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ARE "INDEPENDENT CONTRACTORS" REALLY INDEPENDENT?

JOSEPH M. JACOBS

"When I use a word," Humpty Dumpty said in a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make the words mean so many different things."

"The question is," said Humpty Dumpty, "which is the master—that's all."

—LEWIS CARROLL, Through the Looking Glass.

In recent years the concept of independent contractorship has been invoked in an infinite variety of fact situations under many federal and state statutes and in connection with innumerable non-statutory causes of action. Characteristically, such situations have dealt with public and private rights and duties arising out of the relationships between employers and employees or between either or both of them and third parties. In most instances, there have been concerted efforts by affected employers to exclude any person classifiable as an independent contractor from the operation of the particular law involved in the case. The independent contractor has thus become a kind of legal orphan in the field of modern labor law. This problem of the status of the independent contractor under modern social and labor legislation is no mere matter of abstract speculation. Even a cursory reference to current administrative and judicial decisions reveals that the question of "inclusion" or "exclusion" affects hundreds of thousands of persons performing services in many different industries.

The complexity of the problem is seen in better perspective when it is realized that, currently, there are no less than seventy-five federal

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and state statutes under which it is primarily necessary to ascertain whether an affected person is an employee or an independent contractor. The list of such federal laws and typical state statutes dealing with many varieties of social and labor problems is set forth in the footnote.\(^1\)

\(^1\) Federal Statutes


Illinois Statutes

Definitions of “Employee” can also be found: Ill. Rev. Stat. (1951), c. 24, § 1009; c. 24 1/2, § 153; c. 127, § 217; c. 144, § 83.
Maximum Hours Act: Ill. Rev. Stat. (1951), c. 48:
Limitations on hours of labor of females, § 5;
Hours of work, Child Labor Laws, § 31.3.
Minimum wage standards for women and minors, §§ 198.1–216(d).
Employment Offices and Agencies, §§ 172(a)–(c);
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BASIS FOR EXCLUSION OF INDEPENDENT CONTRACTORS

As above noted, it has become customary to exclude independent contractors from the operation of these statutes. This practice of exclusion which has now become universal is apparently premised on the assumption that an independent contractor plays an entrepreneurial role in our economic society and that he must be kept in a separate category beyond the reach of federal and state regulations affecting the employer-employee relationship. Even the socio-legal architects of the New Deal accepted this principle and refused to assimilate the independent contractor to the employee as a person to whom the protective provisions of the New Deal legislation should apply. This universal exclusionary practice has not been criticized or contested by any recognized legal or economic authority. There is obvious agreement that in any context, federal and state laws applicable to employees should not be applicable to self-employed entrepreneurs or similarly

Public Employment Offices and Agencies, §§ 173–186;
Private Employment Agencies, § 197(a)–(c).
Not-For-Profit Corporation Laws: Ill. Rev. Stat. (1951), c. 32:
Corporations not for pecuniary profit, § 163(a)–(a100);
Requesting employment of convicts and disposition of their products, §§ 74–102;
Convict labor on public roads, §§ 103–104.

Other States

For compilation of statutory enactments concerning labor relations, conciliation and mediation, and arbitration, see Prentice-Hall, Labor Service, Vol. 3. For example, see references therein to various state acts affecting employer-employee relations not hereinabove designated, particularly, various state labor relations acts. For similar compilations also see other loose leaf labor publications, such as, CCH Labor Law Reporter and Bureau of National Affairs Labor Law Reporter.
classified individuals who earn their livelihood as independent businessmen of one kind or another. The latter are clearly outside the societal groups to which these federal and state enactments were intended to be applied.\(^\text{2}\)

Of course, in effectuating these exclusions, there has been the widespread assumption that an independent contractor is clearly identifiable and that his status in our jurisprudence is readily distinguishable from that of an employee. Thus, the Committee on Education and Labor of the House of Representatives in submitting its Report on H.R. 3020, Labor-Management Relations Act (1947), could be quite positive that

An ‘employee’ according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone . . . means someone who works for another for hire. . . . In the law, there always has been a difference, and a big difference, between ‘employees’ and ‘independent contractors.’ ‘Employees’ work for wages or salary under direct supervision. ‘Independent contractors’ undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference of what they pay for goods, materials, and labor and what they receive for the end results, that is, upon profits.\(^\text{3}\)

Accordingly, the House proposed the provision later included in Section 2 (3) of the Labor-Management Relations Act, as amended, that “The term employee shall include any employee . . . but shall not include any individual having the status of an independent contractor.”\(^\text{4}\) Subsequently, the House Conference Committee reaffirmed this point of view.\(^\text{5}\)

The amendment as proposed in the House version was ultimately adopted. Significantly, Congress did not enact any legislative definition of the term “employee” or “independent contractor.”

The same terms in other federal statutes were also left undefined. In the Fair Labor Standards Act, Congress described an employee as any individual employed by an employer,\(^\text{6}\) nor did the Social Security


\(^{3}\text{NLRB, 1 Legislative History of Labor-Management Relations Act of 1947, at 309 (1948).}\)

\(^{4}\text{Ibid., at 35.}\)

\(^{5}\text{Ibid., at 536.}\)

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Act define any distinction between an employee and an independent contractor.\(^7\)

Unfortunately, the problem of identifying the independent contractor in our industrial society is not a simple mechanical problem. The congressional assumption that there is always available some "simple, uniform and easily applicable test . . . to determine whether persons doing work for others fall in one class or the other"\(^8\) is simply not true.

CURRENT CHAOS IN CASE LAW

There are literally thousands of decisions issued by American and English courts revealing an infinite number of varying and inconsistent applications of the tests designed to determine whether or not an individual is an employee. There have been few legislative concepts which have been applied more varyingly or inconsistently. As Justice Rutledge stated,

Few problems in the law have given greater variety of application and conflict in result than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independently entrepreneurial dealing . . . It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction depending upon the state or jurisdiction where the determination is made, and that within a single jurisdiction a per-

\(^7\) 49 Stat. (1935), as amended, 42 U.S.C.A. § 301 (1952). The congressional state of mind which motivated the amendment in the Taft-Hartley Act also subsequently motivated amendment to the Social Security Act by the so-called Gearhart Resolution, 80th Cong. (Pub. L. No. 642, June 14, 1948), 62 Stat. 438. That Resolution designed to preserve the “status quo,” provided that the term “employee” in the Social Security Act should not include (1) any individual who under the usual common law rules applicable in determining the employer-employee relationship has the status of an independent contractor, and (2) any individual (except an officer of a corporation) who is an employee under such common law rules.

