THE TEST OF THE EMPLOYMENT RELATION

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Labor's status is the subject of what seems to be an interminable war, with campaigns in the courts, on picket lines, in conference rooms, and in legislative halls. The prominence of these battles increases, if anything, the obscurity in which a closely related conflict is being worked out. For as long as there are important distinctions to be made on the basis of whether an employment relation exists, there is fairly certain to be at least some argument over the existence of that relation.

And important distinctions are made. Whether it is a familiar claim such as an employer's liability for the tort of his alleged employee or his duty to provide common-law or statutory compensation to an injured employee; or a less known advantage such as a preference under insolvency statutes or exemption of employees' wages from garnishment; or a comparative innovation such as the duty to pay social security taxes or to pay a statutory minimum wage—all of these legal problems and others include the possibility of having to distinguish employment from other relationships.

The pivotal importance of the employer-employee relationship under the recent statutory developments warrants re-examination of an old and well-discussed issue. For throughout the wide and increasing

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1 This list is, of course, merely suggestive and is not intended to be complete.


4 Decisions by the Internal Revenue Bureau on this question, e.g., occupy a large proportion of the Internal Revenue Bulletin numbers since the latter half of 1936.

5 The statutory provisions involved are 29 U. S. C. (Supp. 1938), §§ 203 (e), 206 (a).

6 These distinguishable relationships prove more often than not to be varieties of that all-inclusive non-employment relation, the "independent contract.”

7 The Internal Revenue Bureau alone published over 200 decisions on the employment relation under the national Social Security Act during the first three years after its passage. See issues of the Internal Revenue Bulletin.

8 These are a few of the notes provoked by the problem in the field of work-
scope of application of the employment relation a single standardized
criterion of its existence has been utilized almost to the exclusion of
any other. Perhaps greater familiarity with the development of that
test will deprive it of some of its seeming inevitability and pave the
way for further consideration of possible alternatives.

ORIGIN OF THE CONTROL TEST

The relation of employer and employee is, of course, that for­
merly known under the title of master and servant. The shift to the
first terminology seems to have accompanied the development of
workmen's compensation legislation, which makes clear the substan­
tial identity of the two. And it was in determining the scope of vicari­
ous liability under the doctrine of respondeat superior that definition
of this relation became important. Thus the Agency Restatement's
definition is catalogued under "Liability of Principal to Third Person;
Torts." 9

The orthodox modern definition of the master-servant relation
is mainly in terms of the employer's right of control:

"in all cases the relation imports the existence of power in the
employer not only to direct what work the servant is to do,
but also the manner in which the work is to be done."10

men's compensation: 6 CAL. L. REV. 235 (1918); 70 Univ. Pa. L. REV. 343
(1922); 17 ILL. L. REV. 388 (1923); 12 Minn. L. Rev. 83 (1927); Williams,
"Distinction between 'Employee' and 'Independent Contractor,'" 2 Conn. Bar J.
282 (1928); 19 CAL. L. REV. 220 (1931); 5 Temple L. Q. 478 (1931); 18
Iowa L. Rev. 525 (1933); 9 Ind. L. J. 262 (1934); 35 Col. L. Rev. 1325
(1935); 84 Univ. Pa. L. Rev. 558 (1936); 12 Wis. L. Rev. 219 (1937).

9 Agency Restatement, § 220 (1933).

also 18 R. C. L. 490 (1917). The Agency Restatement, § 220 (1933), is a little
less certain:

"(1) A servant is a person employed to perform service for another in his
affairs and who, with respect to his physical conduct in the performance of the service,
is subject to the other's control or right of control.

"(2) In determining whether one acting for another is a servant or an inde­
pendent contractor, the following matters of fact, among others, are considered:

"(a) the extent of control which, by the agreement, the master may exercise
over the details of the work;

"(b) whether or not the one employed is engaged in a distinct occupation or
business;

"(c) 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 super­
vision;

"(d) the skill required in the particular occupation;

"(e) whether the employer or the workman supplies the instrumentalities, tools,
and the place of work for the person doing the work;

