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“Neither slavery nor involuntary servitude”: Free labor and American law, ca. 1815–1880

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"NEITHER SLAVERY NOR INVOLUNTARY SERVITUDE:"
FREE LABOR AND AMERICAN LAW, CA. 1815-1880

by

JAMES D. SCHMIDT

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE
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ABSTRACT

"Neither Slavery Nor Involuntary Servitude:"
Free Labor and American Law, ca. 1815-1880

by

James D. Schmidt

Most nineteenth-century northerners did not see legal control of the employment relation or the labor market as contradictory with the free labor ethic. Antebellum work discipline rested on statutory and common law rules, the most important of which regulated labor contracts and proscribed vagrancy. With regard to work discipline, labor contracts crystallized the relationship of workers to individual employers, while vagrancy statutes defined the meaning of work in the community at large. Equally important, these legal principles helped construct gender, class structure, and social theory.

Before the Civil War, northern courts adapted labor contract rules to specific modes of production, and by 1860 jurists and law writers formulated two opposing conceptions of law's place in work discipline. Vagrancy laws in the antebellum North served many functions. While labor discipline was the ultimate effect, these statutes expressed ideas about class, gender, and republicanism. Antebellum southerners developed a separate legal tradition, especially in the area of contract law.

During the transition from slavery to free labor, antebellum contract and
vagrancy laws influenced both emerging systems of labor, such as the Union army's program in Louisiana, and the constitutional meaning of freedom in the Thirteenth Amendment. Similarly, prewar labor law configured actions of the Bureau of Refugees, Freedmen, and Abandoned Lands. As the case of Alabama shows, labor law was manipulated at times to secure rights for African-American workers, but it faltered because of resistance by southern whites and because of its basis in class. The Freedmen's Bureau's labor program also failed because of the ways in which local agents interpreted and administered antebellum legal principles, as occurred in South Carolina. In places such as Texas, bureau officials used labor law to oppress African-American workers, but both black and white Southerners manipulated legal restraints to their own advantage.

By 1880 free labor law left its antebellum roots. Courts removed remaining restraints on individual labor contracts, while state legislatures passed tramp acts that enhanced the law's power over the meaning of work, gender, and class.
ACKNOWLEDGMENTS

A member of Prof. Harold Hyman’s seminar in American legal and constitutional history once described this project as "the velcro topic" because an ever increasing list of areas for investigation seemed to adhere to it. The expanding scope of this dissertation has owed much to the assistance of fellow researchers as well as librarians and archivists. My efforts have been aided immeasurably by the library staff members at Rice University, University of Houston, University of Houston Law Library, University of Georgia, Emory University, Mercer University, and University of North Carolina-Chapel Hill. Comments by fellow scholars in Professor Hyman’s seminar helped me focus my inquiries, and I would like to thank especially Ken Deville, who encouraged me to explore the connections between labor contracts and vagrancy laws. Either through course work, examination committees, conferences, or informal conversations, I have also benefitted from the comments of Thomas Haskell, Martin Wiener, Ira Gruber, John Boles, Gale Stokes, Chandler Davidson, John Inscoe, and Wayne Durrill. Special thanks go to my advisor, Prof. Hyman, for encouraging me to broaden my inquiries and for supporting my work even when I argued with him. Finally, I wish to acknowledge those people closest to me. My parents have a consistent source of encouragement throughout my academic career. Most importantly, my wife, Ginger Frost, has taken time away from research and teaching obligations to read and comment on my work and to listen to my obsessive worrying about it.
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INTRODUCTION:

THE PROBLEM OF FREE LABOR

In October 1865 Freedmen's Bureau Commissioner Oliver Otis Howard ordered that "vagrant laws made for free people" would be extended to freed slaves.\(^1\) At first blush it might seem that Howard was being ironic. If emancipated African-Americans were subject to statutes restricting both their mobility and their labor, how could they be free? Historians of Reconstruction and emancipation have asked this rhetorical question and concluded that laws that regulate work contradicted the antebellum North's commitment to free labor.\(^2\) But Howard was not being ironic, and his directive suggests that for northerners of the Civil War generation establishing a free labor society did not mean abandoning legal control of employment. This interplay between the free labor ethic and laws that appear to restrict its operation is the focus of this study.

By 1860 free labor meant many things. To evangelical Protestants, it meant simple self-ownership, but to radical urban artisans and republican ideologues, it

\(^1\)Oliver Otis Howard, Circular Letter, October 14, 1865, 39th Cong., 1st sess., Senate Executive Document 6: Orders Issue by the Freedmen's Bureau, 1865-1866, 197-198.

\(^2\)The best example is in Eric Foner's, Reconstruction: America's Unfinished Revolution, 1863-1877, (New York: Harper and Row, 1989), 155, 208. "Propertyless individuals in the North, to be sure, were compelled to labor for wages," Foner remarks, "but the compulsion was supplied by necessity, not by public officials, and contracts did not prevent them from leaving work whenever they chose." In regard to vagrancy laws, Foner contends that "Northern courts tended to view those without work as unfortunates rather than criminals, usually employing vagrancy laws only to discipline prostitutes and petty thieves."
meant possession of property. Applied to daily life, these abstractions implied social, occupational, and geographic mobility. Through wage labor, propertyless workers could accumulate capital and eventually buy land or a small business, thereby escaping poverty and relieving the United States of a permanent proletariat. Even if laborers could not elude proletarianization, they could avoid unfair treatment by unrestricted movement in the labor market, simply quitting one job for another. In either case, harmony would prevail between labor and capital. Free labor also meant the new milieu of social relations that resulted from the breakdown of the master-journeyman-apprentice system in the skilled crafts. As master craftsmen responded to widening markets after 1815 by expanding output, ancient methods of production eroded rapidly. Journeymen moved out of their masters' homes and into working-class communities. Old rituals of work and time faded as new industrial class

relations emerged. In many ways, the "free labor ethic" was a response to this transformation.⁴

Presumably, these social and ideological changes created a problem in work discipline, whether the term denotes incentives that prompt humans to labor for subsistence or accumulation, or if it means employers' attempts to control their employees, either in the labor market or at the workplace. Free labor removed both the legal restraints of indentured servitude and the customary paternalism of the master-servant relation.⁵ However, the triumph of capitalism in the northeastern United States in the early nineteenth century supposedly resolved these difficulties. With the capitalistic revolution, work became governed by a competitive market, by human necessity, and by an internalized sense of industrial time.⁶

If political economy and social structure alone constituted free labor, then

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legal restriction of either the labor market or the employment relationship seems anomalous.\textsuperscript{7} But free labor in nineteenth-century America was not confined to ideological precepts or to social relations. For most nineteenth-century northerners, legal control of the employment relation and the labor market went hand-in-hand with free labor ideology. In both its meanings, antebellum work discipline rested on statutory and common law rules, the most important of which regulated labor contracts and proscribed vagrancy.\textsuperscript{8} With regard to work discipline, labor contracts crystallized the relationship of workers to individual employers, while vagrancy statutes defined the place of work in the community at large. Equally important, labor contracts and vagrancy laws helped construct meanings of gender, class structure, and social theory. In the chapters that follow, I trace these developments

\textsuperscript{7}The most comprehensive treatment of the legal meaning of free labor is Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870 (Chapel Hill: University of North Carolina Press, 1991). Although he considers the legal origins of free labor, Steinfeld still focuses on the idea of self-ownership and his account is structured to show what led up to its creation by 1820. The best work on the legal conditions after that point is by Christopher Tomlinson. I critique his work and other parts of this literature in chapter 1.

\textsuperscript{8}The main reason I have focused on these two elements is because they were keystones of Northern free labor law in the post-war South. When Northerners faced the task (as they saw it) of reconstructing free labor society from whole cloth, they most often selected labor contracts and vagrancy codes for that purpose. I have also given some treatment to apprenticeship and to enticement of workers. However, I give scant attention such issues as criminal conspiracy doctrines or limitations on the workday. These legal principles concerned primarily the labor movement. My interest is in the place of individual workers in the legal system, and most of them had no connection to the labor movement. Given this approach, I also have not tried to write a comprehensive social history of vagrancy or of the employment relation; in the notes, I have pointed out scholarship that may be helpful on these issues.
from about 1815 to about 1880.

The first three chapters examine legal changes before 1860. In Chapter One I argue that northern courts adapted labor contract rules to specific modes of production, and that by 1860, jurists and law writers formulated two opposing conceptions of law's place in work discipline. Chapter Two looks at northern vagrancy laws. While labor discipline was the ultimate effect, these laws originated in ideas about class, gender, and republicanism. Chapter Three contends that southerners developed a separate legal tradition, especially in the area of contract law. The next four chapters connect antebellum labor law to emancipation. Chapter Four surveys two central parts of the transition from slavery to free labor, the wartime labor program of the Union army in Louisiana and the Thirteenth Amendment. I suggest that antebellum contract and vagrancy laws influenced both emerging systems of labor in the South and the constitutional meaning of freedom. Chapters Five, Six, and Seven look at the activities of the Bureau of Refugees, Freedmen, and Abandoned Lands in three individual states: Alabama, South Carolina, and Texas. I intend these chapters to work on three different levels. They carry the argument about wartime Reconstruction forward in time. They also provide evidence that the ideas I describe in the first two chapters penetrated the consciousness of many northerners by the middle 1860s. Each state study also makes

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9I selected these states partially because of availability of sources but also because I think they represent some of the different areas in the South. South Carolina represents the seaboard, pre-Revolutionary, mixed agricultural, war-ravaged South; Alabama the cotton South; and Texas the trans-Mississippi South.
a specific point. Chapter Five suggests that labor law was manipulated at times to secure rights for African-American workers but that it faltered because of resistance by southern whites and because of its basis in class. In Chapter Six I contend that the Bureau’s labor program also failed because of the ways in which local agents interpreted and administered antebellum legal principles. Chapter Seven explores the potential of labor law to oppress but also examines, through a case study, how its constraints might be avoided. Finally, Chapter Eight argues that northern free labor law left its antebellum roots by 1880. Courts removed remaining restraints on individual labor contracts, while state legislatures passed tramp acts that enhanced the law’s power over the meaning of work, gender, and class.
CHAPTER 1
"MERELY WORKING": LABOR CONTRACTS AND WORK DISCIPLINE IN THE ANTEBELLUM NORTH

"The principles in this case have so long been settled that it seems a waste of time to argue upon them," a weary Sidney Breese began an Illinois Supreme Court opinion in 1862. The settled principles in question referred to a worker's right to recover wages after leaving an employer. In most states in the antebellum North, laborers who voluntarily abandoned their contracts could not collect money due under the agreement. Nor could they treat it as rescinded and recoup the actual value of their work. The "very delicate and much vexed question" in these controversies usually involved "special contracts," compacts under which the laborer pledged to work a specific time at a stated price. In landmark cases such as Stark v. Parker (Massachusetts, 1824), eastern courts established the "entirety" rule, requiring full performance before wages could be paid. However, by the 1830s entirety faced a growing challenge from a different construction of free labor based on the concept of quantum meruit. Britton v. Turner, an 1834 New Hampshire case, introduced this rule to a wide audience and provided ammunition for workers' attorneys. An equitable remedy envisioning payment for time actually served, quantum meruit, or "apportionment," assumed that all work bestowed some benefit to its recipient and that acceptance of that benefit implied a promise to recompense the laborer. Nonetheless, those favoring strict enforcement of contracts found this remedy redundant, claiming that entirety protected workers as well as employers. If a servant
were discharged without a sufficient cause, they pointed out, he/she could collect wages as if the contract had been completed.\(^1\)

In recent years, the use of entire contracts in Jacksonian America's emerging capitalist order has become a topic of considerable debate among historians. According to some Critical Legal Studies scholars and labor historians, strict enforcement of wage forfeiture provisions in labor contracts resulted from the common position of jurists and capitalists in the exploiting class. Employers and judges used forfeiture to discipline the emerging industrial work force after the restraints of involuntary servitude and slavery disappeared.\(^2\) Recent criticism of this


Another important facet of this argument is the apparent doctrinal contradiction that let builders recover while not allowing remedies for other workers.
thesis simply takes the reverse approach, completely denying the power of contract law to configure the employment relation and the conditions of free labor.\textsuperscript{3} A better reading of nineteenth-century labor law lies somewhere between these two poles. To find this mid-point requires moving beyond castigation of judges and uncovering the relationships between formal doctrine and the actual conditions of work and work discipline.\textsuperscript{4}

Recovery of wages after discharge or abandonment remained an open issue

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\textsuperscript{3} Peter Karsten, "Bottomed on Justice': A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880," \textit{American Journal of Legal History} 34 (July 1990): 211-261 argues that contracts often helped service workers and that builders received no special treatment. Moreover, jurists often acted in ways contrary to their apparent class interests. This interpretation, however, moves quite too far in the other direction. There is no denying that at least some, if not most, nineteenth-century labor law decisions hurt workers.


\textsuperscript{4} To be fair, Holt admits at one point that his work centers on ideology and that "it would be an interesting and useful, but different, task to focus on the actual desires and life-situations of the workers in the manner of the new labor history...and to explore the ways in which those desires and life-situations connect to the rhetoric of caselaw ideology." Holt, "Recovery by the Worker Who Quits," 706, n168. In essence, this is what Tomlinson is trying to do in his work, but he cannot escape the CLS creed that demands that judges be seen as uncomplicated oppressors.
up to and through the Civil War. Because the threat of wage forfeiture was the only real means left to control workers’ movements in the labor market, both employers and employees had a vital interest in precise rules governing labor contracts. Yet courts rarely applied the common law consistently. Usually, jurists looked at the particular circumstances in each case, and the only consensus that appeared relied on occupation, not on doctrine. Most state tribunals adhered to some form of entirety, but juries, attorneys, lower court judges, and some high court jurists subjected the rule to increasing criticism as the nineteenth century progressed.

Beyond these formal arguments about the nature of contract lay interconnected discourses about the nature and value of work and the role of law in work discipline. Jurists and attorneys who clung to entirety melded the terms of traditional master-servant language with those of contract. To them, service possessed no intrinsic benefit, nor did it automatically imply a promise of remuneration. Moreover, proponents of entirety believed law could and should be used to control the conditions of free labor. On the other hand, jurists and attorneys who supported apportionment of contracts constructed free labor in less traditional terms. They viewed work as inherently valuable and believed all toil should be paid. While not unconcerned about legal labor discipline, they concentrated on securing equity for

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5Following Holt’s warning that counting jurisdictional noses will not get us very far, I have not attempted to calculate states that adopted one rule or the other. Holt, "Recovery for the Worker Who Quits," 684. For those interested in the number of jurisdictions adopting a particular rule, see the table in Karsten, "Bottomed on Justice," 242.
workers. In theory, jurists applied common law precepts equally, turning a blind eye to the class and conditions of litigants. In practice, the law of labor contracts incorporated customs from the several work cultures present in the antebellum North as jurists fashioned contract rules toward the specific needs of employers. Courts upheld traditional concepts of entirety most forcefully for farm laborers, allowing employers to restrict the labor market. For factory workers, judges hesitantly affirmed contracts securing discipline over the workplace. Courts rarely imposed legal constraints on craft workers, whose class position and skilled work eliminated demands for work discipline. A firm hold on middle-class respectability also helped a growing group of professional clerks, accountants, and managers, who sought to recover their salaries after being discharged.

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6While I am pursuing linguistic analysis in much the same manner as Tomlinson, my ultimate conclusions diverge from his significantly. He contrasts an employer-court image of "employment as a mutually beneficial relationship constructed by free and equal parties secured by the courts" and a workers' version that saw employment as "legally-sanctioned exploitation and inequality." "The Ties That Bind," 219.

7Karsten acknowledges the conditions of labor for farm workers and textile workers but then fails to integrate these points into his general analysis of entirety. In fact, he introduces this material to argue that a labor shortage existed in both areas, and that it lent workers a fair degree of power in making bargains. This is fine as far as it goes, but it fails to recognize the different and changing purposes of contracts. "'Bottomed on Justice,'" 225-229. On work-place control in New England mills, see Tomlinson, "Ties That Bind," 221-223, and below. David Montgomery, The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925 (New York: Cambridge University Press, 1987), 1-5, 22-46 discusses this issue for workers in post-Civil War America.

These multi-faceted controversies about labor and the law originated in the dissolution of traditional master-servant bonds in the late eighteenth century and the concomitant expansion of free labor in the early nineteenth. Whether applied to slaves, indentured servants, or apprentices, a clear demarcation of power constituted the heart of the premodern master-servant relation. Traditionally, legal powers of masters had been vast, and they remained so in the early nineteenth century. As late as 1810, Massachusetts masters could still have runaway apprentices and servants arrested and committed to the house of correction. In the same year, Pennsylvania laws authorized justices of the peace to issue arrest warrants for any apprentice who was "a stubborn and disorderly person" or one who "hath absconded from his [master's] service, contrary to the law, and to the great detriment of [his master]." In New York, masters could bring actions in trespass if their servants had been beaten by others, and they could sue for enticement if other masters employed their laborers.

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Notwithstanding these vestiges of paternal authority, master-servant discourse embraced considerable tensions by the early nineteenth century. Such ambiguities surfaced most transparently when treatise writers attempted to state with precision the actual definitions of a master and a servant. Anchored in the eighteenth century, Tapping Reeve voiced the traditional bonds of servitude in his 1816 treatise on family law. "A master is one who, by law, has a personal authority over another, and such person, over whom such authority may be rightfully exercised, is a servant," he wrote. Reeve still envisioned servants within a traditional household, in which a patriarchal master governed all inhabitants, and servants occupied a distinct position in hierarchies inherited from colonial America. For more forward-looking writers such as Nathan Dane, the matter was not so clear. In his 1823 Abridgement of American Law, Dane echoed Reeve's construction of servitude, noting that "a servant is one over whom authority may be rightfully exercised by another." But he also acknowledged that "servant" was coming simply to mean "persons employed by others" and might include wives, attorneys, and other agents. By recognizing this caveat to customary definitions, Dane described the emerging world of free labor more accurately than Reeve, but he still emphasized power distribution. New York treatise writer John Dunlap most clearly represented the mixture of traditional and contractual language that constituted the employment relation in the 1810s and 1820s. Writing in 1815, he averred that masters' rights arose from "the property that every man has in the service of his domestics, acquired by the contract of hiring, and purchased by giving them wages." Like slave masters, employers acquired property
in their servants, yet they did so through the "modern" avenue of contract. Further confusing the matter, he saw this relationship as equitable. Service contracts rested on "the principles of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons, as well as when there is work to be done, as well as when there is not." The relationship comprised a bargain under which the servant worked diligently during the busy spring and summer in return for a home and a meal during the cold, sparse winter months.\footnote{Tapping Reeve, \textit{The Law of Baron and Femme...}, 3rd ed. (Albany: William Gould Law Publisher, 1862), 339; Nathan Dane, \textit{General Abridgement and Digest of American Law} 8 vols. (Boston: Cummings, Hilliard & Co., 1823), II: 313; Dunlap, \textit{The New-York Justice}, 371-372. For similar analysis of these texts, see Tomlinson, "Ties That Bind," 214-216. "Menial" originally meant "within the walls of the master's house." Feinman, "Development of Employment at Will Doctrine," 123. On servants in the Puritan household, see John Demos, \textit{A Little Commonwealth: Family Life in Plymouth Colony} (New York: Oxford University Press, 1970), 107-118; and Christopher Hill, \textit{Society and Puritanism in Pre-Revolutionary England} (London: Secher and Warburg, 1964), Ch. 13.}

As legal writers grew unsure about servitude, laborers themselves also began to challenge the institution in the courts, and by doing so, they helped clarify the nature of the modern employment relation. By 1840 northern courts had firmly established one crucial difference between servitude and free labor by taking away the prerogative to administer corporal punishment to non-apprenticed servants. Dane had noted that masters must chastise servants "with great moderation, without passion, and with the proper instrument," and workers pressed for even greater limits on this element of power by charging employers who beat them with assault and
battery. In *Commonwealth v. Baird*, the Pennsylvania court declared in 1831 that while corporal punishment might preserve order in factories that employed minors, the law would not support it. In 1838 the Connecticut court considered a similar case against a Litchfield clock-maker and reached similar conclusions. While apprentices might be punished, the power "cannot be lawfully exercised, by a master over his hired servant, whether that servant is employed in husbandry, in manufacturing business, or in any other manner, except in the case of sailors."\(^{12}\)

Courts resolved the matter of corporal punishment for servants in a relatively compressed period in the 1830s, but constructing the contractual relations of free labor started much earlier and took much longer. Doctrinal debate on these issues commenced in the late eighteenth century when servants began to bring litigations against masters who attempted to detain them against their will. The Pennsylvania Supreme Court faced some implications of this question in 1793 when it considered the case of *Respublica v. Catharine Keppele*. On December 22, 1789, the Philadelphia mistress had secured a five-year indenture for Benjamin Hannis, an eleven-year-old orphan boy. When Hannis’s patrons obtained a writ of *habeas corpus* to force Keppele to surrender him before his time expired, she appealed, and the court was forced to decide the status of indentured apprentices. Mr. Sergeant, Keppele’s attorney, argued strenuously for the enforcement of long-held traditions.

"Servitude by indenture is founded upon the immemorial usage of Pennsylvania," he declared. Indigent families needed indentures to avoid their children "being brought up meanly, and in habits of idleness and vice." If the court allowed such children to escape before their time expired, no one would receive them in the future. The boy's attorney, on the other hand, "urged that servants were considered in Pennsylvania, in a very degraded state." They could be whipped, and their service could be extended if they ran away, conducted business, or married. While a parent might have the right to assign a child to such a position, a guardian never could, he maintained. In carefully worded opinions, each justice considered the custom of indentured servitude and decided the boy could not be assigned to it. While some members of the court sustained indentures for the poor or upheld parental powers to bind out children, Justice Bradford decried the indentures altogether. No parent, he argued, could rightfully place a child in an institution that sanctioned prison terms or additional servitude for desertion. "Such a contract which would subject the infant to the severe penalties of our laws, and to be sold to anyone who will buy his service, cannot be for [the child's] benefit." Bradford's opinion represented the expanding assault in the North on the whole idea of servitude, the selling of one's person into service, and on its institution of enforcement, criminal penalties for desertion.

Eight years later the Pennsylvania court extended protection against servitude when it entertained a former slave's claim for wages. The slave, a man named Peter, had been captured behind British lines during the Revolutionary War by William

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13 Republica against Catharine Kepple, 1 Yeates 233-237 (Penn., 1793).
Steel, an American officer. After the war, Steel brought Peter to Lancaster County, Pennsylvania. Perhaps with the assistance of the state's anti-slavery Quakers, Peter obtained his freedom six months later through a habeas writ. After several years passed, he sought remuneration for the time he had labored for Steel. Non-suited in his initial attempt, Peter brought his case before Pennsylvania's high court. Again, the judges eroded the foundations of servitude and allowed Peter the wages he asked. "When one does work for another by compulsion, whom he is under no legal or moral obligation to serve," Justice Jasper Yeates wrote, "the law will...imply and raise a promise on the part of the person benefited thereby, to make a reasonable compensation."\textsuperscript{14}

By the turn of the nineteenth century, then, the function of law in supporting slavery and servitude had become ambiguous in the northern states. By the time the Indiana Supreme Court heard the case of Mary Clark in 1821, northerners had begun to draw distinct lines between servitude and free labor. In its particulars, the litigation resembled those of Hannis and Peter in that Clark sought release from an indenture through habeas corpus. But in 1821, she could use the force of Indiana's anti-slavery constitution, which declared indentures for African-Americans void whether made in Indiana or elsewhere. A former slave, Clark had bound herself as a housemaid to G.W. Johnson for twenty years. Having become dissatisfied with the arrangement, she applied for release and appealed to the state supreme court after

\textsuperscript{14}\textit{Negro Peter against William Steel}, 3 Yeates 250 (Penn., 1801).
a circuit court validated the indenture.\textsuperscript{15}

Upholding her release, Justice Jesse L. Holman discussed fully the relationship between servitude and free labor. A Baptist clergyman and later a Jacksonian Democrat, Holman dispensed with arguments about race by resorting to the rhetoric of equality of laws. Clark was a citizen, and under the state constitution, all citizens possessed "equal right and ability to contract." The constitution also forbade involuntary servitude, but Clark's indenture was made freely. Consequently, Holman believed, it must be tested by the principles of obligations incurred by writing--that is, contracts. By starting from this standpoint, Holman introduced the implicit conflict between the traditional master-servant relation (which relied on customary and legal support for the master's authority) and the "modern" employer-employee relation (which posited legal equality through contract). When courts intervened to settle differences between contracting parties, he pointed out, the litigants' feelings became "irritated against each other, and the losing party feels mortified and degraded in being compelled to perform for the other what he had previously refused." Conflict became even more severe if the outcome placed the losing party under the control of his or her adversary. Degradation manifested itself most plainly "in the case of the common servant, where the master would have a continual right of command, and

\textsuperscript{15}Steinfeld, Invention of Free Labor, Ch. 6. In re Mary Clark, 1 Blackf. 122 (Indiana, 1821). For Steinfeld, this case represents the dawn of free labor in itself, yet this is surely stretching the point. I have located only one citation to this case in antebellum courts, Haight v. Badgeley 15 Barb. 501 (N.Y., 1853), an enticement litigation. Also, the opinion affirmed, rather than established, a principle that had become commonplace by 1820.
where the servant would be compelled to continual obedience." Accordingly, the court would not abide such a situation, for it would "leave a party to exercise the law of the strong." Unlike a minor who might be considered to have no legal will, Clark was an adult and could "regulate her own conduct." She possessed "the right to exercise volition" and to declare "her will in respect to the present service."\textsuperscript{16}

Based on these arguments, Holman rescinded Clark's indenture, declaring that neither the common law nor Indiana statutes authorized compulsion of specific performance. By this simple principle, he distinguished the central difference between forced and free labor. Slavery and involuntary servitude used the law directly to coerce labor, contrary to the will of the worker. In striking down these ancient principles, Holman perceived that in a polity committed to formal equality, power relationships could not be so transparent. Obliging a servant to return to a master whom she/he wanted to depart was equivalent to "absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself." While Holman could have limited his analysis to slavery or indentures alone, he extended it to cover all contracts. If the law sanctioned labor compulsion, it would either end contracts altogether or would "produce in their performance a state of domination in the one party, and abject humiliation in the other."\textsuperscript{17} Though not fully developed, Holman's argument voiced what many northerners were coming to realize

\textsuperscript{16} Blackf. 124-125.

\textsuperscript{17} Ibid., 125.
by 1821—that the destruction of overt forms of labor control did not signify the end of legal labor discipline itself. As he implied, contracts could secure reliable labor without resorting to force, and a few years later, Holman recognized this idea explicitly when he penned opinion that enforced entirety against an Indiana farm laborer.\textsuperscript{18}

For contracts to operate as a form of labor discipline, however, they required some means of persuading workers to labor when criminal penalties were no longer available. As a result, the concept of entirety, available for many years in English master-servant law, became increasingly important in the antebellum North. From 1815 thorough the early 1830s, courts adapted English precedents to establish American foundations for requiring full performance before payment. The New York Supreme Court established the first American precedents for entirety between 1815 and 1822,\textsuperscript{19} but the leading American support for entirety was Stark v. Parker. While it ensconced the rule securely, it also supplied arguments for both sides in the coming debate about the objectives of labor contracts.

Decided by the Massachusetts Supreme Court in 1824, the case involved a farm servant. A hired man on Thomas Parker’s farm, John Stark left before the term expired and tried to recover for the time he had served. In the Massachusetts

\textsuperscript{18} Cranmer v. Graham, 1 Black. 158 (Indiana, 1825).

\textsuperscript{19} The most prominent English case was Cutter v. Powell 6 T.R. 320. The English and early colonial background of entirety is discussed in Karsten, “Bottomed on Justice,” 217-225. The New York cases were McMillan v. Vanderlip, 12 Johns. 165 (1815); Thorpe v. White, 13 Johns. 53 (1816); Webb v. Duckingfield 13 Johns. 390 (1816); and Reab v. Moor, 19 Johns. 337 (1822).
Supreme Court, H.H. Fuller, Stark's attorney, employed three of the standard arguments in favor of *quantum meruit*. First, he contended, it was an "equitable principle.... And this principle ought particularly to be applied to the case of hiring to labor, in which the personal comfort and convenience of the laborer are so much concerned." Next, he argued that by accepting Stark's daily labors as they progressed, Parker took on a responsibility for compensation. Finally, he suggested that *quantum meruit* would promote labor stability. Deduction for damages would induce the laborer to stay, and the ability to recover would prevent employers from making "the laborer's situation uncomfortable towards the end of the term of service, in order that the laborer may leave him and forfeit his wages." Like Holman, Fuller realized that apportionment need not be the end of labor discipline. Following assumptions similar to those that northerners would later employ in the post-Civil War South, he posited that contented laborers might work even harder than those subject to compulsion.

Justice Levi Lincoln was not willing to consider this novel idea, and he responded to Fuller's pleas with a stinging denunciation of apportionment. Courts possessed a duty to enforce contracts and "withhold aid and countenance from those who seek, through their instrumentality, impunity or excuse for the violation of them," Lincoln insisted. He was satisfied that "the law will not admit of the monstrous absurdity that a man may voluntarily and without cause violate his agreement, and make the very breach of that agreement the foundation of an action he could not maintain under it." Charges that employers drove workers away were "wholly ground-
less," and the law offered remedies for cause if this unlikely event did happen.\textsuperscript{20}

The Massachusetts court had tried to solve the abandonment problem definitively, but its harsh condemnation added to smoldering resentment against the entirety rule. By denying any wages to a worker who had completed ten and a half months of a year-long contract in \textit{Lantry v. Parks} (1827), the New York court fostered more agitation for relaxing full performance.\textsuperscript{21} The harsh ruling in \textit{Lantry} provided a stimulus for change, and \textit{Hayward v. Leonard} (Massachusetts, 1828) supplied a means. \textit{Hayward} was the most important in a series of decisions in which courts allowed builders to recover for work after the person who hired them rejected the structure.\textsuperscript{22} Azra Leonard had engaged Nathan Hayward to build a house. Leonard watched the structure going up and directed Hayward to make some changes along the way. The builder completed the home, but he broke the contract by not following its instructions to the letter. In 1828 Chief Justice Isaac Parker for the Massachusetts Supreme Court upheld a lower court judgment in favor of


\textsuperscript{21}8 Cow. 63.

\textsuperscript{22}As noted above, these "building cases" constitute an important facet of the CLS argument. Both Horwitz and Holt point to the contradiction between \textit{Stark} and \textit{Hayward}, but they never clarify what argument they are making by this illumination. Presumably, Holt sees the contradiction as evidence of "class bias." By this, he means that jurists and employers were of the same class. But "class bias" as he means it does not explain \textit{Hayward} at all, nor does it explain the supposed contradiction. Karsten goes to some pains to prove that no contradiction existed. Again, he oversimplifies the question. \textit{Stark} and \textit{Hayward}, and the lines of cases that followed each did contradict at the realm of doctrine, but they appear less contradictory if we look at the type of labor and the class of laborer involved. Holt, "Recovery By the Worker Who Quits," 683, 725-732; Karsten, "'Bottomed on Justice," 255-259.
Hayward. Because Leonard derived obvious benefit from the house and because he had rescinded the contract by approving changes while observing the work, Hayward could recover quantum meruit. The chief justice made it clear, however, that this case differed from Stark v. Parker. Stark deserved no compensation because "he had stipulated to labor for a year, and before the expiration of the time, voluntarily and without fault of Parker, left his service." In approving quantum meruit for Hayward, the opinion explained, "we mean to confine ourselves to cases in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations as to some particulars..."23

Parker's careful distinctions did not last long. In 1834 Hayward was used to perpetrate what the Massachusetts court had tried to prevent—a ruling in support of quantum meruit after an abandonment without cause. In Britton v. Turner, the New Hampshire Supreme Court affirmed the right of workers to recover wages for the time they served, and by doing so, inaugurated a debate over the nature of labor contracts that has not been resolved even in the late twentieth century. Britton resembled Stark closely in its particulars. Britton contracted to work for Turner from March 1831 to March 1832 for $120, but he left two days after Christmas 1831. This time it was the employer's lawyer on the defensive. "Although courts in modern times may have succeeded in getting around the old law," the attorney conceded, precedents like Stark and Lantry still supported entirety. "To hold out inducements to men to violate their contracts, when fairly entered into, is of immoral tendency,"

he warned. The New Hampshire Supreme Court listened to his advice, then issued a carefully crafted opinion in support of apportionment. After a series of qualifications, the court held that workers could be awarded any excess wages after damages for the breach of contract had been deducted. Citing Lantry, Justice Joel Parker called entirety "very unequal, not to say unjust.... By the operation of this rule...the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract." Comparing building cases to service contracts, he concluded that the discrepancy did not justify a different rule. Employers accepted labor on a day-to-day basis just like Leonard had done with his house, Parker submitted. The employer received a benefit for which the worker deserved compensation. By balancing the employer's responsibility for services rendered with the laborer's liability for the breach, the rule would prevent employers from driving away laborers before the end of their terms and would induce workers to stay. In closing, Parker lauded apportionment as a panacea for labor disputes: "[I]t will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions." Extending Holman's concerns about coerced performance, Parker believed that labor discipline could function just as effectively if workers were paid whether they completed the contract or not.²⁴

Parker's worries about entirety concerned workers who quit, but other jurists

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responded that entirety was equitable because a worker who had been fired without cause could recoup payment as if the contract had been completed. Though applied much less often in the antebellum North, this principle received a full hearing in Costigan v. the Mohawk and Hudson Rail Road Company, an 1846 case in the New York Supreme Court. The railroad had hired Costigan to superintend its Albany to Schenectady road from May 1, 1843, to May 1, 1844, at a salary of $1,500. On July 1, 1843 they discharged him for no apparent reason. When a referee awarded Costigan the balance of his pay, the railroad appealed, arguing that Costigan was bound to find other employment instead of suing them for what they owed. Justice Samuel Beardsley dismissed this assertion, declaring that "nothing is better settled than that...the plaintiff is entitled to recover pay for the entire year."26

Cases such as Costigan specified the rights of workers who were fired, but such litigations were few before the Civil War. Conflicts arising from abandonment of contracts were more numerous, and judges and attorneys in these cases developed relatively consistent arguments on both sides of the question. Opponents of entirety portrayed themselves as the party of progress, contrasted entirety's injustice with the equity of apportionment, and adopted Joel Parker's arguments about benefit and daily acceptance. Supporters of wage forfeiture emphasized the value of upholding

25 For example, see Illinois Chief Justice John D. Caton's remarks in Badgley v. Heald, 9 Ill. 66-67 (1847): "Nor is there any hardship in this rule, as it might first appear. It is reciprocal, for if the employer turn off the servant before the expiration of the term of the time agreed upon, without any just cause, the latter may recover the full amount agreed upon, as if he had worked out his whole time."

