What Is an Employee? Why It Does, But Should Not, Matter

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> For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force. At one time the law did not try to equalize the advantages of fraud, but we have generally come to concede that the exercise of such mental superiority as fraud indicates, has no social value, but the opposite. It may well be that the uncontrolled exercise of the advantages derived from possessing the means of living of other men will also become recognized as giving no social benefit corresponding to the evils which result. If so, there is no ground for leaving it uncontrolled in the hands of individuals.[1]

I. Introduction

Reappraisal of the employee-employer relationship has become a theoretical desideratum. Thousands of employers are reclassifying their employees as self-employed entrepreneurs in order to avoid employment taxes.[2] A United States federal appeals court has held unskilled, uneducated, impoverished and capital-less Mexican-American migrant farmworkers hand-picking cucumbers to be independent contractors ("share-farmers")[3] rather than employees. Thus, they are not within the coverage of federal statutes[4] meant to protect such workers from kinds and

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1. Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 Harv. L. Rev. 495, 506 (1908).

2. *See* Marc Linder and Larry Norton, *The Employee-as-Contractor Dodge*, The Philadelphia Inquirer, June 15, 1987, at 15A; Marc Linder and Larry Norton, *The Latest in Employer Scams*, The Texas Observer, Aug. 28, 1987, at 12.

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

4. Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984) (migrant farmworkers who contracted to harvest farmer's crop are not employees within meaning of Fair

levels of exploitation and abuse otherwise unknown in the late-twentieth-century United States.[5] Even some Marxist class analysts hasten to concur that such "proletarians are being transformed into petty commodity producers."[6]

Such a re-examination must be undertaken historically because the categories of "employee" and "employment relationship" lie at the crux of what distinguishes capitalist societies from their predecessors.[7]

> We look back over two centuries in which wage labor has won freedom and self-respect, and are astonished . . . at the prejudices of those who were reluctant to enter the factories; men and women then looked back over two centuries and more of rejection of the slavery of wage labor . . . , of small proprietorship, of an agricultural holding to ward off starvation in unemployment, sickness and old age.[8]

Although wage labor in fourteenth and fifteenth-century England connoted freedom when contrasted to the prior condition of serfdom, it also signaled a loss of independence. The expropriation of the land or "capital" which accompanied the change undermined this anti-feudal emancipatory meaning.[9]

This two-fold sense of "freedom" comprising wage labor still survives. Wage laborers are both formally free to work when,

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Labor Standards Act), *reh'g denied*, 760 F.2d 126 (6th Cir. 1985). *But see* Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987) (holding such cucumber pickers to be employees), *cert. denied*, 57 U.S.L.W. 3255 (U.S. Oct. 11, 1988) (No. 87-1853).

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

6. John Wilson, *The Political Economy of Contract Farming*, Rev. Radical Pol. Econ., Winter 1986, at 56. Wilson relies on Wells, who has reproduced this claim in several formats. *See* Miriam J. Wells, *The Resurgence of Sharecropping: Historical Anomaly or Political Strategy?* 90 Am. J. Soc. 1 (1984); Miriam J. Wells, *What is a Worker? The Role of Sharecroppers in Contemporary Class Structure*, 13 Pol. & Soc. 295 (1984); *Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture*, 21 Law & Soc. Rev. 49 (1987).

7. Historically-oriented studies are not subject to the criticism that exclusive attention to the unchanging private-law contract of employment obscures the crucial functions performed by public-law employment obligations (such as the Statute of Labourers and Poor Laws) and the auxiliary institutions created to enforce them. *See* Michael Tigar and Madeleine Levy, Law and the Rise of Capitalism 307-08 (1977). It is, doubtful, however, whether even Karl Renner, whom Tigar and Levy were criticizing, neglected these changing social contexts.

8. Christopher Hill, *Pottage for Freeborn Englishmen: Attitudes to Wage Labour in the Sixteenth and Seventeenth Centuries*, in Socialism, Capitalism, and Economic Growth 338, 350 (C.H. Feinstein ed. 1972).

9. *See id.* at 341; C.B. Macpherson, The Political Theory of Possessive Individualism 148-51 (1979 [1962]).

where and for whom they please, *and* substantively free from the direct access to the means of production and subsistence that once undergirded the independence of small producers. While the wage-earners in capitalist societies have at times displayed the militancy and autonomy befitting the liberating component of the first meaning, they have also succumbed to their role as the dependent creatures of capital contained in the second meaning.[10] Workers promote an ideological view of the state as an agency that can be manipulated to create the modicum of social security and work-related protection that, at least for certain sectors of the working class, cannot be gained directly from their capitalist employers.[11] Fostering this view, workers have come to believe in an image of themselves as passive beneficiaries of forces that operate outside of the employer-employee relationship.[12]

Paradoxically, entitlements to those benefits are almost universally contingent on being an employee,[13] rather than being self-employed.[14] The variety of benefits and protections in the United

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

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

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

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

T.H. Marshall, *Citizenship and Social Class*, in T.H. Marshall, Class, Citizenship, and Social Development 116 (1963).

13. Approximately nine-tenths of current government social expenditures in the United States are tied to the existence of an employment relationship. *See infra* note 121.

14. In the wake of mass unemployment in Western Europe in the 1980s and the stronger entrenchment of labor unions, European discussion of the need to uncouple the so-called social wage from the existence of an employment relationship

States conditioned on the existence of an employment relationship is impressive:[15] unemployment compensation, workers compensation, collective bargaining rights, minimum wages and maximum hours, social security,[16] pensions, occupational safety and health, and anti-discrimination protection.[17] What an employee *is*, however, has often been left vague, has varied from benefit program to benefit program and from jurisdiction to jurisdiction, and has changed over time. No sound theoretical or empirical ground justifies this lack of uniformity. Indeed, the very existence of this hodgepodge is largely unknown not only to the affected workers, but also to the legislators, administrators and judges who are responsible for articulating policies, formulating definitions and drawing lines.[18]

Two historical questions are raised here. First, whether this crazy-quilt pattern of irrational and unreflective bases of coverage ever made sense in the past. Second, whether the stage of capitalist transformation of the economy and society that has been attained in capitalist countries has now made the distinction between wage-earners or employees and independent contractors or the self-employed, obsolete.

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has centered on unemployment, rather than self-employment, as the chief barrier to access to a living wage. *See, e.g.*, Thomas Schmid, Befreiung von falscher Arbeit (1984); Claus Offe et al., "Arbeitsgesellschaft": Strukturprobleme und Zukunftsperspektiven 355-58 (1984); Oskar Negt, Lebendige Arbeit, enteignete Zeit 215-17 (1987). Twenty years earlier, the specter of unprecedented unemployment brought about by the cybernetic revolution and automation gave rise to a proposal for a basic guaranteed income in the United States. *See, e.g.*, The Guaranteed Income (Robert Theobald ed. 1967).

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

16. In 1950 the self-employed began to be incorporated into the social security programs. Social Security Act Amendments of 1950, Ch. 809, § 104(a), 64 Stat. 492 (1950) (amending Social Security Act of 1935 [*adding* § 211]).

17. For citations of the employee definition/coverage provisions in the pertinent statutes, see Marc Linder, *The Involuntary Conversion of Employees into Self-Employed: The Internal Revenue Service and Section 530*, 22 Clearinghouse Rev. 14 (1988). In addition to workers compensation statutes, numerous state laws are also keyed to employment.

18. For a prominent exception, which, nevertheless perpetuates the tradition, see E.E.O.C. v. Zippo Mfg. Co., 713 F.2d 32, 35-36 (3rd Cir. 1983).

II. The Political-Economic and Juridical Concepts of the Distinction between Wage Workers and Independent Commodity Producers

One leading judicial advocate of the beneficial effects of contractual arrangements and free markets has noted that, regardless of the economic impact such state intervention as the Fair Labor Standards Act (FLSA) exerts, its purpose is clearly to protect "workers . . . selling nothing but their labor. They have no physical capital and little human capital to vend. [T]hose to whom the FLSA applies must include workers who possess *only* dedication, honesty, and good health."[19] In this eminently practical context, is there any categorical difference between one who sells—and has nothing else to sell but—his labor power,[20] and one who contracts to sell the product of his labor?[21] Looked at from another perspective: what distinguishes a worker who depends on fluctuations in the labor market from one whose livelihood hinges on the changes in the non-labor commodity market?[22]

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19. Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook J., concurring). Given the hostility of the Law and Economics school to such schemes as a mandatory minimum wage, it is plausible that Judge Easterbrook's bold and judicially unprecedented proposed per se rule that all migrant farmworkers be "employees" for the purpose of FLSA, flows from a strategy calculated to promote "the amending process." *Id.* That is to say, the repeal of the FLSA. On the incipient judicial version of the Law and Economics critique of minimum wage laws, see Mechmet v. Four Seasons Hotels, 825 F.2d 1173, 1177 (7th Cir. 1987) (per Posner, J.). The continuity with classical political economy may be gleaned from the review provided by Lionel Robbins, The Theory of Economic Policy in English Classical Political Economy 104-05 (1952).

