THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW

A Historical Perspective

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Part I

THEORETICAL FRAMEWORK
What Is an Employee? Why It Does, but Should Not Matter

For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals.

I. INTRODUCTION

Reappraisal of the employee-employer relationship has become a theoretical desideratum now that: Thousands of employers are reclassifying their employees as self-employed entrepreneurs in order to avoid employment
taxes; a United States federal appeals court can hold unskilled, uneducated, impoverished, and capital-less Mexican-American migrant farmworkers handpicking cucumbers to be independent contractors ("sharecroppers") rather than employees and thus not within the coverage of federal statutes meant to protect such workers from kinds and levels of exploitation and abuse otherwise unknown in the late-twentieth-century United States; and even some marxisant class analysts hasten to concur that such "proletarians are being transformed into petty commodity producers."

Such a re-examination must be undertaken historically because the categories of "employee" and "employment relationship" lie at the crux of what distinguishes capitalist societies from their predecessors.

We look back over two centuries in which wage labor has won freedom and self-respect, and are astonished...at the prejudices of those who were reluctant to enter the factories; men and women then looked back over two centuries and more of rejection of the slavery of wage labor..., of small proprietorship, of an agricultural holding to ward off starvation in unemployment, sickness and old age.

Although wage labor in fourteenth- and fifteenth-century England connoted freedom in contrast to a prior condition of serfdom, it also signaled a loss of independence inaugurated by an expropriation of the land or "capital" that undermined this anti-feudal emancipatory meaning.

This twofold sense of "freedom" comprising wage labor still survives—wage laborers as both formally free to work when, where, and for whom they please and substantively free from the direct access to the means of production and subsistence that once undergirded the independence of small producers. While the wage-earning class in all developed capitalist societies has at times during the nineteenth and twentieth centuries displayed the militancy and autonomy befitting the liberating component of the first meaning, it has also succumbed to its role as the dependent creatures of capital inherent in the second meaning. Workers promote an ideological view of the state as an agency that can be manipulated to take the measures required to create the modicum of social security and work-related protection that—at least for certain sectors of the working class—cannot be gained directly from
their employers. Fostering this view, workers themselves have come to believe in an image of themselves as passive beneficiaries of forces that operate outside of the capital-labor or employer-employee relationship. Paradoxically, entitlements to those benefits have almost universally been made contingent on being an employee—as opposed to being self-employed. The variety of benefits and protections in the United States conditioned on the existence of an employment relationship is impressive—including unemployment compensation, workers’ compensation, collective bargaining rights, minimum wages and maximum hours, social security, pensions, occupational safety and health, and anti-discrimination protection. What an employee is, however, has often been left vague, has varied from benefit program to benefit program and from jurisdiction to jurisdiction and changed over time. No sound theoretical or empirical grounds serve to justify this lack of uniformity. Indeed, the very existence of this hodgepodge is largely unknown not only to the affected workers, but also to the legislators, administrators, and judges responsible for articulating policies, formulating definitions, and drawing lines.

The twofold historical question raised here is whether: (1) this crazy-quilt pattern of irrational and unreflective bases of coverage ever made sense in the past; and (2) the stage of capitalist transformation of the economy and society that has been attained in all advanced capitalist countries has made obsolete for all practical protective purposes the distinction between wage-earners or employees and independent contractors or the self-employed.

II. THE POLITICAL-ECONOMIC AND JURIDICAL CONCEPTUALIZATION OF THE DISTINCTION BETWEEN WAGE WORKERS AND INDEPENDENT COMMODITY PRODUCERS/SKILLED SERVICE PROVIDERS

One of the leading judicial advocates of the beneficial effects of contractual arrangements and free markets has noted that, regardless of the economic impact such state intervention as the Fair Labor Standards Act (FLSA) exerts, its purpose is clearly to protect "workers...selling nothing but their labor. They have no physical capital and little human capital to vend. [T]hose to whom the FLSA applies must include workers who possess only dedication, honesty, and good health." What, in this eminently practical context, is the categorical difference between one who sells—and has nothing else to sell but—his labor power and
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one who contracts to sell the product of his labor?\textsuperscript{22} Looked at from another perspective: What distinguishes one who appears, depends, and takes his risks on the labor market from one whose livelihood hinges on a non-labor commodity market?\textsuperscript{23}

Assuming as given the existence of capital-endowed and/or skilled workers, some of whom are wage workers and others independent commodity producers: what distinguishes them? More to the point: what distinguishes their respective relationships to the entities for which they work? How does the relationship of a capitalist qua buyer and consumer of labor power to the seller differ from that of a capitalist qua buyer and consumer of the product or service of an independent commodity producer to the latter?\textsuperscript{24} Does the fact one is committed to the realm of command and the other to that of exchange mean that in one the capitalist is the active element and in the other the passive element? Alternatively: Given that such a worker can be an employee, an independent commodity producer, or merely "on the payroll," that is, partake of the formal status of the employee while substantively remaining outside of the dominion of capital, how can these various relationships be distinguished?\textsuperscript{25}

The origins of the distinction between wage workers and independent commodity producers cannot be situated on the abstract level of the mere division of labor. The socioeconomic and political roots of this fundamental divide drive too deeply into the prehistory of European capitalist societies for the claim to be taken seriously that:

\begin{quote}

since it is obvious that, in the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others, and is also clear that slavery does not now exist, in any shape in England...it seems to follow inevitably...that the relationship of master and servant must exist....\textsuperscript{26}

\end{quote}

A major obstacle to conceptualization of the distinction is that the two categories are obviously not rigidly dichotomous.\textsuperscript{27} The amorphous borderlines owe their existence to the fact that small independent commodity producers constitute an unstable hybrid class constantly being pulled toward dissolution in the direction of proletarianization or competitively viable capital accumulation: "Small masters are neither real proletarians, since they partially live on the labor of
the apprentices, and sell not labor but the finished product, nor real bourgeois, since it is still in the main their own labor that maintains them." In light of the opportunities for self-exploitation available to the self-employed that are legally foreclosed to employees the independence of independent commodity producers can and does become so hollowed out as to render them de facto proletarians.

Some of the ambiguity attaching to the boundary between wage workers and independent contractors derives from the individualistic perspective of both orthodox economic theory and jurisprudence. If the (labor) exchange process, which is responsible for ordering the alignment of workers along one side of that divide or the other, instead is viewed as a phenomenon of compulsory incorporation into a system of social class, the task of line drawing may become more categorical.

A wage laborer is compelled to become and remain one by lack of access to the means of subsistence and of production that would otherwise permit him to become a small independent commodity producer in his own right. In other words, class-determined poverty and lack of "capital" separate wage laborers from independent commodity producers. Alternatively, the possession of a scarce, marketable skill, which cannot be costlessly acquired but can be remuneratively used to produce tangible commodities or intangible services without the ownership of capital, might also function as a definitional marker.

Ownership of significant capital is a less ambiguous indicator of independence than skill in the following sense. A skilled professional--such as a lawyer or physician or even a plumber--may conceivably be "on the payroll" of an employing entity without any pretense that the latter substantively can subordinate these employees in any greater degree than if they provided the same services as "outside contractors." The employing entity may for convenience choose to secure such skilled persons' full-time exclusive services that are tangential to the profit-making core of the business. It is much less plausible that one with substantial physical capital would be so employed. That one who enters a firm with his own specialized means of production would at the least become a partner rather than an employee is more than a mere semantic nicety. In most circumstances he would both want and be able to shield himself from the heteronomy associated with the employee status.