26 2 Denio 609-616 (N.Y., 1846).
tradition, pointed fearfully to the implicit invitation to break promises, and drew
distinctions between building agreements and service contracts.

For equity-minded justices, quantum meruit signified the progressive position
in labor contract law. As the Vermont court remarked, "the ancient, rigorous
doctrine" in relation to entire contracts had been much relaxed by 1850. For
According
to the supporters of entirety, however, this relaxation was precisely the problem. To
them, the "equitable principle" in Britton and the building cases was of "recent
innovation" and applied only to slight deviations from a contract. Entire contacts
were "reasonable, convenient, [were] founded in practical wisdom, and ha[d] long
received sanction of law." Britton, the Ohio Supreme Court proclaimed in 1860, was
"an innovation upon the long established principles governing entire contracts...." The
court did not dispute the equity of the New Hampshire rule, Justice William B. Peck
admitted, but it was not prepared to adopt it because "so radical a change...should
originate with the legislature, and not with the judiciary." 28

As much as Peck and others wanted to cling to tradition, entirety faced
increasing criticism between 1830 and 1860. Joel Parker had called entirety "very
unequal," and lawyers and judges who came after him made the same charge. A
Connecticut court found entirety to be "rigid and unreasonable," and a Vermont

27Green v. Hutlett, 22 Vt. 188 (1850). For a similar comment, see Ryan v. Dayton, 25 Conn. 188 (1856).

lawyer asserted that apportionment would be both just and equitable.\textsuperscript{29} Milo L. Bennett, a Vermont Supreme Court Justice, made the case for apportionment forcefully in \textit{Fenton v. Clark} (1839). Perhaps the most pro-worker of any pre-war justice, Bennett stated straightforwardly that "it is not the object of the law to punish the party for a violation of his contract...." To Bennett, entirety often produced "manifest injustice" for hired laborers. Primarily concerned with an equitable outcome, he believed that upholding entirety on technical grounds was "leaving the substance, and adhering to the shadow." Since the case in question involved a worker's sickness, Bennett may have seen it as anomalous, but his comments were most severe when he considered how entirety compelled workers to stay with cruel employers. A worker who was maltreated "must submit to it, or leave his employer, not only subject to answer for such damages as he [the employer] may have sustained, but even at the peril of forfeiting all his former earnings...."\textsuperscript{30}

By the mid 1850s, equitable arguments for \textit{quantum meruit} also found their way into treatises. When the eighth American edition of \textit{Chitty on Contracts} appeared in 1851, the editor noted that the \textit{Britton} court had come to "manifestly just and sensible conclusions." Theophilus Parsons in his 1853 treatise on contracts gave even more credence to \textit{Britton}. If the New Hampshire court's qualifications were kept in mind, he argued, "it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither, than those of

\textsuperscript{29}\textit{Ryan v. Dayton}, 25 Conn. 188 (1856); \textit{Ripley v. Chipman}, 13 Vt. 268 (1841).

\textsuperscript{30}\textit{Fenton v. Clark}, 11 Vt. 561-562 (1839).
the numerous cases which rest upon the somewhat technical rule of entirety of the contract."\textsuperscript{31}

While apportionment's supporters pleaded for equity, the central concern of jurists, attorneys, and employers who opposed \textit{quantum meruit} was that it would encourage breaking of contracts. As Peck noted, \textit{quantum meruit} "lessens the sanctity of these agreements and tends to encourage their violation." A Maine attorney phrased it more bluntly: \textit{Britton} was simply "an evasion of law." The Maine court agreed, noting that \textit{Britton} was "more equitable," but warning that "if it were permitted to the laborer to determine the contract at his pleasure, no well founded reliance could be placed, at any time, upon due observance of it." Similarly, New York jurist Samuel Wells claimed it was "preposterous" to say that a worker could leave his employer's service without cause or on "mere fancy." Arguing a case before the Illinois Supreme Court in 1847, prominent Belleville attorney and state assemblyman William H. Underwood pressed vigorously for strict enforcement. "To tolerate a recovery in a case like this, would be to impair and destroy the obligation of contracts," he insisted. "It would encourage men to disregard their contracts, and occasion damages, which no one but the party injured could fully appreciate or ascertain." To these men, shadow was indeed more important than substance, as Bennett had feared. Promises implied a duty that they be kept. Laborers must be

taught this lesson, even if it agitated the communities in which they lived and worked. As Massachusetts Justice Marcus Morton noted in 1837, "Laborers, and especially that most improvident part of them, sailors, may excite sympathy; but in a government of equal laws they must be subject to the same rules and principles as the rest of the community...." 32

These concerns pushed the New Hampshire Court to modify Britton v. Turner even further in 1838. Workers wishing to recover must wait until their contract expired; in other words, they must act as if they had worked until the end. This restriction, the court hoped, would alleviate the dangers inherent in Britton. "It is desireable not to give the temptation of a payment in ready money, instead of delayed payment, to those who already have, perhaps, too much encouragement, at least all they deserve, to faithlessness of their contracts," Justice Nathaniel G. Upham wrote. 33

To the most stringent adherents of the sanctity of contract, no exceptions existed. For example, these lawyers and judges did not accept the common principle that exempted minors from the entirety rule because they were incapable of ascertaining their best interests. Asking the court to adopt Stark for minors in 1824, a Massachusetts lawyer maintained that a child's contract should be construed as

32 Larkin v. Buck, 11 Ohio St. 561 (1860); Miller v. Goddard, 34 Me. 102 (1852); Peters v. Whitney, 23 Barb. 24 (New York, 1856); Badgley v. Heald, 9 Ill. 66 (1847); Olmstead v. Beale, 36 Mass. (19 Pick.) 528 (1837).

entire because of "the habits of industry and virtue which would probably be acquired from a faithful performance of it." For Vermont jurist Isaac P. Redfield, even acts of Providence did not absolve contractual obligations. "It is vain to say that the plaintiff was hindered from performing the service by the act of God," he wrote in a blistering dissent to Bennett’s Fenton opinion. "That is never an excuse for the non-fulfillment of a condition precedent." 34

These proponents of entirely saw contracts as a form of legal labor discipline. Whether for adults or minors, contracts would inculcate "habits of industry and virtue" and effect order in the labor market and in the workplace. While equity might be an ideal concern, the common law and the courts' general duty to bolster promise-keeping came first. Yet it would be unfair to see all opponents of apportionment as uncomplicated oppressors. Redfield was a particularly complex jurist. A biographer credited him with infusing equitable principles into the common law and with seeing law as "a broad and noble science, not a mass of arbitrary rules." In an 1836 case Redfield ruled that any work that could not be rejected necessitated payment. Such a principle was imperative "to prevent one party gaining an unconscionable advantage over the other." Sounding like a Jacksonian labor radical, Redfield asserted that "the laborer is entitled to his own labor, or its product, where it is in such a shape that

34 Moses v. Stevens, 19 Mass. (2 Pick.) 333 (1824). For the argument that minors were incapable of contracting, see Ibid., 335; In re Mary Clark, 1 Blackf. 122 (Indiana, 1821); and Forsyth v. Hastings, 27 Vt. 646 (1853). In the last case, the Vermont court denied recovery because the plaintiff had become an adult during its terms. If he had sued before his majority, he could have recovered. Fenton v. Clark, 11 Vt. 566 (1839). On sickness as a defense, see also Fuller v. Brown, 52 Mass. (11 Metc.) 440 (1846).
he cannot carry it away.\textsuperscript{35}

More than a technical dispute over contracts, what separated the two sides was a deeper conflict about the social value of work. Supporters of entirety envisioned merit only in benefit added. By implication they valued skilled labor but not unskilled, and they regarded wages as arising from the products of labor, not from work itself. These jurists and lawyers usually were very careful to distinguish building cases in the vein of \textit{Hayward} from those of service. Litigations involving builders, they pointed out, involved mutual recision of the contract or slight deviations from its form. More important, they argued that the employer must possess the ability to accept or reject the product. However, unlike Redfield, they saw the inability to reject labor as a bar to recovery, instead of the very fact that justified remuneration. When recovery was allowed, they contended, the employers had benefited by acquiring the finished commodity though voluntary acceptance. Manual labor could not be returned, as a Maine lawyer maintained in an 1852 case involving a lumberjack. "We cannot deliver the labor back, [as] we could an unfinished article of property, a carriage, a house, a bridge," he insisted. Such contentions assumed that skilled labor was intrinsically more valuable and socially important than was simple service. Breese made this clear in \textit{Lee v. Quirk}, an 1858 litigation for recovery under a year-long farm contract. "Merely working for the defendant," he wrote, "does not give the plaintiff a right to recover, if a special contract existed under which the work

was done, and that contract violated by the plaintiff himself.\textsuperscript{36}

Proponents of apportionment simply reversed these arguments, focusing on Joel Parker's point about daily acceptance. To them, the fact that labor could not be returned meant that its recipient incurred at least a moral, if not a legal, obligation to pay for it. When the Indiana court allowed a man who had cleared land for another to collect wages, its opinion adopted Parker's analysis in full. Unlike a house, the land cleared could never be rejected or returned to its original condition. In view of this fact, the employer had plainly derived benefit, and his daily acquiescence in letting the work continue meant that he received it. For such jurists, work possessed inherent value. Bennett clarified this point when he noted that he found it difficult to imagine "any very sound ground of distinction" between cases in which a builder raised a structure that deviated from the design and those in which a servant working under a special contract abandoned it. "In both, the defendant has had some benefit from the plaintiff's labor, and in neither can the parties be placed in \textit{statu quo} by rescinding the contract."\textsuperscript{37}

These legal arguments about entire contracts constituted part of the general social debate in Jacksonian America about the meaning and value of labor in a

\textsuperscript{36}Cranmer v. Graham, 1 Black. 158 (Indiana, 1825); Olmstead v. Beale, 36 Mass. (19 Pick.) 528 (1837); Ripley v. Chipman, 13 Vt. 268 (1841); Miller v. Goddard, 34 Me. 102 (1852); Illinois Supreme Court Justice Richard Young made the same argument in Eldridge v. Rowe, 7 Ill. 91 (1845). Lee v. Quirk, 20 Ill. 395 (1858). For a much more complete discussion of the place of manual labor in Jacksonian social theory, see Jonathan A. Glickstein, \textit{Concepts of Free Labor in Antebellum America} (New Haven: Yale University Press, 1991), 3-11 and passim.

\textsuperscript{37}Wolcott v. Yeager, 11 Ind. 84 (1858); Fenton v. Clark, 11 Vt. 566 (1839).
republican society. The 1820s and 1830s saw the growth of an incipient American working class. This period also witnessed the first working men's political and a widespread trade unions movement. With these developments came far-ranging discussions of the meaning of work. For working-class leaders, labor meant crafts production and achieving a "competency," or independence. For employers and middle-class reformers, labor had a broader and more ambiguous meaning that stressed the value of work itself.38

Leaders of the working men's parties and the trade unions confined valuable labor to "producers." In the eyes George Henry Evans, an English-born New York printer, laborers were

those who do the work and fight the battles; who produce the necessaries and comforts of life; who till the earth and dig for its treasures; who build the houses and the ships; who make the clothes, the books, the machinery, the clocks and watches, the musical instruments, and the thousands of things which are necessary to enable

men to live and be happy.\textsuperscript{39}

Radical Francis Wright aimed an 1829 address to "the intelligent working classes, ...the producing laborer and useful artisan."\textsuperscript{40} For New England carpenter Seth Luther, the producing classes' interests concerned everyone. "We believe," he told a group of New England workers in 1832, that "the interests of all classes are involved in the intelligence and welfare of those who labour--those who produce all the wealth and enjoy so small a portion of it themselves."\textsuperscript{41} Producing a tangible commodity in the artisan tradition indicated social worth; mere service did not suffice because it implied loss of skill and degradation to the status of manual labor, which was what the Jacksonian labor movement was trying to prevent.\textsuperscript{42}

This version of labor related not only to work itself. It also carried fundamental political assumptions. "The industrious classes have been called the bone and marrow of the nation; but they are in fact the nation itself," Wright proclaimed. "The fruits of their industry are the nation's wealth; their moral integrity and physical

\textsuperscript{39}Quoted in Pessen, \textit{Most Uncommon Jacksonian}, 175.

\textsuperscript{40}Francis Wright, \textit{An Address to the Industrious Classes} (New York: Free Enquirer, 1830), 4. This tract and the ones cited below from Seth Luther, Edward Everett, and Joseph Tuckerman are taken from facsimile reprints in Leon Stein and Phillip Taft, eds., \textit{Religion, Reform, and Revolution: Labor Panaceas in the Nineteenth Century} (New York: Arno Press, 1969).

\textsuperscript{41}Seth Luther, \textit{An Address to the Working-Men of New-England} (Boston, 1832), 5. Italics in original.

health the nation's strength; their ease and independence is the nation's prosperity; their intellectual intelligence is the nation's hope." Artisans, historian Sean Wilentz has argued, saw themselves as "cooperative yet independent craftsmen." By earning their competence they believed they became the natural citizens of a virtuous republic. John Commerford, a New York chairmaker who rose to the presidency of New York City's General Trades Union in 1835, put the case clearly. In a republic, he believed, the value of a man's labor would indicate his worth, and productive citizens would not become "the willing tools of other men."

Drawing on artisanal and republican traditions, Jacksonian working-class leaders valued work for its products, not for its physical exertion. While middle-class employers and reformers shared this view at times, they more often emphasized the merits of work itself. A nice illustration of the middle-class view appeared in Edward Everett's "Lecture on the Workingman's Party," which he delivered to the Charlestown, Massachusetts, lyceum in October 1831. Everett, a noted Massachusetts educator and politician and later the Constitutional Union Party's vice presidential candidate, believed that work was the natural pursuit of all people. "Nature is so ordered as both to require and encourage man to work," he contended. "He is created with wants, which cannot be satisfied without labor; at the same time, that ample provision is made by Providence, to satisfy them, with labor." Work with "the muscles of the hand" was what counted for Everett. Work must also be steady and

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43Wright, "Address," 4; Wilentz, "Artisan Republican Festivals," 50; Commerford as quoted in Ibid., 65.
difficult. Throughout the ages, men such as Demosthenes, Julius Caesar, Lord Bacon, Washington and Napoleon had been judged by how hard they worked. At points, Everett's address resonated with artisanal language, as when he noted the value of "the man, whose honest industry just gives him a competence." Instead of applying this standard only to productive labor, though, Everett related it to all work. Enumerating how many workers it took to produce a telescope, he included trades such as the glass and brass makers but also noted the day laborers who scooped the sand that made the glass. All labor was dignified because there was "no operation of manual labor so simple, so mechanical, which does not require the exercise of perception, reflection, memory, and judgment; the same intellectual powers, by which the highest truths of science have been discovered." For the conservative Everett, a workers' party would embrace practically everyone, and his broad definition differed significantly from that of artisans who emphasized skilled trades alone. As Bruce Laurie has pointed out, such middle-class definitions could be used as a defense against de-skilling. In the hands of Jacksonian poor law reformers or Civil War era policy-makers, they also could be employed to enforce a general duty to work.44

Jurists and lawyers made their arguments about contract in the context of this discourse, but they did not borrow its terms in ways historians might expect. Conservative jurists who supported entirety imported the presumptions of radical artisans and blended them with concepts of power and authority from master-servant

44Laurie, Artisans into Workers, 66. Edward Everett, A Lecture on the Working Men’s Party (Boston: Gray and Bowen, 1831), 3-6, 17. On the last point, see chapter 2.
language. Liberal jurists adopted the terms of conservative middle-class commentators such as Everett and valued work by itself. At the level of social and legal discourse, these combinations produced some interesting tensions. How could a judge committed to enforcing work discipline through contract mouth the same arguments made by working-class unionists? How could liberal jurists such as Bennett use language dangerously close to that employed by poor law reformers interested in disciplining the working classes? These tensions pervaded Jacksonian dialogues about labor and society, and at the level of social theory, they exerted considerable influence. However, the contradictions appear conspicuous only if labor contracts and their functions in labor discipline are assumed to be monolithic, and such was not the case. Labor contracts in antebellum American served several distinct purposes.

The most common type of entire contract was made between farmers and their hired hands. Such agreements emerged from a combination of volatile labor markets, seasonality in crop production, and the class position of farm workers. Labor requirements for cultivation of small grains and hay varied throughout the growing year. In fall and winter, farmers might take care of their places with members of the family, but the harvest season from July through September required additional hands at a moment's notice. If workers could not be procured, heavy ripened wheat could be downed by a brief shower and would rot in the field. Farm labor markets formed around these exigencies. In the Midwest, much harvest work was done by hands who followed the harvest northward from the Ohio Valley into Canada. Often young, unmarried men trying to move up to farm tenancy and then ownership, they
worked on farms in the summer, then drifted into logging, meat packing, or casual labor in cities during the winter. Fully aware of their prized status at harvest time, workers could command daily wages far above what they would earn under monthly-wage arrangements.  

For many farmers, the solution to high-priced harvest labor was long-term contracts. Workers could be hired in the spring at a lower monthly wage and be kept through the harvest season. Under such agreements, landowners both lowered labor costs and secured workers to gather crops. For example, Allen O. Brown decided to work for Frederick W. Kimball in Orleans County, Vermont, for six and a half months starting on April 4, 1838 for $12 per month. Brown would receive his pay at the completion of the contract, $50 in cash and $28 in sheep. Chester W. Olmstead made a similar contract with farmer Jonathan Beale at Norfolk, Massachusetts. Barnabas Eldridge hired Nelson Rowe to work for eight months on his farm in Kendall County, Illinois, at $90 for the entire time. Near Stephenson, Illinois, William Hanna contracted with John B. Angle on May 15, 1857, to labor until October 1 at $18 per month. Hirings of this sort were usually informal wage bargains.

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struck between employer and laborer after brief negotiations such as those carried on between Lot Davis and Ann Maxwell. Davis contacted Maxwell on an April day in 1844 and asked her for work on her farm near Waltham, Massachusetts. He told her he would rather work for her at $12 per month than for a dollar a month more on a nearby milk farm. The two struck a deal for seven months’ labor, and Davis began work that afternoon.46

Most contracts began in March and lasted through October, but some ran the whole year. Stark v. Parker had involved just this sort of arrangement. John Stark had agreed to labor for Thomas Parker for a whole year at $120. A similar contract made in Connecticut in August 1854 stipulated work for the entire year with a payment of $160 at the end. In Bureau County, Illinois, James Swanzey hired John Moore to work for one year starting March 5, 1856, with pay of $200 at the end. Annual arrangements offered the farm worker economic security and relatively little work in the winter months in return for the strenuous exertion of spring and summer.47

46 Brown v. Kimball, 12 Vt. 617 (1839); Olmstead v. Beale, 36 Mass. 528 (1837); Eldridge v. Rowe, 7 Ill. 91 (1845); Angle v. Hanna, 22 Ill. 429 (1859); Davis v. Maxwell, 53 Mass. 287 (1847). Milking was considered degrading work by male antebellum farm laborers because it was often done by women. Schob, Hired Hands and Plowboys, 199-200.

47 Stark v. Parker, 19 Mass. 267-276 (1824); Ryan v. Dayton, 25 Conn. 188 (1856); Swanzey v. Moore, 22 Ill. 63 (1859). Winifred Rothenberg has found an increasing tendency of farmers in Massachusetts to hire by the month, season, or year rather than by the task, but Christopher Clark notes that five to seven month contracts indicated a decrease in duration from early year-long arrangements. Rothenberg, "Emergence of Farm Labor Markets," 544; Christopher Clark, The Roots of Rural Capitalism: Western Massachusetts, 1780-1860 (Ithica, N.Y.: Cornell University Press,
While valuable for farmers in controlling the labor market and for laborers
in assuring themselves a job, such long-term binding contracts presented potential
problems for both parties. From the farmer’s perspective, she/he might be bound to
a hand who disobeyed commands or shirked labor. From the laborer’s point of view,
he/she might be forced to withstand mistreatment to be paid. Two customs arose to
solve these problems: trial hiring and at-will clauses. Usually, trialhirings involved
a test period of one month and then a longer term for the season. A Cayuga County,
New York, farmer hired a hand for a month in April 1856 with the proviso that if he
liked him he would keep him on for six more months. A Grafton, New Hampshire,
worker started on November 11, 1833, for one month, then agreed to a contract for
a year at $120. In Ohio, David P. Larkin and John Buck agreed to a somewhat
different kind trial of hiring, one that recognized explicitly both the geographic
mobility and the variable wages of farm workers. Buck decided to work for Larkin
from October 17, 1860, for six months at $11 per month, and then for another six
months at $13 per month if he did not leave for Pennsylvania.48

Trial hirings worked to the advantage of employers by testing out workers’

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1990), 305. Given the long tradition of yearly farm contracts bequeathed from
England, Clark’s view seems more accurate. Thompson, Making of the English
Working Class, 231-258. Based on wage data for 1866, Attack and Bateman calculate
periods of actual employment for agricultural workers as ranging from 231 days in
New Hampshire to 186 days Wisconsin, in other words a period of seven to eight
months. To Their Own Soil, 242.

48Peters v. Whitney, 23 Barb. 24 (New York, 1856); Hartwell v. Jewett, 9 N.H.
249 (1838); Larkin v. Buck, 11 Ohio St. 561 (1860); Schob, Hired Hands and
Plowboys, 224.
reliability, and some at-will clauses were inserted for the same purpose. In Wisconsin, an employer who concluded an at-will arrangement noted that "he would not hire a man to work for him if they could not agree, or either was dissatisfied; that when that was the case he would pay them off and let them go."\(^{49}\) While the aim might have been workplace control, such contracts also benefitted laborers by ensuring their ability to respond to the market, and these arrangements were common, even early in the nineteenth century. On May 15, 1835, for instance, John Tyrell agreed to work for brothers William and Harry Sutton for six months. Under the contract, they could discharge him at pleasure, and he could leave without any forfeiture of wages. Isaac P. Whitcomb concluded a year-long contract with Daniel C. Gilman in 1859 with an identical proviso. At least some workers recognized the value of such clauses and insisted on them. In rural western New York in 1859, a worker informed his prospective employer that he "would not hire for any certain time, or any longer than they could agree." Consequently, his eight-month contract provided that he was "not bound to remain" if conflict arose.\(^{50}\) When at-will contracts came before the courts, some refused to uphold them, but others saw them as giving either party the right to

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\(^{49}\) *Evans v. Bennett*, 7 Wis. 405-406 (1858). It is unclear whether this was a farm contract or not, although its terms of six to eight months from April 2 at $14 per month would indicate it was.

\(^{50}\) *Sutton v. Tyrell*, 12 Vt. 79 (1835); *Whitcomb v. Gilman*, 35 Vt. 297 (1859); *Gates v. Davenport*, 29 Barb. 160 (New York, 1859) is not definitively a farm hand, but the circumstances point in that direction.; Schob, *Hired Hands and Plowboys*, 224.
end the contract as long as bona fide disagreement existed.\textsuperscript{51}

In such cases, avoiding conflicts with workers through at-will clauses undermined the original purpose, regulation of the market. This dilemma arose because response to the labor market and conflicts in the field were the two most common reasons why farm workers left their employers. Farm laborers in the antebellum North were highly mobile, relocating often in pursuit of higher wages or better conditions. Through day-to-day interactions with servants from other farms, they obtained valuable information about local wage rates and working conditions.\textsuperscript{52} They often broke contracts, even at the risk of forfeiting wages. When Nelson Rowe deserted Barnabas Eldridge in June 1843, he did so to "go to the South" with another agricultural worker. Eli Heald migrated to Pennsylvania after three months of a six-month contract on Abraham Badgley's St. Clair County, Illinois, farm. Already displaying an awareness of local wage rates when he contracted with Ann Maxwell, Lot Davis continued to eye the market as he stayed at her Waltham establishment. In mid-July, Davis resolved that he was "going to look for work," and he informed his mistress of his decision. Maxwell replied that "there was work enough for him to do" and that "she should not pay him any wages, if he left." Undeterred, he departed and

\textsuperscript{51}For examples of these two opposing views, see Gates v. Davenport, 29 Barb. 160 (New York, 1859); and Seaver v. Morse, 20 Vt. 620 (1848).

\textsuperscript{52}Rebecca A. Shepherd, "Restless Americans: The Geographic Mobility of Farm Laborers in the Old Midwest, 1850-1870," Ohio History 89 (Winter 1980): 28-35; Rothenberg, "Emergence of Farm Labor Markets," 553-554.
sued her for his pay.\textsuperscript{53}

Some workers left simply to look for better wages, but many breached their contracts because of open conflicts with their employers. Sometimes these disagreements were about payments due. In \textit{Lantry v. Parks}, Lantry left because he resolved that "he would work no more...till he ascertained if he could collect his wages." Swan Erickson, a Swedish immigrant, departed Daniel J. Hansell under similar circumstances. Though Erickson had trouble understanding English, he objected when his employer refused to pay by the month as he thought the contract stated.\textsuperscript{54}

More often, conflicts concerned work pace and worker's control. Not unlike their southern counterparts, northern farmers wanted faithful and docile servants, but hired hands tried to preserve control over their time and conditions of labor. Two examples from Illinois illustrate the nature of these disputes. Already upset because John Angle had made him cart bricks for a new house, William Hanna's anger boiled over on an August day in 1857. When Angle tried to speed up the pace at which Hanna was driving a team of horses pulling a flax cutting machine, the hired man refused. Angle then put Hanna on the reaper to pitch off the crop. After once more round the field under the summer sun, Hanna jumped off the machine, stuck his fork

\textsuperscript{53}\textit{Eldridge v. Rowe}; 7 Ill. 91 (1845); \textit{Davis v. Maxwell}, 53 Mass. (12 Metc.) 286 (1847); \textit{Badgley v. Heald}, 9 Ill. 64 (1847). It is unclear whether Heald was a farm laborer or not, but I treat him as such because of the nature of the contract and because this case was often cited in other cases involving agricultural workers.

\textsuperscript{54}\textit{Lantry v. Parks}, 8 Cowen 63 (N.Y., 1827); \textit{Hansell v. Erickson}, 28 Ill. (18 Peck) 268 (1862).
in the ground, declared the work was too hard, and said he would not do it. Angle told Hanna if he disliked the work, he would have to hire someone else, after which Hanna quit. Farm worker John Moore clashed with the son of his employer, James Swanzey, on the family's Bureau County, Illinois place. When the younger Swanzey complained on August 25, 1856 that Moore and another hand had hauled no more than two loads of hay that day, Moore walked off.\(^{55}\)

Some farmers were probably glad to see such workers go, but others tried to retain hired hands even after quarrelling with them. Wishing to keep hands on the farm, they overcame their tempers and their desire for discipline in the field. When Frederick Kimball wanted Allen O. Brown to help haul a load of boards in July 1838, both became angry, but after talking it over, Kimball asked Brown to stay. Caught between the two brothers who had hired him, John Tyrell encountered a similar attempt to get him to remain. In July 1835 he argued with Harry Sutton at Harry's St. George, Vermont, farm. Harry fired him, but when Tyrell went to pick up his belongings at the other brother's farm, William Sutton tried unsuccessfully to persuade him to postpone his departure. Although he had hired his servant for only two weeks, a New York farmer grew angry when the man refused to water and feed cattle on Sunday. However, his ire did not overcome his preference for keeping his help. He simply informed the hand that he could "go to hell, but to mind and first

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\(^{55}\)Angle v. Hanna, 22 Ill. 429 (1859); Swanzey v. Moore, 22 Ill. 63 (1859). See also Gates v. Davenport, 29 Barb. 160 (New York, 1859); Mullen v. Gullikson, 23 Vt. 558 (1847); Forsyth v. Hasting, 27 Vt. 646 (1855); Green v. Hutlett, 22 Vt. 188 (1850); Cahill v. Patterson, 30 Vt. 592 (1858); and Schob, Hired Hands and Plowboys, 214-221.
work his time out."\textsuperscript{56}

When farm workers who had left their employers attempted to recover their wages, they found a sympathetic ear and a reward for time served from local justices of the peace and juries. High courts were not so understanding. While state supreme courts upheld awards in some cases, they more often overturned them. Some of these cases confronted issues of power distribution and workplace control on the farm directly. When the Illinois court heard William Hanna's case for wages, for instance, it reversed the $90 judgment he received from the circuit court jury and disregarded his complaints about the work rhythms of flax harvesting. Since he had been dismissed, Hanna should have benefited from the reciprocity of entirety, but Justice Pinkney H. Walker could not countenance farm hands determining working conditions. Hanna "was employed on the farm in the performance of labor incident to that occupation," Walker intoned, "and he had no right to insist upon the right to perform only the lighter portions of it, and an exemption from the more onerous portions."\textsuperscript{57}

While opinions such as Walker's bolstered control of farm hands in the fields, other jurists assisted farmers in regulating hands' behavior in the market. Moreover, the arguments they heard and the opinions they issued often recognized explicitly the seasonality of farm labor and the traditional use of contracts in governing it. "We

\textsuperscript{56}Brown v. Kimball, 12 Vt. 617 (1839); Sutton v. Tyrell, 12 Vt. 79 (1835); Marsh v. Rulesson, 1 Wend. 515 (New York, 1828).

\textsuperscript{57}Angle v. Hanna, 22 Ill. 429 (1859).
think well established principles are not thus to be shaken," Levi Lincoln concluded his Stark v. Parker opinion, "and that in this commonwealth more especially, where the important business of husbandry leads to multiplied engagements of precisely this description, it should least of all be questioned, that the laborer is worthy of his hire, only on the performance of his contract, and as the reward of fidelity." Himself an active farmer and agricultural reformer, Lincoln knew the value of farm labor and farm contracts from experience. In Larkin v. Buck, the Ohio Supreme Court noted that in farm labor, "the value of the service, and the amount of the compensation, vary with the season and the character of the work required." 58 Jesse Holman, who had penned the perceptive statement of the principles of free labor in Clark's case, explained the function of labor contracts with equal lucidity a few years later:

But it is well known that the labor of a man on a farm is far more valuable in the spring and summer than in the winter months. And it would be contrary to every principle of justice, to permit a man under a contract to labor through the winter months and recover of his employer for that time as for monthly wages, when in all probability the employer would not have hired him during those months, but in consideration of his services for the balance of the term. 59

Holman realized completely the bargain implied in long-term contracts. The farmer hired a hand at lower wages during the winter to make sure he was available for seasonal work during the summer.

The prime reason for requiring entire performance in these contracts before


59 Cranmer v. Graham, 1 Black. 158 (Indiana, 1825).
wages could be collected was made clear by both Redfield and Breese. According to a farm servant’s attorney, the leading British case on entirety suggested an "implied understanding" that servants were entitled to their pay even if they did not serve out the term. Redfield responded that no such understanding existed in the United States for domestic servants. Nor did it prevail "in the case of men hired for the farming season, where the loss of a single month's labor might cost the loss of the products of an entire season." Addressing the case of Swan Erickson, the Swedish immigrant who had left because he was not paid, Breese rapidly disposed of the "pretext" of a possible language barrier as "too flimsy to deserve notice." The worker had made his pledge to stay for the season, and he must abide by it. Breese's indignant opinion went beyond this simple lecture about the sanctity of contracts. Rather, he focused on the problem of laborers absconding at a particular point in the agricultural cycle. Erickson "left his employer in the midst of the harvest, probably under the promise, from some meddlesome person, to give him higher wages," Breese reported. "This is contrary to justice and good morals, and cannot be tolerated." 

Erickson had done exactly what he should have done in a free society; he

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60 Fenton v. Clark, 11 Vt. 566 (1839); Hansell v. Erickson, 28 Ill. (18 Peck) 268 (1862). For other cases recognizing seasonality directly, see Brown v. Kimball, 12 Vt. 617 (1839); and Peters v. Whitney, 23 Barb. 24 (New York, 1856). Even in a case involving a professional employee, a Philadelphia court recognized that most contracts that had a fixed time were farm contracts intended "to endure until those operations have run through their accustomed course, and the revolution of the year has brought round seed-time and harvest in due succession." Coffin v. Landis 5 Phila. 177 (1863). On farm laborers breaking contracts for higher day wages at harvest, see Karsten, "Bottomed on Justice," 246. Karsten defends the need for labor discipline, especially in societies with scarce resources.
responded to the job market as well as any classical economist or free labor Republican could have desired. Farm hands like him put liberal jurists such as Breese in a peculiar position. Breese was not anti-worker. In another context, he eased the operation of the fellow-servant rule, which limited workers claims in industrial accident cases.\textsuperscript{61} Farm labor was another matter altogether. Especially in the grain belt and especially during harvest, many farmers believed success required restrictions on farm workers' mobility. Reliance on day labor was common, but farmers who sought more rationality turned to long-term contracts. Such agreements were not an outright invention of a new capitalist economy so much as an incomplete mutation of traditional customs as indentured servitude slowly transformed into the wage relation. Breese, Redfield, or Lincoln knew farmers' needs in the changing economy almost instinctively.