\(^8\) NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In various state Unemployment Compensation Acts statutory definitions commonly known as “ABC” tests have been inserted. These tests were designed to establish when services performed are deemed to be employment. In general, services are deemed to be employment unless they are free from control or direction, are performed outside the “employer’s” usual course of business, and are performed by an individual customarily engaged in an independently established trade, occupation or business. However, there has been a marked tendency to subordinate the independent calling test to the control test. Many courts have failed to fully apply all of the statutory tests. In fact, many courts have regarded the three-test provision in a perfunctory manner: e.g., Singer Sewing Machine Co. v. Industrial Commission, 104 Utah 175, 134 P. 2d 479 (1943); Moorman Mfg. Co. v. Industrial Commission, 241 Wis. 200, 5 N.W. 2d 743 (1942). See cases cited, Teple, The Employer-Employee Relationship, 10 Ohio St. L. J. 153 (1949).
son who for instance, is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for the purposes of particular legislation, such as unemployment compensation. See, e.g., *Globe Grain & Milling Co. v. Industrial Commission*, 98 Utah 36. In short, the assumed simplicity and uniformity, resulting from application of 'common-law standards,' does not exist.9

In view of the utterly indescribable confusion in this field of the law, the doctrinaire assertions of the congressional lawmakers10 appear to be inexplicable. Many competent legal scholars have graphically dealt with this problem. Many law review articles have fully considered the complete failure of the various "common law" tests to establish any degree of uniformity in the decided cases.11

This point has been so well established that the citation of individual cases hardly seems necessary. In the federal cases many groups performing services of one kind or another have been classified as employees and independent contractors despite the similarity of their respective working patterns in the contradictory cases. This has been true of miners, lumbermen, trappers, fishermen, newsboys, laundry drivers, bakery drivers, milkwagon drivers, salesmen, filling station operators, truck drivers, taxicab drivers, entertainers and many others. In the state cases the contradictory rulings with reference to identical work patterns are far more numerous, simply because there are far more cases. Even the Fuller Brush man has been variously classified as an employee and an independent contractor. This is one of the more incredible instances in view of the minute regulation to which these salesmen are subjected in the various subdivided regions throughout the country.

**ANALYSIS OF CURRENT TESTS: RIGHT OF CONTROL**

In the *Restatement of The Law of Agency*, published in 1933, an attempt was made to codify the definitive elements of employment in connection with the determination of liability in tort actions. Significantly, however, the control test was given primary consideration,

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9 322 U.S. 111, 120 (1944).


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although nine separate factors were listed as pertinent elements.\textsuperscript{12} Subsequent experience showed that the approach provided by the \textit{Restatement} was misguided. The multiplicity of criteria provided merely afforded an opportunity to rationalize judicial preconceptions in the fact situations presented for adjudication.

Court and agency decisions constitute a "patchwork quilt" of conflicting and confusing conclusions. These conclusions, reached in a myriad of decisions, have not resulted from the application of a single "common law" control test. The \textit{Restatement} lists nine separate elements, which, theoretically, were designed to comprise an amalgam of criteria on which uniform determinations could be predicated. In practice, however, judges, boards and trial examiners, with a fine unction, have stressed each of those elements, separately, in different decisions, at different times, in connection with practically identical fact patterns, yielding utterly irreconcilable adjudications. Although most of the decisions pay lip service to the control test as though it were a sacred incantation, the science of legal semantics has proven sufficiently resourceful to provide the necessary "formulae of evasion." An illustrative situation is provided in \textit{Matter of Steinberg and Co.}, 78 N.L.R.B. 211 (1948), where the Board found that fur trappers were employees within the meaning of the amended Act. Subsequently, however, enforcement was denied in a decision which reversed the Board's findings.\textsuperscript{13}

The Board found that the fur trappers subleased land on which they conducted trapping operations during annual seasons lasting approximately seventy-five days. The land was leased by the Company under

\textsuperscript{12} § 220. The nine elements were as follows:

(1) the extent of control which, by the agreement, the master may exercise over the details of the work;
(2) whether or not the one employed is engaged in a distinct occupation or business;
(3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(4) the skill required in the particular occupation;
(5) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
(6) the length of time for which the person is employed;
(7) the method of payment, whether by the time or by the job;
(8) whether or not the work is a part of the regular business of the employer; and
(9) whether or not the parties believe they are creating the relationship of master and servant.

\textsuperscript{13} NLRB v. Steinberg, 182 F. 2d 850 (C.A. 5th, 1950).
contracts which required the trappers to devote their time completely and exclusively to the Company's work during the season. They were prohibited from leaving the premises at any time during the season, without Company permission. At an earlier time the Company frankly acknowledged their status as employees. Their work was steady during successive seasons and their tenure was regarded as permanent. The Company retained title to all muskrats caught by them. The amount of the trappers' earnings was controlled by the Company's exclusive determination of fur grades. The Company retained absolute power of checking, inspection and final termination of services. The Board specifically referred to the "ordinary tests of the law of agency" which it acknowledged were made applicable by the House Committee Report heretofore discussed. However, after referring to the "familiar right-of-control test," the Board invoked the omnibus theory of the Restatement. All pertinent factors, however, were subordinated to the principal finding that the work performed by the trappers constituted an integral portion of the operations carried on by the Company. Among the various countervailing factors which the Board found "relatively unimportant," the Board noted that earnings depended upon the number of furs obtained by the trappers; that the trappers were assisted by wives and children; that no taxes, such as Social Security or Unemployment Insurance, were collected; and that the trappers, like many skilled employees, furnished their own tools of the trade, such as boats and equipment. Although the Board stressed the fact that the trappers engaged in activities which constituted an integral part of the Company's business, it has utterly failed to invoke this test in other cases where it has found that individuals performing services were independent contractors.

The Court of Appeals found that the above incidents did not constitute an employer-employee relationship. Derogating the conclusion that the trappers were engaged in an integral part of the Company's business, the Court made its determination on the basis of its conclusion that there was no control exercised over the manner of rendition of service. The Court admitted that there was some control, but rationalized it thuswise:

14 "The character of the relationship is to be appraised by the presence or absence of no single evidentiary factor but by an over-all view." 78 N.L.R.B. 211, 221 (1948).
15 Ibid., at 222. In the omnibus approach, performance of "integrated" work is treated as one of the indicia of the "right-of-control" principle.
16 See discussion concerning truck drivers, in later paragraphs.
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An employer has a right to exercise such control over an independent contractor as is necessary to secure the performance of the contract according to its terms in order to accomplish the results contemplated by the parties in making the contract without thereby creating such contractor an employee.17

Thus, the Court emphasized the absence of supervisory control over the conduct of daily activities, completely ignoring the crucial fact that such supervision was rendered unnecessary because of the heritage and experience of the trappers. On the other hand, the Court completely derogated the more effective fundamental control exercised by the Company in such a manner as to destroy any vestige of independent entrepreneurial enterprise. This kind of actual control was literally brushed off as an example of the kind of control as to the end result rather than an exercise of control over the detail of the work. Moreover, the Court ignored the Board's basic (although not expressed) conclusion that the trappers were actually carrying on the functional operations of the Company's business, rather than any separate independent business owned by them. It is submitted that it is legal mumbo-jumbo of this kind which has created chaos in this field of law and which has resulted too frequently in judicial evasion of congressional purpose.

