From Street Urchins to Little Merchants: The Juridical Transvaluation of Child Newspaper Carriers

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FROM STREET URCHINS TO LITTLE MERCHANTS: THE JURIDICAL TRANSVALUATION OF CHILD NEWSPAPER CARRIERS

Marc Linder*

"Delivering newspapers is the best education in capitalism there is for young people."1

INTRODUCTION

In chronicling efforts by children in Rhode Island to press grievances against the publisher of the newspaper they deliver, the New York Times reported that "[a]s independent contractors rather than employees, [the news carriers] do not have the power to form a labor union under Federal law."2 This unsubstantiated claim about the status of the carriers inadvertently disinters a largely forgotten chapter in the history of protective child labor legislation. That chapter consists of the success of newspaper publishers in excluding newspaper carriers, both children and adults, from coverage under the Fair Labor Standards Act ("FLSA") and other federal and state statutes.3

The number of children in the United States affected by the exclusion of newspaper carriers from the protection of the FLSA is impressive. A 1988 study estimated that 425,000 such minors accounted for almost three-quarters of all persons who delivered papers.4 The Minimum Wage Study Commission, af-

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1. 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.). One interpretation of this education is that "[t]he children were learning that there was no such thing as morality in the marketplace. . . . They had absorbed the very worst lessons the business world had to offer: how to cheat, lie, and swindle customers." D. NASAW, CHILDREN OF THE CITY: AT WORK AND AT PLAY 86 (1986).


4. INTERNATIONAL CIRCULATION MANAGERS ASSOCIATION, ICMA UPDATE, Jan. 1989, at 1, 2 [hereinafter ICMA UPDATE]. Children account for 85% of all evening newspaper deliverers, but only 56% of those delivering in the morning. Id. An earlier study employing a different data sample revealed about 916,000 carriers in 1979, of whom 90% were below eighteen. W. CHANG & J. FORSEE, A STUDY OF CIRCULATION DISTRIBUTION AND COLLECTION SYSTEMS: UNITED STATES AND CANADIAN DAILY NEWSPAPERS 3 (1980) [hereinafter CHANG & FORSEE]. The decline and the shift toward use of adult carriers appear to be real rather than attributable merely to enumeration.
ter conducting a study a decade ago, reported that children engaged in home delivery of daily newspapers earned considerably less than the minimum wage.\(^5\)

The original linchpin for exempting publishers from child labor laws was the claim that the children were neither their employees nor anyone else's. 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 for future entrepreneurial independence.\(^6\) This defense is a manifestation of "the long-familiar argument of newspaper publishers that child distributors of newspapers are not their employees but 'little merchants' who hold independent contracts with them; and that hence the publishing corporations are not responsible for the conditions under which the children work."\(^7\) Of the 425,000 children delivering newspapers in 1988, approximately eighty-six percent were classified by publishers as "little merchants."\(^8\) On the other hand, less than two percent of children (and seven percent of adults, who are not called "big merchants," but "buy-sell" operators) were acknowledged as employees of the publishers whose newspapers they deliver.\(^9\)

\(^5\) Fritsch, Exemptions from the Fair Labor Standards Act, Retail Trades and Services, in 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 74-75 (1980). The Commission ultimately recommended retention of the exemption on the grounds that "youth have traditionally performed this work to earn extra money" and that the difficulty of defining "actual hours of work" would make enforcement problematic. 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 123 (1981).


\(^8\) ICMA UPDATE, supra note 4, at 2.

\(^9\) Id. “Agents” comprise a third category who are described as independent contractors who sometimes receive a commission for collection. Id. These individuals are “middlemen who hire their own carriers but let the newspaper set and collect the fee.” Freitag, supra note 1, § 3, at 21, col. 3. The contract delivery agent system was devised “as a means of regulating the retail pricing of the newspaper after the Albrecht decision gave independent contractors the right to set their own prices.” W. THORN & M. PFEIL, NEWSPAPER CIRCULATION: MARKETING THE NEWS 243 (1987) [hereinafter THORN & PFEIL]. See infra note 11 for a discussion of Albrecht v. Herald Co., 390 U.S. 145 (1968). See also Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C. 1977), where the court described the practice as follows:

Under it, agents provide delivery, collection, and solicitation services in exchange for fees paid by the Post. The agents do not bear the risks of buying and reselling the newspapers, as in the case of dealers. . . . The agent . . . obtains the bulk of his revenue directly from the Post and avoids the uncertainties of payment by the subscriber that the dealer confronted.

Id. at 484.

In light of the control exercised by the publisher, the fixed monthly fees paid to the deliverer, and the absence of risk of loss, it is unclear why these agents are not classified as employees. See McGuire v. Times Mirror Co., 405 F. Supp. 57, 80-81 (C.D. Cal. 1975) for a sample contract between publisher and agent that by its terms suggests the agents are employees. Since, however,
By the designation of "little merchants," newspapers mean that the children are engaged in "[a]n independent contractual relationship in which newspapers are purchased at wholesale rates and resold to subscribers to produce a profit. A 'little merchant' operation is essentially buy-sell." The publisher, however, unilaterally sets both the buying and selling prices and thus deprives contract delivery agents of being employees. Self-distribution by publishers would not be the only option available, in addition to the use of independent contractors, in the wake of Albrecht. But see Hovenkamp, Vertical Integration by the Newspaper Monopolist, 69 IOWA L. REV. 451, 462 (1984) (publishers focus on self-distribution as only choice to maximize output). It is noteworthy that, although some former dealers sued the Washington Post when it converted them to agents, they had previously "sought to unionize as employees" in an effort to secure paid vacations, insurance benefits, and pensions. 438 F. Supp. at 478. The economic context that spawned these conflicts between the publishers and their dealers or agents was reported in the N.Y. Times as follows:

In recent years, it has become increasingly important for newspapers to control the delivery of their papers, which they once considered almost a nuisance.

In the 1920's, most New York newspapers began selling their papers at wholesale prices to independent dealers who, in turn, sold them to home delivery customers for whatever price they wished. . . .

But while news dealers were interested in getting the highest price for their home delivered papers, the priority of most newspapers was increasing circulation to attract more advertising.

By the 1980's, advertisers began to demand detailed demographic information about newspaper subscribers, which newspapers could not provide because they did not know who was getting the paper.

In 1982, The [N.Y.] Times began its own delivery system in competition with the independent dealers, though the paper continued to sell papers to the deliverers as before.

Many other large papers, including The Washington Post and The Baltimore Sun, eliminated their independent dealer networks and converted the dealers into employees.

Because The Times's priority was gaining customers, it offered the paper for less than many dealers.

Jones, Times Settles Legal Dispute With Independent Dealers, N.Y. Times, Oct. 31, 1989, at D21, col. 2. For an example of the disposition of the antitrust litigation spawned by these disputes, see Belfiore v. New York Times Co., 826 F.2d 177, 183 (2d Cir. 1987) (newspaper lacked intent to monopolize; insufficient evidence to find conspiracy, thus no violation of Sherman Act), cert. denied, 484 U.S. 1067 (1988). See also Bowen v. New York News, Inc., 522 F.2d 1242, 1252 (2d Cir. 1975) (defendant newspaper alleged that, because its franchise dealers were its employees, its actions were unilateral and hence precluded possibility of antitrust conspiracy), cert. denied, 425 U.S. 936 (1976).

Publishers have prevailed in all cases in which formerly independent distributors have used antitrust grounds to resist their termination and/or conversion to employees. See, e.g., Paschall v. Kansas City Star Co., 727 F.2d 692, 704 (8th Cir.) (failure to prove unreasonable anticompetitive effects on market fatal to claim), cert. denied, 469 U.S. 872 (1984); Auburn News Co. v. Providence Journal Co., 659 F.2d 273, 278 (1st Cir. 1981) (publisher's vertical integration of distribution not violation of antitrust laws), cert. denied, 455 U.S. 921 (1982); Knutson v. Daily Review, Inc., 548 F.2d 795, 803-06 (9th Cir. 1976) (termination of independent distributors not unlawful because publishers lacked specific intent necessary to support restraint of trade claim), cert. denied, 433 U.S. 910 (1977).

10. ICMA UPDATE, supra note 4, at 2. In 1979, the percentage of carriers classified by newspapers as "little merchants" appears to have been somewhat higher than the 1988 figure, but the data did not distinguish between adult and child carriers. CHANG & FORSEE, supra note 4, at 15.

11. In Albrecht, the Supreme Court ruled that by imposing a maximum resale price on a dealer by competing with him through other dealers who comply with that price condition, a newspaper violates the Sherman Antitrust Act, 15 U.S.C. § 1 (1988). 390 U.S. at 154. The so-called "new
the children of all entrepreneurial freedom over per unit income. This economic restraint does not appear to deter the publishers from classifying the children as independent merchants.\(^2\)

This article examines the ideological character of the little merchant system and of the antipaternalistic reception of the system by legislatures, courts, and labor unions. This article also discusses the socio-economic consequences of the elimination of state-enforced protective regimes.

I. PROTECTING CHILDREN FROM STREET TRADES

Child labor . . . is however only a particularly acute and conspicuous instance of the mayhem that we are concerned with here—the mayhem that results from treating children as though they were nothing more than adults in the making.\(^3\)

Over the past century, society's view of the experience of newspaper sales and delivery by children has undergone a transvaluation. In the latter part of the nineteenth and into the twentieth century, many people believed that newsboys and other street workers were waifs, strays, or half-orphans.\(^4\) Reformers during this period were concerned less with the economic exploitation to which the children were subject than with the immoral influences exerted by those with whom the children would be associated on the streets.\(^5\) The authorities distinguished sharply between newsboys or "newsies," who hawked papers on downtown city streets,\(^6\) and newspaper carriers, who delivered papers in their own

learning’’ in antitrust law has strenuously criticized the *Albrecht* decision. *See*, e.g., Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. REV. 886 (1981) (concentration is on competitor agreements, not vertical restraints). In Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990), the Supreme Court upheld maximum price fixing that injured only competitors as distinguished from the scheme in *Albrecht* where the price fixing allegedly harmed the newspaper's own dealers and consumers. *Id.* at 1890.

12. "[U]nder the 'little merchant' plan . . . [o]ne publisher estimates that an evening paper with a 30-cent subscription price should allow carriers a profit of at least 10 cents per week per subscriber . . . ." F. RUCKER, *NEWSPAPER CIRCULATION: WHAT, WHERE, AND HOW* 63-64 (1958).


14. N. McGILL, *CHILD WORKERS ON CITY STREETS* 1 (Children's Bureau, U.S. Dep't of Labor, Pub. No. 188, 1928). *See* Adams, *Children in American Street Trades*, 1 CHILD LABOR 25, 39 (1905) (emphasizes the perception of their status as "vagrants"). *See also* Stein, *Hiring Adults to Deliver Papers: the Young are Fading*, L.A. Times, Apr. 10, 1987, part 1, at 1, col. 1 ("plucky inner-city urchins urging 'Read all about it!' ").

15. *See*, e.g., Nearing, *The Newsboy at Night in Philadelphia*, 17 CHARITIES & COMMONS 778 (1907) (addresses negative influences surrounding newsboys); Clopper, *Child Labor in Street Trades*, in *PROCEEDINGS OF THE SIXTH ANNUAL CONFERENCE: CHILD EMPLOYING INDUSTRIES* 137 (National Child Labor Comm. 1910). Even as late as the 1930s, the warden of Sing Sing stated in connection with the debate on child labor laws that 69% of that institution's inmates had sold newspapers in their youth. *Highspots in the Newspaper Code Hearing*, AM. CHILD, Sept. 1934, at 1 (testimony presented for and against government agency's proposal for stricter child labor provisions for newsboys).