20. Highly skilled workers may also have nothing but their labor power to sell. Although in principle FLSA also covers and protects such workers, the empirical association of high skill, small supply and high wages with superior bargaining power makes it clear that they were not the primary objects of state intervention into the labor market (at least with respect to the minimum wage provisions of the Act). At the outer limit of a supply-demand structure favorable to skilled workers, the coercive dependence inherent in the employment relationship may be temporarily tendentially sublated. *See* Marc Linder, *Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the "Law and Economics" Agency Doctrine*, 15 N.Y.U. Rev. of L. & Soc. Change 435 (1987). It must be kept in mind that FLSA excludes from coverage a number of segments of the skilled—namely mental workers with professional training. 29 U.S.C. § 213(a)(1); 29 C.F.R. § 541.3 and §§ 541.301-541.315.

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

22. Employees are not shielded from the risks inherent in the markets for the commodities they produce for their employers; rather, such risks are mediated—with a time-lag. Thus, for example, the workers who produced Edsels presumably lost their jobs rather than invested capital. Robert Nozick, Anarchy, State, and Utopia 255 (1974), overlooks this connection. It may be true, however, that the necessity of valorizing significant fixed capital investment may compel employers to postpone dismissals beyond the point at which less encumbered employers would

Assuming the existence of capital-endowed and/or skilled workers, some of whom are wage workers and others independent commodity producers: what distinguishes them? More to the point: what distinguishes their respective relationships to the entities for which they work?[23] Does the fact one is committed to the realm of command and the other to that of exchange, mean that in one the capitalist is the active element and in the other the passive element? Alternatively, given that such a worker can be an employee, an independent commodity producer, or merely "on the payroll," i.e., partake of the formal status of the employee while substantively remaining outside of the dominion of capital, how can these various relationships be distinguished?[24]

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

> since it is obvious that, in the complicated intercourse of modern society, a great proportion of the business of human life must be carried on through the instrumentality of others, and is also clear that slavery does not now exist, in any shape in England . . . it seems to follow inevitably . . . that the relationship of master and servant must exist . . . .[25]

A major obstacle to understanding the distinction is that the two categories are not rigidly dichotomous.[26] The amorphous

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have already costlessly reduced their payrolls. For speculation on how these considerations played themselves out in the context of the eighteenth-century putting-out system, see M. Dorothy George, England in Transition: Life and Work in the Eighteenth Century 52-53 (1965).

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

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

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

26. The ambiguity may be more acute at historical turning points than with respect to the present-day survival of antediluvian forms of labor. Thus, the fact that journeymen (outside of the building trades) in New York City in the early years of the nineteenth century were paid by the piece according to a list of just prices has been called "evidence that artisan wage labor was not yet fully regarded as a mar-

borderlines owe their existence to the fact that small independent commodity producers constitute an unstable hybrid class constantly being pulled towards dissolution in the direction of proletarianization or competitively viable capital accumulation: "Small masters are neither real proletarians, since they partially live on the labor of the apprentices, and sell not labor but the finished product, nor real bourgeois, since it is still in the main their own labor that maintains them."[27] In light of the opportunities for self-exploitation available to the self-employed that are legally foreclosed to employees[28] the "independence" of independent commodity producers can and does become so illusory as to render them *de facto* proletarians.[29]

Some of the ambiguity attaching to the boundary between wage workers and independent contractors derives from the individualistic perspective of both orthodox economic theory and jurisprudence.[30] If the labor exchange process,[31] which is responsible for ordering the alignment of workers along one side of that divide or the other, instead is viewed as a phenomenon of compulsory incorporation into a system of social class, the task of line-drawing may become more categorical.

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ket commodity, as labor power . . . ." Sean Wilentz, Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850 at 28 (1984).

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

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

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

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

31. On the blurring of the distinction between labor and labor power in neoclassical economics—see Herbert Gintis, *The Nature of Labor Exchange and the Theory of Capitalist Production*, Rev. Radical Pol. Econ., Summer 1976, at 36, 42. Subsequently, Gintis accused Marx of undercutting his critique of liberalism and being indistinguishable from new-classical economics by virtue of his failure to understand that labor power is not a commodity, nor labor its use value. *See* Herbert Gintis and Bowles, *supra* note 23, Winter 1981, at 1.

A worker is compelled to become and remain a wage laborer because she lacks access to the means of production that would permit her to become a small independent commodity producer.[32] In other words, class-determined poverty and lack of "capital"[33] separate wage laborers from independent commodity producers. Alternatively, the possession of a scarce marketable skill might also function as a definitional marker. These skills cannot be costlessly acquired,[34] but can be remuneratively used to produce tangible commodities or intangible services without the ownership of capital.[35]

Ownership of significant capital is a less ambiguous indicator of independence than skill is in at least one sense. A skilled professional—such as a lawyer or physician or even a plumber—may be "on the payroll" of an employer without any pretense that the employer can substantively subordinate these employees in any greater degree than if they provided the same services as "outside contractors." The employer may choose to secure such skilled persons' full-time exclusive services that are tangential to the profit-making core of the business for convenience. It is much less plausible that one with substantial physical capital would be so employed.[36] Someone who enters a firm with her own specialized means of production would become a partner rather than an employee. In this way, she would be able to shield herself from the

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

33. The ownership of capital may not relieve small entrepreneurs of the need to sell their labor power but in fact may place additional pressure on them to do so by imposing on them the necessity of amortizing their capital, i.e. working longer hours in order to generate the revenues to finance the purchase of capital equipment. For a good example (namely, a small masonry subcontractor) of this two-fold structure, see William Reddy, Money and Liberty in Modern Europe 99 (1987). Claus Offe, "Arbeitsgesellschaft": Strukturprobleme und Zukunftsperspektiven 62 (1984), overlooks this circumstance in his labor market typology.

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

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

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

heteronomy associated with the employee status.[37]

Historically, before the rise of large-scale mechanized capitalist industry, skilled artisans owned and used their own modest means of production to produce tangible commodities for an anonymous market. This constituted the chief form of non-agricultural autonomous labor. Commodity producers could attain a degree of relative independence depending on how hard a particular branch of production or occupation was pressed by burgeoning capitalist forms of production. The distinction between these quasi-independent skilled artisans and wage laborers was not difficult to draw.[38] The intermediate situations, however, created, and continue to create, confusion.[39] With the decline of independent commodity producers and the concomitant proliferation of manually skilled service-providers operating in the interstices of capitalist enterprises, it is not surprising that the bulk of real-world legal disputes involve skilled service-providers.

In order to avoid conflating the distinct categories of (capital-endowed and skilled) independent commodity producers[40] and (skilled but less capital-endowed) service-providers, the two will be analyzed separately.

A. Independent Commodity Producers

A non-employing worker who makes tables or jewelry and sells them to the public from a store (or on the street) is unambiguously an independent commodity producer; by uniting the processes of production and distribution in one hand, he consolidates his autonomy. Artisans who also sell directly to the public have become a rarity, but indisputably they are not employees of their myriad anonymous customers. Relationships become some-

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

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

39. Gintis, *supra* note 31, at 36, 43, acknowledges the existence of such a continuum, but the example he chooses to illustrate the "clearly specifiable conditions under which the employer-employee relationship shades off into the 'independent agent' relationship" is the supply of female labor to a company typing pool. This example is hardly calculated to promote categorical or situation-sensitive line-drawing.

40. Although independent, they are no more "contractors" vis-à-vis their customers than is a railway vis-à-vis its passengers. In other words, independent contractors constitute a sub-set of the self-employed.

what less clear where the artisan customizes the product for the individual buyer, for example, a tailor in a clothing store. Even more ambiguous is the relationship where production is not only individualized, but also takes place on premises owned by the consumer—the most common modern example being house construction.

