Explaining the Legal Content of English Wage Labor

CONFLICT, INTERESTS, IDEAS, AND NORMS

To the extent that an explanation has been offered by some labor historians for the rule that authorized criminal sanctions to enforce labor agreements, it is that criminal sanctions served the interests of English employers. During the eighteenth century, at a time when the English economy grew rapidly, the demand for labor intensified and Parliament enacted a series of statutes making penal sanctions available to employers for breaches of labor contracts. The problem of labor scarcity was not limited to the colonial periphery but posed difficulties for employers even in the midst of the general labor abundance of a developed market economy. Does the governing elite’s response to scarce labor then account for the existence of penal sanctions in England?

Labor scarcity cannot be the entire explanation because it does not seem to have been either a necessary or a sufficient condition for the existence of penal sanctions. Penal sanctions were employed in England for centuries during long periods in which labor was in quasi-permanent surplus. In the nineteenth century employers continued to use penal sanctions with reduced frequency even at times when labor was not in great demand, during troughs in the trade cycle. They did so because there were economic advantages to be derived from using sanctions even under those circumstances.

If labor scarcity was not a necessary condition for the existence of a rule of penal sanctions, it was also not a sufficient condition. Labor markets might be tight, but any particular state might be unwilling to accommodate employers. The government of the United States, for example, failed to authorize stringent remedies to enforce contract labor agreements during the Civil War. Even if we add the problems of turnover and agency costs to the general problem of labor scarcity, these factors still do not explain why a state accommodated employers in certain cases but not in others. We face an additional explanatory problem, however. These
kinds of labor problems can be dealt with in a variety of ways. Why were penal sanctions chosen rather than other possible measures? 

English employers and governing elites did not address their labor problems in a social vacuum, in a contextless, neoclassical economic universe. They grappled with these problems in a nation that had a particular history with a particular set of social institutions, norms, and legal rules. Without taking these into account it is not possible to explain why the responses to these problems took precisely the form they did. Why were English employers not authorized to enslave wage workers, for example? During the seventeenth century the Scottish Parliament passed legislation to make coal miners the serfs of mine owners. During the nineteenth century, large numbers of Russian factory workers were serfs. Why were English employers not permitted to whip their wage workers or have them imprisoned for a year at hard labor? Why could they not directly coerce them to enter the wage labor relationship in the first place? At an earlier point in English history, after all, employers could legally “require” certain wage workers to enter their service if they were not otherwise occupied. Why could they not do so in the nineteenth century? If “economic” coercion was not sufficient in the nineteenth century to keep workers disciplined and at their jobs during their terms of employment, why was it sufficient to compel them to enter wage work in the first place? It is always possible, of course, to generate untestable functionalist explanations (such as that the practice satisfied the needs of free markets for labor mobility) to try to account for these anomalies. But ultimately, simple functionalism must fail because it explains social practices without taking into account the numerous possible solutions for a problem and the fact that a particular solution has only been arrived at through a path-dependent but partly contingent process of historical and social evolution.

To arrive at a satisfactory explanation for the existence of penal sanctions in nineteenth-century England, it is necessary to add historical, social, political, and legal dimensions to the undoubtedly crucial economic one. In the process, the nature of the explanation itself will change. It will

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1 Present-day American employers, for example, who cannot avail themselves of penal sanctions, have responded to similar problems through a number of different explicit and implicit contractual practices. For an overview of the literature discussing these contractual strategies, see Mark Kelman, “Progressive Vacuums,” *Stanford Law Review* 48 (April 1996): 978 n. 8, 9, and 986 n. 21.


employ a causal narrative rather than invoke a general law. The narrative presented in this and the following chapters is structured using a multistep framework. The first step describes how certain groups came to define their interests with respect to a legal rule. The second explains why groups failed or succeeded in having the state adopt the rule. The third step describes the interpretive struggles that took place over the proclaimed rule, struggles that may have restricted or expanded its scope. The fourth step describes the economic struggles that took place under the rule as interpreted. The final step explains how a long-established rule came to be challenged and ultimately changed.