The inadequacy of the control test is particularly noticeable in cases such as the Steinberg case (supra) where an individual employee is highly skilled and because of his training and experience requires no supervision. Indeed, there are innumerable work situations where the nature of the job makes the exercise of control over the manner of rendition inexpedient or unnecessary, or impossible. Typical examples are to be found in various ambulatory jobs, such as truck hauling, selling and vending, etc. In the motor carrier cases, which will be discussed in later paragraphs, the skill and the very nature of the drivers' work permits an absence of direct supervision over the manner of rendition of their service. On the other hand, the regulations of the Interstate Commerce Commission and the fact that their services constitute the very essence of the company's operations require a fundamental degree of control which utterly negates any "independent" aspect of their relationship to the company. To ignore the latter and to emphasize the former characteristic, as the National Labor Relations Board and the courts have frequently done, constitutes a flagrant perversion of characterization. It should be universally agreed that mere absence of control in such instances does not mean that such so-called "free

17 182 F. 2d 850, 856 (C.A. 5th, 1950).
wheeling” activities constitute independent contractorship. In a true common law test (to be subsequently considered), it will be recognized that where the very nature of the relationship negates an independent contractorship, a false characterization by mere partisan nomenclature can be eliminated in the process of adjudication.

THE PROBLEM OF EVASION

In fact it must be admitted that the control test encourages efforts to defeat the obvious purposes of such “social duty” statutes as the National Labor Relations Act, and other statutes enacted during the New Deal period. After the passage of New Deal legislation, some employers sought to escape the statutory duties imposed upon employers by setting up artificial independent contractorship arrangements. A pertinent example has been noted in the Steinberg fur trappers case where, prior to 1934, the Company recognized and dealt with the trappers as employees. It would appear as more than mere coincidence that after the “100 days” of New Deal legislative action, the Company suddenly “discontinued the use of employment contracts and adopted the lease or sublease forms” under which it later contended that the trappers were “independent” businessmen. The benefits to such employers were manifold. By such conversion employers sought to obviate any statutory obligations under the National Labor Relations Act, under the Social Security, Unemployment Compensation, and Fair Labor Standards Acts, and, in addition, many of the other federal and state laws enumerated above. Indeed, in a nationally advertised and distributed tax service, the publishers issued a special

18 In United States v. Vogue, Inc., 145 F. 2d 609, 611 (C.A. 4th, 1944), the Court, in finding that seamstresses were employees within the meaning of the Social Security Act, observed:

“The law of independent contractors has an important place in the law, but surely it was never intended to apply to humble employees of this sort so completely subject to the domination and control of the employer. To allow an employer to escape the consequences or to deny the employee benefits of the employer-employee relationship because of agreement that payment is to be made on the piece work basis or because the employee exercises the judgment with respect to the work that is expected of any skilled worker is to lose the substance of the relationship in attempting to apply certain rule of thumb distinctions in the law of independent contractors. The fact that one having an independent calling, such as cook, gardener or chauffeur, exercises a judgment as to the work done free of detailed direction by his employer does not make him an independent contractor. . . .” (Emphasis supplied.) See also Rest., Agency § 220, Comment e on subsection (2) (1933).


20 78 N.L.R.B. 211, 223 (1948).

21 Authorities cited note 1 supra.
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brochure to their clients. In it, suggestions were made concerning considerable tax savings to be effectuated by subtracting sufficient control in given situations, thereby converting an employment relationship into an independent contractorship. Illustrations were provided. Even if cases of deliberate manipulation may be relatively infrequent, there unquestionably are innumerable examples of "evasion by nomenclature." Such instances, made possible by mechanical application of "control" criteria, are manifestly unfair to workers who are thereby deprived of various statutory benefits which they were scheduled to enjoy. Obviously, such situations are contrary to public policy.

INCONSISTENCIES IN NLRB CRITERIA

We have earlier noted that there has been wide-spread inconsistency in the application of various criteria in the administrative decisions. In Matter of Nu-Car Carriers, Inc., the Board found that owner-operators were compelled to purchase a tractor under a conditional sales agreement, at the same time entering into a lease agreement with the company under which the tractor would be used with a trailer supplied by the employer. It was found that all essential controls were in the hands of the employer. The Board noted the circumstances which showed that the employer reserved control over the work of the drivers, and exercised supervision by such means as the use of patrol cars. Significantly, however, the Board emphasized the conclusion that the work performed was inherently the work of an employee. In fact, the Board actually invoked a true common law test of employment, when it said:

The transportation of new cars by trailer-trucks constitutes the sole business of the Respondent and the maintenance of that traffic requires the employment in one form or another of qualified drivers. To accept the Respondent's contention that these operators are engaged in individual business enterprises would require us to consider the Respondent to operate in a manner analogous

22 For an excellent analysis of this problem of statutory evasion, in the trucking industry, see "Statement of David Previant and Warren Hall, attorneys, International Brotherhood of Teamsters, etc.," Hearings before the Committee on Labor and Public Welfare, United States Senate, on proposed provisions of the Labor Management Relations Act of 1947, Part 3, pp. 1686-1692 (1953); e.g., "So, born out of the desire of some employers to evade and frustrate national policy, the use of so-called independent contractors grew and flourished in those industries where they had never existed before. The highly competitive trucking industry, and those industries which distributed their products by trucks, were particularly plagued by this development." Ibid., at 1686.

to a holding company. We do not believe the Respondent to be so divorced from the actual performance of its business.\textsuperscript{24}

The Board has frequently held that where persons are not pursuing a separate and independent calling, and where the work they do is an integral part of the company's business, the relationship cannot be classified as one of independent contractorship.\textsuperscript{25}

And yet, in subsequent decisions where the Board determined that owner-drivers were independent contractors, the fundamental criterion emphasized in the \textit{Nu-Car} case, above quoted, was completely ignored. In \textit{Matter of Oklahoma Trailer Convoy, Inc.},\textsuperscript{26} and \textit{Matter of Malone Freight Lines, Inc.},\textsuperscript{27} the Board described the elements of the relationship on the basis of which its determination was made. Although it pointed to the wide discretion exercised by the drivers in the performance of their driving activities, it must be noted that, essentially, the principal point of fact by which it distinguished its holdings in the latter cases from \textit{Nu-Car}, was its finding that in \textit{Oklahoma} and \textit{Malone} there was absolute and bona fide ownership of the tractors by the drivers! However, in all of these cases, the essential business operations of the respective companies were being performed by the drivers. In no case were the drivers pursuing an independent calling. In all cases, they were required to devote their full time to performing services which certainly constituted the very essence of the company's business. (This is also largely true of the fact situation in \textit{Greyvan Lines, Inc. v. Harrison}.\textsuperscript{28}) Although innumerable facts concerning the work of the drivers were discussed and evaluated in the above decisions, the above discussion deals with those phases of the cases which the Board should have considered decisive—at least as decisive as it did in its \textit{Nu-Car} decision. The Board reliance on ownership as the vital distinguishing factor is even in derogation of the control test. There are many rulings which sustain the proposition that ownership of

\textsuperscript{24} 25 L.R.R.M. 1288, 1289, 88 N.L.R.B. 75, 76 (1950).