"(f) the length of time for which the person is employed;
It is reasonable to expect that the accepted definition should accord with the accepted theory of the principle of respondeat superior. But there exists no single accepted theory of the rule of liability for a servant's negligence or other uncommanded wrongs. Baty listed no less than nine theories together with the most prominent supporters of each and amassed a considerable body of opinion to the effect that the rule was quite unjust and illogical.\textsuperscript{11} The author summed up his own position thus:

"Unknown to the classical jurisprudence of Rome, unfamiliar to the mediaeval jurisprudence of England, it has attained its luxuriant growth through carelessness and false analogy. . . ."\textsuperscript{12}

Of the suggested rationales of the rule one of the most important is, of course, that the master can control his servant's actions. But it may be worth inquiring how this particular one of the much disputed and doubted theories in justification of the rule came to be the standard definition of persons within the rule.

The earliest English case which applies the control test in terms that sound distinctly modern is \textit{Sadler v. Henlock}\textsuperscript{13} in 1855. There the defendant hired a common laborer to clear a drain running from the defendant's land under the highway. The defendant chose the particular laborer for the job because the latter had installed the drain in the first instance. Due to the workman's negligence the highway was left in disrepair, and plaintiff suffered injury thereby. The trial judge instructed the jury that the laborer was to be regarded as a servant of the landowner; and the consequent verdict for the plaintiff was sustained in Queen's Bench. Lord Campbell and Crompton, J., found the relationship of master and servant almost solely from the apparent power of control in the landowner, while Wightman, J., inclined to emphasize the fact that the laborer had no independent employment. Lord Campbell remarked:

"The defendant might have said, 'fill up the hole in the road, but not as you are now doing it, lest, when a horse goes over the

\textsuperscript{(g)} the method of payment, whether by the time or by the job;
\textsuperscript{(h)} whether or not the work is a part of the regular business of the employer;
and
\textsuperscript{(i)} whether or not the parties believe they are creating the relationship of master and servant."

\textsuperscript{11} \textit{Baty, Vicarious Liability} 146-154 (1916).
\textsuperscript{12} Ibid., p. 7.
\textsuperscript{13} 4 El. & Bl. 570, 119 Eng. Rep. 209 (1855).
place, he may be injured. Pearson was therefore the defendant’s servant. ..." 14

But it was Crompton who was apparently most responsible for actually formulating a “test” of the relationship. Any one of the following passages alone would have established his claim to being first in England to state unequivocally the criterion of control:

[arguendo] “Is not this rather a case where the employer maintains a control over the person whom he employs? A contractor chooses the mode in which the work is done, and the persons who do it. I thought the principle of the cases, which are cases of difficulty, was that the contractor had this power of choice.” 15

[arguendo] “In Milligan v. Wedge ... the Court must have supposed that the defendant could not interfere with the management of the beast.” 16

“I decide, not on the ground that Pearson did not employ the hands of another ... though it is true that such employment may sometimes be a test as to whether the employer was a servant or an independent contractor. The test here is, whether the defendant retained the power of controlling the work.” 17

The judges in Sadler v. Henlock are not reported to have relied on any previous cases for their judgment of the point in question, but counsel of course made full citation of the authorities. One of these earlier cases cited was Milligan v. Wedge, 18 a familiar landmark in the development of tests for the employment relation. 19 The facts are familiar: the defendant, a butcher, hired a licensed drover to drive a bullock through London to the butcher’s establishment outside the city. Only licensed drovers were permitted to drive for hire in the city. The drover in turn hired a boy to herd the defendant’s and four other bullocks through the streets. The defendant’s animal escaped its custodian and damaged the plaintiff’s shop. In affirming a decision for the defendant on the ground that the drover was an independent

15 Ibid., 4 El. & Bl. at 575. Italics added.
16 Ibid., at 576.
17 Ibid., at 578.
contractor rather than a servant, the judges used both tests: that of control and that of independent calling. In connection with the case at least two of the judges stressed the distinct occupation of the licensed drover. On the other hand, the control test was relied on merely to distinguish the troublesome case of Randleson v. Murray. Thus it appears that as late as 1840, the date of Milligan v. Wedge, the line of authority for testing the employment relation by reference to the power of control on the part of the alleged master was extremely weak and thin. Both the tests, indeed, were at most suggestions thrown out as possible grounds for characterizing and distinguishing two isolated situations not viewed as necessarily representative of any general principle.