By accepting the idea that penal sanctions served the material interests of employers of waged labor, we have called into question a fundamental tenet of the narrative of free labor. If nonpecuniary coercion of waged labor helped employers reduce turnover and agency costs, we should not be surprised to find wage labor widely subject to such pressures. To the extent that employers viewed nonpecuniary sanctions as promoting their interests, we should expect to find free wage labor in the modern sense only where states failed or refused to authorize the use of these kinds of pressures. In that case, the problem becomes to explain how free labor came into existence in the first place; why states prohibited the use of these kinds of pressures. The answer, contrary to the prevailing wisdom, has to be sought in something other than the interests of employing elites.

**THE PROCESS OF DEFINING GROUP INTERESTS**

It is not altogether obvious why a group’s definition of its interests has to be explained. After all, aren’t interests transparent? The answer seems to be, not entirely. What James March has written about rational choice applies equally to what we commonly call group interest formation: “Rational choice involves two guesses, a guess about uncertain future consequences and a guess about uncertain future preferences.” In light of these uncertainties about any course of action, ideas, it seems, often turn out to be the final arbiters of group interests. Take for example the case of wage

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7 Herzog, *Happy Slaves*, 18. (“Realists counsel us to strip away ideas and focus on interests. But what are interests apart from ideas? Whatever interests I have depend partly on my
setting. For centuries, English elites had supported wage setting as a way to control wages in times of labor scarcity. Why did they change their minds over the course of the eighteenth century, pushing through the repeal of wage setting legislation over the strong objection of working people and some members of the governing elite as well? The answer has to do with the fact that wage setting always had two sides. During times in which labor was in great demand, wage setting helped to reduce the upward pressure on wages, promoting the interests of employers. However, at times in which the demand for labor was weak, wage setting tended to keep wages from falling below subsistence levels, arguably working against the interests of employers.

Given the double-sidedness of wage setting, is it possible to decide definitively whose long-term interests it served? Since repeal of wage setting legislation would mark a basic change in ground rules, one that would be viewed as permanent, it is precisely long-term interests that had to be assessed. Obviously, the answer depended in part on how wage setting was administered and what economic conditions prevailed. Employing elites had long controlled the state wage setting apparatus. Couldn’t they ensure that wage setting was administered in their interests? For centuries, this had been a complaint of working people. However, different groups among employing elites defined their interests differently. In crude terms, some members of the gentry, who had traditionally controlled the wage setting machinery in the country, believed that their long-term interests were served by providing a basic wage to the laboring poor in bad times and by restraining wage increases in good times. Their interests were defined by a set of ideas about the way society should be organized and the political role they should play in that organization. The political identity and economic interests of many members of the commercial and industrial elite were constituted by a different set of ideas by this time, laissez-faire ideas. Just as the ideas of the gentry served to tell them what their interests were in the face of the double-sidedness of wage setting, laissez-faire ideas served to tell members of the commercial and industrial elite what their interests were in the face of the indeterminate long-run consequences of the same practice.

It is true that if employers had enjoyed a permanent oversupply of labor it might have been unambiguously in their interests to have gotten rid of wage setting. However, economic conditions are rarely permanent in a dynamic market economy like England’s in the nineteenth century, and it was inevitable that labor would come into short supply from time to time,
and semipermanently in certain labor markets. At those times and in those markets, the repeal of wage setting legislation worked against the interests of employers. Whether the long-term interests of employers as a class were served by the repeal of wage setting, therefore, depended on how many workers and employers were situated in markets where labor was in quasi-permanent short supply, how many in markets where labor was in quasi-permanent surplus, and how long these conditions could be expected to prevail. Needless to say, this would not have been easy to figure out. It is possible, however, to provide some sense of just how variable the state of the labor market was in England during the nineteenth century by looking at the trade cycle. Labor scarcity probably became a problem for certain groups of employers every time there was a sharp upturn in trade. Over the first three quarters of the nineteenth century, the economy rapidly moved between peaks and troughs every few years. 1797, for example, was a trough year followed by a peak year in 1800 and then another trough year in 1801 followed by a peak in 1802. Between 1855 and 1873 trade moved between peaks and troughs four times. There was a trough in 1855 followed by a peak in 1857, another trough in 1858 followed by a peak in 1860, and then the trade cycle repeated itself. Another trough occurred in 1862 followed by a peak in 1866, then a trough in 1868 and a peak in 1873.

In the face of the nearly impossible-to-calculate long-term aggregate costs and benefits of wage setting, it was laissez-faire ideas that provided a clear answer to the question of where employers' enduring interests lay. Similarly, the opposition to repeal of wage setting by working people was grounded in ideological commitments and temporary conditions as much as in a fine calculation of long-term costs and benefits to wage workers as a whole.