\textsuperscript{26} 30 L.R.R.M. 1201, 99 N.L.R.B. 1019 (1952).

\textsuperscript{27} 32 L.R.R.M. 1622, 106 N.L.R.B. No. 176 (decided September 18, 1953).

\textsuperscript{28} 156 F. 2d 412 (C.A. 7th, 1946), aff'd sub nom. United States v. Silk, 331 U.S. 704 (1947).
tools or vehicles does not convert an employee into an independent contractor where the employer has reserved the right of control. In this connection, the comment by Previant and Hall is pertinent.

**HORSE POWER V. HORSEPOWER**

In the decisions where the Board has stressed “bona fide” ownership of vehicles as a basis for an independent contractorship finding, it has ignored true common law criteria. Even more, it has ignored the leading case of *Singer Mfg. Co. v. Rahn*. In that case, the Supreme Court held a sewing machine salesman to be an employee even though he received no salary and was not actually supervised, although, under his contract, he agreed to accept “instructions” and to devote his full time to his job. He was required to furnish his own horse and harness and to repair the wagon furnished by the company. The salesman, who owned and supplied the one-horse power locomotion, was designated as an employee. Generically speaking, the only difference between the *Malone* and *Singer* fact situations is in the amount of the horsepower locomotion owned and supplied by the employee. The legal patterns are identical. If the ownership of one-horsepower locomotion does not convert an employee into an independent contractor, why should

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29 E.g., Pittsburg Valve Foundry v. Gallagher, 32 F. 2d 436 (C.A. 6th, 1929); Vaughn Bros., 28 L.R.R.M. 1052, 94 N.L.R.B. 382 (1951); A. E. Blacklidge, 26 L.R.R.M. 1478, 91 N.L.R.B. 222 (1950); Pehastin Lumber & Box Co., 26 L.R.R.M. 1381, 90 N.L.R.B. No. 226 (1950). Also note the finding in the Steinberg trappers case, where the Board said that the fact that “the trappers like many skilled employees who furnish the tools of their trade, supply their own traps and equipment, does not prevent their acquiring an employee status.” 78 N.L.R.B. 211, 224 (1948).

30 “In all these delivery situations, both over-the-road and local, the actual transportation service, which is the primary and basic liability of the employer, is accomplished by former employees or those who have replaced them. The only real change in the relationship has been the transfer of the ownership of the vehicle from the employer to the employee; and in some cases there has been no real transfer of ownership but a purported one, achieved through lease, rental or other colorable transactions.

“The trucks involved still bear the name and distinctive markings of the employer; the employees still wear the uniforms required by the employer; the advertising, public-relations, solicitation of customers and good-will programs, are still those of the employer. Insofar as the public is concerned, it is still dealing with the employer, not with a little-business man or independent contractor.

“The owner-driver is still, for all practical purposes, an employee. He is bound to the employer, by lease or contract, to serve such employer only and no other. He is subject to the employer’s direction at all times. He holds his employment solely at the whim of the employer. He is not independent in any sense of the term. He cannot carry on his own business nor hold himself out to the public as an independent, small-business man. All that actually happened is that he differs from other employees in only one aspect—he provides his own tools of the trade just as other skilled craftsmen do.” Hearings, Taft-Hartley Revisions, op. cit. supra note 22, at 1688.

31 132 U.S. 518 (1889).
ownership of 119 or 169 horsepower do so? This is one instance in which social progress requires the application of "horse and buggy" principles.

**ECONOMIC CONSEQUENCES OF EXCLUSIONARY POLICY**

In cases like *Malone*, there is no mere abstract legal principle at stake. Economic tragedy stalks in the wake of the Board decisions. In that case, one hundred twenty-seven employees engaged in concerted activities for the purposes of collective bargaining and self-organization on the assumption that their right to do so was vouchsafed to them by law. When they went on strike to compel the company to comply with what they understood to be its statutory obligations, they were all discharged summarily. As a result of the Board action their charges were dismissed and they were left without remedy or forum in which to seek redress. If the Board's decision stands, they stand helpless, without recourse. Indeed, if they were to continue to resort to "self-help" and continue their collective self-organizational activities, they might well be confronted with further litigation, or even criminal prosecution under the Sherman Anti-Trust Act. Or else, they might experience the fate which recently befell the Teamsters Union in *Matter of Hoosier Petroleum Company*. In that case the Union engaged in a strike to compel recognition. The Company contended that the drivers were actually employed by one Floyd, who owned seven tractors leased by the Company. The Board trial examiner conducted a hearing and found that, actually, the Company was the real employer and that Floyd acted as a foreman. The Board reversed the trial examiner, finding that Floyd was an independent contractor and therefore, the real employer. The Board, thereupon, ruled that the Union picketing of the Company's place of business constituted a secondary boycott, in violation of Section 8(b)(4)(A) of the Act. By picketing the premises of the Company, designated (for the first time, in its decision) as a "neutral," the Board ruled that the Union was encouraging and

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82 The average 2 ton truck develops 185 brake horsepower which is equivalent to 119 regular horsepower. An average tractor-trailer develops 219 brake horsepower which is equivalent to 165 horsepower.


inducing the employees of said “neutral” Company to engage in a strike or concerted refusal in the course of their employment to perform services or to use materials, with the object of forcing or requiring the “neutral” Company to cease doing business with Floyd. Under the Taft-Hartley Act, the employees are not only prohibited from further picketing the premises of the Company—they are also subject to a suit for damages in a federal court under Section 303(b) of the Act!

The Malone decision is hardly defensible by any theory of independent contractorship—whether the control, the omnibus Restatement, the integrated function, the independent calling, or the economic reality (statutory purpose) test. As hereinabove noted the Board has, in many previous cases, held in favor of “employee” status despite the circumstances found in the Malone fact situation. Even as to the ownership of the tractors it could not be said that there was a substantial capital investment by the alleged entrepreneur under circumstances which afforded possibility of potential profit, not merely from service, but from the investment in the equipment. In this connection, it was quite obvious that use of the equipment was strictly controlled by the Company in innumerable ways. The purchase of a tractor, although an obviously expensive “tool,” merely afforded the driver an opportunity to earn such money for services rendered as the Company permitted. The driver could not use his own tractor to haul merchandise for any higher bidder. He could not even delegate his work to another person. The trial examiner conceded many elements of control and restrictions on the activities of the drivers, including the right to direct the driver to haul a load and the right to discharge him at will, regardless of his “contract” or “business investment.” Of course, he completely ignored the Nu-Car theory, certainly applicable here, that the drivers did not pursue an independent calling because they were engaged in a continuous service operation in the exclusive service of the Company, carrying on the functions which constituted the very essence of the employer’s business.

IMPACT AND ANALYSIS OF HOUSE COMMITTEE REPORT

Much of the current confusion in this phase of the law can be traced to the House Committee Report which charged that the National Labor Relations Board, under the Wagner Act, had gone far afield in extending the coverage of the Act to groups which Congress had never
intended to cover. In pinpointing its charge, the Committee stated that in the *Hearst* case, "the Board expanded the definition of the term 'employee' beyond anything that it had ever included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board." 

