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Marx, formal subsumption and the law

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Abstract Recent work rethinking the place of the law in Marxian analysis of capitalist society provides us with a foundation for a renewed look at the labor process. Drawing on this literature, which emphasizes the materiality of institutions through which labor is exploited, and returning to Marx's discussion of formal subsumption in *Capital*, I argue that the law was central for subordinating labor. I then present three case studies from industries in Victorian England to demonstrate the diverse ways in which law was implicated in formal subsumption. The case studies focus on the ways in which capitalists used master and servant law, the key law governing the workplace, to subordinate labor. I conclude by considering how these cases provoke us to consider the materiality of the law in labor relations more broadly, and such questions might be pursued in developing capitalist economies such as China.

> "But the really difficult point to discuss here is how relations of production develop unevenly as legal relations."—Karl Marx (1973, p. 109)

Over the past several decades considerable attention has been focused on developing Marx's theory of the capitalist labor process. A number of social scientists and historians have sought to build on Marx's analysis in *Capital*, particularly in the wake of Braverman's *Labor and Monopoly Capital*. Throughout numerous debates on labor control, however, the place of the law has been conspicuously absent.[1]

This silence on law and its role in the process of capitalist exploitation has several sources. First, as I discuss below, Marx himself in *Capital* and other works made infrequent reference to law in the development of capitalist labor relations. Relatedly, he focused on the technical relations of production with the real

[1]For an exception see Brandenberg (1994).

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subsumption of labor in his analysis of the rise of modern industry. Second, Marxist analyses of law often remain burdened by the legacy of reading Marx's writings on capitalist development through the reductionist lens of the base-superstructure model, in which law is characterized as epiphenomenal and an ideological patina of material social relations.

However, more recent work on Marx's epistemology and renewed interest in the 'Resultate' chapter of *Capital* provide a fresh foundation for thinking through the place of law in capitalist exploitation. My aim in this paper is to demonstrate how the analysis of law can complement Marx's writings on the development of the capitalist labor process. I claim that a focus on law fills in gaps in his analysis that Marx failed to realize because of an incomplete analysis of the concrete institutional forms of social relations necessary to stabilize exploitation. As Bob Jessop and Ngai-Lin Sum have argued, providing more encompassing frameworks for the historical dynamics of capitalism requires a "rejection of the rigid, fetishized distinction between the economic and the extra-economic and on increased interest in the socially embedded, socially regularized nature of economic activities, organizations and institutions." (Jessop and Sum 2006, p. 249).[2] The task, as they suggest, is to wed critical political economy with institutional theory to analyze historically specific forms of coordination and governance in capitalist economic relations. The economic, in this sense, always has a specific *institutional materiality*. The trajectory of this move has been largely at the macro-level of state and economy.[3] My effort in this paper is to add this institutional dimension to problems of governance in the capitalist labor process. In particular, I argue that adding legal institutions to Marx's theory fills out our understanding of exploitation in the production process, by adding to Marx's analyses of the social and technical relations of production.

First, I review Marx's perspective on the development of the capitalist labor process, particularly his analysis of formal and real subsumption, to demonstrate the centrality of the law. Second, I discuss Marx's analysis of the law in *Capital* and related writings. Third, I offer theoretical amendments which focus on the law as a means of domination in the labor process, particularly in the stage of formal subordination. Finally, I provide several examples from labor processes in industries in Victorian England to demonstrate how law was central to exploitation at the time of the writing of *Capital*.

The materiality of institutions: bringing in the law

For many decades scholars interpreted the place of law in Marx's theory through the famous base-superstructure metaphor found in the preface to the *Critique of Political*

[2] See also Sayer (2001).

[3] See Jessop and Sum (2006) and Jessop (2008) for summaries. As Adam Przeworski notes Marxist state theory has tended not to engage in "micro-level strategic analyses", (Przeworski 2004, p.182). For attempts to wed Marx with 'old institutional' economics see Hodgson (2001) and Pagano (2007). For a discussion of regionally institutionalized regimes of labor control see Jonas (1996). Recent attempts to find common ground between Marxism and the institutionalism of Polanyi (despite some recognized antipathies) include Block (2003), Jessop (2001), and the articles in the special issue of *Politics and Society* 31[2] 2003). I will be discussing this last issue at length in *Law, Labor and England's Great Transformation*.

Economy, an interpretation buttressed by G. A. Cohen's widely acknowledged interpretation of Marx's historical materialism (Cohen 1978, 1988). From this perspective law operates as an ideological buttress to material realities, constructing illusory relationships of mystification (Collins 1982; Cotterell 1981; Sumner 1979). However, more recently students of Marx, in a thorough-going reexamination of his corpus, have argued that juridical relations are central to modes of production, rather then epiphenomenal. From within this perspective the fissure of base/material and superstructure/ideal is a reification of social relations that undermines the central tenets of Marx's historical materialism (Wood 1995, pp. 49–75). Instead a mode of production needs to be analyzed as the totality of social relations that make any particular form of production and property possible (Sayer 1991, p. 77). In this interpretation social relations of production necessarily have both economic and juridic dimensions. From the vantage point of Marx's critical realism the latter are no less 'real' than the former, are concretely manifest in social relations, and thus as practices have determinant force. (Bidet 1997a, p. 51; Fine 1984, pp. 95–98; Kinsey 1978, p. 206). As Richard Marsden argues in the specific case of the capitalist mode of production,

> Relations of production are manifest in twin forms, juridic and economic, which are fused as private property. These forms are coterminous, but can be analytically distinguished thus. Economic forms are empirical things of a material nature, principally commodities. Juridical forms are empirical things of a discursive nature principally, contracts. They are 'ideal' embodiments of the relations of production, a discursive medium through which conflicting rights to material things are contested. The important distinction within Marx is not simply between the material and the ideal: it is between social relations of production and their *material* economic and *ideal* juridic forms. . . (Marsden 1999, p. 128).[4]

Contra Cohen and other advocates of base/superstructure interpretations, any property relation (which must be at the foundation of any set of relations of production), must entail a legal form (Sayer 1987, p. 105). The exchange of commodities in a capitalist marketplace more particularly requires a specific juridical form in at least two senses. First, commodity fetishism requires a complementary legal fetishism of the individual, so that both goods and humans are constructed as abstract and independent entities for the purposes of formally 'free' exchange (Balbus 1977, p. 584; Bidet 1997b, p. 376; Fine 1984, p. 142; Kinsey 1978, pp. 215–216; Marx 1976, p. 178). Second, the realization of value (and the valorization of labor which I will turn to below) requires a fundamental organization and stability of social relations, practiced through historical, concrete forms, that mediate relations of production, ownership and exchange (Marx 1973, p. 98; Taiwo 1996, pp. 57–58). Neither dull compulsion nor brute force are sufficient to insure the circulation and accumulation of value in the exchange process: "Both exchange value and the juridical relation are thus intrinsic to the value-relation, and in this respect the juridical relation cannot be treated as epiphenomenal to the socio-economic structure of the capitalist mode of production. . ." (Kinsey 1978, p. 213).

[4] See also (Wood 1995, pp. 28–31).

In the case of the capitalist labor relationship law provides the specific juridic form—the labor contract—through which labor power is transformed into a commodity, and thus engaged in the valorization process. Through the exchange of labor for wages between formally equal parties capitalists acquire the *rights* to potential labor power (Cain and Hunt 1979, p. 64; Kinsey 1978, pp. 213–214, 221; Marsden 1999, p. 134; Marx 1976, pp. 178, 241–243, 272–280).[5] Yet, as Bidet suggests, this sale creates contradictions at the very heart of the employment relationship. While potential labor power is alienated from the worker and becomes a commodity, nonetheless the worker remains the immediate proprietor of the commodity since ultimately she alone 'disposes' of it in the production process.[6]

Marx, of course, recognized that this dilemma posed the capitalists' key problem in the labor process and the accumulation of surplus value. His historical accounts of the development of a specifically capitalist labor process chart the progress made by capitalists in constructing labor discipline to wring the most value from workers. In the "Resultate" and other drafts written in preparation for *Capital* Marx draws a distinction between the *formal* and *real* subsumption of labor under capital as these relations of production develop.[7] The former is the process through which the labor process is first subsumed under capital for the purposes of surplus value extraction. The capitalist, through the exchange process, becomes the manager of production and the owner of labor power (Marx 1976, pp. 1019–21, 1054; Marx 1994, p. 102; Murray 2004, p. 104).[8] The technical relations of production are not transformed fully in this stage. Rather, Marx describes a course of increasing control through direct supervision and increasing the size of units of production, refinements in the division of labor, increasing the intensity and pace of production (in part through the use of piece rates), and a lengthened work day itself, all for the purposes of increasing the rate of absolute surplus value extraction (Marsden 1999, p.143; Marx 1976, pp. 1026–27).

This analysis complements and refines his discussion of the stages of the development of the capitalist mode of production in chapters 13–15 in volume 1. In these chapters Marx methodically charts the maturation of a specifically capitalist labor

[5] As Marx states, "What is sold here *directly* is not a commodity in which labour has already been realised but the *use of labour capacity* itself, hence in practice *labour itself*, since the USE of labour capacity is its ACTION—labour," (Marx 1994, p. 132).