The bothersome decision of Randleson v. Murray was decided in 1838 and, typical of that time, contained no intelligible allusion to the problem of tests of the master-servant relation. And its holding that a warehouseman was liable for the negligence of the employee of a master carter employed by a master porter employed by the warehouseman seems by now to be quite clearly out of the main course of decision of that time. On the other hand, Quarman v. Burnett, decided by the Court of Exchequer, was considered to control the decision in Milligan v. Wedge. And that case, like Randleson v. Murray, cannot be interpreted as attempting to state a definitive test of the master-servant relation. Backwards in time from Quarman v. Burnett, the strongest link in this chain of precedent is the leading but indecisive case of Laugher v. Pointer. Both cases raised the question of liability for the negligence of the driver of a hired team of horses attached to a carriage owned by the lessee. Laugher v. Pointer was finally decided by an even division of the four judges of King's Bench after the case had been heard before twelve judges in Serjeants' Inn Hall (who also were divided). From the four separate opinions rendered, practically nothing can be discerned apropos of

21 Randleson v. Murray was, however, "distinguished" by contemporary judges. See, e.g., Quarman v. Burnett, 6 Mees. & W. 499, 151 Eng. Rep. 509 (1840), distinguishing between negligence of a contractor in regard to land and in regard to movable property. In the former situation the owner and contractee was thought to be liable. This distinction is the part of Bush v. Steinman most definitely repudiated in Reedie v. London & N. W. Ry., 4 Exch. 244, 154 Eng. Rep. 1201 (1849). See note 31, infra.
the question of control. Perhaps the nearest is Chief Justice Abbott’s pointing out that the lessee of the horses probably could not order their driver to turn them over to another person. It was Abbott’s and Littledale’s opinions that prevailed in Laugher v. Pointer by the equal division, and these same opinions were eventually approved by the Court of Exchequer in Quarman v. Burnett.

Sadler v. Henlock, then, may be considered the starting point of the modern doctrine of control. Back of it the most direct line of authority is through Quarman v. Burnett to Laugher v. Pointer; in that line express mention of the test begins only with Sadler v. Henlock. One other case here discussed may actually have contributed: Milligan v. Wedge. And one other ought to be mentioned. In Allen v. Hayward24 the court appended a query as to the rule if an accident occurred in the course of work which the contractor had agreed to do according to his contractee’s instructions and directions. Such a hypothetical case was being distinguished from that actually presented: the work being done was part of that specified and described in the contract and left entirely to the contractor.

As late as 1849, in Reedie v. London & N. W. Ry.,25 the power of selection was stressed to the exclusion of the power of control. This passage has been much cited:

"The party employing has the selection of the party employed, and it is reasonable that he who has made choice of an unskilful or careless person to execute his orders, should be responsible for any injury resulting from the want of skill or want of care of the person employed. . . ."26

From the whole tenor of the case as well as from this quotation, it appears that the court was speaking in terms of a rationale of the doctrine of respondeat superior rather than of a test for the existence of the necessary relation. For the tortfeasor’s being the servant of an independent contractor and not of the defendant in the action was obviously thought too clear for discussion. And a later section of the opinion supports the contention that no test is under consideration. Baron Rolfe denies that the case is influenced by the contractee’s having reserved the power of dismissing its contractor’s employees for incompetence, citing Quarman v. Burnett, in which the defendant was said actually to have selected the servant of his contractor and yet was held not liable.

26 Ibid., 4 Exch. at 255.
It should be pointed out that the American courts were a trifle quicker than their English contemporaries to seize upon Blackstone's control rationale of respondeat superior as the logical test of the master-servant relation. The leading case is undoubtedly *Boswell v. Laird*,

28 decided by the California Supreme Court in 1857. A dam under construction by a contractor burst, injuring the plaintiff's property. Suit was against the land owner who was having the dam built. In an extended opinion Justice Field discussed thoroughly the English cases preceding *Sadler v. Henlock*. (It appears that the report of that case itself had not yet become available.) But the language of his reference to the control test obviously is not derived from those English cases:

"Something more than the mere right of selection, on the part of the principal, is essential to [the relation of master and servant]. That right must be accompanied with the power of subsequent control, in the execution of the work contracted for. In the present case, that power was wanting, and, of course, the relation to which it was essential did not exist." 29

