SUBORDINATE OR INDEPENDENT, STATUS OR CONTRACT, CLARITY OR CIRCULARITY: BRITISH EMPLOYMENT LAW, AMERICAN IMPLICATIONS

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I. INTRODUCTION

Given the changing nature of the working world, engaging workers cultivates contentious and consequential questions for policy makers, the Inland Revenue, the Internal Revenue Service, corporations, and individuals. In Great Britain, as in the United States, the common law seems to make rather fine distinctions which may "depend heavily on the facts of an individual case." Identifying whether a worker is an employee or an independent contractor can have immense consequences. For example, the determination that a sharecropper parent is a "share farmer" may preclude the application of child-labor protection for Alejandra Sanchez, an eleven-year-old cucumber picker. Further examples include the retention of Donna Vizcaino and the

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1 See Henrietta L. Moore, The Future of Work, 33 BRIT. J. INDUS. REL. 657 (1995) (noting increases in the number of women, flexible specialization, and work from home based on information technology are part of the changes in the workplace); Clyde W. Summers, Contingent Employment in the United States, 18 COMP. LAB. L. 503 (1997) (explaining the use of workers who do not fit the traditional model of work has greatly increased during the past twenty years). In addition, the content of the employment contract in Great Britain has changed radically during the past twenty years. See Douglas Brodie, Commentary: Specific Performance and Employment Contracts, 27 INDUS. L.J. 37 (1998).


deployment of a night taxi driver. Vizcaino, a professional, was hired pursuant
to a written agreement in which she explicitly agreed to embrace independent
contractor status; but that did not preclude her from changing her mind and
later successfully suing her principal on the ground that she is actually an
employee and therefore entitled to retroactive employment benefits. \(^4\) A night
taxi driver lost his claim to redundancy payments although the owner sold the
cab and the driver was made redundant. The court held that the night driver
was not an employee in spite of the vehicle having been used during the day
by the owner who paid for the fuel, insurance, and maintenance of the car and
took 65% of the gross turnover. \(^5\)

In this trio of cases, covering two distinct jurisdictions, the courts had to
wrestle with the notions of independent contractor and employee. Historically,
the employment relation was conceived as generally having
three dominant characteristics. First, it was a personal
relationship between a dominant master or employer and a
servient worker. Second, it was full-time, that is for the full
normal work week. Third, it was generally assumed to
continue for a substantial period. . . \(^6\)

Today, “[t]he complex form of modern industrial and commercial organisation
enables people to work under a variety of legal arrangements which may be
entirely satisfactory to all concerned, but which are difficult to rationalise into
well-defined categories necessary for the purpose of legal analysis.” \(^7\) Nowhere
is this dilemma more apparent than in the elusive distinction between what
British courts and employment tribunals call “contracts of service” and
“contracts for services.” While that dilemma implicates United Kingdom law,
its underlying conceptual distinctions find echoes in many other jurisdictions
as well. Historically, in Britain as in many other countries, the archaic concept
of “master-servant” has provided some kind of benchmark; but it is neither

growers to classify migrant farmworkers as ‘independent contractors’ rather than ‘employees.’” \(^4\)
Id. at 1455. Such a classification enables growers to avoid the expense of complying with the
worker/child labor protection provisions of the Fair Labor Standards Act. \(\text{id.}\) at 1456.

\(^4\) See Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997); see also Paul Kellogg,
Note, Independent Contractor or Employee: Vizcaino v. Microsoft Corp., 35 HOUS. L. REV.
1775 (1999).


\(^6\) Summers, supra note 1, at 503.

\(^7\) NORMAN M. SELWYN, SELWYN’S LAW OF EMPLOYMENT 38 (9th ed. 1996).
comprehensive nor always relevant. Courts, employment appeals tribunals, employment tribunals, and legislators also endeavor to distinguish “workers” from nonworkers. Additional strataums of analysis arise out of the confusing notion of self-employment and the appropriate test to be employed to detect whether or not a particular type of worker is self-employed. In fact, it is not always easy to determine how to distinguish between dependent and independent labor. Aside from assorted common law tests, statutory definitions of employees and workers are also in operation in Great Britain.

The aim of this article is to explain the appropriate distinction between what has been labeled a “contract of service” from a “contract for services” and to show that this distinction engenders a rather circular process that leads ineluctably to overlapping tests. In addition, standards for identifying the appropriate tests for explicating the distinction between employment and independent contractor status themselves lead to the possible conflation and repetition of such tests as they are applied to a given set of facts. An additional purpose is to determine whether the determination of an individual as either an employee or an independent contractor is an issue of fact or of law. Lastly, this article applies an expanded conception of economic, social, and bureaucratic subordination as a construct which clarifies both British and American labor law in this arena.

II. THE COMMON LAW TESTS

The distinction between dependent and non-dependent labor takes the form of the classification of workers as either employees or self-employed or independent individuals. “Unlike the civil law systems of Continental Europe which moved from a general theory of contract toward a specific concept of an autonomous contract of employment, British labor law only slowly conceptualised the contract of employment on a case by case basis.”

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8 See id.
9 See id.
10 In addition, Great Britain must comply with European Community Directives. As yet, European Directives seem silent on the definition of “employed” and “self-employed.” While agencies exist to match self-employed individuals with firms, observers argue that the distinction between employee and self-employed is becoming ever more obsolete in Europe’s increasingly outsourced and information based society. See ROGER BLANPAIN & CHRIS ENGELS, EUROPEAN LABOUR LAW 243 (5th ed. 1998).
11 See SIMON DEAKIN & GILLIAN S. MORRIS, LABOUR LAW 149 (2nd ed. 1998).
12 BOB HEPPLE & SANDRA FREDMAN, LABOUR LAW AND INDUSTRIAL RELATIONS IN GREAT BRITAIN 77 (2nd ed. 1992).
This conceptualization was grounded in pre-industrial notions of “service.” Thus, at common law, there “developed a distinction between those under a contract for service (self-employed workers) and those under a contract of service (employees).”

Typically, “employees are subject to the employer’s common law powers of direction and control which, if they do not take the form of express contract terms, tend to be read into the contract as implied terms.” Furthermore, those individuals classified as employees (and sometimes those classified as workers) come under the scope of limited statutory employment protection and also social security legislation. As such, “they may benefit from statutory rights to wage protection, income maintenance and compensation for loss of employment. By contrast, few of the burdens or benefits of dependent status apply to a relationship in which the worker is self-employed.”