A useful typology[41] for classifying these relationships in terms of proximity to the final consumer commodity market (in descending order of independence) can be adapted from Max Weber[42]:

1. *Preiswerker*: Small entrepreneurs producing inventory to be sold directly to the anonymous final consumer market. Have disposition over raw materials and tools.
2. Artisans producing for the bespoke trade:
   a. Have disposition over raw materials and tools:
      i. Sell directly to consumers;
      ii. *Verlegte Preiswerker* (Artisan-Outworkers): Produce to order for an entrepreneur, who monopolizes their labor power;[43]
   b. *Kundenlohnwerker* (custom wage workers): Customer furnishes raw materials and perhaps tools.
3. *Hausindustriell verlegte Lohnwerker* (Capitalist-Outwork Wage Workers): Consumer is entrepreneur.[44]
4. Inside Contractors: Skilled workers in machinery and metals plants to whom capitalists provide space, machinery, materials and delegate responsibility for production and hiring in exchange for piece rate.[45]

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

42. Max Weber, Wirtschaftsgeschichte 112-13 (1923). *See also* Karl Bucher, Industrial Evolution 150-84 (3d ed. 1968).

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

44. *See, e.g.*, Peter Kriedte, Hans Medick & Jürgen Schlumbohm et al., Industrialisierung vor der Industrialisierung 194-232, 272-92 (1977); Robert Millward, *The Emergence of Wage Labor in Early Modern England*, 18 Explorations in Econ. Hist. 21 (1981); S. Bindoff, Tudor England 124-25 (1950).

45. *See* Carter Goodrich, The Frontier of Control 120 (1921); Buttrick, *The Inside Contract System*, 12 J. Econ. Hist. 205 (1952); Sidney Pollard, The Genesis of Modern Management 38-47 (1965); Daniel Nelson, Managers and Workers: Origins of the New Factory System in the United States 1880-1920, at 36-38 (1975); Dan

5. Wage Laborers: In manufactory or factory attached to capitalist's capital.[46]

This typology expresses historical stages in the growth of industrial-capital control over immediate producers.[47] The transitions from artisan outworkers to capitalist outwork wage workers,[48] and from inside contractors to capitalist wage workers[49] were essentially characterized, if not driven, by efforts to subject the immediate producers to greater centralized control. This is true regardless of whether attainment of that control was the sole subjective purpose and objective reason for the ultimate supremacy of industrial-capitalist hierarchical methods of organizing production.[50] Nevertheless, the advanced state of subordination achieved, for example, on the modern assembly line, should not obscure the forms and substance of dependence that prevailed in earlier stages.[51] More indirect forms of control could still undermine the autonomy of an independent commodity producer suf-

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Clawson, Bureaucracy and the Labor Process: The Transformation of U.S. Industry, 1960-1920, at 71-125 (1980); Englander, *The Inside Contract System of Production and Organization*, 28 Labor History 429 (1987). On the related phenomenon of the so-called butty system in coal mining, see Pollard, *supra* at 41-42; Raphael Samuel, *Mineral Workers*, in Miners, Quarrymen and Saltworkers 1, 48-50, 62, 73 (Raphael Samuel ed. 1977); Carter Goodrich, The Miner's Freedom (1925).

46. *See, e.g.*, Paul Mantoux, La Révolution Industrielle au xviii[e] siècle.

47. In his rich historical study of management, Pollard remarks that sub-contracting was not a stage, but rather, compatible with various stages of industrial capitalism. Only the dogmatism of nineteenth-century classical political economy, Pollard concludes, led to the view that the capitalist-entrepreneur-owner facing an individual, property-less worker is the normal, highest, finite form of organization. Pollard, *supra* note 45, at 39. Apart from the anti-teleological implications of Pollard's criticism, it is questionable whether his strictures apply to any of the other types mentioned in the text. For an extended argument that "the existence of technologically advanced forms of work presupposes the continued existence of archaic forms and vice versa," see Charles Sabel, Work and Politics 11 passim (1982), and Michael Piore and Charles Sabel, The Second Industrial Divide 19-48 (1984).

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

49. On the massive and systematic use of sub-contracting in the peculiar form of labor sweating and sub-letting—"bastard artisan industry"—see Sean Wilentz, Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850, at 113 (1984).

50. As asserted by Marglin, *What Do Bosses Do? The Origins and Functions of Hierarchy in Capitalist Production*, Rev. Radical Pol. Econ., Summer 1974, at 60. *But see* David Landes, *What Do Bosses Really Do?*, 46 J. Econ. Hist. 585 (1986).

51. For case studies of the process in various trades during different periods in the United States and England, see M. Dorothy George, London Life in the Eighteenth Century 155-213 (1964); Alan Dowley, Class and Community: The Industrial Revolution in Lynn, 11-96 (1979); I.J. Prothero, Artisans and Politics in Early Nineteenth-Century London 22-50, 332-40 (1979); Wilentz, *supra* note 49, at 107-42.

ficiently to bring her within the orbit of another entity. Thus, the transaction between a merchant and a capitalist outworker working on raw materials owned by the merchant pursuant to a piece rate on a simple machine which is owned by the worker should be characterized not as a market exchange (that is, an exchange of entitlements), but rather, as part of a system which closely resembles production within a firm.[52] Despite the absence of direct supervision,[53] such workers could be subjected to discipline not much inferior to that of a factory master.[54]

Whatever independence such capitalist outworkers were able to retain rested on their continued ownership of some component of the means of production that was located outside the sphere of domination of the capitalist-merchant. But did retaining this asset act as a buffer to shield the worker against incursions into his sphere of domination? In the eighteenth century, "[h]istorians might find it useful to describe such men where they depended on working for a capitalist 'putting-out' employer as a 'dependent artisanry', but contemporaries would not have needed the qualifying adjective."[55] Moreover, the line was blurred between such dependent artisans working on a piece rate and wage-earning or sub-contracting small masters, because both might have been working for the same merchant capitalist who supplied materials to other workers.[56]

Just as the *Verlagssystem* involved a method of compensating for a low degree of integration and centralization that permitted merchants to gain control of production, inside contracting represented an attempt to attack indirectly the problem of inadequate control that existed in certain kinds of factories when their size increased in the eighteenth and nineteenth centuries.[57] As such, inside contracting spanned a period of transition from the tool-builder's requiring someone who could furnish capital, to the capitalist's requiring someone who could manufacture a product that

52. Millward, *supra* note 44, at 24.

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

54. *Id.* at 32. Moreover, industrial craftsmen under the industrial putting-out system "were as economically dependent on their employers as were wage labourers, and their employment was less continuous." Christopher Hill, The Century of Revolution 1603-1714 at 206 (4th ed. 1963).

55. John Rule, The Experience of Labour in Eighteenth Century Industry 22 (1981).

56. *Id.* at 32-36; 2 C.G.A. Clay, Economic Expansion and Social Change: England 1500-1700, at 11, 94-97 (1984). For a discussion of the isomorphism between labor markets and credit markets, see John Roemer, A General Theory of Exploitation and Class 93-95 (1982).

57. Pollard, *supra* note 45, at 38.

he could sell.[58] For example, in certain metals manufacturing industries[59] the firms provided space, machinery, materials, working capital, as well as managed sales, while the inside contractors were delegated responsibility for production of certain parts of the firm's output, including labor. Since their income equalled the difference between their wage bill and their "sales" to the company,[60] inside contractors presumably had incentive to engage in "sweating" their laborers.[61] The Winchester Repeating Arms Company used this system at the turn of the twentieth century. The capitalist owner had neither mechanical training nor ability, so he was forced to enter into a "partnership" with a master mechanic.[62] Once the hybrid entity was operating, however, the capitalist, as a functional character mask of his capital, was likewise forced to enhance his control vis-à-vis the inside contractor's "private knowledge of production methods."[63] Capital's success in gaining control of the relevant technology and enforcing its own direct supervision was in large part a function of the increasing complexity of manufacturing. This rendered inside contractors less innovative because the requisite knowledge was no longer the arcane lore of practitioners, but publicly transmitted scientific knowledge that could be acquired only through specialized training.[64]

Late-nineteenth-century appellate court decisions in tort actions brought by the employees of inside contractors against a mill or factory reflected the ambiguity inherent in the status of inside contractors.[65] In a case involving a spike mill, the Pennsylvania

58. Buttrick, *supra* note 45, at 221.

59. Tin mills, brass works, rolling mills, iron smelting and blast furnaces were among the affected industries in addition to cotton spinning. Pollard, *supra* note 45, at 42-47.