9 For estimated unemployment rates between 1857 and 1875, see Table 2.1 in Chapter 2.

10 See W. W. Rostow, _British Economy of the Nineteenth Century_ (Oxford, 1948), 33, Table II. It has been estimated according to a number of measures of wages that the duration of expansions in the first half of the nineteenth century was roughly equal to the duration of contractions. In other words, there were roughly as many years of upturn in trade cycle terms as years of downturn. See Arthur D. Gayer, W. W. Rostow, and Anna Jacobson Schwartz, _The Growth and Fluctuation of the British Economy, 1790–1850_ (Oxford, 1953), II:939–40, Table 94a.

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What I have been arguing is that rules normally cut in more than one direction. In contests over rules a group's judgment that a rule will promote its long-run interests is almost never based on a genuine empirical weighing of the benefits and costs of the rule to the group as a whole. Such a calculation would necessarily involve a summing up of all the costs and benefits to different individuals in the group, some of whom might be small or large net losers under the rule, whereas others might be small or large net gainers under the rule. Such judgments are generally arrived at through an ideological decision about the best course for the group to pursue. In a sense, ideological commitments are as much responsible for creating group identity and group interests out of the often diverse and conflicting interests of group members as they are reflective of such interests.

**Criminal Sanctions**

The adoption of criminal sanctions represents another example of a course of action in which ideas played an important role in the formation of group interests. Criminal sanctions for labor contract breaches had a number of clear benefits for employers that we have already talked about, but the rule also had its drawbacks. In tight labor markets employers who needed workers and were willing to pay for them could not always secure them because the law stood in their way. According to testimony before

The year 1773 produced a new era, and marks the strange vicissitudes of human events. The laws which had been heretofore so obnoxious to the workmen and artificers, were now in the most clamorous manner demanded by them. The silk weavers in Spitalfields, disgusted at the avaricious conduct of their masters, determined to throw themselves into the hands of the magistrates to fix the rate of their wages. . . . From 1349 till the era of Cromwell, 1649, the artificers and labourers had run the risk of being branded with red hot irons and treated as felons rather than submit to the rates fixed by magistrates, and then in little more than a century they become outrageous for the magistrates to have the power sooner than their masters.


This reversal of opinion too seems to have been dictated as much by a combination of traditional ideas, and economic conditions in certain labor markets, as by a fine calculation of long-term costs and benefits to working people as a whole. During earlier centuries many working people believed that wage setting operated against their interests.

Writing of the employer role in the campaign to abolish servitude among Scottish miners in the eighteenth century, Christopher Whatley describes one mine owner whose motives were to gain access to labor: "Having acquired a colliery in 1764, and with plans to sell coal in the large lucrative Edinburgh market as well as to inland towns to the south, but having only a handful of bound colliers, [James] Dewar's interest in reform can clearly be understood. As one of his opponents later asked, 'What significance was it . . . to stock his coal-works with colliers liable to be reclaimed as the law then stood?'" There
the Select Committee on Master and Servant in 1866, workers engaged by one employer who were enticed away by another employer were invariably punished. The law was always used against them, depriving the second employer of their services.\textsuperscript{13} Employers frequently used criminal sanctions to break strikes. On the other hand, criminal sanctions could also work against employer interests during strikes. Consider the following description from 1868:

The other day two workmen left their employment in Kingston, attracted by the high wages offered at the gas works during the strike, and engaged themselves for the vacant places. Men, as we know, who had struck, were being sentenced every day to prison under the [Master and Servant act]. Yet those men who had come up from Kingston to take the places of the men on strike and do their work were sent to prison by the same rule.\textsuperscript{14}

The gas works apparently had more difficulty replacing strikers because criminal sanctions were used to hold replacement workers to their agreements. In such situations, one result of the rule would have been to make strikes more effective.

To take full advantage of the rule, moreover, employers had to commit themselves to long contracts. To induce workers to sign such contracts employers often had to agree to supply work or wages during the contract term.\textsuperscript{15} These commitments represented gambles that the demand for their goods would remain steady. If demand fell during the contract term, are clearly grounds for suggesting that the liberty which he sought was his own, to expand his labour force by vigorously recruiting from neighbouring collieries free from the fear that their owners could recall their bound labour." "The Fettering Bonds of Brotherhood," 146–47.