This is important given the changes in the labor force in England “from the pattern of full-time employment in the core of the labour market, toward part-time temporary and ‘self-employed’ work.” In reality, many workers may be categorized as dependent labor.

In assessing whether an individual is, or should be, classified as an employee pursuant to a contract of service or as a self-employed person under a contract of services, employment tribunals and courts employed many varied, and at times contradictory, tests. These tests/rules are often deployed “on a casuistic basis.” Yet, the importance of determining dependence cannot be overstated. Moreover, to the extent that the worker is classified as an independent contractor (that is under a contract for services) but in

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13 See id.
14 Id. Notably, the “English common law category of ‘employee’ is often narrower than the range of persons under a contract of employment in a civil law system.” Id.
15 DEAKIN & MORRIS, supra note 11, at 149. One perceptive source disputes whether thinking of the individual employment relationship in contract terms is useful. See PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND’S LABOUR AND THE LAW (1983). On the contrary, this source asserts that “[i]n its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment.’” Id. at 18; see also LORD WEDDERBURN, LABOUR LAW AND FREEDOM: FURTHER ESSAYS IN LABOUR LAW 111-13 (1995).
16 DEAKIN & MORRIS, supra note 11, at 149. To be sure, most systems of “labour law draw a fundamental distinction between employment which is categorised as ‘dependent’ or ‘subordinate’ and that which is ‘independent’ or ‘autonomous.’” Id.
17 HEPPLE & FREDMAN, supra note 12, at 77.
18 See id. For a discussion of how to identify dependent labor, see DEAKIN & MORRIS, supra note 11, at 149-182.
19 HEPPLE & FREDMAN, supra note 12, at 78.
substance functions as an employee, the worker may be denied the benefit of employment protection laws consistent with common law and judicial interpretations.  

A. Case Illustrations

Several recent cases illustrate the complexity of the calculus in detecting whether or not dependent labor is present. In *Express and Echo Publications Ltd. v. Tanton*, the Court of Appeal was called upon to decide a case involving Tanton, who was first engaged as an employee driver for his employer. Then he was made redundant. Finally, he was reassigned as a driver on what the company intended to be a self-employed basis notwithstanding Tanton's objection to this new status. In January 1996, Tanton received a copy of a document titled "An Agreement For Services." Clause 3.3 within this document provided that if Tanton "is unable or unwilling to perform the services personally he shall arrange at his own expense entirely for another suitable person to perform the services." Tanton refused to sign the agreement.

The Employment Tribunal decided that (1) it was the employer's intention that Tanton be self-employed, and at one point both sides agreed on this fact; (2) at the outset Inland Revenue considered Tanton as an employee; (3) the proposed January 1996 contract (which Tanton refused to sign) clearly placed Tanton outside of the employment relationship; (4) Tanton's duties included picking up newspapers and delivering them pursuant to a fixed route set by the appellant; (5) the employer provided Tanton with both a vehicle and a uniform; (6) the remuneration was a fixed fee per journey determined by the employer; (7) Tanton received no sick or holiday pay; (8) Tanton had, and

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22 *Id.*

23 *Id.* at 368.

24 *See id.*

25 Employment Tribunals, until recently, were referred to as Industrial Tribunals. They consist of a legal chairperson and two lay members. The chairperson can be either a barrister or a solicitor and may be full-time or part-time. The lay members, who are all part-time, are selected from a panel drawn up after consultation with representatives of employers' organizations and trade unions. *See* DEAKIN AND MORRIS, *supra* note 11, at 84-92. Decisions by Employment Tribunals are appealable to Employment Appeals Tribunals. *See* SELWYN, *supra* note 7, at 11-13.
utilized, the right to employ a substitute driver, whom he compensated.\textsuperscript{26} Of paramount importance was the degree of control that the employer appeared to exercise over Tanton.\textsuperscript{27} Accordingly, the tribunal decided that he was an employee under a contract of service.\textsuperscript{28}

This decision was sustained by the Employment Appeals Tribunal.\textsuperscript{29} Before the Court of Appeal, the employer maintained that the Employment Tribunal committed legal error in its approach to determining whether or not Mr. Tanton was engaged under a contract of employment. Specifically, it was asserted that the tribunal should: (a) discern what the terms of the agreement were between the parties (a question of fact), (b) consider whether any of the contract terms were inherently inconsistent with the existence of a contract of employment (a question of law), and (c) if no inherently inconsistent terms were apparent, determine whether the contract was a contract of service or a contract for services based on the entire agreement (a mixed question of law and fact).

Relying on \textit{Ready Mixed Concrete South East Ltd. v. Minister of Pensions and National Insurance},\textsuperscript{30} the Court of Appeal found that an agreement allowing the hiring of substitutes is inconsistent with an employment relationship (contract of services).\textsuperscript{31} Under \textit{Ready Mixed Concrete}, a contract of service exists if the following three conditions are fulfilled:

(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.

(ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.

\textsuperscript{26} \textit{See Tanton}, 1999 Indus. Rel. L. Rep. at 368.

\textsuperscript{27} \textit{See id.}

\textsuperscript{28} \textit{See id.}

\textsuperscript{29} \textit{See id.}

\textsuperscript{30} Employment Appeal Tribunals "consist[] of judges of the High Court nominated by the Lord Chancellor in England, and the Lord President of the Court of Session in Scotland, plus other members (appointed on the joint recommendations of the Lord Chancellor and the Secretary of State) who have special knowledge or experience of industrial relations as representatives of employers or of workers." \textsc{Selwyn}, supra note 7, at 11-12.