16. "[A]n urchin who shivers on the street corner." E. CLOPPER, *CHILD LABOR IN CITY STREETS* vii (1912). "Newsies" still abound in New York, Boston, Los Angeles, and Houston. For example, the *Chronicle* in Houston "has a little merchant system for newsboys and girls, who hawk
neighborhoods to subscribers. The latter were deemed to be engaged in much less objectionable work in less unwholesome environments than the former.

In the early twentieth century, to protect children from "exposure to the vices of the street," a number of states enacted so-called street trades statutes that specifically regulated children's employment in newspaper distribution and sales. The statutes generally prohibited children under a certain age from working, but exempted newsboys and carriers above a certain age from its prohibition. Children between those ages were required to obtain permits and to wear badges while working. In addition to penalizing parents and/or the publishers for any violations of the law, several of these statutes provided for the punishment of the boys themselves.

The sanctions, however, were hardly severe...
vere. For example, in New York State
[a]n employer of child labor in a factory could be made to pay a fine, but a “self-employed” newsboy stood before the judge alone—the publisher of the newspapers he sold could not be prosecuted. Since the natural sympathy of the public was with the newsboy who was “hustling” his way to success, it is not surprising that most of the newsboys who appeared before the New York Children’s Court were let off with a warning.24

Strengthening of street trades laws was opposed by “newspaper interests,” which struggled to retain their access to children on whom they wished to impose the loss of nonpayment by subscribers.25 Thus, the protection from the “vices of the street” tended to be more illusory than real.

II. EXPOSING CHILDREN TO STREET TRADES: THE LITTLE MERCHANT SYSTEM

I do not see any reason for referring to newsboys ... as “these noble little independent merchants.”26

Prior to the 1930s, the immorality perceived as threatening the street hawkers under the street trade laws was analyzed specifically as interwoven with the newsboys’ alleged entrepreneurial ways. A special report appended to the Census of 1920 stated that the newsboy “is an independent dealer, working on his own account and himself assuming all the responsibility for the success of his ventures. He buys his stock of papers, tucks them under his arm, and sells them on the streets.”27 On the other hand, the report distinguished the home delivery carriers as employees:28

parents as well as the children; several statutes also penalized the employer. See E. CLOPPER, supra note 16, at 194-96 for an overview of the penalties imposed.

24. J. FELT, HOSTAGES OF FORTUNE: CHILD LABOR REFORM IN NEW YORK STATE 160 (1965). Even sympathetic observers saw a rationale in this approach in the sense that “[c]hildren engaged in street trades require special treatment in child labor laws, because they sell on their own account and are not actually employed by anyone.” Johnson, supra note 19, at 434. E. CLOPPER, supra note 16, noted that although the distinction between regulated employees and unprotected little merchants was “hairsplitting, narrow-minded and unjust,” “tiny workers in the streets ... are freely patronized even by the avowed friends of children, who thereby contribute their moral support toward continuing these conditions and maintaining this absurd fiction of our merchant babyhood.” Id. at 5-6.


27. UNITED STATES BUREAU OF THE CENSUS, FOURTEENTH CENSUS OF THE UNITED STATES: CHILDREN IN GAINFUL OCCUPATIONS 53 (1924) [hereinafter CENSUS]. In an era virtually without minimum wage standards for any male children, the report did not explain how or why the mere absence of a contractually specified minimum wage per se qualified these children as self-employed.

28. A pre-World War I study of children in Seattle further differentiated between two groups of newsboys.

Downtown sellers, in relation to the circulation department, are almost universally regarded as independent merchants. In some respects this is true, in others untrue. The corner boys purchase their papers directly from wholesalers. ... They are not, however, sufficiently independent to decide, at all times, with absolute freedom, how large their
The delivery boy is in no sense an independent merchant or dealer. He neither buys nor sells; he handles no money; and he assumes no responsibility except for his own work. He is an employee, subject to fixed and definite regulations. He delivers a definite number of papers to definite subscribers, living on a definite route. There is a careful check upon his work.29

Yet within a few years, the Children's Bureau, a specialized division of the United States Department of Labor, was already observing an assimilation of the status of the two groups:

The carrier in some places is paid a salary or wage; in others he works on a commission basis but is supervised and obviously is an employee. In fact, the work of the carrier is usually so clearly work for an employer that it would appear to be subject to regulation under general child-labor laws that cover "all gainful employment." But it is not usually so regulated, probably because it is popularly associated with the work of the newspaper seller, who as an independent "merchant" is very generally held to be excluded from the benefit of these laws.30

By the time of the Depression, the Children's Bureau was reporting that whereas its earlier studies had revealed that "[t]he prevailing method was to employ boy carriers at a flat salary to make deliveries only"—with adults making collections and soliciting new subscriptions—"[w]ith few exceptions newspapers in the cities visited in 1934 used the little-merchant system for delivering papers to homes."31 The creation of this new system was accompanied by the imposition of an adhesion contract of such blatant one-sidedness32 as to be reminiscent of contracts judicially certified as "carrying a good joke too far."33 The oppressiveness of the little merchant system was reflected in the imposition of "a

purchase shall be. Owing to the youth of sellers and to the tendency of many boys to be satisfied with comparatively small sales, a custom has grown up of allowing wholesalers to decide the number of sales for which each corner "is good," and then to force the boys to maintain sales and service standards. Sometimes boys are obliged to accept a larger number of papers than they desire, and sometimes they are forced to pay for more papers than they can sell.

A. REED, NEWSBOY SERVICE: A STUDY IN EDUCATIONAL AND VOCATIONAL GUIDANCE 2 (1917). The newspapers thus have the best of both worlds—the control associated with employees and the ability to shift risk of loss associated with contractors. On the other hand:

The unsupervised boy in news service is the self-employed boy, usually the very young boy who buys a few papers from a corner seller and hangs around two or three hours, accomplishing nothing financially and often cultivating detrimental habits. Wholesalers do not care for the services of boys under 12 years of age and would prefer such to be forbidden freedom of the streets for sales purposes.

Id. at 138.

29. CENSUS, supra note 27, at 53.
30. N. MCGILL, supra note 14, at 33.
32. For example, the carrier may not cancel a subscription even though subscribers do not pay. Id. at 31. See F. RUCKER, supra note 12, at 80-84 for sample contracts.
33. Campbell Soup Co. v. Wentz, 172 F.2d 80, 83-84 (3d Cir. 1948) (quoting Francis Bohlen that contract is too hard and unilateral).
task out of all proportion to the pay and to the maturity of a grade-school boy.”

During the Depression, for example, because risks were overwhelmingly placed on the little merchants, delivery of papers generated earnings as low as one dollar for a thirty-hour week. The inequity was exacerbated when publishers succeeded in avoiding the costs of the high accident and fatality rates associated with child carriers and newsboys by resisting workers’ compensation claims on the ground that the children were uncovered independent contractors.

Manuals written by circulation managers for their colleagues, district managers, and carrier “advisors,” unintentionally shed light on the substance of the children’s putative independence. One manager, for example, writes 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.” Although it

34. CHILDREN’S BUREAU, CHILDREN ENGAGED, supra note 31, at 32.
35. Id. at 33. See also id. at 30 for a chart of weekly earnings. Such risk-shifting to the little merchants was not unique during the Depression. For similar phenomena, see Linder, Towards Universal Worker Coverage under the National Labor Relations Act: Making Room for Uncontrolled Employees, Dependent Contractors, and Employee-Like Persons, 66 U. Det. L. Rev. 555, 578-80 n.99 (1989) (cab companies switch from employment to leasing system).
36. The California Supreme Court expressly adopted the following position, albeit in dictum, in a case involving a 34 year-old newsboy:

The petitioners . . . have presented much plausible argument as to the effect of upholding the legal conclusion and award of the Commission upon the numerous army of more or less irresponsible persons of immature years . . . who come . . . within the classification of newsboys . . . . The impossibility in the main of exercising any more than a very limited supervision or control over this promiscuous and ever-changing body of assorted individualities . . . has been plausibly urged as a reason why the legislature in the adoption and limited application of the Workmen’s Compensation Act could not have intended to embrace within its terms this . . . class of persons, and that to impose upon the publishers of newspapers . . . responsibility for their individual mischances while pursuing such vocation would work disaster to a very large number of persons who now receive a measure of their livelihood in the retailing of newspapers . . . but with respect to whom such publishers could not in reason be held to assume the responsibilities arising out of the established relation of employer and employee. While the foregoing course of reasoning could not be held to be conclusive in determining whether or not such a relation in clear cases existed, it is persuasive in . . . doubtful cases . . .

37. Stone, Industrial Accidents to Employed Minors in California in 1932, 39 MONTHLY LAB. REV. 1078, 1084-85 (1934) (of 169 accidents reported during 1932 by clerical, messenger, delivery, and transportation workers, 70 involved newsboys; of these 70, four were fatalities).
38. See, e.g., New York Indemnity, 213 Cal. at 49-50, 1 P.2d at 15 (independent newsboy not covered by workers’ compensation law). But see Globe Indem. Co. v. Industrial Accident Comm’n, 208 Cal. 715, 284 P. 661 (1930), where the California Supreme Court ruled that, for workers’ compensation purposes, a 12 year-old paper distributor who was employed by a 15 year-old was employed by the newspaper because the intermediate employer was the publisher’s employee. The 15 year-old “carried on an agency” by which he paid the publisher a set amount for papers and kept a set sum from subscribers. Id. at 718, 284 P. at 662.
39. C. JEFFERSON, CARRIER LEADERSHIP (1955), is striking for inculcating the same attitude of commercial instrumentalism in the child carriers vis-à-vis the subscribers that it commends to the advisors in dealing with the children.
may seem odd for a commercial entity to plumb the depths of independent contractors' souls, the author devotes almost half of his book to a discussion of boys' psyches, including their masturbatory habits. Similarly, the author appears oblivious to 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 of a newsboy as independent contractor emerges clearly from the following directive which verges on an essay in self-hypnosis:

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 proceeds to present twelve pages of detailed instructions to be impressed upon the carriers. Indeed, the points that "should be taught each carrier" are so comprehensive and elementary that they both deprive the children of any discretion and confirm in the most glaring manner the fact that they cannot be trusted to possess the slightest capacity for independent judgment. Not only are 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 deliv--

41. Id. at 15.
42. Id. at 43, 48.
43. Id. at 67. The legal naiveté of publishers appears widespread. For example, the vice president of circulation for the Chicago Tribune stated that the carriers "are truly independent contractors, it's even in their contract." Fitzgerald, Independent Carrier Status Investigated in Illinois, EDITOR & PUBLISHER, Feb. 14, 1987, at 27.
44. R.E. GREGORY, supra note 40, at 80-92.
45. Id. at 81-82. The children are trained in folding and throwing despite the fact that the
"ery activities" must be taught to take along a pencil, to "stand erect and smile," and never to "peek in the door."46 These semantic gymnastics47 reflect publishers' efforts to attain the best of all possible worlds without having to pay for it.48 Publishers sought a "solution to the enduring 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."49 That solution, the "little merchant" system, has been traced back to the rise of the penny daily in 1833.50 Adopted from the so-called London Plan, the little merchant system "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,"51 In the London Plan, publishers portray themselves as wholesalers to child carriers. The London Plan is traditionally contrasted with the Philadelphia Plan, which treats the children as employee-carriers. In the Philadelphia Plan, publishers function as a retailer marketing the papers directly to the public through their employee-carriers. These plans are regarded as the two major responses by publishers to the economic consequences of mass circulation newspapers: the role of retailer or wholesaler.52

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46. R.E. GREGORY, supra note 40, at 85-86.

47. One attorney even cautioned publishers against implementing safety programs for carriers because the control associated with them could jeopardize the children's status as independent contractors. He therefore recommended that the programs be "'informational' rather than 'instructio nal.' " Garneau, Carriers as Employees, EDITOR & PUBLISHER, July 29, 1989, at 9, 10.