This mixture of master-servant discourse with the language of wage relations also appeared in a case involving a housekeeper on a Pennsylvania farm. Mary Albright had begun serving John Ranck and his one child on his Lancaster County farm for $3 per month under an express contract. When she started in 1854, Ranck's farm had been worked by sharecroppers, but in 1856 he resumed personal management, employing additional farm hands and several artisans to improve the place. Albright saw this as a change in the nature of her work, demanded a raise, and left on July 13, 1858, when Ranck refused to grant it. Considering the case in 1860,

the Pennsylvania Supreme Court admitted that the change in circumstances had indeed increased her duties. Nevertheless, "by her original contract of hiring, she had sold to him the right to all her time and labour, if they were needed for housekeeping." By not objecting immediately, the opinion argued, she accepted the new terms. "Her silence was an assent," Justice William Strong concluded.\(^{62}\)

Strong's rhetoric resonated with both traditional and modern constructs, and it reveals the fluid state that labor contract law had reached by 1860. The justice recognized the cash nexus: Albright "sold" complete control over her "time and labour" to Ranck. But the wage bargain and the employment relation were not equivalent. As a servant and as a woman, Albright's failure to resist became a positive act, conferring her acquiescence to new employment but not to new wages. Her status as a servant subtracted from her importance as an actor in the market. In Albright's case, both class and gender girded power structures. For the farm hands she served, class was ultimately the overriding consideration. Schooled in an agrarian world, jurists viewed both farm servants and domestic help in traditional terms and felt safe in supporting the entire contracts such servants entered. In other words, the class of the workers counted more than the class of their employers.

\(^{62}\)Ranck v. Albright, 36 Pa. 367. For other cases involving housekeepers, see Bond v. Corbett, 2 Minn. 248 (1858); Hackman v. Flory, 16 Pa. 196 (1851); and Patterson v. Gage, 23 Vt. 558 (1851). In the last case, the Vermont court held in 1851 that sexual harassment was a valid cause for abandoning a contract. On domestic servants generally, see Faye E. Dudden, Serving Women: Household Service in Nineteenth-Century America (Middletown, Conn.: Wesleyan University Press, 1983), 12-72; and Schob, Hired Hands and Plowboys, 193-206. Sharecropping was not uncommon in the antebellum North. Gates, Farmer's Age, 194; Schob, Hired Hands and Ploughboys, 266.
Drawing on a long agrarian tradition, farm contracts in antebellum America possessed clear purposes. The possible uses of labor agreements in industrial work, however, became intelligible only with time. As the consciousness of industrial workers and their employers was transformed from master-servant to employer-employee, contracts initially served purposes similar to traditional arrangements. But by the eve of the Civil War, their role in shopfloor control had been established. Nowhere was this long transformation more apparent than in New England’s textile mills.

In the early years of tremendous growth, owners and workers alike tried to use entire contracts to bolster their economic fortunes. In some places, operatives asked for year-long arrangements to protect themselves from the vagaries of the market. In others, owners experimented with unbreakable long-term agreements to regulate the labor supply. The New York Supreme Court appraised the latter usage in *McMillan v. Vanderlip*, (1815). Vanderlip had contracted with McMillan to spin yarn at three cents per run for one year. He quit the job after about thirteen weeks and sued McMillan for the work already completed. Some ambiguity about the terms of the contract clouded the case, but the court held that "the contract was entire, and must be performed as a condition precedent before any action could be maintained for the price of labor."\(^6^3\) Vanderlip’s arrangement was much like a farm worker’s

contract, and the court had little trouble sustaining it.

Entire contracts might be used by entrepreneurs such as McMillan to discipline the work force, but they carried an implicit danger. If markets for cotton or woolen goods soured and mill owners wanted to slow down production, they could be saddled with workers for the entire year. The hazards of entire contracts to textile mill owners became clear in two cases decided in the 1830s. In both instances, operatives who were not supplied with work tried to use entirety in their favor. In an 1835 Connecticut case, a wool spinner had contracted to labor for $1 per day for an entire year. When his employer failed to provide work, he sued, claiming he had made an entire contract. After the operative won a judgment from a Litchfield jury, his employers sought an arrest of the judgment from the state's high court. Not wishing to reverse the case at so late a stage, the court reviewed it "with some anxiety to sustain it if possible" but overturned the award because no work had been performed. A similar case faced the Massachusetts Supreme Court two years later. In April 1836 spinner Solomon Thayer had agreed to work until April 1, 1837 in David Wadsworth's factory at a set rate per yard. The owners were unable to keep his loom occupied, so he left in late August. Following a local custom, the owners settled for the first quarter of Thayer's work, but refused to go beyond that, setting up his breach of contract as a defense. In arguing the case, both attorneys relied on Stark v. Parker, Thayer to prove Wadsworth's liability, and Wadsworth to prove Thayer's breach of entirety. The lower court judge ruled that an entire contract existed as a bar to recovery, and the jury returned a verdict for the mill owner.
However, in the high court, Justice Charles S. Dewey reversed the judgment. More important, he implied that entirety might not apply to industrial contracts at all. "The legal principles of [Stark] are undoubtedly correct," he maintained, "but care should be taken to apply them to cases depending on similar facts, or those substantially analogous to them."

Dewey's implication that agreements for labor in textile manufacturing were materially different from the farm contract in Stark was correct. Mosthirings in New England textile firms were not contracts at all. Rather, operatives submitted to work (and in Lowell, live) under a list of regulations. Although operatives nominally bound themselves to year-long contracts, the key provision was the requirement for notification before quitting. In daily practice, firms in Lowell, Massachusetts, the hub of the New England textile industry, did not enforce yearly terms or notice requirements with any consistency. As textile concerns expanded, and especially as labor unrest became more pronounced, owners and courts began to recognize the value of notification rules in disciplining the workplace. Yet this realization came slowly, and courts proceeded cautiously and uncertainly in affirming it. When initially requested to graft agrarian concepts of entirety onto industrial work relations, they resisted, and the function of contracts in disciplining textile workers was not firmly

64Russell v. Slade, 12 Conn. 455 (1835); Thayer v. Wadsworth, 36 Mass. 349 (1837).

established until the 1850s.\footnote{For a quite different reading of the following cases from Massachusetts, see Tomlinson, "Ties That Bind," 221-225.}

Notices before quitting may have been intended initially to rationalize the labor market more effectively than entire contracts. An example from Massachusetts in the late 1820s demonstrates textile firms use of regulations for this purpose. A weaver named Reeves, who had recently arrived in America, walked into the weaving room at a Mr. Stevens’s Andover textile mill on July 3, 1828, and asked the overseer "if he had a loom idle." The overseer answered, "Yes," and set Reeves to work. Two weeks later, Reeves disappeared for a couple days, then went to work at another mill on July 21. Before he left, Reeves received $10 under the company’s piece rate for the weaving he had completed. Finding him at the other mill, Stevens sued Reeves for breach of contract, presumably to recover the $10 and to teach other wayward workers a lesson. The industrialist’s attorneys claimed it was common knowledge among weavers in the area that quitting required a fortnight’s notice. Asked to construe this custom as a bar to payment of wages, the Massachusetts court balked. Justice Isaac Parker found that the contract was not one for a specific time, notice was not a general custom, and Reeves had not been informed of it as part of the factory regimen.\footnote{Stevens v. Reeves, 26 Mass. 198 (1829). On overseer’s control of hiring, see Bradley v. Salmon Falls Man. Co., 30 N.H. 487 (1855); and Dublin, Women at Work, 22, 112.}

Although notification requirements in Stevens’s factory were aimed at
wandering weavers, the practice eventually became another means of workplace control. Two key cases that elaborated on the purpose of notification occurred in Massachusetts in the 1840s. The first, *Hunt v. Otis* (1842), directly raised the question of whether failure to give notice fell under the entirety rule. Elvira Hunt, a textile operative, left her job without giving the four weeks' notice required by the company's oral agreement with her. Hunt then sued Otis when the company refused to pay wages she had not yet received. After being instructed that Hunt's failure would not necessitate forfeiture but that the company could deduct for breach of contract, the jury awarded the $59.64 she requested. Hearing the company's appeal, the high court decided such regulations did not constitute a special contract. Justice Samuel Hubbard acknowledged the company's claim that "this regulation...is important to them in due management of their business, not merely in regard to this case, but as to others." Still, he did not consider a notification requirement to be "a special contract for specific labor for a definite period." Even if viewed in "the most favorable light" for the company, Hunt would not have to forfeit more than four weeks' wages. If the regulation had been in writing and signed as part of the contract, Hubbard suggested, the court might have held otherwise. But as the agreement stood, Hunt "did not expressly agree to labor for any specific time." Entirety, which governed "special contracts," could not apply.68

Massachusetts's industrialists apparently acted on Hubbard's suggestion. When the court again considered notification six years later, the requirement was embedded

in a long list of written instructions adopted by The Dwight Manufacturing Company, a textile mill organized after the Lowell model. Again the plaintiff, Mary Rice, had quit her job without four weeks' notice. The jury in the lower court ruled in her favor after instruction that the obscurity of the regulations voided the contract. Reacting to this anti-legalist action, the higher court decided in favor of the mill owners. However, the justices recognized that "the services might have been, to some extent, meritorious and valuable to the defendants, and it might be equitable that a reasonable compensation should be made for them."69 The same court that invariably denied recovery for farm workers proposed that apportionment might be possible for a mill girl.

While the Massachusetts cases did not directly address the intention of regulation papers or notification, a Maine litigation in 1853 considered the matter fully. Frank L. Harmon and his wife, Almeda, sought the wages she had earned as a weaver at the Salmon Falls Manufacturing Company before their marriage. Almeda had commenced work on September 27, 1847, under a regulation paper that required two weeks' notice before leaving and that designated the agreement as an express contract. The Harmons' attorney, Mr. Luques, claimed that regulations such as these did not constitute a contract at all. They contained no certainty nor any statement about duration. Furthermore, they evaded the essence of contract doctrine "because there was no mutuality. The company were at full liberty to dismiss the laborer at any moment." Unexplained when handed to her, the paper was "a mere intimation

of the company's wishes, as to the hours of work and mode of behavior." Luques's argument subscribed the terms of industrial discipline, accepting regulation of work time and work rhythms, but he would not allow these to be engrafted to older concepts. As he pointed out to the court, "it is not even pretended that the company suffered any damage by want of notice of quitting." Industrial contracts could not fall within agricultural categories. If a worker left without notice, one loom might lay idle for a time, but a whole year's crop would not be lost.

J.N. Goodwin, the mill's attorney, also set up regulation papers as a means of workplace control, frankly outlining the firm's motives. Though the amount sought was small, he noted, the case presented "principles of deep importance, especially to those who are conducting the business of our large manufacturing establishments." Goodwin dismissed Luques's arguments about definiteness and certainty, basing this point on the central difference between industrial and agricultural work time. "The company," he alleged, "from the nature of its business, cannot beforehand fix more exactly the time of each operative's services." The stimulus to contracts for textile mills was not rationalization of the market, but management of the shopfloor and limitation of workers' control. Goodwin then got to the heart of the matter. Mill regulations were "indispensably necessary for protection against 'strikes' and such losses as must almost certainly ensue from a sudden cessation of the operatives to carry on the machinery."71


71Ibid, 450.
If Goodwin spoke for other companies, by the 1850s regulations had become a precursor to the post-Civil War "yellow dog" contract, intending to prevent strikes and govern workers while at their machines. While it could be said that these contracts restricted the labor market in a larger sense, they did not do so in the same way as agricultural compacts. In actual effect, industrial regulations aimed to reign in large bodies of workers who demanded higher wages or better working conditions and who did not intend to leave the company permanently.

Reviewing the Harmons' case, Chief Justice Ether Shepley wasted no time in discarding their claim and affirming the company's contract. Shepley expressed deepest sympathy for the mill owners. Manufacturers, he asserted, concluded agreements for the delivery of vast quantities of goods. If workers could idle machines until replacements could be procured, no one could trust the industrialist, nor could he obtain "indemnity for losses occasioned by the fault of others." Shepley accepted Goodwin's suggested cure for this problem whole cloth. Contracts requiring forfeiture of wages for leaving machines were "the only valuable protection...against what are in these days denominated 'strikes'...." Though the courts should not be instrumental in making such agreements, they should not "shirk from the duty" of enforcing them. Workers who violated them could not "expect to obtain relief by the rules of moral right and wrong, or by those of equity jurisprudence or the common law." Having gone this far, Shepley even dispensed with the concept of mutuality. "The position is quite novel," he professed, "that a contract will not be valid unless
each party assumes precisely the same obligations." In other words, while individual wage negotiations might have to be just, the conditions of work which ensued after the bargain did not.

Shepley's opinion was one of the baldest manifestos for employers' powers issued from any antebellum court. Yet it demonstrates that industrial work discipline rested not on the formal doctrine of contracts but on the nature of work and workplace control. This latter goal underlay another industrial case decided in the Massachusetts Supreme Court at about the same time. This litigation examined what might happen when an operative in the Lowell mills followed the rules, laboring faithfully for a year and giving a fortnight's notice before leaving. Under such circumstances, the operative was supposed to be given a "line" or "honorable discharge," without which he/she could not obtain employment elsewhere in Lowell.73

In 1852, Catherine Cassidy sued the Suffolk Manufacturing Company of Lowell because they had denied her a line. Trying to clarify the custom, the trial court heard many explanations of the custom's purpose and operation. According to Alexander P. Wright, the company's agent, reasons for refusing a line included "bad temper, producing disturbance in the room...[and] any such conduct as would render the hand unserviceable elsewhere, such as insulting the overseer, trying to get the other hands discontented." The implication was that Cassidy had committed one of

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72Ibid., 452-455.

73On this practice, see Dublin, Women at Work, 59, 70.
the enumerated offenses. On July 19, 1849 she was dismissed by her overseer, John Clark, for "improper conduct" after working since May 29, 1848. Cassidy and her friend, Bridget Gaiten, then sought work at Boott Mills, but Cassidy was turned down for want of a line. In early August, 1849 William Markland, overseer at the Lowell Company, hired her for a week, but again she had to leave because of her missing reference. With a "crippled mother dependent" to care for, Cassidy attempted in October to secure her honorable discharge by convincing her neighbor, John Montague, to accompany her on a visit to her former overseer. The pair called on Clark at the mill, and Montague told the overseer he "thought it a rather hard discharge" and "how hard it was for her and her mother." The trio then proceeded to see the agent Wright, who first assured Cassidy that she might come back to work for them because "she was a very good girl, there was nothing against her." Not receiving Wright's condescension with due deference, Montague told him they might sue, to which Wright responded that "he would spend $5,000 rather than change the line he had given her...." In December, Cassidy finally acquired a line from a previous employer and worked for Markland at the Lowell Company for thirteen months. By the time her suit reached the Supreme Court, she had married Bernard Thornton and presumably retired from the mills.\footnote{Thorton & wife v. Suffolk Manufacturing Company, 64 Mass. 377-382 (1852). Women often quit the mills after wedlock, but mill work was not just a short sojourn before marriage as once believed. Dublin, \textit{Women at Work}, 23-57. Cassidy brought the suit \textit{feme sole} and then married sometime during the litigation.}

The case went to the supreme court, where Chief Justice Lemuel Shaw was
asked to determine its legitimacy. Shaw declared the plaintiffs nonsuit and affirmed unhesitatingly employers’ right to exercise workplace control. Cassidy had claimed that her twelve months’ service by itself gave her a right to the line. Shaw answered that if an unsatisfactory operative secured an honorable discharge simply by staying an allotted time, "it would be the certificate of a falsehood, tending to mislead and not to inform other employers." Indeed, employers had the right to adjudge operatives’ conduct "in all respects, including not only skill and industry in such employment, but conduct in point of morals, temper, language, and deportment, and the like...." Because of their relation to each other, Lowell companies had a "common interest...in maintaining their discipline...." 75

While the proletarianization of the workforce in textile and other industries was the most significant alteration in the antebellum North’s class structure, economic growth generated other new occupations. Besides operatives, it produced an expanding class of accountants, clerks, and managers. In relations with their employers, such "servants" often entered long-term contracts to protect their salaries from downturns in the market. Seeking to maintain their middle-class position, they often sued for their entire wages if they were discharged. 76

As in agricultural and industrial cases, a combination of the class of the

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worker and the nature of the work influenced the outcomes of these suits. Generally, jurists were sympathetic with middle-class professionals, affirming their right to recover entire wages. In 1842 the Pennsylvania Supreme Court denied recovery to a bookkeeper for a textile mill because he made mistakes in the accounts. Nevertheless, the court noted that if the dismissal were unjust, nothing prevented the servant from being paid for time worked plus "the wages he would have earned had the contract continued in full force." Daniel P. Ingraham, a conservative New York judge, observed in an 1850 case involving a clerk that a servant might obtain his whole compensation after being discharged if "it appears that he was idle and could not obtain other employment." As noted earlier, the New York Supreme Court issued the landmark opinion on this issue in the 1854 Costigan decision, a case that rested on the nature of employment for professionals. Costigan's attorney, N. Hill, Jr., declared that though the demand for common labor was "constant and uniform," his client's profession of superintending railroads was "peculiar, and the call for it limited." M.T. Reynolds, the company's attorney, rejoined that the nature of Costigan's calling was no excuse. Many branches were open, and even if Costigan could not find employment, he was "not entitled to a life of ease and enjoyment with leisure for mental improvement, which he should have earned in a laborious occupation." For Reynolds, middle-class respectability must be earned and retained by constant exertion. Justice Beardsley refused to accept this line of analysis. If the company could claim he must find other employment, it must be in the same area and in the same occupation. They could "not insist that he should, in order to relieve
their pockets, take up the business of a farmer or a merchant." The courts, Beardsley implied, would neither enforce nor sanction downward social mobility for the middle class.

If the nature of professional occupations often worked to the advantage of employees, it sometimes augured against them, as an 1858 Wisconsin case demonstrates. Much like Costigan, the William Brewster had been discharged, and his employer's attorneys argued that Brewster was bound to seek employment. "[H]e could not unnecessarily remain idle for any portion of the time," they asserted. "[H]e must do everything in his power to render the damages as light as possible to his employer...." Brewster had left a lucrative Chicago business in 1856 and concluded a five-year written contract with Peter Gordon to superintend his Wisconsin logging business. Gordon resided out of the state, so he entrusted his two large saw mills at Oconto, northwest of Green Bay, to agents. Brewster managed these mills and their pineries during the winter and acted as a general agent during the summer for a yearly salary of $2,000. On May 10, 1857, Gordon discharged Brewster, refusing to pay him the $300 owed for the current year. Brewster sued not only for his back pay, but for the whole $8000 remaining under the contract. The lower court jury gave Brewster $4,480, the amount he could have earned less what he had received from another job he had procured. The high court found this amount excessive and

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decided Brewster could recover only what he earned up to the discharge. In so ruling, the court relied on its own assessment of the labor market. "In any business the price of labor fluctuates greatly within four years, particularly is this true of the lumbering business in this country."  

Although the class position of professionals did not consistently work in their favor, it and the conditions of their employment placed them in a privileged position. So too did the social station of builders and other artisans involved in labor contract cases. Most of these litigants were not "workers" at all. Workers proper in the transforming artisan world of Jacksonian America were journeymen in the traditional artisanal system. Increasingly unable to become shop-owning masters, journeymen's skill levels declined as they approached the status of factory operatives.  

While this vast social transformation engendered class conflict that artisans expressed through working-class organizations, most journeymen did not carry their conflicts into the courts. However, a few state supreme court cases before the Civil War did involve workers identifiable as journeymen. As in the textile cases, courts ruled in favor of employers more hesitantly than in agricultural litigations. A joiner working a year-long contract at $1 per day for a New York cotton mill in 1816 recovered a quarter's wages, but a joiner working under a $180 yearly contract for

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78 Gordon v. Brewster, 7 Wis. 355-364 (1858).

79 Laurie, Artisans into Workers, Ch. 2; Paul E. Johnson, A Shopkeeper's Millennium, Ch. 3; Stephen J. Ross, Workers on the Edge: Work, Leisure, and Politics in Industrializing Cincinnati, 1788-1899 (New York: Columbia University Press, 1985), xvii-xix and passim.
a Grand Isle, Vermont, boat builder lost his wages when he left after six months. In 1845 Thales B. Winn, a journeyman tailor who pressed clothes and oversaw the work of girls employed in Porter Southgate's shop in Vermont, lost a suit for back wages against his merchant tailor employer. Ten years later, gilder John Nounenbocker won his claim for extra wages against Thomas Hooper, who ran a gold and silver gilding establishment at 14 Dutch Street in New York City. In 1856 Michigan's supreme court allowed a gunsmith laboring by the day to recover wages, even though he did not complete the piece on which he was engaged.80

A more detailed illustration of journeyman-master conflicts comes from a Maine litigation. On January 5, 1835, shoemaker Leonard Cobb had promised to work in Josephus Stevens's shop for ten months at $10 per month, but he reserved the right to leave and to have a third party determine the value of his work. Stevens protected his interests by inserting a clause stating that if Cobb worked for any other area shoemaker, he would forfeit his wages. On June 11 Cobb left after an altercation that had prompted Stevens to exclaim that "if he hated everybody as bad as he did Cobb, he should not want to live long." The Maine court decided that Cobb's contract was void for vagueness and that Stevens's "violent hatred" constituted a reasonable cause for leaving. Cobb recovered $32.86 in wages.81

Though journeymen were not absent from antebellum courtrooms, most

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81Cobb v. Stevens, 14 Me. 472-474 (1837).
artisan cases involved carpenters, joiners, masons, painters, and builders who were either independent workers or master craftsmen. Many were large contractors who had long since left the artisan system behind. Their contracts diverged significantly from the service arrangements that farm workers, mill hands, professionals, and even their own journeymen signed. Time contracts such as the one under which a Maine carpenter agreed to build a barn under six-month contract for $13 per month were not unknown, but most artisans' contracts established a price for the whole job. In addition, they often described the work in very specific terms, as in the agreement Amasa G. Smith made in 1829. Smith was to build a meetinghouse in Lowell, Massachusetts, for $8,000 following plans provided by the church's committee. Among the provisions in the covenant were stipulations that the roof was to be "well strengthened, and covered with slate," and that all materials used were to be "good and well seasoned."  

Given the intricate nature of master artisans' contracts, courts were often asked to decide cases of skill, and when doing so they incorporated both judgments from other artisans and the customs of the artisan world. In 1839 the Maine Supreme court approved the use of fellow artisans in evaluating work. "In particular branches

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of trade or manufacture," the court believed, "the opinions of persons skilled in these respective matters should be received, as well as to the value, as the fidelity and excellence of the work." Reviewing the erection of an iron works, the Pennsylvania court concluded that the "construction of blast furnaces is an art." In such vast and highly capitalized enterprises, success depended on skill, and if the company called in a man avowing expertise in construction, "the rules of law applicable to other artisans, attach to him." If he failed to meet accepted standards, he could not recover. However, not all jurists were willing to allow custom to overcome law. Indiana Justice Thomas L. Smith would not allow juries to consider "customary prices charged by other workmen." Such a practice would give the builder an "unfair advantage, for he could stop when he pleased and compel the owner to pay him a full price for what work he had done...."83

When jurists assessed the remedies available to master artisans, they usually relied on the standards pronounced in the 1828 Hayward case. Even before the Massachusetts court had acted, New York Judge Jacob Sutherland had argued that if work was not done exactly according to the contract, a builder could still recover for the actual value. A New York court twenty years later saw this concept as valuable to employer and employee alike. An artisan should not be able to force an

83Tebbetts v. Haskins, 16 Me. 289 (1839); Waugh v. Shunk, 20 Pa. 130 (1852); McKinney v. Springer, 3 Ind. 68 (1851). For other cases involving judgments of skill, see Felt v. School District No. 2, 24 Vt. 297 (1852); Loundsberry v. Eastwick, 3 Phila. 371 (Penn., 1859); Goslin v. Hodson, 24 Vt. 140 (1852); Cole v. Clarke, 3 Wis. 323 (1854); Pullman v. Corning, 14 Barb. 177 (N.Y., 1853); Cobb v. West, 11 N.Y. Super. Ct. 38 (1854). For other direct statements on artisan adjudication, see Efner v. Shaw, 3 Wend. 547 (N.Y., 1829); Holinshead v. Mactier, 13 Wend. 276 (N.Y., 1835).
employer to accept work because the employer's circumstances may change. If one person hired another to build a house and subsequent events rendered it impossible for him to pay, it would be "commendable for him to stop the work, and pay for what has been done and the damages sustained by the contractor," the court maintained. As time passed, the Massachusetts court also elaborated on the reasoning behind the Hayward rule. Samuel S. Wilde argued in 1847 that if a defendant had derived any benefit, "it would be unjust to allow him to retain that without paying anything." However, he applied the rule cautiously to cases where "the labor has been performed in good faith, and not to those where the party has intentionally...failed to comply with the stipulations of his contract." In an 1851 builder's case, Dewey noted that the rule was introduced to modify entirety so plaintiffs could recover even if they "had not literally complied with all the minute stipulations of the contract...." The defendants' attorneys had asserted that in cases under the Hayward rule the contract had been substantially performed, but Dewey would not accept this line of reasoning. If it were adopted, he predicted, the builder would be "entirely remediless, and wholly at the mercy of his employer." The employer could simply elect at any time to reject the work and thus evade paying for it.84

Not all jurists were willing to allow master artisans to recover. In Pullman v. Corning, New York Judge Henry Welles deemed the Hayward rule more fitted for "a court of conciliation, than of law." He could "see no just ground for making a

84Jewell v. Schroeppe, 4 Cow. 566 (N.Y., 1825); Clark v. Marsiglia, 1 Denio 318-319 (N.Y., 1845); Snow v. Inhabitants of Ware 54 Mass. 50, (1847); Bassett v. Sanborn, 63 Mass. 58 (1851).
distinction between a building contract and any other." This might cause some hardship, but courts had no right to make contracts or dispense with rules of law. Welles pointed out that the mason in the case had not supplied materials. "All that he contributed was his labor" and that had been "unskilfully and negligently performed."85 In essence, he was closer to a worker than to an independent artisan.

Welles's comments echoed Sidney Breese's disdain for those who simply labored, and taken together, their views pointed to the central difference between workers and the master artisans involved in building cases. An odd case in Connecticut in the late 1850s articulated even more explicitly the differences between master builders and members of the working class. In spring 1857 Lewis Corbin contracted with the town of Vernon to repair a road, for which he was to receive a cash payment plus any stone he removed. The enterprising Corbin then made a contract with the American Mills to construct a mill dam with this stone. Blasting stone to build the road, one of Corbin's workmen accidentally blew a two-ton boulder onto and through the roof of a nearby paper mill, smashing a machine. The owners of the paper mill sued Corbin for damages, and he tried to claim that American Mills was liable. Reviewing the complicated litigation, Justice William Wolcott Ellsworth admitted that it was not always easy to tell the difference between the relation of "master and servant" and that of "independence in the employee." For Ellsworth, the issue rested on whether the servant was acting solely within "his master's will and not his own." Corbin obviously did not fit this description. He had "sole control and

oversight of the work—hired his own men, as many as he pleased, set them to work as he pleased, and dismissed them if they did not serve him with fidelity." Corbin resembled any other "mechanic or master builder," and "such a contractor is in no proper sense a hired servant or agent."  

As Ellsworth made clear, master builders were not workers but small capitalists. Instead being employed, they employed others. Most importantly, they were not subject to the will of others. Almost in passing, Ellsworth and other jurists affirmed the social system that had developed since the early years of the century. Master artisans owned a particular position in that structure because of the nature of their labor and their class. So too did professionals, journeymen, industrial workers, and farm hands. In judging the place of individual classes, legal writers returned to republican tenets of independence and free agency. In doing so, they unwittingly joined the broader social and legal debate about the meaning of free labor that would climax in the two decades ahead. Central to this discourse was the object of work in republican society. While some adhered directly to the republican traditions, others saw social worth in all labor. For the latter, it was only a short step to measures that made work not only a moral duty but also a legal requirement.

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86 Corbin v. American Mills, 27 Conn. 274-280 (1858). The thousands of industrial accident cases under the fellow-servant rule also rested on this concept. Iowa Supreme Court Justice George G. Wright believed severable contracts could be distinguished from entire agreements if the work consisted of "several distinct and separable items" priced individually. Dibol & Plank v. Minott, 9 Ia. 405-406 (1859).
CHAPTER 2
"WORSE THAN USELESS":
VAGRANCY IN THE ANTEBELLUM NORTH

But idleness is sometimes sluggish and solitary, earns nothing, but constantly consumes and corrupts the man who lives by himself, and makes him a vagabond, and worse than useless.¹

This sentiment of Harvard law professor Nathan Dane would have received a warm response from his fellow members in the elite and middle classes of the antebellum North. Based in part on similar laments about vagrants and beggars, northerners altered social welfare practices they had inherited from Britain via colonial America. The main elements of Jacksonian poor law reform are familiar, but the accompanying changes in the concept of vagrancy are not. Concerns about idleness were central to puritan thought and colonial society, but at law, specific transgressions against the poor laws constituted the "crime" of vagrancy. By the 1830s, however, vagrancy rested on a general violation of middle-class culture and embraced class- and gender-based definitions used during and after the Civil War. Beyond this statutory alteration, vagrancy and begging became key elements in republican ideology and social discourse. Because begging exposed class and gender relationships, it made reformers ponder their culture’s contradictions between independence and dependence, between legal discipline and social discipline, and most important, between a humanitarian impulse to give and a revulsion toward

recipients who were located in an alienated class.

The Jacksonian transformation of both vagrancy laws and the social meaning of the "crime" were rarely discussed openly, and in part they become apparent only by comparison with English and colonial concepts of the offense. The "crime" of vagrancy originated as a response to the disorder of late medieval England. The decline of feudalism, the rise of enclosure, the plague, and the reduction in poor relief from monasteries, all destabilized labor and forced workers to tramp the roads in search of employment. Consequently, Parliament passed the Statute of Labourers in 1349 and 1350, restricting migration and setting wage rates, and it enacted increasingly severe enforcement statutes in following years. By the mid-sixteenth century, labor regulation gave way to a new conception of vagrancy laws, one that envisioned their purpose as social discipline. Parliament associated vagrancy with theft and other crimes and punished it with whipping, branding, slavery, and death for repeat offenders. By the turn of the seventeenth century, England started to develop new laws and institutions to deal with the poor. The Poor Relief Act of 1601 (commonly called 43 Elizabeth or the Old Poor Law) initiated state aid for the poor. Simultaneously Parliament started to separate vagrancy into categories based on specific acts.²

In British North America many colonial assemblies directly copied the English poor laws. The basic elements of the Old Poor Law, local responsibility for the poor and cash or in-kind relief outside institutions, transferred across the Atlantic. Local officials determined eligibility based on the law of legal settlement, an increasingly arcane set of rules that determined a person's place of residence. People deemed ineligible by local overseers of the poor were either "warned out" (told to move on under pain of criminal prosecution) or "removed" (taken back to their home communities, often against their will).³

Colonial vagrancy codes relied on the law of removal coupled with corporal punishment. These acts subsumed a variety of behaviors, but they commonly defined the offense as returning to a town after being removed or warned out. Town magistrates undertook few prosecutions, but through the pillory and the public whipping post, the community punished wayward members. Harsh criminal laws and sentences survived up to the time of the American Revolution; but by the turn of the nineteenth century, reliance on community control eroded across the northeastern United States. Lawmakers began to abandon corporal punishment in favor of vagrants into "idle and disorderly persons," "rogues and vagabonds," and "incorrigible rogues." The 1824 law and its interpretations based vagrancy on specific acts at specific times rather than on continuing status.

institutionalization or forced labor.\textsuperscript{4}

Although these changes had begun to alter conceptions of vagrancy, nineteenth-century definitions of the crime emerged from the movement to reform state poor laws.\textsuperscript{5} As part of these changes, legislatures and reform writers altered the

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For a good example of a colonial vagrancy law, see the reprinted 1767 statute in Laws of Pennsylvania, 1883, 35. This act defined vagrants as returnees after legal removal; persons living idle without visible means of support; beggars and wanderers; and immigrants who followed "no trade, occupation, or business," who had no visible support, and who could give "no reasonable account of themselves of their business." Such offenders could be committed to the work house or to jail at hard labor for up to a month.

For the best example of the trend away from corporal punishment, see the section on New York below.

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Historians of social welfare in Jacksonian America have often viewed this period of poor law reform as a reaction to the post-Revolutionary upsurge in poverty. Some accounts have envisioned this process as the triumph of liberal institutions, while others have stressed the need to reimpose social control after the breakdown of community. A more current synthesis emphasizes the need for austerity, the desire to rid the social welfare system of the able-bodied, and the imposition of the work ethic in light of classical political economists' claims that indiscriminate charity diminished industry.

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meaning of the "crime" of vagrancy and expanded its place in social discourse. In some ways, they drew on English and colonial definitions. The British experience had bequeathed two distinct but interrelated traditions. One envisioned vagrancy laws primarily for labor control, while the other saw them as part of a broader attempt at social control. Neither strand usually appeared apart from the other, and both carried over into the reform discourse of the nineteenth century.

In Iowa and Illinois, vagrancy laws clung to the earlier of the two strands. Both states hired out poor people arrested under the vagrancy laws. In its 1839 act, Iowa requested sureties for good behavior, and if detainees could not post bond, courts could place them in year-long labor contracts with half the proceeds going to the county and the other half to the worker. The use of year-long contracts in an


agricultural state suggests that legislators intended to help farmers in the same way the civil courts were doing, but this was not the only purpose. If no contract could be made, the court could order the county jailor to buy materials and tools and compel the accused to work with them.\textsuperscript{6} Although this law did not exactly authorize criminal enforcement of labor contracts as existed in England, it did go a long way in that direction. At the least, such criminal statutes enforced a general duty to labor.

Illinois initially employed a six-month term of incarceration for vagrants. This 1827 code also contained a separate, harsher sentence for "rogues" (potential criminals caught with burglar tools or weapons in places where they were likely to steal). These offenders faced fines up to $500 and prison terms up to a year. Four years later, Illinois revised the law in the direction of social welfare and reform. Retaining the conduct-based distinction for rogues, the state added begging and drinking to idling as the definition of common vagrancy. It also adopted a system of hiring out to the highest bidder. Monies from this labor went to the county if the accused was single or to his wife and family if he was married. The state also initiated good behavior bonds by which the vagrant would "betake himself to some honest employment for support, and that he shall not, or his family, become a county charge, through, or by reason of his idleness, immorality, or profligacy."\textsuperscript{7}

Hiring out in these midwestern states tied vagrancy laws directly to labor

\textsuperscript{6}\textit{Revised Statutes of Iowa} (1860), 772-774.