(iii) The other provisions of the contract are consistent with its being a contract of service.32

In reality, this method might be called an opened-ended approach.33 Although this test has “been cited with approval on numerous occasions, in its first two stages it represents little more than a repetition of the test of personal control.”34 In addition, it can be argued that the “third stage adds nothing, since it neither indicates what the core features of the contract of service (or employment) are, nor which features are necessarily inconsistent with it.”35 Lastly, the test invites the courts to “engage in a balancing act, the outcome of which may be almost impossible to predict in advance.”36 In any case, guided by the uncertain direction furnished by Ready Mixed Concrete, the Court of Appeal in Tanton counseled that the servant must provide his own personal work and skill.37 Freedom to complete a job either by one’s own hands or by another’s is inconsistent with a contract of employment.38 Furthermore, the Court of Appeal concluded that there must be “an irreducible minimum of obligation on each side to create a contract of service.”39

Given that Tanton was not obliged to perform any services personally since he was free to select a substitute, there was not the irreducible minimum obligation necessary on each side to create an employer-employee relationship.40 The fact that Tanton was not required to work personally for the putative employer precludes the mutuality of obligations required to establish a contract of service. Accordingly, the Court of Appeal held that Tanton worked under a contract for service—that is, he was an independent contractor.41

In Lee Ting Sang v. Chung Chi-Keung,42 the Privy Council was required to decide a case involving casual construction work. There, the issue was whether an individual whom the building contractor paid primarily on a piece rate basis and who was not supervised was an employee for purposes of

32 See Ready Mixed Concrete, 1968 Q.B. at 515.
33 See DEAKIN & MORRIS, supra note 11, at 168.
34 Id.
35 Id.
36 Id. at 168-69.
38 See id.
39 Id. at 369 (citing Ready Mixed Concrete, 1968 Q.B. 497).
40 See id.
41 See id. at 370.
42 1990 W.L.R. 1173.
claiming compensation for injury at work. To decide this issue, the court used the following test:

[Is the person who has engaged himself to perform these services acting as a person in business on his own account? If the answer to that question is 'yes,' then the contract is a contract for services. If the answer is 'no,' then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.]

The worker, Lee Ting Sang, was a mason who suffered a head injury at work. He had been told to work at a particular site, had been given a plan showing him where to chisel, and worked unsupervised except for periodic inspections by the main contractor. Normally he was paid based on the amount of concrete he chiseled. In addition, Lee Ting Sang worked from time to time for other contractors. On these facts, the Privy Council, if sitting as the trier of fact, would have had no difficulty in concluding that he was an employee and not an independent contractor. The Privy Council found the authority cited in Market Investigations Ltd. to be very persuasive. Most specifically, Lee Ting Sang did not provide his own equipment nor did he hire

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43 See id.
45 See id.
46 See id.
While he worked for other contractors, he gave the contractor at issue in this case highest priority. In addition, he had no management or investment obligations. While he was not supervised in his work, this was not a dispositive consideration given that he was a skilled worker. From these facts, this portrait emerges: a skilled artisan earning his living by working for more than one employer as an employee and not as a small businessperson with attendant risks. Despite this conclusion, the Privy Council had to decide whether the lower court decision finding that Lee Ting Sang was an independent contractor constituted an error of law or of fact; if of fact, there would be no appeal, but if of law, an appeal would be allowed. The Privy Council found an error of law and therefore overturned the decision of the lower courts.

In another recent case, Cheng Yuen v. Royal Hong Kong Golf Club, the Privy Council had to decide whether a dismissed golf caddie, Cheng Yuen, was an employee or an independent contractor. Cheng Yuen worked at a club that (1) directed for whom he worked, (2) exercised disciplinary and supervisory powers over him, and (3) paid him for rounds worked (although the employer was reimbursed for caddie's fees by individual golfers). However, he had no obligation to appear for work. While the club trained him, equipped him with a uniform and a locker, and strictly controlled his jobs, Cheng Yuen received neither sick pay nor holiday pay, nor did he have the benefit of a pension scheme. The trial court determined that he was an employee of the club rather than an independent contractor. The Privy Council found that the failure of the tribunal to consider whether the claimant had contracted with individual golf players rather than with the club amounted to a misdirection that justified setting aside the tribunal's decision.

47 See id. at 1177.
48 See id.
49 See id.
50 See id.
51 See Lee Ting Sang, 1990 W.L.R. at 1178.
52 See id. at 1181-82.
54 See id. at 131-32.
55 See id. at 132.
56 See id. The pertinent Hong Kong statute was Employment Ordinance (ch. 57) section 2 which defines contracts of employment as "any agreement, whether in writing or oral, express or implied, whereby one person agrees to employ another and that other agrees to serve his employer as an employee." Id. at 133. At issue, then, was with whom Cheng Yuen had contracted. This requires an examination of common law rules.
The tribunal looked to *Ready Mixed Concrete* and *Market Investigation Ltd.* for guidance. It determined whether the relationship between the club and Cheng Yuen had the requisite elements of control, including the provision of a uniform, instructions about his duties, and the disciplinary power to reduce his grade or to terminate his employment. These elements of control outweighed the fact that he did not secure benefits normally furnished by an employer. The High Court affirmed this decision.

However, the Privy Council found that the tribunal and the lower court’s reliance on *dicta* culled from earlier cases may have misled them. The Privy Council found that “the arrangements between the club and the claimant went no further than to amount to a license by the club to permit the claimant to offer himself as a caddie for individual golfers on certain terms dictated by the administrative convenience of the club and its members.” Furthermore, there was “no mutual obligation that the club would employ him and that he would work for the club in return for a wage.” Because he lacked an employment contract with the club, he was not entitled to a termination allowance.

This brief evaluation of relevant case law suggests that the question of the appropriate test to apply is perplexingly enigmatic. While one asserted merit of common law is its ability to adapt to the changing needs of society, one vice is its incremental approach which can lead to the creation of gossamer and imprecise “distinctions which depend heavily on the facts of the individual case.” Any inventory of applicable employee/contractor tests plausibly must include a number of considerations. Those considerations potentially include: (1) control, (2) integration, (3) an American inspired conception of

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57 See id. at 134.
58 See id.
60 See id. at 137-38.
61 Id. at 138.
62 Id.
64 See Yewens v. Noakes, 1880 Q.B.D. 530. Here one might ask whether the individual has subjected herself to the personal command of another. See DEAKIN & MORRIS, *supra* note 11, at 159-61. Another test asks whether the employer could order or require not only what was to be done but how it should be done. See Collins v. Hertfordshire County Council, 1947 K.B. 598, 615.
65 This is arguably an “alternative to the control [test] which sees the essence of employment as the employee’s subjection to the rules and procedures of an organisation, rather than as subjection to personal command. . . .” DEAKIN & MORRIS, *supra* note 11, at 162.
economic reality,\(^66\) (4) mutuality of obligation,\(^67\) (5) the parties' choice\(^68\) tempered by a review of their actual intention\(^69\) (6) the burden of financial risk,\(^70\) and (7) a multiple faceted approach.\(^71\) While such factors should be assessed in light of the modern fluctuating character of employment relationships,\(^72\) the parties' own choice may conflict with the actual degree of control exercised by the employer. In addition, the parties' own choice may vary with tax issues and other collateral concerns and may conflict with the actual economic reality of the situation. Similarly, the lack of mutuality of obligation can arise because the principal seeks to avoid the adverse implications of mutuality. For example, characterizing the relationship as one of employment implicates statutory employment protection rights. Whatever the common law test employed, the pertinent issue is the determination of whether the individual is subject to subordination (either formal [social] or economic or both).\(^73\) As we shall see, the notion of economic and social subordination may

\(^{66}\) See Hall v. Lorimer, 1994 W.L.R. 209 (holding a skilled technician who worked for 20 separate companies on a series of short-term engagements was self-employed for income tax purposes); Lee Ting-Sang v. Cheung Chi-Keung, 1990 W.L.R. at 1178; Market Investigations, Ltd. 1969 Q.B. 173 (citing with approval United States v. Silk, 331 U.S. 704, 713 (1946)). One argument for validating the economic reality test is that in some cases an individual may have some discretion and therefore not fall fully within the control of the employer but may, in fact, be economically dependent. See DEAKIN & MORRIS, supra note 11, at 162.