48. The following editorial from the St. Louis Star-Times at the time of the debates over the child labor provisions in the newspaper codes under the National Industrial Recovery Act (NIRA) must qualify as an exceptionally forthright stand:

Legally it is true that the newsboys are not employees. But 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.


49. Fitzgerald, Independent Agency vs. Independent Contractor System, EDITOR & PUBLISHER, July 2, 1988, at 13. As a recent journalism school text notes:

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 carrier, bears the bad debt from uncollectible subscriptions . . . .

THORN & PFEIL, supra note 9, at 245.


51. THORN & PFEIL, supra note 9, at 45.

52. Id. at 46-47. Some newspapers have adopted the office control method of advance payment, used in mail subscriptions, paired with carrier-employee delivery to deal with the collection problem. See id. at 40. See also B. COMPAINE, THE NEWSPAPER INDUSTRY IN THE 1980s, at 44-45 (1980) (changes and new methods of newspaper distribution; replacement of little merchant system).
Yet, at least with regard to the use of little merchants, the retailer-wholesaler distinction is moot inasmuch as publishers need not renounce any of their goals. As one trade author concluded from a long 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 newspaper] absolute control at all times." The real effect of exercising such "benevolent despotism" has been to give the publisher "all the control over the carrier it would have if he were on a 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 . . . ."


Just as newspaper owners earlier in the century had opposed state street trade laws, later they lobbied Congress to exclude carriers from coverage under the major labor welfare legislation enacted during the New Deal: the Social Security Act ("SSA") and Fair Labor Standards Act ("FLSA").

53. The conceptualization of little merchants excludes from its scope the issue of commercial relations with large delivery entities characterized by significant capital investments and numerous employees (or alleged independent contractors).

54. The St. Petersburg Times and Evening Independent, both "owned by a not-for-profit institution," use "employee carriers who are well paid" and whose high level of productivity is not undercut by receipt of "a regular wage," suggesting that the only issue at stake for publishers is how to obtain uncompensated services from vulnerable workers. Thorn & Pfeil, supra note 9, at 323, 325 (St. Petersburg Times and Evening Independent represent examples of adult carrier force that consistently meet company standards).


56. Id. at 98. A modern text phrases the proposition of benevolent despotism in more delicate terms: "With youth carriers such recommendations [made by publishers] usually have the effect of an order." Thorn & Pfeil, supra note 9, at 243.

57. The Social Security Act is codified at 42 U.S.C. §§ 301-1397f (1988); the Fair Labor Standards Act is codified at 29 U.S.C. §§ 201-219 (1988). Publishers, perhaps the most recalcitrant group of employers with regard to protective provisions for children under the National Recovery Administration codes, succeeded in adopting the laxest codes. See W. Trattner, Crusade for the Children: A History of the National Child Labor Committee and Child Labor Reform in America 193-95 (1970) (newspapers which had applauded 16-year limits for child workers in other industries, gained the most lenient provisions for themselves). In particular, they objected to a provision in the code 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. See K. Lumpkin & D. Douglas, Child Workers in America 214-16 (1937); The NRA and the Newsboy, Am. Child, Jan. 1935, at 2 (publishers object to provision which recognizes workers under 16 as employees of the newspaper because of carrier liability suits). See also supra note 48 for a further discussion of the NIRA. 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." Press Fight Urged to Keep Radio Free From Censorship, N.Y. Times, Apr. 24, 1936, at 1, col. 3, 14, col. 4.
A. The Social Security Act

Congress does not appear to have discussed the coverage of child carriers in connection with the passage of the SSA in 1935. Nevertheless, publishers, apprehensive lest employment taxes be levied on their "little merchants," succeeded in 1939 in convincing Congress to exclude from covered employment under the old-age and unemployment compensation titles of the SSA "service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution." This exclusion for minors is still in effect.

Not satisfied with this victory, or perhaps because they feared that the express exclusion of those below eighteen might create a presumption that adults who were otherwise employees were covered, publishers lobbied Congress during the 1940s to extend the exclusion to adults as well. The Eightieth Congress was the only one since 1929 in which the Republican Party controlled both houses by large majorities. It was notable for the anti-labor rollbacks achieved in a number of areas pertaining to the scope of the employment relationship for purposes of coverage under labor-protective statutes. Specific decisions by the United States Supreme Court expanding the universe of protected workers had served as a lightning rod for congressional action regarding the National Labor Relations Act ("NLRA") and SSA. At the same time, the right-wing was

58. A dozen years later, Harold Knutson, the Republican chairman of the House Ways and Means Committee and himself a publisher, asserted that Edwin Witte, the Executive Director of the Committee on Economic Security, had assured publishers that newsboys would not be covered under the social security programs. Wilbur Cohen, a technical advisor to the Commissioner of the Social Security Administration, stated that the opposite was true. Newspapers Vendors: Hearings Before the House Comm. on Ways & Means, 80th Cong., 1st Sess. 1 (1947) [hereinafter Newspaper Vendors].

59. See Publishers Foster U.S. Paper Industry, N.Y. Times, Apr. 23, 1937, at 16, col. 4 (one of the gravest problems for newspaper publishers under state and federal laws was determination of status of newspaper boys).

60. Social Security Act Amendments of 1939, Pub. L. No. 379, §§ 209(b)(15), 614(c)(15), 53 Stat. 1360, 1376, 1395 (1939). At the same time, Congress voted to withdraw newspaper carrier boys from coverage under the District of Columbia Unemployment Compensation Act in part because they "do not need the protection of the act as they are always able to maintain their positions if they so desire." S. REP. No. 1276, 76th Cong., 3d Sess. 1 (1940); H. REP. No. 1669, 76th Cong., 3d Sess. 1 (1940).


62. See Newspapers Vendors, supra note 58, at 23 (statement by Wilbur J. Cohen, Technical Advisor to the Commissioner of the Social Security Administration) (exclusion of newsboys under age 18 from SSA creates presumption that those over age 18 are covered).

Further galvanized to exclude adult news vendors from the SSA statutorily by the decision announced in 1946 by the United States District Court for the Northern District of California in *Hearst Publications, Inc. v. United States.* The district court held that adult vendors in San Francisco were employees of the Hearst newspapers for the purposes of social security and federal unemployment taxes. Part of the congressional response to these events took the form of an amendment that excluded from coverage:

Service performed by an individual in, and at the time of, the sale of newspapers or magazines to ultimate consumers, under an arrangement under which the newspapers or magazines are to be sold by him at a fixed price his compensation being based on the retention of the excess of such price over the amount at which the newspapers or magazines are charged to him, whether or not he is guaranteed a minimum amount of compensation for such service, or is entitled to be credited with the unsold newspapers or magazines turned back.

That *Hearst Publications* may have served merely as a pretext for congressional intervention is strongly suggested by the fact that the district court judge went to great pains to criticize and reject the expansive interpretation of "employment" for which the United States pleaded and to craft a very narrow holding designed to apply only to one sector of adult news vendors. The publisher not only fixed both the price at which the workers sold the paper and the price that they were charged for them, thus determining their income, but also guaranteed the vendors a minimum weekly income. Moreover, to insure compliance with its directives concerning time and place of service, the publisher kept the workers "under...surveillance." Although the vendors, who assumed no expenses or risks, were free to sell "non-competitive publications and other articles," only one-sixth of them did so. Perhaps the most unusual aspect of *Hearst Publications* was that the affected workers were members of a labor

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**Employment Relationship in Anglo-American Law: A Historical Perspective** 186-95 (1989) (Republican party, having substantial majorities in the House and Senate in 1947, sought to amend NLRA to accommodate corporate constituents and financial supporters in response to expansive definition of employee enunciated by Supreme Court). 64. 70 F. Supp. 666 (N.D. Cal. 1946), *aff’d per curiam,* 168 F.2d 751 (9th Cir. 1948). Oddly, the affirming opinion was issued after the repealing legislation went into effect. 65. Id. at 673. 66. Act of Apr. 20, 1948, Pub. L. No. 80-492, ch. 222, 62 Stat. 195 (1948) (Act to exclude certain vendors from certain provisions of SSA and Internal Revenue Code). *See infra* note 72 for a discussion of Congress's action with regard to the NLRA. 67. 70 F. Supp. at 670. 68. The vendors could return and receive a credit for unsold papers—the number given to them not being in their discretion. *Id.* at 668. 69. *Id.* at 673. The court noted that to the extent control was absent, it was due to the fact that where there is only one way to perform a job, control is superfluous. *Id.* at 674. In an early antitrust case involving adults, an appeals court ruled that in light of the sums the newspaper had invested in building up a carrier system, "each carrier, though owning his own 'route' and buying outright from day to day his copies of the paper, recognized that the Tribune Company had at least a moral right to a voice in controlling the methods and personnel of the carriers." Journal of Commerce Publ. Co. v. Tribune Co., 286 F. 111, 113 (7th Cir. 1922). 70. 70 F. Supp. at 669.
union, which negotiated contracts on their behalf.\textsuperscript{71}

The United States, as party to the suit, sought to extend to the SSA the expansive interpretation of the employment relationship that the Supreme Court had created for vendors trying to exercise their rights under the NLRA just two years earlier in \textit{NLRB v. Hearst Publications, Inc.}\textsuperscript{72} The district court judge, however, aggressively rejected the government's contention "that all persons performing services for others not in the pursuit of an independent calling are employees within the remedial legislation."\textsuperscript{73} Instead, he confined the scope of coverage to:

\begin{quote}
[A]ny person . . . who is engaged as a means of livelihood in regularly performing personal services which (1) constitute an integral part of the business operations of another; (2) are not incidental to the pursuit of a separately established trade, business or profession,—involving in their performance capital investment and the assumption of substantial financial risk or the offering of similar services to the public at large; and (3) are subject to a reasonable measure of general control over the manner and means of their performance.\textsuperscript{74}
\end{quote}

The judge ruled that it seemed "reasonable to regard" workers who met all these criteria as being "singularly subject to the hazards of unemployment and needy old age."\textsuperscript{75} He explained, by way of contrast, that those who are "protected by capital reserve or equipped with the enterprising characteristics of a free agent, are more favorably endowed with what it takes to combat their own economic ills."\textsuperscript{76} Because the affected workers met squarely all of the aforementioned criteria, the court was unconcerned with "what eventual outer boundaries are to be placed around the definition of the term employment."\textsuperscript{77}

The judge further noted that the wholesaler-retailer imagery was inappropriate for the relationship between vendor and publishers:

The publishers are not engaged in the wholesale business of selling newspapers to retailers, and the news vendors are not in any sense retail merchants in the business of buying and selling merchandise. . . . Charging the vendors outright the "wholesale" price of papers delivered to them for sale, is referable more to an intent on the part of the publishers to impose a high degree of responsibility on the vendors for the care of the newspapers so delivered to them and for accuracy in accounting for the proceeds of the sales rather than to an intent to

\textsuperscript{71} Id. at 667-68.


\textsuperscript{73} 70 F. Supp. at 670 (language of Supreme Court does not support government's contention for such an expansive definition of "employee").

\textsuperscript{74} Id. at 670-71.

\textsuperscript{75} Id. at 671.

\textsuperscript{76} Id. How this standard differed from the government's position remains unclear.

\textsuperscript{77} Id. at 672.
create a bona fide buyer-seller relationship. This finding succeeded in antagonizing Congress. Led by Representative Gearhart of California, who decried Marx as the spiritual father of the income tax, the Republicans promptly denounced the decision as so "absurd" that it could not bear serious scrutiny and issued committee reports recommending passage of an amendment to the SSA. Although both houses of Congress passed the bill, President Truman's veto was sustained. After debating the same bill the next session, the Republican-controlled Congress finally succeeded in overriding the presidential veto and excluding adult carriers from coverage under the SSA. This exclusion of adult carriers also remains law.