\textsuperscript{13} Testimony of William Dronfield before the "Select Committee on Master and Servant" (1866), XIII:Q. 866.


\textsuperscript{15} But see Chapter 4 for a discussion of the common law rule that allowed masters to bind piece workers for a term, impliedly binding themselves only to find reasonable work during the course of the term. In practice, in long contracts employers made more or less extensive promises about what their obligations would be during the contract term. In the case of contracts for a term that paid fixed wages periodically, the employer was obligated to pay those wages during the entire term even if demand for goods fell off, unless the contract provided that it could be sooner terminated by giving notice. In cases of contracts for a term based on piece work actually done, employers did in many cases obligate themselves to provide some earnings security for workers during the term. Some collieries at some points offered annual contracts that provided earnings protection when the pit was closed because of accidents, others provided wider protection against...
workers might be able to seek wages while they were laid off. How often employer gambles turned out badly is anybody’s guess. It is also true, of course, that many employers sought to bind workers for a term without explicitly binding themselves to provide work during the term. In doing so, however, they ran a risk that the courts or the magistracy would find the contract unenforceable on the ground that it lacked mutuality, undermining the rationale for undertaking the contract in the first place. By the 1850s, the common law courts were imposing a limited obligation on employers to find reasonable work during the term even where they had not explicitly undertaken such an obligation.

The need to commit to long contracts to gain the full benefit of the rule must be counted one of the costs to employers of the rule’s operation. Even a commitment to shorter contracts of a fortnight or a month meant that there might be some delay in laying workers off, given that they could not be dismissed without a period’s notice. If they were let go, an slack trade, and still others bound workers for a term but gave no guarantees. Long contracts in other trades could provide more or less wage protection during the contract term. For examples, see contracts referred to in cases discussed in Chapter 4. In many instances, employers explicitly promised to provide reasonable work during the term or wages in lieu of work but sometimes also reneged on these promises. See Testimony of William Evans before the “Select Committee on Master and Servant” (1866), XIII:Q. 1359.

16 See Beeston v. Colby, 4 Bing. 309, 130 Eng. Rep. 786 (1827); Fawcett v. Cash, 5 B. & AD. 904, 110 Eng. Rep. 1026 (1834); Williams v. Byrn, 6 L.J. (n.s.) (King’s Bench) 239 (1837); Aspin v. Austin, 5 Q.B. 671, 114 Eng. Rep. 1402 (1844). These were all cases in which fixed wages were to be paid periodically during the term. When the wages to be paid during the contract term were based on work by the piece actually done, whether a worker could recover depended on whether the employer had promised to provide reasonable work during the term. See Williamson v. Taylor and Others, 5 Q.B. 175, 114 Eng. Rep. 1214 (1843) (miner cannot recover because the contract did not expressly obligate the employer to provide reasonable work during the term). This rule was modified in the 1850s. For a contract where the employer did promise to provide reasonable work or wages in lieu of work during the entire term, see Hartley v. Cummings, 17 L.J. (n.s.) (C.P.) 84 (1847); for a separate report of the same case, see 5 C.B. 247, 136 Eng. Rep. 871 (1847).

17 In an action for harboring a plaintiff’s servant who had undertaken to serve for a year, Lord Denman upheld the verdict in favor of the defendant on the ground that there was no contract of service: “[T]he master not undertaking to employ [the servant], or to find him work . . . there is no consideration for the workman’s hiring himself to the plaintiff exclusively.” Sykes v. Dixon, 8 L.J. (n.s.) (common law) (1839), 102, 103–4. For a case in which magistrates refused to enforce a contract because it lacked mutuality, see The Queen v. Welch and Another, 22 L.J. (n.s.) (mag. cases) (1853), 145.

18 These mutuality cases are discussed in greater detail in Chapter 4.
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Did the benefits of the rule outweigh the costs? Were some members of the group hurt by the rule while others were helped by it? If so, how were intragroup interest conflicts resolved? To my knowledge, no contemporary ever attempted to calculate overall costs and benefits to employers or differential impacts on different employers. How then did employers determine that this rule served their interests on balance as a group? The answer may be found in widely shared ideas about contracts of service and in widely shared employer self-conceptions. This is not to say that this judgment was not also solidly based on the significant economic benefits employers derived from the rule.