\(^{68}\) Courts ask whether the terms of agreement are inherently inconsistent with the agreement of the parties. See Express and Echo Publications Ltd. v. Tanton, 1999 Indus. Rel. L. Rep. at 369 (citing the Chairman of the Employment Appeals Tribunal).

\(^{69}\) See id.

\(^{70}\) See Ready Mixed Concrete South East Ltd. v. Minister of Pensions and National Insurance, 1968 Q.B. 497.

\(^{71}\) See DEAKIN & MORRIS, supra note 11, at 168-70.

\(^{72}\) See McKendrick, supra note 2, at 137. For commentary on the changing nature of work, see Moore, supra note 1, at 667-78.

\(^{73}\) Hugh Collins argues that contracts of employment produce dual source subordination, which depends on both market power (economic) and social power and which seems to include bureaucratic power (or rule book power). Workers join bureaucratic organizations comprising a hierarchy of ranks of employees and normally the consent of the parties legitimates any subordination so created by contractual obligations. Bureaucracies impose subordination through hierarchical social structure and disparities in economic power. This dual source of subordination has the potential to lead to worker abuse by arbitrary employer action. See Hugh Collins, Market Power, Bureaucratic Power, and the Contract of Employment, 15 Indus. L. J. 1, 1-3 (1986) [hereinafter, Collins, Market Power]; see also OTTO KAHN-FREUND, LABOUR &
allow us to simplify and compress the possible tests available and reconstruct asserted tests as simply considerations which the courts should or will take into account before rendering a decision. These considerations influence both the application of the appropriate decision and the determination of the appropriate tests (assuming an appropriate test can be discovered). In addition to the common law, statutes often provide supplemental information regarding tests for employment or contractor relationships.

III. STATUTORY DEFINITIONS

Under various statutes, an employee can be defined in deceptively simple terms as one who works under a contract of employment. A contract of employment is defined as working under a contract of service. While this approach is somewhat circular, the scope of such legislation "rests upon the common law tests as developed and applied over time by the courts." As such, defining an employee under the statutes urgently implicates the analysis examined in the preceding section. In addition, British statutory definitions must be applied in a way which is consistent with United Kingdom obligations under European Community law. However, the European Community accords wide discretion to member states in defining the term employee.

Notably, some statutes apply to traditional common law employees as well as to "workers," which might implicate a broader group of people than a "contract of services." There are at least three current statutory definitions of the term "worker." One is found within the Employment Rights Act, 1996, section 230:

an individual who has entered or works under (or worked under): (a) a contract of employment, or (b) any other contract by which the individual undertakes to do or perform


74 See National Minimum Wage Act, 1998, ch. 16, § 54(1)-(2) (Eng.).
76 DEAKIN & MORRIS, supra note 11, at 151.
77 See id.
78 See Trade Union and Labour Relations (Consolidation) Act, 1992, ch. 52, § 295 (Eng.) (defining employee within the meaning of the Act as an individual who works under a contract of service or apprenticeship).
personally any work or services for another party to the contract whose status is not by virtue of the contract that of client or customer of any profession or business undertaking carried on by the individual. 79

Another definition of "worker," found in section 296 of the Trade Union and Labour Relations (Consolidation) Act, states that:

a worker is an individual who works or seeks to work: (a) under a contract of employment; or (b) under any other contract by which he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his; or (c) in employment under or for the purposes of a government department (otherwise than as a member of the armed forces). . . . 80

In still another statute, "worker" largely means:

an individual who has entered into or works under . . . (a) a contract of employment; or (b) any other contract, whether express or implied . . . whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual. 81

All three of these statutory definitions implicate both the common law rules of employment based on contract as well as the more modern notion of economic and social dependency based on personal service. These statutory approaches are important if, as one observer contends, the economy confronts a new pattern of "vertical disintegration of production," which transforms employees into subcontractors thus enabling management to substitute commercial contracts for employment relations. 82 This is attributable to the fact that "[d]espite the form of the contractual relation . . . in substance the workers frequently appear to be in an equivalent position of social subordina-
tion and economic dependence to that of ordinary employees. . . ."\(^83\)
Additionally, income tax and social security statutes "divide the labour force
into the two principal groups of employees and the self-employed."\(^84\) Taken
together, these statutes counsel concern for (1) the existence or nonexistence
of a contract of service or employment and/or (2) a determination of whether
the individual works personally for another. Having hinted at the applicable
tests in both statutory and common law settings, it is necessary to examine
briefly how the various tests have actually been applied.

IV. APPLYING THE APPROPRIATE TESTS

In applying the disparate tests available, the courts have not always been
consistent. In *O'Kelly v. Trusthouse Forte P.L.C.*,\(^85\) the industrial tribunal
assembled a list of at least eighteen different relevant factors for consideration.
Some of these factors, such as the lack of any financial investment by workers
into their company, were considered consistent with the existence of a contract
of employment.\(^86\) Other factors were considered not inconsistent with a
contract of employment such as whether the applicants were only paid for
work actually performed and the fact that they were not subject to regular
working hours.\(^87\) Still other factors were considered inconsistent with
employee status and include the ability to terminate contracts without notice
on either side and the view that the workers were independent contractors.\(^88\)
This search process again hints at the idea that the courts are really looking for
economic and social subordination. Yet, some courts apparently have
difficulty articulating that search. Others are a bit more transparent.