\textsuperscript{7}\textit{Revised Code of Illinois} (1827), 152; \textit{Revised Laws of Illinois} (1833), 201-202. The same law was still in force as late as 1845. \textit{Revised Statutes Illinois} (1845), 175-176.
control, albeit for reducing public expenditures. As in southern criminal codes before and after the Civil War, the state intervened in the labor market directly by funneling unemployed workers to private employers. This practice differed considerably from the more common practice of employment at hard labor for the state or for the local community. In the latter case, labor was either a form of punishment or, at most, an attempt to force inculcation of the work ethic. Although such incarceration constricted the labor market, it did not place workers in jobs.

Laws in these midwestern states were extraordinary in their focused adherence to the heritage of the Statute of Laborers. Pennsylvania, on the other hand, was atypical in its devotion to a lenient interpretation of the Old Poor Law. Poor law reformers in the state were as strident in their rhetoric as elsewhere, employing some of the more extravagant descriptions of the evils of vagabonds. However, when the state revised its poor laws in 1836, legislators did not proceed as drastically as critics might have liked. More a restatement than a revision, the statute retained most of the provisions of the old poor law system. The law of settlement remained, as did removal and the eighteenth-century definitions of vagrancy. (In fact, the state did not possess a separate vagrancy statute until after the Civil War.) As in the past, overseers of the poor were allowed to bind out poor children as apprentices until age 18 for females and 21 for males. The statute required local officials to provide work for poor persons according to their abilities and allowed localities to employ the poor in repairing public roads. The law viewed these requirements as the bound duty of those in charge, for it imposed stiff penalties for neglect of office. The one major
change that reformers won was imposition of the workhouse test. Touted by English utilitarian Jeremy Bentham as the key to poor law reform in England, the clause in the Pennsylvania law stipulated that "if any poor person shall refuse to be kept and employed in such a [work]house, he shall not be entitled to receive relief from the overseers during such a refusal."\(^8\)

Because of its workhouse test, the 1836 revision could be seen as a restrictive policy, as indeed poor law revisions in England and in some other states were. Nevertheless, outdoor relief persisted in nineteenth-century Pennsylvania. In Philadelphia, where a local law of 1828 had authorized a new workhouse and tried to cut off outdoor relief, aid was suspended for only five years, 1835-1840. Even then, some assistance in-kind, such as fuel, was granted.\(^9\) Moreover, local workhouse enabling acts outside Philadelphia largely ignored reform principles. Scores of these local acts cleared the Pennsylvania legislature between 1790 and 1900, and although diversity and attention to local demands prevailed, common elements appeared. These acts abolished the old office of overseer of the poor, replacing it with a board of poorhouse administrators. All called for the erection or purchase of houses of employment, the transferral of the poor to these institutions, and the provision of indoor work. Eligibility was based on residency, and officials could refuse aid to persons who declined to take an oath and give information about their legal

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\(^8\) Laws of Pennsylvania, 1835-36, 541-550.

\(^9\) Clement, Welfare and the Poor, 74-75. Clement sees a significant turn away from humanitarianism in this law and in this period generally.
settlement. However, outdoor relief continued within the limits of what might be called an budgetary workhouse test. Local directors retained the right to administer outdoor relief to the poor provided that "the expense of their maintenance does not in any case exceed that for which [they] could be maintained at the poor houses." Directors had the power to bind out apprentices, though this, too, was often tempered by stipulations that indentures for work not be made more than thirty miles away from home. These provisions eased the operation of the workhouse system and retained the spirit, if not the exact form, of local control embodied in the Old Poor Law. If the specific provisions did not uphold local control, one last section in most of these laws did. Almost all the acts until at least mid-century were subject to approval in local referenda. Apparently, local voters often failed to endorse workhouses because similar laws for the same counties appeared in the statutes over a period of several years.\(^{10}\)

Although they did alter their laws, Iowa, Illinois, and Pennsylvania maintained

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\(^{10}\)This is drawn from a survey of Pennsylvania session laws from 1790 through 1900. The quote comes from an enabling act for Westmoreland County passed in 1839, *Laws of Pennsylvania* 1838-39, 2-9. This statute is a good example of these provisions. Other examples that I have drawn on specifically are Chester and Lancaster Counties: *Laws of Pennsylvania*, 1797, 202-203; Philadelphia: *Laws of Pennsylvania*, 1827-28, 170-176; Blair Co.: *Laws of Pennsylvania*, 1848, 324-325; Lawrence Co.: *Laws of Pennsylvania*, 1856, 352-355; Warren Co.: *Laws of Pennsylvania*, 1864, 438-443. By the time this last law passed in April 1864, workhouse provisions had begun to become more specific. The Warren County law stipulated separate cells for the paupers and for "the temporary confinement of refractory and insubordinate paupers." Idleness and drinking were to be discouraged and reading matter and religions instruction furnished. See also Guardians of the Poor, *A Compilation of the Poor Laws of the State of Pennsylvania* (New York: Arno Press, 1971 [1788]).
older meanings of vagrancy, and they show the considerable diversity of statutory development. The midwestern states kept alive the idea of vagrancy law as a direct means of controlling the labor market. The Pennsylvania legislation offered alternatives to harsher legal constructions elsewhere in the nation. Nevertheless, laws of New England and New York were ultimately more important, for they became the basis for the vagrancy codes used by Union army, the Freedmen’s Bureau, and southern legislatures themselves after emancipation. While these states did not involve the legal system directly in work discipline as in the Midwest, neither did they follow Pennsylvania’s mild example. Instead, they either emphasized the harsher elements of the Old Poor Law or dispensed with it entirely and set up new definitions for the crimes of begging and vagrancy.

In New England these offenses remained part of the system of poor laws, workhouses, and houses of correction based loosely on the English model. The specifics varied, but these laws may be treated as a group in their overall effect.\textsuperscript{11} Defining the infraction broadly, these states proscribed idleness, wandering, begging, and gaming. Maine, New Hampshire, and Connecticut retained the old prohibitions against juggling and palm reading. These laws banned any pattern of behavior considered morally unacceptable or liable to transform citizens into public charges.

By sending these individuals to the workhouse or house of correction, states

\textsuperscript{11}The following generalizations are drawn from Revised Statutes of New York (1829), 79-80; Revised Statutes of Maine (1847), 217-220, 739-743; Compiled Statutes of New Hampshire (1853), 268-269; Statutes of Connecticut (1854), 738-744; Compiled Statutes of the State of Vermont (1851), 130-140. Massachusetts’s law comes from Cummings, "Poor Laws."
hoped to achieve two goals. Foremost they intended to amend the offending lifestyle through both negative and positive reinforcement. Statutes enabled workhouse stewards to punish resistors and runaways with shackles, solitary confinement, and restriction to bread and water. However, correction was to be paternalistic. Punishment should not exceed "such reasonable correction as a parent may inflict upon a refractory child," New Hampshire legislators advised. On the positive side, Connecticut lawmakers in 1853 allowed stewards to release any prisoner who "has so conducted himself while confined that he should not longer be imprisoned." In addition, commitment to the workhouse forced the non-reformed male vagrant to support himself or his family. In Connecticut, income from work in the poorhouse served to support the offender while incarcerated, to pay court costs, and to aid the family with any surplus monies.\textsuperscript{12}

In New York, reform of vagrancy and poor law legislation started earlier and underwent perhaps the most thorough changes of any state. The Revolutionary War aggravated the state's vagrancy problem, but the rhetoric of the Republic also brought sentiments that undermined the permanence of colonial solutions. The first hint of the new ideals' impact on vagrants appeared in 1785 when the state legislature allowed officials to substitute six month's confinement at hard labor for corporal punishment. Although it conceivably applied to all criminals, the act singled out "all idle and disorderly vagrants, not having a visible means of livelihood and all

\textsuperscript{12}Compiled Statutes of New Hampshire, 268; Statutes of Connecticut, 743, 742.
common prostitutes."13 Earlier that year, state legislators passed "An Act for apprehending and punishing disorderly persons." More inclusive than earlier colonial legislation, this law outlawed the activities of idlers, wanderers, beggars, prostitutes, and men who abandoned families and place of legal settlement. Such offenders could be kept at hard labor in the bridewell (a prison) for up to sixty days awaiting trial before a justice of the peace. If the justice of the peace adjudged an offender to be a "disorderly person" within the scope of the law, he could sentence him/her to six months in the bridewell. During the confinement the convict could be "corrected by whipping in such a manner and at such times and places, as according to the nature of such person's offence, as [the keepers] in their discretion shall think fit." If the disorderly person's place of legal settlement could not be determined, they could be kept "until they can provide for themselves" or until the justices could "place them in some lawful calling as servants, apprentices, mariners, or otherwise." Finally, the offender's money could be confiscated and clothing sold to pay for the cost of conveyance to his or her place of settlement upon release.14 By the late eighteenth century, state officials started to think about abandoning the specific definitions of its colonial laws and its more severe forms of corporal punishment. These attempted changes reflected uncertainties about vagrancy and the poor that New Yorkers were to confront for the next several decades.

13Laws of New York, 1785, 81. The law had been passed initially in 1784, but it was vetoed by the Council of Revisions. Schneider, History of Public Welfare, 150.

14Laws of New York, 1788, 643-646.
In the early nineteenth century, New York City experimented with ingenious methods of dealing with its seemingly intractable vagrancy problem. In 1816, the city erected Bellevue penitentiary specifically for vagrants, petty offenders, and trouble-making paupers from the almshouse. Under pressure from the New York Society for the Prevention of Pauperism, the city also installed a tread-wheel. Invented by building contractor Samuel Cubitt for the punishment of British vagrants, this contraption consisted of a revolving drum fitted with steps. Vagrants lined up on the wheel and began ascending it in unison, coming down to rest after they reached the top. The wheel was connected to a grinding stone for the production of meal. Bellevue installed two of these machines in 1823, and on them inmates ground about forty pounds of meal per day, saving the city about $1900 a year. Reaction to the device grew quickly. In 1826 the Common Council suspended the wheel's use for females and ordered the Police Committee to investigate. Shortly thereafter, the wheels were removed.\textsuperscript{15}

Calls for social welfare reform also became louder after the turn of the century. Laws of 1784, 1788, and following years had retained the colonial system of settlement and removal. Influenced by the debate over the Old Poor Law in Britain and the ideas of political economists, middle-class reformers in New York began to think about changing their system. In 1819 the New York legislature appointed a

\textsuperscript{15}Schneider, History of Public Welfare, 152-155; Michael Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850 (New York: Pantheon Books, 1978), 177. The wheel was employed in Britain until the 1870s.
committee to look into the matter. Its report claimed that the poor law encouraged begging and that these "idle, vicious and intemperate" souls should be excluded from the public dole.\textsuperscript{16} Nothing became of this report, but in 1823 the legislature appointed J.V.N. Yates to examine the problem again. Yates's report and proposal to the legislature, perhaps the most comprehensive study of poverty during the antebellum period, produced a new poor law for New York.\textsuperscript{17}

Yates suggested far-reaching measures. He wanted to simplify the law of settlement and to end removal altogether. In addition, he intended to exclude all healthy men from public relief and to make begging a specific crime. Most important, Yates hoped for the creation of a separate system of workhouses where vagrants and beggars could be punished. The legislature passed a revision based on his suggestions in November 1824. However, it dropped all Yates's severe provisions, constructing a scattered system of poorhouses that mixed all types of impoverished people, exactly what Yates did not want. The confused poor law of 1824 allowed counties (except the thirty-eight it excluded) to levy property taxes to build poorhouses and employ supervisors. These supervisors could devise rules of discipline including hard labor and solitary confinement on bread and water for intractables. Counties were also


allowed to continue contracting the poor to local employers. Once the houses were constructed, overseers of the poor were to conduct all paupers applying for relief to the poorhouse. Further, if the county supervisors approved, justices of the peace could apprehend "disorderly persons" under the 1788 act and convey them to the poorhouse to be confined at hard labor up to six months. Beggars under the age of fifteen could also be so incarcerated. Finally, the law ended removal, prescribing relief of the sick, infirm, and poor in the county where they requested it. Healthy vagrants and beggars were to be treated as disorderly persons, which meant that they were funneled back to the poorhouse.  

The state incorporated these provisions into its 1827-1828 Revised Statutes, and they served as the basic vagrancy law in New York into the 1860s. The section concerning vagrants and beggars in the revision combined the 1788 disorderly persons act, the 1824 poor law provisions, and an 1821 rider on child begging. It streamlined the definitions but left punishment open. The law denominated three classes of people as vagrants. First, it included idle persons without visible means or visible employment, the heart of American vagrancy statutes. Second, it proscribed persons "wandering abroad and lodging in taverns, groceries, beer-houses, out-houses, marketplaces, sheds or barns, or in the open air, and not giving a good account of themselves." Finally, it discouraged three kinds of beggars: those wandering about, those going door to door, and those standing in public places. A separate section sent child beggars to the county poorhouse until released or bound out as apprentices. A

\footnote{Yates Report, 956-957; Laws of New York, 1824, 382-386.}
special law passed for New York City in 1833 added prostitutes, destitute habitual drunkards, and men who abandoned their families.\textsuperscript{19}

Punishment was left to justices of the peace and other public officials. They were to make critical distinctions, sending vagrants one of two ways. First, if the accused "be not a notorious offender, and be a proper subject for relief," the person would be sent to the county poorhouse for up to six months of hard labor. Second, "if the offender be an improper person to be sent to the poor-house" the convict would be committed to the bridewell or house of correction if the county had one, if not to the common jail. These offenders could be incarcerated for sixty days, with up to half their time on bread and water. Since most counties could not raise the funds for separate facilities, these provisions meant that creating a separate system of almshouses and workhouses had been given up in most areas of the state.\textsuperscript{20}

The statutory shift that occurred in New York was the clearest example of a general change that was taking place in the nature of vagrancy. Ending removal abandoned the one important part of colonial laws that made the "crime" a specific, one-time act. Now only the vague definitions that punished broad patterns of behavior or membership in the lower classes remained. As the nineteenth century


\textsuperscript{20}Ibid. On the lack of funding see Mohl, Poverty in New York, 63-64. On the persistence of mixing into the 1850s, see Report of Select Committee Appointed to Visit Charitable Institutions Supported by the State and All City and County Poor and Work Houses and Jails: New York Sen. Doc. 8, 1856 (New York, Arno Press, 1976), 3-10 (cited hereafter as Sen. Doc. 8).
progressed, this latter construction became more and more important as vagrancy became the "crime" of belonging to the underclass or the ongoing activity of begging for subsistence. While rarely stated by lawmakers themselves, the nature and causes of this transition are visible in the writings of antebellum poor law reformers.

In part, the waning of the eighteenth-century construction of vagrancy resulted from the rise of humanitarian sentiment. This transformation reflected the influence of Enlightenment thinking and Evangelical religion as well as changes in the face-to-face community necessary for shaming punishment. However, as Thomas Haskell has suggested, the rise of humanitarian sensibilities also involved the late eighteenth-century evolution in capitalism. In short, as market relations connected individuals outside their local communities, they gained a heightened awareness of personal power over previously intractable problems such as slavery.21

With regard to more distant issues such as slavery, the connection between humanitarianism and capitalism may have rested on broader forces engendered by market relations. But examining the relationship between the capitalist transformation and humanitarian reform of the poor and vagrancy laws requires attention to another facet of market society--class separation. The existence of a group of elite and middle-class reformers who shared a common culture was central to the ways in which vagrancy was imagined in Jacksonian America. An assorted group of master artisans, entrepreneurs, and professionals became increasingly aware

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of the gap between themselves and the incipient Jacksonian working class. While the separation between master artisans and their workers may have still been unclear, the chasm between the middle and elite classes and the smaller vagrant underclass was unmistakable. This split generated contradictory impulses for reformers. On the one hand, separation engendered a humanitarian inclination to assist those in the underclass with a view toward closing social fissures. On the other, it motivated attempts to cement class alienation through legal institutions. The latter tendency was especially strong because of the nature of the vagrant underclass. When seen in the terms of Jacksonian social theory, vagrants and beggars seemed strangely perverse. Their behavior defied expectations about relationships between people, and between people and the state. In addition, in their clothing or lack of cleanliness, beggars emphasized the gap between themselves and the respectable classes.

Focusing on class separation does not mean that reformers’ humanitarian sentiments were insincere. The very authenticity of these feelings was what made the question of vagrants and beggars so acute. Elite and middle-class spokespeople, many of whom denounced vagrancy in the harshest terms, also expressed the most sincere altruism toward the poor. Matthew Carey, a wealthy Philadelphia businessman, philanthropist and political economist, denounced Malthusian critics of the poor laws and urged greater charity. Many "benevolent and liberal" individuals, he believed, were "by these pernicious and cold-blooded doctrines prevented from indulging the feelings of their hearts." A committee investigating the charitable and public institutions of New York in 1856 deplored conditions in the poorhouses, workhouses,
jails and penitentiaries. The committee stressed that these institutions were overcrowded, dingy, and inhumane; they mixed the sexes promiscuously and exposed the young to untold corruptions. "Common domestic animals are usually more humanely provided for than the paupers in some of these institutions." From New York, Yates wrote that removal of paupers was inconsistent with "the spirit of a system professing to be founded on principles of pure benevolence and humanity." Removal also contradicted "the genius of a free government" and entailed "an invasion upon natural an inalienable rights." Yates found contracting out and auctioning paupers to be morally objectionable because the poor were "frequently treated with barbarity and neglect by their keepers." In addition, when he described poorhouses Yates envisioned them as happy, cheerful abodes connected to a farm where the deserving poor could pursue "some healthful labor, chiefly agricultural" and their children would be "carefully instructed, and at suitable ages, to be put out to some useful trade or business."\(^{22}\)

From the outset, however, such feelings were ambivalent. Unitarian clergyman Joseph Tuckerman exemplified the complexities of Jacksonian reformers' humanitarianism. Tuckerman argued forcefully for personal action to reach the alienated poor. However, in an 1833 report he wrote for a Massachusetts committee studying the state's poor laws, he advanced a differing view. Citing English political

economist Thomas Chalmers, Tuckerman argued that public provision for the idle poor quelled the impulse to charity among respectable members of the community. The vagrant poor themselves incurred the blame for the inability of elites to give. "[E]very individual of the reckless and vicious poor," he averred, "contributes his or her share, to the hardening of the heart against the best sympathies of common nature." This diminution of charity could be overcome if the system of legal provision was abolished and "a more humane and Christian" system of local and private charity substituted in its place. The commissioners believed it was "the sure and benignant [sic] effect of this [kind of] charity, unlike that of the law, which alienates, to bind more closely together those who impart, and those who receive."23

Tuckerman grasped the alienated position of the Jacksonian underclass and desired at least some effort to bridge the gap, yet the strains that vagrancy placed on Jacksonian social theory pushed him toward entertaining means of discipline. As historians of the Early Republic have noted, the dependent poor presented a particular problem for republican ideology. Republicanism visualized a society of independent landholders, and poor people dependent on others or the state violated this vision.24 While dependence alone may have been reformers primary concern


24Both republicanism and the more specific point about dependence have become staples in the historiography of the Early Republic. See Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America (Chapel Hill: University of
with regard to the "worthy" poor, vagrants and beggars presented a far more complicated problem.

The Tuckerman committee's description of the wandering poor focused on the critical interrelationships of dependence and independence involved in being a vagrant. The report identified the wandering poor as

...outcasts; possessed of nothing, except the miserable clothing which barely covers them; accustomed to beggary, and wholly dependent upon it; with no local attachments...; with no friendships, and neither feeling nor awakening sympathy; is it surprising that they are debased, and shameless; alternately insolent, and servile; importunate for the means of subsistence, and self-gratification, and averse from every means, but that of begging to obtain them?25

This passage captured a central problem of vagrancy. Homeless people were not simply dependent on the public. Bound by no or few social ties, they were also independent in a certain way, and Tuckerman's characterization captured this tension. Vagrants were "alternately insolent, and servile," impudently independent and fawningly dependent at the same time. The committee's solution was to compel this section of the poor to work. If a man able to labor refused to do so, the commissioners contended, he incurred "a debt to the community for all that he


receives from it; and if he refuses to pay this debt, the Government may of a right 
compel him to pay it."26 In other words, a dependent position involved reciprocal 
obligations that must be fulfilled.

Reformers in Pennsylvania exhibited a similar concern for the degradation of 
vagrants and their effect on others.27 In 1827, a committee of the Board of 
Guardians of Philadelphia visited poorhouses in other cities in the Northeast and 
filed a report that indicted the poor laws severely. In part, the committee's 
conclusions echoed the arguments of Malthusian political economists. Because of 
dependence on public support, the committee's report asserted, "the incentives to 
industry have been weakened, the ties which connect society have been relaxed, and 
the desire to honest independence lessened...." The basic problem involved the sense 
of security that public pensioners developed. "The certainty of a comfortable and easy 
life in the winter," the report continued, "is a perpetual and very effectual 
encouragement, to a thoughtless, dissipated, and self-indulgent course during the 
summer."28

Concern about relaxation of "the ties which connect society" illuminated 
another facet of dependence and independence, one that centered on gender roles

26Ibid., 19.

27On the incidence of vagrancy in antebellum Pennsylvania, see Priscilla Ferguson 
Clement, "The Transformation of the Wandering Poor in Nineteenth-Century 
Monkkonen (Lincoln: University of Nebraska Press, 1984), 56-79.

28Report of the Committee Appointed by the Guardians of the Poor... 
(Philadelphia: Samuel Parker, 1827), 24, 27 (cited hereafter as Philadelphia 
Committee, Report).
and the Victorian home. The constant use of masculine pronouns by reform writers and in vagrancy statutes was more than nineteenth-century literary practice. Apart from female prostitutes, vagrants were male in the consciousness of most reformers and legislators. Purveyors of middle-class culture defined vagrancy in part as the abandonment of supposed male responsibilities in the home. Addressing a workingman’s political party in 1831, Edward Everett maintained that a man who refused to work was more alarming than a mere idler. "In almost every case," Everett observed, "he must be something worse,—such as a spendthrift, a gamester, or an intemperate person; a bad son, a bad husband, a bad father." This person was blameworthy because he had abandoned his familial, male responsibilities. He who "leaves to want those whom he ought to support, even if he does not pass his idle hours in any criminal pursuit, has no right to call himself a working man." 29 Everett anchored the source of vagrancy in the degeneration of domestic relations and gender roles. His emphasis was as much on the individual’s loss of masculinity as on his working-class status. By contrast, Tuckerman reversed the relationship, blaming vagrants for the breakdown. A lack of discipline often left children open to early contact with vagrants who would corrupt them. Without proper constraints, children might gravitate to taverns, where "the restraints of domestic discipline, and the pleasures of domestic affection and virtue are lost." 30


Concentrating on gender and domestic roles illuminates an important facet of the meaning of vagrancy as a criminal offense. "Independence" was central to masculinity in Jacksonian America. In Republican thought, personal autonomy meant economic independence through ownership of property or through the "simple competency" of artisanship. In political thought, it meant that men's votes could not be controlled by economic dependence on other men, and it was used as a primary basis for denying suffrage to women and others.\(^{31}\) But members of the antebellum northern middle class expected that political and economic independence would be checked by Tuckerman's "restraints of domestic discipline." Viewed this way, vagrants denied both halves of male gender roles. They made themselves economically dependent on others through the state, and they became independent from the constraints of the home, abandoning their patriarchal duties.

Such behavior left reform writers such as Yates willing to abolish all poor relief to any "male person, with the use of his faculties" between the ages of 18 and 50.\(^{32}\) They implied that vagrants and beggars maintained an alienated relationship both with the middle-class home and with society and culture in general. For the most part, however, reformers remained unable to describe the structures that


\(^{32}\)Yates, Report, 957.
underlay the fissure. As a result, they turned to metaphors to describe the nature of a beggar.

Most commonly, these images dehumanized the objects of humanitarian concern, rendering them into animals or diseases that must be controlled. The resort to metaphor can be seen in reformers' descriptions of beggars as "vicious." In the context of the violence of Jacksonian culture and by modern gauges, asking for a few cents in the street hardly seems dangerous. Nevertheless, Yates worried that the street beggar, "that profligate and disgusting character" who plagued Europe, was becoming prevalent in New York. The beggar's concentration in the state's growing urban areas justified "a rigid police, for compelling the sturdy vagrant to abandon his vicious pursuits." Yates's solution was the workhouse, where vagrants and beggars would be subjected to "a rigid diet, hard labor, employment at the stepping mill, or some treatment equally efficacious in restraining their vicious appetites and pursuits."33

A concern over vagrancy and the "corruptions of mendacity" pervaded Carey's account. His most powerful image related to legalized French begging. France, he claimed, contained "an aggregate of nearly a million of souls in a state of beggary, prowling abroad, and preying on the public to an enormous amount."34 Like Tuckerman in Massachusetts, Carey was humanely concerned for the poverty-stricken, yet simultaneously he could not overcome his alienation from them. This


34Carey, Appeal to the Wealthy, 32.
tension helped prompt the extremes of his rhetoric. Beggars again became something less than human, "prowling" and "preying" on respectable society.

While Yates and Carey used animal metaphors, the 1827 Pennsylvania committee found disease a more appealing image. Its revulsion appeared most strongly in a description of New York City's social welfare institutions. There, part of the pesthouse was set aside for "the reception of vagrants, whose filthy condition unfits them for the Alms House." In this building, "by no means the least useful," vagrants were "cleansed of their vermin, their clothes [were] burnt, and [they were] otherwise purified." Such vivid sensory images translated the reformers' vague disgust into concrete, eradicable behavior; vagrancy became associated with pestilence and open to harsh treatment. The Pennsylvanians' imagery also highlights the role of material culture in defining vagrancy. The offense came in vagrants' "filthy condition," especially in their clothing. They must be "purified" by removing them from society to a metaphorical pesthouse.

Revulsion toward the underclass based on standards of material culture such as cleanliness formed part of a larger middle-class consciousness, but these sentiments existed in an uneasy tension with humanitarian impulses. This contradiction, which became more obvious as the Jacksonian period progressed, appeared most transparently in the program of the New York Association for Improving the Condition of the Poor. The AICP aimed to overcome ambivalence about begging by treating it as a face-to-face encounter. The organization was

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founded after the Panic of 1837 by Robert Milham Hartley, the Presbyterian owner of a New York mercantile firm who left it in the 1830s to become a full-time temperance advocate. The Panic put thousands out of work in New York City and vastly increased the number of vagrants and beggars. Hartley garnered support from other members of the Protestant middle and lower-middle classes and established the AICP as an umbrella organization for New York City charities in 1843. The group worked for housing reform, immigration laws, and juvenile delinquency reform. However, its chief goal was "to discountenance indiscriminate alms-giving, and to put an end to street begging and vagrancy."36

To achieve the latter purpose, the group developed a system for separating "worthy" recipients of charity from the "unworthy." Instead of dispensing food, clothing, or money, the group encouraged almmsgivers to hand out paper tickets that the AICP provided. Beggars then had to present the tickets to an AICP member who would investigate their claims. With these tickets and an examination form listing character traits such as virtuous/vicious and industrious/idle, the AICP hoped to categorize the poor and stabilize the power relationship between the classes. This would not be accomplished by using an impersonal and formalistic legal system, but

by individual contact across class lines. Correcting the problem, the AICP emphasized, would "require nothing less than a volunteer individual guardianship over the poor, with faithful efforts for their moral and physical elevation."\(^{37}\)

In 1847 the organization printed two letters alleging to show the system at work. Perhaps concocted for promotional purposes, they depict how the system was intended to work, and they betray some of the motivations beneath it. The first letter concerned an encounter between a female AICP visitor and a poor African-American woman. The poor woman presented the visitor with tickets, and the latter discovered that the woman's husband "drove a cart, owned some property, and was unusually well off for a person of his class." His wife, the visitor reported, pursued begging "on the ground that there could be little harm in a poor woman like herself begging a little from the rich." The visitor quickly disavowed her of this belief:

> I tried to impress on her mind [the visitor recounted] the wickedness of such a life of deceit and imposture, with the warning that I would watch her, and if she was again seen begging it would be my duty to report her as a vagrant, and the police would probably send her to the penitentiary. She became alarmed, and promised to do better in the future, and, I have no doubt, is entirely cured of her begging and vagrant propensities.\(^{38}\)

In this case, the visitor experienced a sense of power over an elusive situation. She resolved the problem of the unworthy and temporarily overcame her estrangement from them.

The report of "a gentleman living up town" displayed the potency of the ticket

\(^{37}\text{Fourth Annual Report}, 13.\text{ Emphasis in original.}\)

\(^{38}\text{Ibid., 16.}\)
system even more clearly. The gentleman was beset by a common household nuisance. "My door was so frequented by vagrants and beggars, chiefly foreigners, as to prove a serious annoyance to me," he related. This situation discomfited him. "So importunate were they, and so pitiful often were their tales of distress, that we knew not how to send them away." He noticed, upon observation, that his neighbor was not bothered by beggars, and he inquired why. "'Oh, ho,' said [the neighbor], 'we give them nothing but tickets, and they never come back.' 'Tickets!' [the gentleman] rejoined; 'what do you mean?'" The neighbor then explained the AICP system, the uptown gentleman adopted it, and he "pretty much cured" his problem in about a week. "Of all the cures for vagrancy," he concluded, "this is the most complete." The gentleman had found a way out of the dilemma. He could give, yet not give. He could assuage humanitarian sentiments by handing out paper, but he could be sure that a respectable organization of his peers would see that his gift did not complicate the problem.

Members of the AICP confronted the dilemmas of vagrancy and humanitarianism more directly than most other antebellum reformers. On a macro-social level, they and fellow reformers faced the task of devising a new method for sifting out the growing number of seemingly unworthy poor produced by an industrializing society and dealing with them in an ideological context that increasingly disfavored corporal punishment. In addition, the dilemmas created by vagrants for humanitarians reached a personal level. Begging momentarily bared class

\[39\text{Ibid.}\]
divisions in the face-to-face act of the outstretched hand, connecting the impersonal with the personal and rendering power structures uncertain.

Independence from home, work, and community, and dependence on the state, reformers believed, justified actions to reconstitute the proper balance. Such concerns returned the matter to the legal system and focused attention on what civil and political rights vagrants might possess. As Dane noted, Massachusetts's vagrancy laws had operated "with great tenderness generally, in some cases perhaps too great." Reformers such as Tuckerman converted supposed lenient enforcement into an outright deficiency in the legal system. Under current law, he complained, "a vagrant, however dependent and miserable, and unfit for self-direction, must now be left free, while he chooses to be at large, till he has committed some crime." The culpability of the dependent and undeserving poor related to their lack of self-reliance, and Tuckerman carried this principle to its political conclusion:

To me, [he continued], it seems most absurd, to talk of the personal rights, and of the constitutionally guaranteed [sic] freedom of those who not only have nothing, and who, though able, will do nothing, for self-support, but whose example is every day extending corruption to those around them.\(^{41}\)

For Tuckerman and many of his fellow northerners, rights and freedom were based not so much in property ownership, as republicanism envisioned, as in work and self-reliance. Without the latter, talk of rights would become senseless. Rights by implication rested on yet another foundation, discipline, which provided the basis for

\(^{40}\)Dane, Abridgement, 7: 46.

\(^{41}\)Tuckerman, Wages, 46.
reforming lost men. Change would come about through "the Christian discipline of the [work]house, [whereby] some at least of these poor vagrants, all of whom would otherwise die as miserably as they have lived, would be made to live virtuously, and to die happily."42 In Tuckerman’s scheme, discipline and work underlay virtue and thus political participation and civil rights.

As Tuckerman indicated, the legal system sometimes denied reformers their wish to deprive vagrants of all rights. This relationship between vagrancy and civil rights received little discussion in the pre-war period, but a trio of opinions on summary conviction issued by New York judges did explore the issue. The first of these cases, People v. Phillips, was decided in August 1847 by Judge John Worth Edmonds. Eliza Phillips probably could not have found a more sympathetic ear on any other high court in the nation. Edmonds had grown up in New York and had studied law under Martin Van Buren. In the 1830s he was an influential Democrat in the New York legislature, opposing the Second National Bank and supporting abolition of imprisonment for debt. From 1843 to 1845 he had been inspector of the state prison at Sing Sing, and he helped organize the Prison Discipline Society, the Prison Society, and the Women’s Prison Association of the City of New York. Edmonds was influential in the movement to abolish corporal punishment in New York, although at times he expressed a desire to exclude African-Americans and

42Ibid., 47.
immigrants from prison reform.\textsuperscript{43}

Phillips had been charged and detained at Blackwell's Island under the 1833 vagrant law for New York City as a common prostitute. The case was carried to Edmonds on a writ of \textit{certiorari}. Apparently this was a common procedure, for Edmonds noted that he had "been frequently called upon to discharge from the penitentiary prisoners committed on summary convictions for vagrancy on the ground of some alleged defect or irregularity of the sitting magistrate."\textsuperscript{44}

The judge released Phillips and took the opportunity to indict the process of convicting vagrants. The problem, Edmonds began, was that summary conviction was in derogation of the common law. He then examined the history of summary conviction in the context of trial by jury and due process and laid out carefully how the proceedings should take place. The central theme of his opinion was the need for a clear record of the case. Without it, the magistrate would be liable in trespass and would have no defense. More important, without a record the defendant would "be deprived of all means of inquiring whether he had been justly condemned and also deprived of an effectual remedy against a wanton excess of jurisdiction." The vagrant could try a suit in trespass but that "would not come until after he had suffered the wrong." This, Edmonds implied, would be unjust. While the vagrant's "conviction


\textsuperscript{44}\textit{The People v. Phillips}, 1 Parker's Criminal Reports, 95-98 (N.Y., 1847).
would be exceedingly prompt and summary, his remedy for the wrong done him would be very slow and burdensome.\textsuperscript{45}

Edmond's more general section that closed the opinion suggests that he was not merely tampering with fine points to protect magistrates from litigation. A proper record must go beyond appearances, he insisted. It should "...not be merely to record the fact of judgment, but to show that the proceedings required by justice had been regularly observed and the sentence legally supported by the evidence." Reviewing the decisions of other state courts on summary conviction, Edmond concluded that its "manifold dangers" had led these tribunals to "assert and maintain the principles on which personal liberty is dependent." In the end, he avowed that New York's laws did and must do the same:

These principles are deeply imbedded in the system of laws in our state also, and as thousands of our citizens are yearly subjected to the operation of this summary and dangerous jurisdiction, it is of the highest importance that the rules which have been adopted for the purpose of restraining it, within due bounds, should be strictly and carefully preserved.\textsuperscript{46}

In other words, Tuckerman's views of legal rights could not be sanctioned; vagrancy did not unfit people for full citizenship.