[6] Bidet offers an extensive argument that because of this tension the political and the economic are fused at "the most fundamental level". Because capitalists fail to obtain complete control over commodified labor in this exchange political domination is inherently tied to economic exploitation (1997, pp. 48, 50–1, 69–70).

[7] As David Nielson notes,

> While 'exploitation' denotes the process of the appropriation of surplus value as an economic process based in a social structure of private ownership and wage labour, 'subordination' denotes the political technologies that drive this appropriation. Marx's model of subordination is based on a coercive concept of power as a matter of physical survival, and in which workers' bodies are physically and outwardly controlled in their every detailed movement (Nielson 1995, p. 94).

[8] Marx notes that the key to this transition is the qualitative transformation in the nature of the employment relationship, distinguishing capitalist relations from those under earlier guild systems: " The master now ceases to be a capitalist because he is a master, and becomes a master because he is a capitalist" (Marx 1976, p. 1031).

process. He starts, following the political economists on whom he draws, with the development of a simple division of labor in the period of cooperation. Control of the production process is then expanded in the period of manufacture, in which production is displaced from home or workshops into factories organized by the capitalist.

The last stage in this transformation is the period of modern industry, with the advent of steam-powered machines by which the capitalist seizes the very roots of the production process. This is also the coup de grace of real subsumption, in which the very foundations of the production process are transformed and the worker becomes a mere appendage of the system:

> With the real subsumption of labour under capital, all the *changes* we have discussed take place in the technological process, the labour process, and at the same time there are changes in the relation of the worker to his own production and to capital—and finally, the development of productive power of labour takes place, in that the productive forces of social labour are developed, and only at this point does the application of natural forces on a large scale, of science and of machinery, to direct production become possible. Hence, there is a change not only in the formal relation but in the labour process itself (Marx 1994, p. 106; see also Postone 1993, p. 182).

These are wholly modern capitalist social relations of production, and the age of modern industry heralds increases in relative surplus value as the steam-powered machines of the satanic mills drive the workers (Marx 1976, p. 1024; Nielson 1995, p. 95). Marx's detailed analyses of relative surplus value extraction, in both the volumes of *Capital* and elsewhere, focus on the ways in which machinery inverts the entire production process; transforming workers into no more than cogs in the machinery they at one time controlled and in vampiric fashion draining them of their life force.

In Marx's analysis of the move from formal to real subsumption the focus is on technological control within the workplace, and most of the discussion of law centers on the shedding of old statutes. However, as I will argue below, the juridic aspects of production played a larger role than Marx realized in his archetypal English case, certainly in processes of formal subsumption. First, however, I briefly review Marx's attentiveness to the law.

The place of the law

Marx was by no means blind to the importance of the law in these momentous transformations, and in *Capital* and other writings he offered detailed discussions on it in several respects. First, he devoted an extensive section of his chapter in volume 1 on "The Working Day" to the struggles of the proletariat for the passage and enforcement of what collectively became known as the Factory Acts (Marx 1976, pp. 389–411).[9] In this section (and in related writings) he posed the struggle for the passage and

[9] For an extended analysis of Marx's examination of the struggle over the Factory Acts and their relevance to his theory of the state see (Booth 1978). As Sayer also notes Marx did not pursue the ways in which the Acts create gendered categories of labor and citizenship, (Sayer 1991, p. 85). Engels also produced a separate, more critical, account for the *Neue Rheinische Zeitung*, (Marx and Engels 1976, pp. 96–108).

implementation of the Acts throughout the 1830s to the 1860s as a substantive victory for the working class, not only over the rabid rapacity of manufacturers but also in the debunking of their intellectual apologists, the Political Economists, who proclaimed the Acts unworkable.[10] However, Marx does not characterize these laws as providing any real impediments to the large forces of real subsumption.

Additionally, in his short discussion of "Bloody Leglisation" Marx briefly traces the trajectory of 'feudal' legislation controlling labor starting in the 14th century and its ultimate repeal in the early decades of the 19th century (Marx 1976, pp. 896–904). This section however, is mostly devoted to the unfettering of capitalism from its remaining feudal chains, and makes only passing reference to the continuing legal struggles of the working classes in the 1860s and 70s. Apart from his examination of the Factory Acts, most of Marx's references to law in this section are thus retrospective in nature and concern the passing of the previous mode of production. Paralleling this evolutionary account of change, in the *Grundrisse* Marx observes that "One can say that wage labour is completely realized in form in England only at the end of the eighteenth century, with the repeal of the law of apprenticeship" (Marx 1976, p. 902)[11] As Duncan Kennedy asserts, Marx, much as his contemporary foes the Political Economists, envisioned law as "as a kind of embroidery on the surface of the essential structure", and as a consequence,

> He defetishized commodities by revealing the dependence of the law of value on a particular legal structure, but only partially defetishized law itself. He denaturalized it, in the positivist mode, by emphasizing its human origin, without cracking its appearance of coherence (1985, pp. 995–96; see also Young 1979, p.147).

As a result Marx never fully develops an institutional perspective necessary for a complete analysis of the juridical aspects of the production process and he comes to see the despotism of the factory owner as a 'private law' of the capitalist behind factory gates, even as he engages in a biting analysis of how manufacturers skirted and violated state codes with impunity.

> In the factory code, the capitalist formulates his autocratic power over his workers like a private legislator, and purely as an emanation of his own will,

[10] As Marx observed in his inaugural lecture to the Workingmen's International Association in 1864,

> After a 30 years' struggle, fought with almost admirable perseverance, the English working classes, improving a momentaneous split between the landlords and money lords, succeeded in carrying the Ten Hours' Bill. . . . Through their most notorious organs of science, such as Dr. Ure, Professor Senior, and other sages of that stamp, the middle class had predicted, and to their heart's content proved, that any legal restriction of the hours of labor must sound the death knell of British industry, which, vampirelike, could but live by sucking blood, and children's blood, too. . .. This struggle about the legal restriction of the hours of labor raged the more fiercely since, apart from frightened avarice, it told indeed upon the great contest between the blind rule of the supply and demand laws which form the political economy of the middle class, and social production controlled by social foresight, which forms the political economy of the working class. Hence the Ten Hours' Bill was not only a great practical success; it was the victory of a principle; it was the first time that in broad daylight the political economy of the middle class succumbed to the political economy of the working class (Marx 1975, pp. 10–11).

[11] This is a misunderstanding of the legal history on Marx's part, since the law was only repealed in 1815. See generally Orth (1991).

> unaccompanied by either that division of responsibility otherwise so much approved by the bourgeoisie, or the still more approved representative system. This code is merely the capitalist caricature of the social regulation of the labour process which becomes necessary in co-operation on a large scale and in the employment of common instruments of labour, and especially machinery. The overseer's book of penalties replaces the slave-driver's lash (Marx 1976, pp. 549–550; see also pp. 303, 902).

Here processes of private domination become conflated with public rights and entitlements in problematic ways.

Because of this ambiguity, Marx at times loses the thread of his critical and dialectical analysis of the capitalist labor process and the problems constructed by capitalists even as they transform it. Marx establishes these tensions in his initial discussion of the sale and purchase of labor power in *Capital*:

> . . . labour-power can appear upon the market as a commodity, only if, and so far as, its possessor, the individual whose labour-power it is, offers it for sale or sells it as a commodity. In order that its possessor may sell it as a commodity, he must be the free proprietor of his own labour capacity, hence of his person. He and the owner of money meet in the market, and enter into relations with each other on a footing of equality, as owners of commodities, with the sole difference that one is buyer, the other seller; both are therefore equal before the eyes of the law. For this relation to continue, the proprietor of labour-power must always sell it for a limited period only, for if he were to sell it in a lump, once and for all, he would be selling himself, converting himself from a free man into a slave, from an owner of a commodity into a commodity. He must constantly treat his labour-power as his own property, his own commodity, and he can do this only by placing it at the disposal of the buyer, i.e. handing it over for the buyer to consume, for a definite period of time, temporarily. In this way he manages to both alienate his labour-power and to avoid renouncing his rights of ownership over it (Marx 1976, p. 271; see also Marx 1994, p. 132).

And, as Marx observes, the "peculiar nature" of labour-power as a commodity is that it does not pass immediately between seller and buyer (Marx 1976, p. 277). As Jacques Bidet suggests, however, this disjuncture precisely represents a difficulty for the capitalist: "This division of property is not adequately expressed by the category of 'hire' that Marx introduces ('just like a horse he hired for the day') which simply denotes a division of property between two owners who share its disposition" (Bidet 1997a, pp. 48–49). It is because of this peculiar nature of labour-power as a commodity, whose promise of delivery is offered in contract, but whose proprietary control remains problematic, that capitalists must seek some form of domination in the labour process to insure their realization of value. Problems of juridic form are thus present in the social and technical relations of production.

More problematically, during his great moments of rhetorical panache, Marx loses this complexity of analysis entirely at moments, even in the 'mature' work of *Capital*. Thus, in his analysis of simple reproduction he observes, "In reality, the worker belongs to capital before he sold himself to the capitalist" (Marx 1976, p. 723). And in a discussion of the underlying dynamics of capitalism in the "Resultate" he observes

that ". . . the capitalist mode of production itself raises obstacles in the way of its own tendency, but it pushes to one side all *legal* and other *extra-economic* obstructions standing in the way of this versatility" (Marx 1976, p. 1013, emphasis in the original). These and other comments echo early formulations in Marx's opus in which the examination of juridic aspects of this exchange were less fully developed (Fine 1984, p. 119).