For example, in *McMeechan v. Secretary of State for Employment*,\(^89\) the
Court of Appeal cited with approval the conclusion in *O'Kelly* that because no
single factor is by itself decisive, the trier of fact must consider all aspects of
the relationship between the individual and the employer.\(^90\) In essence, the
*McMeechan* court opted for a balancing test to ascertain whether the person
was running a business on her own account. Reference might be made to such
questions as (1) whether mutuality of obligation exists (here that means was

\(^83\) *Id.* at 354.
\(^84\) *Deakin & Morris*, *supra* note 11, at 152.
\(^85\) 1983 W.L.R. 605 (C.A.).
\(^86\) See *Deakin & Morris*, *supra* note 11, at 169-70.
\(^87\) See *id.* at 170.
\(^88\) See *id.*
\(^89\) 1997 I.C.R. 549 (C.A.).
\(^90\) See *id.* at 555.
there an absence of a duty on one side to provide work); (2) whether there is an absence on the other side of any obligation to do such work as was voluntarily provided (is there mutuality with respect to the expected continuity of employment); (3) who is in control; and (4) is there in fact continuity of employment.91

The courts concede that the appropriate distinction between a contract of service (employment) and a contract for services (an independent contractor) is elusive and that no single test is available.92 However, recall that the Privy Council announced its support for the general criteria derived from Market Investigations Ltd. v. Minister of Social Security.93 The question to be asked is: “‘Is the person who has engaged himself to perform these services performing them as a person in business on his own account?’ If the answer to that question is ‘yes,’ then the contract is a contract for services. If the answer is ‘no,’ then the contract is a contract of service.”94 The court must then compile a list of plausible considerations that can be utilized to catalog the case and to flesh out an answer to the appropriate test or rules. Careful examination of the plausible considerations will enable the court and commentators to support, if not discover, a particular answer.95 For instance, in Market Investigations, the court assessed facts concerning the individuals, such as whether the individual (a) was under the control of another, (b) bore the financial risk, (c) profited from good management skills, (d) provided the necessary equipment, (e) hired substitute workers when unavailable for a given job, (f) was paid on a piecework basis, and (g) invested his own capital.96

Of course, the question to ask is whether the courts have provided tests or policies. Focusing on how an individual is paid, whether she invests her own capital, whether the individual can hire substitutes, whether she bears a financial risk, or whether she is subject to control seems to imply a dominant concern with the level and degree of economic and perhaps bureaucratic subordination, rather than the specific test or its particular application. Whether test or policy, incomplete comprehension of these matters would occur without some understanding of the courts’ attempt to decide whether this issue is one of fact, law, or a mixed question of fact and law.

91 See id.
92 See id.
95 See Lee Ting Sang, 1990 W.L.R. at 1176-77.
96 See id.
V. FACT OR LAW

Many cases which aspire to clarify the appropriate test to be applied when determining whether dependent labor is present also illuminate the fact versus law distinction. This distinction is important, as it enables or prevents appellate courts from reviewing the case. Without principled appellate review, actual instances of subordination may remain wrongly classified. "Prior to O'Kelly there were numerous decisions in which it was either expressly stated or implicitly assumed that the question of whether a particular contract is a contract of employment or some other kind of contract is a question of law to which there is a right and a wrong answer. ..."97 This perspective encouraged appellate review. For example, in O'Kelly, the Court of Appeal decided that the application of the legal criteria for identifying a contract of employment was a question of mixed law and fact to which several correct answers are possible.98 In deciding against the plaintiffs, who were regular casual workers, the court found that there was a lack of mutuality of obligation.99 Furthermore, in Davies v. Presbyterian Church of Wales,100 construing the terms of a written contract, the House of Lords held that the employment status of a church minister was a question of law. Moreover, in Hellyer Brothers Ltd. v. McLeod,101 the Court of Appeal was called upon to decide an arrangement based in both conduct and writing.102 There were two issues: (a) did the Appeals Tribunal misdirect itself on the law in reversing the Industrial Tribunal's decision and (b) whether continuity of employment was sufficiently evidenced.103 Here, the appellate panel "distinguished Davies and preserved the status of O'Kelly on the grounds that the former was a decision concerning the construction of a written contract, whereas the latter, involving an arrangement based partly on conduct and partly on writing, fell to be decided as a question of mixed fact and law."104 Is there good reason for drawing a distinction between a written contract and an arrangement based partly on conduct and partly on writing? One may fail to find a principle to cabin such a distinction or infer it from the relevant provisions of the employment

97 DEAKIN & MORRIS, supra note 11, at 154.
98 O'Kelly, 1983 W.L.R. 605.
99 See id.
100 1986 W.L.R. 323 (noting the exception that where the relationship is dependent solely upon the true construction of a written document, it is regarded as a question of law).
101 1987 W.L.R. 728
102 See id.
103 See id.
104 DEAKIN & MORRIS, supra note 11, at 154.
protection legislation. The legislation implicitly negates such a distinction, defining a contract of employment as a ‘contract of service . . . whether express or implied . . . ’.¹⁰⁵ In addition, other decisions have intelligibly confirmed that the determination that a contract contains an implied term, as suggested by the applicants in *O’Kelly*, is one of law. Notwithstanding these conclusions, it seems that courts are more inclined to give greater weight to complete and written statements of the parties’ intent. Where parties possess similar access to information and are able to engage in alternative employment or engage alternative contractors, the court’s deference to the parties’ intent may be logical yet inconsistent with the law. In any case, where there is a written agreement, there is authority for the proposition that the determination of intent is a question of law.

More recent authority states that whether a given set of facts supports the claim that the relationship is a “contract of service” or a “contract for services” is a question of law.¹⁰⁶ For instance, in *Carmichael v. National Power*, the Court of Appeal determined that the standard for reversing a lower panel decision requires that the lower court must have committed an error of law which can be shown either where there was no evidence to support the lower court’s finding or where the findings can be shown to be so excessively against the weight of evidence as to be demonstrably wrong.¹⁰⁷

Despite the *Carmichael* decision, the prevailing conviction is that determination of whether the individual is employed under a contract of service or a contract for services is one of fact, or a mixed question of fact and law, unless there is a complete written agreement at issue. For example, in one prominent case, the Privy Council stated that the work “relationship has to be determined by an investigation and evaluation of the factual circumstances in which the work is performed . . . ”¹⁰⁸ When reviewing trial court and tribunal rulings, appellate courts should defer to the factual conclusions of those lower courts.¹⁰⁹ Lord Griffiths argues that unless the relationship is dependent solely upon the true construction of a written document, it was “firmly established that the question of employee status was a question of fact . . . ”¹¹⁰ At first glance, Lord Griffiths’ argument seems strange because “whether or not a certain set of facts should be classified under one legal head rather than

¹⁰⁵ *Id.* (emphasis added).
¹⁰⁷ *See id.*
¹⁰⁸ *Lee Ting Sang*, 1990 W.L.R. at 1178.
¹⁰⁹ *See id.*
¹¹⁰ *Id.*
another would appear to be a question of law."111 Yet the rule is explicable.112 "[B]ecause of the difficulty of devising a conclusive test to resolve the question and the threat of the appellate courts being crushed by the weight of appeals if the many borderline cases were considered to be questions of law," the courts have concluded that the determination is typically now one of fact.113 In truth, the determination that this issue is one of fact or of mixed law and fact is a statement of convenience that allows the appellate courts to decline to either hear or to overturn lower courts or Employment Tribunal Decisions.