Historically, before the rise of large-scale mechanized capitalist industry, skilled artisans owning and using their own modest means of production to
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produce tangible commodities for an anonymous market constituted the chief form of non-agricultural autonomous labor. Depending on how hard a particular branch of production or occupation was pressed by burgeoning capitalist forms of production, such commodity producers could attain a degree of relative independence. The distinction between these quasi-independent skilled artisans and wage laborers was not difficult to draw. The intermediate situations, however, created—and still create—the confusion. It is not surprising, given the long-run decline of independent commodity producers and the accompanying proliferation of manual skilled service providers operating in the interstices of, and less easily subordinated to, capitalist enterprises, that the bulk of real-world legal disputes involves service providers.

In order to avoid conflating the distinct categories of (capital-endowed and skilled) independent commodity producers and (skilled but largely capital-less) service providers, the two will be analyzed separately.

A. Independent Commodity Producers

A non-employing worker who makes tables or jewelry and sells them to the public from a store (or on the street) is unambiguously an independent commodity producer; by uniting the processes of production and distribution in one hand, he consolidates his autonomy. Artisans who also sell directly to the public have become a rarity, but indisputably they are not employees of their myriad anonymous customers. Relationships become somewhat less transparent where the artisan customizes the product for the individual buyer (e.g., a tailor in a clothing store); more ambiguous still is the relationship where production is not only individualized but also takes place on premises owned by the consumer—the most commonplace modern example being house construction.

A useful typology for classifying these relationships in terms of proximity to the final consumer commodity market (in descending order of independence) can be adapted from Max Weber:

1. Preiswerker: Small entrepreneurs with disposition over raw materials and tools producing inventory to be sold directly to the anonymous final consumer market.
2. Artisans producing for the bespoke trade:
   a. Have disposition over raw materials and tools:
      i. Sell directly to consumers;
      ii. Verlegte Preiswerker (Artisan-Outworkers): Produce to order for an entrepreneur, who monopolizes their labor power;
   b. Kundenlohnwerker (Customer Wage Workers): Customer furnishes raw materials (and perhaps tools as well).

3. Hausindustriell verlegte Lohnwerker (Capitalist-Outwork Wage Workers): Consumer is entrepreneur.

4. Inside Contractors: Skilled workers in machinery and metals plants to whom capitalists provide space, machinery, materials and delegate responsibility for production and hiring in exchange for piece rate.

5. Wage Laborers (in manufactory or factory attached to capitalist's capital).

The typology expresses historical stages in the growth of industrial-capital control over immediate producers. Regardless of whether attainment of that control was the sole subjective purpose and objective reason for the ultimate supremacy of industrial-capitalist hierarchical methods of organizing production, the transitions from artisan outworkers to capitalist outwork wage workers (and from inside contractors) to capitalist manufactory and factory wage workers were essentially characterized if not driven by efforts to subject the immediate producers to greater and greater centralized control. Nevertheless, the advanced state of subordination achieved, for example, on the modern assembly line, should not obscure the forms and substance of dependence that prevailed in earlier stages. For more indirect forms of control could still undermine the autonomy of an
independent commodity producer sufficiently to bring him within the orbit of another entity. Thus the transaction between a merchant and a capitalist outworker working up raw materials owned by the merchant pursuant to a piece rate on a simple machine owned by the worker has been characterized not as a market exchange—that is, an exchange of entitlements—but rather as part of a system bearing affinities to production within a firm. Despite the absence of direct supervision, such workers could be subjected to discipline not much inferior to that of a factory master.

Whatever independence such capitalist outworkers were able to retain rested on their continued ownership of at least some component of the means of production and its location outside the core sphere of domination of the capitalist-merchant. But did this asset-endowment act as a buffer to shield the worker against incursions into his sphere of domination? For the eighteenth century, "[h]istorians might find it useful to describe such men where they depended on working for a capitalist 'putting-out' employer as a 'dependent artisanry', but contemporaries would not have needed the qualifying adjective." Moreover, the line was blurred between such dependent artisans working on a piece rate and wage-earning or subcontracting small masters—who might have been producing for the same merchant-capitalist who put-out materials to other workers.

Just as the Verlagssystem involved a method of compensating for a low degree of integration and centralization that permitted merchants to gain control of production, so-called inside contracting represented an attempt to attack indirectly the problem of inadequate control within certain kinds of factories as their size increased in the eighteenth and nineteenth centuries. As such, inside contracting spanned a period of transition from the toolbuilder's requiring someone who could furnish capital to the capitalist's requiring someone who could manufacture a product that he could sell. Thus in certain metals manufacturing industries the firms provided space, machinery, materials, working capital as well as managed sales, while the inside contractors were delegated responsibility for production (of certain parts of the firm's output) including labor. Since their income equalled the difference between their wage bill and their "sales" to the company, inside contractors presumptively had an incentive to engage in "sweating" their laborers. As the example of the Winchester Repeating Arms Co. at the turn of the twentieth century shows, where the capitalist had neither mechanical
training nor ability, he was forced to enter into a "partnership" with a master mechanic. Once the hybrid entity was operating, however, the capitalist, as a functional character mask of his capital, was likewise forced to seek to enhance his control vis-à-vis the inside contractor's "private knowledge of production methods." Capital's success in gaining control of the relevant technology and enforcing its own direct supervision was in large part a function of the increasing complexity of manufacturing. This rendered inside contractors less and less innovative because the requisite knowledge was no longer the arcane lore of practitioners, but publicly transmitted scientific knowledge that could be acquired only through specialized training.

Late-nineteenth-century appellate court decisions in tort actions brought by the employees of inside contractors against a mill or factory reflected the ambiguity inherent in inside contractors' status. In a case involving a spike mill, the Pennsylvania Supreme Court held that whether the plaintiff-worker was in the company's employ directly or indirectly as assistant to the roller boss, he could be treated as the company's employee because he was engaged in its work, upon its machinery and in the mill it operated. In contrast, the Indiana Supreme Court abstracted from all production-related contexts and hinged its finding that the injured plaintiff-worker was not the servant of the defendant-rolling mill solely on the ground that the company was not—in the absence of an express or implied contract—liable for his wages. The inside contractor ("heater"), to whom it furnished scrap iron to be put into a furnace—furnished and fueled by the company—the court deemed an independent contractor in spite of the fact that the mill superintendent was responsible for insuring that the heaters fulfilled their contracts by properly performing a certain amount of work each day and had the power to discharge them if they refused to discharge a helper whom the superintendent considered derelict.

B. Skilled Service Providers

In order to avoid both the pitfalls inherent in the consumer-as-employer relationship, the "pure" case of a skilled manual worker with some modest investment in specialized physical capital assets selling his services to a capitalist entity may be adduced—for example, a plumber. An automobile factory may employ a maintenance plumber or engage one from time to time as needed. This example is poorly chosen in the sense
that this particular capital is not geared to exploit this plumber. A better example would be a skilled production worker. But since such workers are attached to huge capital investments not their own, their dependence would be inevitable. Thus the example would be appropriate only where no capital investment were required of either party—in other words, where no representative capitalist firm were involved.

The fact that the aforementioned automobile manufacturing capital does not self-valorize by exploiting plumbers employed or contracted with to maintain the urinals is merely another way of saying that such plumbers are not integrated into the core production of that entity. The lack of such integration may also be equivalent to a lack of control by the entity. This structure may apply to the payroll plumber as well as to the independent contractor.