In sum, Marx provides a partial analysis of the juridic dimensions of the labor process. His emphasis on the transformation of the social and technical relations of production with the advent of modern industry and the rise of machinery, however, diverts attention from the examination of these dynamics. Marx does not sufficiently analyze the ways in which law is used as a means of domination within the production process to insure surplus value extraction. In the following sections I pursue these themes.

Adding the law

Marx thus provides an opening for the place of law in the social relations of capitalist production in several ways. First, through a market relationship potential labour power is commodified and made a form of private property. As I noted above, this creates possible problems for the capitalist who legally owns this potential labor power as a use-value to be expended, but does not actually have full proprietary control over it. For the capitalist this creates the imperative of exerting control in the labor process to realize the full value of the commodity, which lies at the heart of the labor process literature. Much of this literature follows Marx in focusing on the solutions created through real subsumption.[12] In this section I concentrate on the role of law as a force of domination in the labor process to insure valorization under the regime of formal subsumption.

Much of *Capital* and Marx's other work focuses on the advent of the mechanized factory, a transformation which is classically viewed as archetypal of the industrial revolution. Yet, writings by many economic and social historians over the last several decades have detailed how significant portions of the British industrial base were proliferated through hand-power rather than steam-power, and developed as craft labor, or more notorious 'sweated trades' rather than through mechanized production.[13] For large swaths of industrial and even factory production capitalists, lacking technical solutions, were forced to rely on the organizational repertoire of formal subordination discussed above. Legal prosecutions, drawing on a number of different statutes dating from the 18th century, were used extensively in particular industries and regions to secure surplus in valorization. While there were a variety of such possible legal angles, such as prosecutions for embezzlement, master and servant law became a central means of domination.[14]

[12] The outstanding exception being the work of Burawoy (1979, 1985).

[13] For major historical works on the craft trades, sweating and industrialization see Behagg (1990), Berg (1994), Berg and Hudson (1992), Bythell (1978), Hudson (1992), Joyce (1990), Pollard (1992), Price (1984, 1999), Rule (1988), Sabel and Zeitlin (1985), and Samuel (1977).

[14] For the analyses of embezzlement and theft prosecutions in relationship to labor control see Becker (1983), Godfrey (1999a, 1999b, 2002) and Styles (1983).

Until recently most social scientists and historians have viewed master and servant law as a remnant of a waning feudal order, a position to which Marx himself alludes in his passing references to this body of law.[15] While the concept of service that is a centerpiece of the law can be found in the 14th-century Statute of Laborers, "the master-servant model was a product of industrialization" (Deakin and Wilkinson 2005, p. 62). These master and servant laws were passed in response to the petitions of specific groups of masters in the 18th century. Between 1720 and 1792 ten such acts were passed, with each successive piece of legislation broadening the reach of the law. High court rulings in 1806 and 1817 generalized the applicability of the laws to most forms of employment and a further statute was passed in 1823 consolidating and extending previous statutes. The law was partially reformed in 1867, but not substantially reformed until 1875 (Hay 1988, p. 29, 2005, pp. 66–67, 86; Hay and Craven 2005, p. 6; Napier 1975, pp. 83–86, 99; Simon 1954, pp. 161–166; Steinfeld 2001; p. 42; Woods 1979, p. 322).

Under the law most disputes between masters and servants were subject to the summary jurisdiction of local magistrates' courts or petty sessions. Workers could bring civil suit against employers for failure to pay agreed-upon wages, for dismissal without proper notice, or for abuse.[16] However, employers could bring *criminal* charges against workers (who worked for them under terms of exclusive service) for failure to engage in a written contract, unauthorized absence, failure to complete a contract (parole or written), misconduct or the misrepresentation of skills. Up until 1867 workers could be tried before one magistrate, and penalties for convictions included a fine, the posting of a surety for completion of the contract or up to 3 months in prison at hard labor. With the reforms passed in that year conviction required the presence of two magistrates, added the possibility of damage payments to employers and mandated that imprisonment was warranted only in cases of "aggravated" offenses on the part of workers. However, as James Davis, a noted stipendiary magistrate and author of a text on the laws wrote to a royal commission considering reform of the laws, "I have always found that the employers care little about the money, about getting actual compensation, and that they wanted labour" (P.P. 1867 XXXII [3873], pp. 322–23).

Losers of cases also had to pay court costs, which at 10s. or more could amount to a good part of a week's wages. Employers could appeal the civil judgments against them. However, workers had great difficulty in appealing a summary judgment of a criminal offense and had to obtain a writ of habeas corpus to get out of prison.[17] Up until 1867 workers were not allowed to testify on their own behalf in criminal

[15] See for example Orren (1991) and Marx (1976). Marx in fact notes that, "The provisions of the statutes of labourers as to contracts between master and workman, regarding giving notice and the like, which allow a civil action against the master who breaks his contract, but permit, on the contrary, a criminal action against the worker who breaks his contract, are still in full force at the moment" (Marx 1976, p. 903). However, this is the only passing reference he makes to these laws.

[16] The limit on requests for back wages was £10. Such suits were often difficult to enforce because workers had to pay for additional legal assistance in cases of non-payment. Workers could also bring larger claims to County Courts which operated to settle small financial claims, though it appears that this was much less frequent (Napier 1975, p. 122).

[17] For texts of the acts, including the reforms of 1867, see Davis (1868) and MacDonald (1868).

prosecutions for neglect, though it is not clear how regularly this clause was observed in practice. A convicted worker was not released from his service obligations, despite having served up to 3 months in prison.[18] Workers therefore were bound to service for the duration of their initial agreements, and parole contracts (unless specifically stipulated) generally were taken to be a year in length unless explicit assertion to custom mandated otherwise.[19] Workers found negligent by the court whose contracts were then terminated also lost all claims to outstanding wages (Davis 1868, p. 9; Hay 2000, p. 228, 2005, pp. 82–91; MacDonald 1868, pp. 75–76, 83; Napier 1975, pp. 106, 122; Simon 1954, pp. 161, 166, 166; P.P. 1866 XIII [449], pp. 2, 37).[20]

As Deakin and Wilkson recently have argued, master and servant laws were passed to provide employers with a means of workplace control that offered a ready form of direct coercion:

> …the master and servant legislation was not an attempt to maintain in place a pre-industrial model of household employment. Instead, it aimed to impose a more rigorous system of work discipline upon the growing numbers of labourers, artisans and outworkers employed in manufacturing, as well as maintaining control of the agricultural labour market at a time of considerable upheaval. . . . The historical evidence suggests that the disciplinary mechanism of the Acts was widely used as instruments of economic regulation during a period when modern managerial techniques had yet to develop, and when shifts in the business cycle could lead to considerable fluctuations in the

[18] However, in a Queen's Bench case, Barnsley v. Taylor, the court ruled that a successful suit for wrongful dismissal did terminate a contract and an employer could not be held responsible for failure to provide work under the old contract after the worker received damages, even if the latter went back to work assuming that the previous contract was still active (*The Justice of the Peace* 32, [April 11, 1868], 238).

[19] Binding agreements were still used in some industries, particularly coal mining in the northeast, until the early 1870s, at which point they were largely eliminated. The agreement "included employer-administered fines for poor work or absence of lack of output, and was inescapable proof of a contract, it was a powerful instrument for employer self-help as well as prosecutions before the justices" (Hay 2005, p. 102; see also Deakin and Wilkinson 2005, pp. 67–8, 217; Frank 2005, p. 409; and Hair 1965). The bonding period was often conducted during the low point in the demand for coal or ore, leaving the workers in their most disadvantageous bargaining position. Since the bond for all workers expired at the same time, and the bonding period lasted a week, workers were faced with signing on mine owners' terms or missing out on employment for an entire year. The bond obligated the worker to the employer even during periods in which no work was available, creating periods of forced unemployment Mews et al. 1884, p. 153; *Justice of the Peace* 26 [Feb. 1, 1862], p. 69). In those areas where bonding was absent mine owners often had other sorts of leverage, such as the provision of housing (P.P.1874 XXX [1157], pp. 32,156). A similar type of bonding existed among agricultural laborers in some parts of the country, particularly the north, up through the 1860s. At these 'mop' or annual hiring fairs laborers would bond themselves to a farmer for a year (Snell 1985, pp. 91–3; P.P. 1868–69 XIII [4202], App. Ai, p. 260). Often all such bindings were sealed by a small amount of earnest or binding money which prevented the worker from accepting a better offer before the starting state of his contract (Woods 1979, pp. 323–24).

[20] Description of relevant Queen's Bench ruling for the period can be found in *The Justice of the Peace* (21, [Aug. 1, 1857], pp. 486–88, 22 [Jan. 23, 1858], pp. 53–4, 25 [Dec. 7, 1861], pp. 776–77, 27 [June 14, 1862], pp. 372–3, [Aug. 6, 1962], p. 508, 28 [May 21, 1864], p. 332, 29 [May 19, 1866], pp. 310–312, 31 [Nov. 30, 1867], p. 758, 39 [June 24, 1874], pp. 388–9, and [Aug. 15, 1874], pp. 517–18).