These words are not the product of the English cases on which Justice Field purports to found his decision but rather of a similar passage in the New York case of *Blake v. Ferris*,

30 which he cites merely as confirming the doctrine of the English cases. *Blake v. Ferris* anticipates *Sadler v. Henlock* by five years. But it in turn is based solely upon substantially the same English cases that were available to the English judges in the later case. It is the forerunner of *Boswell v. Laird* also in pointing out that the trend of the English decisions was away from the apparent holding of *Bush v. Steinman*. 81

Both English and American courts, then, may be considered to have reached the control test independently of each other about 1850, after at least a half century during which the issue was potentially

27 See note 32, infra.


29 Ibid., 8 Cal. at 489.

30 1 Selden (5 N. Y.) 48, 55 Am. Dec. 304 (1851). Compare the following passage, 1 Selden at 54, with that quoted in the text from Boswell v. Laird: "[The rule of *respondeat superior*] is founded on the power which the superior has a right to exercise, and which for the prevention of injuries to third persons he is bound to exercise, over the acts of his subordinates. Therefore the rule can not be applicable to cases where no such power exists." This is the clearest statement the writer has seen in the early cases of the transition from rationale of vicarious liability to test of the master-servant relation.

before the English courts in frequent cases. For it was not for want of the suggestion that the control test was not earlier adopted in England. In 1799 in the case of Bush v. Steinman, later discredited, it was apparently refused recognition as the proper means of defining the liability for the torts of another under the principle of respondeat superior. That case raised the question of the responsibility of a property owner for the negligence of a servant of a remote subcontractor who was engaged in repairing the defendant's house. Counsel for the defendant clearly argued the control test, citing Blackstone's statement:

"A master is, lastly, chargeable, if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance . . . for the master hath the superintendence and charge of all his household." 82

The passage quoted is obviously intended by its author as a rationalization of the somewhat strange doctrine of vicarious liability. But counsel in citing it for the defendant invoke its converse as a test of the questioned relation. Rejecting by implication the argument so founded, the court clearly thought that the defendant's ownership of the property and his benefiting from the activity there carried on was sufficient reason for holding him liable. If the element of control entered into the opinions at all, it was in the fact that the court imposed upon the defendant the duty of control in such a situation. 83

For some reason not apparent, the English courts thus long refused to adopt Blackstone's theory of the reason of the rule of respondeat superior as the test of the relationship necessary for its application. Whatever may have been the cause of the protracted delay, the eventual outcome, now well known, can be better understood after an examination of another line of judicial opinion, expressed, it is true, largely in dicta. In Quarman v. Burnett the following significant language occurs:

"It is undoubtedly true, that there may be special circumstances which render the hirer of job-horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or

82 1 BLACKSTONE, COMMENTARIES 431 (1765).
ordering the servant to drive in a particular manner, which occasions the damage complained of, or to absent himself at one particular moment, and the like."  

It is this approach which is adopted in the discussions of the element of control in subsequent cases. Where it is not mentioned merely in passing as a suggested rationale of the whole doctrine of vicarious liability, it is thus used to create liability where the relation of master and servant is at the outset assumed not to exist. The following passages are typical:

"Here it does not appear that the defendant attended the drover or his servant...."  

"The defendants not having personally interfered or given any directions as to the performance of the work, but merely having contracted with a third person to do it, cannot be held responsible for an unauthorized and unlawful act of such third person in the course of it. It is quite true, as was said in Bush v. Steinman, that the original contractor might be liable equally with the subcontractor, if he in any manner directed or countenanced the doing of the act complained of. But there is no pretence for so charging the defendants here: they contracted with Warren to lay down the kerb-stone in a particular way, not to so place the stones, and so negligently leave them, as to occasion injury to the plaintiff."  

"I apprehend, that, if the defendants had been present, and directed or sanctioned the doing of the act complained of, they would have been responsible for it."  

"The true result of the evidence here was, that the defendants had nothing whatever to do with the wrongful act complained of. They employed somebody to do something, which might be done either in a proper or an improper manner; and he did it in a negligent and improper manner, and injury resulted to the plaintiff. . . . There is no pretence here for saying that the defendants employed Russell to do the work in question in the particular manner in which he did it."