Edmond was a radical; a few years after he rendered this opinion he became an avowed Spiritualist.\textsuperscript{47} Yet his opinion should not be dismissed. It proves that vagrancy laws and other laws against petty crime were being enforced regularly in

\textsuperscript{45}Ibid., 100-102.

\textsuperscript{46}Ibid., 107.

\textsuperscript{47}NCAB, X:231.
antebellum North, at least in New York. In a broader sense, Edmonds provided an alternative vision. He used the common law as a way to solve the moral problem of vagrancy. Through reasoned and equal application of stated principles, he would mediate the effects of vagrancy laws for both his class and for the "offenders."

Another New York opinion issued by Judge Josiah Sutherland in 1860 also produced freedom for the offender, but Sutherland arrived at this conclusion by a different route. In the years since Edmonds wrote, the legislature had created a commitment form for New York City vagrancy arrests based on the judge's suggestions. They had also sanctioned the use of habeas corpus and certiorari as means of appeal. In the case before Sutherland, Catharine Forbes had been convicted as a prostitute and had appealed to Sutherland on the habeas writ.

Sutherland began from the assumption that vagrancy had not been a common law crime. Consequently, the words of the statutes must be strictly construed. At issue was whether the 1827 Revised Statutes and the 1833 law for New York City prohibited something more than mere idleness. Sutherland thought they did. In Forbes's case, the law implied "a want of any lawful business, occupation or means whereby to sustain herself." Sutherland then proposed a new justification for vagrancy laws. The intent of the law was "not to punish common prostitutes as a sin or moral

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49 People v. Forbes, 4 Parker's Criminal Reports 611-612 (N.Y., 1860). Sutherland's remarks also demonstrate the prevalence of these sorts of arrests and convictions, for he prefaced his opinion by saying that he had "given most serious consideration" to the case because of its "great importance and public interest."
evil, or to reform the individual." Instead, the object was "to protect the public against the crimes, poverty, distress or public burdens, which experience has shown common prostitution causes or leads to." Vagrant laws were police regulations for the public good, and if a person fit the description, "he may be convicted and imprisoned whether such a condition is his misfortune or his fault. His individual liberty must yield to public necessity or the public good...." Though Sutherland seemed strained by the words, he concluded that vagrancy laws were "constitutional, but should be construed strictly and executed carefully in favor of the liberty of the citizen." Sutherland's position foreshadowed the way later lawmakers would try to resolve the vagrancy problem. He wanted to turn vagrancy purely into positive act of commission, to enumerate a list of specific restrained behaviors and remove them for the elusive "public good." Again, the legal system offered an alternative to reformers' ideas.

A short opinion issued a month later by Judge Daniel Phoenix Ingraham concluded New York's antebellum litigation on summary conviction. William Gray had brought his case before Ingraham on *habeas*, a practice that Ingraham believed was "not to be commended." The police justices had tinkered with the forms to combine the habitual drunkard section of the 1833 law with the idleness section of the state's revised statutes. This irregularity notwithstanding, Ingraham would not dismiss the charge. "The offence is being a vagrant," he declared unequivocally. "It is not necessary that the commitment should state all the particulars necessary to

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50Ibid., 612-615.
make out the offense." He attempted to align himself with Sutherland by asserting that he was talking about the commitment, not the charge. But he was making an artificial distinction; he clearly saw vagrancy as a status offense. "The words defining the particular causes of vagrancy, may therefore be regarded as surplusage, and the charge of being a vagrant and being committed thereof is sufficient," he concluded.\(^{51}\)

Ingraham’s opinion regarded vagrancy as a lifestyle or pattern of behavior, and it reflected the legal and cultural standards prevalent in 1860 better than those of his colleagues. Edmonds’s opinion was too extreme to be adopted widely; Sutherland’s idea was only catching on. These New York litigations focused on the narrow issue of summary conviction, but two other antebellum appeals cases illustrate the broader interplay between reform language and legal constructions of the "crime" of vagrancy.

The first of these cases involved an 1834 constitutional challenge to the Maine vagrancy law. Adeline G. Nott of Portland had been committed to the workhouse by the overseers of the poor. The statute allowed such actions against "all persons of able body to work and not having estate or other means to maintain themselves, who refuse or neglect so to do; live a dissolute life, and exercise no ordinary calling or lawful business, sufficient to gain an honest livelihood."\(^{52}\) Nott’s attorney, R.A.L. Codman, urged the Maine Supreme Court to find that the action derogated the natural rights of all people by "authorising the commitment to a dungeon or workhouse, of a citizen without trial or hearing, and that too, by persons invested with no

\(^{51}\)People v. Gray, 4 Parker’s Criminal Reports, 616-618 (N.Y., 1860).

\(^{52}\)Adeline G. Nott’s case, 6 Me. 209 (1834).
judicial power." The law violated "the spirit and genius" of the state constitution on the same grounds and breached due process by denying the right to counsel and the right to present witnesses and face those of the prosecution.\textsuperscript{53}

Writing for the court, Justice Nathan Weston ignored Codman's arguments, resting denial of the appeal on social utility. Weston's opinion advanced three arguments in favor of vagrant laws and workhouses: relief, reform, and sanitation. First, vagrants were obligated to pay for their support. "The indigent have no claim to be supported in idleness," Weston declared. "Their poverty generally grows out of an unwillingness to labor, or is occasioned by reckless or improvident habits." Consequently, poor people "have no just right to complain, if they are sent to, employed and governed in a work house, provided for the purpose of making their support less burthensome." Nott's health and strength, Weston reasoned, "constitut[ed] a fund, of which [the overseers] have a right reasonably to avail themselves, to contribute to her maintenance." Nott had a social duty to work, to supply her own relief.\textsuperscript{54}

Weston carefully avoided the tension between dependence and independence embedded in Maine's vagrancy laws and refused to confront directly the issues of gender hidden not far beneath the surface of the case. For the purpose of convicting her, Nott was independent and wholly responsible for her own well-being, a condition

\textsuperscript{53}Ibid.

she would not have been accorded in Jacksonian culture, economy, or political system had she not been before the court. Yet while Weston held that she was an independent agent before the law, he balanced this assumption precariously with her behavior. She had voluntarily chosen to become dependent, and had therefore forfeited her "right to complain" (and apparently to appeal, as well). Her sacrifice of independence allowed the state to claim its guardianship over her, further complicating the matter by placing her in an even more dependent position.

Second, the justice professed that the law was intended for Nott's own benefit. It would show her how to "draw an honest livelihood. That she may be removed from temptation, and compelled to cultivate habits of industry, to be again restored to society, as a useful member, as soon as may be." Despite the conditions, Nott would eventually come to realize the law's benevolence, Weston assured. "When enlightened conscience shall do its office, and sober reason has its proper influence, she will regard the interposition as parental; as calculated to save instead of punishing." Paternalistic correction would lift the fallen woman. So gender (and dependence) ultimately got the upper hand in Weston's mind. Because Nott was a woman, it was far easier for Weston to imagine her as child, in need of the "enlightened conscience" of her fatherly correctors.

As a final, "collateral" reason, Weston suggested that removing Nott from society was a sanitary measure. Overseers' actions could be "viewed as a police regulation, to preserve the community from contamination." Likening the woman to

\[55\text{Ibid.}\]
a "victim of contagious disease," Weston dismissed the due process claim. "There may be cases of so pressing a character," he contended, "that they cannot await the forms of law, ordinarily provided for the protection of right, and the suspension of wrong."56 By 1834, then, common elements of the Jacksonian language of poverty had begun to seep into the courts. By likening vagrants to victims of disease (and in this case, to contagion itself), reformers could place vagrants safely outside the realm of normal life, and jurists such as Weston could place them outside the constitutional protection of the law. Paradoxically, to be restored to society vagrants first had to be placed beyond its boundaries.

The second litigation, Commonwealth ex relatione Joseph v. McKeagy, Superintendent of the House of Refuge (Philadelphia, 1831) was exceptional in several ways. It dealt with the problem of juvenile vagrancy, and it involved a boy of apparently solid middle-class parentage. These circumstances were probably the only reasons for it being brought to the Philadelphia County Court of Common Pleas in the first place. Yet, these unusual conditions prompted a full discussion of the law and popular notion of vagrancy.

The case involved 14-year-old Lewis Joseph, the only child of Abraham Joseph. Lewis grew up in a home with "every comfort of life" and with a mother who was "both a respectable and intelligent woman, much devoted to him." Lewis received

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an education in Philadelphia's "best private schools." However, the boy developed a habit of wandering the streets of the city, once for ten days, until he was returned in "a perishing condition" by constable William McGinley. His father feared Lewis was stealing from him for support, and in March 1830, he took Lewis to the Philadelphia House of Refuge to have him committed. The superintendent refused, but a Mr. Goodman, a manager of the House present at the time, convicted Lewis of being a vagrant and "adjudged him to be 'a proper subject for the House of Refuge.'" Soon, Abraham Joseph reconsidered, admitting that "his excited feeling on the occasion betrayed him into error," and sought to have Lewis released under habeas corpus because of the summary nature of the commitment. The attorney for the House, poor law reformer William Meredith, argued that Lewis was a vagrant and, failing that, that he had been placed in the institution with the full knowledge of his father to "submit his son to the discipline and regulation of the house."57

Judge King began his lengthy opinion by discussing the authority of institutions like the House of Refuge. He noted that its summary powers were warranted in periods of public emergency and that juvenile delinquency in Philadelphia indicated that such an emergency did exist. Moreover, summary conviction did not conflict with constitutional rights. Since the adoption of the state constitution of 1790, King noted, "this power has been exercised without question in cases of infant and adult vagrancy indifferently; and no one ever supposed, that the right of trial by jury...was infringed by the exercise of this beneficial and useful jurisdiction." The only change had been

from "a temporary, but degrading punishment" in the eighteenth century to one of "public care and solicitude" for the minor vagrant by which "the public assumes the guardianship of this person during his minority with a view to his future usefulness." While King captured the significant legal changes of the early nineteenth century in this statement, he did not consider the implications.

Most of King's opinion dealt with Meredith's first argument and tried to outline the meaning of vagrancy and its social consequences. To begin with, King in effect called upon his own character witness for Lewis. His colleague, Justice Freytag, had described the boy as "of a lively temperament, passionately fond of military music, and apparently incapable of resisting its charms." Although Freytag had once thought of sending Lewis to the House, he "consider[ed] him in no respect a vagrant." Such an opinion was important, King averred, because of the "offence charged is in its character degrading, if not infamous, so much so that our courts have held that calling a person 'a vagrant' is actionable in itself."59

King then examined the case under Pennsylvania's 1767 vagrancy act. Lewis was not an emigrating pauper, a person living idly or a wandering beggar. He might be a loiterer, but this section could not fairly be applied to children, for to allow a magistrate to pass such a "degrading conviction" on a child would be a power that "would not be endured in any community." While Lewis's father had referred to him as a vagrant when trying to have him committed, King argued that the question of

58 Ibid., 250-253.

59 King referred to Miles v. Oldfield, 4 Yeates 423.
vagrancy was "not referable to the opinion of a witness; it is an offense composed of
an aggregation of circumstances" that resided in the details of each case. 60

The key to vagrancy was a constant pattern of behavior. King compared Lewis
with an example raised by Meredith. In a previous case, King had upheld the
conviction of a young woman for vagrancy. However, the woman "had given herself
up to a course of most shameless abandonment" though she was old enough to marry
or work. Like Adeline Nott, this unnamed woman had been accorded an unusually
high status in order to convict her of a crime. Lewis, on the other hand, had proved
himself to be "good tempered, docile, and intelligent" and receptive to "that gentle
but firm discipline...that was necessary to root out from his mind the luxuriant weeds
produced by weak indulgence, bestowed by an erring parent on a sportive and
volatile disposition." Overall, King concluded, Lewis had shown

none of that malicious capacity for wickedness, and that wanton and
continued indulgence in it; nothing of that wandering and abandoned
course of life, which alone would justify me in pronouncing him a
vagrant.

King concluded that Lewis should have the stain of vagrancy expunged from his
character and be restored to society. 61

The imagery in King's opinion revealed nicely the popular as well as legal
conception of vagrancy. The prevailing theme was disorder, from the "luxuriant
weeds" in Lewis's head to the "wanton" indulgence in wicked actions. What made

60 Ibid., 257.

61 Ibid., 258
such behavior as this into vagrancy was its incorrigible nature, the inability to respond to "gentle but firm discipline." Unlike the merely misbehaving Lewis, a confirmed vagrant lived his or her life wandering about with no fixed spot in the community. These images again pointed to the dominant cultural conception of vagrancy as the antithesis of the nineteenth-century social system.

As these two appeals indicate, key concepts of social discourse on poverty in the antebellum North penetrated the legal world as well. Although alternatives existed, reform writers and jurists constructed the "crime" of vagrancy in similar terms. Vagrancy meant independence from the informal social discipline of work and the home, and dependence on the state; it equalled the abandonment of gender roles. Vagrancy also meant membership in a group alienated from the middle class by these activities and by dirty hands and torn clothing. Finally, vagrancy meant that with the social reality of self-reliance gone, the rights based on it became meaningless. These concepts would figure prominently when Republicans in Congress and Union army officials were given a free hand to reconstruct free labor after Emancipation. Before the war, however, these ideas were only in a formative stage, slowly working their way into the consciousness of upper- and middle-class northerners. At the same time, a considerably different ideological and legal world had developed in the South.
CHAPTER 3

"WHOLLY EXEMPT FROM THE TORRENT OF PAUPERISM":
THE LAW OF POVERTY AND FREE LABOR
IN THE SLAVE SOUTH

The people of Virginia, the Reverend Hugh Jones wrote in 1724, "are never tormented with vagrant, and vagabond beggars."¹ Although early in the South's history, Jones's comment mirrored the southern attitude toward poverty and vagrancy that would prevail through the onset of the Civil War. Elite southerners generally believed their states had few poor people, and by the 1850s proslavery writers who exploited this tradition advocated an anti-capitalist conception of society and charity. This mythology could not hide the fact that slavery automatically impoverished a third of the South's population and pushed many of the region's non-slaveholding whites into destitution as well. Neither could the prevailing fictions mask completely the existence of laws concerning poor and vagrant southerners. Supposedly free of pauperism, many southern states nevertheless constructed a system of poorhouses at about the same time as the North, and most states maintained harsh vagrancy provisions that northern states had abandoned in the late eighteenth century. Paradoxically, the South abandoned the contractual elements of free labor law that persisted in the North into the 1860s. Because planters needed to dissolve relationships with their overseers easily, southern courts diluted the restrictive

entire doctrine more rapidly than their northern counterparts.²

Both of these legal developments were related ultimately to slavery, as was southern ideology concerning the poor. Free-labor poverty was an essential element in what became the pro-slavery argument.³ One of slavery's most zealous champions, Virginian Edmund Ruffin, based part of his defense on a discussion of poverty and charity. For Ruffin the problem of the poor formed part of a larger argument over free and slave labor. He held that slaves were better off than northern and English laborers who were motivated by want and hunger. Free labor society caused "extreme want and destitution, the competition for sustenance, class-slavery of labor to capital, and lastly pauper slavery." By pauper slavery, Ruffin meant the northern system of wage labor and poor relief. "The pauper, whether laborer or otherwise, receiving

²By implication this chapter speaks to the question of whether there was or is a distinctive legal tradition in the South. The material below confirms James Ely and David Bodenhamer's conclusion that the South mirrored some elements of Northern law while maintaining its own separate legal tradition, especially in matters such as race, personal status, and crime. James W. Ely, Jr. and David J. Bodenhamer, "Regionalism and the Legal History of the South," in Ambivalent Legacy: A Legal History of the South, ed. Ely and Bodenhamer (Jackson: University of Mississippi Press, 1984), 2-3, 9, 13-14, 17-21. Ely and Kermit Hall have made a similar point about Southern constitutional development. See Kermit L. Hall and James W. Ely, Jr., "The South and the American Constitution," in Uncertain Tradition: Constitutionalism and the History of the South, ed. Hall and Ely (Athens: University of Georgia Press, 1989), 6.

support from the parish, is neither more nor less than a slave to the administrators of the law and dispensers of the public charity," he contended. "The pauper ceases to be a free agent in any respect." Essentially, Ruffin claimed that northerners were deluding themselves about free labor. The poor of the North, whether working or destitute, were in the same dependent relationships to their masters as southern slaves were.4

Less prominent proponents of slavery also raised the specter of pauperism. Vindicating the South against the "reproaches of the North," Iveson Brookes echoed the familiar line that southern slaves were materially better off than northern wage workers. Brookes invited his readers to investigate the "back streets and crowded cellars" of industrial cities. There they would witness "a condition of squalidness, hunger, and sickness without medical aid, for which you will look in vain among the slaves of the South, because the humanity and pecuniary interests of the owner combine to prevent such wretchedness." Addressing Cincinnati's Young Men's Mercantile Library Association in 1849, Elwood Fisher asserted that pauperism best gauged the health of a country. By this standard, the North fell far short of perfection. Public dependence was increasing in Massachusetts and New York at a rate ten times faster than the population. What was worse, this shocking figure included many able-bodied men who could not or would not earn their own living.

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If this were true, Fisher speculated, "what must be the condition of the great mass of people hanging on the verge of pauperism, but withheld by honorable pride, from applying for public charity?" Contrasting this melancholy vision to the happy state of Virginia and Kentucky where public charity was nearly unknown, Fisher reversed the realities of poverty North and South: "[T]he pauper in an alms house is a slave," Fisher declared. "He works under a master, and receives nothing but a subsistence." Like Ruffin, Fisher's most stinging criticisms involved dependence and what he saw as outright slavery in the North's poor laws.\textsuperscript{5}

George Fitzhugh carried the argument even further, constructing a theory to explain poverty and its relief. As the hierarchical society of Europe gave way to liberalism, he noted, crime and pauperism increased. Like Ruffin, Fitzhugh contended that the universal competition of free labor was ultimately degrading. This belief originated in a deeper conviction that "universal liberty and equality [were] absurd and impracticable." Because it had not abandoned dependence and subordination, the South had no conflict between rich and poor; it was "wholly exempt from the torrent of pauperism, crime, agrarianism, and infidelity which Europe [was] pouring from her jails and alms houses on the already crowded North." The South had its poor, he admitted. "But none who are over-worked and under-fed." The relationships of southern society meant that poor relatives and friends were

nourished in the homes of their betters.⁶

Fitzhugh's proslavery manifesto, Cannibals All!, considered pauperism in much greater detail. He explained the unrest in Europe and the North: "All writers agree," he asserted, "there were no beggars or paupers in England before the liberation of the serfs." Freedom cut the serfs from the land and the dependent relationships that sustained them. Now, they constituted "the Proletariat, the Lazzaroni, the Gypsies, the Parias, and the Pauper Banditti of Western Europe, and the Leperos of Mexico. As slaves, they were loved and protected; as pretended freedmen, they were execrated and persecuted." Therefore, the English enacted the poor laws to punish the poor and make them work at low wages. The solution to pauperism that Fitzhugh derived from these premises was to restore the freed serfs to slavery. His theories on pauperism originated in his defense of slavery. He had to make free society look worse than the slave society. In his thinking on Christian charity he went beyond a mere defensive position, declaring that benevolence could exist only in a slave society. He harkened back to the old idea of a Great Chain of Being: "The moral and physical world is but a series of subordinations, and the more perfect the subordination, the greater the harmony and the happiness." Christian morality depended on these subordinate relationships of slavery and family and had always been intended to operate in such a society. Christian morality was natural in the only

⁶George Fitzhugh, Slavery Justified, by a Southerner (Fredricksburg: Record Printing Office, 1850) in McKitrick, Slavery Defended, 41-49.
natural society, slavery.\textsuperscript{7}

Since the South was a slave society, Fitzhugh claimed, it could be more charitable than the North. southerners' relationships were "not competitive and antagonistic as in free society; and selfishness is not general, but exceptionable." Without universal competition for status or wealth, neighbors helped each other instead of trying to surpass each other. The South was also more benevolent because charity was "safe, prudent, and expedient." \textbf{Here}, Fitzhugh touched one of northerners' core fears--indiscriminate almsgiving. "Public and private charity is a fund created by the labor of the industrious poor, and too often bestowed on the idle and improvident," he pointed out. "It is apt to aggravate the evils which it intends to cure." Fitzhugh proposed a solution for this problem:

Those who give should have the power to control, to some extent, the conduct and expenditure of the objects of their charity. Not till then can they be sure their gifts will be promotive of good. But such power of control would be slavery.\textsuperscript{8}

The South had solved the dilemma by dispensing charity safely to dependents under the control of the provider.\textsuperscript{9}

Finally, Fitzhugh located the heart of northern qualms about charity. "Wealthy men who are sincere and devout Christians in free society, feel at a loss what to do with their wealth, so as not to make it an instrument of oppression and wrong." If the


\textsuperscript{8}Ibid., 188.

\textsuperscript{9}Ibid., 188.
wealthy gave to colleges, they taught students how to exploit the laboring class and the poor. Charity dispensed to tradesmen and land owners produced the same result. On the other hand, "if you give to the really needy, you too often encourage idleness, and increase the burdens of the working poor who support everybody."\(^{10}\)

By focusing on the degrading lives of the northern poor, proslavery writers attempted to defend slavery by a common device: finding the sin in the accuser. They also tried to divert attention away from the South’s own poverty. They had to begin with an incredible act of self-denial, ignoring the extreme and obvious poverty of their African-American chattels. Then they had to overlook the destitution of the South’s poor whites. What is curious is that, except for those like Fitzhugh, they also wanted to hide the South’s system of public welfare. Denials notwithstanding, most southern states possessed poor laws and vagrancy statutes to assist the poor, discipline labor, and police deviant sections of the social order.\(^{11}\)

In the seaboard South, the poor laws predated the Revolution. While some elite spokesmen such as the Reverend Jones wanted to believe there were absolutely no vagrants in Virginia, colonial legislation showed otherwise. Three years after he

\(^{10}\)Ibid., 219

wrote, the colony enacted its first vagrancy statute. Assemblymen envisioned the law partially for the "restraint of vagrant and idle people," but essentially they saw it as a settlement act "for better securing the payment of Levies." The lawmakers intended to detain both able-bodied persons who neglected labor and husbands who left wives and children "whereby they are likely to become burthensome to the parish wherein they inhabit." Offenders could be removed to their home parish and required to give security for good behavior. Those who refused to post bond had a choice of punishment. They could either be bound out to labor for one year or receive twenty-five lashes. Thirty lashes were administered to those of "ill-repute" who could not be bound to a master. In 1748 the assembly strengthened the law by adopting the English method of whipping vagrants from constable to constable until they reached home. The law also ended the choice between labor and punishment, requiring one year terms of work.12

Basically these laws intended to put "masterless men" back into a dependent relationship of home or labor. Vagrants had committed an act against the social order, and they threatened to disrupt the system of poor relief by not paying the rates or by abandoning their dependents to the parish. They were a social problem that

must be controlled in a society with the assumptions of an organic world, in which all people were in some type of dependent relationship to each other.

By 1755 those relationships were under stress from a growing number of impoverished people in Virginia. As a result, the colony experimented with the workhouse to prevent the "great mischiefs arising from such numbers of unemployed poor." The workhouse statute allowed parishes to commit beggars for twenty days. More important, it established a workhouse test. Any person who refused to enter the house could be denied aid altogether. The workhouse act was probably a late colonial reaction to a temporary upswing in paupers. For most of the colonial period, relief was given outside institutions. Sometimes churchwardens gave money to the poor, but more often they used taxes to buy goods and give relief in kind. They also paid parishioners to lodge the poor in their homes. This policy of generous relief did not mean a total lack of distinction between deserving and undeserving poor. The undeserving usually received the minimum, and removals proceeded as the law dictated. In a few cases, the unsettled poor were even removed to England.\footnote{Henning, \textit{Laws of Virginia}, 6:475-477; McCamic, "Administration of Poor Relief," 176-177; Howard Mackey, "The Operation of the Old Poor Law in Colonial Virginia," \textit{Virginia Magazine of History and Biography} 73 (January 1965): 28-40. See also Virginia Bernhard, "Poverty and the Social Order in Seventeenth-Century Virginia," \textit{Virginia Magazine of History and Biography} 85 (April 1977): 141-155. Bernhard argues that the growth of the gentry in Virginia occasioned more lenient attitudes toward the poor as these new gentlemen tried to emulate English country squires.}

In the middle eighteenth century the Carolinas and Georgia also established means for disciplining the poor. North Carolina enacted a vagrancy statute in 1755
that forbade residents to harbor strangers for more than forty-eight hours, that required vagrants to give security bonds or face being indentured, and that stipulated whipping for offenders whom no one wanted as bound workers. In South Carolina the merchant-planter elite of Charleston took steps to control the city's poor. The town's vestry won support from the assembly for a workhouse in the 1730s, and by the 1750s the structure had become crowded, prompting an enlargement. A decade later, the Charleston grand jury again informed the assembly that the institution was so overburdened that "notorious bawdes, strumpets, vagrants, drunkards, and idle persons who might be there committed, reign and infest the...town." In the pre-Revolutionary period Savannah also erected a workhouse, although it appears the institution was intended primarily for the incarceration and punishment of refractory slaves.\(^{14}\)

The disorder that accompanied the Revolution prompted seaborde elites to take further steps to manage the poor. In Virginia, the assembly passed one of the stranger vagrancy acts in American history. A great increase in disorderly people had occurred, the preamble declared. The problem was that friends immediately broke them out of jail, "whereby the good purposes of the [vagrancy] act are not only defeated, but continual expenses are incurred in repairing jails." The law allowed judges to compel potential escapees to row in the commonwealth's ships for up to

a year at the same wages as volunteers. In 1788 Georgia lawmakers noted the presence of numerous "idle and disorderly persons, having no visible estate, or lawful employment," who wandered about without paying their taxes or became public charges, making themselves "a pest to society." The assembly empowered justices of the peace to apprehend such persons as well as men who deserted their wives and inquire into their circumstances. Unlike the vague provisions of many vagrancy statues, Georgia lawmakers stated explicit criteria. The accused must show that he "cultivate[d] at least three acres of ground in some grain or other, or that he is of some mechanic trade, and works at that trade for his support, or that he is in some honest employment engaged by the State, or some citizen thereof of good fame...."

The legacy of the colonial and revolutionary South carried over into the nineteenth century. Southern social welfare in the antebellum period pursued the same three basic aims as did the poor laws of Britain and the North: relief, labor discipline, and social control. But as numerous historians have pointed out, the region did not experience the ideological debates about poverty and poor relief that characterized poor relief in the Jacksonian North. Southerners were slow to abandon the traditions of the Old Poor Law. This regional distinctiveness has been ascribed to many factors, most notably the agricultural and anti-institutional nature of southern society. Since southerners for the most part did not adopt the precise

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measures of discipline embraced by northern poor and vagrancy laws, some historians have been tempted to see southern poor laws as somehow more humane.\textsuperscript{16} This assertion essentially adopts the line taken by pro-slavery advocates, albeit with an ironic twist. And to the extent that the well-disciplined almshouse was not prevalent in the South, it is accurate.

Yet taken as a whole, the southern poor laws remained harsher in letter and spirit than those in the North. Southern communities lacked poorhouses often more because of neglect than because of humanity. Moreover, southern vagrancy laws retained punitive measures that had been abandoned, or at least eased in the North. All the same, southerners did not exhibit the same harshness of rhetoric as did poor law reformers in the North. The southern legal system endowed the providers of charity with the certainty that Fitzhugh argued must underlay all philanthropy--that their acts would have no real economic impact on the lives of recipients. The most significant function of these laws, then, was not their effect on poverty or "crime" (although these were undoubtedly both intended goals and actual outcomes), but rather in the way they helped designate who was, and who was not, a member of the ruling white elite.

To say class legitimation was the broader effect of the poor laws does not mean southerners failed to relieve distress. Lacking an equally sophisticated institutional structure, southerners did not pursue the systematized charity of the

\textsuperscript{16}Most notably Ely, "Few Subjects," 877. On these general points about Southern social welfare, see also Daniel C. Vogt, "Poor Relief in Frontier Mississippi, 1798-1832," \textit{Journal of Mississippi History} 51 (August 1989): 181-199.
North; instead, they relied on traditional means of social welfare. Some areas relieved the poor by placing them in private homes or auctioning them to the highest bidder. In very early frontier days in Adams County, Mississippi, local officials provided for the poor by contracting with other members of the community, sometimes shifting public charges from one care-giver to another. Auctioning was common in South Carolina, prompting the grand jury of Lancaster District to note in 1821 that "the plan of letting the poor to the lowest bidder is calculated to place the poor in the hands of those least able to support them, and thereby the humane object of the law is frustrated and many poor actually suffer." In many locales of North Carolina, the poor were sold in public. Before the construction of his Hertford County's poorhouse, attorney and diarist William Valentine recalled, "The miserable poor were put at auction and knocked down to the lowest undertaker!" The state did not explicitly forbid the practice until 1876.17

Binding out orphans, bastards, and other poor children was also commonly practiced in the South. On May 15, 1796, Thomas Leftwich and Charles Moorman, overseers of the poor for Bedford County, Virginia, bound out John Gowing to Samuel Poindexter until the age of 21 to learn carpentry. By the terms of the indenture, Poindexter was teach Gowing to read, write, and do arithmetic, as well as house, clothe, and feed him. At the expiration of the indenture, Poindexter promised

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to pay Gowing "his freedom dues according to the law." At times, apprenticeship indentures were as much family or personal decisions as they were actions by the overseers. When Lot Dooling moved his family out of South Carolina, he left behind a daughter bound out to a Mr. Bramblett, near Laurens. Another South Carolinian, Ann Delaney, bound herself as an indentured apprentice to the Charleston Orphan House and subsequently the indenture was transferred to William Magill, with the proviso that he pay her $60 damages if she were dismissed before the end of her term.\textsuperscript{18}

While masters were legally obligated to perform their halves of the bargain, they did not always comply, and in some cases, apprentices sued. Gowing sued Poindexter and was awarded $200 in damages, but the state supreme court reversed the ruling without giving reasons. In another litigation, an apprentice bound out by the overseers of the poor sued his master for breach of covenant but also lost on appeal. In Delaney's case, the South Carolina court took the side of the apprentice, after Magill discharged her for the "immoral behaviour" of being "disobedient and vicious." "It is the duty of every master," Judge John S. Richardson wrote, "to persevere, and strive to correct and improve his apprentice throughout the whole term of service. When the Doctor yielded to her perverseness, and dismissed his

\textsuperscript{18}Poindexter v. Wilson and Others, 3 Munf. 183-184 (Va., 1812); The Commissioners of the Poor for Laurens District v. Lot Dooling, 1 Bailey 73-75 (S.C., 1827); Commissioners of the Orphan of the City of Charleston v. William Magill, Cheves 56-59 (S.C., 1840); Ely, "Few Subjects," 863-864; Vogt, "Poor Relief," 187-188.
forward pupil, he himself failed in his primary undertaking...."¹⁹ In such rulings, the court affirmed that if one undertook to act as part of the elite, that role must be maintained.

The Virginia court was even more severe in upholding the indentures of a family of free black children. In October 1848 Retha Harris, a free black woman and the wife of a slave, applied to the Henry County Circuit Court for a writ of habeas corpus to release her three children, Sally, Joannah, and Milly, from John S. Brewer. On May 13, 1844, the county’s overseers of the poor had indentured the children to Brewer as bastards. Brewer agreed to pay their mother a dollar each per year while they were between the ages of 14 and 17 and also to give each child $12 for the last year of her service. The indenture for Milly also specified that Brewer teach her "all the art, trade and mystery of washing and spinning...." The county court held that the children be discharged and Brewer appealed. Harris’s attorney acknowledged the power to bind out poor orphans and "children whose parents are not able to support them and bring them up in honest courses...is a power of great delicacy, and liable to great abuse, and is certainly not to be wantonly exercised." The court rejected this charge and validated the indentures. To justify the decision, Judge Francis T. Brooke asserted that "In cases of police, the acts of police officers are not to be construed very technically; if substantially right, it is all that can be expected." Brooke avoided completely the implications of the ruling. "Whether the children of free persons of

¹⁹Poindexter v. Wilson, 183-184; Commissioners of the Orphan of the City of Charleston v. Magill, 56-59; Bullock v. Sebrell, 6 Leigh 560-561 (Va., 1835).
colour are all to be construed as bastards, it is not material to decide in the case.  

Another southern vestige of the Old Poor Law was the diligence with which states enforced the bastardy laws. In South Carolina in 1847 the state supreme court compelled Jesse Gilbert to pay $25 annually for the support of his illegitimate child. As Judge D.L. Wardlaw noted, "The Bastardy Acts themselves recognize in bastards this natural right [to necessary support], and the father's moral duty, to a certain extent, and enforce the duty under penalty." Local officials in Virginia also forced men to pay for bastard offspring. In October 1816 William Mann, Jr., was charged in Cumberland County Court with being the father of Mary M. Hudgins's bastard and ordered to pay $50 per year to support the child for ten years. However, the state's high court limited this power somewhat by making indictments easy to overturn if the letter of the law were not strictly followed.  