60. Buttrick, *supra* note 45, at 205, 206.

61. This circumstance conflicts with the romantic-communitarian image of inside contracting that pervades the description offered by Michael Piore and Charles Sabel, The Second Industrial Divide 33 (1984). On the role played by the sweating and sub-letting of labor in obscuring the overall structure of class relations, see 1 Karl Marx, Das Kapital, ch. 21 (1867). Further confusion of class roles could have resulted from the fact that in some instances inside contractors also received day pay as employees that exceeded their "profit." *See* Buttrick, *supra* note 45, at 206, 209.

62. Buttrick, *supra* note 45, at 207.

63. *Id.* at 210.

64. *Id.* at 214-15.

65. With one exception, the reported cases involve actions by employees of inside contractors against the capitalist employer. This would be significant if it reflected the consciousness of such contractors that they were not employees and hence could not take advantage of protective statutes. People v. Remington, 45 Hun. 329 (App. Div. 1887), *aff'd*, 109 N.Y. 631, 16 N.E. 680 (1888), was brought under an 1885 New York statute preferring the wages of operatives and laborers in

Supreme Court held that whether the plaintiff-worker was in the company's employ directly, or indirectly as assistant to the roller boss, he could be treated as the company's employee because he was engaged in its work, upon its machinery, and in the mill it operated.[66] In contrast, the Indiana Supreme Court abstracted from all production-related contexts, and instead, hinged its finding that the injured plaintiff-worker was not the servant of the defendant-rolling mill solely on the ground that the company was not liable for his wages in the absence of an express or implied contract. The inside contractor, who was a "heater," was furnished scrap iron to be put into a furnace which was furnished and fueled by the company. The court deemed the heater an independent contractor, in spite of the fact that the mill superintendent both was responsible for insuring that the heaters fulfilled their contracts by properly performing a certain amount of work each day, and had the power to discharge them if they refused to discharge a helper whom the superintendent considered derelict.[67]

Analysis of the historical transformations of autonomy for what were once independent commodity producers turns out to be conceptually and empirically much more staightforward than that of skilled service-providers. Because the latter operate on the fringes and in the interstices of employing entities, the seemingly tangential quality of these relationships creates an appearance of dissociation or separateness which requires further-reaching critical exploration.

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corporate bankruptcy proceedings. The defendant corporation had furnished the petitioners with stock, rooms and machinery to manufacture parts of machines for which the corporation agreed to pay a fixed price; these persons in turn employed their own laborers. The opinion contains no further discussion of the actual working conditions, making it difficult to assess the claim. Unfortunately, although the headnote states that the petitioners were not covered, the opinion itself is confined to citing long passages from other cases, in particular ones decided under the British Truck Act. *See also* People v. Remington, 6 N.Y.S. 796 (Sup. Ct. 1889) (decided on basis of earlier case).

66. Rummell v. Dillworth, Porter & Co., 111 Pa. 343, 346-47 2 A. 355, 357 (1886). Without explaining how it arrived at the conclusion, the court added that, since it did not appear that the roller boss was an independent contractor, it was not important that his compensation was calculated by reference to the number of tons manufactured. *Id. See also* Indiana Iron Co. v. Cray, 48 N.E. 803 (Ind. App. 1897) (steel mill worker was company's employee and boss roller—who was in effect foreman, though he had sole control of the manner of manufacturing and could hire and fire—was not independent contractor where company also had the latter authority).

67. New Albany Forge & Rolling-Mill v. Cooper, 131 Ind. 363, 364-65, 30 N.E. 294, 295-96 (1892).

B. *Skilled Service-Providers*

In order to avoid the pitfalls inherent in the consumer-as-employer relationship, the "pure" case of a skilled manual worker with some modest investment in specialized physical capital assets who sells his services to a capitalist entity may be adduced—for example, a plumber.[68] An automobile factory may employ a maintenance plumber or engage one from time to time as needed. This example is poorly chosen in the sense that this particular capital is not geared to exploit this plumber. A better example would be a skilled production worker, but such workers are attached to huge capital investments not their own, and so their dependence is inevitable. Thus, the example would be appropriate only where no capital investment were required of either party—in other words, where no representative capitalist firm were involved.

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

The degree of vertical integration a firm has achieved can only be analyzed concretely. For instance, the reason why Ford inaugurated its own steel production while General Motors purchased its steel from producers cannot be sufficiently explained on the level of "capital in general." Regardless of the reasons, the structure of GM's commercial relations with United States Steel or Bethlehem Steel will differ qualitatively from those with the

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

> Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other.
>
> . . . [T]he employer, under the spur of tax or other liability, solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no shoveling services, but you rather sell me a product: a pile of coal from an emptied car."

Powell v. Appeal Bd. of Mich. Emp. Sec. Comm'n, 345 Mich. 455, 472, 479, 75 N.W. 2d 874, 883, 886 (1956) (Smith, J., dissenting).

outside solo practice plumber.[69]

Since this fundamental difference occurs in the absence of control by GM over the actual production process engaged in by either the steel producer or the plumber, the distinction must lie elsewhere. It could be explained either by the unequal positions the latter two occupy in the macro-economic wage-price-profit matrix (which would be reflected in all their economic relations) or in their specific degree of *economic* dependence or independence vis-à-vis GM. With the exception of a few extraordinary skills that have not been routinized and hence, are transitionally monopolized, a kind of economic dependence arises for the "independent" contractor. The substance of independent contracting is thus negated when a manual worker uses little capital equipment or when the disparity in the size of his capital vis-à-vis that of his contractee exceeds a certain critical threshold.[70]

According to one critical interpretation of the neo-classical economic view of the distinction between employees and independent contractors,[71] the essence of the employment relationship lies in the employee's relinquishing to the employer complete disposition over his activities subject to agreed-upon limitations.[72] But, so the objection runs, this kind of relationship in which a perfected agreement between the parties resolves the question of who has power over whom, in fact characterizes independent contracting rather than employment:

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

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

70. For a mathematical proof of how, given unequal organic compositions of capital, market exchange generates the division of non-employing self-employed producers into exploiters and exploited, see Roemer, *supra* note 56, at 123-32; Roemer, *New Directions in the Marxian Theory of Exploitation and Class*, in Analytical Marxism 81, 84-90 (J. Roemer ed. 1985).

71. *See, e.g.*, Herbert Simon, *A Formal Theory of the Employment Relationship*, 19 Econometrica 293 (1951); Herbert Simon, Administrative Behavior, 123-53 (2d ed. 1957 [1945]).

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

> gally enforceable quid pro quo. Not so in the case of wage labor, where in return for a wage (quid), the worker normally offers only to submit to the political authority of the firm. When a specific quo is in the form of labor services, the individual is an independent agent, not a wage laborer.[73]

In other words, where the labor task is completely specified contractually, and the contracting party is paid for that task regardless of the time required to perform it, that worker would, according to this interpretation, be an independent contractor. Conversely, compensation for time worked abstracted from the amount of work performed, demarcates a wage laborer.[74]

This categorization is not in itself a sufficient criterion. For instance, a client paying a lawyer in solo practice $250 per hour, when the lawyer has dozens of such clients, does not transform the lawyer into a wage worker. In the sphere of material production, a plumber or mechanic can illustrate the same principle. If the owner of a house wishes to contract with the plumber to repair a drain, the plumber may certainly charge by the hour. The same would apply to an automobile mechanic. In either case, the worker would not be considered a wage worker rather than an independent contractor, even though the other party may have specified the precise task to be accomplished. To be sure, the buyer of the services may not have specified the methods to be used or supervised the execution. But the reasons for that failure or inability do not lie in the forms of the contracts into which the parties entered or the forms of compensation. Those forms can be adapted to a variety of socio-economic relationships.

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73. Gintis, *supra* note 31, at 36, 41-42.