85 Milligan v. Wedge, 12 Adol. & El. 737 at 741, 113 Eng. Rep. 993 (1840), per Lord Denman, C. J.  
87 Maule, J., ibid., 11 Com. B. at 873.  
The nearest to a case decided on this principle seems to be *Burgess v. Gray*. There the owner of houses engaged the contractor who had built them to connect them with a drain in the street. The contractor hired another to cart away a pile of rubbish remaining in the street and charged this exact item to the owner. Plaintiff sued the owner for injuries alleged to be due to the carter's failure to remove the entire pile. In sustaining a verdict for the plaintiff, the Court of Common Pleas pointed out that, to escape liability, defendant must have parted with the entire control of the work. It relied especially on this incident to show that defendant had not so relinquished control: A policeman had pointed out to defendant the dangerous condition of the street; and defendant had promised to remedy it. Defendant had, the court said, at least "sanctioned" his contractor's servant's act. But whatever may be thought of the decision or logic of *Burgess v. Gray*, it is clear that the court in it purported to apply the principle laid down in the dicta quoted above.

This treatment of the question of control is not that evident in *Sadler v. Henlock* and *Boswell v. Laird* and to which modern courts have become accustomed. Rather, in the uncertain field of respondeat superior, the liability of the master for the negligence of his servant, the court has turned for guidance to a more certain and indisputable principle. It was established beyond doubt that a person, whether called master or principal, was liable for commanded acts. Control in these cases is not important in the sense of Blackstone's rationalization of the master's responsibility for his household's misdeeds, but as evidence of that command which spells liability for the defendant without reference to the vexed question of how far this vicarious liability should be extended. In such cases control must have meant

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39 1 Com. B. 578, 135 Eng. Rep. 667 (1845). Cf. Ellis v. Sheffield Gas Consumers Co., 2 El. & Bl. 767, 118 Eng. Rep. 955 (1853), in which the contractee's liability was based upon its having engaged the contractor to excavate in the highway without having leave from the public authorities to do so. Defendant was held liable for personal injuries caused by the contractor's having left the street in disrepair.

40 This further enlightening passage occurs in the report of the argument of Peachey v. Rowland, 13 Com. B. 182 at 183-185, 138 Eng. Rep. 1167 (1853): "Piggott now moved for a new trial... The true rule upon this subject is that laid down in *Burgess v. Gray*.... Tindal, C. J., says there was evidence that the defendant was exercising a dominion over the work, and that the soil was placed upon the road with his consent, if not by his express direction. [Maule, J. Does not Overton v. Freeman govern this case?] It is submitted that it does not. [Jervis, C. J. Where is the distinction?] The law there laid down is not disputed; but the facts distinguish it... Upon the evidence given in the present case, it is impossible to say that Ansell, whose negligence caused the injury, was not the servant of the defendants. The defendants' carts were to be employed in carrying away the earth; and...
not a theoretical "right to control" but rather actual interference and superintendence. Only thus could the necessary fact of command of the precise tortious act be established.

From consideration of this aspect of the control doctrine and from the rather curious blank in the judicial history of its modern application, there seems to be reason for suspecting that the use of control last above discussed must have served as a stepping stone from Blackstone's theorizing to the really modern cases of the 1850's.

A Modern Rival for the Control Theory of Respondeat Superior

While the control test of the master-servant relation has not gone completely unchallenged in this first important field of its application, the materials for a rival criterion are rather to be found in a new approach to the whole problem of vicarious liability. Its basis lies somewhat hidden in Baty's statement concluding his summary of the growth of the doctrine of respondeat superior quoted above:

"[Extension of the master's liability] cannot but operate to check enterprise and to penalize commerce. The extension of joint-stock enterprise with limited liability alone makes the consequences of the doctrine tolerable. One unjuridical institution is inelegantly cured by another."

But Baty's view is directly contrary to the modern analysis mentioned. The latter looks rather to the countervailing doctrine, of

Evans admitted that he was on the spot, and saw the objectionable way in which Ansell was doing the work. Can it be said,—as is put by Tindal, C. J., in Burgess v. Gray,—that the defendants had parted with all control over the work? [Maule, J. The contractor employs a sub-contractor to do a certain thing,—to do it in a proper manner, I do not say there might not be such thing as a contractor employing another to do that which would be a public nuisance. There is no pretense here for saying that the defendants were the persons who committed the nuisance. Can you shew that they ordered the thing complained of to be done?] The question is, whether they, by themselves or by their servants, wrongfully permitted the soil to remain on the road. [Maule, J. If the thing complained of,—that is, the work which the defendant procured to be done,—could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences. But, unless you can shew that the work was so done that the defendants might have been indicted for obstructing a public highway, they are not liable in this action...]