This review implies that English courts have added to the confusion by engaging in strained decision-making on the issue of whether employment or independent contractor status is a question of fact or law. Arguably, because of the difficulty in reaching a dispositive conclusion as to the appropriate standard for deciding whether the relationship is a "contract of service" or a "contract for services," British courts have embraced a procedural solution to ascertain whether appellant intervention is necessary. If the lower court is simply wrong but within a band of reasonableness, the appellate court can decline to hear the case. Where the lower court has committed a flagrant error, however, the error can now be characterized as one of law, and the appeal may proceed. This does not mean the appellate courts are relieved of their responsibility.114 The appellate court is permitted to "intervene in a case where the employment tribunal misconstrues the meaning of contractual documents or fails to apply the correct test for the implication of a contract term, since these amount to errors of law."115 Furthermore, employers and principals who successfully insist on a complete written agreement are more likely to find that such agreements shield them from employment protection obligations, if that is their intent.

VI. ANALYSIS

The determination of whether dependent or independent labor exists remains a formidable and complex task in both Great Britain and within other common law jurisdictions. Lacunae in statutory enactments continue to force

111 Id.
112 See DEAKIN & MORRIS, supra note 11, at 155.
113 Lee Ting Sang, 1990 W.L.R. at 1178.
115 DEAKIN & MORRIS, supra note 11, at 155.
the courts, tribunals, and various other entities to return to an exasperatingly confusing investigation of the common law principles and standards. However, one potentially fruitful and clarifying avenue of attack is available. Consider two previously mentioned cases along with a third. First, recall O'Kelly, where the tribunal appraised a plethora of factors in deciding whether certain casual workers (on-call table servers) were employees or independent contractors.\(^{116}\) Second, the issue in Ready Mixed Concrete was whether a lorry (truck) driver, who delivered cement under a contract of self-employment and who bought the lorry from the principal but who had to drive for the company for a certain number of hours per week, find his own replacement if he were unavailable, and comply with reasonable orders from the principal, was in fact an employee for insurance purposes.\(^ {117}\) In “both Ready Mixed Concrete and O'Kelly there was clear evidence of both personal and economic dependence between worker and employer. In each case the worker consistently contracted with the same employer, was required to obey certain, reasonable orders and was dependent on that employer for continuing work and income.\(^ {118}\) This analysis is consistent with an approach drawn from an examination of the underlying assumptions that govern contracts of employment.\(^ {119}\) The approach contests the notion that contract relationships arise from agreement by parties who both possess the same economic, social, and political power. Disparities in economic power are typically self-evident. Rigid adherence to the common law is likely to incorporate archetypal models of master and servant and may sustain more than economic subordination derived from the notion of control.\(^ {120}\) For instance, an inherent tension exists between the social demands of the employment relationship and the spirit of the common law which is not concerned with the balance of bargaining power as it is inspired by a belief in the equality (real or fictitious) of individuals.\(^ {121}\) From this perspective, “[c]ontracts engender relations of power. Normally, however, the consent of the parties legitimates any subordination created by

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\(^{116}\) O'Kelly, 1983 W.L.R. 605.

\(^{117}\) Ready Mixed Concrete, 1968 Q.B. at 497.

\(^{118}\) Deakin & Morris, supra note 11, at 170.


\(^{120}\) See Wedderburn, supra note 14, at 111.

\(^{121}\) Paul Davies & Mark Freedland, Labour Legislation and Public Policy 13 (Oxford 1993).
the contractual obligations." Collins further contends that a clear perception of subordination must accept the notion of its dual source. This dual source of worker subordination is derived from both market and bureaucratic power. If this claim is persuasive, incorporating an expansive conception of subordination may be helpful in clearly distinguishing between employment and independent contractor relationships. If an employment relationship exists, arguably there will be more subordination, more compliance with the rules of the organization, and the individual will have fewer work options and business alternatives. In addition, the importance of this approach can be enhanced by the appellate court's willingness to declare that whether subordination exists is a question of law which thus requires elevated scrutiny. Such an approach would disregard the limitation placed on Davies and instead require that Davies be broadened to require appellate review of all cases which plausibly involve subordination whether dependent on a written instrument or not.

For example, recall Cheng Yuen v. Royal Hong Kong Golf Club, where Cheng Yuen was dependent on a strict rotation system with players being allocated to the next caddie in line. This system was based neither on negotiations between Cheng Yuen and the Royal Hong Kong Golf Club nor on an agreement between individual golfers and Cheng Yuen determining who he worked for. The club determined this unilaterally. This situation suggests a hierarchy which is consistent with social and bureaucratic subordination. Despite the fact that Cheng Yuen "was free to attend work ... when he pleased and did not receive sick pay, holiday pay or have the benefit of a pension scheme," his economic livelihood was dramatically tied to the club. There was no indication that he worked at other clubs or that he arranged to work for particular golfers before coming to the club. In other words, he was economically dependent on the Royal Hong Kong Golf Club and lacked alternatives. Furthermore, one could ask whether his work primarily benefitted the club which wished to serve golfers or whether the benefits accrued largely to the golfers, with whom the Privy Council presumed Cheng Yuen had a contractual relationship. These and other considerations, grounded on the urge to flesh out an enlarged assessment of subordination, would help courts or employment tribunals determine that other similarly

123 See Collins, Market Power, supra note 73, at 1-2.
125 Id. at 132.
126 See id. at 138.
situated caddies were in fact employees and not "independent" contractors. Even if there was a putative agreement between the parties sufficient to characterize the relationship as "contract for services," the court could assess whether the "agreement" represented a freely bargained exchange or whether it simply represented the absence of alternative employment for the individual who had "agreed" to work for the master. In his admirable dissent, Lord Hoffmann alludes to the reality of the situation to deflate the asserted deficiency in Cheng Yuen's claim—the lack of mutuality of obligation needed to justify a "contract of service." While it was argued for the employer that Cheng Yuen had to prove that he was employed under a continuing contract, Lord Hoffmann observes that Cheng Yuen only had to show that:

when working at the club, he had been a casual employee, in the same way as a casual waitress, gardener or labourer, employed from time to time as and when he presented himself for work and the club had work to offer. Provided that he was an employee of the club at such times as he was actually working, the effect of Schedule 1 to the Employment Ordinance would be to deem him to have been in continuous employment. And for the purpose of deciding whether he was a casual employee, the fact that neither party was under an obligation to employ or be employed is of course irrelevant. That is the nature of casual employment. The whole purpose of Schedule 1 was to equate the position of a regular casual employee with that of a person engaged under a continuous contract of employment.