> bargaining power of employers and workers (Deakin and Wilkinson 2005, pp. 65, 71).[21]

Such an analysis was shared by many 19th-century observers. The editors of *Capital and Labour*, a periodical produced by the recently formed National Federal Association of Employers in the wake of the Trades' Union Congress's press for labor law reform, bluntly argued, "It is only by a summary process and severe penalties that any real protection can be given to employers against the caprice or willfulness of workmen. . . . It furnishes to employers the only security for the due performance of work contracted to be done. If it were repealed, they would be absolutely at the mercy of the workmen" (1(2) [March 4, 1874, p. 2). Even Justice Blackburn of the Queen's Bench remarked, the 1823 Act "was passed for the protection of masters" (*The Justice of the Peace* 30 [May 19, 1866], p. 311).

There was no systematic data of any kind collected on master and servant prosecutions until Parliamentary annual reports for summary criminal prosecutions, which were published from 1858 until the repeal and reform of the law in 1875. No data were ever collected on workers' civil claims against employers. However, recent historical work suggests that prosecutions by employers were far more numerous, at least by the early 19th century, and sometimes dominated the dockets (Hay 1988, pp. 36–38).[22]

The Parliamentary annual reports for 1864–74 show that reported criminal prosecutions averaged around 11,300 per year.[23] This was slightly below prosecutions for petty larceny and on par with those for vagrancy and begging. Hay

[21] See also Steinfeld and Engerman (2000) and Woods (1979). Hay complements their analyses by arguing that these laws were designed to inject discipline more generally into the very structure of the labor market:

> The penal and other clauses of the employment statutes are not an irrelevant gloss on markets: on the contrary, they are crucial constituents of the labor market. Master and servant law was carefully designed to create labor markets that were less costly, more highly disciplined, less 'free' than markets in which the master's bargain was not assisted by such terms. . .. Criminalizing worker unruliness was consistent with a belief in the criminal inclinations of the propertyless. Master and servant law was also a way of keeping people in their place. The penal statutes made it clear that the contract of employment was an agreement between unequals. The social structure was displayed and reinforced in proceedings before justices and reflected in specific master and servant regimes . . . (Hay 2005, pp. 32, 35).

[22] Hay suggests that during the 1860s, in areas with high prosecution rates, employers brought about 80% of all claims (Hay 2005, p. 258). In my own studies in three different towns with high numbers of prosecution during the 1860–75 period I suggest an imbalance of at least this much if not greater in some instances (2003, 2005, 2006). As William P. Roberts, a lawyer who championed workers causes for many decades in the mid-Victorian era, informed a Parliamentary committee, workers had cogent reasons for being wary of pressing a case in any court:

> When you proceed against a master for breach of contract you cannot take him before a magistrate; you take him before the county judge, and a few shillings damages are awarded. The master may the next day take the man before the magistrate, and may visit him, for a less breach of contract, with three months' imprisonment and hard labour (PP 1866 XIII [449], p. 103).

[23] It is not clear how complete the reporting for summary convictions was. The range varied from a low of 7,365 in 1869 to a high of 17, 082 in 1872 at the height of an economic boom. For the annual records see P.P. 1865 LII [445], 1866 LXVIII [483], 1867 LXVI [523], 1867–68 LXVII [947], 1868–69 LVIII [737], 1870 LXIII [753], 1871 LXIV [231], 1872 LXV [235], 1873 LXX [247], 1874 LXXI [251], and 1875 LXXXI [259].

observes that nationally between 1858–75 prosecutions of workers were equivalent to between 12–32% of all prosecutions for theft, and that in the final years of the law it was between 25–32%.[24]

The number of prosecutions, however, does not wholly reveal the power of the laws as a tool of discipline in the workplace. Employers were straightforward in their admissions that a single prosecution had a salutary effect in the entire workplace. As William Menelaus, the manager of 11,000 men in the Dowlis Iron works in Glamorganshire, plainly stated before a parliamentary committee,

> I see that taking a man down to Merthyr and fining him, and in default of his paying the fine sending him to prison, restrains scores and scores of men from committing the same act for probably a month or so (PP 1874 XXX [1157], p. 147; see also Hay 2005, p. 107).

And his immediate successor at the witness docket, the solicitor and secretary to the Mining Association of Great Britain Maskell Peace, readily responded that the statutes were a useful reserve power kept "in terrorem" (PP 1874 XXX [1157], p. 155).[25]

The coercive power of the law increasingly was abetted by the composition of the local bench itself. The justices of the peace who oversaw petty sessions were generally either county magistrates on a circuit or borough magistrates. These positions had been the domain of large landholders, but by the early decades of the 19th century industrialists and their sympathetic professional allies were ascending to the bench as they achieved greater political power to influence nominations (Frank 2005, p. 408; Philips 1976; Swift 1992; Trainor 1993, pp. 167–70; P.P. 1866 XIII [449], pp. 3, 13, 36; P.P. 1874 XXX [1157], p. 132).

According to the law, magistrates were to recuse themselves when cases came before the bench involving potential conflicts of interests, and adjudication of disputes within their own industries was clearly such a case. However, these courts were not monitored and in the rare event that a particular magistrate did temporarily step aside his peers who were also often within the same social and political networks generally maintained similar legal dispositions. Workers for decades complained of the bias of magistrates who were also local industrial magnates. A potters' union periodical from the mid-nineteenth century proclaimed for example that,

> He, as we have before stated, who would administer the law from vindictive, or class-regulated feelings, is a villain, and ought to be subject to some heavy, penal enactment. The judge who would act from passion, prejudice, or class interest, and not from the letter of the law, is a blot on jurisprudence of a country,—a moral pestilence in the very heart of social existence, that threatens the security of life, liberty, and property; and ought, consequently, to be removed, as the greatest possible evil of civilized society (*Potters' Examiner and Workman's Advocate*, 1 [Dec. 12, 1843], p. 29).[26]

[24] He also estimates that for the 1750–1823 period about 10% of all prosecution were master and servant (Hay 2005, pp. 98, 108).

[25] As Robert Steinfeld suggests, "In a sense, English wage labor operated under a permanent, standing order for specific performance" (Steinfeld 2001, p. 52).

[26] See also PP 1866 XIII [449], pp. 3–4, 9, 17, 36, 87, and 91 for complaints by workers' representatives. For other critiques see (Hunter 1875); *Bee-Hive*, no. 527 (Nov.18, 1871), p. 5.

Disputes over work rules and the normal scope of a position were often heavily colored by what was deemed 'customary' in the industry and locale. Magistrates were often left as the arbiters of custom, and in those areas in which employers dominated on the bench workers frequently complained of bias (Deakin and Wilkinson 2005, p. 11; Hay 1988, p. 36; Steinfeld and Engerman 2000, pp. 268–270; Philips 1976, p. 175). High court rulings in the 1820s also had determined that workers were to obey all reasonable commands concerning the hours of work, since the employee was bound in service (Deakin and Wilkinson 2005, p. 73; Napier 1975, pp. 118–119). As Simon suggests, by the 1860s disobedience probably included keeping faith with trade-union work rules, not encroaching on another trade worker's proper job, rebuffing attempted production speed ups, and other related workplace issues (Simon 1954, p. 165). By the 1850s employers in some industries, such as pottery, were moving to printed labor contracts where they found customary practices disadvantageous to labor control in the workplace (Hay 2005, p. 104; Steinberg 2003, 2005).[27]

In general terms master and servant laws provided the best of both worlds for English capitalists in a hybrid relationship of contractually coerced employment. Marx focused his analytic attention on the formally free contractual labor market, which he argued was actually a coercive force on the worker, who lacked all access to the means of subsistence. However, given that master and servant law placed them in a hierarchical status order of service, their standing in the workplace and in the production process was not one of formal freedom which Marx identified as an ideological buttress of the labor market (Deakin and Wilkinson 2005, pp. 25, 37; Steinfeld 2001, p. 9).[28]

So imbricated was the law and its notion of service into the employment relationship and hence the production process, that constructing a fully commodified view and use of labor required some odd turns. As I noted above exclusive

[27] The reach of the laws was progressively extended to outworkers over whom employers most ready control was piece rates. An act of 1777, covering leather, iron, fustian, hemp fur, hat-making and various textiles provided up to three months imprisonment for workers who did not return work within 8 successive days or who could be charged with neglecting their work or whom returned damaged work. This was extended to all textile industries in 1843 which stated that,

> any workman who failed to finish work and return work within seven days of the appointed date—or who failed to work it up properly or did any damage to it or neglected it or left it or otherwise broke his contract—was to be punished with a fine up to £2, besides making good the damage and paying costs; or, if he failed to pay, with imprisonment up to two months. S.3 of the same Act laid down that a workman who failed to return on demand within fourteen days any material given out and not used up, or any tools, was to be punished as for embezzlement, viz., (S.2) by forfeiture of the value of the goods and a fine up to £10 and costs; or, if he failed to pay, by imprisonment up to three months (Simon 1954, p. 166).