Although traditional forms of relief predominated, many southern states erected poorhouses and workhouses. Some areas of Virginia had workhouses by the eighteenth century, and after the Revolution the state re-enacted the colonial poor law of relief, settlement, and removal. In 1780 it transferred authority over the poor

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21Commissioners of the Poor v. Jesse Gilbert, 2 Stroh. 152-155 (S.C., 1847); Mann v. The Commonwealth, 6 Munf. 452-453 (Va., 1819); Fall v. The Overseers of the Poor, 3 Munf. 495-510 (Va., 1811); Jack Kenny Williams, Vogues in Villainy: Crime and Retribution in Ante-Bellum South Carolina (Columbia: University of South Carolina Press, 1959), 53-55. See also State v. John Clark, 2 Brevard 386 (S.C., 1810); State v. Aaron Caspary, 11 Rich. 356-357 (S.C., 1858); Howard v. The Overseers of the Poor, &c., 1 Rand. 464-465 (Va., 1823); Willard v. Overseers of the Poor of Wood County, 9 Gratt. 139-142 (Va., 1852).
from the churchwardens to elected overseers of the poor. Consolidated into one poor law in 1819, Virginians possessed a solid statutory base for indoor relief by the early nineteenth century. During the 1840s and 1850s the Virginia legislature allowed several localities to erect workhouses, but they were essentially non-punitive poor farms. For example, in 1844 lawmakers responded to a memorial from the citizens of York, James City, and Williamsburg requesting authorization to institute workhouses. The law provided for a poor farm with medical care and schooling for poor children. Similarly, South Carolina authorized local officials to build poorhouses in 1824. The North Carolina legislature passed numerous local poorhouse acts as well as a general poor law in 1831.  

Poorhouses being authorized, however, did not necessarily mean they were widely built or used. Outdoor relief remained prevalent. The South Carolina poor law of 1824 allowed overseers to continue to board paupers with relatives and friends. The Virginia poor laws, the governor wrote in 1824, relied almost entirely on "pecuniary aid." Paupers with homes received money or provisions, while homeowners accommodated the homeless at public expense. Poorhouses and workhouses had been tried in so few instances that the governor confessed he knew little about their operation. Some, he believed, were poor farms, while in others the poor were employed indoors. On the whole, he concluded, this work "may be

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considered rather as employment to prevent idleness, and contribute somewhat
toward the support of these people, than a well digested operative system of
employment for the poor." The president of the Richmond overseers of the poor,
Robert Greenhow, concurred, describing the city almshouse as nothing more than the
local hospital. The poorhouse of Adams County, Mississippi, served a similar
function.23

As late as the 1850s Virginia's poor were not institutionalized. Figures from
the Richmond almshouse show a low number of recipients for indoor relief. Out of
a total population of 27,463 in Henrico County, an investigator in 1854 found 135 in
the almshouse, or about 0.49 percent of the population. The highest incidence
occurred among foreign-born inmates, at 1.38 percent of the total foreign population
in the city. For whites the corresponding figure was 0.36 percent, and for free blacks,
it was 0.63 percent.24 These statistics are shadowy in their meaning. The time of

23Laws of South Carolina, 1824, 67; "Extract of a letter from the governor of
Virginia" in John Yates, Report of the Secretary of State in 1824 on the Relief and
Settlement of the Poor in The Almshouse Experience: Collected Reports ed. David
J. Rothman (New York: Arno Press, 1971). This is a reprint of Thirty-Fourth Annual
Report of the New York State Board of Charities. The page numbers are from this
last report. The citation in this note is at pp. 1102-1103; "Extract of a letter from N.
Shippard, Esq. Chamberlain of the city of Richmond," Ibid., 1104; "Extract of a Letter
from Robert Greenhow, Esq. President, &c., of the City Overseers of the Poor of
Richmond," Ibid., 1104-1107; Vogt, "Poor Relief," 192.

284-285. Everest was an Englishman who was interested in supposed racial and
ethnic roots of poverty. Apparently, he undertook the project of collecting statistics
on his own and his figures seem fairly reliable. For other statistics on poverty in
Virginia, see "Report of the Second Auditor in Relation to the Number of Poor
Children Sent to School..." in Virginia Convention, 1850-1851, Documents Containing
Statistics of Virginia (Richmond, 1851).
year for the visit is not known, but this was usually a factor in other investigations since almshouses held greater numbers during the winter. In addition, nothing is known about the circumstances of the residents, and how many of Richmond's citizens would have encountered the almshouse throughout the year. More basically, the almshouse served the sick as well as the poor. Nevertheless, these figures do show that only a miniscule portion of Richmond resided in the poorhouse at this particular point in time.

The operation of the Beckford Parish Poorhouse in Virginia illustrates the mixed functions of southern social welfare institutions, especially those in rural areas. Located in upstate Virginia, the house served as a hospital, lunatic asylum, and nursing home. The most common residents were elderly Virginians, who entered in their fifties or sixties, often being described as insane. They usually spent the rest of their lives in the house, some dying as long as twenty to thirty years after they were admitted. Apart from being a kind of nursing home, the Beckford Poorhouse also functioned as a foundling hospital, recording the births of one to four children per year in the 1820s and 1830s. Some of these children left the house with their mothers, while others were bound out by the overseers. While the overseers seem to have relieved a few adult males, they recorded no commitments to the poorhouse for vagrancy.25

The underuse of poorhouses in the South stemmed in part from the region's

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25 Beckford Parish Poorhouse Account Book, 1799-1838, Shenandoah County, Virginia, Books, 1799-1838, in the Southern Historical Collection of the Manuscripts Department, University of North Carolina, Chapel Hill.
complicated attitudes about pauperism. The local dependent poor were often seen as a part of the community and did not receive the scorn they sometimes did in the North. Although Greenhow noted that Richmond discouraged begging, he focused on the operation of assistance. He assumed it was beyond question that "the poor of every community, are as integral and component parts thereof, as the members of individual families are." It followed from this premise that "every civilized society [was] bound from the nature of its compact to offer aid and assistance to all of this description, within their bounds." Such views led some dispensers of southern poor relief to act as advocates for their charges. In Savannah, Poor Board member James Watts assured Mary Evans that he would help her get paid for her second stay in the workhouse and informed her of the proper procedures to use. Watts appears to have kept a close eye on the records, for he told her that he had "frequently wondered why you did not come forward with your account." However, a less contemptuous view toward the poor need not always have implied a more humane one. As Valentine observed, North Carolina had its paupers, many of whom were "decrepid [sic] and miserably afflicted, calling forth the sympathy of every humane, and I hope, human bosom." Yet, he confessed that many of his acquaintances were "too callous to this destitute portion of our people."²⁶

²⁶Extract of a Letter from Robert Greenhow, Esq. President, &c, of the City Overseers of the Poor of Richmond," in Yates, Report, 1104-1107 (my italics); Vogt, "Poor Relief," 192; Valentine, Diary, 1837-1855, 9: 161, April 23, 1849; James Watts to Mrs. Mary Evans, July 5, 1811, McKay-Stiles Family Papers, 1734-1915, in the Southern Historical Collection of the Manuscripts Department, University of North Carolina, Chapel Hill.
Perhaps because of this insensitivity, southerners of all classes feared poverty and viewed the poorhouse as a place to avoid at all cost. Valentine believed the local poor regarded the poorhouse as a penitentiary and "loathe it as a disgrace and infamous notoriety. The consequence is but few comparatively go there...." While some consigned themselves to public dependence, he concluded, "The paupers are too proud to go to the Poor House. Many of them rather suffer than go there." Quite early in the nineteenth century, public assistance was seen as an option of last resort for the South’s poor. When Catherine McGolnick of Savannah, Georgia, applied to have her sister relieved in the city's poorhouse in 1811, she assured authorities that she had "hitherto done what lay in my power for her but am, last necessitated to apply to the public for assistance." McGolnick’s sister was quite ill, was not receiving proper nourishment, and was finally ready to enter the house. To McGolnick, her sister’s illness was yet another crisis in life mired in poverty. Living in a house across from Savannah’s cemetery, with two small children of her own and another small sister to support, McGolnick struggled to keep the family from outright deprivation. "[I] have no other support but what I get by my industry," she wrote, "and what I am able to do is barely sufficient to keep my family from want...." Such feelings, of course, were part of the more widespread cultural fear of impoverishment in America’s fluid social structure, and these sentiments appeared in the southern middle class as well. When he contemplated his engagement and approaching marriage, North Carolina attorney David Schenck was haunted by the prevailing male middle-class fear of poverty. His law career had not yet become successful and he
worried that he could not "obtain all the luxuries and blessings" his betrothed might expect. "My pride will not submit to poverty--it would almost kill me to be unable to gratify the wishes of my wife," he confessed.27

Though middle-class professionals such as Schenck dreaded poverty and would have been loathe to accept assistance, relief was a major goal of the southern poor laws, as it was in the North. In southern cities where charity was better developed, it certainly helped destitute people who had no other recourse. Nonetheless, it also served several functions for the elite. As Barbara Bellows has argued, elite benevolence bolstered racial control by making it obvious that poor whites were the proper objects of charity. While this is certainly accurate, poor relief also strengthened class lines. In their role as public stewards, elites asserted their power as a class vis-à-vis poor whites and clarified the lines of division that Fitzhugh asserted were critical to almsgiving.28

A second aim of the traditional poor laws, labor discipline, would seem to be redundant in a slave society. Nevertheless, many southern states passed vagrancy acts that prescribed periods of forced labor longer than those in the North. However,

27Valentine, Diary, 1837-1855, 9: 161, April 23, 1849, 12: 28, May 4, 1852; Catherine E. McGolnick to Dr. Grimes, June 4, 1811, McKay-Stiles Family Papers, 1734-1915, in the Southern Historical Collection of the Manuscripts Department, University of North Carolina, Chapel Hill; David Schenck, Diary, 1835-1902 12 vols., typescript edition, in the Southern Historical Collection of the Manuscripts Department, University of North Carolina, Chapel Hill, 4:113.

28Bellows, "Tempering the Wind," 4, 29-30, 250-58. See also Ulmer, "Benevolence in Colonial Charleston," 2-3. Ulmer does not really intend to make such an argument, but her analysis points in this direction.
these laws functioned not to train a disciplined work force or even to secure an additional source of labor. Their specific purpose was usually to compel people to work for support or to make work a punishment for disreputable behavior. Apart from these precise goals, they also helped legitimate forced labor in general.

Even in Virginia, where the poor laws were fairly lax, the state's vagrancy laws called for forced labor. In the late eighteenth century, lawmakers intended to prevent vagrants from "becoming burthensome to the industrious and useful part of the community." When they clarified the provisions, legislators defined three kinds of vagrants: married men who abandoned families to the public charge, unmarried men who begged or refused to pay taxes, and keepers of gambling houses and equipment. Offenders could be hired out at the best wages obtainable, and their pay went to support the poor. The statutes of the 1780s and subsequent revisions formed the basis for the codified poor law for Virginia adopted in 1819. The 1819 poor law established a dual policy for vagrants. One section authorized overseers of the poor to remove those indigents "strolling" outside their county of residence. It also let them expel from the state anyone who had immigrated within the previous three years. A different section enabled counties to build workhouses and hire managers for them. Husbands who had abandoned their families and single men who were unemployed or who begged could be committed to labor there for three months. The 1849 Code retained the settlement and removal requirements of 1819, although it now specifically ordered overseers to remove beggars. While it mentioned workhouses in a short section, it did not elaborate. By 1860 all mention of vagrants and workhouses
had dropped from the poor law. In 1856 the legislature did sanction a punitive workhouse for the city of Richmond. The statute allowed the city council to commit "all vagrants, and idle, dissolute persons, without means of support" to the institution for up to twelve months. Vagrants could also be forced to work on roads, in quarries, or at other public works. This rather anomalous act seems to have been related to specific disturbances. In 1860 it and similar laws for Petersburg and Norfolk were incorporated into the state riot act rather than the poor law.29

Hiring out was the cure for undesirables in Missouri and Arkansas, states with nearly identical statutes. Both states' definitions included loitering or "rambling" idlers, beggars, steamboat gamblers and gambling house keepers, and husbands who abandoned their families. Minors convicted under these laws were bound out as apprentices. Offenders over twenty-one were offered at auction for six-month terms, with the proceeds to pay court costs and to support the vagrant or his family. Arkansas went one step further in situations in which a labor arrangement could not be made. In these cases, vagrants could be confined for thirty to ninety days on bread and water. St. Louis also employed a municipal vagrancy ordinance. A recent student of the law found that town fathers adjusted it to meet changing needs in the growing city. During the 1820s and 1830s police turned the law against outsiders who drifted into the town. From the 1840s through the late 1850s, however, St. Louis was a burgeoning urban hub that needed to attract new citizens. To promote expansion,

officials amended the ordinance to support mobility. Simultaneously, they narrowed its definitions to make it a crime-fighting device. Police arrested suspicious persons and those with reputations or records of criminality, especially thievery. They also imprisoned suspected felons as vagrants in cases where evidence was lacking. In the late 1850s and early 1860s city leaders broadened the definition to include all disreputable persons. In competition with Chicago as the model city in the West, St. Louis used its vagrancy ordinance to remove the human sores from its complexion.  

Kentucky enacted its vagrancy law in 1795 and included it in the code of 1834. The initial law was a response to "a great increase of idle and disorderly persons" who entered the state with other post-Revolutionary migrants. Idlers, ramblers, beggars, and gamblers, Kentucky lawmakers believed, "render[ed] themselves incapable of paying their levies when listed." To deal with those unable to supply a surety for good behavior, the legislature approved nine-month terms of servant labor for adults and apprenticeships for minors. Proceeds went to support the vagrant or his family. If no one would hire the offender, the law prescribed up to twenty-five lashes. Between 1834 and 1852 the state modified the law, raising the term to twelve months, setting the bond level at $100, and eliminating whipping.

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31Digest of the Statute Laws of Kentucky (1834), 1521-1524; Revised Statutes of Kentucky (1852), 690-692. The poor house section of the 1852 Code also mandated 12-month terms for the vagrant poor from outside the state. Ibid., 531.
During its years as a Republic, Texas also used vagrancy laws as a means of forced labor. In 1839 the Texas Congress required all justices of the peace and other civil officers to arrest "all vagrants and idle persons" in their jurisdictions and "examine into their mode of living." In cases where no "visible means can be found for the support of such individuals, or where no proper exertions are made by the party defendant to obtain an honest livelihood," officials could require thirty days of labor for a first offense and sixty for a second. A triple offender faced a year of labor or "thirty-nine lashes on his bare back."32

African-Americans living outside slavery constituted another specific target of labor control. Most states had comprehensive special codes for "free persons of color," and these often included vagrancy sections intended to constrain free blacks in labor contracts. In addition, southern legislatures passed vagrancy acts specifically aimed at free blacks. In 1820 the Virginia legislature empowered overseers of the poor to investigate free blacks and commit them to the workhouse if they had no employment. In 1859 Georgia passed a law that anticipated aspects of the post-war black codes. Free blacks living without employment could be arrested for vagrancy. A first offense meant a two-year reassignment to bondage; a second arrest meant a permanent return to slavery. In essence, these laws enacted the suggestions of pro-slavery writers about how to avoid pauperism.33 Laws against free black "vagrancy"


constructed an additional prop for the slave codes.

Coerced labor was one motive of southern vagrancy laws, and on one level it enforced the hegemony of planter dominion over larger structural work patterns. Still, labor discipline was not the main purpose of vagrancy laws in the antebellum South. After all, the question of labor discipline had been supposedly solved by slavery; only the margins needed policing. Vagrancy laws served a broader function of social control by delineating the cultural membership in the elite and asserting its claims to power. Poor whites may not have constituted a large underclass in the Old South, but they did present a general threat to the vision of a well-ordered society. Moreover, they sometimes colluded with slaves in runaway attempts and in the market for goods stolen from plantations.\textsuperscript{34} By patroling this slice of the southern social structure, elites helped affirm their ability to exercise hegemony over levels of society to which they were not intimately connected. Like their northern counterparts, these laws operated as means of regulating behavior that the respectable classes found unacceptable and of establishing the perimeters of propriety. Unlike northerners who intended to accomplish these means primarily through institutions, most southern states retained corporal punishment or other harsh sentences, at least

\textsuperscript{34}Genovese discusses "the hegemonic function of the law" in \textit{Roll, Jordan, Roll}, 25-49. On the relationship between slaves and poor whites, see Ibid, 22-23; and Fraser, "Controlling the Poor in Colonial Charles Town," 13-14. While he is primarily interested in local relief in Mississippi, Christopher Johnson also notes the role of Southern social welfare law in upholding the social order. See "Poor Relief in Antebellum Mississippi," \textit{Journal of Mississippi History} 49 (1987): 2-3.
in their statutes.\textsuperscript{35}

Southern legislators substantiated this general purpose of social control by using definitional sections to outline improper behaviors and by prescribing severe penalties for their commission. North Carolina used jail, labor, and the whip for incorrigibles. Aimed at idlers and gamblers, the law approved a ten-day sentence for the first arrest. If a second arrest occurred within twenty days, the offender was subject to a month's imprisonment, for which he had to pay all costs. If he refused or could not pay, he was bound over for trial. When convicted by "a jury of good and lawful men," the court could hire out the vagrant for up to six months. But persons "of ill fame" who could not be hired received thirty-nine lashes and their freedom.\textsuperscript{36}

Although comprehensive statutes such as North Carolina's were common, many southern vagrancy acts policed gaming specifically. Gambling played an odd role in the antebellum South. On the one hand, amateur gaming formed part of the social bond in the gentlemanly code of honor; on the other, the professional gambler faced scorn and community retribution. A South Carolina gentleman named gambling the most harmful of all vices. "Oh, it is shocking! Abominable! Damnable!," he declared. "It corrodes the heart, it destroys all the finer feelings of man."\textsuperscript{37} Southern

\textsuperscript{35}On the control of poor relief by Southern elites, see Bellows, "Tempering the Wind," 9-14, 17-19, 36, 90 and passim; Vogt, "Poor Relief," 193-198.

\textsuperscript{36}Revised Statutes of North Carolina (1837), 1:201; Compilation of the Laws of Georgia, 1810-1819 (Lamar, 1821), 642. See also Digest of the Laws of Georgia (Prince, 1837), 647; Codification of the Statute Law of Georgia (1845), 748; Code of Tennessee (1858), 359-360; Revised Code of Mississippi (1857), 628-629.

\textsuperscript{37}Quoted in Williams, Vogues in Villainy: Crime and Retribution in Ante-Bellum South Carolina, 47.
vagrancy laws embraced this disdain for making a living at betting. When North
Carolina passed a supplementary vagrancy act in 1841, it singled out people
"endeavouring to maintain themselves by gaming or other means." Offenders were
required to give security or face imprisonment for twenty days if found guilty by "a
Jury of good and lawful men." Gamblers could be convicted repeatedly under the
statute, provided the courts allowed fifty days between each sentence. The form used
by the justices of the peace in Clarke County, Georgia, to arrest David Everall for
vagrancy in June 1818 employed similar language.\(^{38}\)

Gambling as vagrancy received its most thorough examination in South
Carolina. In December 1836 South Carolina passed a new vagrancy act specifically
aimed to control gambling and prostitution in the vicinity of South Carolina College
in Columbia. In 1835 the legislature had recommended that the town of Columbia
use all existing statutes "to exterminate...bawdy houses, gambling houses, and other
nuisances, calculated to vitiate the morals, pervert the minds, and destroy the health
of the young men committed to their charge...." These existing statutes failed to clean
up the town, and in the next legislative session, South Carolina declared anyone
keeping a gambling house or brothel within ten miles of the College to be a vagrant.

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\(^{38}\)Laws of North Carolina, 1840-41, 102; Augustin S. Clayton, The Office and
Duty of Justice of the Peace... (Milledgeville, Ga.: S. Grantland, 1819), 413; Williams,
Vogues in Villainy, 47-50; Bertram Wyatt-Brown, Honor and Violence in the Old
South (New York: Oxford University Press, 1986), 131-142. In other instances, local
citizens might form a committee to police gambling. See Athens, Alabama,
Resolution on Disorderly Persons, January 31, 1852, in the Southern Historical
Collection of the Manuscripts Department, University of North Carolina, Chapel
Hill.
An arrest under the new law brought an appeal to the South Carolina Court of Errors and prompted an opinion that illuminated the act's broader purposes. Upholding the constitutionality of the new statute, Judge Baylis J. Earle argued that vagrancy in itself did not constitute "a distinct offense." Rather, vagrancy laws were "intended to afford some adequate security to the public, against the danger apprehended from the several classes of persons enumerated, all of whom, from their want of honest employment, or from their vicious pursuits, may well be considered a danger to society." With this object in mind, vagrancy proceedings were "merely inquisitorial," aiming to examine the life and livelihood of a suspect character, ascertain the likelihood of crime, and require security bonds if the person seemed to be a threat.39

In some ways, Earle's analysis pointed to the twentieth-century justification for vagrancy as a supposed benign form of crime prevention. But his opinion also drew a line between members of the public who needed "adequate security" and those who could be incarcerated because they were "vicious" and "a danger to society." Constructing the "crime" in this manner met two purposes. In the narrow sense, it allowed Earle and his colleagues to envision themselves as men who would not participate in professional gambling or other disreputable acts. On a broader level, it helped legitimate their position as purveyors of standards of respectable behavior to the remainder of South Carolina society.

A similar end was met by vagrancy laws that dealt with prostitution. For example Texas's 1857 Penal Code mentioned vagrancy only in the chapter on disorderly houses. The code defined a disorderly house as "one kept for the purpose of public prostitution, or as a common resort for prostitutes, vagabonds, and free negroes." Vagabonds, wandering and homeless men or women, became lumped in this statute with other social undesireables.⁴⁰

While often more specific than their northern cousins, these statutes still proscribed a way of life or a certain status more than they did specific acts. In the broad sense, vagrancy was not so much a crime as it was a description or an epithet, and southerners sometimes used slander and libel actions to rebuild their reputations after being labeled as vagabonds. In South Carolina, a Mr. Brown acted as Informer to get a Mr. Colson tried under the 1787 vagrancy act. After being acquitted, Colson sued Brown under a clause of the 1787 law stating that if a conviction ensued from an accusation made "through malvolence, or resentment, without reasonable cause" the informer was bound to pay the five-pound fine and face a suit for civil damages. Brown claimed that no malice had been intended, but the lower court rejected his arguments. In April 1809, however, the South Carolina Supreme Court reversed the decision on the grounds that no conviction had occurred. In 1822 the state of South Carolina indicted Michael P. Walsh on libel charges because he told an unnamed

victim: "[You are] the meanest man and the greatest rascal that I ever came across, or heard of; you are worse than the lowest of vagabonds, &c." 41

Given such meanings, vagrancy arrests became informal rituals of affirmation for middle-class and elite members of southern communities, even quite late in the antebellum period. The language that separated the respectable classes from social outcasts appeared clearly in the young David Schenck’s description of an arrest that occurred in January 1853:

The Sheriff (Lowe) was taking a young (18 yrs) vagabond to jail and he broke and run. Every boy and young man followed, and kept near him till he got near Mr. Ax'rs woods, there got horses and dogs and caught him. There was much excitement and lots of fun. It was certainly a 'rich' race. 42

The object of the chase, Martin Harriss, "excited sympathy of everyone when taken," Schenck reported. "...He was an object of pity." Harris was actually being pursued on a bastardy indictment, not one for vagrancy, so Schenck’s account is particularly interesting. A "vagabond" was seen as someone wholly other, a person whose misfortunes were at once to be pitied and enjoyed as a diversion. For a boy who was also eighteen at the time, the event helped secure Schenck’s sense of social place. The event also played a role in ensconcing Harriss's location in the suspect classes. Harriss himself seemed to perceive he had slipped across some sort of boundary, for when faced with the indictment, "His soul seemed to sink within him, and his hopes


42 Schenck, Diary, 3:8-9, January 10, 1853.
of happiness [were] forever blighted.\textsuperscript{43}

This event and Schenck's perceptions of it capture the broader significance of southern vagrancy laws. By illustrating the behaviors southern lawmakers and planter society found unacceptable, laws became a text through which elites could assert their hold on the class and power structure, all within the objective cloak of law. Prohibitions against "rambling" or "loitering" proscribed mobility at the lowest levels of society. Hard labor, whipping, or incarceration for idlers punished them for not supporting themselves or their families by what lawmakers considered "honest means." Such proscriptions defined people who did "ramble" or "loiter" as outsiders to accepted society, as practitioners of dishonesty. Gambling and prostitution sections played a similar role, enforcing the code of honor that determined the gentlemanly avenues of vice. These constructions allowed southerners to adopt the more benevolent position toward relief that the pro-slavery writers touted. Southern dispensers of charity did not face the central problem of indiscriminate almsgiving that so troubled northerners because power structures remained relatively demarcated. Their want of northern sensibilities, however, did not mean that they lacked feeling for the poor. The main difference was that southern aristocrats or middle-class parvenus used slavery and, more importantly, the legal system to buttress the dependent relationships of their society and to temper the dilemmas that beset northerners. Whatever the actual force planters and wealthy merchants wielded in the whole of southern society, they knew they controlled their slaves, and they

\textsuperscript{43}Ibid.
believed that the remainder of society was in a dependent relationship to them. With the question of dependence resolved, southern elites felt free to be charitable, at least in word if not in deed.

Regulating class tensions through legal means was also a prominent theme in southern labor contract law. For all the charges raised against northern free labor, the South possessed its share of workers outside the normal bounds of slavery. Slaves who hired their own time, free black workers, and urban artisans and mechanics created anomalies in the hegemony of the legal system of slavery. Some southern states adopted the entirety rule in use in the North for white manual laborers, but most of southern pre-war labor contract law was dominated by one particular type of litigation, those between planters and overseers. In considering the frequent conflicts between planters and overseers, southern courts constructed a system of free labor law quite different from that of the North, a legal order in which reserving the employer’s power rested on the ability to discharge rather than bind workers. In the broadest sense, like the South’s poor laws, its version of free labor law aimed to resolve through an uneasy truce the class conflicts of a biracial slave society.

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44 Of the 153 southern labor contract cases I have examined, overseers were litigants in seventy-two.

The only full-length study of overseers is William Kauffman Scarborough, The Overseer: Plantation Management in the Old South (Baton Rouge: Louisiana University Press, 1966). Scarborough contends that overseers were not the rogues often pictured in older versions of plantation life. Three classes of overseers existed: sons of planters, a small band of “floaters” and a class of semi-professional managers. An older book-length study is John Spencer Bassett, The Southern Plantation Overseer as Revealed in His Letters (Northampton Mass.: Smith College, 1925). Genovese, Roll, Jordan, Roll, 12-25 is a useful discussion of the relationship between planter and overseer.
The level of conflict that engendered these suits was plain in a complaint of a young Virginia agriculturist to the *Southern Planter*: "I am afflicted with an overseer who is one of the most faithful, industrious, obstinate, hard-headed and conceited beings that ever walked on two legs." Needing the overseer's knowledge, unable to fire him because of his "hard-fisted honesty," the planter declared himself to be "the veriest slave on the plantation; for I have no will of my own." In their response, the editors of the *Planter* voiced the solution most southern agricultural reformers wanted: "discharge your overseer and attend to your business yourself."  

For planters this solution was not as simple as it sounded, for common law contract rules set the terms under which conflicts between overseers and planters could be settled. Consequently, southern courts were asked repeatedly to resolve friction between these two classes. As South Carolina Justice David Johnson noted in 1834, "Collisions frequently arise out of the relations of overseer and employer, and they are so varied in circumstance as to render it impossible to lay down a rule that will embrace them all." In constructing doctrines to arbitrate such disputes, southern jurists started with the same English precedents used by their northern counterparts. While most northern courts upheld the sanctity of contract by quashing attempts to apportion wages, southern courts created a much more permissive system of labor contracts. Nevertheless, like northern doctrines, these rules resulted from the needs of the producers. Owners depended on overseers to make the crop and care

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for their property in slaves. Owners required the flexibility to dispose of overseers who threatened the stability of the plantation and endangered agricultural success. Therefore, southern courts created an agricultural contract system that in many ways was the opposite of the northern model, a system in which agricultural stability relied on the ability to violate labor agreements.

Contracts under which overseers worked varied widely. Some employers agreed to give their overseers from one-twentieth to one-fourth of the proceeds of the farm in lieu of wages. Others paid a cash wage plus provisions for the employee, his family, and his stock. Most offered wages of $150 to $500, payable at the end of the year. North Carolina planter Robert A. Jones's dealings with his overseers illustrate the ways in which wage bargains in the early part of the nineteenth century used all of these methods. Jones paid cash wages, but at the same time provided overseers with supplies for which they settled at the end of the year. In 1818, he paid P. Skiles a total of $306.50, of which $285 was a cash settlement. The remainder included a cash advance of $15 earlier in the year, $5.25 for a coffin and some geese.

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47 For examples of share contracts, see Cochran v. Tatum, 19 Ky. 405 (1826); Anderson v. Rice, adm’x, 20 Ala. 240 (1852); Lambert v. King, 12 La. Ann. 662 (1856); Steed v. McRae, 18 N.C. 57 (1836); Dillard v. Wallace, 1 McMull. 482 (S.C., 1837); Graham v. Lewis, 2 Hill 478 (S.C., 1834); Hassell v. Nutt, 14 Tex. 260 (1855); and Rogers v. Parham, 8 Ga. 191 (1850). See also, Southern Planter, 1 (April 1841): 58; Southern Planter, 3 (October 1843): 234. For contracts with supply clauses, see Seal v. Earwin, 2 Mart. (N.S.) 245 (La., 1824); Walworth v. Pool, 9 Ark. 395 (1849); Nolan v. Danks, 1 Rob. 332 (La., 1842); and Coursey v. Covington, 5 H.&J. 46 (Md., 1820). For examples of contracts with wages only, see Wright v. Falkner, 37 Ala. 274 (1861); Johnson v. Gorham, 30 Ga. 613 (1860); Anderson v. Wales, 22 Ky. 324 (1827); McDaniel v. Parks, 19 Ark. 673 (1858); Hays v. Marsh, 11 La. 369 (1837); and Hendrickson v. Anderson, 50 N.C. 246 (1858).
and 25 cents for "a quart of rum for Molly," presumably Skiles's wife who seems to have lost a child during the year (hence the coffin). When Skiles left the next year, Jones employed Micajah Griffith for $250 per year, and by the time Griffith died in October 1823, he had accumulated numerous debts with Jones for small items. Jones's agreements with overseers at his two plantations at New Hope and Indian River, North Carolina, in the middle 1820s corresponded with these earlier agreements. Their wages ranged between $150 and $250 per year plus in-kind allowances.48

Once employed, overseers lived under lengthy sets of rules governing their behavior and that of slaves. Such regulations covered everything from how, when, and what to plant to the specific dictates for the discipline of slaves. A Sumter County, Alabama planter ordered his overseer to "treat the slaves placed under his control with humanity." In nearby Lowndes County, John Murray included a similar clause and added injunctions that William B. Whitely was not to leave the plantation and was "never to drink ardent spirits to intoxication, while in my employ...." Other rules were more mundane. In a somewhat ironic reference to the need for fertilizer, a Savannah, Georgia, planter ordered his overseer to "make manure of everything you can."49

48Robert A. Jones Account Book, 1817-1828, in the Southern Historical Collection of the Manuscripts Department, the University of North Carolina, Chapel Hill, 129-30, 309-10, 341-42, 385-386.

Improving the management and productivity of the plantation often appeared explicitly in overseers’ contracts. Some planters offered productivity bonuses to their managers. In Mississippi, Robert Sale contracted with Harden Hariston for $650 plus a $25 bonus if he could make 200 bales of cotton weighing 500 pounds per bale. Planters also reserved the right to discharge their overseers at will. For example, a South Carolina planter stipulated that he could discharge his overseer for good cause and be liable for only the time served rather than for the whole salary. In the Red River cotton district of Arkansas, it was "invariably understood" that planters could discharge an overseer and pay him for his services and that "the overseers always reserved to themselves the right to quit at any time upon becoming dissatisfied, and to settle and receive their wages in proportion to the time they had served." A contract between Jesse Whatley, overseer, and George Jones, planter, provided for payment of $400 for the year or "thirty three dollars and thirty three cents a month if the said George Jones should wish to terminate this agreement before the end of the aforesaid year." When John Ball of South Carolina fired John E. Morton after


a month, he considered the overseer's poverty and "allowed him 1/4 yrs. wages which was more than he deserved." At inception, overseers' contracts accepted easy dissolution and apportionment of wages.

If at-will clauses were not present and overseers abandoned their arrangements, southern jurists enforced the entirety rule with a zeal worthy of their northern brethren. Pettigrew v. Bishop, an 1842 Alabama decision, typified jurists' reactions to abandonment. Pettigrew had contracted with Bishop to manage twelve months for $275 plus twenty bushels of corn. He started on January 1, 1839, but left the job in November. The jury in the lower court awarded him his wages when he sued for recovery, but the state supreme court reversed the ruling. The Louisiana court considered contract abandonment in Hays v. Marsh and pointed out directly the threat to the plantation. Hays was an overseer on Marsh's sugar plantation and left before completing the harvest. As a result, Marsh lost forty hogsheads of sugar worth $2,500. The court denied Hays his wages, noting the need for stability. "The agricultural interests of the country are mainly under the control of this description of men [overseers]," the opinion declared, "and if they could abandon their employers in the time of greatest need...it is plain that great and remediless mischief would

ensue.\textsuperscript{52}

The Louisiana court realized that sugar cultivation required constant attention, and abandonment near harvest time could not be tolerated. As such its decision echoed the arguments of northern jurists who enforced entirety of contract harshly against agricultural workers who absconded during harvest. Agricultural production necessitated intensive labor and intensive labor management at certain seasons, and courts in both the North and South were not prepared to allow agricultural workers to influence work arrangements to any great extent.