74. Samuel Bowles and Herbert Gintis, Democracy and Capitalism: Property, Community, and the Contradictions of Modern Social Thought 76 (1987). Samuel Bowles, *The Production Process in a Competitive Economy: Walrasian, Neo-Hobbesian, and Marxian Models*, 75 Am. Econ. Rev. 16, 21 n.9 (1985), has extended this categorical definition of wage workers to piece rates with one significant modification:

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

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

Instead, the ability of the "employer" to specify the work methods and to control the worker's performance is rooted in the relative assets and skills that each of the parties brings into the relationship. If the "employer" not only owns all the machinery and materials that the worker must use, but also understands them and how to use them better than the worker does, then the worker is dependent on the employer, while the reverse is not true. Where, as in the case of the plumber or mechanic, the worker owns and skillfully operates the equipment while his contractee could not, the latter is a customer (not an employer) and the former an independent contractor (not a wage worker).[75]

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

III. Current Legal Tests of the Employment Relationship: Personal Control versus Economic Dependence

Two rival tests of the employment relationship have developed over time: the more restrictive control test and the more expansive economic reality of dependence test. Both approaches have venerable progenitors. Control is rooted in pre-capitalist

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

forms of state-enforced compulsory labor and, in the course of the past two hundred years, has been adapted to fit the classical capital-labor relationship. This relationship is characterized by labor's institutionalized work-site and *personal* subordination embodied in its "attachment" to capital. The virtue of this test is its relative transparency and facilitation of bright lines. Its drawback lies in the absence of any demonstrated relevance to the way the control test is utilized. For example, there is no reason why protection against the insecurity of unemployment, or against the unilateral domination inherent in atomized individual "bargaining" vis-à-vis adhesion contracts, should be confined to workers who are closely supervised by their employers, as opposed to those with more work-place autonomy.[76]

The control test was and remains[77] an appropriate standard

76. An interesting example is the nationally successful effort by taxicab companies since the 1970s to increase profits by shedding their obligations to pay employment taxes and to bargain collectively with their employees. They have achieved this goal by creating the illusion that they have transformed their employees into daily "lessees." As such the drivers are not even accorded the status of independent contractors, but approximate the same status as consumers renting a car from a car rental agency. In the leading case, the federal appeals court managed to pervert every indicium of the employer's unilateral economic power into an indicium of self-employment. Thus, for example, the fact that the company was able to impose on the drivers a system by which it secured the amortization and profit on its invested capital before any wages were paid—by compelling them to pay the daily lease fee before they took the cabs out—was transmogrified into a relationship identical to that obtaining between a commercial landlord and a shopkeeper enabling the lessee "to produce as much income for himself as possible. . . ." Local 777, Democratic Union Organizing Comm., Seafarers Int'l Union v. NLRB, 603 F.2d 862, 878 (D.C. Cir. 1978). The court thereby neglects the fact that commercial landlords are not in, for example, the bakery business, whereas the taxicab companies have otherwise hardly changed the way they do business at all. The very imbalance between the organized drivers and the cab companies that gave rise to the imposition of this regime in the first place ironically also triggers the former's disqualification as employees. Consequently, ineligible for protection under the National Labor Relations Act, the atomized workers become powerless to halt the further deterioration of their bargaining position. Earlier the Internal Revenue Service approved this result with respect to employment taxes. Rev. Rul. 71-572, 1971-2 C.B. 347. Subsequently the Social Security Administration adopted the same position. SSA, Program Operations Manual System, § RS 02101.217A. & D (Nov. 1981).

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

77. Ironically, the law review literature is replete with assertions that "with the

for the core capital-labor relations in which the employer dominates the employee socio-technologically[78] within the process of production. That is where the capitalist firm owns, controls, understands and coordinates the use of all the means of production while the worker performs a closely supervised minute task the control test is adequate. Where the control test has become problematic is not at the core, but on the periphery.[79] The periphery encompasses a heterogeneous mass of work and employment relationships in which the classical model of oppressive capitalist control is less tangible at the point of performance.[80]

Precisely in response to the special situation of such "peripheral" workers, the economic reality of dependence test[81] was designed to expand the scope of employment, and has had that effect. Instead of being confined to the work place,[82] this test exam-

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advent of the large corporation-absentee ownership—employer control in any realistic sense almost vanished." Roscoe Steffen, "Independent Contractor and the Good Life" 2 U. Chi. L. Rev. 501, 507 (1935). In point of fact, it was only with the rise of mass production and Taylorism ("scientific management") that capital was able to break the grip which skilled craft workers at one time held on numerous production processes. *See* Harry Braverman, Labor and Monopoly Capital, (1974). By the same token, it is incorrect to characterize as "fictitious" the control which Blackstone and nineteenth century judges presumed the master invariably exercised over his servant's activities. *See, e.g.*, Fowler Harper, "The Basis of the Immunity of an Employer of an Independent Contractor" 10 Ind. L. J. 494, 497 (1935). Although social control was surely exercised vis-á-vis domestic and agricultural servants, production "masters," too, were typically better skilled and endowed with more capital than the artisans working for them, and thus, in a position to dominate them.

78. Although courts have confined the scope of the control test to this sphere, a realistic conception of such physical control implies economic domination as well in the sense that those lacking capital need an "employer." *See* Linder, *supra* note 20, at 444.

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

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

81. Its nineteenth-century English precursor, which was molded in the context of labor-protective statutes such as the truck acts, was rather a bright-line economic reality of class poverty test. *See* Linder, *supra* note 20, at 444-45.

82. In its modern version—dating back to the 1940s—the economic reality of dependence test subsumes the control test; in other words, it encompasses all workers covered by the control test, which is a sub-set of the economic reality test. Hiroshi

ines the *economic* subordination of the worker to the employing entity. The test's virtue thus consists in its realistic view of the broader scope of the class of dependent workers. Its weakness, on the other hand, derives from its inherent lack of logical rigor. By providing no plausible stopping point, the test potentially opens the way to proclaiming the existence of universal dependency in the guise of universal interdependency. Deterred as much by the consequences of formulating a rigid binary class conflict approach as by such open-endedness, even liberal courts have sought to avert this outcome and the backlash that would follow—but at the price of drawing lines that are devoid of any articulable principle.

IV. Status versus Contract

The lack of a principled position to distinguish between employers and independent contractors creates tension with attempts to create a per se rule[83] securing protection to all workers. Efforts to create a per se rule have been motivated by the well-founded apprehension that, absent such a rigid rule, some employers might succeed in manipulating the legal forms of their employment contracts so as to convince courts that the affected workers are independent contractors and thus not protected.[84] Precisely why such machinations are inconsistent with protective labor statutes was succinctly and eloquently explained by Judge Learned Hand. In drawing out and rejecting the implication of a defendant-coal mining company's argument that it "is . . . not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors," he noted in the workers compensation context that:

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

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Motomura, *Employees and Independent Contractors Under the National Labor Relations Act*, 2 Indus. Rel. L. J. 278 (1977), noted—in a somewhat different sense—that the two were not antithetical to each other.

83. For a detailed analysis of the cogent reasons supporting a per se rule as applied to one group of workers—namely, unskilled, hand-harvest migrant farmworkers—see Linder, *supra* note 20.

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

> purpose of such statutes, which are meant to protect those who are at an economic disadvantage.
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> It is true that the statute uses the word "employed," but it must be understood with reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their "hand," if any one is. . . .
>
> Such statutes are partial; they upset the freedom of contract, and for ulterior purposes put the two contesting sides at unequal advantage; they should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them.[85]

By illustrating how socio-economic dependence, specific statutory purpose and freedom of contract are interconnected, Hand was able to forcefully demonstrate how statutory protection supplanted the common law of the employment contract. But in formulating this stringently pro-worker canon of construction, Hand reproduced the dichotomy between state intervention and employment contracts, which centuries of English jurisprudence had erected and buttressed as an insurmountable barrier. Judges who adopted a socio-economically more doctrinaire approach did not fail to allude to the alleged moral consequences of this substitution. Thus, in construing workers' compensation statutes during their formative period, appellate judges in Britain and the United States[86] tended to view them in binary terms as substituting status for contract.[87] For example, an English jurist stated that the Workmen's Compensation Act of 1897:

> presupposes a position of dependence; it treats the class of workmen as being in a sense "inopes consilii," and the Legislature does for them what they cannot do for themselves: it

85. Lehigh Valley Coal Co. v. Yensavage, 218 F.547, 552-53 (2d Cir. 1914), *cert. denied*, 235 U.S. 705 (1915).

86. British and American adjudication pertaining to labor-protective legislation during this period fits the dichotomous formal-substantive paradigms elaborated by P.S. Atiyah and Robert Summers, Form and Substance in Anglo-American Law (1987).