This congressional pronouncement has certainly created a "climate of opinion" in which the Board and many courts have been prompted to rationalize their adjudications in terms of the mythical standards enunciated in the Congressional Report. Thus, in the illustrative *Steinberg* case, the Board, in 1948, acknowledged that the new legislative history required that a "conventional meaning" be given to the definition of "employee," and that "ordinary tests" be used. The Board said, "Apparently the test thus contemplated is the familiar 'right-of-control test' which the courts apply in a variety of situations to differentiate between an employee and an independent contractor." As noted in earlier paragraphs, the Board, applying the "required" tests, held that the trappers were employees of the partnership company. In our earlier discussion we observed that the Board stressed its conclusion that the work performed by the trappers constituted an integral aspect of the company's operations. Although the Board was strongly motivated by this finding, its ultimate rationalization was delivered in terms of the "right-of-control" test. In other words, under the omnibus theory of the *Restatement*, this jurisdictional finding constituted one of the nine indicia of the overall "right-of-control" theory. The Board has employed this technique in other cases where it has found an employment relationship. Actually, as we shall see in subsequent pages, it was not necessary. It may well be that the Board's obvious belief that it must pay lip service to the "right-of-control" test has prevented its invocation of the "independent calling" or "integrated function" test in certain of the cases hereinbefore noted. At any rate, it is to be observed that the Committee Report does not specify what it means by conventional tests or ordinary meanings.

86 "It must be presumed that when Congress passed the Labor Act, it intended words to have the meanings that they had when Congress passed the Act, not new meanings that, nine years later, the Labor Board might think up." NLRB, 1 Legislative History of Labor-Management Relations Act of 1947, at 309 (1948).

87 Ibid.

88 78 N.L.R.B. 211, 221 (1948).


40 See previous discussion of Oklahoma and Malone cases in text above notes 25 and 26 supra.
However, in evaluating the Committee Report as legislative history, it is pertinent to ascertain the accuracy of factual allegations on the basis of which the legislative command is predicated. In this connection, sober evaluation on the basis "of the record" yields the irrefutable conclusion that the Committee accusation was unfounded invective.

In the Board's original decision in the Hearst case, it actually emphasized the degree of control exercised by the employer over the manner in which the newsboy employees performed their duties. The Board made specific findings of fact to support its conclusion. Thus, it was found that the publishers actively supervised the selling activities of the newsboys in many details such as calling, holding and displaying the newspaper, and the selling spots within allotted territory; that the boys were fired, transferred and laid off as disciplinary measures. Many circumstances found to exist demonstrated that the newsboys were not free agents in the performance of their continuing service. The Board specifically cited its earliest decision on this subject, with reference to which it noted:

In cases where the status of an individual was challenged, we have indicated that the statutory definition of the term 'employee' embraces all employees in the conventional as well as legal sense, except those by express provision excluded, and that the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act.

The Board's definition of "employee" in its early Hearst decision, therefore, is obviously not an expansion of the definition of the term "beyond anything that it had ever included before" as charged by the House Committee. In fact, the Board itself, in 1938, and again in 1941, invoked the very limitation which the House Committee demanded in its Report. In view of the record evidence establishing the elements of control over the details of service, the newsboys were classified as employees on the basis of the most rigid of "right-of-control" test standards. In fact, applying these same standards, the Board, between 1935 and 1947, declared in many cases, that would-be employees were ex-

41 Stockholders Publishing Co., 28 N.L.R.B. 1006 (1941).
42 "On the basis of the foregoing, we are of the opinion that the companies have the right to exercise, and do exercise such control and direction, over the manner and means in which the newsboys perform their selling activities as establishes the relationship of employer and employee for the purposes of the Act." Ibid., at 1023.
43 Seattle Post-Intelligencer, 9 N.L.R.B. 1262 (1938).
cluded as independent contractors. In the *Houston Chronicle* case, decided on January 7, 1941, two days before the *Stockholders* case, the Board held that newsboys were independent contractors because the company exercised no supervision of any kind over their activities on the street with respect to the manner and methods used in news vending.

On the other hand, the Board in its early cases, ruled in favor of employee status on the basis of the same standards which it applied in the *Stockholders* case.

It is quite clear that the Board's ruling in the *Stockholders* case was not "most far reaching" as stated in the Committee Report, and that it did not import any "new meanings" which Congress did not have in mind or which the Board thought up nine years after the Act was passed. In short, it is here stated, without qualification, that there is no scintilla of accuracy in the Committee's characterization of the Board's decision in the *Stockholders* case.

Moreover, when the Supreme Court affirmed the Board in *NLRB v. Hearst,* the Court's decision did not grant any administrative "carte blanche" permitting an extension of Board jurisdiction to groups of persons to which Congress never intended the Act to apply.

The House Committee's condemnation was based upon the assumption that the "economic reality" test invoked by the Supreme Court constituted a broad, sweeping generalization designed to herd large groups of individuals into the jurisdiction of the National Labor Relations Board, contrary to allegedly obvious congressional intent. Actually, the assumption is as far fetched as it is invidious. In its decision, issued in 1944, the Court stated:

It cannot be taken . . . that the purpose was to include all other persons who may perform service for another or was to ignore entirely legal classifications made for other purposes. Congress had in mind the narrow technical legal relation of 'master and servant.' The question comes down to, therefore,


46 28 N.L.R.B. 1043 (1941).

47 28 N.L.R.B. 1006 (1941).

48 E.g., South Bend Fish Corp., 38 N.L.R.B. 1176 (1942); Blount, 37 N.L.R.B. 662 (1941); Yasek, 37 N.L.R.B. 156 (1941); Reichelt, 21 N.L.R.B. 262 (1940); Park Floral Co., 19 N.L.R.B. 403 (1940); Sun Life Ins. Co., 15 N.L.R.B. 817 (1939); Interstate Granite Corp., 11 N.L.R.B. 1046 (1939).

49 322 U.S. 111 (1944).
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how much was included in the intermediate region between what is clearly and unequivocally 'employment,' by any test, and what is clearly an entrepreneurial enterprise and not employment.\textsuperscript{50}

Three years later, after the House Committee issued its Report on April 11, 1947, and after the passage of the Labor-Management Relations Act on June 6, 1947, the Supreme Court reiterated its position, thereby, in effect, rejecting the House Committee's characterization of its \textit{Hearst} decision.\textsuperscript{51} Once again the Court specifically stated that there were limitations to be recognized in determining the employer-employee relationship. As though it were administering a rebuke to the House Committee, the Court said:

Of course this does not leave Courts free to determine the employer-employee relationship without regard to the provisions of the Act. The taxpayer must be an 'employer' and the man who receives wages an 'employee.' There is no indication that Congress intended to change normal business relationships through which one business organization obtained services of another to perform a portion of production or distribution.\textsuperscript{52}

The point here made is that the fundamental guide post to be used in any administrative or judicial determination is the jurisdictional determination as to whether the individuals involved in the context of the existing relationship affected are within the purview of a legislative intendment. If the people involved, as a matter of economic reality, belong to a group in our society to whom a congressional act is designed to apply, or if the relationship between the parties and the factual developments constitute objectives at which the provisions of such act are aimed, then it should be universally recognized that such circumstances may not be ignored in the administrative or judicial process.