In other words, mutuality of obligation was a red herring which allowed the majority of the court to disallow Cheng Yuen employment protection regardless of his undeniable economic and social subordination. It is doubtful, whatever the arrangement negotiated between Cheng Yuen and the club, that the relationship was based on equality of bargaining power. The club determined the rate of pay, the manner of payment, for whom Cheng Yuen would work, and when discipline was necessary. An expansive conception of subordination would allow a court to decide that Cheng Yuen was an employee whatever the "tests" applied and to disregard (1) the assertion that the club was

\[\text{\textsuperscript{127}} \text{Id. at 139.}\]
\[\text{\textsuperscript{128}} \text{Cheng Yuen, 1998 I.C.R. at 139.}\]
\[\text{\textsuperscript{129}} \text{See id.}\]
acting as an agent for the members of the club or (2) that he held independent contractor status. The club’s reliance on the fact that it did not pay sick benefits or holiday benefits to caddies “merely showed that it was consistent in denying the caddies the rights to which as employees they were entitled. Such self-serving acts cannot alter their legal status.”

The application of an expansive conception of subordination to Express and Echo Publications Ltd. yields a similar result. Surely the Court of Appeal is correct in stating that clause 3.3 of Tanton’s contract (if it is a contract) allowing him to hire a substitute is arguably inconsistent with the view that he is an employee. First, personal service is one of the hallmarks of employment derived from the notion of master-servant. Yet, an examination of the history of the relationship between Tanton and Express and Echo Publications indicates without contravention that Tanton was initially an employee. Second, at all relevant times, appropriate tax and national insurance contributions were deducted from Tanton’s pay. Third, the manner in which he was to perform his duties was highly regulated; the firm required him to pick up and deliver newspapers in a particular order. Express and Echo Publications provided the vehicle he was to drive. The company unilaterally fixed the rate of pay and gave him a uniform. All of this evidence was obscured by the mere fact that Tanton could and did hire a substitute. Accordingly, the trier of facts’ decision that he was an employee was reversed on appeal presumably as a result of the teaching of Ready Mixed Concrete. If one considers the application of company rules to Tanton, the level of his economic dependence and subordination to the controls of the company, and the seeming absence of alternative employment options available to him, it is difficult for a rational observer to agree with the assertion that Tanton was an independent contractor. On the contrary, it seems that the court’s decision was one of capricious convenience.

Application of an expansive conception of subordination to the two earlier examples drawn from the United States might likewise lead to the reversal of both decisions while simultaneously enhancing consistency as well. Under the typical sharefarming agreement, the landowner generally provides and prepares the land, plants the crop, cultivates, sprays and fertilizes the crop, and pays the costs of such activities. In return,
the 'sharefarmer' agrees to furnish the labor necessary to care for the land and plants during the growing season, to harvest the . . . crop, and to sort, grade and pack the [crop] for marketing by [the grower]. After the crop is sold, the grower and sharefarmer equally split the gross proceeds of the harvest.\textsuperscript{135}

First, it is doubtful that equality of bargaining exists. Economic disparity seems self-evident.\textsuperscript{136} In addition, many, if not most sharefarmers lack adequate alternative employment or independent contract opportunities. While it can be argued that sharefarmers have some control over how labor is furnished to care for the plants during the growing season or how the crops are harvested, their latitude seems minimal at best. Beyond that, the specific tasks required of sharefarmers are, in fact, determined by the growers. Accordingly, it "is a stretch of the imagination . . . to characterize today's migrant farmworkers and their families as managers of 'independent farming operations.'"\textsuperscript{137} On the contrary, "[i]n a majority of the contractual arrangements between migrant workers and landowners, the farmworker exercises little control over the care and management of the entire operation."\textsuperscript{138} In addition, many sharefarmers lack the education necessary to understand the written agreement fully and "often sign these independent contractor agreements only because they are forced to as a condition of employment."\textsuperscript{139} Indeed one of the prime, though not only, motivating factors for such agreements is the desire by growers to avoid liability to employees under the Fair Labor Standards Act. Growers accomplish this by "manipulating the formal designation of their relationship with their migrant work force."\textsuperscript{140} An

\textsuperscript{135} Id.

\textsuperscript{136} This case can be analogized to United States v. Silk, 331 U.S. 704, 713 (1946). In that case, the Supreme Court announced its support for the economic realities test, premised on its concern for inequality of bargaining power in controversies over wages, hours, and working conditions. See id. at 715.

\textsuperscript{137} Glader, supra note 3, at 1466.

\textsuperscript{138} Id.

\textsuperscript{139} Id. at 1467.

\textsuperscript{140} Id. One commentator adverts: "Pickle farmers in Ohio, Wisconsin, Michigan, Colorado, and Texas directly, without recourse to a crewleader, recruit entire families of Mexican-American farmworkers in South Texas to harvest their crop. They require the workers, as a condition of employment, to sign a statement to the effect that they are independent contractors and not employees." Marc Linder, Employees, Not-So-Independent Contractors, and the Case of Migrant Farmworkers: A Challenge to the 'Law and Economics' Agency Doctrine, 15 N.Y.U. Rev. L. & Soc. Change 435, 438 (1986-87).
expansive conception of economic and social subordination enforced by elevated scrutiny at the appellate level should arguably deprive landowners of the benefits which are attached to the contention that sharefarmers have independent contractor status by vitiating the claim that it was the actual intent of the parties which resulted in such "agreements."