The degree of vertical integration a firm has achieved can be analyzed only concretely. Thus the explanation of why Ford inaugurated its own steel production while General Motors purchased its steel inputs from steel producers cannot be exhaustively provided on the level of "capital in general." Regardless of the reasons, the structure of GM's commercial relations with USX or Bethlehem Steel must differ qualitatively from those with the outside solo practice plumber.

If this fundamental difference occurs in the absence of control by GM over the actual production or work process in which the steel producer or the plumber is engaged, the distinction must lie either in the unequal positions that the latter two occupy in the macroeconomic wage-price-profit matrix—and that would be reflected in all their economic relations—or in their specific degree of economic dependence or independence vis-à-vis GM. With the exception of a relatively few extraordinary skills that have not been routinized and hence are transitionally monopolized, a kind of economic dependence arises that negates the substance of independent contracting when a manual worker uses little capital equipment or the disparity in the size of his capital vis-à-vis that of his contractee exceeds a certain critical threshold.

According to one critical interpretation of the neoclassical economic view of the distinction between employees and independent contractors, the essence of the employment relationship lies in the employee's relinquishing to the employer complete disposition over his activities subject to agreed-upon limitations. But, so the objection runs, this kind of relationship—namely, one in which a perfected agreement between the parties resolves the question of who has power over
whom—in fact characterizes independent contracting rather than employment:

Clearly, the neo-classical assumption can be extended to hiring the services of an independent agent. If hired, the agent contracts to supply a particular service for a price. Failure to provide the service entitles the user to withhold payment, and perhaps also sue for damages. The contract is guaranteed by an external political power (the judicial system) and the exchange can be treated symmetrically with other market transactions.

The essence of these various market exchanges is a legally enforceable quid pro quo. Not so in the case of wage labor, where in return for a wage (quid), the worker normally offers only to submit to the political authority of the firm. When a specific quo is in the form of labor services, the individual is an independent agent, not a wage laborer. In other words, where the labor task is completely specified contractually, and the contracting party is paid for that task regardless of the time required to perform it, that worker would, according to this interpretation, be an independent contractor. Conversely, compensation for time worked in abstraction from the amount of work performed would mark off a wage laborer.

The latter categorization is not in itself a sufficient criterion. For, obviously, a client paying a lawyer in solo practice—who has dozens of such clients—$250 per hour has not transformed the lawyer into a wage worker. If this situation is deemed too far removed from the sphere of material production, a plumber or mechanic can illustrate the same principle. The owner of a house wishes to contract with the plumber to repair a drain; the plumber may certainly charge by the hour. The same would apply to an automobile mechanic. In neither case would the worker likely be considered a wage worker rather than an independent contractor—although the other party may have specified the precise task to be accomplished. To be sure, the buyer of the labor services may not have specified the methods to be used or supervised the execution. But the reasons for that failure or inability do not lie in the forms of the contracts into which the parties entered or the forms of compensation. Those forms can be adapted to a variety of
socioeconomic relationships. Rather, the ability or inability of the "employer" to specify the work methods and to control the worker and his performance is rooted in the relative assets and skills that each of the parties brings into the relationship. If the "employer" not only owns all the machinery and materials that the worker must use, but also understands them and how to use them better than the worker does, then the latter is dependent on the former in a sense in which the reverse is not true. Where, as in the case of the plumber or mechanic, the worker owns and understands the equipment and is skilled at using them while his contractee is not, the latter is a customer (not an employer) and the former an independent contractor (not a wage worker).

Or so it would seem at the level of control. As the historical case of outworkers using their own equipment demonstrated, however, even ownership of their own equipment located in their own private sphere may not have rescued them from relegation to wage-labor status. In other words, substantive subordination of labor to capital within the process of production is not a necessary condition of dependent labor. Even in contemporary capitalist societies, in which such subordination does unambiguously function as a sufficient condition of labor dependency, large numbers of workers who are not subject to such physical domination are nevertheless economically dependent on firms.

III. CURRENT LEGAL TESTS OF THE EMPLOYMENT RELATIONSHIP: PERSONAL CONTROL VERSUS ECONOMIC DEPENDENCE

The two major current rival tests of the employment relationship—the more restrictive control test and the more expansive economic reality of dependence test—both have venerable progenitors. Control is rooted in pre-capitalist forms of state-enforced compulsory labor and has in the course of the past two hundred years been adapted to fit the classical core capital-labor relationship, which is characterized by labor's institutionalized worksite and personal subordination embodied in its "attachment" to capital. The virtue of this test is its relative transparency and facilitation of bright lines; its drawback lies in the absence of any demonstrated relevance to the uses to which it is put. Why, for example, should protection against the insecurity of unemployment or against the unilateral domination inherent in atomized individual "bargaining" vis-à-vis adhesion contracts be confined to workers over whose
shoulders employers look as opposed to those with more workplace autonomy? 78

The control test was and remains 79 an appropriate standard for the core capital-labor relations in which the employer dominates the employee socio-technologically 80 within the process of production (where the capitalist firm owns, controls, understands, and coordinates the use of all the means of production while the worker at best performs a closely supervised minute task). Where the control test has become problematic is not at the core, but on the periphery. 81 The periphery encompasses a heterogeneous mass of work and employment relationships in which classical capitalist control at the point of performance is less tangible. 82

Precisely in response to the special situation of such "peripheral" workers, the economic reality of dependence test 83 was designed to expand and has had the effect of expanding the scope of employment. Instead of being confined to the workplace, 84 this test examines the economic subordination of the worker to the entity for which he is working. Its virtue thus consists in its realistic view of the broader scope of the class of dependent workers; its weakness derives from its inherent lack of logical rigor: by providing no plausible stopping point, it potentially opens the way to proclaiming the existence of universal dependency in the guise of universal interdependency. Deterrad as much by the consequences of formulating a rigid binary class (conflict) approach as by such open-endedness, even liberal courts have sought to avert that outcome and the backlash that would follow— but at the price of drawing lines that are devoid of any articulable principle.

IV. STATUS VERSUS CONTRACT

This lack of a principled position creates a tension with attempts to create a per se rule 85 securing protection to all workers. These efforts have been motivated by the well-founded apprehension that, absent such a rigid rule, some employers might succeed in manipulating the legal forms of their employment contracts so as to convince judges that the affected workers are independent contractors and thus not protected. 86 Precisely why such machinations are inconsistent with protective labor statutes was succinctly and eloquently explained by Learned Hand. In drawing out and rejecting the implication of a defendant-coal mining company's argument that it "is... not in the business of coal mining at all, in so
far as it uses such miners, but is only engaged in letting out contracts to independent contractors," he noted in the workers' compensation context that:

[W]hat is confessedly only a means of speeding up the miners and their helpers becomes conveniently an incidental means of stripping from them the protection of the statute. The laborers, under this contention, are to have recourse as an employer only to one of their own, without financial responsibility or control of any capital; the miner is to take his chances in the mine without the right to a safe place to work, or any other protection except as an invited person. This misses the whole purpose of such statutes, which are meant to protect those who are at an economic disadvantage.

It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their "hand," if any one is. ...

Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.87

By illustrating how socioeconomic dependence, specific statutory purpose, and freedom of contract are interconnected, Hand was able in exemplary fashion to show how statutory protection supplanted the common law of the employment contract. But even in formulating this stringently pro-worker canon of construction, Hand reproduced the dichotomy between state intervention and employment contracts, which centuries of English jurisprudence had erected and buttressed as an insurmountable barrier. Socioeconomically more doctrinaire judges did not fail to allude to the
alleged moral consequences of this substitution. Thus in construing workers' compensation statutes during their formative period, appellate judges in Britain and the United States tended to view them in binary terms as substituting status for contract. For example, Collins, M.R., stated that the Workmen's Compensation Act of 1897 presupposes a position of dependence; it treats the class of workmen as being in a sense "inopes consilii," and the Legislature does for them what they cannot do for themselves; it gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves.