41 See Leidy, "Salesmen as Independent Contractors," 28 Mich. L. Rev. 365 (1930), criticizing the orthodox test as uncertain of application and of doubtful relation to the purpose of the doctrine. Professor Leidy suggests that more use be made of the test of the independent calling of the alleged contractor.

42 Supra, at note 12.

43 Baty, Vicarious Liability 7 (1916).

44 See, in general, Douglas, "Vicarious Liability and Administration of Risk,"
independent contractor and non-liability, as a protection to enterprise and a stimulus to commerce. How far entrepreneurs should be allowed thus to insulate themselves from liability is a far-reaching question of public policy;\(^4^5\) opposed to the desirability of stimulating enterprise is the practical necessity of caring somehow for persons injured in the course of enterprise.\(^4^6\) And the present tendency seems to be towards further securing the latter interest at the expense of "encouraged haphazard exploitation."\(^4^7\

The definition of servant or employee is, then, part of the general question of how the risk and cost of injuries should be borne. That risk and cost are considered as resting ultimately upon society as a whole in any case. So the problem is to be looked at as one of administration of risks. Three aims of this administration, at least, can be discerned: stimulation toward reduction of the costs by preventing injuries;\(^4^8\) minimizing the administrative expense of shifting and distributing that cost;\(^4^9\) and, so far as is reasonably possible, securing all persons against the risk of serious loss from tortious injuries.\(^5^0\

To these aims the ordinary control test (to determine for whose torts the "employer" is responsible) is almost completely irrelevant.\(^5^1\) The exception lies in the first aim: prevention of injury.\(^5^2\) The person who has most nearly complete knowledge and control of an "employee's" activities will be in the best position to introduce and enforce safety measures.

A Quantitative Test

If the control test can properly be criticized thus in its original sphere of application, how much more inappropriate it must be for further and extended application, for instance as the basis of a system

\(^{49}\) Ibid., at 591, 599.
\(^{50}\) See Laski, "The Basis of Vicarious Liability," 26 Yale L. J. 105 (1916).
\(^{51}\) Douglas, "Vicarious Liability and Administration of Risk," 38 Yale L. J. 584 at 602 (1929).
\(^{52}\) Ibid., at 601 and note 39, p. 602. Leidy, "Salesmen as Independent Contractors," 28 Mich. L. Rev. 365 (1930), particularly urges the "independent calling" test as better suited to this objective.
of social insurance. Yet, since there was no substitute apparent, the Internal Revenue Bureau quite naturally turned to the old criterion in its regulations for the enforcement of the new social security taxes.58

But whatever may be the proper test of it, there can be no doubt of the utility of the employment relation itself as a basis of social insurance systems. The pioneer form in the United States is, of course, workmen’s compensation; and after thirty years of operation it shows no signs of departing from its original base. This industrial accident insurance system is one of the great sources of the more recent social security legislation. The other great source, even older,54 lies in the social insurance systems of the major European nations. They too are based almost unanimously upon the employment relation.55 Such long and widespread use of the concept, it seems, must surely be founded on characteristics of that relation which may eventually be developed into a more rational criterion than that of the power of control.

In explanation of the doctrine of respondeat superior there has been proposed a new theory of administration of risk.56 A parallel idea underlies discussion of one aspect of the employment relation as used in workmen’s compensation acts. Many such acts expressly exclude from their coverage employment termed “casual.”57 And Professor Bohlen’s remarks in connection with his discussion of this exception58 seem to merit a wider application than he gave them.