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

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

> gives them a sort of State insurance, it being assumed that they are either not sufficiently intelligent or not sufficiently in funds to insure themselves.[88]

This rigidly dichotomized approach has, since the mid nineteenth century, generally been associated with the free-market, contractarian rejection of the argument that "to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will."[89] But its roots reach further back. It is based, first of all, on an ambiguous use of the term "status." As intended by Maine in his famous statement "that the movement of all progressive societies has hitherto been a movement from Status to Contract,"[90] the term encompassed the powers and disabilities imposed by society on individuals, without regard to their volition, because of accidents of birth, or out of a desire to protect wards of the state who were deemed incapable of protecting themselves because of age, mental infirmity or gender.[91]

The social policy underlying labor-protective statutes, which forcibly prevent the disparate degrees of bargaining power of the parties from resulting in specific kinds of unacceptable exploitation,[92] is closely related to the policies which support protection of wards (but not of differential birth rights). The crucial difference is that modern ideas of status presuppose and operate through the medium of the employment relationship: the existence and termination of status depend on the parties' volition, while its content is

88. Simpson v. Ebbw Vale Steel, Iron & Coal Co., [1905] 1 K.B. 453, 458 (C.A.).

89. Otto Kahn-Freund, Labour and the Law 14 (2d ed. 1977).

90. Henry Sumner Maine, Ancient Law 174 (1927).

91. Otto Kahn-Freund, *A Note on Status and Contract in British Labour Law*, 30 Mod. L. Rev. 635, 636 (1967).

92. The Fair Labor Standards Act, for example, "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency . . . ." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706 (1945). The enactment and enforcement of minimum wage laws thus express a societal conviction that—even absent physical coercion—certain economic agreements are unjust and hence invalid: "The community is not bound to provide what is in effect a subsidy for unconscionable employers." West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937). For a discussion of the morality of contractual relations, see Emile Durkheim, Leçons de Sociologie 235 (1950). Orthodox economists, while axiomatically critical of minimum wage laws, do concede one exception—namely, where employers have a significant degree of control over wage rates. *See* Stigler, *The Economics of Minimum Wage Legislation*, 36 Am. Econ. Rev. 358, 360 (1946). To that extent it impliedly approves "the prime purpose of the legislation . . . to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." *Brooklyn Savings Bank*, 324 U.S. at 707 n.18.

partly determined by norms out of which the parties are not permitted to contract, to the detriment of the weaker party.[93]

Courts conflated a relationship that can (and must) be voluntarily entered into and terminated, with one created without or even against the volition of the affected parties. This result occurred because nineteenth and early twentieth-century Anglo-American jurisprudence persisted in the anachronistic and atavistic tradition, codified by Blackstone, of viewing the master-servant relationship[94] as grounded in semi-feudal and mercantilist statutory compulsion and protection. With the ascendancy of the contractarian mode in the nineteenth century, judges (and lawyers) regarded both residual and nascent statutory protection of the working class as non-market obligatory norms, totally distinct from and operating outside of the context of the employment contract.[95] Unable to integrate these two dimensions of the employment relationship, status and contract, courts tended to identify the mandatory norms as enforceable on the same grounds that applied under the Statutes of Labourers in the fourteenth century—as effluences of status.[96]

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

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93. Kahn-Freund, *supra* note 91, at 640-41.

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

Justice: Come in *Edmund*, I have talk'd with your Master——.

Edmund: Not *my master*, and't please your Worship, I hope I am *my own Master*.

Justice: Well, your Employer, Mr. E——, the Clothier; will the word Employer do?

Edmund: Yes, yes, and't please your Worship, any thing but *Master*.

[Daniel Defoe], Great Law of Subordination Consider'd; or, the Insolence and Unsufferable Behaviour of Servants in England duly enquir'd into 97 (1724).

95. *See generally*, Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment*, 93 Law Q. Rev. 508, 511-12, 524-28 (1977). Kahn-Freund, *supra* note 91, at 641-42, distinguished between the English and continental legal traditions, exempting the latter from the approach analyzed in the text. Yet the Cour de cassation and the majority of labor law scholars in France rejected the notion of economic dependence or subordination, absent express legislative instruction, precisely because it made contract interpretation hinge on an alien element—namely, a party's social condition (i.e., status). *See* 2 Paul Durand, Traité de droit du travail, 224-25, 242 (1950).

96. This bifurcation is rooted in the circumstance that the common law "ignores any disequilibrium of power which results from normal social relations as distinct from abnormal personal conditions (infancy, mental disorder). It ignores the realities of social constraint and of economic power . . . ." Kahn-Freund, *supra* note 89, at 22.

> Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the "contract of employment."[97]

Consequently, where workers are unable to achieve improved working conditions and income security through direct economic action against their immediate employers on the labor market and at the work place, and must rely, instead, on class-wide political action through state legislation—the protective regimes that they do create such as minimum wages, workers compensation and unemployment compensation—will continue to bear the stigma of status precisely because they remain conditioned on and attached to the existence of an employment relationship. Thus, all those in an employment relationship will remain excluded, whether they are alleged independent contractors or lumpen proletarians.[98]

V. Mapping the Borders of the Working Class

Protecting against the vicissitudes of capitalism by the creation of juridically narrowly-defined proletarian characteristics, may have promoted the distinctive self-identity, solidarity and self-confidence of a working class that was being forged out of heterogeneous strata during the nineteenth century. It may also have encouraged the identification and alliances with the working class that have driven progressive social change in the United States since at least the advent of the New Deal. But now, at the end of the twentieth century, in spite of all the talk of "bourgeoisification" of the working class, the share of the economically active population that can have any plausible pretension to the title of entrepreneur is smaller than at any other time in history.[99] Can it still make sense to exclude the vulnerable from protective

97. *Id.* at 6.

98. The British welfare legislation of the 1940s dismantled the old three-tier system of the independent, the paupers and the insured. *See* T.H. Marshall, *The Welfare State—A Comparative Study*, in T.H. Marshall, Class, Citizenship, and Social Development, 319 (1965).

99. The attempt by William Reddy, Money and Liberty in Modern Europe, ch. 3 (1987), to replace the concepts of class and value with that of "monetary exchange asymmetry," may be misguided insofar as it blurs the distinction between labor exchanges and consumption. For example, he states "the mere difference in the relative significance of a particular commodity to each party could give the rich a certain power over the poor." *Id.* at 66. It is useful, however, in emphasizing the global exploitativeness that encompasses small contractors. *Id.* at 99, 104-05.

regimes?[100]

The difficulty in drawing a bright line between those who are dependent and those who are independent is, according to influential sociological view, a quintessentially modern one:

> In 1848 one simply knew who were the proletarians. One knew because all the criteria—the relation to the means of production, manual character of labor, productive employment, poverty, and degradation—all coincided to provide a consistent image. . . .
>
> To restate the point more abstractly: *in the middle of the nineteenth century the theoretical connotation of the concept of proletariat, defined in terms of separation from the means of production, corresponded closely to the intuitive concept of proletariat conceived in terms of manual, principally industrial, laborers.* No ambiguity had yet arisen because material conditions closely corresponded to their theoretical description.[101]

Ambiguity arose, according to this line of thought, when "proletarianization in the sense of separation from the means of production" began to diverge from the other characteristics of proletarianization.[102] This divergence was synonymous with the subsequent explosive growth of the so-called new middle classes—"variously termed salaried employees, white-collar workers, non-manual workers, *ouvriers intellectuels*, service workers, technicians."[103] More concretely, these hybrid proletarians include "secretaries and executives, nurses and corporate lawyers, teachers and policemen, computer operators and executive directors."[104]

Intriguingly,[105] when it is time to decide on cases (and livelihoods) that turn on classifying persons as employees or self-employed, the aforementioned sociological ambiguity turns out not to be pivotal. The advent of "the new middle classes"[106] has not been

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

101. Adam Przeworski, Capitalism and Social Democracy, 56, 57 (1985).

102. *Id.* at 60.

103. *Id.* at 62.

104. *Id.* at 57.

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

106. Przeworski, *supra* note 101, at 62.

confounding the juridical cartographers of class structure, although in some non-trivial sense the replication of the diverging two meanings of proletarianization continues to underlie both the perceived need and to hamper the judicial, legislative, and administrative ability to distinguish between employees and self-employed. Instead, a remarkable continuity exists between the disputed class positions in the mid-nineteenth century and in the present. Even if they were self-employed, the subjects of employee status determination litigation would resemble more the " 'traditional' or 'old' middle class" of petty bourgeois non-employing self-employed producers, than they would the new middle class of highly skilled professional wage-earners.[107] If "[t]he focal inquiry in the characterization process is . . . whether the individual is or is not, as a matter of economic fact, in business for himself,"[108] highly skilled wage-earners and even workers moderately endowed with capital have rarely constituted contested terrain.