Although this rigidly dichotomized approach has, since the mid-nineteenth century, generally been associated with the free-market, contractarian rejection of the argument that "to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will," its roots reach further back. It is based, first of all, on an ambiguous use of the term "status." As intended by Maine in his famous statement "that the movement of all progressive societies has hitherto been a movement from Status to Contract," the term encompassed the powers and disabilities conferred or imposed by society on individuals, without regard to their volition, because of accidents of birth or a desire to protect wards of the state who were deemed incapable of protecting themselves because of age, mental infirmity, or—formerly—gender.

To be sure, the social policy underlying labor protective statutes, which forcibly prevents the parties' disparate degrees of bargaining power from resulting in specified kinds of unacceptable exploitation, is closely related to that supporting protection of wards (but not of differential birth rights). The crucial difference is that so-called modern status presupposes and operates through the medium of the employment relationship: its existence and termination depend on the parties' volition, while its content is partly determined by norms out of which the parties are not permitted to contract to the detriment of the weaker party.

Courts conflated a relationship that can (and must be) voluntarily entered and terminated with one created without or even against the volition of the affected
parties because nineteenth-century and early twentieth-century Anglo-American jurisprudence never adequately reflected on and overcame the anachronistic and atavistic tradition, consolidated by Blackstone, of viewing the master-servant relationship as grounded in semi-feudal and mercantilist statutory compulsion and protection. With the ascendancy of the contractarian mode in the nineteenth century, judges (and lawyers) consequently regarded both residual and nascent statutory protection (and oppression) of the working class as non-market obligatory norms totally distinct from and operating outside of the context of the employment contract.Unable to integrate these two dimensions of the employment relationship, courts tended to identify the mandatory norms as enforceable on the same grounds that applied under the Statutes of Labourers in the fourteenth century—namely, as effluences of status.

By the same token, certain attenuated and socioeconomically transformed incidents of status survive as a result of the fact that even modern wage labor is a coercive regime:

Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."

Consequently, where workers are unable to achieve certain working conditions and income security through direct economic action against their immediate employers on the labor market and at the workplace, and must rely, instead, on classwide political action through state legislation, such protective regimes as minimum wages, workers' compensation, and unemployment compensation will continue to bear the stigma of status precisely because they remain conditioned on and attached to the existence of an employment relationship. Thus all those—whether because they are alleged independent contractors or lumpen proletarians—not in an employment relationship will remain excluded.
WHAT IS AN EMPLOYEE? 19

V. MAPPING THE BORDERS OF THE WORKING CLASS

Tying protection against some of the vicissitudes of capitalism to the existence of juridically narrowly defined, unambiguously proletarian characteristics may, during the nineteenth century, have promoted the distinctive self-identity, solidarity, and self-confidence of a working class that was being forged out of heterogeneous strata. It may also have encouraged the identification and alliances with the working class that have driven progressive social change in the United States since at least the advent of the New Deal. But at the end of the twentieth century, when, in spite of all the talk of "bourgeoisification" of the working class, the share of the economically active population that can have any plausible pretension to the title of entrepreneur is smaller than at any other time in history, can it make sense to exclude the vulnerable from protective regimes? The difficulty in drawing a bright line between those who are dependent and those who are independent is, according to an influential sociological view, a quintessentially modern one:

In 1848 one simply knew who were the proletarians. One knew because all the criteria—the relation to the means of production, manual character of labor, productive employment, poverty, and degradation—all coincided to provide a consistent image. ... To restate the point more abstractly: in the middle of the nineteenth century the theoretical connotation of the concept of proletariat, defined in terms of separation from the means of production, corresponded to the intuitive concept of proletariat conceived in terms of manual, principally industrial, laborers. No ambiguity had yet arisen because material conditions closely corresponded to their theoretical description.

Ambiguity arose, according to this line of thought, when "proletarianization in the sense of separation from the means of production" began to diverge from the other characteristics of proletarianization. This divergence was synonymous with the subsequent explosive growth of the so-called new middle classes—"variously termed salaried employees, white-collar workers, nonmanual workers, ouvriers intellectuels, service workers, technicians." More concretely, these hybrid
proletarians include "secretaries and executives, nurses and corporate lawyers, teachers and policemen, computer operators and executive directors."\textsuperscript{106} Intriguingly, when it is time literally to get down to cases (and livelihoods) that turn on classifying persons as employees or self-employed, the aforementioned sociological ambiguity turns out not to be pivotal.\textsuperscript{107} That is to say, although in some non-trivial sense the replication of the divergence of the two meanings of proletarianization continues both to underlie the perceived need and to hamper the judicial, legislative, and administrative— in short, the political— ability to distinguish between employees and self-employed, the advent of "the new middle classes" has not been confounding the juridical cartographers of class structure. Rather, a remarkable continuity obtains between the disputed class positions in the mid-nineteenth century and at the present. Even if they were self-employed, the subjects of employee-status-determination litigation would approximate more to the "'traditional' or 'old' middle class" of petty bourgeois non-employing self-employed producers than to the new middle class of highly skilled professional wage earners.\textsuperscript{108} If "[t]he focal inquiry in the characterization process is...whether the individual is or is not, as a matter of economic fact, in business for himself,"\textsuperscript{109} highly skilled wage earners and even workers moderately endowed with capital have rarely constituted contested terrain.

The reason is manifest. What is new about the so-called new middle classes is that, despite being employees—"[t]hey are all proletarians, they are all separated from the means of production and compelled to sell their labor power for a wage"—they lack the other indicia of proletarianization (manual labor, productive employment, poverty, and degradation). Consequently neither is their formal-legal status in question nor are they the kinds of workers preeminently in need of state interference with market forces.\textsuperscript{111} The typical grey areas of litigated disputes in the past as well as now have, instead, primarily encompassed a considerably more pedestrian cross section of occupational reality: (1) relatively unskilled manual providers of services (e.g., coal loader, janitor); (2) transportation and storage services (e.g., drover, horse driver, truck driver, taxicab driver, porter, drayman, stevedore, delivery "boy"); (3) skilled and unskilled construction, excavation, and repair work (e.g., digger, roofer, bricklayer); (4) homeworkers (e.g., lace clipper, knitter, silk weaver, shoemaker, tinman); and (5) a heterogeneous group of unskilled, semi-skilled, and
skilled manual workers engaged in various types of labor subletting, sweating, or piece-rate work (mining, construction, logging, sharecropping, brickmaking, fishing, shipbuilding, potter printing, earthenware manufacture, meat boning, hairdressing). The nub of the disputes in these sorts of cases has always been reducible to two basic issues: (1) whether the classification in question was merely a sham perpetrated by the employer; or (2) whether the work involved was sufficiently specialized and/or skilled and thus outside the core business and/or expertise of the employer to qualify as independent of that entity. Independence in the latter sense is not inconsistent with the proletarian connotations of manual productive labor combined with poverty and degradation. Thus the fact that one who cleans an office at night or delivers coal to a factory may not be integrated into its operation and thus not subject to the control of its owners in no way suggests that she belongs to the class of the entrepreneurial bourgeoisie, which is purported to thrive on or perish under the risks inherent in an anonymous market.