\textsuperscript{50} Ibid., at 124.

\textsuperscript{51} United States v. Silk, 331 U.S. 704, 713, 714 (1947), where the Court said that the application of the Social Security legislation should follow the same rule that it applied to the National Labor Relations Act in the \textit{Hearst} case:

"We pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.' The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. The aim of the Act was to remedy the inequality of bargaining power in controversies over wages, hours, and working conditions." Ibid., at 713.

\textsuperscript{52} Ibid., at 714.
It is to be emphasized that the "economic reality" test as circumscribed by the Supreme Court itself is not actually negated by the House Committee Report. It must be conceded that what the House Committee excoriated was its own erroneous characterization of what the Supreme Court said. Thus viewed, it is submitted that the Board and the courts need not interpret the House Committee Report as a legislative command to exclude from the coverage of the National Labor Relations Act those persons whose economic status marks them as persons to whom the Act was intended to apply. This is not to say that the Act should be applied as indiscriminately as the House Committee erroneously thought it was. On the contrary, a true effectuation of the legislative purpose requires a truer perspective as to who shall be treated as employees in our economic system. It needs to be recognized that the interpretational and judicial processes are not to be put into a legalistic strait-jacket on the mistaken assumption that excesses were indulged in prior to 1947. Actually, as has been indicated throughout this article, the reverse has been true. By the application of the "right-of-control" test in countless situations and with an infinite number of variations, the doctrine of independent contractorship has been expanded far beyond its original scope in our common law. The purposes of federal and state social and labor legislation have been substantially subverted by the use of erroneous "common law" standards.

ORIGIN OF THE INDEPENDENT CONTRACTOR CONCEPT

Much of the current confusion and conflict in the law of independent contractorship has developed from an imperfect understanding or total disregard of the judicial pronouncements which gave birth to the original concept. Analysis of earlier decisions in American and English law will furnish basic guide principles which can be effectively invoked by contemporary boards and courts in restricting the independent contractor to the true position he was originally designed to occupy in our industrial society. Such result is inevitable despite the paradox that it is here proposed that original guide principles be applied to industrial fact situations which the original judicial inventors of the doctrine never contemplated.

The concept of independent contractorship is a modern judicial in-
vention. It was utterly unknown to the early common law. Although the independent contractor was not mentioned specifically by name until the middle of the nineteenth century, it is apparent that the doctrine was used a little earlier as a device to ameliorate the rigorous application of the early common law doctrine of Respondeat Superior. The early judges noted that there were cases in which they would be required to inflict tort liability on a master for torts committed by a servant or one hired by him in a situation where the servant was actually performing a single job of work for a price as part of his own independent or established business, profession or calling. In these instances some judges reasoned that the nature of the relationship between the master and person hired by the servant was too remote to justify the imposition of vicarious liability. In applying the doctrine of cause and effect, it was observed that liability could only be premised on the right of control over performance. Because of the very nature of the relationship, the right of control did not, normally, exist. However, the absence or waiver of right of control was not a fact to be proven in establishing one as an independent contractor.

In the foundation cases, the decisive principle applied was that a person engaged in performing a job in the course of an independent calling should not be treated as a servant in determining tort liability. The criteria used in those cases constituted, in fact, a true "economic reality" test based on the economic facts of the relationship between the parties involved. Thus, it was on the basis of the role he played in the economy that it was determined that the person who hired him could not justly be held accountable for his torts. The original revolt against the unlimited application of the doctrine of Respondeat Superior, giving rise to the independent contractor concept, was instigated by the adverse reaction of English and American judges to the decision in Bush v. Steinman. In that

65 There is no definition of an independent contractor in a standard law dictionary published in 1843: Bouvier, A Law Dictionary Adapted to the Constitution of the United States of America (2d ed., 1843). Justice Holmes in 3 Selected Essays in Anglo-American Legal History 395 (1909), points out that as late as Blackstone, various kinds of agents, including factors, were classified as a species of servant.

64 For a history of this doctrine, see Smith, Frolic and Detour, 23 Col. L. Rev. 444 (1923), and Douglas, Vicarious Liability and Administrative Risk, 38 Yale L. J. 584 (1929); New York Law Revision Commission, Legislative Document No. 65 (1939); Stover Bedding Co. v. Industrial Commission, 107 P. 2d 1027 (Utah, 1940).

65 Milligan v. Wedge, 12 A. & E. 737 (K. B., 1840).

66 1 B. & P. 404 (C.P., Ex.Ch., 1799).
case, the defendant was held responsible for causing a pile of lime to be placed on a roadway by means of which the plaintiff’s carriage was overturned. The defendant had purchased a house by the side of the road and had contracted with a surveyor to put it in repair for a stipulated sum. A carpenter under contract with the surveyor to perform the job employed a bricklayer under him. The bricklayer, in turn, contracted with a lime burner to furnish a quantity of lime. The servant of the lime burner placed the lime on the roadway where it caused the accident with its resulting injury. The defendant was held responsible under the doctrine of Respondeat Superior. The judges remarked that the act which caused the injury complained of was done for the defendant’s benefit and was done by persons authorized to perform the work for him. One of the concurring judges frankly stated that he had great difficulty in stating with accuracy the grounds on which the verdict could be supported. Several judges dissented. One of the cases cited was Littledale v. Lord Lonsdale\(^{57}\) where liability was imposed for injury caused by servants of an agent engaged in working the defendant’s colliery. It was stressed that Lonsdale should be held responsible because the agent was managing Lonsdale’s business. The agent was not pursuing any independent calling. Although the Bush decision was universally condemned later, the Lonsdale decision appears never to have been overruled or even criticized.

During the early days of the nineteenth century some courts made distinctions as to real and personal property in these negligence cases. However, the distinctions were ultimately abolished and the Bush doctrine was effectively repudiated. The evolutionary process of judicial repudiation is described in the scholarly opinion in Hilliard v. Richardson.\(^{58}\) There the court cited the early landmark decisions\(^{59}\) on the basis of which it was able to say “Bush v. Steinman is no longer law in England. If ever a case can be said to have been overruled, indirectly or directly, by reasoning and by authority, this has been.”\(^{60}\) Milligan v. Wedge\(^{61}\) is illustrative. There it was recognized that a

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\(^{57}\) 2 H.Bl. 267 (C.P., 1793).

\(^{58}\) 3 Gray (Mass.) 349 (1855).

\(^{59}\) Allen v. Hayward, 7 Q.B. 960 (1845); Rapson v. Cubitt, 9 M.&W. 710 (Ex., 1842); Milligan v. Wedge, 12 A. & E. 737 (K.B., 1840); Quarman v. Burnett, 6 M.&W. 499 (Ex., 1840); Laugher v. Pointer, 5 B.&C. 547 (K.B., 1826).

\(^{60}\) 3 Gray (Mass.) 349, 363 (1855).