By the nineteenth century, there was wide agreement in certain segments of the English elite that the old system of comprehensive labor regulation violated "general principles of the first importance to the prosperity and happiness of the community."20 These principles required that every individual must enjoy "perfect liberty ... to dispose of his time and of his labour in the way and on the terms which he may judge most conducive to his own interest."21 From the late eighteenth century on certain members of the English governing elite had worked to realize a vision of labor markets regulated by contract, which they undoubtedly also believed would promote their interests. However, the principle of free contract placed limits on the coercive measures they could justify in dealing with the problem of labor scarcity. Such measures had to be consistent with the general norm of perfect liberty to make labor agreements, and that norm was interpreted to mean that one person could not force another into entering a contract by using threats of physical violence or imprisonment.22 Other aspects of the contract ideology of the time, however, pointed toward legitimate steps that might and should be taken. If labor markets were to function properly under the new system of contract, it


21 Ibid.

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was thought to be crucial that employers be able to enforce the agreements of their workers. Moreover, it was right and proper that people should be held to their promises. In *Lumley v. Wagner*, the Lord Chancellor noted:

Wherever this Court has not proper jurisdiction to enforce specific performance, it operates to bind men’s consciences as far as they can be bound, to a true and literal performance of their agreements; and it will not suffer them to depart from their contracts at their pleasure, leaving the party with whom they have contracted to the mere chance of any damages which a jury may give. 23

In the case of propertyless wage workers, it was widely believed that a system of enforceable contract could not be based on money damages. As one lawyer argued, “an Action is in effect, no remedy against person’s in the appellant’s rank of life, and the [Master and Servant] act has substituted an efectual remedy in lieu of an action.” 24 People, especially people of low status, had an obligation to fulfill their contracts. They should not be permitted to walk away from these obligations at their pleasure, nor should they be allowed to defy their employers with impunity. Only penal sanctions could assure this result, and there was nothing particularly objectionable about using these kinds of sanctions to enforce agreements, given that they had been entered into voluntarily. In effect, strict enforcement of a contract was merely “giving effect to [the contracting party’s] own expressed desire.” 25

Equally important, the interests of enticers of labor carried little legitimacy among employers even though many employers engaged in the practice. One manufacturer thought “that another manufacturer ought to be horsewhipped for offering inducements to his workers.” 26 Upright employers tended to imagine themselves in the position of those who had workers, rather than in the position of those who needed them. It would have been entirely possible for employers to have cultivated a self-image in which those who could afford to pay workers a premium would be thought to have won out fair and square in the competition of life in the market, but that was not the case in mid-nineteenth-century England.

It was these views – that labor markets should be based on voluntary agreements, agreements must be enforceable, agreements could not be enforced by suing for money damages, penal sanctions to enforce voluntary

26 Testimony of William Dronfield, Q.865.
agreements were not particularly objectionable, those who lacked labor had no valid claim on the labor controlled by others – that filtered and channeled the response of English elites to the real problems of tight labor markets, turnover costs, and labor discipline. These views also led them to promote penal sanctions as a way of advancing their interests, in the context of the wider utopian project of remaking market relations so that they would henceforth be based on private property and free contract.

MAKING THE RULES

Once group interests had been formulated, didn’t the ruling elites of nineteenth-century England have the power simply to put in place the rules they wanted? The answer seems to have been, not always. It is true that the mercantile and industrial classes succeeded in having wage setting repealed early in the century over the strong opposition of working people, and in 1823 Parliament did pass a new Master and Servant Act that reinvented criminal penalties for contract breaches. However, only a year later, in 1824, employers suffered a serious reverse when Parliament repealed all earlier Anti-combination acts. The very next year the 1824 act was itself repealed and an Anti-combination act less favorable to labor was put in its place. But the 1825 act also repealed all earlier anti-combination legislation and formally recognized the right of unions to exist for the purpose of bargaining over wages and hours. Although the 1825 act and the law of conspiracy continued to limit the kinds of activities unions were able to engage in, the recognition of their basic legal right to exist represented a crucial improvement in the position of wage workers.