The chief and classical exposition of the economics of workmen’s compensation is that the financial cost of accidents59 ought to be

54 The earliest compulsory contributory pension plan created by state action was established in France in 1673 for seamen. The genesis of effective modern social insurance covering wide sectors of the population, however, is to be sought in Germany, where Bismarck inaugurated a comprehensive program 1881-1889. See Armstrong, Insuring the Essentials 398-400 (1932); Armstrong, “Old-Age Security Abroad,” 3 Law & Contem. Prob. 175 at 176-179 (1936).
55 Exceptions are the Swedish system and those of three cantons of Switzerland. See U. S. Committee on Economic Security, Social Security in America 185 (1937). The former, at least, is not considered to have operated very successfully on this account.
56 Supra, subdivision beginning at page 198.
59 Only the pecuniary risk, of course, can be shifted from the employee. And only part of that risk is cared for. By fixing standard and relatively low compensation rates the states have abandoned the common-law theory of damages: full monetary restitution. See 1 Campbell, Workmen’s Compensation § 30 (1935).
treated as a part of the expense of production, made an element in the price of goods, and so passed on to the ultimate consumer. But the final incidence of any such charge is a doubtful and complicated matter. A more certain and tangible benefit has been recognized in the insurance principle, the distribution of risk. Putting the cost of industrial accidents on the employer spreads the risk of loss wider than does leaving it on the individual employee; but still there is no very wide distribution, especially for the employer of only a few workers. Insurance of the risk is much more satisfactory:

"[Its function] is to spread and distribute this burden over a sufficiently great body of persons employed in a particular occupation to give an insurable accident exposure. The burden imposed upon an industry taken as a whole is slight, the addition to the cost of producing the commodity astonishingly small, yet a single serious injury or death, one of the many which must be expected in the industry as a whole, if it happens to a workman employed by an employer with a small business employing only a few men, may well ruin him if he has to pay the appropriate compensation himself. Yet it would probably be mere chance that his workman rather than a workman of one of his competitors was the victim of this accident. It is the function of insurance to reduce this chance, this gamble on ruin or immunity, to distribute this risk over so large a number of workmen pursuing the same occupation as to give an accident exposure sufficient to enable actuarial experience to calculate the average risk per unit of payroll and so fix a fair but adequate premium as the price of securing protection against liability under compensation acts."

From this administrative viewpoint, then, the characteristics of an employment to be included in the compensation system will be those necessary to economical and practical application of insurance. The most essential would seem to be the centralization of enough employment or risk about a single "employer" so that it will be both possible and economical to collect premiums and otherwise administer accounts. Marking the line between risks which will be carried and those considered too uneconomical to administer is obviously a ques-

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60 I Bradbury, Workmen's Compensation, 2d ed., § 1 (1914); Downey, Workmen's Compensation 15 (1924).
61 See Downey, Workmen's Compensation 19, note 30 (1924).
62 Ibid., loc. cit.
tion of policy for the legislatures, and they may be expected to differ on the point.

These observations are equally applicable to any system of social insurance and should serve to accent the characteristics of the normal employment relation which give it its great utility in such legislation. In the first place an employer is thought of as an entity as opposed to a number of individual workmen whom he employs. By dealing through employers the public enforcing agency or insurance organization involved makes the administrative savings which alone make a compulsory social insurance scheme feasible. Again, the habitual association together of both employer and his workmen creates an economic unit whose existence is generally well known, so that enforcement of obligations by the authorities is not a difficult matter. Even if the effort were financially justifiable, enforcement against unaffiliated individuals would be impossible in many cases. And finally the periodic wage accountings characteristic of the usual employment relation create convenient sources of funds for the payment of contributions and taxes under social security legislation.

The contentions above are reinforced and illustrated by some departures from employment as the basis of coverage in foreign social insurance systems. In England, for example, old age and allied pension and health insurance legislation is applicable to one class of "independent contractors;" i.e., lessees or bailees of vessels or vehicles which are to be plied for hire. But note that the person from whom the vessel or vehicle is obtained is to be considered as if he were the employer of the lessee or bailee. In France certain share farmers are included on much the same terms, with their lessors, again, treated as employers. In such instances as these there is obviously no reliance placed on the element of control in the relation involved, but the advantages of the employment relation are preserved by substituting another relation involving a similar course of regular dealing.