\(^{61}\) 12 A.&E. 737 (K.B., 1840).
drover driving cattle through the streets of London was not a common law servant because he was performing a special job of work in the course of his own separate business. It was a business in which he was licensed to engage. Lord Denman said of the defendant, "The party has not done the act complained of, but has employed another who is recognized by the law as exercising a distinct calling." The exemption was not premised in any manner on the mere absence of right of control.

In these early cases, it was clearly recognized that one engaged in an independent calling, trade, occupation or profession is a specialist or expert. It was presumed that one who hired such a person would not normally be expected to exercise supervision over the performance of the job. That was the inherent circumstance on which exemption from vicarious liability was premised. The absence of control was a descriptive qualification justifying the judicial rationalization. It was a necessary one. The exemption from vicarious liability afforded in those cases was, of course, in derogation of the earlier rigid common law liability standards, and was strictly construed. Therefore, if the person hiring an independent contractor reserved the right of control over the work detail, he would have destroyed the basis of his exemption. Throughout the developmental period of the independent contractorship concept in tort cases, it was never applied in any case except where the services rendered were in the course of an independent occupation, trade or calling.

DEVELOPMENT OF AMERICAN LAW

When one turns to the early American precedents in the development of this phase of the law, it is immediately apparent that the English doctrine was closely followed here. Although Bouvier's law dictionary of 1843 did not even contain a definition of an independent contractor, the cases subsequent to that time clearly established an exemption from the vicarious liability in tort cases for those who hired one. As was to be expected, this phase of tort law developed on a case-by-case basis. Nevertheless, it is a singular fact that no early American precedent accords tort exemption on the sole basis of the right-of-control test which has created so much chaos in administrative and

62 Ibid., at 740-41. (Emphasis supplied.)

judicial decisions during the last few decades. The only test applied in our earlier cases as to who is an independent contractor appears to be the same as that expressed in the English cases. An early standard American definition is "one who carries on an independent business and in the line of his business is employed to do a job of work, and, in doing it, does not act under the direction and control of his employer, but determines for himself in what manner it shall be done." This definition is cited in landmark text books of American law.

Perhaps the most widely quoted definition is the one contained in Shearman and Redfield's Standard Work on Negligence, where it was stated:

Although in a general sense, every person who enters into a contract may be called a contractor, yet the word, for want of a better one, has come to be used with special reference to one who, in pursuit of an independent business, undertakes to do a specific piece of work for other persons using his own means and methods without submitting to their control in respect to all its details. The true test of a 'contractor' would seem to be that he renders service in the course of an independent occupation, representing the will of his employer as to the result of his work, and not as to the means by which it is accomplished.

The text book definitions were, of course, derived from the decisions of judges. They are distillations of judicial pronouncements dating back to the Civil War period when this phase of the law was evolved. However, examination of the early cases shows no wide-spread diversity of judicial opinion. In DeForrest v. Wright, the Michigan Supreme Court held that an employer was not liable for injury caused by a public licensed drayman hired to haul salt from a warehouse. In the act of delivering the load, a barrel, through the carelessness of the drayman, rolled against and injured a man on the sidewalk. The Court stated that the drayman was exercising a distinct and independent employment. Linton v. Smith was an early leading case in which stevedores engaged to unload cargo were found to be independent contractors. The Court observed that "the business of stevedores is a separate, distinct, well-recognized business in Bos-

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64 Keys v. Second Baptist Church, 99 Me. 308, 59 Atl. 446 (1904). (Emphasis supplied.)


67 2 Mich. 368 (1852).

68 8 Gray (Mass.) 147 (1857).
of interest is the comment by the judge concerning his use of the word “contractor.” “The word is a bad one, but there is no substitute.” Citing Laugher, Quarman, Milligan, Hilliard and De-Forrest, the court referred to the exception of one “in the exercise of a distinct and independent employment” as “well known.” Similar applications of this rationale were made in various cases in many state jurisdictions.

An instructive example of a strict common law approach is provided in Mullich v. Brocker. In that case an employee having no regular vocation agreed to break in a horse. Although he had some “amateur” experience, the court said,

We find no countenance for the proposition that a person not especially qualified for a particular service, but ready to undertake any job which may be offered to him that he thinks himself able to perform, becomes, when hired for some job, an independent contractor simply because the employer relinquishes control over the work and trusts to the employee's discretion. It looks like the employee must have a calling in which it is fair to presume he has developed skill, before he will be regarded otherwise than as a servant. We do not say he must have a trade or profession, be a skilled mechanic, doctor or lawyer; but he must hold himself out as having an occupation with which he is familiar.

Some of the cases have also stressed the aspect of the definition referring to the performance of a single job of work. In such cases the courts have held that a continuing service relationship is contrary “to the spirit” of the contractorship concept. Typical cases to this effect are set forth in the footnote.

69 Ibid. 70 Ibid., at 148.

71 Murray v. Dwight, 161 N.Y. 301, 55 N.E. 901 (1910) where the court said, “a servant is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling”; Humpton v. Unterkircher, 97 Iowa 509, 66 N.W. 776 (1896); Zimmerman v. Bauer, 11 Ind. App. 607, 39 N.E. 299 (1894); E. G. Powell v. Construction Co., 88 Tenn. 692, 13 S.W. 691 (1890); Bennett v. Truebody, 66 Cal. 509, 6 Pac. 329 (1885); Pickens v. Doecker, 21 Ohio St. 212 (1871).

72 119 Mo. App. 332, 97 S.W. 549 (1905). 73 97 S.W. 549, 551.

74 Linton v. Smith, 8 Gray (Mass.) 147 (1857); Hale v. Johnson, 80 Ill. 185 (1875); Rome & D. R. Co. v. Chasteen, 88 Ala. 591, 7 So. 94 (1889); Long v. Moon, 107 Mo. 334, 17 S.W. 810 (1891); Morgan v. Smith, 159 Mass. 570, 33 N.E. 101 (1893); Carlson v. Stocking, 91 Wis. 432, 60 N.W. 58 (1895); Norfolk & Western Railroad Co. v. Stevens, 97 Va. 631, 34 S.E. 525 (1899); Engler v. Seattle, 40 Wash. 78, 82 Pac. 136 (1905); Messmer v. Bill & C. Co., 133 Ky. 19, 117 S.W. 346 (1909); Laffery v. U.S. Gypsum Co., 83 Kan. 349, 111 Pac. 498 (1910); Lindquist v. Hodges, 248 Ill. 491, 94 N.E. 94 (1911); Pottarff v. Fidelity Coal Mining Co., 86 Kan. 774 (1912); Alexander v. R. A. Shuman & Sons Co., 86 Conn. 292, 80 Atl. 514 (1912); Madix v. Hachgreve Brewing Co., 154 Wis. 448, 143 N.W. 189 (1913); Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N.E. 365 (1914).
The independent contractorship test developed in the landmark American cases was definitive and readily applicable. In applying it, an independent contractor was an easily identifiable person. In the pursuit of his profession, trade, business or calling he served the many who hired him to perform single jobs of work. *This availability for service to the public was the identifying characteristic of his status.*