On the other hand, an expansive yet principled conception of subordination might serve to invalidate the decision in *Vizcaino v. Microsoft.* Donna Vizcaino, along with seven other highly skilled individuals, agreed to be classified as independent contractors and not as employees in exchange for higher cash compensation. Later, they sought fringe benefits including access to a stock plan that accrues to individuals classified as employees. Accordingly, they commenced a class action suit against the company after the firm had, in response to an Internal Revenue Service investigation, reclassified the independent contractors as common-law employees solely for tax purposes.

The evidence adduced shows that the plaintiffs were made aware of Microsoft’s intention to decline to furnish these independent contractors with employee benefits. Unlike Alejandra Sanchez’s father, all of the plaintiffs were university-educated and one had a law degree. Accordingly, it can easily be argued that “[t]hey knew what they were getting into” and received compensation in the form of “more cash on an hourly basis than regular employees.” The uncontroverted evidence clearly underscores the fact that the plaintiffs understood the situation. Furthermore, their agreement cannot be characterized as irrational. They were guaranteed more cash per hour both

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141 97 F.3d 1187 (9th Cir. 1996) [Vizcaino I], rev’d en banc, 120 F.3d 1006 (1997).
142 Skilled individuals who offer their services to the public are generally considered independent contractors. *See Silk,* 331 U.S. at 715. To be sure, Vizcaino and her colleagues might be able to distinguish themselves from physicians, dentists, public stenographers, contractors, and the other specific categories discussed in *Silk,* but logically Vizcaino and her colleagues fall much closer to those categories than to sharefarmers.
143 *See Vizcaino,* 120 F.3d at 1008.
144 *See id.* at 1009. Microsoft agreed to reclassify the independent contractors as employees for tax purposes but maintained that in effect such individuals were independent contractors for benefit purposes. Notably, the pertinent Internal Revenue Code section, 26 U.S.C. § 423, does not create a private right of action by plaintiffs against Microsoft. *See Vizcaino I,* 97 F.3d at 1198. Microsoft did not contest the contention that individuals such as Vizcaino were employees. Instead, Microsoft sought to reserve the question as to whether certain specific individuals fell within the class as well as the question of the amounts due to class-members. *Id.* at 1190 n.1.
145 *See Vizcaino I,* 97 F.3d at 1195, 1201-02 (Trott, J., dissenting).
146 *See id.* at 1201.
147 *Id.* at 1201-02 (emphasis in original).
to avoid undertaking the risk attendant to benefits that might fluctuate with the stock market and as consideration for the additional flexibility that Microsoft and presumably they themselves wanted.\footnote{See id.}

Admittedly, the plaintiffs worked with other individuals who were at all times Microsoft employees. They were integrated into the bureaucratic hierarchy of the firm. The company determined their hours of work, which generally were the same for Microsoft employees. They also worked under the same supervisors. And yet, after the unfavorable yet not dispositive IRS decision, Microsoft divided the freelancers into two groups: those who were offered permanent positions and those whose options were either to quit or to become employees of a newly created temporary employment agency which would pay them.\footnote{See Kellogg, supra note 4, at 1799.} This analysis shows Microsoft’s view of the freelancers’ job status: “If Microsoft considered them all as the equivalent of employees and in fact had treated them as such from the date they were hired as the Ninth Circuit suggested, one would logically assume that the company would have converted all the freelancers into permanent employees.”\footnote{Id.} Instead, Microsoft divided them up into two groups: employees whose employment was dependent on other factors and task specific workers.\footnote{See id. at 1799-1800.} Workers were so classified because of the company’s choice to maintain an ongoing relationship with one group while maintaining only a task specific relationship with the other. In fact, members of the contingent group were no longer needed after their tasks were completed.\footnote{See id. at 1800.} A paramount reason for hiring independent contractors is the notion that they are hired for specific as opposed to ongoing tasks.\footnote{See id.} While Microsoft’s conduct is not by itself dispositive, this evidence along with the initial agreement of the parties should be considered relevant. As one British commentator stated,

\begin{quote}
in a finely balanced case, the parties’ own view of their relationship may tip the scales in one direction or another: ‘since the law looks to substance and not to form, the fact that the parties honestly intend that between themselves the contract shall be a contract for services and not a contract of service . . . is a relevant fact. . . .’\footnote{Deakin & Morris, supra note 11, at 156.}
\end{quote}
For instance, in *Massey v. Crown Life Insurance Co.*, an accountant agreed to enter into an independent contractor status after being informed of the cost and benefits of doing so. He then sought the benefits of employee status. In response, Lord Denning stated: "Having made his bed as being self-employed, he must lie on it." The primary justification for constraining or abolishing the doctrine of at will employment is grounded in the belief that the contract at will invites the exercise of arbitrary power by persons with dominant economic positions against individuals whose mobility is said to be limited by the structure of the labor market. The "absence of viable alternative employment opportunities is thought to leave employees vulnerable to coercion and exploitation." On the other hand, in *Vizcaino*, fully informed university-educated professionals who possessed employment alternatives and options sought and received the benefits attached to economic subordination without suffering the attendant cost. It is doubtful that they agreed to the deal under circumstances of duress or because they lacked viable employment alternatives. Even if that conclusion is clouded, only an unchecked imagination could agree with the perspective that grants such professionals more protection than unskilled American sharefarmers and their eleven-year-old children. A focus on "subordination reality," coupled with the consideration of the absence or presence of viable employment options, informed by British cases yet unencumbered by conflicting rules and rigid tests, may be helpful in distinguishing those who are covered or who should be covered by existing employment protection laws.

**VII. CONCLUSION**

It must be conceded that this modest exegesis of British labor law and its application to a few American cases is not grounded in a compelling meta-ethic nor in a defense of existing employment protection laws. Such laws may or may not be justifiable. However, this article demonstrates that distinguishing an employment relationship from independent contractor status is riven with pitfalls, inconsistencies, and perhaps incoherence on a transnational basis. This article provides a spare scaffold for constructing a more principled approach to the knotty issues that surround labor and contractor relationships.

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156 Id. at 596.
157 See Epstein, supra note 122, at 949 (commenting on the argument raised against at will employment while offering a spirited defense of the doctrine of at will employment).
158 Id.
Given the changing nature of work in Britain, the United States, and transnationally, a rigorous focus on an expanded conception of economic, bureaucratic, and social subservience (perhaps labeled "subordination reality") coupled with elevated appellate review may engender more consistency and clarity in distinguishing dependent from independent labor. Given the accelerated change within the global workplace and new forms of work, more coherence, scrutiny, and additional research likely will be required in the future.