Despite the consciously narrow holding crafted by the Hearst Publications judge apparently in contemplation of just such attacks, publishers and their

78. Id.
79. 93 CONG. REC. 9058 (1947) (Rep. Gearhart requested immediate consideration of bill to exclude certain vendors of newspapers or magazines from certain provisions of SSA and Internal Revenue Code).
80. 94 CONG. REC. 889 (1948).
83. 93 CONG. REC. 10,591 (1947). Truman's position was based on the argument that: [Full-time news vendors] are dependent on that job for their livelihood. They and their families are exposed to the same risks of loss of income from old age, premature death, or unemployment as are factory hands or day laborers. They unquestionably fall in the group for whose protection our social-security laws were devised.
84. See H.R. REP. No. 1320, 80th Cong., 2d Sess. (1948) [hereinafter H.R. REP. No. 1320] (Rep. Gearhart recommended passage of bill to clarify employer-employee status of certain newspaper and magazine vendors for social security purposes); S. REP. No. 985, 80th Cong., 2d Sess. (1948) (Sen. Millikin recommended passage of bill to clarify employer-employee status of certain newspaper and magazine vendors for social security purposes); 94 CONG. REC. 2142-43, 4134, 4590-92, 4594 (1948) (bill to exclude certain vendors of newspapers or magazines from certain provisions of Social Security Act and Internal Revenue Code passed into law over presidential veto). In his second veto message, Truman emphasized that the bill would permit employers to avoid payroll taxes "by the establishment of artificial legal arrangements governing their relationships with their employees." 94 CONG. REC. 4134. The wording of the amended provision encouraged precisely such manipulation by making it irrelevant whether the vendor was guaranteed a certain income—so long as his compensation was based on the difference between the wholesale and retail price of the newspapers. Moreover, the committee report virtually invited such manipulation by asserting that the vendors "deal as independent principals with their own customers and that their success depends in large measure upon the good will engendered by them among such patrons." H.R. REP. No. 1320, supra, at 2. On the legal problems of similar workers "whose physical distance from their employers and direct cash contact with the final consumer render the traditional indicia of control ambiguous and thus amenable to contractual manipulation by imaginative employers," see Linder, supra note 35, at 555-56.
86. See Newspaper Vendors, supra note 58, at 12-17 (statement of William Mitchell, Acting Comm'r for Social Security) (representations by officials of the Social Security Administration to the
congressional allies conjured up a slippery slope down which all retailers would slide into the role of employees of wholesalers, who in turn would become the employees of manufacturers. In this regard the publishers echoed the bitter criticisms directed by publishers at the Supreme Court for its extension to newsboys of collective bargaining rights under the NLRA in NLRB v. Hearst Publications:

The effect of such a decision, if carried to its logical conclusion in other fields, is almost fantastic. If applied to the corner drug store, for instance, which carries but one wholesaler’s line of drugs, it will over night, create a new class of employees, one never dreamed of. The wholesaler sets the rate he charges the retailer for his merchandise. The retailer’s earnings represent the difference between the wholesale and retail price, just as in the newspaper boys’ case. The wholesaler determines the volume of drugs he will sell to any retailer just as the publisher determines the number of papers he will allocate to any corner merchant. The parallel can be continued indefinitely and in many fields, such as food distribution, automotive, rubber, clothing . . . .

If all are to be treated alike, the Supreme Court has created, for purposes of union control, an astronomical group of employees for union organizers to prey upon. At the same time it has struck at the very foundation on which the small business man of this country has operated so successfully during our entire history.

What this rhetoric obscures is that the “retailers” in question are outworkers with no employees or capital investment of their own and are tightly integrated into the operations of newspapers, which are large industrial entities.

Both the congressional proponents of the legislation and witnesses appearing on behalf of publishers sought to capitalize on the fact that the Newspaper & Periodical Vendors & Distributors Union, which had appeared as amicus curiae in Hearst Publications v. United States, opposed coverage of these adults under the SSA. While explaining that opposition, however, one witness unwittingly offered cogent grounds for disqualifying the vendors as self-protected against
economic vicissitudes by a "capital reserve," by noting that the vendors were largely old or disabled and incapable of earning a living elsewhere and thus were likely candidates for replacement by those of full capacity. This was precisely the class of potentially indigent workers against whose akrasia or short-sightedness the SSA was paternally intended to guard.

Representative Gearhart further unveiled his agenda with regard to the child carriers by stating:

If some of those 18-year-old boys, and younger, are actually employees . . . that is one thing. But the newspapers do not want to be bothered with taking care of those boys, and the boys do not want to be bothered with being charged with deductions, so many of those boys are just arbitrarily excluded.

The gravamen of such remarks appeared to be that, although staunch advocates of free enterprise had lost the battle over compulsory social insurance for the working class, they were drawing the line at "the involuntary conversion of the small businessman into an employee status." They would not permit the courts "to scoop" the vendors "into the voracious maw of Social Security against their will."

B. The Fair Labor Standards Act

During the periods immediately before and after the FLSA went into effect, uncertainty prevailed as to whether the Act would apply to newspapers in general and newsboys in particular. Supporters of strict regulation believed

93. See R. HARDIN, MORALITY WITHIN THE LIMITS OF REASON 199 (1988) (paternalistic legislation is sometimes required in society); Linder, Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers, 23 U.C. DAVIS L. REV. 733 (1990) (explores the extent to which State needs to protect individuals against disruptive, anarchic market forces and State's superior competence to make decisions on behalf of individuals through paternalistic legislation).
94. Newspaper Vendors, supra note 58, at 25. Chairman Knutson was equally blunt in stating that it was irrelevant whether the newspaper boys were 18 or 35—Congress never intended to include part-time employees or contractors. Id. at 11.
95. Id. at 9 (statement of H. Price, representing San Francisco Publishers Ass'n). Republicans were not alone in attacking coverage for newspaper vendors. For example, Representative Lyndon B. Johnson stated that "it would be just as logical to tax the cigarette companies for the old-age benefits tax covering the cigarette girls who sell their products over the counters." 94 CONG. REC. A851 (1948). Also, Representative Lynch remarked that: "[W]e want to get away... from the legal distinctions in this case, and try to dispose of this as businessmen." Newspaper Vendors, supra note 58, at 12.
98. See, e.g., Newspapers, Wire Services Conform to Wage-Hour Law, EDITOR & PUBLISHER, Oct. 29, 1938, at 3 (while uncertainty surrounded application of Fair Labor Standards Act to daily newspaper, developments during first week indicate that newspaper publishers observed its provisions). One commentator has erroneously stated that newsboys were from the outset excluded from FLSA. W. TRATTNER, supra note 57, at 205.
that "[t]he legislators who framed the child labor provisions of the Act apparently intended to bring children who sell and deliver newspapers under its protection." 99 In contrast, publishers' counsel sought to convince the Children's Bureau of the United States Department of Labor to adopt the position that boys working under "Little Merchant" plan contracts were not covered. 100 During this period, Bureau Chief, Katharine Lenroot, declined to assure publishers that her Bureau would interpret "little merchant" contracts as deferentially as had the social security tax unit of the Bureau of Internal Revenue under the SSA. 101 Further, in November 1938, when the Wage and Hour Administrator of the Department of Labor announced that the FLSA was generally applicable to newspapers, he had not yet issued any decision concerning the status of "little merchants." 102

The Department of Labor foreshadowed its ultimate position, however, at the end of 1938 in connection with the only lawsuit that has apparently ever litigated the coverage of child carriers under the FLSA. 103 In that very early test case, 104 a thirteen-year-old child carrier requested a declaratory judgment that he was not covered by the FLSA so that his employer would void the cancellation of his contract. The newspaper had been motivated to cancel the contract solely because it feared that the child would be a covered employee. 105 "The Children's Bureau did not intervene in the case because the Solicitor of the Department of Labor declared that the boy's employment could not be considered to have been "in or about" the newspaper company's establishment." 106 Without any relevant findings of fact, a state court judge ruled that the child was

99. Lumpkin, supra note 7, at 400.
100. Small Dailies May Be Exempt from Wage Act, Inland Hears, EDITOR & PUBLISHER, Sept. 24, 1938, at 9, 37 (independent contractors under "little merchant" plan not subject to child labor provisions of FLSA because the act does not cover nonemployees).
101. Publishers Safe in Using 14 as Age Minimum, EDITOR & PUBLISHER, Oct. 29, 1938, at 4 (definition of "employ" in FLSA sufficiently general so that it may include little merchant contracts).
102. Andrews Rules Newspapers Subject to Wage Law, EDITOR & PUBLISHER, Nov. 5, 1938, at 5 (issues left undecided included whether "little merchant" leases relieve publishers of employer-employee responsibilities).
104. The press expressly referred to it as a test case in its reports on the filing of the action and the decision. See, e.g., Test Suit By A Newsboy, N.Y. Times, Dec. 10, 1938, at 5, col. 3 (litigation begun to test constitutionality of federal Wages and Hours Law); Ruling Due By Jan. 1 in Wage-Hour Test Case, EDITOR & PUBLISHER, Dec. 24, 1938, at 6 (13 year-old child worker's case against Journal Co. seen as test case on constitutionality of FLSA); Newsboy Is Ruled Beyond Wage Law, N.Y. Times, Jan. 1, 1939, at 7, col. 1 (judge does not rule on constitutionality of FLSA in holding that it does not apply to case before court); Boy Carriers Under Lease Ruled Outside Wage Law, EDITOR & PUBLISHER, Jan. 7, 1939, at 5 (constitutionality of FLSA not ruled upon in proposed test case by 13 year-old under route contract); Test Case on Newsboy Status Under Wages and Hours Act, AM. CHILD, Jan. 1939, at 2 (editorial) (first case involving Wages and Hours Act seen as test case).
105. 1 Lab. Cas. ¶ 18,290, at 818.
106. Lumpkin, supra note 7, at 401. See also Ruling Due By Jan. 1 in Wage-Hour Test Case, EDITOR & PUBLISHER, Dec. 24, 1938, at 6 (Children's Bureau fails to intervene since plaintiff's route was entirely outside contiguous area of newspaper and not in or about newspaper's establishment).
an independent contractor and hence not a covered employee.\textsuperscript{107} He added in
dictum that the child labor provisions of the FLSA would "result in the filling . . . of the reformatory
institutions and prisons beyond their capacity."\textsuperscript{108} Using
himself as a role model, he lauded the virtues of a paper route: "Whatever mea-
sure of success the writer of this opinion has achieved is due in part, at least, to
the fact that he was compelled in early life to work, one of his duties being the
operation of a paper route similar to the one involved here."\textsuperscript{109}

A few months later, the Children's Bureau formalized its position by an-
nouncing that the FLSA covered only those news carriers under sixteen whose
work required them "to come in or about the establishment in which the news-
papers are produced."\textsuperscript{110} After World War II,\textsuperscript{111} when the specter of renewed
unemployment induced Congress to tighten the child labor provisions of the
FLSA, publishers, capitalizing on this concern, acted to eliminate any doubt
about the validity of their position on the exclusion of the child newspaper deliv-
erers from coverage. Fearing that the new "prohibition against employment [of
those] under 16 years in 'any employment' [was] susceptible of creating an ex-

cplicit ban on ['employing'] newsboys and carriers,"\textsuperscript{112} an association of newspa-
ners urged Congress in 1948 to insert the following section into the FLSA:
"Child-labor provisions of this Act shall not apply to any child engaged in the
delivery or sale of newspapers and periodicals outside of school hours."\textsuperscript{113} The
association testified that state courts had concluded that newsboys were in-
dependent contractors whose relationships with publishers were similar to those
between buyers and sellers. These decisions, the association asserted, supported
the claim that carriers were also not employees because the "carrier conducts his
sales and his deliveries by his own methods, just as in the case of the news-
boy."\textsuperscript{114} Nonetheless, it requested express statutory relief lest the Wage and
Hour Administrator exercise his "broad discretion ary powers" to the publishers'

\textsuperscript{107} 1 Lab. Cas. ¶ 18,290, at 821.
\textsuperscript{108} Id. at 820.
\textsuperscript{109} Id.
\textsuperscript{110} Lumpkin, supra note 7, at 400 (citing CHILDREN'S BUREAU, U.S. DEP'T OF LABOR, AP-
PLICATION OF THE CHILD LABOR PROVISIONS OF THE FAIR LABOR STANDARDS ACT TO CHIL-
DREN ENGAGED IN THE DISTRIBUTION AND DELIVERY OF NEWSPAPERS, April 12, 1939). See also
RULES ON NEWSBOYS FOR WAGE-HOUR LAW, N.Y. Times, Apr. 13, 1939, at 6, col. 2; ON THE WAGE-HOUR
FRONT, AM. CHILD, May 1939, at 3 (newsboys under age 16 covered by Wage-Hour Act only where
work required them to come in and about the establishment in which the newspapers produced).