[28] As Hay notes more generally,

> Markets are always constituted by the law that enforces the bargains made in them. Whether and how the state intervenes or abstains is expressed largely through legal rules of their enforcement (or deliberate nonenforcement) and so rests ultimately on coercive power. Law is always coercive, even when it is also simultaneously facilitative and enabling of social organization. Nor is the law neutral: its rules, at any particular time, tend to favor to a greater or lesser degree one or the other party in any given labor relation. *Freedom of contract does not mean freedom to abandon contract* (Hay 2005, p. 26, my emphasis).

agreements for service would have customary notification periods for termination, so that employers were often required to provide a minimum of a week or two notice to workers or face a civil suit for unlawful dismissal and unpaid wages. To maximize the use of labor without this encumbrance employers in certain industries from the 1850s turned to what was termed the "minute contract". This practice was adopted in some regions in iron works and collieries. Under this construction of the employment relationship workers were hired for a minute and then subsequently renewed until an employer (or worker) ended this process. Through this legal maneuver labor became more of a discrete commodity for disposal and use in the marketplace (Deakin and Wilkinson 2005, pp. 83–3; Napier 1975, p. 125; Steinfeld 2001, pp. 64, 181–2, 202, 224; P.P. 1866 XIII [449], pp. 93–5).[29]

Historical examples

The industries in which the law seems to have been deployed most frequently map well onto the divide between formal and real subsumption. As Steinfeld notes, "The more disciplinary options an employer had available the better off he was. English employers found criminal sanctions for contract breach quite useful in regulating their workers" (Steinfeld 2001, p. 66).[30] A standard interpretation of the use of the laws in the nineteenth century has been that it was resorted to most frequently by small masters who lacked other forms of coercion (Simon 1954, p.195; Woods 1979, p. 318). While there are many examples that validate this contention, a closer look at the patterns of their use and the vocal advocacy for their retention during the repeal campaign, reveals a pattern of use particularly by capitalists who sought control of the production process without the aid of steam-powered machinery, or as Marx would term it the relations of production in modern industry.

Contemporary reports and parliamentary hearings reveal that capitalists used the law in a wide variety of industries, including shipbuilding, bottle making, iron molding, brickmaking, hardware and cutlery, mining, cabinet making, the leather trades, and the building trades. Some employers in large concerns found master and servant law to be an effective cudgel against skilled workers who controlled choke points in the production process (P.P. 1866 XIII [449], pp. 17, 34, 40, 48, 60, 77–8; Hay 2005, p. 101). Two managers of extensive iron works, for example, testified in hearings concerning the acts that their coercive powers enabled them to tame obstreperous puddlers and furnacemen, who had the capacity to cost their firms hundreds of pounds by a work stoppage or absenteeism (P.P. 1874 XXX [1157], pp. 129, 144).

[29] In the building industry the battle for an hourly contract instead of a daily hire and wage payment was fought and largely won by contractors in the 1860s, particularly among the largest employers. The switch provided greater productivity and control over craft members. Among other benefits it allowed contractors essentially to hold workers idle without paying them during periods of inclement weather (Postgate 1923, pp. 209–10; Price 1980, pp. 111–14).

[30] Deakin and Wilkinson concur, "…the significance of the master and servant legislation lay in providing employers with a mechanism for imposing discipline on workers who otherwise had only a loose organizational connection to the firm, and who would often be in a position to take advantage of labour shortages to push up wages" (Deakin and Wilkinson 2005, p. 70).

In my own research on particular industries I have found examples of both large and small employers who routinely used master and servant law to inject discipline into the production process. The North Staffordshire earthenware industry provides a good case for highlighting its use among large employers. The earthenware or pottery industry has been heralded as exemplary for its refinement of the division of labor as initiated by Josiah Wedgwood, his contemporaries and successors.[31] The industry had a wide range of firms, many employing only a few dozen workers, but also a number of giants that employed hundreds, such as Brown-Westhead (1,500 in two manufactories), Ashworth Brothers (500) and the famous Etruria factory of the Wedgwoods. The average number of workers for firms in Hanley, one of six towns that formed the heart of the pottery region, was over 160 (though 60% of the 195 listed firms employed fewer than 20 workers). Most firms specialized in a particular line of products, with the earthenware trade including statuary, porcelain, stoneware and "sanitary" ware (toilets and basins). The larger manufacturers operated with a system of vertical integration, within which they would see through the entire production process, from the production of the clays, glazes and colors, to the final firing of goods for the market (Dupree 1995, pp. 52, 149–50; McKendrick 1961; Moyes 1979; Pollard 1965, pp. 177–78, 184, 261; Whipp 1990, p. 22; P.P. 1863 XVIII [3170], p. 1).

The production process relied on highly specialized labor and was partly the result of the successful attempts pioneered in the 18th century by the Wedgwoods and their peers to wrest control of production from male craft workers. By the mid-Victorian period there were some 30 separate steps for the production of finished wares and a highly refined division of labor (Dupree 1995, 149; Evans 1848, pp. 26–30; McCarthy 1886, pp. 163–166; P.P. 1863 XVIII [3170], pp. 2–3, 14).

Despite capitalists' attempts to wrest control of the labor process from craft workers, skilled males retained considerable control in critical areas of production, from pressing, throwing and casting to firing. Manufacturers faced challenges of control for several reasons. First, well into the late 19th century most production of wares was hand labor, unassisted by steam power. It was not until the 1880s that the industry was able to harness steam-powered machinery for the exacting processes of shaping clay. Relatedly, some processes, such as the casting of statuary, were not readily amenable to mechanization. Second, many factories were actually the accretion of separate buildings and workshops that had been erected with the expansion of productive capacity, and retrofitting these spaces for steam power proved difficult and highly capital intensive. Finally, skilled male workers, assisted by apprentices, were highly productive. A thrower on a manually-powered wheel, for example, could produce a teacup a minute (Celoria 1973, p. 15; Lamb 1977, p. 56; Moyes 1979, p. 48; Shaw 1903, p. 187; P.P. 1865 XX [3473], p. 10).

The spatial organization of labor into distinct workshops and the extensive use of apprentices and assistants made constant managerial supervision difficult, and in the eyes of the employers in some respects unwarranted. Since skilled male workers controlled the workplace they also engaged in the hiring and control of all their assistants, obviating the need for the manufacturer to deal with these tasks. Direct

[31] Marx himself comments many times on the state of the pottery trade in *Capital* as exploitative of children as highlighted in the battle over extending the Factory Acts and as one highly organized (despite steam power) to accommodate a legislated work day by the Acts (Marx 1976, pp. 354–5, 535, 1071–72).

supervision would also conflict with the patriarchal authority of skilled workers in the workshops, since male workers often hired family members as apprentices and ancillaries (Botham 1982, pp. 370–375; Dupree 1995, pp. 153–159; Whipp 1990, pp. 73–75; P.P. 1863 XVIII [1], p. 20).

From at least the 1850s onward larger employers mandated the signing of printed contracts granting them extensive authority, prohibiting union membership and providing guidelines for the piece rates by which workers were paid.[32] Up through the mid 1860s such contracts were conducted as annual bonds, in which a pottery worker promised exclusive service to his employer, but was often only guaranteed 16–20 working days per month.[33] After that period many skilled male workers were still hired on an annual basis (Botham 1982, p. 380; P.P. 1863 XVIII [3170], pp. 2–3, 14).

Manufacturers thus had substantial leverage over their skilled male workers through the contractual agreements, piece rates, the localized nature of the labor market and annual hiring. Nonetheless, they faced a workforce that was tightly bonded through male camaraderie in the workshop, had de facto control over the immediate pace and organization of production, and whose skill defied easy replacement through mechanization. Within each firm the two groups often tussled over changes in the production of specific wares allowed under the contract and the piece rates offered for them, the daily volume of output of ware required, the movement of workers from one product line to another and the encroachment on skill territories, deductions for what the manufacturers labeled as inferior ware and order and discipline in the workshop (particularly in regards to hours kept and drinking). Disputes were highly localized but regular, so much so that it appears that some union locals maintained standing funds to hire counsel for prosecuted workers (Burchill and Ross 1977, p. 126; Shaw 1903, p. 185; Whipp 1990, pp. 57, 66, 147–149; Stoke-on-Trent Archives Service, PA/Hob/70/P.U.R.B.).

Lacking control in the production process, despite their advantages, manufacturers made routine use of master and servant laws for labor discipline. In towns such as Hanley they were abetted by their control of local boroughs and thus their substantial presence among the borough's magistracy, and the appointment of a stipendiary magistrate for the district who was very sympathetic to their plight.[34] Borough magistrates were nominated to the position by alderman, and the predominance of manufacturers among the ruling oligarchy insured their ample representation. In the 1860s and 70s, for example, half of the two dozen men who filled the role for Hanley were earthenware manufacturers, and some of the most regular members of the bench were several of the largest employers in town.[35]

[32] After a particularly rancorous strike in 1836 manufacturers were able to defeat once powerful unions, and they remained fairly weak organizations, divided by craft and location, throughout the period.

[33] See note 19 on bonding in other industries.

[34] Stipendiaries were professional magistrates who had extensive background in the law as barristers before being appointed to the job. Unlike their borough counterparts they were salaried, and their appointment was made at the special request of a town or region. They were an outgrowth of the earlier professionalization of the London magistracy, though few areas of the country elected to request them. During the 1860s and 70s the Potteries region had two such stipendiaries, Davis and Balguy. The former wrote a treatise on master and servant law (because of his extensive experience) listed in the references (French 1967a, 1967b).