For a test of the employment relation as used in such legislation as workmen's compensation and the more recent social security program insurance schemes it is submitted that an almost purely quan-

64 National Health Insurance Act, 1936, 26 Geo. 5 & 1 Edw. 8, c. 32, First Schedule, Part I; Widows', Orphans' and Old Age Contributory Pensions Act, 1936, 26 Geo. 5 & 1 Edw. 8, c. 33, § 2.
66 By way of contrast, consider another use of the employment relation to which the control test is equally foreign: the preference granted to employees' wages in insolvency statutes (see note 2, supra). Any criterion suggested for use with social
titative criterion may be desirable. It will not be simple: several factors may appear. At least two are fairly obvious and have already been used in a limited sphere. Both are closely related to the theories of administrative convenience propounded here. First, the proportion of his time spent by an alleged employee in service of a single putative employer is important. Perhaps even more important is the total amount of such services used by an alleged employer. For it is this latter factor particularly that will determine whether the employer is an efficient and economical intermediary for the administration and enforcement of a social insurance system.

The necessity for some such new criterion is apparent from the relative failure of the control test to supply a satisfactory rationale for the actual decisions under recent social insurance legislation. There exists a widespread feeling among lawyers that the decisions and regulations of the Internal Revenue Bureau have been illogical and vacillating and hence quite unpredictable. But such an objection can hardly spring from the Bureau's choice of a novel theoretical base for its decisions on the employment relation. For that base has been quite uniformly the same control test with which lawyers are familiar. Its opinions on the distinction between employees and independent contractors have been in general put carefully in terms of the control

insurance is likely to be quite inappropriate to the problem of preferences. For the essence of the latter is that a limited number of claims must be selected for preferential treatment in order to make that treatment effective, while in social insurance the general objective is to increase coverage to the limit of practicability.

The difficulty in distinguishing employees from independent contractors is aggravated by the fact that both render "service," the public utility to its customers as well as the servant to his master.

This principle is apparent in, e.g., the exception of casual employees from the scope of workmen's compensation acts. See supra, at note 57.

This principle is illustrated by a development of some of the workmen's compensation statutes exempting casual employment. These three restrict their definitions of "casual" to undertakings which are to be completed in not exceeding ten working days and on which labor is to cost less than $100. 2 Cal. Codes (Deering, 1937), Labor Code, § 3354; 5 Fla. Comp. Gen. Laws (Perm. Supp. 1938), § 5966(2); 2 Nev. Comp. Laws (Hillyer 1929), § 2688. See also a similar presumption laid down for the Social Security Act taxes by the Internal Revenue Bureau. Mim. 4847, 17 INT. REV. BUL., Part 2, p. 310 (1938).

It is the writer's opinion that this view probably is held without any comprehensive acquaintance with the decisions criticized. After a study of those of the Internal Revenue Bureau covering a period of nearly three years and dealing with the employment relation, he believes that they exhibit an internal consistency not to be compared unfavorably with those of other courts or administrative tribunals, even taking into account the short period of time they cover.
criterion. It must be, then, that the objection to the holdings is to particular results rather than to their theoretical basis. The Bureau and its critics are ostensibly agreed on the theory but reach inconsistent conclusions.

While reaching diverse results from a single theoretical assumption is not a unique phenomenon, the control test seems to lend itself particularly well to such confusion. For the very multitude of matters of fact which are to be considered in the determination of whether the right of control exists evidences the vagueness of the criterion. One end which vagueness may actually serve is the defeat of attempts to evade the spirit, so-called, of the social security legislation: the careful drawing by employers' counsel of service contracts to present the appearance of an independent relation while retaining to the employer the substantial benefits of the employment relation. If the control test were plain and simply applied, such contracts would be sure protection to those for whom they were drawn. Yet undoubtedly there would still be the objection in some quarters that the spirit of the act was violated. Such an objection is made possible by the irrelevancy of the control test to the purposes of the social security legislation. The letter may be upheld and the spirit violated because the two do not coincide. The answer to the difficulty, a criterion more relevant to the purposes of the act, should both give a greater measure of certainty and protect the legislation from undermining attacks. A quantitative criterion of the sort proposed should offer certainty to a greater extent than is commonly found among legal tests. And if it is as appropriate as it seems, the spirit and letter of the laws will have been made to coincide.

71 The cases are generally stated in terms of subsidiary tests or indicia of the existence of the right of control. The Restatement is less clear on the point but seems to imply the same approach. See note 10, supra.