Why had workers lost out so badly in 1823 when criminal sanctions for contract breach were reaffirmed, but only two years later participated in a successful campaign to have the old anti-combination laws repealed? The 1824 Anti-combination Act was passed mainly as a result of the efforts of two men, Francis Place and Joseph Hume, who maneuvered the act through Parliament. They were motivated primarily by a commitment to a particular vision of laissez-faire, a vision they believed would help to restore harmony to labor relations. In their highly contested interpreta-


28 6 Geo. IV. c. 129 (1825).

29 Webb and Webb, History of Trade Unionism, 107, 261–95; and Orth, Combination and Conspiracy, 68–95.

30 The abstract concept laissez-faire does not yield a clear answer to the question of whether labor should be permitted to form combinations. Freedom in the market can mean either that workers should be free to combine or not. Another contemporary version of freedom in the market held that laissez-faire meant that only individuals should be free to
tion, the principle of laissez-faire implied that workers should be free to bargain however they saw fit, by combining if they liked. Not surprisingly, a number of employer groups reacted strongly to the passage of the 1824 act, mounting a parliamentary campaign to have the new act repealed. For a while it looked as though the old Anti-combination acts might be reinstated.\textsuperscript{31}

When it seemed likely that they would be reinstated, in 1825, even the Government was shaken by the storm of protests, petitions, meetings, and deputations from every trade. "Vigilant and intelligent men" came down to watch the parliamentary proceedings, from Lancashire, Glasgow, Yorkshire, Tyneside. Any attempt to re-enact the Combination Acts, John Doherty, the leader of the Lancashire cotton-spinners, wrote to Place, would result in a widespread revolutionary movement.\textsuperscript{32}

The 1825 legislation that emerged from Parliament preserved the core gains of the 1824 act. By contrast, criminal sanctions for contract breaches were given new life in 1823 with the passage of a new Master and Servant Act.

In 1823, Peter Moore, the Radical MP for Coventry, introduced a bill that sought to repeal practically all previous Master and Servant acts. In a pamphlet produced to accompany the bill, Gravener Henson, a leader of the Nottingham framework knitters, and George White, a clerk of committees at the House of Commons, made clear that one of the central concerns of the Moore bill was to rid workers of the piece work clause of the old Tudor Statute of Artificers, which punished failure to finish work: "Very few prosecutions have been made to effect under the combination Acts, but hundreds have been made under this law, and the labourer or workman can never be free, unless this law is modified." The piece work clause, they went on to say, was

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bind with one another, indeed, that labor combinations represented an interference with the freedom of individuals to bargain in the market. See John Nockleby, "Two Theories of Competition in the Early 19th Century Labor Cases," The American Journal of Legal History 38 (1994) for a discussion of these two interpretations of laissez-faire in the American context. For an account of the politics of Place and Hume, see Webb and Webb, History of Trade Unionism, 96–108; and E. P. Thompson, The Making of the English Working Class (New York, 1966), 516–21.
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\textsuperscript{31} For a fuller discussion of these developments, see Webb and Webb, History of Trade Unionism, 107, 261–95; and Orth, Combination and Conspiracy, 68–95.

\textsuperscript{32} Thompson, Making of the English Working Class, 518.

\textsuperscript{33} White and Henson, A Few Remarks on the State of the Laws, 51.
a branch of the system to compel a man to work for low wages. . . .

[A] number of servants, on account of change of trade, &c. wish to leave their master, if he will not give them fair wages; he says, I cannot prevent you from leaving WHEN you have finished your work; but if a man leaves before he has finished, a gaol is his doom; instead of acting with one impulse, to compel him to give fair wages, some must stay a month, some two months, and perhaps some leave and are made what the master calls examples of, by being imprisoned. 34

Remarkably, Moore’s bill did not propose to repeal the criminal sanctions provisions of the Master and Servant acts, merely to amend them. Under the bill’s provisions, workers would continue to be subject to prison terms for contract breaches, not only for quitting, but also for idleness or negligence at work. 35 Moore’s bill proposed three main modifications of existing law. First, piece workers could, by giving fourteen days’ written notice, free themselves of their obligations to finish the work they had agreed to perform. However, this provision only applied to those who were engaged to do piece or task work. It did not extend to anyone who was hired for a term. 36 Under Moore’s bill, all workers hired for any term continued to be subject to penal sanctions for failing to fulfill their engagements. Second, the bill reduced the maximum sentence for first offenses to an unspecified number of days rather than three months. 37 Third, it made appeals to Quarter Sessions available even in the case of orders of commitment, although not where the penalty was less than fourteen days’ imprisonment. 38 That was all. Apparently, in 1823, total repeal of criminal sanctions was not an imaginable possibility even for those closest to working people in the parliamentary community. The rule of penal sanctions seems to have been treated as part of the unchangeable background scenery of social and economic life even by working people during this period. Individual workers might denounce the Master and Servant acts as an invasion of the sacred liberties of the people, but a world without those laws does not seem to have presented itself as a realistic option at the time.