[35] See Steinberg (2003) for biographical references on the manufacturers who participated as borough magistrates.

Data from the annual parliamentary reports show that Hanley had significantly higher rates of master and servant convictions than the national average, and at the crest of a boom in the early 1870s had a multiple of nearly five times this average. For closer analysis I collected data from the Hanley magistrates' court minute books and compiled reports of court cases from the "Police Reports" section of the *Staffordshire Advertiser* (one of the main weekly newspapers for the area) for 1864–1874.[36]

Given the dominance of the industry in Hanley it is not surprising that 59% of the recorded master and servant prosecutions in this data are for the earthenware industry. Among earthenware workers the vast majority of prosecutions involved males in one of the skilled units of production.[37] Defining employer success as a conviction or as having the worker assent to the employer's demand prior to a decision by the bench, about 85% of these prosecutors achieved their goals. Additionally, the largest manufacturers in town also dominate the list of the most frequent prosecutors, holding the first nine positions in this ranking. Their prominence demonstrates that they resorted to master and servant law just as their more diminutive peers in the trade.

The court records and newspaper reports reveal a standard set of disputes and accusations for this decade. Manufacturers prosecuted for tardiness or absence, irregular work habits, drinking and refusal to work based on a piece-rate disagreement or a demand that workers switch to a different line of ware. Absence was often prompted by these disputes. Manufacturers also turned to the court to end small-scale work stoppages.

Throughout the decade prosecutions typically resulted in the employee returning to work to follow the manufacturer's dictates, the posting of a surety to guarantee the completion of the contract, fines or damage payments. In less than 10% of the cases brought to judgment were workers actually sent to prison, which would have meant a loss of labor for the manufacturer and the need to find a replacement.[38]

While demonstrating direct causality is tricky, the Staffordshire pottery industry did engage in a sustained drive to add steam-powered machinery after the reform of master and servant law in 1875. Mechanization for throwing spread in the mid 1870s and for pressing in the 1880s. As such machinery was added, skilled male operatives were increasingly replaced by adult women, much to the consternation of the former group (Burchill and Ross 1977, p. 154; Celoria 1973, pp. 135–140; Lamb 1977, pp. 57–60; Whipp 1990, pp. 47, 138).

A second set of different examples of the importance of master and servant laws comes from the Black Country, a region encompassing south Staffordshire, East Worcestershire and Birmingham. As a contemporary observer wrote the district was characterized by a "dense fuliginous blackness" created by the coal and iron industries that comprised the economic heart of the area. Another noted "The whole of the Black Country between Birmingham and Wolverhampton is a nebula of coal

[36] It is clear that these data on prosecutions are by no means complete, yielding numbers equivalent to about 20–25% of all of the convictions in the annual parliamentary reports. It is not possible to decipher selectivity biases. Trial reports from the *Advertiser* were particularly useful for decisions rendered by the stipendiary magistrate which had its own circuit and thus different minute books.

[37] For detailed tabular data see Steinberg (2003).

[38] For a detailed breakdown of the data on convictions see Steinberg (2003).

and iron towns, making one great cloud of industrial communities . . .” (Anon 1863, p. 210; Burritt 1868, p. 344).

Unevenly dotting the district were some 100 firms that engaged in the production of iron, and a greater number of coal and iron mines.[39] While there was a wide array of specialized metal production throughout the entire region, and some boroughs such as Walsall were known as a “town of a hundred trades,” generally each town had a sizeable if not dominant industrial base by which it was known. Walsall, a township of over 48,000 people in south Staffordshire, for example, produced about one-third of all the saddlery for the country (in addition to a substantial export market) and the trade employed about a fifth of all the workers in the town.[40] Its smaller immediate neighbor, Willenhall, along with the larger Wolverhampton (further to the west), were national centers for the lock trades. In the former, for example, of a total population of about 18,000 in the 1870s, there were almost 3,000 journeymen and masters in the trade (Allen 1929, pp. 79–80; Barnsby 1980, p. 2; Gale 1966, p. 104; Liddle 1991–92, pp. 76, 79).

To the south, on the eastern edge of Worcestershire, lay the satellite towns of Birmingham, including Halesowen and Oldbury. The former was known for its gun production and had a couple of button factories, while the latter had a number of significant iron works, was a hub of alkali and phosphorous production and was a center of the edge tool trades. However, the dominant trades in this area were nail and chainmaking. A local magistrate termed the trade “endemic”, and observers estimated that there were some 10,000 workshops and, depending on the state of the trade, anywhere between 20–30,000 employed in production. A commentator noted that one could appreciate the economic foundation of the area by hearing “the clinking of hundreds of their little hammers supply the *aria* to the great concerts and concertos of mechanical industry” (Allen 1929, pp. 66–67, 90–98; Ball 1967, p. 111; Burritt 1868, p. 228; P.P 1864 XXII [3414–1], pp. 137–188; P.P. 1876 XXIX [1443], Vol. 2, pp. 84–85, 323).

While iron works, mines and factories could employ well over 100 workers at a single site, the metal trades were typically either outwork or workshop-based and completely manual. The size of the production units and the numbers employed by firm varied by trade and the institutional organization of production. The largest saddlery shops in Walsall employed between 50–100, though generally masters in leather trades often employed far fewer, as did those in saddlers’ ironmongery. The approximately 275 master lockmakers typically maintained between 6–8 journeymen and apprentices in their shops. Chainmaking generally involved a mixed gender and age group of about a dozen workshop-based workers. The hand-made nail trade was based in forges appended to the nailers’ cottages. The workshop was often patriarchally run, contained a husband, wife and one or two children, though stalls could be rented to other nailers, and adult women could be the central figures in the shop while their husbands engaged in other work. While these were tiny units of

[39] One contemporary source stated that there were 104 blast and 2,049 puddling furnaces for iron production active in the area in the early 1870s (*The Stourbridge Observer, Cradley Heath, Halesowen and District Chronicle* no. 428 [June 8, 1872], p. 4).

[40] Walsall was a complicated administrative unit. It was comprised of the borough, which only contained about 8,300 people, and the foreign township which included adjacent villages and hamlets (White 1873, p. 918).

production, the nail masters who chiefly organized the trade could control hundreds of outworkers through their warehouses from which they dispensed iron for working up and accepted finished goods for payment on a weekly basis (Allen 1929, pp. 129, 132, 147–148; Hackwood 2002, pp. 81–106; Liddle 1991–92, p. 86; Tildesley 1967, p. 88; P.P 1864 XXII [3414–1], p. 137; P.P. 1876 XXIX [1443], Vol. 2, pp. 299, 304–8, 322–4, 328; P.P. 1876 XXIX [1443], App. C, p. 72).

These trades also varied by the degree to which they were degraded or 'sweated', which was to some extent reflected the prominence of women and children in production. The nail trade was widely considered to be debased. The nailers themselves were characterized by a Halesowen magistrate as "more ignorant than the miners. They are not wanting in intelligence but are rough and untaught." A representation of nailers described their condition to a parliamentary commission as being "bigger slaves than ever the slaves were in Africa" and viewed the continuing expansion of women in the trade as a sign of their degraded status (P.P 1864 XXII [3414–1], p. 138; P.P. 1876 XXIX [1443], Vol. 2, p. 318). Other signs of the low status of the trade were the number of factors, middlemen who would act as intermediaries between the manufacturers and the nailers and offer work at lower piece rates, and payment of truck, often by these factors, which was in kind payment partly through factor-owned groceries or beer shops (Moseley 1968, p. 24; P.P 1864 XXII [3414–1], p. 138; P.P. 1875 XVI [1345], pp. 80, 83–4; P.P. 1876 XXIX [1443], Vol. 2, pp. 306, 308, 319). While the lock trade did not have female labor, the use of poorhouse apprentices was common. The quality of the work in the low end of the trade was derided by a major manufacturer, who observed that a locksmith never stooped down to pick up a dropped piece in preparation, because he could make another more quickly. The saddlery and harness ironmongery industries appear to have been the least debased, with women working in the light end of the latter trades, though there were some factors who plied their trade. Wages, generally in the form of piece rates, reflect these differences. Male leather workers could earn 28–30s. per week in Walsall, while on the other end of the spectrum a common nailer might earn 9–10s. after numerous reductions for shop and tool rental, fuel and carriage charges for the heavy bundles of iron (Allen 1929, pp. 155–167; Barnsby 1977, p. 124; Burritt 1868, p. 213; Franklin 1967, p. 87; Hackwood 2002, p.165; P.P. 1876 XXIX [1443], App. D, p. 151; P.P. 1876 XXIX [1443], Vol. 2, pp. 304, 309).

Workers in most of these trades lacked strong unions, though in the 1860s and 70s even the more lowly trades were organized locally and cooperated in regional actions to defend or advance wages. During the depressed years of the early to mid-1860s there was little collective action, but in the boom period of the late 1860s and early 70s organizing for wage increases occurred in most of these trades. Locksmiths, saddle, harness and related ironmongery workers all agitated for several piece-rate raises in the early 1870s, when the business was brisk.[41] The nailers and chainmakers had the most extensive record of strike activity throughout the period, which at times affected the entire region (Allen 1929, p. 117; Ball 1967, p. 114; Barnsby 1980, pp. 168–175; Burritt 1868, p. 232; Trainor 1993, 279; *Bee-Hive* June

[41] Employers in the Walsall trades seemingly feared workers' organizations, since a writer in the annual trade directory (ironically named *The Red Book*) for the town in 1872 warns workpeople against the fantasies of "Communism" ('Spes Ancora Mea' 1872, pp. 19–23).