None of which is to gainsay the existence of self-employed whose specialization and skill not only protect them from succumbing to the worksite domination of their customers but also secure them distinctly non-proletarian remuneration. Rarely, however, have such relationships become the subject of employment-related litigation because they seldom generate problems that fall within the universe of actionable events that traditionally have beset proletarians. But if only the existence of such substantively irrelevant "counterfactual" cases nurtures the hypothetical vision of independence that sustains litigation, then arguably the benefits of eliminating coverage disputes and hence reducing the economic insecurities of workers and legal uncertainties of employers are not worth the cost of imposing protective coverage on a relatively small group of quasi entrepreneurs who may not be in "urgent need" of such state interference.

NOTES

3. See also Sachs v. United States, 422 F. Supp. 1092 (N.D. Ohio 1976) (migrant cucumber pickers are share farmers for the purposes of federal employment taxes and not employees).


5. In a similar vein, a federal district court held that non-English speaking, unskilled Vietnamese backers, peelers, and pickers in crabmeat plants whose "capital investment" consists of a hairnet, apron, gloves, and a rudimentary knife are independent contractors because they "commonly serve more than one facility in a single day"—depending on which plant is supplied with fish that day. Donovan v. Seafood, Inc., No. 84-1684 "L," slip op. at 7, 4 and 8 (W.D. La. Lafayette-Opelousas Div. July 13, 1987), rev'd sub nom. McLaughlin v. Seafood, Inc., 861 F.2d 450 (5th Cir. 1988), modified on suggestion for reh'g en banc, 867 F.2d 875 (5th Cir. 1989).


7. Historically oriented studies are not subject to the criticism that exclusive attention to the unchanging private-law contract of employment obscures the crucial functions performed by public-law employment obligations (such as the Statute of Labourers and Poor Laws) and the auxiliary institutions created to enforce them. See Michael Tigar and Madeleine Levy, Law and the Rise of Capitalism 307-8 (1977). It is, doubtful, however, whether even Karl Renner, whom Tigar and Levy were criticizing, neglected these changing social contexts.


10. On the original continental European equivalence of the social question and the labor question in the sense of aiding a disadvantaged group, see Zacher, "Verrechtlichung im Bereich des Sozialrechts," in Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität 14, 15-18 (Friedrich Kübler ed. 1985 [1984]).

11. These remarks are not intended as a glorification of the "voluntarism" or anti-political orientation of the craft unions in the American Federation of Labor, which prior to the New Deal rejected protections conferred by the state on workers who were unable to secure them through direct economic action vis-à-vis their employers. For a concise account of voluntarism, see Grant McConnell, Private Power and American Democracy 79-86, 319-29 (1970 [1966]). Although the use of formally democratic legislative procedures to negotiate old-age pensions, unemployment compensation, etc., could theoretically make the division of income between labor and capital globally transparent by removing it from its subjection to the spontaneous needs of capital accumulation, in the United States this political debate has been dulled by virtue of being couched in terms of class-neutral personal income tax brackets.

12. Of the English trade union movement at the turn of the century it has been said that it was engaged in the anomalous, impossible, and hence transitional effort to use collective civil rights to assert basic social rights:

Rights are not a proper matter for bargaining. To have to bargain for a living wage in a society which accepts the living wage as a social right is as absurd as to have to haggle for a vote in a society which accepts the vote as a political right. Yet the early twentieth century attempted to make sense of this absurdity. It fully endorsed collective bargaining as a normal and peaceful market operation, while recognizing in principle the right of the citizen to a minimum standard of civilized living....

13. Approximately nine-tenths of current government social expenditures in the United States are tied to the existence of an employment relationship. See infra ch. 7.

14. In the wake of mass unemployment in Western Europe in the 1980s exceeding the levels reached in the United States and as a result of the stronger entrenchment of labor unions, European discussion of the need to decouple the so-called social wage from the existence of an employment relationship has centered on unemployment rather than self-employment as the chief barrier to access to a living wage. See, e.g., Thomas Schmid, Befreiung von falscher Arbeit (1984); Claus Offe et al., "Arbeitsgesellschaft": Strukturprobleme und Zukunftsperspektiven 355-58 (1984); Oskar Negt, Lebendige Arbeit, enteignete Zeit 215-17 (1987 [1984]). Twenty years earlier, the specter of unprecedented unemployment brought about by the cybernetic revolution and automation gave rise to proposals for a basic guaranteed income in the United States. See, e.g., The Guaranteed Income (Robert Theobald ed. 1967 [1966]).

15. Although the scope of state intervention has been considerably expanded since the New Deal, even at the high point of Victorian contractarianism, capital-labor relations were regulated not only by punitive anti-union master-servant relations acts, but also by labor-protective regimes such as the truck acts. Only from the radically ahistorical perspective of Law and Economics doctrine could it seem that: "During the nineteenth century, the area of labor relations was governed by a set of rules that spanned the law of property, contract, tort, and procedure. There was no special set of rules for labor cases as such." Epstein, "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation," 92 Yale L.J. 1357, 1357 (1983). For a broad, international analysis, see Simitis, "Zur Verrechtlichung der Arbeitsbeziehungen," in Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität 73 (Friedrich Kübler ed. 1985 [1984]).


17. For citations to the employee definition/coverage provisions in the pertinent statutes, see infra Appendix.
18. For a prominent exception, which, nevertheless perpetuates the tradition, see E.E.O.C. v. Zippo Mfg. Co. 713 F.2d 32, 35-36 (3rd Cir. 1983).

19. This conjecture is intended in a sense distinguishable from that offered by André Gorz, Adieux au prolétariat (1980).

20. Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring). Given the hostility of the Law and Economics school to such schemes as a mandatory minimum wage, it is plausible that Judge Easterbrook's bold and judicially unprecedented proposed per se rule that all migrant farm workers be "employees" for the purpose of FLSA, flows from a strategy calculated to promote "the amending process," id. at 30—that is to say, the repeal of the FLSA. On the incipient judicial version of the Law and Economics critique of minimum wage laws, see Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987) (per Posner, J.). The continuity with classical political economy may be gleaned from the review provided by Lionel Robbins, The Theory of Economic Policy in English Classical Political Economy 104-5 (1952).

21. Highly skilled workers may also have nothing but their labor power to sell. Although in principle FLSA also covers and protects such workers, the empirical association of high skill, limited supply, and high wages with superior bargaining power makes it clear that they were not the primary objects of state intervention into the labor market (at least with respect to the minimum wage provisions of the Act). At the outer limit of a supply-demand structure favorable to skilled workers, the coercive dependence inherent in the employment relationship may be temporarily tendentially sublated. See Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435 (1987). It must be kept in mind that FLSA excludes from coverage a number of segments of the skilled—namely mental workers with professional training. 29 U.S.C. § 213(a)(1); 29 C.F.R. §§ 541.3, 541.301-.315.

22. For a historical illustration of the moment of transition from the latter to the former, see Marie Rowlands, Masters and Men in the West Midland Metalware Trades before the Industrial Revolution 157-58 (1975).

23. Employees are not shielded from the risks inherent in the markets for the commodities they produce for their employers; rather, through the latter such risks are mediated— with a time lag. Thus, for example, the
workers who produced Edsels presumably lost their jobs rather than invested capital. Robert Nozick, Anarchy, State, and Utopia 255 (1974), overlooks this connection. It may be true, however, that the necessity of valorizing significant fixed capital investment may impel employers to postpone dismissals beyond the point at which less encumbered employers would already have costlessly reduced their payrolls. For speculation on how these considerations played themselves out in the context of the eighteenth-century putting-out system, see M. Dorothy George, England in Transition: Life and Work in the Eighteenth Century 52-53 (1965 [1931]).