The reason is manifest. What is new about the so-called new middle classes is that, despite being employees—"[t]hey are all proletarians, they are all separated from the means of production and compelled to sell their labor power for a wage"[109]—they lack the other indicia of proletarianization (manual labor, productive employment, poverty and degradation). Consequently their formal-legal status is not in question, nor are they the kinds of workers pre-eminently in need of state interference with market forces.[110]

In contrast, the typical grey areas of litigated disputes have primarily encompassed a considerably more pedestrian cross-section of occupational reality: (1) relatively unskilled manual providers of services (e.g., coal loader, janitor); (2) transportation and storage services (e.g., drover, horse-driver, truck driver, taxicab driver, porter, drayman, stevedore, delivery "boy"); (3) skilled and unskilled construction, excavation and repair work (e.g., digger, roofer, bricklayer); (4) homeworkers (e.g., lace-clipper, knitter, silk weaver, shoemaker, tinman); and (5) a heterogeneous group of unskilled, semi-skilled and skilled manual workers engaged in various types of labor sub-letting, sweating or piece-rate work (mining, construction, logging, sharecropping, brickmaking, fishing,

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

108. Donovan v. Tehco, 642 F.2d 141, 143 (5th Cir. 1981).

109. Przeworski, *supra* note 101, at 57.

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

shipbuilding, potter printing, earthenware manufacture, meat boning, hairdressing).[111]

The nub of the disputes in these cases can be reduced to two basic issues: (1) whether the classification in question was merely a scam perpetrated by the employer; or (2) whether the work involved was sufficiently specialized and/or skilled and thus outside the core business of the employer to qualify as independent of that entity.[112] Independence in this sense is not inconsistent with the proletarian connotations of manual productive labor combined with poverty and degradation. The fact that someone who cleans an office at night or delivers coal to a factory may not be integrated into its operation, and thus not subject to the physical control of its owners, in no way suggests that she belongs to the class of the entrepreneurial bourgeoisie, which is purported to thrive on or perish under the risks inherent in an anonymous market.

This is not to deny entirely the existence of particular self-employed whose specialization and skill not only protect them from succumbing to the worksite domination of their customers,[113] but also secure them distinctly non-proletarian remuneration. Rarely, however, have such relationships become the subject of employment-related litigation, because they seldom generate problems that fall within the universe of actionable events that traditionally have beset proletarians. But, if it is only the existence of such substantively irrelevant "counterfactual" cases that nurtures the hypothetical vision of independence that sustains litigation, then arguably the benefits of eliminating coverage disputes, thereby reducing the economic insecurities of workers and legal uncertainties of employers, exceed the cost of imposing protective coverage on a relatively small group of quasi-entrepreneurs who may not be in "urgent need" of such state interference.[114]

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111. For extensive case citations describing or at least mentioning the relevant occupations under modern protective legislation in the United States, see Annotation, *Determination of Employer-Employee Relationship in Social Security Contribution and Unemployment*, 37 A.L.R. Fed. 95 (1978) and Annotation, *Determination of "Independent Contractor" and "Employee" Status for Purposes of the Fair Labor Standards Act*, 51 A.L.R. Fed. 59 (1981).

112. Support for this claim is presented in Linder, *supra* note 20.

113. In this context only business entities are intended. Where households contract with such skilled mechanics as plumbers, the categorical framework of the employment relationship loses its applicability.

114. See T.H. Marshall, *The Welfare State and the Affluent Society*, in T.H.Marshall, Class, Citizenship, and Social Development 292 (1965). Since, on the other hand, exposure "to the risk of being reduced by circumstances to a state of destitution . . . is not exactly correlated with . . . membership of any particular social or economic class," universal coverage would also be expedient. *Id.* In the United States such a step was partially taken when the self-employed began to be incorporated into the social security old-age pension system in the 1950s. Such

VI. From Contract to Status to Universal Social Right

This historical perspective serves a dual purpose. First, it has presented the transformations which the juridical distinction between servants and independent contractors has undergone in its accommodation to radically different socio-economic and political contexts over the past six centuries. Such a study underscores the fact that the currently prevailing versions are neither new nor self-explanatory. Second, it has traced the transitions from the punitive to restrictive to expansive ends that this distinction has been designed to implement. Thus, a historical account prompts inquiry into whether the ongoing disintegration of that distinction calls for a reconsideration of the appropriateness of tying socio-economic protections to the existence of an employment relationship. In other words, rather than administering these labor-protective benefits and programs through private, profit-driven employers—whose raison d'etre is tangential if not hostile to such protections—perhaps advanced capitalist societies have accumulated sufficient wealth to enable them to confer such protections on all their members as a component of their fundamental social rights.

The most striking aspect of these various protective schemes is how varied the coverage is.[115] This characteristic clashes with their uniform purpose of conferring benefits on workers. No logic or policy appears to undergird the variations. Why, for example, should coverage be narrower under the Employers' Liability Act or the Age Discrimination Act than under the Occupational Safety and Health Act?

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

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supra-class coverage has the ancillary positive effect of preventing the security program from being relegated to the status of charitable welfare.

115. *See supra* note 17.

The question becomes: which definition? The control test is the most widespread standard for coverage in legislatures and the courts. Although some courts have advanced the economic reality of dependence test in interpreting certain statutes, it has been on the decline since the 1940s.

But the economic reality of dependence test does have a rational kernel, which Justice Douglas, in a lonely dissent in the heyday of the Warren Court, articulated in the context of an anti-trust-injunction case. Glossing the *Hearst* case,[116] Douglas stated that the Supreme Court had "pointed out that there were marginal groups who, though entrepreneurial in form, lacked the bargaining power necessary to obtain decent compensation, decent hours, and decent working conditions." Especially where the formally self-employed " 'had no established places of business; no employees . . . ; no capital investment except a small equity in a truck; no skill or special qualifications,' " both employees and independent contractors were "in the same boat."[117]

This approach recognizes that significant numbers of so-called self-employed workers are not in a position, either in terms of their "factor endowments" (namely, capital and skill) or of the supply and demand of the labor market, to bargain successfully qua individuals for the levels of compensation and the whole array of private and public security benefits that employees have obtained through either collective bargaining[118] or state intervention.[119] Douglas's approach could be utilized or codified by

116. NLRB v. Hearst Publications, 322 U.S. 111 (1944) (National Labor Relations Act intended to remedy individual worker's inequality of bargaining power even in absence of immediate technical relationship of employer and employee).

117. Los Angeles Meat & Provision Drivers Union Local 626 v. U.S., 371 U.S. 94, 109-11 (1962). Douglas was quoting from the stipulated facts in the case. Of particular relevance in the present context is his reference to Bakery and Pastry Drivers and Helpers Local 802 v. Wohl, 315 U.S. 769, 770-71 (1942), in which bakery companies, in the wake of the advent of social security and unemployment compensation taxes, compelled their driver-employees to become so-called independent peddlers. In the context of federal contracts subject to the Davis-Bacon Act, it has recently been recognized that:

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

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

118. Although efforts by workers to self-organize and to bargain collectively should reasonably constitute prima facie evidence of an employee-employer relationship, courts have nevertheless held such workers to be self-employed. *See, e.g.*, Saiki v. U. S., 306 F.2d 642, 648 n.3 (8th Cir. 1962) (skilled chick sexers—absent control—not employees for employment tax purposes).

119. As formulated by the chief architect of the modern British system of social insurance: "Many persons working on their own account are poorer and more in

creating a category of statutory or constructive employees—that of "dependent contractors." Models abound in the legal systems of other societies that have sought to approximate the social conditions of traditional employees and dependent contractors.[120]

Alternatively, irrationally invidious treatment could be eliminated by, going beyond the so-called social wage,[121] establishing a

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need of State insurance than employees. . . ." William Beveridge, Social Insurance and Allied Services ¶ 4, at 6 (1942). *See also*, *id.* ¶ 118, at 53 and ¶ 314, at 126.

