doing business would "radically change the way newspapers are distributed in this country"\textsuperscript{193} suggests the degree to which publishers have come to believe that they are entitled to avoid paying the social wage that is the norm in U.S. industrial enterprises. Only one of two possible economic scenarios can exist in this regard. One is that the imposition of the social wage for carriers would — because profitability is already so low that these costs could not be financed out of profits — increase costs and newspaper prices so significantly that large

\textsuperscript{190} 26 U.S.C. § 3508 (b)(2) (1994).  
\textsuperscript{193} NAA, \textit{supra} note 189.
numbers of people could no longer afford to buy individual copies. The corollary would be that currently very low-paid carriers are subsidizing much higher-income readers.

Since the legislative intent behind mandatory social wage programs such as workers' compensation, unemployment insurance, and the minimum wage is that firms that cannot pay for them are parasitic and must disappear, their application to carriers would bring about further concentration in the newspaper industry, leaving the most efficient firms with larger market shares. If society believed that such intensified monopolization threatened the foundations of a free press, legislatures could establish employment tax and wage subsidies out of general revenues to enable economically less potent newspapers to continue publishing.

The other, and vastly more plausible, possibility is that newspaper companies are already sufficiently profitable to pay carriers the social wage, but choose preemptively to siphon off such payments as profits simply because they have traditionally possessed the economic power and legal sanction to take advantage of groups of weak workers. Newspaper industry officials would have labor-law policymakers believe that "because margins are so thin in newspapering, managers cannot be forced into operating an employee work force when heretofore it was independent contractors." In fact, however, in spite of the warnings of bankruptcy that would result from having to comply with social wage norms, the "newspaper industry continues to be one of the most profitable industries in the nation . . . . Throughout the 1980s, public newspaper firms averaged 17% pretax operating margins and asset growth of about 16% annually." The industry's own organ, Editor & Publisher, revealed that in the early 1990s newspapers yielded quite plump margins — annual profit rates (calculated as operating income as a percentage of assets) of 14.7 percent to 17.2 percent. The return

on equity for some newspaper groups such as Gannett exceeded 20 percent in the early 1990s.198 And profits have continued to rise thereafter.199

That newscarriers treated as employees perform in accordance with publishers' standards without bankrupting their employers is amply on display at those newspapers whose managers have not been coerced by peer pressure into racing to the bottom. The St. Petersburg Times, for example, uses "employee carriers who are well paid" and whose high level of productivity is not undercut by receipt of "a regular wage."200 The newspaper employs about 900 carriers, all of whom are treated as (part-time) employees and are covered by the company's workers' compensation policy as well as by other benefits.201 And the Wall Street Journal is distributed nationwide by its wholly owned subsidiary, National Delivery Service. All of its 3,890 deliverers, even those who work only one hour, are, according to the parent company, Dow Jones, treated as employees and covered by the firm's workers' compensation policy. Indeed, an official of the corporation expressed surprise and puzzlement that other publishers failed to adhere to the same policy.202

41, tab. 1 at 637 (Aug. 1995).


200. Thorn, supra note 18, at 323, 245.

201. Telephone interview with Mike Foley, vice president for community relations, St. Petersburg Times, St. Petersburg, FL (June 24, 1997), who stressed that, contrary to a widespread but erroneous impression, the newspaper is a profit-making enterprise and not the creature of a charitable institution.

202. Telephone interview with Richard Tofel, director of corporate communications, Dow Jones, New York, N.Y. (June 17, 1997); telephone interviews with, Angela Santoro, a staff member of corporate communications, Dow Jones, New York, N.Y. (June 17 and 18, 1997). Santoro noted that temporary employees were covered by the workers' compensation policies of the "temp" firms that refer them. To be sure, even the Wall Street Journal contracts with nonemployees for some delivery service in "remote and sparsely populated areas." Telephone interview with an unidentified circulation fields operations official of the Wall Street Journal, Chicopee, MA (June 16, 1997). The company apparently defines "remote and sparsely populated" quite capiously since the National Delivery Service branch in Chicago, for example, does not even deliver to some of the suburbs and not at all south of Interstate Highway 55; the National Delivery Service "subcontracts" delivery to the remaining locations. Telephone interview with unidentified
One quasi-magic tool that the state has permitted publishers to use to sustain their profitability is just calling their carriers independent contractors. By inducing workers, legislators, and judges to confuse word and reality, publishers "can pass on a portion of the distribution costs . . . because they are not subject to the higher costs of wage and hour laws, benefit payments . . . ."\textsuperscript{203} Debate on this issue would be joined only if publishers or government officials truthfully admitted: "Yes, unfortunately, a certain proportion of newspaper deliverers, including very young children, will be severely injured and deprived of medical and rehabilitative care because we have chosen to exclude them from our state workers' compensation program. But such suffering is a small price for them to pay in order to keep newspaper publishing profits attractively high." Only such a scenario — unthinkable in an era when the intertwining of greed and "public relations" massively obstructs access to information — could ultimately make it true, albeit not the way publishers have traditionally meant it, that delivering newspapers is "the best education in capitalism there is for young people."\textsuperscript{204}