24. Strictly speaking the purchase by capital of the labor services of an independent contractor would figure as expenditure on constant capital (or indirect labor?). See Gintis and Bowles, "Structure and Practice in the Labor Theory of Value," Rev. Radical Pol. Econ. Winter 1981, at 1, 23 n. 34.

25. For extensive case citations adducing various fact patterns, see Annot., 19 A.L.R. 1168 (1922) ("Circumstances under which the existence of the relationship of employer and independent contractor is predicable").

26. Charles Manley Smith, A Treatise on the Law of Master and Workman xxv (1852). Without warrant, Smith cites Pufendorf, de Jure Nat. ac Gent., lib. 6, cap. 3, sect. 4, as authority for this claim. Similarly unfounded is the claim that: "In the 1840s and the 1850s men were not aware of reasons why there ought to be legal differences between the status of the workmen and the status of their masters." Miller, "The Master-Servant Concept and Judge-Made Law," 1 Loyola L. Rev. 25, 28 (1941)

27. The ambiguity may be more acute at historical turning points than with respect to the present-day survival of antediluvian forms of labor. Thus the fact that journeymen (outside of the building trades) in New York City in the early years of the nineteenth century were paid by the piece according to a list of just prices has been called "evidence that artisan wage labor was not yet fully regarded as a market commodity, as labor power...." Sean Wilentz, Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850 at 28 (1984).

28. Friedrich Engels, Die Lage der arbeitenden Klasse in England, in: I:4 Marx-Engels Gesamtausgabe 190 (1932 [1845]). The present discussion abstracts from the issue of working small employers who may both exploit and be exploited. Beyond a critical threshold
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(indicated by the number of employees) such self-employed are employers in their own right; below that threshold their status approximates that of their employees. The issue was raised by nineteenth-century English courts in interpreting the Truck Act. See infra ch. 3.

29. In addition to workweeks reminiscent of the hours that prevailed in early nineteenth-century mills, the self-employed also have access to the exploitation of family members, especially children.

30. In some eighteenth-century English trades "the skill and the capital required were so small that it was said that every man was his own master, though the earnings of such a master might be below those of an unskilled labourer." M. Dorothy George, London Life in the Eighteenth Century 157 (1964 [1925]).

31. It is odd to see such a magisterial historian as E.P. Thompson write of the transition from half-free forms of labor into free, mobile wage labor in the eighteenth century: "But crops could not be harvested, cloth could not be manufactured, goods could not be transported, houses could not be built and parks enlarged, without labor readily available and mobile, for whom it would be inconvenient or impossible to accept the reciprocities of the master-servant relationship." E.P. Thompson, "Patrician Society, Plebeian Culture," 7 J. Soc. Hist. 382, 383 (1974).


33. "Quiconque veut vendre des marchandises distinctes de sa propre force de travail doit naturellement posséder des moyens de production tels que matières premières, outils, etc." 1 Karl Marx, Le Capital 131 (tr. Roy 1969 [1875]).

34. It is important to observe that the ownership of capital may not only not relieve small entrepreneurs of the need to sell their labor power but in fact may place additional pressure on them to do so by imposing on them the necessity of amortizing their capital. For a good example (namely, a small masonry subcontractor) of this twofold structure, see William Reddy, Money and

35. The costs of acquiring such a skill in the representative case include forgoing current compensation, which in turn presupposes positive savings or access to others' (typically relatives') savings. With the expansion of commercial mass entertainment it has become possible for actors and singers to secure large incomes for the display of skills that arguably were not acquired in the aforementioned manner. See Frank and Zweig, "The fault is not in our stars," Forbes, Sept. 21, 1987, at 120, 126.

36. In terms of self-consciousness, one aspect of this distinction has been poignantly captured as follows: "'For all that, a chap 'at's learnt his trade an' can use his hands--he isn't a machine an' he isn't a flippin' monkey--he's a man, lad, wages or no wages, a man.'" J.B. Priestley, The Good Companions 630 (1929).

37. This claim abstracts from such aberrant examples as the owner of a business who, upon selling it to a still larger entity, joins the merged organization as a corporate executive, manager, or supervisor.

38. A major exception is truck drivers owning their own equipment. Such arrangements by means of which employers fragment, disperse, and shift the risk associated with large capital investment onto their drivers while retaining control over the market for transportation of goods resemble those obtaining under the early capitalist putting-out system. See N.Y. Times, July 25, 1988, at 29, col. 1 (nat. ed.).

39. "An industry would remain in the hands of small independent men...if the raw materials were in open and abundant supply, if the process of manufacture was simple and could be carried out in one stage, and if the product could be sold locally, direct to the consumer." Sylvia Thrupp, The Merchant Class of Medieval London [1300-1500], at 4 (1968 [1948]).

40. Once industrialization took hold of the British economy in the nineteenth century, however, artisans became so proletarianized that the term "artisan" itself came to mean "wage worker." Eric Hobsbawm, Workers 254 (1984).

41. Gintis, "The Nature of Labor Exchange and the Theory of Capitalist Production," Rev. Radical Pol. Econ., Summer 1976, at 36, 43, acknowledges the existence of such a continuum, but the example he
chooses to illustrate the "clearly specifiable conditions under which the employer-employee relationship shades off into the 'independent agent' relationship"—viz., the supply of female labor to a company typing pool—is hardly calculated to promote categorical or situation-sensitive line drawing.

42. Indeed, although independent, they are no more "contractors" vis-à-vis their customers than is a railway vis-à-vis its passengers. In other words, independent contractors constitute a subset of the self-employed.

43. The schematic classification is not intended to reflect a unilinear historical sequence. For a concise historical outline, see George Unwin, *Industrial Organization in the Sixteenth and Seventeenth Centuries* 10-13 (1957 [1904]).


45. Such monopolization often resulted historically from artisans' being indebted to entrepreneurs or their lack of access to the export trade. See Maxine Berg, *The Age of Manufactures: Industry, Innovation and Work in Britain 1700-1820*, at 280 (1985). For a factually disputed modern example involving carpenters working for a home-building company, see *Trustees of Sabine Area Carpenters' Health & Welfare Fund v. Lightfoot Home Builder*, 704 F.2d 822, 826-27 (5th Cir. 1983).


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48. See, e.g., Paul Mantoux, La Révolution industrielle au XVIIIe siècle (1959 [1906]).

49. In his rich historical study of management, Pollard remarks that subcontracting was not a stage but rather compatible with various stages of industrial capitalism. Only the dogmatism of nineteenth-century classical political economy, Pollard concludes, led to regarding the capitalist-entrepreneur-owner facing an individual, propertyless worker as the normal, highest, finite form of organization. Sidney Pollard, The Genesis of Modern Management 39 (1965). Apart from the anti-teleological implications of Pollard's criticism, it is questionable whether his strictures would apply to any of the other types mentioned in the text. For an extended argument that "the existence of technologically advanced forms of work presupposes the continued existence of archaic forms and vice versa," see Charles Sabel, Work and Politics 11 and passim (1987 [1982]), and Michael Piore and Charles Sabel, The Second Industrial Divide 19-48 (1984).


51. Although this transition is crucial to the socio-epistemology offered by Alfred Sohn-Rethel, his merely denoting the stages as "Lieferungsverhältnis" and "Arbeitsverhältnis" does not explain the transition. See Alfred Sohn-Rethel, Soziologische Theorie der Erkenntnis 99 (1985).


55. Such monitoring would have required centralization of production, which was inhibited by the cost of attracting labor from its rural base. Id. at 37.