\textsuperscript{111} See W. TRATTNER, supra note 57, at 215-19 (reincorporation of children into labor force
during World War II); J. SEIDMAN, AMERICAN LABOR FROM DEFENSE TO RECONVERSION 155
(1976) (substantial increase in number of young people in work force as result of war production).

\textsuperscript{112} Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Committee
on Labor and Public Welfare, United States Senate, Part 2, 80th Cong., 2d Sess. 760 (1948) (hereinafter
FLSA Amendments) (statement of Ed Anderson, Nat'l Editorial Ass'n).

\textsuperscript{113} Id. The National Editorial Association represented 6,000 small-town newspapers. Id. at
752. This appears to be the only testimony the Senate heard on this subject at the FLSA hearings in
Subcommittee of the Senate Comm. on Labor and Public Welfare, 81st Cong., 1st Sess. (1949) (meet-
ings of Senate subcommittee to consider various bills which envision amendments to the Fair Labor
Standards Act).

\textsuperscript{114} FLSA Amendments, supra note 112, at 760.
Even when the Republican party lost control of the Eighty-First Congress, publishers succeeded in prevailing upon Senator Taft, who had been chairman of the Senate Labor and Public Welfare Committee of the previous Congress, to submit their proposed amendment of the FLSA. This amendment expressly excluded from the minimum wage, overtime, and child labor provisions of the Act "any employee engaged in the delivery of newspapers to the consumer." In conjunction with the debates on the amendment, Taft and his colleagues created the following legislative history:

Mr. TAFT. The amendment makes it perfectly clear that the boys engaged in the delivery of newspapers to the home and the consumers are exempt. I think Senators know various people whose sons are engaged in that business today.

Mr. ELLENDER. The Senator means if they have a contract direct with the newspaper company?

Mr. TAFT. No; any boy delivering newspapers to the home. I believe such boys are exempt already. I believe they are exempt because of the fact that such work is not in interstate commerce. I think they are exempt because of the fact that they are usually independent contractors. But we have added some additional restrictions on child labor. The newspapers were particularly concerned lest that restriction might in some way affect the newsboys. So they have asked that it be made perfectly clear, without any doubt whatever, that boys who are concerned solely in delivering newspapers to the consumers shall not be covered by any of the provisions of the act. I think there was general agreement in the committee and elsewhere on that question, and I see no reason why the amendment should not be adopted . . .

Mr. THOMAS of Utah. I think it ought to be pointed out that the whole theory of child-labor legislation was to stop the exploitation of children. Everyone knows that the ordinary newsboy is not exploited labor in any sense at all.

The House accepted the Senate amendment in conference, and the exclusion became law: "The provisions of sections 206, 207, and 212 [of the FLSA] . . . shall not apply with respect to any employee engaged in the delivery of newspapers to the consumer . . . ."
Despite this exclusion of employees, some newspaper publishers have continued to insist that child carriers are not their employees. This disclaimer presumably is designed to avoid liability for workers' compensation premiums. Only where a state street trades act makes children the statutory employees of the news agency or publisher may such evasion be precluded.

IV. COLLECTIVE BARGAINING ADJUDICATIONS: THE NONPARTISAN MANIPULATION OF CHILDREN'S STATUS

Contrary to the proposition in the New York Times that news carriers are independent contractors rather than employees, the National Labor Relations Board ("NLRB" or the "Board") has ruled repeatedly that child newspaper carriers are employees. In an interesting twist, however, it is not the children who have been behind such litigation. Instead, the disputes involve publishers and unions representing adult employees who oversee the children.

The Taft-Hartley amendments to the NLRA exclude supervisory employees from coverage. To overcome this statutory barrier to organizing supervi-

(FLSA exempts from minimum wage and overtime laws minors who deliver papers, not those who sell subscriptions outside their routes).

120. Representative of the publishers' position is the following statement: "The newspapers consider the carrier to be an 'independent contractor' and therefore exempt under the act. However, in written comments to the Minimum Wage Study Commission, the American Newspaper Publishers' Association recognized that 'in the event of a contest a common-law independent-contractor arrangement might not be demonstrable.'" Fritsch, supra note 5, at 74 (citing written comments of the American Newspaper Publishers' Association of Nov. 26, 1980).

121. In Higgins v. Monroe Evening News, 404 Mich. 1, 272 N.W.2d 537 (1978), an extensively litigated case that lasted twelve years, the Supreme Court of Michigan held that a five-year-old child, who was hit by a car while helping an older child 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. Id. at 18, 272 N.W.2d at 542. The majority ruled that the relationship between the plaintiff and the substitute carrier was "a social relationship" based on a "gratuitous" promise rather than an employment relationship. Id. at 21, 272 N.W.2d at 544.

122. See, e.g., Wis. Stat. § 103.21(1) (1987-88) ("[e]very minor selling or distributing newspapers ... on the streets or other public place, or from house to house, is in an 'employment' and an 'employe,' [sic] and each ... publisher ... is an 'employer' of the minor").

123. Cowan, supra note 2, at A18, col. 6.

124. See, e.g., Virginian-Pilot/Ledger Star & International Printing & Graphic Communications Union, Local 54, 241 N.L.R.B. 575 (1979); Philadelphia Newspapers, Inc. & Local 628, Int'l Bhd. of Teamsters, 238 N.L.R.B. 835 (1978); A.S. Abell Co. & Local 355, Int'l Bhd. of Teamsters, 185 N.L.R.B. 144 (1970). The Providence Journal Bulletin, the newspaper on which the Times was reporting, has in an undated press release also perpetuated the myth of total exclusion.

125. The Labor Management Relations Act of 1947, added the provision that "the term 'employee' ... shall not include ... any individual employed as a supervisor." Pub. L. No. 80-101, § 2(3), 61 Stat. 136, 137 (codified at 29 U.S.C. § 152(3)). The statute defines a supervisor as: [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

29 U.S.C. § 152(11) (1988). Although supervisors are permitted to become or to remain union mem-
To appreciate precisely how aberrant a ruling that child carriers are not employees would be, it is important to observe that the Board and the courts decided early on that adult motor route drivers and adult newsboys working under the same terms of employment as the children were employees.\(^1\) Although these decisions were ostensibly overruled by Congress in 1947,\(^126\) Congress never expressly addressed the issue of the status of "little merchants" for purposes of the NLRA.

The unprincipled position of the disputing parties is reflected in and reinforced by decisions of the NLRB, the persistent illogic of which can be explained only by the desire of shifting political majorities of the Board to insure or to preclude coverage for certain adult workers.\(^128\) In *Buffalo Courier-Express, Inc. \& American Newspaper Guild, Local 26*,\(^129\) a union sought a collective bargaining unit of all employees in a newspaper's outside circulation department, which consisted of adult distributors and salesmen.\(^130\) In addition, the newspaper "employed" carrier boys, selected by the salesmen, to whom the distributors

\(^{126}\) NLRB v. Hearst Publications, 322 U.S. 111, 129, 132 (1944) ("employee" defined broadly by "underlying economic facts" rather than by conventional legal classifications; Board's selection of collective bargaining units consisting of "newsboys" and "checkmen" upheld); Seattle Post-Intelligencer \& Seattle Newspaper Guild, Local No. 82, 9 N.L.R.B. 1262, 1274-75 (1938) (term "employee" in the NLRA includes all employees in the conventional and legal sense except those expressly excluded; motor route drivers perform work that is functional part of business and are employees). *See supra* note 72 for a discussion of Congress's response to *Hearst Publications.*

\(^{127}\) See 29 U.S.C. § 152(3) (includes independent contractor exclusion). *See also* Linder, *supra* note 35, at 601 for an analysis of the express exclusion of independent contractors from coverage under the NLRA as amended by the Taft-Hartley Amendments of 1947.

\(^{128}\) Shifting political majorities exist by virtue of the fact that the five Board members are appointed by the President to serve staggered five-year terms. 29 U.S.C. § 153(a) (1988).

\(^{129}\) 129 N.L.R.B. 932 (1960).

\(^{130}\) *Id.* at 933. The distributors buy for resale a certain number of newspapers at a wholesale rate. *Id.* The circulation salesmen supervise and sell circulation in a given area. *Id.* at 936. They also select, subject to the approval of the distributors, the carriers to whom newspapers are delivered. *Id.*
delivered newspapers. The employer contended that the distributors were independent contractors, but that if they were held to be employees, the unit was inappropriate because the salesmen were the supervisors of the distributors. On the basis of an extensive catalog of criteria going to control and opportunity for profit and risk of loss, the Board held that the adult distributors were employees. The Board then held that the salesmen were not statutory supervisors of either the distributors or the carriers. As to the carriers, the Board found that the salesmen's "direction of the work of carrier boys is routine in nature and does not require the use of independent judgment." It then added a non sequitur: "In any event carrier boys are not employees of the Employer." The Board, however, not only failed to identify the employer of the carrier boys, but further mystified the situation by noting that the newspaper did not allow the distributors "to select the carrier boys to whom they distribute papers . . . ."

This structure became almost boilerplate in NLRB decisions. Five years later, in *Eureka Newspapers, Inc. & Local 684, International Brotherhood of Teamsters*, a case involving no intermediate layer of supervisor between the distributors (dealers) and the children, the Board, bringing to bear a very expansive interpretation of control, held that the dealers, who had sought to form a collective bargaining unit, were employees of the newspaper. The NLRB again ruled against the publisher-employer that its dealer-employees, who "also hire and pay carrier boys to help in the distribution of the newspapers[,] . . . do not exercise supervisory authority over any employees of the Employer" because "the carrier boys are not employees of the Employer." Two years later, in *El Mundo, Inc. & Local 225, American Newspaper Guild*, the Board handed down a decision virtually identical to that in *Eureka Newspapers*. The Board held that dealers who "hire, fire, and establish rates of pay for their carrier boys" were employees of the newspaper yet not supervisors because "[t]he record fails to establish that the . . . carrier boys hired by the dealers are employees of the

131. *Id.*
132. *Id.* at 933.
133. *Id.* at 936.
134. *Id.* at 937.
135. *Id.* at 936.
136. *Id.* at 936-37. In fact, the parties had stipulated that the carriers were not employees. *Id.* at 934 n.2.
137. *Id.* at 936 n.5. Actually, the salesmen selected the carriers to whom the distributors delivered papers, "subject to the latter's approval." *Id.* at 936. Since the carriers were not considered employees of the newspaper, it is difficult to understand why the salesmen were the ones to select the carriers when it was the distributors who dealt directly with the carriers. *See id.* (once signed to lease, "carrier then deals directly with his distributor").
139. *See Linder, supra* note 35, at 601 for an analysis of the origins and evolution of the test for whether one is an employee or an independent contractor under the NLRA.
140. 154 N.L.R.B. at 1184.
141. *Id.* at 1183, 1185.
142. 167 N.L.R.B. 760 (1967).
employer." The Board, however, has never bothered to explain how it would be logically or economically possible, under agency law, for an employee's employee not to be the employer's employee.