120. *See, e.g.*, Ontario Labour Relations Act, § 1(1)(ga) and (gb) (1975) (defining a dependent contractor as a person erforming work or services for another on such terms and conditions that she is in a position of economic dependence and under an obligation to perform duties more closely resembling an employee relationship than that of an independent contractor, and defining "employee" to include a dependent contractor). In the Federal Republic of Germany, "arbeiterähnliche Personen" ("employee-like persons") have secured collective bargaining and vacation rights. Tarifvertragsgesetz § 12a (25 Aug. 1969, BGB1. I, 946). On the hybrid categories of "dependent contractors" and "non-controlled employees" in Sweden, see Statens Offentlga Utredningar, No. 59: Betankande med Forslag till Andrad Semesterlagstiftning 200-209 (1944); Statens Offentliga Utredningar, No. 14: Beroende Uppdragstagare (1957); Statens Offentliga Utredningar, No. 57: Sociallagstiftningen och de s.k. Beroende Uppdragstagarna (1961); Adlercreutz, "De s.k. beroende uppdragstagarna och arbetstagarbegreppets utveckling," 1956 Sociala Meddelanden 370; Folke Schmidt, The Law of Labour Relations in Sweden, ch. 3 (1962) (written by Adlercreutz); Axel Adlercreutz, Arbetstagarbegreppet 20, 78, passim (1964). This approach raises the question of the purpose of the significant aggregate public and private litigation costs consumed by this exercise in line-drawing: what countervailing social value is vindicated when a court determines that a would-be employee is really an entrepreneur? If the outcome is that the injured worker will be deprived of some income security or in-kind medical benefit, as a consequence of which she will become a public charge and/or a less productive worker, the result is too shabby to merit discussion at this late date in the development of civilization. If, however, the only issue at stake is which of the litigants' insurance account will be charged, this is a technical problem with a technical solution. The virtual abolition of common law tort by the New Zealand Accident Compensation Act 1972 merged employees and the self-employed in the category of "earners." 1 New Zealand Stat. § 521 (1972). *See also* Geoffrey Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (1979).

121. Exactly what the social wage encompasses has confused even such an astute left-wing critic as Samuel Bowles, who asserts that in the U.S. in 1979 twenty-nine per cent "of the standard of living of workers is acquired through the exercise of citizen rights rather than through the exchange of labor power for a wage." Samuel Bowles, *The Post-Keynesian Capital-Labor Stalemate*, 12 No. 5 [No. 65] Socialist Rev. 45, 52-53 (1982). *See also* John Myles, Old Age in the Welfare State (1984). In point of fact, the vast bulk of the components of the social wage is tied to the existence of an employment relationship and no entitlement to them exists as a right of mere citizenship. An examination of the results of a detailed and careful reworking of the data for 1980 indicates that even the less than one-tenth of 390 billion dollars comprising the so-called secondary consumer income cash benefits receipt of which was not so tied was largely subject to means-testing (e.g., Supplemental Security income for the aged, blind, and disabled, AFDC, and general assistance) rather than classifiable as entitlements of citizenship. *See* Robert Lampman, Social Welfare Spending, Table A.1 at 175-77 (1984). Medicaid accounted for ca. one-sixth of the corresponding health benefits. *Id.* Table A.2 at 178-79. Only in the area of in-kind food and housing and other benefits did general poor-law type of benefits (such as food stamps) account for more than one-quarter of the total bene-

universal entitlement to various benefits and protections,[122] which would be uncoupled from the employment relationship.[123] A number of Western European countries have already achieved this end with respect to health, invalidity, old-age and maternity benefits.[124] Such an approach would euthanize, for practical purposes, the independent contractor problem. At the same time, the universality of a guaranteed basic income[125] would remove the stigma of passive dependency that has always attached to the receipt of quasi-charitable welfare. Recipients would be no more stigmatized than those who currently are entitled to state funded and organized education.[126] Rather than constituting a dilution of the working class, such a system, combined with a program of community-building public works that could provide useful and therefore meaningful work for all those whom capital cannot employ,[127] would be a step towards creating a society in which social

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fits. *Id.* Table A.4 at 181. Since much of this income flow serves to support children, it is questionable whether it should be classified as part of the social wage.

122. This proposal does not pre-judge the method of financing.

123. Britain already accomplished this uncoupling in the original Old Age Pensions Act, 8 Edw. 7, c. 40 §§ 1-2 (1908), although it re-introduced the tie to an employment relationship in the National Health Insurance Act, 1 & 2 Geo. 5, c. 55, part I, § 1 (1911).

124. Within the European Community, Denmark has been a leader in this regard; the United Kingdom, the Netherlands and Italy have also taken significant steps. For an overview, see Commission of the European Communities, Comparative Tables of the Social Security Schemes in the Member States of the European Communities (13th ed. 1985). The Scandinavian countries have also incorporated the self-employed into the unemployment insurance system. *See also* Council of Europe, Comparative Tables of the Social Security System in Council of Europe member states not belonging to the European Communities (2d ed. 1985).

125. *See, e.g.*, André Gorz, Les Chemins du paradis 91-92 (1983). For a discussion from the distinctive perspective of poor-law-like welfare stigmatization, see American Enterprise Institute, Should the Federal Government Guarantee a Minimum Cash Income to All Citizens? (1967). On the conservative origins of the negative income tax, see Booker, *Lady Rhys Williams' Proposals for the Amalgamation of Direct Taxation with Social Insurance*, 56 Econ. J. 230 (1946); Lady [Juliette] Rhys-Williams, Taxation and Incentives (1953).

126. *See* Dwight McDonald, *Our Invisible Poor*, 38 The New Yorker 82, 131 (Jan. 19, 1963).

127. Although a vital truth lies in the argument that a society as wealthy as the United States needs less work rather than more, it is only a partial truth, which, when presented absolutely, effectively propagates demoralization. *See, e.g.*, Fred Block, *Rethinking the Political Economy of the Welfare State*, in Fred Block, Richard A. Cloward, Barbara Ehrenreich & Frances Fox Piven, The Mean Season 109, 134 (1987). That is to say, it may be true that a reorganization of production and a redistribution of income could sustain the current standard of living with a shorter work week. By the same token, that standard of living, particularly with regard to the quality of housing, health, child care, the environment and mass transportation, is so inadequate that the work required to raise it to acceptable levels would presumably occupy several generations. *But see* Kesselman, *Work Relief Programs in the Great Depression*, Creating Jobs: Public Employment Programs and Wage Subsidies 153, 222 nn.236 & 237 (John Palmer ed. 1978). Finally, the notion that those

and labor law would coalesce because the right to socially useful work and to adequate income and security would be emphatically linked.[128]

Finally, a guaranteed income would corrode the coercive character of the labor market. By undermining the need to sell labor power under any and all circumstances, it would make possible a qualitatively different range of choices to a society of significantly more autonomous individuals.[129] The resulting democratic restructuring of capital-labor relations would also contribute to subverting the dichotomous domains of freedom and unfreedom underlying the original Roman-law distinction between independent contractors and servants.[130]

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who have been discriminatorily shut out from income-generating work should be relegated to the role of welfare consumers in perpetuity is calculated to consolidate the existence of a divisive lumpen proletariat. This position must be distinguished from the authoritarian-restorationist lamentations embodied in Lawrence Mead, Beyond Entitlement: The Social Obligations of Citizenship (1986).

128. From the perspective of Jürgen Habermas, such a "step would be revolutionary, but not revolutionary enough." Habermas, *Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien*, in Habermas, Die Neue Unübersichtlichkeit 141, 157-62 (1985) (originally delivered as a speech before the Spanish Parliament in 1984).

129. This theme was developed by many of the contributors to The Guaranteed Income (Robert Theobald ed. 1965). *See also* Krouse & McPherson, *Capitalism, "Property-Owning Democracy," and the Welfare State*, in Democracy and the Welfare State, 79, 91 (Amy Gutmann ed. 1988). On the surprisingly small negative impact of an experimental negative income tax on the supply of labor, see Work Incentives and Income Guarantees: The New Jersey Negative Income Tax Experiment (Joseph Pechman and P. Michael Timpane ed. 1975); Burtless, *The Work Response to a Guaranteed Income: A Survey of Experimental Evidence*, in Lessons from the Income Maintenance Experiments 22, Table 2, at 26 (Alice Munnell ed. 1986).

130. On this distinction between *locatio conductio operis* and *locatio conductio operarum*, see 2 Francis de Zulueta, The Institutes of Gaius: Commentary 170-72 (1953); Francesco De Robertis, Lavoro e lavoratori nel mundo romano (1963); Linder *supra* note 20, at 441-42.