56. Id. at 32. Moreover, industrial craftsmen under the industrial putting-out system "were as economically dependent on their employers as were wage labourers, and their employment was less continuous." Christopher Hill, The Century of Revolution 1603-1714, at 177 (1982 [1961]).


61. Tin mills, brass works, rolling mills, iron smelting, and blast furnaces were among the affected industries in addition to cotton spinning. Sidney Pollard, The Genesis of Modern Management 42-47 (1965).


63. This circumstance conflicts with the romantic-communitarian image of inside contracting that pervades the description offered by Michael Piore and Charles Sabel, The Second Industrial Divide 33 (1984). On the role played by the sweating and subletting of labor in obscuring the overall structure of class relations, see Karl Marx, Das Kapital ch. 21 (1867). Further confusion of class roles could have resulted from the fact that in some instances inside contractors also received day pay as employees that exceeded their "profit." See Buttrick, "The Inside Contract System," 12 J. Econ. Hist. 205, 206, 209 (1952).

64. Id. at 207.

65. Id. at 210.

66. Id. at 214-15.

67. With one exception the reported cases involve actions by employees of inside contractors against the capitalist employer. This would be significant if it reflected the consciousness of such contractors that they were not employees and hence could not take advantage of protective statutes. People v. Remington, 45 Hun 329 (App. Div. 1887), aff'd, 109 N.Y. 631, 16
N.E. 680 (1888), was brought under an 1885 New York statute preferring the wages of operatives and laborers in corporate bankruptcy proceedings. The defendant corporation had furnished the petitioners with stock, rooms, and machinery to manufacture parts of machines for which the corporation agreed to pay a fixed price; these persons in turn employed their own laborers. The opinion contains no further discussion of the actual working conditions, making it difficult to assess the claim. Unfortunately, although the headnote states that the petitioners were not covered, the opinion itself is confined to citing long passages from other cases, in particular ones decided under the British Truck Act. See also People v. Remington, 6 N.Y.S. 796 (Sup. Ct. 1889) (decided on basis of earlier case).

68. Rummell v. Dillworth, Porter & Co., 111 Pa. 343, 2 A. 355, 357 (1886). Without explaining how it arrived at the conclusion, the court added that, since it did not appear that the roller boss was an independent contractor, it was important that his compensation was calculated by reference to the number of tons manufactured. Id. See also Indiana Iron Co. v. Cray, 48 N.E. 803 (Ind. App. 1897) (steel mill worker was company's employee and boss roller—who was in effect foreman though he had sole control of the manner of manufacturing and could hire and fire—was not independent contractor where company also had the latter authority).


70. As producers of tangible commodities, who are easier to distinguish, have receded in socioeconomic significance in favor of those who sell services—an exchange considerably more difficult to distinguish from the sale of labor power—a putative employer seeking to avoid even the appearance of an employment relationship may be tempted to transmogrify a service relationship into the sale-purchase of a commodity.

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. [T]he employer, under the spur of tax or other liability,... solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result,
a pile of coal. You render me no services, but you rather sell me a product: a pile of coal from an emptied car."


71. This will be true even abstracting from the possibility that the automobile manufacturer contracts with rather than employs a plumber because the sporadic nature of the work would not justify full-time employment.

72. For a mathematical proof of how, given unequal organic compositions of capital, market exchange generates the division of non-employing self-employed producers into exploiters and exploited, see John Roemer, A General Theory of Exploitation and Class 123-32 (1982); Roemer, "New Directions in the Marxian Theory of Exploitation and Class," in Analytical Marxism 81, 84-90 (J. Roemer ed. 1985 [1982]).


74. For a penetrating analysis of the dialectic inhering in the struggle over converting that contractual disposition into effective control at the point of production, see David Brody, Workers in Industrial America 188-210 (1980).


76. Samuel Bowles and Herbert Gintis, Capitalism and Democracy 76 (1987 [1986]). Bowles, "The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models," 75 Am. Econ. Rev. 16, 21 n. 9 (1985), has extended this categorical definition of wage workers to piece rates with one significant modification:

"[E]ven the use of straight piece-rate payments will not render costs independent of the hours of labor hired unless the piece-rate workers use no inputs owned by the firm, and the determination of the number of pieces produced requires no surveillance inputs and hence is costless. But in this extreme case, there is no reason--by conventional definitions--to consider the piece-rate workers part of the firm that purchases their
output, for their relationship to the firm is an exchange.

Where, however, the firm monopolizes the piece-rate workers' labor power, the independence that creates the basis for selling commodities distinct from their labor power may be undermined. This conclusion would apply not only to the historical Verlagssystem but—with due attention to the more complicated matrix of prices, wages, and profits—also to modern subcontractors who produce exclusively for one (large) entity. See, generally, Andrew Friedman, *Industry and Labour* 118-29 (1977).

77. Exclusive reliance on the disciplinary functions of "monetary exchange asymmetries" in abstraction from the substance of employer-employee relations has caused one author to extinguish the societal significance of the distinction between an employer and a customer. See William Reddy, *Money and Liberty in Modern Europe* ch. 3 (1987). By focusing on transactions in which the rich gained power over the poor by virtue of the fact that the latter attributed much greater significance to the commodity in question, and by denying that production and consumption are distinguishable, id. at 64-66, 156, Reddy in effect lumps into one category traditional proletarians, house owners who are at the mercy of a plumber, and consumers who desperately need to buy food from a merchant. This approach appears to be grounded in the author's view that market society never existed—only market culture, which is a false ideology imposed by market language. Wrong perceptions—especially those regarding labor as a commodity and denying that workers were independent or petty commodity producers—formulated by means of that language then shaped misguided practices. William Reddy, *The Rise of Market Culture: The Textile Trade and French Society, 1750-1900* (1984).

78. An interesting example is the nationally successful effort by taxicab companies since the 1970s to increase profits by shedding their obligations to pay employment taxes and to bargain collectively with their employees. They have achieved this goal by creating the illusion that they have transformed their employees into daily "lessees." As such the drivers are not even accorded the status of independent contractors, but approximate the same status as consumers renting a car from a car rental agency. In the leading case, a federal appeals court managed to pervert every indicium of the employer's unilateral economic power into an indicium of self-employment. Thus, for example, the fact that the company was able to impose on the drivers a system
by which it secured the amortization of and profit on
its invested capital before any wages are paid—by
compelling them to pay the daily lease fee before they
take the cabs out—was transmogrified into a
relationship identical to that obtaining between a
commercial landlord and a shopkeeper enabling the
lessee "to produce as much income for himself as
NLRB, 603 F. 2d 862, 878 (D.C. Cir. 1978). The court
thereby neglects the fact that commercial landlords are
not in the bakery, etc., business whereas the taxicab
companies have otherwise hardly changed the way they do
business at all. The very imbalance between the
organized drivers and the cab companies that gave rise
to the imposition of this regime in the first place
ironically also triggers the former's disqualification
as employees; ineligible for protection under the
National Labor Relations Act, the atomized workers
become powerless to halt the further deterioration of
their bargaining position. Earlier the Internal
Revenue Service approved this result with respect to
Subsequently the Social Security Administration adopted
the same position. SSA, Program Operations Manual
detailed analysis of Local 777, see Linder, "Towards
Universal Worker Coverage under the National Labor
Relations Act: Making Room for Uncontrolled Employees,
Dependent Contractors, and Employee-Like Persons," 66

Emblematic of how little progress has been
achieved in consolidating a realistic conceptual
framework for the employment relationship is the fact
that in the middle of the nineteenth century the chief
judge of the Court of Queen's Bench was able to see
through exactly the same sham in the context of a
vicarious liability case. Even absent physical control
by the owner of the hackney cab over the driver, Lord
Campbell was unwilling to be distracted by the fact
that the driver paid a fixed sum to the owner and
collected the fares for himself: "[M]ust not the actual
arrangement between them be equally considered a mode
by which the proprietor receives what may be estimated
as the average earnings of the cab, minus a reasonable
compensation to the driver for his labour?" Powles v.
Hider, 6 El. & Bl. 207, 212, 119 Eng. Rep. 841 (Q.B.
1856).