Most cases involving overseers, however, were not suits for an apportionment of wages after abandonment of a work contract. Rather, they were actions in which overseers sought pay after being dismissed. Under such circumstances, both the common law entirety rule and the Civil Code in Louisiana required payment of the entire year's wages. Envisioned as supplying equity in contract arrangements, this side of entirety left southern planters in a predicament. If they fired an incompetent overseer in, say, March, they might be liable to pay for the remainder of the year. On the other hand, if they avoided this unpalatable outcome by keeping him on, they risked mismanagement of their farms and slaves.

Trying to resolve this dilemma, southern courts established a distinctive form of labor contract law that upheld and even encouraged the violability of contracts

\textsuperscript{52}Pettigrew v. Bishop, 3 Ala. 440 (1842); Hays v. Marsh, 11 La. 369 (1837). See also Roberts v. Brownrigg, 9 Ala. 106 (1846) and Whitley v. Murray, 34 Ala. 155 (1859). In the few cases involving common laborers, Southern courts usually upheld entirety as strongly as their Northern counterparts. For example, see Wright v. Turner, 1 Stew. 35 (Alabama, 1827).
between planters and overseers. The leading case and impetus for change in other states was *Byrd v. Boyd*, a decision handed down by the South Carolina court in 1825. In an opinion upholding recovery of wages by an overseer who had been dismissed, Justice Johnson noted that "the relation of employer and overseer is one which the state of the country renders almost indispensably necessary to every planter and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject." Johnson was sure that overseers could not recover when they abandoned without cause, and that masters could not prevent recovery when they discharged without cause. There was, however, "a third class of cases" in which "the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justified...." In these cases, Johnson held, overseers could recover for the time they had served. 53

By 1860 most other southern states had adopted *Byrd* specifically or had devised a similar rule. Adopting the South Carolina court's reasoning, Mississippi Justice J.S.B. Thacher noted that "the strict rule of law, governing contracts, has been much relaxed in this country in relation to those made between employer and overseer." The Tennessee Supreme Court also recognized *Byrd* in an 1853 case. William T. Jones had been fired after eight months service. The court was quick to

53*Byrd v. Boyd*, 4 McCord 246 (S.C., 1827). It is unclear when the case was actually decided. It appears that it was in 1825. However, it was lost for a time and not reported until 1827. The court used this rule in several subsequent cases: *McClure v. Pyatt* 4 McCord 26 (1826), *Eaken v. Harrison*, 4 McCord 249 (1827), *Saunders v. Anderson*, 2 Hill 486 (1834), *Suber v. Vanlew*, 2 Speer 126 (1843).
hold that "abuse and cruelty toward the servants, and of neglect and mismanagement of the farm and stock..." constituted sufficient cause for firing him. And while the high court would not allow the lower court jury's $275 award for Jones's whole year's wages, it did sanction recovery for the time actually served. "This liberal rule has been adopted in South Carolina, and we think it just and reasonable," the court declared. Courts in Alabama, Arkansas, North Carolina, Texas, and Louisiana took similar courses.\footnote{Hariston v. Sale, 14 Miss. 634-640 (1846); affirmed in Robinson v. Sanders, 24 Miss. 391 (1852); Jones v. Jones, 32 Tenn. 605-609 (1853); Steed v. McRae, 18 N.C. 435 (1836); Meade v. Rutledge, 11 Tex. 50 (1853). For the doctrinal development in Louisiana, see Nolan v. Danks 1 Rob. 333 (La., 1842); Youngblood v. Dodd, 2 La. Ann. 187 (1847); Lambert v. King, 12 La. Ann. 662 (1856); Kessee v. Mayfield, 14 La. Ann. Reports 90 (1859). For Alabama, see Martin v. Everett, 11 Ala. 375 (1847). Arkansas formed a similar rule, but it was not based on Byrd v. Boyd. See McDaniel v. Parks, 19 Ark. 671 (1858). South Carolina also passed an act in 1747 to regulate overseer's contracts, but it was not enforced. Dillard v. Wallace, 1 McMul. 484 (S.C., 1837).}

Knowledge of these rules apparently became widespread among overseers. In 1858 Robert P. Ford left Catherine P. Danks's Louisiana plantation, but he was subsequently "advised by others that it would be better to return and be discharged...."\footnote{Ford v. Danks, 16 La. Ann. 119 (1861).} If overseers possessed information about their legal remedies, the key for planters in avoiding payment of full wages was inducing the court to recognize a sufficient cause for the dismissal. As a result, civil actions for overseers' wages became investigations of the employment relation and its conflicts.

One great source of friction and a common excuse for termination was
disputes about supervision and treatment of slaves. Employers such as Plowden C.J. Weston, a South Carolina rice planter, made the duty to care for their chattels unmistakably clear in contracts. "The Proprietor, in the first place," Weston emphasized, "wishes the Overseer MOST DISTINCTLY to understand that his first object is to be, under all circumstances, the care and well being of the negroes." In order to discover any maltreatment, many masters encouraged slaves to report complaints about overseers. J.W. Fowler of Coahoma County, Mississippi permitted slaves to bring him complaints about the overseer and considered genuine reports of cruelty to be "good and sufficient cause for the immediate discharge of the Overseer."  

Based on such reports or on first-hand information, planters often fired overseers for mismanagement or mistreatment of their slave property, and the courts upheld their actions. One common form of mismanagement was simply being absent from the plantation. In North Carolina, for instance, Gray Armstrong found that his overseer, John Fly, was

...very often seen at grog shops, and at a bowling alley at the depot, in the working hours of the day and on sundays, during the three months while he had charge on the farms...and was at one time observed playing at cards at about 10 o'clock in the morning, of a week day. Frequently during this time, he was proven to be excited with spirits, but not drunk.  

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Fly claimed his activities did not cause "any special injury" to Armstrong, but the North Carolina court disagreed. Armstrong, the Court ruled, "was not bound to wait until his crops were ruined before he removed the cause of the impending evil."58

More common than disregard for the plantation were complaints that overseers accumulated too much control to themselves. Many overseers, as William Scarborough has pointed out, saw themselves as semi-professionals. As such, they wanted more influence in plantation decision-making than planters were willing to concede. Texas overseer Thomas P. Rutledge quit his employers in 1847 because they would not allow him to whip slaves, while Mississippi cotton planter Theophilus Prichard quarrelled with Richard Martin in 1851 over which tasks should be assigned to which slaves. A Georgia overseer refused to commence work under his contract unless the planter "would give up to him the plantation, negroes, and stock to his entire and exclusive control and management...." Generally, courts refused to countenance such assertions of worker control. "An overseer contracts to do everything according to the means furnished by his employer, which a prudent and economical man would do in attending to his own business," a Mississippi judge intoned in 1854. North Carolina was even more direct. "It cannot for a moment be admitted," Justice William H. Battle wrote in 1859, "than an overseer has a right to control of the slaves under his charge, against the known wishes, much less the positive commands, of the owner." The Louisiana court considered refusal by the

58Ibid, 342. For other complaints about absence, see McCracken v. Hair, 2 Speers 258 (S.C., 1843); Martin v. Everett, 11 Ala. 375 (1847). The latter case also involved cruelty to slaves.
overseer to follow the planter’s explicit orders on the method of whipping slaves to be "sufficient cause" for discharging him.\(^{59}\)

The most prevalent justification for discharge was cruelty and injury to slaves. Sometimes such charges were brought in conjunction with allegations of sexual impropriety. South Carolina planter M.D.C. Cane claimed that Samuel E. Dwyer’s "conduct with the women of the plantation was grossly and openly immoral."\(^{60}\) More often owners simply alleged injury to their chattels. While courts did not construe threats of violence to slaves as grounds for discharge, actual harm usually justified an end to the contract. In 1838 Dabney Garth, the overseer on Bird Posey’s Missouri farm, beat a slave to death with a handspike. The Missouri Supreme Court held that Posey was justified in disposing of Garth. "He not only had a right to discharge him," Justice William Scott declared, "but it was his duty to do it." In 1848 the Louisiana Court examined a case in which an overseer’s treatment of a slave had been "of a

\(^{59}\)Meade v. Rutledge, 11 Tex. 50 (1853); Prichard v. Martin, 27 Miss. 308 (1854); Johnson v. Gorman, 30 Ga. 613 (1860); Harper v. Ray, 27 Miss. 623 (1854); Lane v. Phillips, 51 N.C. 443 (1859); Kessee v. Mayfield, 14 La. Ann. 90-91 (1859); Scarborough, Overseer, passim. In the last case, the planter wanted the black drivers or other slaves to perform the task, but the overseer flogged the slaves himself. See also Dillard v. Wallace, 1 McMul. 480 (S.C., 1837); and Saunders v. Anderson, 2 Hill 486 (S.C., 1834).


\(^{60}\)Dwyer v. Cane, 6 La. Ann. 707 (1851). For other cases involving allegations of sexual misconduct, see Fowler v. Waller, 25 Tex. 697 (1860); and Suber v. Vanlew, 2 Speers 126 (S.C., 1843).
most revolting character," held that the slave codes governing use of violence by masters applied to overseers, and denied recovery of wages. In 1855 the same court considered the gruesome case of a runaway slave named Jim Crack who had been beaten to death with a whip and a handsaw by overseer W.G. Kennedy. Trying to achieve a zero balance in order not to sanction the overseer's action for his earnings, the court allowed the planter's counterclaim for damages to offset his employee's claim for wages.61

Mistreatment of slaves and mismanagement of the plantation were the most common reasons for firing an overseer, but numerous dismissals stemmed from a more general class conflict between southern planters and their hired managers. Many planters agreed with the Alabaman who wrote "the great mass of overseers are totally unqualified" to manage slaves. Overseers fought back against these charges. One complained bitterly that he and his fellows were expected to manage plantations and slaves "for wages scarcely if at all in advance of that given to an Irish ditcher." Another suggested sarcastically that "the wise and good show some charity, and instruct and pull us up out of the mire and dirt, rather than getting on our shoulders, and bidding us GOD speed."62


62Harris S. Evans, "Rules for the Government of the Negroes, Plantation &c. at Float-Swamp, Wilcox County South Alabama," Southern Agriculturist 5 (May 1832): 231-234, in Advice Among Masters: The Ideal in Slave Management in the Old
With these tensions in the background, disagreements over management of the plantation often became contests about personal honor that ended in violence between employer and employee. This incipient class conflict came before the courts when owners or overseers tried to use personal disputes to excuse breaches of contract. In Byrd v. Boyd, the conflict involved southern constructions of class, gender, and honor. The overseer had "managed the crop well, but in July he made use of abusive language to the [planter's] daughter for which he was turned away."

In another South Carolina litigation, Henry Suber claimed he left H.D. Vanlew because a slave woman had complained that he "was too familiar with her" to Vanlew's wife, who had believed the allegation. Suber told the court that "he felt he was above any such thing." A Louisiana overseer added a suit for slander to his claim for wages when his employer accused him of stealing, and a Texas manager claimed $500 damages for "injury to his reputation as an overseer."

Such disputes grew out of a combination of class tension, the honor ethic, and


racial ideology that made overseers unwilling to be treated as servants. For example, Richard Martin explained (and the Mississippi court accepted) that while he would be glad to do his duty, he "would not worship" his employer. At Darlington, South Carolina, Caleb Boone had a similar but more violent reaction to his employer's aristocratic pretensions. Boone believed that John Lyde "wanted him to knuckle to him too much," and when Lyde tried to fire him, the overseer "got into a great rage and got a rail to strike Lyde." Boone's confrontation with Lyde did not produce actual violence, but other conflicts did. Near Macon, Georgia, Benjamin Stiles ambushed his employer, Simeon Henderson, and "brutally beat him with the barrel of his gun...." Justice Eugenius A. Nisbet deemed this act a breach of contract and "incompatible with the peaceful exercise of all the rights of dominion over his property on the part of the employed...." Nevertheless, the Georgia court as well as others allowed apportionment of contracts in such situations. 64

These conflicts centered on a fundamental disagreement about the distribution of power in the employment relation. Planters and agricultural writers believed contracts established the undisputed dominance of owners. "Subordination to the master is the first of an overseer's duties," the editors of the Southern Planter asserted bluntly. An overseer must be unfailingly loyal. "Of his own free will he has sold them [sic] to [his employer] for one year, and as an honest man he must stand by his bargain." While the journal's editors framed the terms of power within a

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mixture of the lexicons of slavery and capitalist contracts, another contributor placed them in gender discourse. To advance the interests of his employer, the writer noted, an overseer "has one of the requisites of a good wife, 'a keeper of the home....'" Some overseers, at least, recognized such assertions of power and refused to accept them. In regard to planter's unwillingness to contract early for the next year, one overseer noted, "I cannot see what Mr. Farmer wants, unless it is to put the overseer off until the last hour of the day, and then he will have him in his power, and say you may take this, or that, and let it alone."  

While most of the events leading to discharging an overseer resulted from the nature of slavery or from the class tensions and code of honor it produced, a few cases resulted more directly from the exigencies of the market. In considering such actions, some justices recognized a additional role for the apportionment of contracts. In 1849 an Arkansas judge held that instead of recovering their whole wages, overseers could recoup only the actual loss or injury they had sustained. If such a rule were not adopted, he believed, "extreme injustice" would befall planters who found themselves unable to retain an employee because of "events that could not have been foreseen and were beyond their control...." A Texas jurist also justified recovery for time served by the vagaries of the market. "The planter might, in the course of the year, remove elsewhere, or his plantation might be sold for debts," he noted.

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"[W]ould there be any justice in an overseers' exacting compensation for the whole year?"66

While these two judges focused solely on planters' needs as capitalists, such candid recognitions of market forces were in the minority. Insofar as it pertained to overseers, southern labor contract law was an expression of capitalism only peripherally. Instead of upholding the sanctity of contracts like their northern counterparts, many southern courts encouraged violability by expanding grounds for discharge and allowing overseers to collect for the time served. Such practices grew out of the class relationship between planter and overseer, the needs of staple agriculture, and, most of all, the peculiarities of slavery. The high level of conflict between owners and managers meant that disputes occurred almost inevitably. Jurists acknowledged the "collisions" between these two classes and relaxed the entirety rule for discharge to fit the prevailing practice of open contracts. Plantation agriculture fostered this course. The planter required an overseer who would produce crops and maintain stability and good health among the owner's valued slave property. If the overseer failed, he must be dismissed immediately or crops and slaves--all the owner's property--might be lost.

By the time of the Civil War, labor contract law had diverged along sectional paths. In the South as in the North, differing methods of agriculture and industry underlay different forms of contract law. As such, contractual relations in labor resulted not from undifferentiated capitalism itself but from the specific needs of its

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many forms of production. For southerners, control of free labor rested ultimately with the planter-merchant elite. To maintain control, they needed the ability to dismiss workers, especially overseers, at will and not face legal consequences. In contrast, northerners had come to see the sanctity of contract as essential to labor discipline, especially in agriculture.

Just as southern and northern labor contract law diverged, so too did the two regions' poor and vagrant laws, but more subtly. Ideologically, southerners did not exhibit the extreme contempt for paupers and vagrants common in the North. With slavery to institutionalize the dependence of the very poor, southern elites believed they could be more lenient toward destitute whites. Nevertheless, they used vagrancy laws to help demarcate cultural membership in the respectable classes and to control behavior they found unacceptable.

In pursuing such a goal, southern elites were not as far from their northern counterparts as they might have appeared. Northern vagrancy laws had also evolved into one means for the respectable classes to assert their legitimacy. Congressmen,

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67 This point affirms the conclusions of Hall and Ely about the relationship between modes of production and regional distinctiveness in law. See Hall and Ely, "South and the Constitution," 4, 7. It also supports Lawrence Friedman's suggestion that looking closely at Southern legal history often complicates theories of legal, social, and economic change that are based on research primarily in northeastern sources. Lawrence Friedman, "The Law Between the States: Some Thoughts on Southern Legal History" in Ely and Bodenhamer, Ambivalent Legacy, 43. This latter argument is especially relevant with regard to the relationship between the law and capitalism. Southern courts started with the same English doctrines but derived a considerably different law of contracts. Yet they did so for essentially the same "capitalist" purpose that Northern courts pursued in setting up the entirety doctrine: discipline of non-slave workers.
missionaries, Union army officers and others who would be active in the post-emancipation South had imbibed these ideas and the legal rules that embodied them. For them, erecting free labor society on the ruins of slavery meant establishing the northern system of labor contract and vagrant laws. In doing so, they would unwittingly aid southern elites in reestablishing labor control and would engender charges of reviving slavery.
CHAPTER 4

"THIS UNIVERSAL LAW OF LABOR":
VAGRANCY, CONTRACT, AND THE MEANING
OF EMANCIPATION, 1863-1865

When Carl Shurz grappled with how the Union might respond to the changes wrought by the Civil War and emancipation, he had a broad vision. "[T]he whole organism of southern society," the German-born Radical Republican wrote in late 1865, "must be reconstructed, or rather constructed anew to bring it in harmony with the rest of American society." By envisioning social reconstruction, Shurz captured what Union officials, politicians in Washington, white southerners, and freed slaves had been pursuing for more than three years. For the former two groups, remaking the South had already proved to be a daunting task, as they uncovered competing models for what distinguished "the rest of American society." As northerners tried to implement their divergent ideas of freedom, they clashed with each other as nearly as often as they did with southerners. When Major General Nathaniel P. Banks set up labor regulations in Louisiana in 1863, for instance, the New York Principia labeled them the "Governmental Establishment of Slavery in New Orleans."2

Banks's labor rules provoked such condemnation because the relationship between work discipline and the law was central to the meaning of emancipation. This question would play a major part in wartime experiments with free labor across

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the South, but its salience was nowhere more apparent than in Union-occupied Louisiana. Consequently, radical papers like the Principia watched the army's program carefully and censured it often. In evaluating labor law in the wartime South, twentieth century historians have often followed the lead of these publications. For these scholars, the labor system resulted from Lincoln's need to conciliate Free State sugar and cotton planters; and the wartime rules set up in Louisiana prefigured the labor arrangements of Bureau of Freedmen, Refugees and Abandoned Lands. While much evidence exists to support this view, historians of emancipation now

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realize that labor arrangements in the South during and after the war were more complicated than this story indicates. Planters and African-Americans pursued their own agendas. Nevertheless, Union army officers, Freedmen's Bureau officials, and the Republicans in Congress who passed the Thirteenth Amendment also groped toward a new forms of work discipline. In doing so, they drew heavily on free labor ideology, and they set limits within which labor in the post-war South would be organized.\footnote{The best examination of free labor ideology and the conditions of labor in the post-war South is in the work of the Freedmen and Southern Society Project of the University of Maryland. For a short overview, see Ira Berlin et al., "The Terrain of Freedom: The Struggle Over the Meaning of Free Labor in the U.S. South," \textit{History Workshop} 22 (Autumn 1986): 109; and especially Berlin, \textit{Wartime Genesis}, 2-8 and passim. The FSSP is especially good at noting the influence of Northern social welfare concepts on Union policy, though they do not mean vagrancy in particular, Ibid., 15-16, 29-30. The importance of free labor ideology is, of course, a main point of Foner in \textit{Reconstruction}, esp. 54-60. In this work, Foner still adopts much of the previous point of view. Moreover, as noted in the introduction, Foner and others see labor law as anomalous to free labor ideology.}

As important as abstract elements of free labor ideology were in determining the outcome of emancipation, more important were legal precepts received from the prewar North. Antebellum labor law offered officials in the South and in Washington both general assumptions regarding unemployed, unskilled laborers and specific legal rules with which to discipline their lives and labor. The very existence of these rules predisposed many northerners to desire a system of labor (a set of principles enforced by courts) instead of letting the market regulate conditions. Moreover, emancipation forced northerners to connect explicitly elements of criminal and civil law that had previously remained detached. In itself, this linkage caused a great deal
of criticism. It revealed relationships between law and labor that had not been apparent before, relationships that many northerners did not care to discuss openly. The systems of labor that Banks and others promulgated were also problematic because antebellum law was not cohesive. By 1860 northern (and southern) courts and legislatures had developed many options. Radical abolitionists and African-American groups often voiced these alternative views, but even they sometimes reverted to dominant themes of legal and social discourse.

Banks was not the first Union representative to regulate labor in Louisiana. After occupation of New Orleans and surrounding areas by forces under General Benjamin Butler, army officers searched for ways to organize labor and poor relief. Butler inaugurated a mass program of public works for New Orleans, but his subalterns also influenced the outcome of labor for African-Americans in the process of emancipation. Slaves fleeing plantations formed "contraband colonies" such as Camp Parapet north of the city. There, Lieutenant George H. Hanks, who would later become the first superintendent of the Bureau of Negro Labor, required work in return for support. Hanks’s actions recalled the work requirements of the northern poor law system. Another officer, General Thomas W. Sherman, forbade occupants of the colonies to "stroll away," borrowing directly the language of vagrancy laws. In October 1862 Butler appointed a northern civilian to oversee the sugar harvest on abandoned estates and then met with planters from St. Bernard and Plaquemine parishes to organize plantation work. Butler promised these Unionists that if they paid wages and ended corporal punishment, the army would assist them in enforcing
labor. November brought more clarification as Butler set up a three-member Sequestration Commission to convey the previous agreement to other parishes. Butler and his subordinates had sketched a new labor law for the state, but it remained only in the formative stages when the general's controversial actions in other areas of administration prompted his removal in December 1862. For the most part, any official in Butler's labor and welfare system had been no more than overseer of the poor and local constable rolled into one. Still, Butler's tenure initiated the army's role in securing work discipline, a part taken up with alacrity by Butler's replacement.

Nathaniel Prentiss Banks was a nearly perfect embodiment of northern legal and social theory. Having started life as an industrial operative in Waltham, Massachusetts, he benefitted from an unlikely rags-to-riches story. Dubbing himself the "Bobbin Boy," Banks used his rise from the working class to political advantage, serving as Speaker of the U.S. House and as Republican Governor of Massachusetts before the Civil War. While he opposed slavery, Banks was a moderate Republican, alienating Massachusetts radicals, who labeled him a political "trimmer." A friend of Lincoln as well as Secretary of State William Seward, Banks commanded an army against "Stonewall" Jackson in the Shenandoah Valley campaign and carried out a policy of conciliation there. On December 17, 1862, Banks relieved Butler, again

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6Berlin, Wartime Genesis, 349-354. For other, more complete treatments of the Butler's labor policies, see Gertis, Contraband to Freedmen, 65-73; Ripley, Slaves and Freedmen, 25-45; Messner, Freedmen, 32-43.
believing he had come to make peace with Union loyalists.7

After the harsher rule of Butler, Louisianans expected Banks to be less severe. "It is supposed that Gen. Banks intends to pursue a liberal course here," the New Orleans Picayune assured its readers shortly after he arrived. In his initial actions, the General did not disappoint the local citizens. "The war is not being waged by the Government for the overthrow of slavery," Banks declared in his first official proclamation. Yet he believed that as a work of Providence, the war was ending slavery in a way that even abolitionists could not have foreseen. Banks remained unclear about the status of slaves in Louisiana, part of which was under Union control and part of which was not. It seemed at the time that parts of the state would be exempt when the Emancipation Proclamation became official on January 1, 1863. Consequently, Banks advised slaves "to remain upon their plantations until their privileges shall have been definitely established." Slaves could "rest assured that whatever benefit the Government intends will be secured them," but he warned them not to take the law into their own hands. At the same time, he promised anxious planters that "no encouragement will be given to laborers to desert their employers," yet he went on to say that "no authority exists to compel them to return." For the time being, he urged planters to devise a system whereby some "equitable portion" of the proceeds from coming year's crops could be "set apart and reserved for the

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support and compensation for labor.\textsuperscript{8}

While the status of African-American laborers remained unclear into January 1863, officials in Banks's army, with or without his permission, took steps that made the New Orleans newspapers praise him even more. On January 21 acting Chief of Police Colonel J.H. French ordered his lieutenant to arrest all African-Americans found without a pass after 8:30 in the evening. Military authorities detained between three hundred and four hundred blacks in the streets of New Orleans that night. The incensed free black community of the city then petitioned Banks for redress, but it is unclear what became of their pleas. When an abolitionist visiting New Orleans tried to free one of the arrested, the army's provost marshal general told him that the woman had been arrested "to prevent her from being a vagrant about the streets. It is perfectly proper." This seemed odd to the abolitionist, who wrote to a friend that most of the people likely to become public charges in New Orleans were white. So he pressed the case further. The provost marshal then threatened him with arrest as well. He appealed to a provost court judge, who directed him to Banks. Saying he had no knowledge of the order, the general sent the man back to Clark. The abolitionist left the city with the woman still incarcerated.\textsuperscript{9}


\textsuperscript{9}New Orleans Picayune, January 22, 1863; National Anti-Slavery Standard, February 21, 1863; Liberator, March 6, 1863. Although William Lloyd Garrison later approved of Banks's course, he commented that the arrests showed that "the 'iron hand' of military rule is laid almost as tyrannically upon the victimized colored
While this incident rightly supplied northern critics with support for their charges of tyranny, it also revealed the extent to which concerns about vagrancy pervaded Banks's developing labor policy. On January 29, 1863, his birthday, the general issued orders explaining the Emancipation Proclamation and establishing a labor system. These rules, the basis for Union army policy in Louisiana for the next three years, rested firmly on northern pre-war assumptions about the relationship between labor and poverty. Banks proclaimed that "the public interest peremptorily demands that all persons without means of support be required to maintain themselves by their labor. Negroes are not exempt from these laws." African-Americans who left their employers would be compelled to labor on public works for the support of themselves and their families. "Under no circumstances whatever" would blacks be "maintained in idleness, or allowed to wander through the parishes and cities of the State without employment. Vagrancy and crime will be suppressed by enforced and constant occupation and employment." To institute actual legal relationships of labor, Banks had Butler's Sequestration Commission meet with planters and others to arrange a yearly program of labor that would provide fixed wages or shares as compensation, would ensure for proper treatment, and would secure provision of food, clothing and medical care. Upon reaching such an agreement, the army would enforce "all the conditions of continuous and faithful service, respectful deportment, correct discipline and perfect subordination." Payment
of wages rested on a lien against the crops by the laborer. Banks admitted that this was not the best system, but he declared that it was the only "practicable" arrangement and predicted that under this "voluntary system of labor" Louisiana would increase its production threefold.\textsuperscript{10}

Early in February, Banks and the Sequestration Commission met with planters at the St. Charles Hotel in New Orleans. After negotiations, Colonel E.G. Beckwith, president of the commission, issued an order setting monthly wages at $3 for mechanics, sugar-makers, and other skilled laborers, $2 for able-bodied male field-hands, and $1 for able-bodied females. Contracts for shares were fixed at three, two, and one for the previous categories. Planters were to provide food, clothing and education. The status of ex-slaves under these agreements was far from clear, for the commission stipulated that planters did not give up their property rights in slaves by signing them. Moreover, these "contracts" hardly constituted free labor even under the most conservative of northern definitions because workers had not been a part of the wage bargain. Still, the commission was not in the business of reinforcing plantation slavery; instead, they intended to enforce work generally. Beckwith closed the order with another warning about vagrancy: "All negroes not otherwise employed will be required to labor on the public works, and no person capable of labor will be supported at the public expense in idleness." The planters present assented to these terms, though, the New York Tribune's correspondent reported, they "made the best of what they consider[ed] a compulsory bargain." In the coming weeks, planters

\textsuperscript{10}OR, XV: 667.
expressed their dissatisfaction, especially about their decrease in personal power. Freedpeople also hated the settlement, in particular the vagrancy section's restriction of their freedom of movement.\footnote{New York Tribune, February 18, 1863. Berlin, Wartime Genesis, 355-56. The FSSP argues that the vagrancy section "bound [ex-slaves] to a given plantation for an entire year, [and] violated their conviction that freedom conferred the right to come and go as they pleased." If viewed out of the context of pre-war law, this certainly seems to be the intent, but federal officials were more interested in enforcing work discipline than in enforcing plantation discipline. This distinction was something that none of the parties involved ever grasped fully.}

As the justification for the labor system, Banks used the terminology employed by poor law reformers. Vagrancy meant unemployed people wandering about or becoming a financial burden upon the government. Promulgating this order, Banks applied a language developed as a projection of class power under very different circumstances to a situation where the interested parties operated from a language of race instead. Although his system separated blacks as a group for almost compulsory labor, he reached that point from assumptions about the nature of unemployed, unskilled workers rather than from those about slave labor. Reliance on poor law concepts appeared in the way in which Banks and the Sequestration Commission carried out their threat of forcing vagrants to labor for the government. The commission acquired control of several abandoned plantations from the Quartermaster's Department. These plantations, the so-called "home colonies" which lasted until 1866, operated as "a sort of general poor farm," Freedmen's Bureau chief Oliver Otis Howard later wrote. They also served as a labor bureau after the organization of the Bureau of Negro Labor under Hanks in February 1862. Like
antebellum local governments who auctioned off paupers, the home colonies funneled workers to private plantations as well as employing them on government lands.\textsuperscript{12}

While Banks and many of his later supporters acted from these predilections, former slaveholders saw freedpeople in purely racial terms and desired a much stronger apparatus of racial control. After the January 29 orders, the \textit{New Orleans Picayune} praised the General's "determination ...not to permit swarms of 'contrabands' to be any longer a tax upon the government and a vicious prey upon society." Yet the paper also played an instrumental role in bringing about another planters' convention at the St. Charles on February 19-20.\textsuperscript{13} This well-chronicled, yet vague, event has become central to historians' investigations of Union intentions.

After an organizational meeting at noon on the 19th, about sixty planters from parishes within federal lines assembled in the rotunda of the St. Charles that evening, observed by a buzzing crowd gathered in the gallery above. At about 8 p.m. they retired to the "oppressively warm" gentleman's parlor. Two or three took seats at the table, and the remainder formed an irregular circle around the room. Three and a half hours of heated debate about the future of plantation labor in Louisiana ensued.


\textsuperscript{13}New Orleans Picayune, January 31, 1863; quote from February 19, 1863; \textit{New York Times}, February 23, 1863.
The group promptly appointed a committee to find out from Banks whether assenting to the agreement of the 5th meant that the military would bind blacks to work. The meeting next resolved to see if police juries could be formed to enforce patrols for "all strange slaves in the parish." A Dr. Knapp then proposed that while they should thank Banks for arresting "black vagrants," they would like the return of all civil authority. After considerable discussion, the motion was tabled. Another man then offered a resolution authorizing planters to hire laborers from other plantations, but the group shouted him down with cries of "No! no! never!" and "Shame! shame!" Finally, the meeting resolved to contact Banks and request him to meet with them.

The next evening the meeting resumed. A committee reported that it had received Banks's pledge that he and the state would "do everything in their power to facilitate the planters in carrying out the arrangements that had been entered into." Upon hearing these assurances, the assembled planters agreed to support Banks and the Sequestration Commission. At 8 p.m. the General entered the hall to "a tolerably good imitation of applause." The president of the group expressed their "high respect for [him] as an officer and a gentleman," and thanked him for the "many favors" he had bestowed upon them. Unmoved by flattery, Banks said he had not come to interfere and that he was there reluctantly. He claimed he had "published that which I have thought it to be my duty to do as an officer of the government," and concluded his speech with what the correspondent of the New York Tribune called "amiable Fourth-of-Julyism." That same correspondent, from one of the leading radical papers
in the nation, drank to Banks's health in the hotel bar five minutes later.\textsuperscript{14}

What actually happened at the St. Charles meetings appears hazy. The planters thought they had received Banks's guarantee that slavery would be all but reinstated in the loyal regions of Louisiana. Yet they did not achieve agreement between themselves or with the General on their more extreme demands. Neither could representatives of northern radicals agree on what was going on in Louisiana. Another correspondent of the \textit{Tribune} at first thought the meeting of February 19-20 intended to "criticize and reform the orders of the commanding general," but after hearing Banks's speech exclaimed that the commander "talked of peace with all the fervor of a Copperhead Democrat of the Middle or Western States." Banks "was willing to be turned from his purpose by any suggestions" the planters might make. George Denison, an agent and correspondent of Treasury Secretary Salmon P. Chase, believed that "Slavery, abolished by Gen. Butler [had been] completely re-established."\textsuperscript{15}

Perhaps the most confused person of all was not one of the planters or one of the radicals but David Hunter Strother, a Virginia Unionist and sketch artist travelling with Banks. He recorded the meetings earlier in the month with some consternation. After speaking with Banks on February 2, he felt confident in notifying


planters that "their servants would be returned to them and forced to make a living." Yet the next day, Banks said he "had no intention or authority to force the slaves back to their masters." A disappointed Strother complained that his "efforts to reconcile the Massachusetts idea of the Negro with the planter's practical knowledge was a total failure." They had agreed while dealing in generalities, but now a "vast gulf" had developed, Strother believed. Promising to return slaves "without contemplating a resort to physical force" was like doing *Hamlet* with Hamlet left out. Yet Strother must have been even more amazed when Banks disapproved of a proposal by Captain W. Sturgis Hooper, whom Strother described as an abolitionist, to require African-Americans' assent in being returned. He finally concluded that "the General seemed solely interested to accomplish a good result within the limits of his authority and willing to let it take its chance with the public..."\(^{16}\)

In his description of these events, Strother inadvertently mentioned the key to the confusion about Banks's program--reconciling the "Massachusetts idea" with that of the planters. The northern view of slaves being freed by the war was not as singular as Strother assumed, but in forming his system, Banks drew on the general ideas of Bay State labor and poor law reformers and on his own pre-war experience. As the state's pre-war governor, he had been involved in the treatment of vagrants. In 1859, boys at the Westborough Reform School set it on fire several times, destroying at least two-thirds of the structure. Banks discharged all the board

members except the son of the founder and appointed a new board that instituted a "school-ship" for the "discipline of the older and more vicious boys."\textsuperscript{17}

Banks's reliance on previous labor law became more clear when he issued a new set of regulations on February 3, 1864. In part a response to criticism of the previous year's program, these more explicit rules fixed the hours of labor at ten in summer and nine in winter, stipulated payment for overtime, established a schedule of wages, rations, shares and fines for disobedience, and gave provost marshals the authority to adjudicate all labor disputes. They outlawed flogging but also required passes for plantation hands to travel from place to place. The new rules restricted the labor market further by incorporating the terms of northern farm labor contracts. Freedpeople could choose their employers, but they would be "held to their engagement for the year, under the protection of the government." Workers feigning sickness or refusing to labor could be turned over to the provost marshal for employment on the public works. Banks declared that these rules supported the "encouragement of independent industry" and that they aimed to "prepare the laborer for the time when he can render so much labor for so much money...." Besides the labor laws, he also initiated a free labor bank and a freedmen's school system.\textsuperscript{18}

This time Banks stated explicitly why he was acting in this manner. The

\textsuperscript{17}The Massachusetts Board of State Charities, and the Westborough Reform School," Christian Examiner 83 (July 1867): 117; Bremner, Public Good, 30, 172. In the immediate post-war period, this ship became a receptacle for young black men who were arrested for vagrancy after drifting northward.