Despite the weighty rationales supporting carriers' status as employees, thousands of cases spawned by coverage disputes under many labor standards statutes in many jurisdictions over many decades leave little doubt that vindicating universal entitlements to protection through litigation is futile. Too many employers, assisted by too many lawyers, are too intent on cutting their costs by bestowing the talismanic label "independent contractor" on their workers, and too many judges have been and remain so sympathetic to employer interests that adjudicatory

\textsuperscript{203} Picard, supra note 196, at 199.

\textsuperscript{204} Michael Freitag, What's New in Newspaper Delivery, N.Y. Times, Mar. 22, 1987, § 3, at 21, col. 3 (quoting David Sundwall-Byers, manager of circulation administration for Gannett Co.). Senator Phil Gramm meant it the way publishers do when he explained why it was important to "deal with these lawsuits concerning the independent contractor status of . . . paper boys," whose understanding of "how our free enterprise system work[s]" he regards as well-honed. "I mean, go out and explain to a paper boy how a minimum wage law is going to help him. Explain to him how government could . . . raise his wages as a paperboy without either affecting the price he pays for the newspaper or the amount he collects when he collects for the paper. And any newspaper boy in America would laugh in your face." Employment Classification Issues, at 10.
outcomes uniformly consistent with openly pro-worker statutory intentions cannot be expected.

Not that litigation would necessarily be futile under all circumstances. It is, for instance, possible to imagine a class poverty test that would link coverage either to a wage too low to enable the worker to buy insurance equivalent to workers' compensation or to bargaining power too feeble to enable the worker to impose the cost of such a policy on his "customers." Regardless of controversy over the continuing propertylessness of the working class, it remains clear that workers whose wages leave them with "no practical opportunity to insure themselves or their families against . . . work injuries" by buying personal accident, disability, or income-protection insurance are, in the words of the California Supreme Court, precisely the "class of workers to whom the protection of the Act is intended to extend."205 Wages below, at, or anywhere near the minimum wage should qualify as a dispositive indicator that the workers who receive them (such as the farm workers whose entitlement to workers' compensation protection the California Supreme Court was deciding) are not in a position to deduct from their definitionally minimal resources the considerable amounts that would be required to pay the premiums on a private insurance policy offering the unlimited medical and extensive income replacement provisions of a industrial workers' compensation policy — provided that an insurance company would write such a policy.206

If any group's wages ever refuted Adam Smith's claim that workers receive compensatory wage differentials to indemnify


206. See ROLF WINK, ARBEITBEHMER UND SELBSTÄNDIGE 95-96 (1988). One insurer offers a policy with $10,000,000 in medical benefits and a $1,500 deductible but only 26 weeks of income replacement for a premium of $70 monthly for a 26-year-old newspaper carrier earning $200-$250 weekly; the agent noted that the kind of long-term disability income that workers' compensation provides would be much more expensive but that he was not certain whether any insurer would write such a policy. Another insurer offers a policy with $2,000,000 in medical benefits and a $1,000 deductible for $50 monthly as well as a 65 percent income replacement policy covering 2 years for $17.37 monthly; unlike workers' compensation, this income replacement is excluded for any disability lasting less than 30 days; for a premium of $19.16 it is possible to reduce the waiting period to two weeks. A disability policy extending coverage to age 65 costs $29.78 per month. Thus a subminimum-wage worker would have to pay $1,000 annually (or about 8-10 percent of his pretax income) to secure protection inferior to that of workers' compensation. Telephone interviews with various insurance agents in Iowa City, IA (June 4-5, 1997).
them for the "unwholesomeness" of their employment, it is those of newscarriers, and especially child newscarriers, whose entire meager wages may be insufficient to pay the premiums on an individual insurance policy with benefits equivalent to those of workers' compensation insurance. Nevertheless, the sheer waste of adjudicating eligibility and administering such a poverty-test-based system cannot be ignored.