The definition which gave him his legal status negated the possibility of its application to one who served in continuous employment relationship. This was so, particularly where one performed services which constituted an integral phase of another’s business.\(^7\) In a true independent contractorship the genuine independent businessman’s status of the contractor is, of course, the crucial issue. If the “independence” is a mere descriptive phrase and not an economic reality, then, of course, the independent contractor classification should not be applied. It should be conceded that the independence characterizing a true independent contractorship certainly cannot be ascribed to one exclusively engaged in an integral portion of the day-to-day operations of another’s business. As we have seen, even the National Labor Relations Board in some of its cases has inferentially acknowledged the inconsistency of ascribing independent contractorship status to one who was actually an integrated human cog in another’s working machine. Thus, there is a universal juridical and economic validity in the doctrine which prevents the establishment of independent contractorship status unless the contractor is actually engaged in his own independent calling, trade or profession in the performance of specific jobs. “Whose business is it?” was the question originally asked by the English common law court in the *Lonsdale* case in 1793. That question is equally applicable today. It must be remembered that the later common law decision\(^7\) which was repudiated, and out of which arose the independent contractor concept, was one in which liability was imposed where various persons working for the original employer were engaged in their own respective independent and separate trades and callings.

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\(^7\) Poulson v. John Jarvis & Co., 122 L. T. 471 (1919): (Younger, L.J.), Where “work to be done by the servant is merely part, a necessarily integral part, of a larger operation every other section of which is admittedly under the complete control of a particular employer,” then the principle that the servant of another becomes *pro hac vice* the servant of the particular employer applies.

\(^7\) Bush v. Steinman, 1 B. & P. 404 (C.P., Ex. Ch., 1799).
In the "independent calling" test the emphasis on the essential nature of the occupation itself guaranteed uniformity in adjudication. Moreover, a further virtue of that postulation was that the status could not be created by mere subtraction by an employer of his power to supervise the performance of the work. The very nature of the definition which gave the contractor an exempt status in tort law was calculated to apply only to the "genuine article."

CORRUPTION OF LEGAL DOCTRINE

And yet, as we have seen, the doctrine has become corrupted beyond recognition in a complex of statutory and current legal contexts. Speculation as to the cause may be fruitless. However, it seems pertinent to observe that the standard text book and judicial definitions specifying the jurisdictional elements of "independent calling" and "performance of single work items" also included the further descriptive provision that such contractor does not act under the direction and control of the employer. It is a credible thesis to presume that at some point in the development of the law of our time, when social and labor laws were accumulating on our statute books, social pressures increased correspondingly to escape the numerous social obligations imposed under such laws. With the meteoric rise in litigation, it was natural that many attempts were made to exempt individuals and groups from the operation of such laws. Judges and administrative boards in many instances were induced to attach new and unprecedented significance to the qualifying words of the definition. As a result, it became increasingly customary, albeit erroneously, to regard the freedom from control as a necessary condition precedent to the establishment of the status itself. In this posture, the independent contractorship concept could no longer be applied as uniformly or as restrictively as was originally intended in the decisions which created the status.

Under earlier doctrine an independent contractor was universally accorded such status, on the sole basis of the inherent nature of his business enterprise. There was a presumption that the very nature of the status precluded the exercise of control over the work of the independent contractor by the man who hired him. It must be remembered that the independent contractor concept was in derogation of the

77 See court's language in Mullich v. Brocker, in text above note 73 supra.
common law and strictly construed. Therefore, it was deemed necessary to describe him in his status as one who was not subject to control. The reason for this is obvious. If, by contract or otherwise, the independent contractor relinquished his freedom from control and subjected himself to the supervision of the man who hired him, he would, of course, thereupon be considered an employee and his master would be held vicariously liable for his torts. Unfortunately, however, in the modern development of this phase of the law, many judges and administrative boards have misapprehended the reason for the qualifying descriptive language in the definition. As a result, decisions appeared in which the absence of control was regarded as a necessary qualification for the establishment of the independent contractor status. This new condition precedent constituted a flagrant perversion of common law intent in view of the fact that originally, it was not the absence of control which created an independent contractorship, but rather, the presence of control which destroyed it.

In order to view current adjudications affecting the law of independent contractorship in proper perspective, it is absolutely essential to recognize that the shift from “independent calling” criteria to “right-of-control” rationalizations is no mere transfer of emphasis from one common law test to another; it is nothing less than an abrogation of the original common law doctrine. The essential evil of the “right-of-control” test is that it is a corruption of a common law doctrine originally established to promote social responsibility and that, as it is being currently applied, is has served only to foster social irresponsibility, statutory evasion and unwarranted penalties.

CONCLUSION: AN EFFECTIVE SOLUTION

The description of the “right-of-control” test in action, as hereinabove described, cannot be characterized as an exaggeration, in view of the record. It is indeed unfortunate that the invidious consequences resulting from its manifold applications have not been apparent to those to whom has been delegated the responsibility of administering the labor and social laws of our generation. It may well be that one of the causes of the apparently universal official myopia has been the failure to realize that social and labor legislation fails in its purpose, unless it is so administered and interpreted that the
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social “mischief” at which the legislation is aimed, and the remedies offered, are applied to all of those who are intended to be aided. In this connection, it should be regarded as an axiom, that in administering such laws legalistic devices to escape statutory obligations should be discouraged.

The need for a solution of the problem discussed in this article has been recognized in many quarters. Various remedies have been proposed. For example, it has been suggested that a new definition of independent contractorship be submitted to Congress and state legislatures which will effectuate the “economic reality” test discussed by the U.S. Supreme Court. Others have suggested legislative enactments incorporating the so-called “integral function” theory. The difficulty with suggestions of this kind is obvious. The problem of procuring legislative amendments modifying the numerous federal and state laws such as are listed in footnote 1 of this article presents practical obstacles which at present appear to be difficult to overcome. Nevertheless, the problem is far from insoluble. It is here suggested that no vast program of legislative amendment need be undertaken to extend the benefits of this nation’s socio-economic legislation to all those to whom such legislation should morally, ethically and legally apply.

A relatively simple solution which promises vast social benefits deals with the fundamental process of statutory interpretation. We are confronted with a paradox. It is obvious that the most effective, available formula for social progress in administering the socio-economic laws of this nation is a reversion to the common law concept of independent contractorship, formulated by American and English jurists a century ago. Their “independent calling” test for independent contractorship of the past affords the most effective formula for the future.

78 “It is true, I think, today in every department of the law that the social value of a rule has become a test of growing power and importance. This thought is powerfully driven home to the lawyers of this country in the writings of Dean Pound. Perhaps the most significant advance in the modern science of law is the change from the analytical to the functional attitude. The emphasis has changed from the content of the precept and the existence of the remedy to the effect of the precept in action and the availability and efficiency of the remedy to attain the ends for which the precept was devised.” Cardozo, The Nature of The Judicial Process, at 73 (1921).


80 E.g., see Teple, op. cit. supra note 8, at 178.