27, July 11, 1863, May 16, August 8, 22, 1868, Feb. 20, July 24, Sept. 18, 1869, Oct. 28, Dec. 12, 1871; July 13, 1872, March 14, 21, 28 1874; *Saddlers', Harness Makers' and Carriage Builders' Gazette* Oct. 2, Nov. 1, Dec. 1,1871, Jan. 1, 1872; *Staffordshire Advertiser* May 5, 1871, Jan. 6, 20, Feb. 17, March 23, Sept. 7, 1872, March 1, Sept. 4, 1875; *Walsall Free Press* Jan. 6, 13, 20, March 9, 1872).

Lacking any technological control of the labor process, and sometimes (as in the case of the nail trade) dependent on outworkers, the employer in all of the trades routinely faced issues of insuring that "work is performed in an orderly and methodical fashion and that the use-value he has in mind emerges successfully at the end of the process" (Marx 1976, p 986). As Marx observes in *Capital*, piece rates are the foundation of "a hierarchically organized system of exploitation and oppression" in these circumstances (Marx 1976, p 695). However, they do not make superintendence superfluous as he suggests, and employers experienced numerous control problems in the production process. For one, employers in saddlery, iron, lock, nail and other trades continued to struggle with workers electing to celebrate "St. Monday" (and sometimes "St. Tuesday") during which workers would absent themselves entirely (Allen 1929, p. 166; Jones 1967, 75; Tildesley 1967, p. 91; P.P 1864 XXII [3414–1], p. 138; P.P. 1876 XXIX [1443], pp. 85, 306, 309, 317). To make up the time workers often engaged in long intense days the remainder of the week, to the chagrin of their employers who complained of poorer quality products.

Employers also employed a repertoire of other strategies to discipline their workforces. In the nail trade, for example, some masters insisted that the iron to be worked by outworkers be bought directly from them, so that they could have direct claim on the materials. In that trade, chainmaking and other out-work and shop-based industries employers also charged workers for all of the ancillary services needed for production—from the carting of materials to the coal used for heating metal—creating not only a profit on these services but more impoverished workers, keeping them, according to a leading manufacturer "under their fingers". In the lock trade (as well as others) masters would lend money to locksmiths creating a type of debt peonage, since workers were often unable to work out the loan and provide for themselves under the conditions of their contracts. Middlemen and factors, particularly in the nail and chain trades, also ran truck or 'tommy' shops through which workers received their remuneration as goods or alcohol at inflated prices, even though such arrangements had been made illegal decades ago (P.P. 1864 [3414–1] XXII, pp. 136, 138; P.P. 1876 [1443] XXIX, App. D, 151; P.P. 1875 [1345] XVI, p. 84; P.P. 1876 [1443] XXIX, Vol. 2, 297, 304, 306–309, 320, 327; *Saddlers, Harness Makers and Carriage Builders' Gazette*, Oct. 1, 1872: 167; *Staffordshire Advertiser* July 5, 1873, Feb. 27, 1875).

However, as the local historian George Barnsby has observed, "The keystone of the control of employers over their workers was, however, the Master and Servants Acts. . ." (Barnsby 1977, p. 220). The employers' reliance on the law was predicated on their more general control of borough and town politics. As David C. Woods notes in the case of the Black Country,

> The prevalent form of law and authority in the Black Country towns in this period emanated from self-perpetuating oligarchies who were able to dominate

> both borough government and borough law enforcement. They not only administered the law, but helped to make it as well. In this sense the manufacturers, iron and coal masters, merchants and factors, complemented their formidable economic power with control over local administration and justice (Woods 1979, pp 88–89).[42]

Richard Trainor also observes that larger manufacturers and commercial and professional elites were the bulwark of the local governance and justice system. Borough magistrates, he notes, constructed self-images of equanimity, mixing tolerance with an air of moral superiority, though taking a firm line on industrial discipline and civic order (Trainor 1993, p. 170).

Analyses of the occupations of sitting magistrates in Walsall, Willenhall, and Halesowen confirms these depictions. In Walsall and Willenhall the majority of magistrates were connected to the iron or coal trades or were merchants, and also included in their ranks a solicitor, doctor and land agent. The bench in Halesowen was largely composed of manufacturers and coal masters along with the town surgeon, a rector and a major landowner.[43]

The social composition of the local bench thus facilitated its recourse by employers, and the extant evidence suggests that they made frequent and successful use of it. Walsall was a large enough administrative unit that separate statistics for summary criminal prosecutions were collected annually for parliamentary reports.[44] Over the decade prior to the repeal of the old laws in 1875 the rates of prosecution in the borough were generally three to five times higher than those of the nation as a whole. In relation to all other offenses heard at petty sessions it was at least the fourth most common, with only violations of local bye-laws, assault and drunkenness being more frequent.

No local registers or minute books remain for Walsall, though information is available on some cases that were reported in the police reports section of local and regional papers for 1869–73.[45] Not surprisingly the plurality of cases discussed were in the saddlerly, harness and hardware trades (37%) followed by coal mining (31%). Iron, lock-making and other or non-determinable trades trailed far behind. The sentences meted out in the saddlery trades cases were fairly harsh; just over half had

[42] Marx was aware of this bias problem in the local courts from his readings of the troubles that the factory inspectors experienced in enforcing manufacturing and mining safety laws (1967, pp. 88–89).

[43] The analyses were conducted by using the magistrates lists for each town from the *White's Directory*, *Littlebury's Directory and Gazetteer of the County of Worcester*, the names of magistrates listed in the magistrates' entry books (for Halesowen and Oldbury, Worcestershire County Record Office, Register of the Court of Petty Sessions, 1870–1877, BA 2509, Class B260.103 and for Willenhall, Walsall Local History Centre, Walsall Magistrates' Courts Entry Books, 254-1-8: May 1873–Dec. 1875) and cross-referencing them with the occupations listed for each of the individuals in the 1871 English Census registers. Oldbury had two magistrates, a landowner and a retired surgeon.

[44] For a list of the relevant parliamentary reports see n. 23.

[45] For this analysis I collected descriptions of all cases that were reported on in the *Staffordshire Advertiser* and/or the *Walsall Free Press*. This group of a little more than 100 cases is certainly not a representative sample of the many hundreds that were brought before the court, and it is impossible to tell on what basis the cases were selected. My experience in comparing data collected from newspapers and original court records is that the subset derived from the former generally overemphasized the cases with the more severe penalties and under-represents cases that received lighter sentences or were otherwise disposed by the courts.

to pay a fine or damages, court costs and return to work, almost a quarter received jail time and just a couple were dismissed. Coal miners felt a slightly more kind hand of justice, being fined a little less than a third of the time. Payments were often 10 shillings or more, and coupled with court costs a conviction could often cost a worker the better part of a week's wages. A common jail sentence for cases reported in these articles was 3–4 weeks.

That employers in the harness and saddlerly trades saw master and servant law as a standard means of maintaining production is exemplified by the prosecution of a hame maker, Samuel Sawbridge, for his employer John Adams, at the beginning of April of 1872.[46] The indictment was actually brought by the Hame Makers' Association, an employers' group, and the town clerk appeared on their behalf to prosecute the case. The case was a type of show trial to both warn workers against absenteeism and encourage employers to take advantage of the courts to instill labor discipline.[47]

The court registers for Willienhall for the 3 years of 1873–75 provide a more comprehensive (if briefer) picture of the ways in which employers relied on master and servant prosecutions. Similarly to Walsall, master and servant prosecutions amounted to a little under 10% of all cases heard before the court and trailed not to far behind drunkenness and assault as the most common criminal infraction. Not surprisingly the clear majority of identifiable cases (61%) involved the lock trades, with coal and iron occupying the next two positions in the ranks.[48] For those cases involving locksmiths that ended in sentencing, about a third were required to pay fines or damage and courts costs and a third sentenced to jail terms. The next most common action was the withdrawal of the case before it proceeded to trial (about a fifth of all cases) suggesting that the scare of the summons to court might have been sufficient to make these locksmiths more amenable to their employers' demands. Among those in the iron trades two-thirds were subject to damage payments or fines. The majority (55%) of all coal miners also faced fines or damage payments, though a substantial minority, as with the locksmiths, had their charges withdrawn before the proceedings.

The court records for these last two groups also reveal the strategic uses of master and servant law for employers. In early September 1873 the entire staff of 21 horse drivers for the colliery of Messrs. Deeley and Dudson's Essington Farm Colliery deserted work for other interests, leaving the pit operations at a standstill. The colliery masters quickly obtained summons for unlawful leave of absence and the drivers initially resisted return because of the prosecution, but after the first exemplary conviction all rapidly fell into line, pleading guilty, receiving fines and stern admonishments from the sitting justices (Walsall Local History Centre, Walsall Magistrates' Courts Entry Books, 254–1, Sept. 8, 1873, cases 400–420; *Staffordshire Advertiser*, Sept., 13, 1873). In late September the following year the Herbert

[46] A hame is part of a horse collar and the trade was a major workshop industry in the area.