If the system of collective compensation for industrial injuries could be effectively and efficiently financed through special sales taxes imposed on ultimate consumers, then workers' compensation could be detached from the employment relationship. Under foreseeable political circumstances in the United States, such a measure is only marginally more plausible than the even more radical step of creating a universal entitlement to medical care and income security, which would render a specialized industrial injury program unnecessary by integrating occupational and non-occupational disability insurance. However, since at least three states (Wisconsin, Maryland, and Kentucky) long ago conferred per se statutory workers' compensation coverage on all newspaper carriers, and New York has done the same for those under 18 years of age, such an approach, especially as confined to one group of workers, would not be discontinuous with current policy.

After all, as early as the mid-1950s, the U.S. Department of Labor drafted a Comprehensive Workmen's Compensation Law, that expressly defined covered employees to include: "Every person regularly selling or distributing newspapers on the street or to customers at their homes or places of business. Such a person shall be deemed an employee of each independent news agency subject to this Act . . . or, in the absence of all such agencies, of each publisher whose newspaper he sells or distributes." This per se coverage was justified, in the view of Arthur Larson, the assistant secretary of labor who was the author of the draft and presided over its adoption in 1963 by the Council of State

Governments, \(^{210}\) by virtue of "the hazardous nature of the occupation, the economic reality of the status as employment, and the desirability of eliminating further uncertainty . . . ."\(^{211}\) Even the U.S. Chamber of Commerce concedes that: "A basic and oft-repeated objective of workers' compensation where there is broad agreement is coverage . . . should be virtually, if not completely, universal."\(^{212}\) Here the Chamber is merely echoing a long-standing position of one section of U.S. big business: the U.S. Steel Corporation, for example, proposed universal workers' compensation coverage, extending even to farm laborers and domestic servants, as early as 1911.\(^{213}\)

Rationality may call for the monetary costs of injuries sustained in distributing newspapers to be collectively financed just as they are in other industries — by employers and consumers. But given the strong legislative trends toward economic deregulation in general and the fact that several states have expressly excluded all carriers from their workers' compensation statutes in recent years, prospects for such reform are dim. Indeed, publishers in Kentucky, one of the three states with mandatory coverage, have been lobbying for years to repeal that provision.\(^{214}\)

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210. Arthur Larson, *Tensions of the Next Decade*, in *New Perspectives in Workers' Compensation* 21, 37 (John F. Burton, Jr. ed., 1988); telephone interview with John F. Burton, Jr., New Brunswick, N.J. (June 20, 1997). The Council's model act is *A Comprehensive Workmen's Compensation and Rehabilitation Law § 4(e)*, in Program of Suggested State Legislation 1963, at 137, 141 (1962). To be sure, this coverage is made subject to a proviso that the worker "does not maintain a separate business, does not hold himself out to and render service to the public and is not himself an employer subject to this act." *Id.* § 4(d). See also Council of State Governments, *Workmen's Compensation and Rehabilitation Law (Revised) §§ 4(d) & (e) (1974)*. Interestingly, the Department of Labor draft contained a similar provision but did not link coverage of news deliverers to it. U.S. Department of Labor, *Draft Provisions for a Comprehensive Workmen's Compensation Law § 4(d)* at 5.


214. When the governor in 1996 called a special session of the state legislature to accommodate employers' needs with regard to changes in the Kentucky workers' compensation statute, publishers ultimately refrained from pushing the issue of repeal of universal coverage for carriers only after their lawyers and insurance agents assured them that they would still have to buy some type of liability insurance, which would be
In a period of public acquiescence in massive nationwide and even global undermining of labor standards through paper-only conversion of employees into self-employees, the much more probable outcome is a continuation of the socio-economically absurd and unjust status quo, which deprives marginal workers injured in the service of employers and consumers of the medical care and cash benefits for wage loss they urgently need.

just as expensive. Telephone interview with David Thompson, executive director, Kentucky Press Association, Frankfort, KY (July 1, 1997). In contrast, publishers in Maryland, according to the executive director of the Maryland-Delaware-D.C. Press Association, have accepted universal mandatory coverage and have not urged its repeal. Telephone interview with James Donahue, College Park, MD (July 8, 1997).