Both publishers and unions have, for different reasons, cultivated the fiction that child carriers are not the publishers' employees. Publishers assert this position to bolster their claim that the adult distributors are independent contractors, and the unions maintain the same position to support their contention that distributors are not supervisors. Yet neither claim is logically compelled by the ultimate result the parties wish to achieve. The confusion is in part dictated by the fact that each side is faced with an argument in the alternative that is inconsistent with its main position. The dialectic works itself out in the following manner. The threshold issue is whether the distributors are employees or independent contractors. Here, of course, the publishers allege independent contractor status, while the unions argue employee status. At this stage, strictly speaking, it is not necessary for either side to take a position at all on the children's status. Arguably, however, the publishers could inflate the distributors' status as entrepreneurs by pointing out that they employ others who work either as employees of the distributors, or as independent contractors. By the same token, the unions need not be concerned with the children at all at this point, but would have to raise the issue only to preempt the publishers' alternative argument that the children are employees. Once the Board has ruled that the adults are employees, the focus shifts to whether they are excluded supervisors. At this point the respective positions are modified. The publishers argue that the children are the distributors' supervisees while the unions resist this characterization. The easiest move for the unions is then to claim that their members cannot supervise the children because the latter are independent contractors. Why this claim is any more compelling than the argument that the distributors supervise

143. Id. at 761.
144. See Restatement (Second) of Agency, § 5 comment (2) e (1958). The Restatement reads in relevant part:

[A] subservant relation . . . may exist where a person is paid by the piece or job and is allowed by the master to select assistants at his own expense, it being understood that the servant is to direct the conduct of the subservant who is to be subject also to the superior power of control which the master may exercise.


Perhaps, in its less than ingenious style, the Board will find a way out of the analytical box into which it has worked itself, but until then, its mere holding that such persons hired by vendors . . . of the employer (publisher) are not employees of the employer does not make it so.

146. Publishers have also pursued this tack in the employment tax context. See, e.g., Westover v. Stockholders Publishing Co., 237 F.2d 948, 949 (9th Cir. 1956) ("route district men" and "dealers" of newspaper are employees and taxes on their earnings can be assessed against the employer).
them but in a manner that does not involve independent judgment, is unclear. Both claims are implausible for the same reason—young children cannot be trusted to operate profit-making enterprises without adult control.

The ambiguities of these alternative positions have made it most convenient for both parties not to delve deeply into the children's status so that it can be available for manipulation on other occasions. The Board has ratified and compounded this confusion by adopting the parties' contradictory positions. When the Board wishes to confer coverage on the adults as nonsupervisors, it has latched on to the sometimes tactical allegation that the children are not the newspapers' employees. Yet, because the NLRB cannot logically integrate this finding of fact into its opinions, at times it has been forced to refrain from directly characterizing the children as independent contractors (or as anything else for that matter). Therefore, the Board has maintained the custom of leaving children's status a mystery.

The Board teetered on the edge of breaking with this custom in 1968 in *Newsday, Inc. & Local 406, International Printing Pressmen,*147 a case involving a unit of 260 district circulation managers. While the publisher conceded that "it has always considered [the carrier newsboys] to be independent contractors," the union, carrying on the tradition of ambiguity and ambivalence, contended that "the carrier boys are independent contractors or, in any event, not employees of the Employer."148 The Board's finding that the members of the proposed unit "recruit, train, and direct carrier newsboys, whom they assign to routes and may terminate at their discretion"149 transparently threatened to dispose of the petition for an election on the ground that the managers were excluded supervisors. To forestall that conclusion, the Board examined the relationship between the children and the publisher. Discounting the fact that the carriers were prohibited from distributing any other publications and that they were covered by the employer's workers' compensation policy, the NLRB sought to paint an entrepreneurial picture. The Board focused on the difference between the wholesale and retail prices of the newspaper as the child's "profits" out of which he "buys his own . . . carrier bag, collection book, and any additional equipment desired such as a wagon or bicycle."150 The child bore the risk of loss associated with unsold papers or customers' failure to pay.151 Without expressly calling the children independent contractors, the Board found that they were not the publisher's employees. The Board could, therefore, in good conscience find that the managers were not supervisors of any of the employer's employees within the meaning of the NLRA.152 What the Board failed to explain, however, was how an employee could supervise putative independent contractors without *ipso facto* converting them into employees.

The Board absolved itself of this intellectual obligation by handing down a

147. 171 N.L.R.B. 1456 (1968).
148. Id. at 1456.
149. Id.
150. Id.
151. Id.
152. Id.
series of decisions in which it held that the children were employees and the adults excluded supervisors.153 Among the early decisions was A.S. Abell Co. & Local 355, International Brotherhood of Teamsters.154 In Abell, a union sought a unit of 77 home circulation employees or district advisors, who, the employer contended, supervised 800 carrier newsboys. The union, once again, asserted that the newsboys were not the employer's employees, being either independent contractors or in a position "too casual to warrant a finding that an employment relationship existed."155 Perceiving "no meaningful distinction"156 between the publisher's two different distribution systems—in one the company paid the boys and in the other the boys retained the difference between the wholesale and retail prices—the Board found all the children to be employees:

[T]he carrier boys bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies and personal investment, for the record shows that the carrier boys must sell the newspaper at a price determined by the Employer within territories defined and controlled by the Employer. Moreover, the carrier boys' risk of loss and capacity to draw upon personal initiative to increase their earnings are minimized to a significant extent by the Employer's practices and policies which are calculated to prevent competition between carrier boys; its practice of territorial allowance to compensate for small routes; its right to change unilaterally the size of the routes; and its control over the number of newspapers which carrier boys may receive.157

From the finding that the children were the publisher's employees flowed the result that those with the authority to hire, discharge, and direct them were excluded supervisors.158

In the late 1970s, the Board issued several more decisions holding the children to be the publishers' employees and the adults excluded supervisors. For example, Philadelphia Newspaper, Inc. & Local 628, International Brotherhood of Teamsters159 offered the spectacle of the union seeking to rely on the employer's field operations manual, which expressly referred to the carriers as independent businessmen who were "in business for themselves and [were] not employees" of the publisher, while the employer, scarcely embarrassed by its fictional indiscretion, emphasized the fact that the manual provided for "detailed and specific controls" that the managers were to exert over the children's performance.160

155. Id. at 145.
156. Id. at 145 n.4.
157. Id. at 145-46.
158. Id. at 146.
160. Id. at 836. The publisher argued that the "manual, taken as a whole, supports its position that the youth carriers are employees." Id.
In Virginian-Pilot/Ledger Star & International Printing & Graphic Communications Union, Local 54,161 the Board upheld the finding of a Regional Director that the carriers were employees. The decision was remarkable, however, for containing the first full-fledged ideological defense of the “little merchant” system by a member of the Board.162 In his dissent, Board member Truesdale attacked on procedural grounds the employer's self-serving recantation of its “little merchant” nomenclature as a fiction.163 Truesdale emphasized the scope of entrepreneurial activity afforded the children, who averaged thirteen to fourteen years old.164 He recognized the opportunity for profit that the carriers enjoyed in the form of tips and employer-sponsored contests.165 Truesdale, however, failed to explain how these possibilities distinguished the children from tipped employees. Similarly, the children had to “determine how best to insulate their operations from loss” including robbery, which, he admitted, the company on occasion absorbed. The dissenter noted that these opportunities and risks, though small, were “commensurate with the small scale of their businesses.”166 In an unprecedented turning on its head of the universally recognized control associated with economies of scale and division of labor, Truesdale found the large number of supervised children (forty to ninety) per supervisor and “the relatively simple nature of the newspaper delivery tasks” to be prima facie evidence of lack of control.167 The dissent further attempted to characterize the children's immaturity as an indicium of independence from the employer.168 Truesdale interpreted the “intermediation” of the parents for enforcing the employer's discipline as meaning that “the Employer has effectively severed its lines of control over the carrier.”169 Finally, Truesdale undermined his own economic-entrepreneurial approach by justifying the absence of labor protections by reference to the quasi-volunteer character of the project:

Newspapers with carriers... enjoy an exemption from most child welfare legislation on the theory that a newspaper route provides valuable training experience in the responsibilities of life for a young person. Because the carrier's job is viewed as one step in the child's learning process, the compensation received by carriers is considered

162. Id. at 575-78 (Truesdale, dissenting).
163. Id. at 575-76 (Truesdale, dissenting). Truesdale asserted that the employer's sudden change of position was entitled to little weight in view of the fact that this change occurred subsequent to initiation of the instant suit. Id.
164. Id. at 576 n.7.
165. Id. at 576.
166. Id. The carriers "personal investment" consisted merely of "plastic sleeves, bands, and calendars." Id. at 577.
167. Id.
168. Id. "As a natural corollary of their youth, carriers necessarily require the continued guidance and supervision of their parents in their daily activities... As a result, the intermediation of the parents... compels the conclusion that carriers are independent contractors." Id.
169. Id. Nick Russo, director of circulation at the Toronto Globe, offered a variation of this trope to explain why it was terminating the little merchant system: "'You can't discipline other people's children.'" Gersh, Toronto Daily Says Good-bye to Youth Carriers, EDITOR & PUBLISHER, May 17, 1986, at 20.
incidental to their primary concerns of education and maturation.\textsuperscript{170}

Shortly before the Board issued its decisions in \textit{Philadelphia Newspapers} and \textit{Virginian-Pilot/Ledger Star}, the Board, in \textit{Oakland Press Co. \& Local 372, International Brotherhood of Teamsters},\textsuperscript{171} appeared to be reverting to its analyses in earlier cases finding that the child carriers were not employees.\textsuperscript{172} The slipshod nature of the \textit{Oakland Press} decision led to a seven-year conflict with the United States Court of Appeals for the Sixth Circuit. The dispute arose out of a refusal by a suburban Detroit newspaper to bargain with a local of the Teamsters representing fifteen district managers each of whom supervised approximately eighty-five twelve-year-old carriers.\textsuperscript{173} In 1970 the union had filed a petition with the Board for certification as the representative of the managers. After the union and the newspaper entered into a "consent election agreement stating that the carriers were nonemployees and that the district managers were accordingly not supervisors within the meaning of the Act,"\textsuperscript{174} an NLRB regional director, denying approval of the agreement, submitted the question of the children's status to the Board. Before the Board decided the issue, however, the union withdrew its petition and won an election conducted by the Michigan Employment Relations Commission.\textsuperscript{175} After the expiration of the second of two collective bargaining agreements in 1976, the newspaper reversed its position on the children's status. The consequent refusal by the newspaper to bargain triggered an unfair labor practice charge by the union.\textsuperscript{176}

The \textit{Oakland Press} cases first occupied the Board in 1977.\textsuperscript{177} At that time, the Board affirmed the ruling of an Administrative Law Judge (A.J) that the newspaper's district managers were not excluded supervisors because the children were not employees.\textsuperscript{178} Bizarrely, the A.L.J reached this conclusion "without deciding whether they are actually independent contractors."\textsuperscript{179} Implicitly disavowing the traditional control-test approach to such determinations, the A.L.J appeared to suggest that policy reasons offered a way out of the binary world of employees and independent contractors. Yet after this initial insight into the social issue, he failed to create a consistent jurisprudential basis for his implied proposition that tertium quid est:

It is difficult to conceive that subteenage children who carry newspapers for a period of 6 months to a year for which they are paid in the range of $2 a day are entrepreneurs in the traditional sense of an in-

\begin{enumerate}
\item 241 N.L.R.B. at 577.
\item 229 N.L.R.B. 476 (1977), enforced in part, remanded in part, 606 F.2d 689 (6th Cir. 1979).
\item See supra notes 129-43 and accompanying text for a discussion of the earlier precedent as developed in \textit{Buffalo Courier-Express} and other cases.
\item See 249 N.L.R.B. 1081, 1081 (1980) (decision after first remand) (fifteen district managers oversaw approximately 1250 carriers), aff'd in part, remanded in part, 682 F.2d 116 (6th Cir. 1982).
\item Id.
\item Id.
\item 229 N.L.R.B. 476 (1977), enforced in part, remanded in part, 606 F.2d 689 (6th Cir. 1979).
\item Id. at 477. The Board adopted the A.L.J.'s opinion as its own. Id. at 476.
\item Id. at 477.
\end{enumerate}
dependent contractor. This, however, does not necessarily mean that they should be considered employees. Their employment, if any, is very minimal, amounting to only a few hours a week. . . . The question here is not so much whether a 12-year-old who delivers newspapers 1 hour a day on a skateboard is an entrepreneur, but whether, as a matter of policy, they (or the adults) should be treated as employees.\textsuperscript{180}

Although considerable plausibility attaches to the argument that “policy” should govern the determination as to the existence of an employment relationship, the ALJ adduced no policy reasons for his decision. Instead, he singled out such irrelevant factors as the fact that the publisher had not paid payroll taxes for the carriers.\textsuperscript{181}

Acting on the employer’s petition to review the Board’s order, the Sixth Circuit severely reprimanded the ALJ and the NLRB for having “specifically refrained from deciding” the issue of the carriers’ status, which was “the determinative factor” regarding the status of the district managers.\textsuperscript{182} In response to the ALJ’s fiat that “as a matter of policy” the carriers should not be treated as employees,” the Sixth Circuit, in remanding the issue to the Board, stated: “We cannot accept the finding that, as a matter of policy, they are not employees. Whose policy? They are entitled to be definitely classified under the statute. Either they are legally employees or . . . they are not employees.”\textsuperscript{183}

Since the 1,250 twelve-year-olds earning two dollars per day were not parties to any of these proceedings and had no ostensible stake in the outcome, the court’s desire for certainty concerning the status of these children seems misguided. Yet, as a matter of logic, the Sixth Circuit was correct.

On remand, the Board reversed. Based on the control the managers exercised over the children and the children’s lack of investment and very limited risk of loss or opportunity for increasing their income, the Board held that the children were employees and that the district managers were their supervisors.\textsuperscript{184} The Teamsters then petitioned the court of appeals for review of the Board’s order that the employer had not committed an unfair labor practice on the grounds that the company should be equitably estopped from asserting a position on the status of the district managers inconsistent with its past conduct and statements. A different panel of the Sixth Circuit, agreeing that the Board had erroneously considered itself precluded from reviewing the union’s contention, remanded the case again to the Board.\textsuperscript{185}

On the second remand, the Board decided that equitable estoppel did not lie

\textsuperscript{180} Id. In the decision announced by the NLRB, the term “adults” appears to mean those who handled the 35 motor routes, earning eight dollars daily plus expenses. Id.
\textsuperscript{181} Id. at 477-78.
\textsuperscript{182} Oakland Press Co. v. NLRB, 606 F.2d 689, 692 (6th Cir. 1979).
\textsuperscript{183} Id. at 693.
\textsuperscript{184} 249 N.L.R.B. 1081, 1081-83 (1980), aff’d in part, remanded in part, 682 F.2d 116 (6th Cir. 1982). NLRB member Truesdale again dissented, reproducing his dissent from the Virginian-Pilot decision. Id. at 1083-84. See supra notes 161-70 and accompanying text for a discussion of the Virginian-Pilot decision and dissenting opinion.
\textsuperscript{185} Local 372, Int’l Bhd. of Teamsters v. NLRB, 682 F.2d 116, 118 (6th Cir. 1982).
primarily because stipulations by the parties could not override express provisions of the NLRA concerning exclusion of supervisors. A third panel of the Sixth Circuit upheld the Board's ruling on the grounds that, since Congress intended employers' recognition of supervisors for collective bargaining purposes to be voluntary, the employer's freedom of choice could not be curtailed by its prior conduct.

Although the court's enforcement of the Board's decision ended reported judicial involvement in this dispute, the Sixth Circuit could not resist dropping a footnote which for the first time in seven years of litigation called a spade a spade:

The law of the case requires that we accept the Board's determination that the newspaper carriers are employees. Nonetheless, we feel compelled to note our disagreement with this decision. It is difficult to imagine that 12-year-old children, working five hours a week for two dollars an hour, are the type of people to whom Congress intended to extend the protections of the National Labor Relations Act. It is even more difficult to imagine that such a group would, or even should, ever organize. To us, these children are much like the sheltered workshop people... and the part-time student janitors... whom [sic] the Board has already determined are not employees for purposes of the Act. The only practical effect of this decision is to exclude from the Act a group of employees whom Congress surely intended would be covered by it.

The Sixth Circuit's indignation is difficult to reconcile with the mirror-image instrumentalism that it applied. The court appeared to suggest that, because children qua employees would not or should not be allowed to avail themselves of the protections of the Act anyway, it was permissible to manipulate their status arbitrarily in order to preserve the collective bargaining rights of their adult supervisors. In contrast to their admonition in the initial hearing of the case, the panel impliedly condoned the original finding of the ALJ that the children "were not really independent contractors but were not employees of the newspaper either." In so doing, the court conveniently overlooked the fact that the child carriers were not in the same position as either the part-time student janitors or the sheltered workshop people. The carriers differed from the student janitors in that the latter had stepped forward to demand representation in their own right, whereas the children were merely unknowing pawns in the

188. Id. at 970 n.** (citations omitted).
189. Id. at 970.
190. Id.
191. San Francisco Art Inst. & Local 39, Int'l Union of Operating Engineers, 226 N.L.R.B. 1251, 1251-52 (1976) (recognition of student janitors as a unit for collective bargaining denied because of complications such as those stemming from rapid turnover rate).
conflict between the newspapers and the adult supervisors. Similarly, the Board found that the sheltered workshop's handicapped clients were not the kind of workers the Act is intended to cover. Central to the effort that led to the enactment of the Act was a concern about the exploitation of employee by employer . . . . But "exploitation" has meaning in an employment context only where one employs another in order to derive some net benefit from the other's output. That is not why [this employer] "employs" its clients . . . .

By way of contrast, not even the ideological trappings of the "little merchant" system can make it seem credible that newspapers exploit child carriers less rather than more than adult workers.

Consequently, the only principled, as opposed to merely expedient, justification for characterizing child workers as a tertium quid who need not be classified as employees or independent contractors under the NLRA is the claim that their situation does not fall within the congressional purpose underlying the exclusion of supervisors—namely, "that no one, whether employer or employee, need have as his agent [i.e., supervisor] one who is obligated to those on the other side, or one whom, for any reason, he does not trust." Unless the NLRB and the courts are willing to make the unsupported assumption that children who are subordinated to the power of a profit-making enterprise, unlike others similarly situated, stand in no need of protection because all adults, regardless of their antagonistic socio-economic positions in the firm, will be solicitous of their welfare, no reason undergirds their a priori exclusion from employee status. If the child carriers are potential members of a bargaining unit of outside distributors, they need not acquiesce in representation by their disciplinarians.

CONCLUSION: SENDING A MAN TO DO A BOY'S JOB, OR, THE CASUALTIES OF THE CASUALIZATION OF THE LABOR FORCE

"The only (problem) is among papers that pay carriers 50 cents an hour to carry 50 papers that weigh seven or eight pounds apiece."

193. Perhaps the most far-reaching ideological claim was made by H.W. Stodghill, President of the Louisville Courier-Journal at the National Recovery Administration code hearings in 1934. "There is a question . . . as to whether the work of the newspaper boy is child labor or play . . . . I say it is play." Bromley, The Newspaper and Child Labor, NATION, Jan. 30, 1935, at 131 (quoting H.W. Stodghill). More realistically, a latter-day newspaperman concedes that "[w]hen times are bad and money is scarce, boys usually are anxious for part-time work." F. Rucker, supra note 12, at 62-63.
194. 735 F.2d at 971 (citing H.R. REP. No. 245, 80th Cong., 1st Sess. 17 (1947)).
195. To be sure, the unions in the Oakland Press cases and in virtually all the other cases discussed were petitioning for units consisting only of adult supervisors, from which the children as well as all other employees were excluded. But this practice, while conforming facially to the statutory mandate of establishing "appropriate" collective bargaining units, 29 U.S.C. § 159(a) (1988), characterized by substantial mutual interests, also reflects the unions' neglect of the child workers' interests.
Over time, only one argument worthy of serious consideration has emerged in support of the assertion that child (and/or adult) news carriers are not employees. The argument is that some publishers have succeeded in foisting upon the carriers a significant measure of the risk of loss. This risk does not entail the critical loss of capital investment, for none is involved. It does, however, amount to a significant incursion into the workers' (and/or their families') income security by eliminating even the minimal guarantees associated with the statutory protections afforded employees in the form of minimum wages, unemployment compensation, workers' compensation, and social security. The question is whether the publishers' ability to force children (and adults) to assume the losses associated with nonpayment by subscribers should suffice to disen-title the children to the protections other employees have secured. For example, employers in many states are prohibited from deducting the sums customers fail to pay from their employees' wages. Thus, only by virtue of the prior untested classification of carriers as self-employed can publishers evade such statutory prohibitions.

Two centuries ago, Kant sought to provide empirical justification for excluding certain adult men from the political franchise. In casting about for an economic grounding that would qualify the elector who could be counted on to

197. Those publishers that contractually or de facto hold child carriers harmless for losses stemming from nonpayment of subscriptions have reduced the “little merchant” system to the status of sheer propaganda. See Reducing Carrier Turnover: Publishers Discuss How to Improve Delivery Service, EDITOR & PUBLISHER, May 28, 1988, at 24 (newspaper reimburses carriers for losses from nonpayment despite potential for legal advice to the contrary). Another newspaper has aspired to achieve the best of all possible worlds by reducing the carriers' income while increasing its control over them and maintaining their status as independent contractors. See Stein, Relieving Carriers of 'Deadbeat' Collection Responsibilities, EDITOR & PUBLISHER, May 17, 1986, at 45 (carriers paid ten percent of all money collected in exchange for relieving them of risk of noncollection). Significantly, even the Rhode Island children mentioned at the beginning of this article demanded merely a raise to help cover losses rather than direct assumption by the newspaper of such losses. Whitaker & Zuckerman, Labor and Delivery, COLUM. JOURNALISM REV., July-Aug. 1989, at 10.


199. "In no other industry were bad debts passed on to its delivery men." W. TRATTNER, supra note 57, at 110. Yet even Trattner concedes that newsboys "were self-employed." Id. Publishers' shifting of losses to the carriers is merely one example of a worldwide trend toward casual-ization of employment accompanied by an imposition on workers of the assumption of certain costs of production and of "a lower return on their labor." S. ALLEN & C. WOLKOWITZ, HOMEWORKING: MYTHS AND REALITIES 174 (1987).

200. See, e.g., IOWA CODE § 91A.5(2)(c) (1989): "The following shall not be deducted from an employee's wages: [D]efault of customer credit, or nonpayment for goods or services rendered so long as such losses are not attributable to the employee's willful or intentional disregard of the employer's interests."

201. See, e.g., Press-Citizen Co. v. Fajardo, No. 28099, slip op. at 3 (Iowa D.C., Johnson Cty., Small Claims Div. July 10, 1989), where the court found that a non-English-speaking adult carrier "was a de facto employee of the [publisher] and therefore, not personally liable for deficiencies in the payments and collection process for his routes." The court made this determination without reference to the relevant provision in the Iowa Wage Payment Collection Law.
be "his own master (sui iuris)," Kant reasoned that such a person would have to have some property (including every art, craft, or science) that would sustain him so that when he acquired the means of life from others, he would do so by alienating what was his rather than authorizing others to make use of his powers. Thus, without the benefit of having observed the development of industrial capitalism, Kant formulated a distinction between those ("Operarii") who merely sell their labor power to another, who exercises control over it, and those ("Artifices") who create a work under their own dominion for sale to another.