[47] Damages of £2 were claimed, but the defendant was released with a stern warning, (*Walsall Free Press*, April 6, 1872).

[48] The trades involved were identified by matching the employer's and or workers' names listed in the court register with names found in the English census record books for Willenhall and its immediate environs for 1871 (RG 10 series) or 1881 (RG 11 series). Identification using this strategy was possible for a little less than 90 percent of the listed cases.

Park Ironworks owned by David Jones & Sons appears to have had a dispute with a group of puddlers and shinglers during a night shift, two critical skilled groups of workers who were linchpins of the production process. Eleven of them walked off the job before the completion of the evening's heat and they were presented with summonses the next day and faced damages claims of £1 each. Eight pleaded guilty and had their payments reduced to 10 s., while three refused to admit guilt, and were subjected to the full damage penalty. All subsequently returned to work (Walsall Local History Centre, Walsall Magistrates' Courts Entry Books, 254–4, Sept. 28, 1874, cases 58–69; *Staffordshire Advertiser*, Oct., 3, 1874).

As several historians have noted master and servant law was perhaps the most effective tool during the nineteenth century in the suppression of strikes and other work stoppages (Barnsby 1977, p. 220; Curthoys 2004, pp. 35, 235; Deakin and Wilkinson 2005, pp. 67–68; Hay 2005, p. 101; Philips 1976, p. 180; Simon 1954, pp. 168, 171; Steinfeld 2001, p. 65; Woods 1979, pp. 313, 321, 331).[49] Because all agreements for exclusive service had traditionally assumed or explicitly written agreements for notice of dissolution (generally 2 weeks or a month, though for highly skilled workers this could be even longer) employers, as in the above cases, readily could obtain summonses against obstreperous workers for lack of proper notice of termination. With such legal restraints work stoppages rapidly collapsed and production was soon restored.[50] The court records from Willenhall during these years suggest that colliery and iron masters used the law several times in this way to their advantage.

A look at the 1870–75 the Halesowen and Oldbury court registers provides us with a slightly different angle on the same picture. The plurality of cases (about 40%) involve the nail trade with the iron trades following second (at about 30%). In the latter industry about 40% of all cases involve damage payments to employers, while a quarter of the cases were withdrawn prior to prosecution. In the critical nail trades a different pattern emerges: over 40% of the cases were either withdrawn or not pursued by the employers while another 40% were settled with an agreement by the nailers to finish their work. In the case of outworkers a summons regarding delinquent work may well have been sufficient to prompt completion of production goals. Such was the strategy of one of the larger firms in the area, Messrs. Homes & Hickton, which seems to have summoned workers routinely to insure that outstanding work was completed in a timely fashion.[51] As in the Staffordshire Potteries, so in the Black Country the law was a critical means for controlling the labor force and the production process.

[49] For contemporary observations see Longe (1860); *The Justice of the Peace* 32 (Nov. 14, 1868), pp. 726–29, 38 (June 6, 1874), p. 357, 39 (Jan. 2, 1875), p. 6.

[50] Such a strategy was even used in highly mechanized industries, such as in the famed cotton spinning factories of Lancashire. In 1866, for example, there were 498 prosecutions in the town of Preston, which represented almost two-thirds of all master and servant master and servant proceedings for the entire county that year (PP 1867 LXVI (523), p. 27). The prosecutions were used to break a rancorous strike of cotton spinners, Robert J. Steinfeld (personal communication).

[51] See for example the cases reported in *The Stourbridge Observer, Cradley Heath, Halesowen and District Chronicle*, Feb. 10, July 27, Oct., 19, 1872.

Discussion

The above cases demonstrate the range of possibilities provided by master and servant laws for capitalists seeking effective strategies for formal subordination. Having little leverage against skilled workers who controlled choke points in the production process, such as potters or puddlers, the threat of fines or damages was generally a sufficient prod to engage their work at expected levels of productivity.[52] But the uses of the laws extended to less skilled and even debased trades. As Robert J. Steinfeld argues, employers in a wide variety of industries could turn to the law to enforce labor discipline in low-wage industries in which turnover and absenteeism could be a problem, and enforce productivity levels in the absence of other means of sanctioning, supervision or control (Steinfeld 2001, pp. 61, 71). By drawing on the law these capitalists, such as those in the nail trades, fashioned regimes of formal subordination that bolstered exploitation. Outworkers, who labored beyond the supervisory watch of their employers or assistants, were not beyond the reach of the law. And, as we saw in the case of Willenhall (and examples could be provided for the other towns as well) master and servant laws were one of the most effective tools available to employers to break strikes and maintain general discipline among their workforces.

In reconstructing Marx's theory of ideology in *Capital*, John Mepham (1979) has argued that capitalist processes of production and circulation proceed simultaneously through phenomenal forms and real relations.[53] The compulsion of economic relations and the mystification of commodity fetishism operate simultaneously in the reproduction of the capitalist circuit. A parallel argument can be made for the ways in which law operates in the formal subsumption of labor in the production process. Master and servant law ideologically defined the employment relationship not only in ways that Marx understood capitalist mystification, but also as a fundamental status relationship that created a hierarchical tie binding 'servant' to 'master'. Working-class opposition to the law and this mystification emerged slowly over the decades in the nineteenth century, and the ultimate critique offered against it by trade union activists in the Trades' Union Congress Parliamentary Committee and their allies was developed through the concepts of equality and exchange in the market, still deeply embedded within the confines of political economy.[54] But as I have sought to indicate above, the law also had a very palpable coercive dimension that could be exerted in the production process. In the organization of economic exploitation in some industries, political domination via the strong arm of the state was needed. In this respect formal subsumption was not based solely on forces interior to the social and technical relations of the production process. This coercive force assumed a particular institutional form that governed the workplace.

Of course, as a commodity cum property, labor power was necessarily governed by a capitalist legal system concerning the circulation of commodities and the

[52] Hay argues that master and servant law was often very effective in handing skilled workers (Hay 2005, p. 101).

[53] Isaac Balbus makes a similar argument (Balbus 1977, pp. 576, 584–5).

[54] In the early struggles against master and servant law workers' lawyers had fought against it on technical rather than substantive grounds. See for example Christopher (Frank 2002). For discussions of this struggle for reform see, Curthoys (2004), Fraser (1974), Harrison (1965), pp. 251–342, Kaufman (1974), McCready (1955, 1956), Spain (1991) and Trades' Union Congress Parliamentary Committee (1874).

processes of accumulation. In this sense we also need to investigate the ways in which law was part of real subordination in the bowels of the dark satanic mills that were so emblematic for Marx of the process. It is perhaps in this sense that E. P. Thompson's observation that "'law' was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law," applies not only to the particulars of eighteenth-century English agrarian capitalism, but to capitalist productive relations *tout court* (Thompson 1975, p. 261). As Ellen Meiksins Wood states the case more broadly:

> But relations of production themselves take the form of particular juridical and political relations—modes of domination and coercion, forms of property and social organization—which are not mere secondary reflexes, not even just external supports, but *constituents* of these productive relations. The 'sphere' of production is dominant not that it stands apart from or precedes these juridical-political forms, but rather in the sense that these forms are precisely forms of production, the *attributes* of a particular productive system. A mode of production is not simply a technology but a social organization of productive activity; and a mode of exploitation is a relationship of power (1995, p. 27).

Many workers in Victorian England understood this analysis all too well, for they lived it. Their history should inform our analyses of the present. Recent work by Ching Kwan Lee and by Mary E. Gallagher demonstrates a huge increase in recourse to an invocation of the law by Chinese workers since the enactment of the 1993 Labor Law (Gallagher 2005, 2006, 2007; Lee 2007). Gallagher in particular documents a ten-fold increase in labor dispute filings during this period (Gallagher 2005, pp. 98–100). Gallagher also analyzes the ways in which workers have come to see the law as a means of tactical engagement with both corrupt local officials as well as exploitative employers. As she notes, "The legal consciousness of Chinese workers is profoundly shaped by the heavy hand of the state in the creation of new legal institutions that are at least partially intended to buttress the state's legitimacy" (Gallagher 2006, p. 792). For many workers the process creates a legal consciousness which she terms "informed disenchantment," an understanding of legality through which workers come to see the pursuit of claims through legal means as strategic and instrumental (Gallagher 2006, p. 804). Workers increasingly perceive employment as a contractual relationship within which they have to maneuver tactically.

Lee and Gallagher analyze the limited victories that workers have won through the pursuit of legal claims, but also how the invocation of the law can reposition workers with their employers and the state in bargaining concerning wages and working conditions during collective protests. Formal institutions of the local courts and labor bureaus rarely resolve grievances to workers' satisfaction, yet legality does enter the workplace as legal discourses partly set the terrain for extra-institutional contention concerning work pace, safety issues, work rules, overtime and other related issues.

For many workers in Victorian England the law was a key component in their subordination in the labor process. Their struggles in the workplace were shaped by master and servant law, and individually and collectively the law was invoked as a

touchstone of their exploitation. As we extend our analyses of the labor process and its continuing transformation greater scrutiny of the ways in which law is imbricated in struggles in the workplace should be a priority.

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