34 Ibid., 52.
36 Ibid., 275–76. See also White and Henson, A Few Remarks on the State of the Laws, 116.
38 Ibid., 306-8; and White and Henson, A Few Remarks on the State of the Laws, 90–91. 6 Geo. III, c. 25 (1766) allowed appeals to Quarter Sessions except for orders of commitment (s. IV).
The Moore bill aimed to free piece workers who had not agreed to work for a term from open-ended obligations to finish work. As for those who had agreed to work for a time certain, they should continue to be bound to complete their terms or work out their notice. What the bill, and White and Henson, sought in the case of these contracts was not freedom from the traditional obligation to perform but enforcement of the reciprocal obligations of employers. No worker hired "by the day, week, month or year, or longer period, shall be liable to be discharged from such hiring without his, her, or their own consent, previous to the expiration of the term of such hiring." White and Henson explained that

"[i]f a man is hired by a master for his own convenience, he ought to be bound to give the real wages agreed on, and ought also to be compelled to keep that servant the whole of the time for which the agreement was made, unless he can show sufficient cause to discharge him, before a Justice. . . . The master and servant ought to be reciprocally bound by their engagements." (emphasis added)

They went on to add that it

is nothing but just, that if a master requires a workman, for his interest, to give up his services to him for a certain time, though he may have many opportunities in the time to mend his situation, the master ought to keep such servant for the whole term, as it was to obtain permanent employment that he was induced to engage.

White and Henson, *A Few Remarks on the State of the Laws*, 51, 117. The piece work clause of the Statute of Artificers has been much abused, as in many businesses they never finish their work, as the nature of the employment is such, that they are compelled to begin one before they finish another . . . therefore, if any dispute ariseth . . . or men leave their work, having words, the master prosecutes them for leaving their work unfinished . . . the labourer or workman can never be free, unless this law is modified. . . . This [proposed] clause is to set the workman free from any tyrannical master, who may wish to detain him under the pretext of not finishing his work. There are a number of trades who are compelled, from the nature of their employment, to begin one article before they finish the other; and masters frequently, in some trades, deliver out as much work as will take a workman six months to finish. . . . Fourteen days is sufficient for a master to obtain another workman: he can stop the workman any day he pleases, and 14 days is sufficient notice in return.

This would encompass contracts for a term, short periodic contracts, and contracts of indefinite duration determinable on a fixed period of notice.


Ibid., 116.
Appeals to Quarter Sessions from orders of commitment were to be allowed in the proposed legislation, according to White and Henson, because a single justice of the peace simply could not be trusted to deal fairly with workers, although the bill continued to allow single justices to adjudicate cases initially.\textsuperscript{44} In addition, the bill made justices who were also employers in a particular trade ineligible to adjudicate master and servant cases arising within the trade.\textsuperscript{45} On the other hand, the bill prohibited the common law courts from removing "by Certiorari, or any writ or process whatsoever" any order, judgment, conviction, determination, or dismissal made under the proposed act.\textsuperscript{46}

Nowhere in White and Hensons's pamphlet is there the slightest indication that they considered penal sanctions an abridgment of the liberties of Englishmen in and of themselves. In their view, what could turn a contract of hire into a contract of slavery was the length of the engagement:

\textit{One step more in this "economy," and slavery is at hand immediately. If a man is to make any agreement, unprotected, which his master can impose upon him, he has only got to sell, or hire himself, for life, and then, by his own agreement, he may become the property of his master. Such has been the want of employment in England, of late years, that there have been a great number of persons who would have sold themselves for life, to have had victuals, lodging, and clothing.}\textsuperscript{47} (emphasis original)

\textsuperscript{44} "As to misbehaviour, one Justice is to be the judge of what may be so called; a few angry words, singing, appearing dirty, smoking tobacco, workman not finishing his work to please his master, or not doing enough, ~ in short, everything that the master chuses to style misbehaviour, has been construed into an offence before one Justice, who sends the unfortunate man to the gaol, or house of correction, without an appeal." Ibid., 91. "No man ought to be sent to gaol, without an appeal, by one Justice, unless he is a well known and convicted rogue and vagabond." Ibid., 94. The proposed legislation, however, continued to allow a single justice to adjudicate initially and prohibited appeals from commitments of less than fourteen days; see "A Bill for Repealing Several Acts," \textit{Parl. Papers} (1823), II:275, 307-308.