79. Ironically, the law review literature is replete
with assertions that "with the advent of the large
corporation--absentee ownership--employer control in
any realistic sense almost vanished." Steffen,
"Independent Contractor and the Good Life" 2 U. Chi. L. Rev. 501, 507 (1935). In point of fact, only with the rise of mass production and Taylorism was capital able to break the grip that skilled craft workers at one time held on numerous production processes. See Harry Braverman, Labor and Monopoly Capital (1974). By the same token, it is not correct to characterize as "fictitious" the control which Blackstone and nineteenth-century judges supposed the master invariably exercised over his servant's activities. See, e.g., Harper, "The Basis of the Immunity of an Employer of an Independent Contractor" 10 Ind. L.J. 494, 497 (1935). Although social control was surely exercised vis-à-vis domestic and agricultural servants, production "masters," too, were typically more skilled and equipped with more capital than the artisans working for them, and thus in a position to dominate them.

80. Although courts have confined the scope of the control test to this sphere, a realistic conception of such physical control implies economic domination as well in the sense that those lacking capital need an "employer." See Linder, "Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine," 15 N.Y.U. Rev. L. & Soc. Change 435, 444 (1987).

81. Insofar as employers (and/or their attorneys and accountants) have grown bolder, this statement is no longer categorically correct. The most blatant example is unskilled hand-harvest agricultural employees, whose widespread treatment as self-employed by farmers would--it is conjectured--scarcely have been viewed other than as a bad joke let alone administratively countenanced before the 1970s.

82. The vast expansion of homework made possible by the development of cheap microcomputers underscores the importance of conceptualizing the employment relationship so as to embrace such workers. At the high point of the federal judiciary's openly empathetic interpretation of the humanitarian purpose of the FLSA, it regularly held technologically more backward homeworkers to be employees. See, e.g., Walling v. American Needlecrafts, 139 F.2d 60 (6th Cir. 1943); Walling v. Twyfford, Inc., 158 F.2d 944 (2d Cir. 1947); McComb v. Homeworkers' Handicraft Co-op, 176 F.2d 633 (4th Cir. 1949), cert. denied, 338 U.S. 900 (1949); Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961).

84. In its modern version--dating back to the 1940s--the economic reality of dependence test subsumes the control test; in other words, it encompasses all workers covered by the control test, which is a subset of the economic reality test. See infra ch. 7.


86. For a rare pre-New Deal example of a court's seeing through the form to the substance, see Robinson v. Younse Lbr. Co., 8 La. App. 160, 163 (1927) (holding forestry workers to be employees under state workers' compensation law).


89. The modern development and growth of industry, with the consequent changes in the relation of employer and employee, have been so profound in character and degree as to take away, in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant.... Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract....

Cudahy Packing Co. of Nebraska v. Parramore, 263 U.S. 418, 423 (1923).


92. Henry Sumner Maine, Ancient Law 174 (1927 [1861]).


94. The Fair Labor Standards Act, for example, "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706 (1945). For an analysis of the original purposes of FLSA, see Linder, "The Minimum Wage as Industrial Policy: A Forgotten Role," 16 J. Legislation ___ (1989). The enactment and enforcement of minimum wage laws thus express a societal conviction that--even absent physical coercion--certain economic agreements are unjust and hence invalid: "The community is not bound to provide what is in effect a subsidy for unconscionable employers." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937). For a discussion of the morality of contractual relations, see Emile Durkheim, Lecons de sociologie 235 (2d ed. 1969 [1950]).


96. At least as early as the first part of the eighteenth century social significance attached to the distinction between a master and an employer. Thus an anonymous author, commonly held to be Defoe, recounted the following dialog between a justice of the peace and a journeyman weaver:

Justice. Come in Edmund, I have talk'd with your Master ------.
Edmund. Not my master, and't please your Worship, I hope I am my own Master.
Justice. Well, your Employer, Mr. E ------, the Clothier; will the word Employer do?
Edmund. Yes, yes, and't please your Worship, any thing but Master.

[Daniel Defoe], Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behaviour of Servants in England duly enquir'd into 97 (1724).
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98. This bifurcation is rooted in the circumstance that the common law "ignores any disequilibrium of power which results from normal social relations as distinct from abnormal personal conditions (infancy, mental disorder). It ignores the realities of social constraint and of economic power...." Otto Kahn-Freund, Labour and the Law 22 (2d ed. 1977 [1972]).

99. Id. at 6.


101. Although the attempt by William Reddy, Money and Liberty in Modern Europe ch. 3 (1987), to replace the concepts of class and value with that of "monetary exchange asymmetry"—i.e., "the mere difference in the relative significance of a particular commodity to each party could give the rich a certain power over the poor," id. at 66—may be misguided insofar as it blurs the distinction between labor exchanges and consumption, it is useful in emphasizing the global exploitativeness that encompasses small contractors. Id. at 99, 104-5.

102. Thus, for example, Rep. Richard Gephardt, in campaigning for the Democratic presidential nomination, proposed that businesses be forced to provide "health insurance to their employees, 'just as they must now provide a minimum wage.'" Observing that "'[h]ealth insurance in the modern age is just another cost of doing business,'" he stated that it was necessary to prevent employers from "'passing on the cost of their employees' health care to society.'" New York Times, Dec. 4, 1987, at 15 col. 5 (nat. ed.). Although this reasoning may be impeccable as far as it goes, it does
not explain why non-employees should be deprived of the same care.

103. Adam Przeworski, Capitalism and Social Democracy 56, 57 (1987 [1985]).

104. Id. at 60.

105. Id. at 62.

106. Id. at 57.

107. That is, despite the pleas for adherence to the "methodological individualism" that will create the "microfoundations" of grand socioeconomic theory of the non-teleological functionalist variety. See, e.g., id. at 92-97; Roemer, "Divide and Conquer: Microfoundations of the Marxian Theory of Discrimination," 10 Bell J. Econ. 695 (1979); Jon Elster, Making Sense of Marx (1985).

108. For the typology, see Wright, "What is Middle About the Middle Class?" in Analytic Marxism 114, 126-27 (John Roemer ed. 1986).


110. Adam Przeworksi, Capitalism and Social Democracy 57 (1987 [1985]).

111. By the same token, the classical political-economic distinction between independent commodity producers (the old middle class) and wage laborers has also played a distinctly marginal role in litigation.


114. In this context only business entities are intended. Where households contract with such skilled mechanics as plumbers, the categorical framework of the employment relationship loses its applicability.
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115. See T.H. Marshall, "The Welfare State and the Affluent Society," in T.H. Marshall, Class, Citizenship, and Social Development 292 (1965 [1961]). Since, on the other hand, exposure "to the risk of being reduced by circumstances to a state of destitution...is not exactly correlated with...membership of any particular social or economic class," id., universal coverage would also be expedient. In the United States such a step was partially taken when the self-employed began to be incorporated into the social security old-age pension system in the 1950s. Such supra-class coverage has the ancillary positive effect of preventing the security program from being relegated to the status of charitable welfare.