Although Kant never wrote a critique of little merchantry, his political analysis provides philosophical support for enlightened precedent suggesting

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203. "[D]ass er, in den Fällen, wo er von andern erwerben muss, um zu leben, nur durch Veräußerung dessen was sein ist erwerbe, nicht durch Bewilligung, die er anderen gibt, von seinen Kräften Gebrauch zu machen ...." Id.

["In cases where he must earn his living from others, he must earn it only by selling that which is his, and not by allowing others to make use of him ...." (H.B. Nisbet trans. On the Common Saying: 'This May be True in Theory, but it does not Apply in Practice,' in KANT'S POLITICAL WRITINGS 78)].

204. Kant, supra note 202, at 151. Kant states:

Derjenige, welcher ein Opus verfertigt, kann es durch Veräußerung an einen anderen bringen, gleich als ob es sein Eigentum wäre. Die praestatio operae aber ist keine Veräußerung. Der Hausbediente, der Ladendiener, der Taglöhner, selbst der Friseur sind bloss Operarii, nicht Artifices .... Obgleich der, welchem ich mein Brennholz aufzuarbeiten, und der Schneider, dem ich mein Tuch gebe, um daraus ein Kleid zu machen, sich in ganz ähnlichen Verhältnissen gegen mich zu befinden scheinen, so ist doch jener von diesem, wie Friseur vom Perückenmacher (dem ich auch das Haar dazu gegeben haben mag), also wie Taglöhner vom Künstler oder Handwerker, der ein Werk macht, das ihm gehört, so lange er nicht bezahlt ist, unterschieden. Der letztere, als Gewerbetreibende, verkehrt also sein Eigentum mit dem anderen (opus), der erstere den Gebrauch seiner Kräfte, den er einem anderen bewilligt (operam). —Es ist, ich gestehe es, etwas schwer, die Erfordernis zu bestimmen, um auf den Stand eines Menschen, der sein eigener Herr ist, Anspruch machen zu können.

Id.

[He who does a piece of work (opus) can sell it to someone else, just as if it were his own property. But guaranteeing one's labour (praestatio operae) is not the same as selling a commodity. The domestic servant, the shop assistant, the labourer, or even the barber, are merely labourers (operarii), not artists (artifices) .... And although the man to whom I give my firewood to chop and the tailor to whom I give material to make into clothes both appear to have a similar relationship towards me, the former differs from the latter in the same way as the barber from the wig-maker (to whom I may in fact have given the requisite hair) or the labourer from the artist or tradesman, who does a piece of work which belongs to him until he is paid for it. For the latter, in pursuing his trade, exchanges his property with someone else (opus), while the former allows someone else to make use of him (operam). —But I do admit that it is somewhat difficult to define the qualifications which entitle anyone to claim the status of being his own master. (H.B. Nisbet trans., supra note 203, at 78)].

C. NEUSÜSS, DIE KOPFGEBURTEN DER ARBEITERBEWEGUNG ODER DIE GENOSSIN LUXEMBURG BRINGT ALLES DURCHEINANDER 144-45, 349 n.14 (1985), who cites this passage from Kant at second hand, extinguishes the distinction Kant made by characterizing all labor power as property.
that 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," 205 it should be struck down as a "subterfuge." 206

[W]here it is shown . . . that the maximum benefits that can be expected by the cook and her helpers from this sort of arrangement are less than would accrue to them from outright employment under the wage and hour restrictions of the Act; and when . . . the arrangement appears . . . to be intended for the benefit of the employer in limiting his outlay, rather than for the benefit of the cook-contractor (who is given little opportunity to make of the contract a profitable business venture), the surface appellation of "contractor" must be stripped off to uncover the real relation of the parties . . . 207

Such judicial outbursts of economic realism cannot, of course, gainsay the tenacious hold that the little merchant 208 ideology has secured among entrepreneurially minded legislators and judges. Perhaps the most conspicuous example of this orientation appeared in a dissenting opinion to a decision by the Supreme Court of Mississippi in Laurel Daily Leader, Inc. v. James. 209 In Laurel Daily, the court awarded workers' compensation benefits to a fifteen-year-old "little merchant" who had suffered serious and permanent injuries as a result of having been struck by a car. 210 In his dissenting opinion, Justice Gillespie was willing to sacrifice the medical and vocational rehabilitation of children on the altar of the entrepreneurial ideology:

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

206. "Permitting the minor under fourteen years of age to buy the papers . . . and sell them entirely on his own . . . is merely a subterfuge to evade the statute." Op. Att'y Gen'l Indiana 437, 439-40 (1938).
208. "Little merchants" were more recently referred to as "junior independent merchants." J. Felt, supra note 24, at 168.
209. 224 Miss. 654, 80 So. 2d 770 (1955).
210. Id. at 659, 80 So. 2d at 771.
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.\footnote{Id. at 683-84, 80 So. 2d at 781-82 (Gillespie, J., spec. op.).}

In sharp contrast to interest theory, which would view the dissent's ideology merely as a deception of the uninformed, the anthropologist Clifford Geertz has urged articulation of a conception of ideology as a "trop[e]" or "attempted metaphor," that "draw[s] its power from its capacity to grasp, formulate, and communicate social realities that elude the tempered language of science, that ... may mediate more complex meanings than its literal usage suggests ...."\footnote{Geertz, Ideology as a Cultural System, in THE INTERPRETATION OF CULTURES 193, 210 (1973).}

The fact that little merchantry has in some sense continued to exist through generations of working-class parents and their children indicates that the ideology cannot be disqualified as sheer partisan propaganda by profit-driven employers. Yet the real significance of this ideology rests not so much in the images its adherents attempt to evoke as in its application of a patina of plausibility to the circular reasoning—or more precisely, circular power—that inheres in the employer's self-vindicated right to create the presumption of the status under which the carriers may work.\footnote{See Linder, Petty-Bourgeois Pickle Pickers: An Agricultural Labor-Law Hoax Comes a Cropper, 25 TULSA L.J. 195, 242-43 (1989) (despite a rebuttable statutory presumption that all workers are employees, in practice workers must take initiative to vindicate their status).} Only in this power-mediated sense can the ideology be viewed as "defining (or obscuring) social categories."\footnote{Geertz, supra note 212, at 203.}

Despite this entrepreneurial bias of the little merchant ideology, since more than ninety percent of the economically active population in the U.S. are employees,\footnote{See Linder & Houghton, Self-Employment and the Petty Bourgeoisie: Comment on Steinmetz and Wright, 96 AM. J. SOC. 727, 732 (1990) (table I indicates 8.6% of total workforce was self-employed in 1988).} a more relevant rite of passage arguably would include the experience of self-organization by those seeking to improve their working conditions. Unions, forced to make a Hobson's choice by virtue of having failed to persuade Congress to remove the exclusion of supervisors from the labor laws, may eventually abandon their attempts to convince the NLRB that their members do not supervise young children because the latter are independent contractors. If the unions do so, they might also proceed to help organize such children, as they once did at the turn of the century.\footnote{See D. NASAW, supra note 1, at 164, 167-77, 181-86 (successful organization by boys in Seattle and Minneapolis; failure in Pittsburgh); Bruère, Industrial Democracy: A Newsboys' Labor Union and What It Thinks of a College Education, 84 OUTLOOK 878 (1906) (discussion of partly successful efforts at self-organization by "newsies" in New York and Boston). For a discussion of union-led strikes by child newsboys in 1934, see A. LEE, supra note 50, at 300 (strike in Cleveland got salesmen an increase of 15 cents per hundred plus a $15/week guarantee for full-time work).}

Alternatively, the children should be replaced by adults who receive adult wages. This substitution process is already underway, promoted by the proliferation of single-copy sales through coin-operated racks, the decline in the potential supply of school children, the growing weight of larger newspapers, which
children cannot carry in significant numbers, and the trend towards morning editions, which make "a convenient after-school job into a more difficult pre-dawn chore."\textsuperscript{217} Recent governmental enforcement actions geared toward affording all carriers, regardless of age, certain statutory protections,\textsuperscript{218} may contribute to the demise of the little merchant system.\textsuperscript{219} If, however, the adult carriers are largely drawn from and/or incorporated into a contingent workforce of retired, part-time, and student workers upon whom the publishers can impose essentially the same unprotected status now characteristic of the children,\textsuperscript{220} little would have been gained economically.\textsuperscript{221} But insofar as it is true that "[t]he newsboy who ... has to pay for uncollectible accounts out of his earnings is an exploited worker,"\textsuperscript{222} then in a different sense than the one meant by publishers, delivering newspapers may well turn out to be "the best education in capitalism there is for young people."\textsuperscript{223}

\begin{itemize}
\item \textsuperscript{217} Stein, \textit{supra} note 14, part 1, at 30, col. 5; Freitag, \textit{supra} note 1, § 3, at 21, col. 3.
\item \textsuperscript{218} Both state unemployment insurance agencies and the Internal Revenue Service have begun to investigate carriers' status for employment tax purposes. See, e.g., Fitzgerald, \textit{Circulation Managers Irked by IRS Adult Carrier Rule, EDITOR & PUBLISHER}, Feb. 25, 1984, at 18 (IRS requires businesses selling more than $5,000 in consumer goods on a buy-sell basis to report that person's name, address, and social security number); Fitzgerald, \textit{supra} note 43, at 27. Presumably, school children would derive no benefit from the unemployment insurance system.
\item \textsuperscript{219} See Gersh, \textit{The Move to Adult Carriers, EDITOR & PUBLISHER}, Nov. 8, 1986, at 26, 27 (safety and efficiency concerns cause newspapers to turn from traditional delivery services).
\item \textsuperscript{220} Early child labor reformers in fact urged the substitution of "old men, cripples, the tuberculoId and those otherwise incapacitated for regular work" for newsboys. E. Clopper, \textit{supra} note 16, at 75. \textit{See also The Child Workers of the Nation, in ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI., Supp.}, Mar. 1909, at 233-34 (statement by Florence Kelley) (just as all other peddling by children under 16 is prohibited, so should peddling newspapers; it would be a God-send to handicapped men with stands).
\item \textsuperscript{221} Securing employee status is obviously no panacea. See Fitzgerald, \textit{supra} note 49, at 13, 35 (even where newspaper acknowledged carriers as employees and paid them $4.50/hour plus mileage, area fast food restaurants paid higher wages).
\item \textsuperscript{222} \textit{When is a Newsboy a Child Laborer?}, AM. CHILD, Mar. 1949, at 4.
\item \textsuperscript{223} Freitag, \textit{supra} note 1, at 21, col. 3. \textit{See also} D. Nasaw, \textit{supra} note 1, at 67, 68. Nasaw constructs a cultural consciousness thesis concerning turn-of-the-century "newsies" based on a flawed notion of what distinguishes employees from independent contractors:
\begin{quote}
The children's situation was almost unique. Their first encounter with the workplace was as workers without bosses. As independent contractors they did not have to accept management control of the workplace or work routines. They were free to set their own schedules, establish their own pace, and work when and where they chose. They ... experienced more autonomy at work than in school or at home. ... The little hustlers would grow up and ... carry with them the memory of the work world they had encountered as children and the notion that work in America need not be exploitative or unpleasant.
\end{quote}
\textit{Id.}
\begin{quote}
Nasaw's description may have been valid for the Marx brothers and a few other celebrities he cites. Nasaw, however, ultimately leaves unexplained how being "independent merchants ... did not prevent the children from patterning their organizations after labor unions, calling them 'unions,' and applying directly to local and national federations for certification and support." \textit{Id.} at 181.
\end{quote}
\end{itemize}