\textsuperscript{46} "A Bill for Repealing Several Acts," \textit{Parl. Papers} (1823), II:307; see also White and Henson, \textit{A Few Remarks on the State of the Laws}, 136-37. The 1747 act (20 Geo. II, c. 19) had similarly prohibited the issuance of writs of certiorari. However, the 1823 act (4 Geo. IV, c. 34), enacted some time after Moore's bill was set aside, did not explicitly prohibit writs of certiorari although it did make justices' orders final, giving no appeals to Quarter Sessions.

Peter Moore’s bill contained a provision limiting contracts of hire to no longer than five years (with certain exceptions).\textsuperscript{48} In the event, even these timid proposals alarmed many members of Parliament, and Moore agreed to allow discussion on his bill to be postponed until the next session.\textsuperscript{49} That occasion never presented itself because later in the year Parliament passed the 1823 Master and Servant Act, reenacting the existing system of criminal penalties for contract breaches.

Whether statutory rules persist or are changed in a society like that of nineteenth-century England depends on many factors, including the state of political and economic organization of the contending parties, the scope of the suffrage, and more. One important factor is whether the moral and political principles asserted by one side or the other have come to be widely accepted. To return to an earlier example, if a practice like wage setting had been advocated strictly instrumentally to promote group interests, we would expect employing elites to press for wage setting at times when it was in their interests to do so (when wages were rising) but to move to get rid of it at other times. The fact that this did not happen indicates that part of what was involved in the movement to repeal wage setting legislation at the beginning of the nineteenth century was a genuine normative judgment based on laissez-faire ideas about the way society should properly be organized. Furthermore, even though it might have been possible for employers to have argued that one principle was appropriate under one set of circumstances and another under other circumstances, such a strategy would have undermined the normative power of all their arguments. Their arguments would then have all come to be viewed as transparently self-serving. It is true that groups often manipulate normative arguments to gain instrumental benefits, but if they prevail, they are often forced to live with the results, good and bad.\textsuperscript{50} Normative arguments are among the most powerful political tools groups have available for maintaining or changing ground rules.

Although many employers believed that criminal sanctions served their interests, many also believed that the anti-combination laws served their interests as well. That one rule remained in place while the other was changed seems to have been the result, on the one hand, of the success a few well-placed Benthamite radicals had in gaining just wide enough acceptance of a particular interpretation of laissez-faire, with support at one crucial moment from the working classes, and on the other hand, of a failure of the few parliamentary supporters of labor to see that criminal sanc-


\textsuperscript{50} Elster, \textit{Cement of Society}, 128.
tions could be similarly recast as a violation of other basic English political norms. Instead, the principle that people must fulfill their voluntary contracts (compelled by penal sanctions if necessary) held the field uncontested. Although the earlier Anti-combination acts were repealed in 1824 to 1825, employers continued to enjoy the benefits of criminal sanctions for another fifty years. Such were the different fates of two rules that many employers believed were equally important to the profitable conduct of their businesses.

It was not until 1863 that labor launched a campaign to reform the master and servant law, and it was here that labor advocates began to argue that criminal sanctions violated the basic political norm of equal treatment under law. I pick up the story of this ultimately successful campaign to change basic ground rules in Chapter 6. The next chapters, however, turn to the legal and social conflicts that took place while the rule of criminal sanctions remained in effect, a taken-for-granted part of the landscape. These struggles occurred on at least two levels: interpretive struggles over the meaning of the rules and tactical struggles for economic advantage under the rules. Although they did not directly challenge the rule of criminal sanctions, they had the unintended consequence of reshaping the terrain on which the rule rested. One unanticipated result was that over time these battles began to cut the ground out from under the previously unquestioned rule of penal sanctions, making thinkable a campaign to try to change the rule outright.