\textsuperscript{18}OR XXXIV(2): 228-229.
regulations were "based on the assumption that labor is a public duty, and idleness and vagrancy a crime." Civil and military authorities were not exempt from this law, he continued. "Every enlightened community has enforced it upon all classes of people by the severest of penalties. It is especially necessary in agricultural pursuits." Those people "identified with the cultivation of the soil" should not believe they had been "relieved from the necessity of toil, which is the condition of existence of all children of God." The revolution of the war had not altered basic social arrangements, Banks declared. "This universal law of labor will be enforced upon just terms by the Government, under whose protection the laborer rests secure in his rights."19

Again, the General saw freedpeople not only as former slaves but as unemployed agricultural laborers. Banks's rules and his arguments for them were well in line with the legal and social principles of his home state. Massachusetts's courts had been instrumental in establishing the legal rule that agricultural laborers must be encouraged, if not coerced, to honor long-term labor agreements. Northern courts had assumed these contracts had been the product of a free bargain in the marketplace. Banks and other federal officials in the South intervened in the labor market at the inception of these agreements, but they expected normal rules to apply once contracts were signed. Moreover, they knew, and northern courts had explicitly recognized, that the seasonal nature of non-mechanized agriculture required workers

19Ibid., 229-230.
to be available to labor at specific moments in the crop cycle. Whether intentionally or not, the legal and social assumptions of northern farmers and courts fit all too comfortably with the needs of southern planters. The same fit between northern ideas and southern needs occurred with regard to vagrancy. For Banks, vagrancy laws were not an earmark of oppression but of "enlightened communities." It was not only African-Americans who possessed a duty to work, but "all children of God." The role of the state in this political economy was to enforce both the rights of workers and the duty to labor.

The Rev. Thomas W. Conway, who headed the renamed Bureau of Free Labor after Hanks departed, summarized the point the system had reached in 1864. Banks's labor order, he believed, had notified fifty thousand freedpeople "that they were free to labor as freemen, protected by the government which had broken their chains; that they were to have schools for their children, and pay for their services, and redress for their grievances." While federal regulations had restricted freedpeople, they had also protected them by compelling planters to give laborers all the benefits they deserved. The reverend also noted one-fourth of workers held the status of "first-class hands" and received $8 per month plus board, medical care, schooling for their children, and one acre of land. At this level, their wages were "as a whole, more remunerative than those which have ordinarily been paid to Northern

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20 Even the radical Shurz recognized the importance of seasonality in the Union's labor program. Shurz, Report, 16.
farm hands who worked by the year.\textsuperscript{21}

Conway had enumerated most elements of the evangelical version of free labor--lack of literal bondage (self-ownership), protection, education, and paid labor. Moreover, he acknowledged specifically the northern legal standard of year-long farm contracts. Conway clarified the use of vagrancy law when he testified before the Smith-Brady Commission. He had not forced individual workers to work with individual planters, he stated. Rather, he had counseled them in wage bargaining and let them make the ultimate decision. Nevertheless, he compelled the idle to work for wages "with parties whom I knew to be suitable" or to go to the home colonies and work without pay. In his policy toward the latter group, he explicitly imported the gender distinctions of northern law and thought. If whole families were taken to the army's poor farms, those who could were permitted to work for wages elsewhere, "while the vagrant,--the head of the family,--would be taken alone to the farm." If such men were eventually hired by planters, Conway sent their families with them and required their employers to support them and their dependents in return for wages. Trying to establish a semblance of northern material culture, Conway required planters to house such workers in a single-family dwelling.\textsuperscript{22} Similar to Tuckerman and other pre-war writers, he wanted "vagrant" men to learn both work and domestic


\textsuperscript{22}Excerpts from testimony of Thomas W. Conway, 28 Jan. 1865, Testimony Received by the Commission, ser. 736, Smith-Brady Commission, in Berlin, \textit{Wartime Genesis}, 576 (quote), 578.
discipline.

Banks's program was not the only effort to organize labor in wartime Louisiana. For a short period in mid-1863 and then for a longer duration in late 1864 and 1865, part or all of the Union labor program in the Mississippi Valley came temporarily under the Treasury Department. In July 1864 Treasury Agent William P. Mellen issued a different set of labor rules for lessees of abandoned plantations. The central benefit of this arrangement was that it set wages much higher than previously and at almost twice the pre-war rate for farm workers in the North. Nevertheless, these regulations incorporated northern law. They required work of all able-bodied people over the age of twelve and continued the Home Farms. In addition, they employed both apportionment and entirety. For workers who failed "to labor as contemplated in the contract," the superintendent could cancel the contract after the employer paid wages due. Such a provision instituted specifically jurists' suggestions about the role of apportionment in labor discipline. Yet the rules also allowed lessees to reserve half of workers pay until the end of the season, a formalization of pre-war payment procedures, and they used wage forfeiture for workers who "quit voluntarily." Half the remaining wages went to the planter, half to the government.²³

²³James B. Yeatman, Report of the Western Sanitary Commission in Regard to Leasing Abandoned Plantations with Rules and Regulations Governing the Same (St. Louis: Western Sanitary Commission, 1864), 13-15; Berlin, Wartime Genesis, 373-374. In the late 1850s, farm wages averaged $140 per year plus board. Bremner, Public Good, 12. The contracts I have looked also suggest that farm wages ranged between $10-16 per month, depending on the duration of the contract and whether the worker got room and board. Under any estimate, they were considerably lower than William
When Mellen reissued these orders in February 1865, the half-pay sections caused critics to fear that workers would slip back into dependence on planters. Partially in response to these worries, President Lincoln returned the labor program to the army a month later, and Major General Stephen A. Hurlbut issued a new series of labor regulations. Hurlbut's system required rations, clothing, and medical attention and established a graduated wage scale that recognized a superior value for skilled labor. Using a combination of the entirety rule and quantum meruit, Hurlbut advised freedpeople that they might choose their employers; but once hired, they would not be permitted to abandon the contact. If they did so, they would "forfeit all wages earned to the time of abandonment and be otherwise punished...." Those refusing to work would be employed at public works without pay. "The laborers must understand," Hurlbut declared, "that it is in their own interest to do their work faithfully, and that the Government, while it will protect and sustain them, cannot support those who are capable of earning an honest living by industry."\(^{24}\) In response to criticism from New Orleans's free black community, the general stressed that the regulations guaranteed paid labor, kept the family together, provided education, and allowed freedpeople to bring suits for redress. Further progress must

\[^{24}\text{OR XLVII(1): 1147.}\]
come through a slow process of education to eradicate entrenched prejudices.\(^{25}\) As 1865 progressed, these cheery predictions faced the realities of white Louisiana's growing backlash against emancipation. Beginning with Opelousas in July, towns reenacted the curfews and pass laws of slavery. In response, Conway and General E.R.S. Canby, who had taken command of the Department of the Gulf, voided these ordinances and declared that laws must not discriminate racially.\(^{26}\)

By summer 1865 authority over free labor passed to the Freedmen's Bureau. Having headed the Union army's Bureau of Free Labor, Conway set up the Louisiana Freedmen's Bureau and became its first Assistant Commissioner. In doing so, he ordered that freedpeople must "in all cases enter into free and voluntary contracts with employers of their own choice," contracts that could "not be broken by either party except for just and sufficient cause." Conway assured freedpeople that they would not be forced to work for unsuitable employers, but his orders contained the ambivalence the vagrancy concept produced. Bureau agents must "give the freedmen to understand that they are entirely free to work where and for whom they please, and that at the same time that a life of idleness will not be allowed or encouraged."\(^{27}\) While Conway pursued a policy similar to Banks, he did interfere with local laws and often ordered the release of blacks arrested for vagrancy. This moderate course prompted Louisiana planters to lobby President Andrew Johnson

\(^{25}\) *New Orleans Tribune*, March 28, 1865.

\(^{26}\) *New Orleans Tribune*, July 15, 1865, July 16, 1865, August 4, 1865.

\(^{27}\) Circular No. 2., Bureau of Refugees, Freedmen, and Abandoned Lands-Louisiana, in *New Orleans Tribune*, July 16, 1865.
for Conway's removal. In October 1865 Johnson pressured Bureau Commissioner Howard into relieving Conway from duty. Although Howard appointed Brevet Major General Absolom Baird as assistant commissioner for Louisiana, travel delays prevented his arrival, and General Joseph S. Fullerton took over during October 1865.28

Whether from naivete or from a more conservative stance, Fullerton began immediately to dismantle Conway's moderate administration. Fullerton tried to close all orphan asylums supported by the Freedmen's Bureau and to apprentice the children to private citizens. When a group of citizens complained to him about black vagrants in New Orleans, he allowed the chief of police to arrest them and bring them to the Bureau's provost marshal, who was to "secure for them employment and means of support during the coming winter." On October 27 the authorities arrested hundreds of arrests of African-Americans under this order, both employed and unemployed. By November 1 Fullerton modified this policy to make the existing state vagrant law applicable to blacks as well as whites. Fullerton's administration lasted only a month, and by November 1865 Baird arrived.29

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29New Orleans Tribune, October 27, 28, November 3, 1865. Fullerton to Chief of Police of the City of New Orleans, October 25, 1865, Records of the Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Louisiana, Roll 1; White, Freedmen’s Bureau in Louisiana, 25.
From its inception through the permanent organization of the Freedmen’s Bureau, federal policy in Louisiana had followed the general outlines of the free labor ethic and the concepts of antebellum labor and poor law. The free labor indictment of slavery had predicated the new southern society merely as slavery’s negation. Laborers would be protected at home, educated in schools, and free from physical compulsion at work. Yet they would be subject to the legal compulsion embodied in the system of laws that enforced free labor. While freed from specific coercion to work for a master—the antebellum definition of involuntary servitude—workers were not free from a general duty to labor and to perform contracts fully. For many northerners, including many abolitionists, emancipation itself merely implied this transition in forms of labor discipline. It did not mean the advent of an unregulated labor market.

Although set within this general discourse, the specifics of emancipation were an open issue, and northern commentators and African-Americans in New Orleans expanded the meanings of legal regulation of labor. Their discussions voiced the fluidity of free labor law between 1863 and 1865. As might be expected, conservative northerners expressed almost unqualified support for the stringent rules governing labor. Perhaps more surprising, most moderates, some abolitionists, and even African-American commentators upheld certain elements of Union policy. Only radical abolitionists challenged dominant themes about labor law’s place in emancipation.

If adherence to the language of poverty established perimeters for Banks, it
also acted as a measure of acceptance for his system. Conservative organs quickly rallied to his program in 1863. Harper's Weekly commended Banks's labor regulations and reminded its readers of the universality of laws for the idle. "Those who regard the unwillingness of the negro to work as evidence of his inferiority to the white," the editors wrote, "will do well to remember that every civilized nation in the world has vagrant laws on its statute books, and that time was when our ancestors needed the gentle stimulus of the law to compel them to earn their living." The New York Times ran numerous editorials praising Banks's every step, concentrating especially on his vagrancy laws. The restrictions on idleness were "capable of much wider application," the editors suggested. Linking emancipation to the general question of controlling the unemployed, the paper suggested that

[i]t should be distinctly understood that emancipation is from Slavery---not from work. No community can safely have any portion of its dependent population unemployed. ...Every State has its laws concerning vagrants--compelling them to work for the public if they depend on the public for support, or punishing them for their refusal to do so.  

Like those who argued for harsh vagrancy laws before the war, these conservative writers believed that the unemployed owed an obligation of labor for their support, and that all dependent groups must be compelled to labor. The rhetoric they applied

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31 New York Times, February 14, 1863. The paper continued to observe Banks with great interest, and by the summer of 1864, the editors feared that Banks's labor system was "Philanthropy Run Mad." Yet they believed he had found the "golden mean" of remunerating the laborer but compelling him to work. New York Times, July 23, 1864.
to freed African-American seems mild in comparison to what would appear in the industrial crisis of the 1870s.

While conservatives gave unqualified support, radical abolitionists criticized Banks sharply for his system of labor as well as his general tone of conciliation. "Under Gen. Banks method," railed the *New York Principia*, "our government, the government of the United States, is as truly a slave-trading government as that of the Confederacy." Although William Lloyd Garrison supported Banks, another editorialist in the *Liberator* declared that Banks substituted serfdom for slavery and that he used his military authority to enforce his vagrancy orders against "the poorest and weakest class only." The *Christian Watchman and Reflector* implied that Banks deliberately delayed enforcing the Emancipation Proclamation and then "published it with a general order that seem[ed] designed to make its effect as little as possible." The *New York Tribune* charged that Banks formulated his 1863 regulations with a "complete disregard for the welfare of the negroes and the authority of the President...." Banks had "yielded without hesitation or reluctance to every demand which the grasping avarice" of the Louisiana planters had wanted.\(^{32}\)

A persistent critic was radical abolitionist Wendell Phillips. "Banks's freedom'...is no freedom to me," he stated flatly. Phillips charged that provost marshals were in the service of planters and that whipping was "undoubtedly practiced" on Louisiana plantations. For Phillips, the "Idea of Massachusetts liberty

is, a man competent to sell his own toil, to select his own work, and when he differs with his neighbor, a jury to appeal to." Banks, he claimed, denied all these privileges:

Gen. Banks liberty for the negro is, no right to fix his wages; no right to choose his toil, practically no right; having once chosen his place, no right to quit; any difference between employer and employed tried by a Provost Marshal, not a jury.\textsuperscript{33}

Phillips did not share Banks's assumptions about poverty and explained pauperism as the result of intemperance rather than a refusal to labor.\textsuperscript{34}

Perhaps the most thoroughgoing criticism of Banks's system came from American Freedmen's Inquiry Commission member James McKaye. If allowed to become permanent, he warned in 1864, the Union program would "differ very little from the workings of slavery itself." In part, McKaye worried about the actual administration of the program. Planters co-opted assistant provost marshals and convinced them to allow whipping and other forms of corporal punishment. McKaye also singled out year-long contracts as a problem. He conceded that ex-slaves must be taught the general obligations of contract and "should be held to the just fulfillment of such as he has voluntarily entered into." Still, long-term agreements were open to abuse.\textsuperscript{35}

McKaye was more concerned with the general nature of the Union regulations

\textsuperscript{33}Speech before the Massachusetts Anti-Slavery Society, January 26, 1865, printed in the \textit{Liberator}, February 10, 1865.

\textsuperscript{34}Phillips, "On a Metropolitan Police," \textit{Liberator} April 10, 1863.

\textsuperscript{35}James McKaye, \textit{The Mastership and Its Fruits: The Emancipated Slave Face to Face with His Old Master} (New York: William C. Bryant, 1864), 27 (first quote), 26, 28 (second quote).
and their restriction of African-American workers as free agents in the labor market. The program allowed assistant provost marshals and planters to classify hands and fix the wage bargain, leaving laborers out of a process in which they should be central. If the wage bargain must be fixed, McKaye suggested the Treasury Department's program would be better. He praised their classifications and claimed (wrongly) that their wage rates were nearer the market level. His central point was that the Union program undermined freed slaves sense of self-reliance:

If the only object to be accomplished was simply 'to compel the negro to labor' in a condition of perpetual subordination and subjection, this arrangement would be appropriate enough. But if the object be to make the colored man a self-supporting and self-defending member of the community, then he must be placed in a position where he can determine the value of his own labor, and be left to take the responsibility of his own existence and well being, as well as that of his family.

If self-mastery could not be secured, he predicted, not only would the freedpeople be hurt but "the great industrial interests dependent on their voluntary, enlightened, and justly compensated labor, will be seriously, if not fatally, jeopardied." McKaye

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36Ibid., 26-27. On problems with provost marshals, see Berlin, Wartime Genesis, 359-60.

37Ibid. Self-reliance was a central theme of the AFIC's preliminary report. See 38th Cong., 1st sess., Senate Executive Document 53: Preliminary Report Touching the Condition and Management of Emancipated Refugees, Made to the Secretary of War by the American Freedmen's Inquiry Commission, June 30, 1863, 8, 18-19. Written by labor reformer Robert Dale Owen this report also connected the issue to images of gender, for it quoted favorably a judge who contrasted the "shiftless" ways of blacks in the towns with the "bold, erect carriage and free bearing" of those in the military. "It makes men of them at once," the judge had said, and the commissioners presumably agreed. Ibid., 7.

38Ibid., 28.
wanted a free market in labor and like Joel Parker, Jesse Holman, and other northern jurists, McKaye thought that legal controls on labor actually hurt work discipline.

Radical critics voiced what might appear to be dominant nineteenth-century themes about political economy and labor relations. Their view of the "Idea of Massachusetts liberty" rested on self-ownership. In line with classical economists, they envisioned a laissez-faire market in labor, in which workers selected their occupations, bargained away their labor power as free agents, protected their interests by leaving undesirable employers, and sought protection in the civil courts. As labor reformer Robert Dale Owen advised in the AFIC's final report, labor should be hindered by no compulsory contracts, no "statutory rates of wages," and no restrictions on movement except those relative to the war. "The natural laws of supply and demand should be left to regulate rates of compensation and places of residence," he concluded. Radicals such as Shurz expected the wage relation itself to contain the means of work discipline. The willingness to work depended on the reliability of wages, he argued, and northern employers managed free labor by firing

38th Cong., 1st sess., Senate Executive Document 53: Final Report of the American Freedmen's Inquiry Commission to the Secretary of War, May 15, 1864, 110 (cited hereafter as AFIC, Final Report). The commissioners could hold these ideas in part because they had no fear about freedpeople becoming vagrants. They suggested that ex-slaves were willingly accepting self-restraint and building their own institutions of poor relief. "Scarcely any beggars are found among them," Dale happily noted. Ibid., 100.
undependable employees, not whipping them.\textsuperscript{40} Such ideas aligned well with formal principles of political economy, but they did not match most northern state's legal rules regarding the employment relation. As such, radicals existed as a community with a language outside nineteenth-century legal discourse on poverty and work.\textsuperscript{41}

While radicals could accept little or nothing of what was happening in Louisiana, many northern reformers reacted to Banks's program with some reservations about the particulars but with wholehearted support for the assumptions on which it was based. The Christian Examiner, a Unitarian social reform journal, responded to Phillips with a lengthy defense of Banks and the general principles of his system. W.H. Allen, a Massachusetts educator and member of the American Freedmen's Aid Commission, worried that freedpeople as well as white refugees would be thrown upon the nation's charities. Consequently, Banks's "principle of compulsory labor, harsh as it appears," seemed wise. To Phillips's point that freedpeople were bound to their positions, Allen responded with a rhetorical question: "If I hire an Irishman for a year, has he a right to stay with me through the winter at high wages, and then go elsewhere to get still higher for the summer?" In other words, strict enforcement of contract must apply to freedpeople as well as

\textsuperscript{40}Shurz, Report, 28-30. Shurz suggested that the cure to vagrancy lay in providing land and a sense of place, not in penal measures.

whites; legal agreements superseded an open market. Additionally, African-Americans rendered indolent by slavery must be taught to become self-reliant workers. "This mass of needy freedmen must either be supported by charity, or work must be found for them," Allen believed. If they were to secure land, they must achieve it through wage labor first. "[W]hy," he asked, "should a worthless vagrant, because he is a negro, receive the gift of a farm, the value of which a hard-working farmer's son in New England would think himself fortunate to acquire in ten years?" Allen's argument carried the ethics of free labor and equality before the law to their logical extremes. He would apply reform principles despite the situation or outcome.

Other reformers also supported Banks. E.E. Hale, a political economist and social critic, noted that Banks faced uncertainty because of the parishes exempted from the Proclamation. Considering these difficulties, Hale believed Banks had used his opportunities the best way he could. Though Garrison withheld open praise, he approved the assumptions on which Banks's program was based. The system constituted a temporary remedy "to adjust matters in the midst of a disorganized state of society, where masters no longer have power to enforce authority, and where the unemployed and uncoerced are liable to be a burden to the government, or to become vagabonds." Such comments have usually been taken to indicate that

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Garrison modified his stance on race as emancipation approached. Yet they also show how some abolitionists could be or could become radical about racial equality while maintaining class-based assumptions about poverty that undermined their radicalism.\textsuperscript{44}

Several people who had worked with Banks in Louisiana also came to his defense. James Bowen, Provost Marshal General for a time under Banks, claimed that the regulations assumed that the able-bodied were to labor for support and that restrictions were placed on both races. "Vagrancy was held to be a public misdemeanor with one race as with the other," he affirmed. Through Banks's system "the black was taught that freedom was not idleness, and that with his newly acquired right he was still subject to the inexorable law, that in the sweat of his brow he should earn bread." E.M. Wheelock, a self-proclaimed "John Brown abolitionist" who favored land confiscation, also stressed the suppression of "idleness, insolence and vagrancy." The "famous Free Labor System" intended to "supersede the lingering remnants of chattel slavery on the one hand, and on the other the idleness, misery, and vice with which the Department [of the Gulf] was filled." The Rev. Charles

\textsuperscript{44}The issue of poverty had long troubled the abolitionist movement, and its relationship with the working-class had been strained at the best of times. See Glickstein, "Competitive Labor Market," 200-205; Aileen S. Kraditor, Means and Ends in American Abolitionism: Garrison and His Critics on Strategy and Tactics, 1834-1850 (New York: Pantheon Books, 1969), 243, 247, 253; Foner, Politics and Ideology, 24-25; and Bernard Mandel, Labor: Free and Slave, Workingmen and the Anti-Slavery Movement in the United States (New York: Associated Authors, 1955), 61-62, 73, 77-78, 89-95.
Hepworth, who with Wheelock helped implement the regulations, reproduced documents showing that passes were issued in cases where freedpeople had been evicted and that blacks were returned under an agreement promising fair treatment. Calling himself a "warm abolitionist," Hepworth echoed reform writers' concerns about material culture, describing the labor system as a humanitarian response to the conditions of dirt and degradation existing in the contraband camps. The system would "elevate the black man to the position of the white laborer," teaching him the value of money. It would also protect the crop and save government funds. Overall, it would "fit [the freedman] for the freedom to which he is destined if the war continues."\(^{45}\) While these men had a personal interest in defending the system, they all employed a set of terms that saw the former slaves first as poor people and only second as black poor people. Especially for Wheelock, truly radical ideas such as land redistribution need not preclude adherence to a conservative belief in the need for controlling vagabonds.

Debate over labor regulations in Louisiana was not confined to northern commentators. Its most persistent source of criticism in the South was the *New Orleans Tribune*, the city's radical black newspaper. Throughout the evolution of federal policy, the paper's editors carried on a dialogue with Union officials and fought what they saw as a poor replacement for slave labor. "Slavery is dead," they

noted in April 1865, "but 'free labor' still lives and has yet to be killed." By criticizing federal policy, they helped define the meaning of freedom and offered alternatives to the free labor ethic. Yet at crucial points their ideology remained with the bounds of mid-nineteenth-century thinking.

The Tribune was primarily the work of three men. In September 1862, Dr. Louis Charles Roudanez, a Louisiana-born free black who had received medical degrees from University of Paris and Dartmouth College, started L'Union, a French-language journal that spoke primarily to New Orleans's gens de couleur and retained the group's pre-war separation from slaves. Its editor was Paul Trévigne, another native-born free black. Later in the year, Roudanez gave the editorship to Jean-Charles Houzeau, a Belgian emigre. Houzeau had studied at the universities of Belgium and Paris, where he had encountered radical political theory. His first foray into political writing came in the revolutions of 1848. Disenchanted with the revolutions' failure, he eventually left for the United States in 1857, settling first in Texas, where he helped operate a slave escape route to Mexico. After federal occupation of New Orleans, Houzeau moved to the Crescent City, where he met Roudanez and began a biracial cooperation in radicalism. When L'Union failed in July 1864, Roudanez, Trévinge, and Houzeau initiated the Tribune, which published in both French and English. Drawing more on European radical thinkers and

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46New Orleans Tribune, April 9, 1865.

47Before the war, many of Louisiana's free blacks had amassed considerable amounts of property, and many owned slaves. See John Blassingame, Black New
political economists than on American precedents, the journal developed a philosophy of labor that diverged significantly from the free labor ethic and from free labor law.\textsuperscript{48}

In a general way, the Tribune objected to the federal policy as a guardianship for freedpeople. Analyzing the Treasury Department's program in Fall 1864, the editors recognized its more liberal elements but lamented that again the freedpeople were not consulted. Reviewing Conway's annual report for 1864, they noted that the government had given the freedpeople "protectors, a special code, special rules, and special obligations." When Hurlbut's labor orders appeared in March 1865, the Tribune published them with "a deep sentiment sorrow," claiming that the Bureau of Free Labor was "now pushing our brethren into a disguised servitude." The journal organized freedpeople, free blacks, and white radicals in response to the new rules. A mass meeting at Economy Hall on March 17 adopted a series of resolutions denouncing the new policy. James Ingraham, a black captain in the Corps d'Afrique, seconded these charges at the Economy Hall meeting in March 1865. "No system of gradual elevation is required to make us men," he declaimed. Yet the free black position on protection was not uncomplicated. The Tribune constantly advocated removing all restrictions on labor. "Let the laborer alone!" Houzeau exclaimed. "We denounce every plan calculated to keep him from moving about, in order to compel him to work for low wages." Yet, the editor also called for federal intervention as the

only way to secure the rights of labor and blacks generally. Rejecting Hurlbut’s suggestion of slow learning process on racism, the paper averred that prejudice had never been rooted out by education. "All injustices against races, classes, or sets of individuals had to be removed by the strong arm of power."^{49}

A primary indication of guardianship, the Tribune believed, was the requirement that contracts include provisions for rations and clothing. When the Treasury Department allowed laborers to provide for themselves, Houzeau hailed it as "the first step toward self-management of domestic affairs, which will gradually elevate the freedmen to a higher social status." When Hurlbut reinstated these stipulations, the paper decried them as a step backward. Contracts requiring planters to feed and clothe their hands "provided for [freedpeople] like the mules and cattle on the plantations."^{50} Provisions represented a badge of slavery, yet the journal reverted to the evangelical free labor ethic when it argued that guaranteed rations destroyed self-reliance.

A more obvious badge of servitude that drew the paper’s ire was the system of passes used by the Union army. Houzeau claimed that free travel was among the

^{49}New Orleans Tribune, March 14, 1865, March 18, 1865, December 4, 1864, February 18, March 18, 29, April 9, 1865. The resolutions passed at the Economy Hall meeting and the exchange with Hurlbut are also reprinted in Berlin, Wartime Genesis, 594-598. In part, the Tribune's ambivalence came from the shifting role of the pre-war free black elite. As federal orders began to lump all African-Americans together, the elite tried to move from being a separate community to being the leaders of freedpeople. See Ibid., 373-374.

^{50}New Orleans Tribune, November 23, 1865, March 14, April 9, 1865. Numerous Northern writers also focused on self-provision as a hallmark of freedom. See Wendell Phillips speech and "Free Labor in Louisiana" cited above.
most basic of natural rights. The Economy Hall meeting resolved that "The right of traveling is guarantied [sic] by the National Constitution to all citizens, and any particular restrictions put upon any particular classes of Americans, on account of color, [are] unconstitutional." Not only did passes violate constitutional rights, the editors argued, they also impaired the laborer's ability to secure a fair contract. The Tribune was not the only organ to make these charges. Northern abolitionists denounced these obvious restrictions on travel so severely that Banks felt prompted to defend his actions. The general claimed the passes were issued for the sole purpose of controlling an epidemic of smallpox. The Tribune answered that the passes lacked any relation to the disease. The army did not ask blacks whether they were infected or were inoculated, nor did it suspend the system when the danger passed. The passes represented "an abridgement of Liberty, bearing on the acts of everyday life, a constant annoyance, a servitude."

The paper was correct in its assessment of the pass issue, for Banks exaggerated disease as the motive. A sample pass reprinted by the Tribune demonstrated that the real purpose was to prevent arrests of blacks on charges of vagrancy:

Office Provost Marshal
Parish of Assumption
Napoleonville, March 10, 1865

to certify that X.... (COLORED) has appeared before me, and given

\footnote{New Orleans Tribune, November 27, 1864, March 18, 1865, April 9, 1865, April 16, 1865; Nathaniel P. Banks to William Lloyd Garrison in Liberator, February 24, 1865.}
satisfactory evidence that he is employed as ....... at ....... Plantation, and that he is a resident of the Parish, capable of supporting himself and not liable to be arrested as a vagrant.

[Signed]

J. W. Greene
Capt. and Provost Marshal.\textsuperscript{52}

The army finally abolished passes in the Department of the Gulf in August 1865 when General Philip Sheridan republished a War Department order ending all travel restrictions. Yet that order retained many of the assumptions upon which the passes were based:

Neither whites nor blacks will be restrained from seeking employment elsewhere, when they cannot obtain it at a just compensation at their homes, and when not bound by voluntary agreement; nor will they be hindered from travelling from place to place on proper and legitimate business.\textsuperscript{53}

The exceptions in this order represented a clearer statement of its intentions than did its actual policies. Laborers were to seek "just compensation" in voluntary agreements and were to travel on "proper and legitimate business." Such a definition of freedom did not recognize an unqualified right to travel; it assumed that freedom of movement remained subject to bounds of law at all times.

Similar themes existed in the actual administration of vagrancy laws in Louisiana and in the Tribune's response. Gen. Banks's doctrinaire adherence to vagrancy concepts in his labor program resulted in arbitrary arrests in actual practice. In August 1864 provost marshals detained numerous blacks including several

\textsuperscript{52}New Orleans Tribune, April 16, 1865.

\textsuperscript{53}General Order 7, Department of the Gulf, August 7, 1865 reprinting General Order 129, War Department, July 25, 1865, in New Orleans Tribune, August 19, 1865.
prominent citizens. Responding to complaints from the black community, Banks contended the arrests were "not only without orders, but against orders." He claimed that white citizens had informed him that hundreds of New Orleans blacks were "escaping regular labor and indulging in the propensities which vagrants are inclined to follow." He had simply instructed provost marshals to ascertain the truth of these charges.\(^54\)

While the Tribune decried arbitrary arrests of unemployed workers, it did not oppose the general concept of vagrancy laws. Houzeau and Roudanez merely wanted equal application to both races. "A good law on vagrancy, equally applicable to the whole population, giving power to set to work the man who has no honest means of existence, will effectively protect the interests of society," Houzeau wrote.\(^55\) Yet for free blacks and white radicals, a "good vagrancy law" meant something different than it did for Banks and other federal officials. For these men, idleness constituted a punishable vice only when it was "habitual and voluntary." Unlike most mid-nineteenth-century political economists, Houzeau recognized the existence of structural unemployment. "It is the very nature of trade," he noted, "that men be sometimes unoccupied and have to pass from one shop to another and to look for employment elsewhere."\(^56\) As such the Tribune again retained some aspects of the free labor ethic while rejecting others. Vagrancy itself could be "voluntary," but it had

\(^{54}\)New Orleans Tribune, August 18, 1864.

\(^{55}\)New Orleans Tribune, February 7, 1865. See also March 30, 1865, July 20, 1865.

\(^{56}\)New Orleans Tribune, July 22, 1865.
to indicate a pattern of outright refusal to work, and at times it might be beyond the laborer's control.

If New Orleans's free blacks rejected northern versions of freedom in part with regard to vagrancy, they spurned them as a whole with regard to contracts, adopting an increasingly radical position. In response to Hurlbut in March 1865, the paper submitted that "...Liberty of contracts is the essence of industry and the characteristic of freedom. Permit our brethren to try themselves that way...." By late 1865 with action on contract law pending in the Louisiana legislature, the journal claimed that through contracts planters "intended...to renew a servitude or bondage." Freedpeople, the editors counseled, should only agree to short-term contracts because the only means to "escape the injustice and exactions of a bad master, is to remain free to leave the plantation and go elsewhere." Finally, the paper recommended the outright abandonment of contracts.\(^{57}\)

Similar to McKay and Phillips, the Tribune's position on contracts originated in its desire for a free labor market. The paper criticized fixed wage rates and demanded the removal of government from wage bargaining. It cautioned planters that they must negotiate fairly with freedpeople who knew that they could do better as casual laborers on the New Orleans Levee. When a labor shortage developed in the fall of 1865, the editors advised freedpeople to take advantage of their power and work only for good employers. If allowed to do so without government interference,

\(^{57}\)New Orleans Tribune, March 14, 1865, March 18, 1865, June 21, 1865, December 12, 1865, December 17, 1865, December 31, 1867.
they would receive justice. "As soon as [the freedpeople] will be permitted to freely
discuss, with their employers, the terms of agreement of contract, they will
obtain...just remuneration for their labor, according to the natural law of supply and
demand," Houzeau predicted. Drawing explicitly on European political economists,
the journal argued in 1867 that laborers must be free to leave their employers at any
time and look for better wages elsewhere.\textsuperscript{58} Unlike McKaye, however, the \textit{Tribune}
did not suggest that the ultimate goal of a competitive labor market was work
discipline.

Even in the face of the glaring power disparities in Reconstruction Louisiana,
the radicals at the \textit{Tribune} retained their extreme laissez-faire conception of the
labor market. Yet they did not mean to leave laborers entirely unprotected. Houzeau,
Roudanez, and Trévigne also advanced several unique solutions to the problem of
achieving justice for former slaves. One of the journal's most significant departures
from dominant conceptions of labor law came in its suggestions for legal remedies
to labor disputes. In fall 1864 the paper identified what was, in truth, the central
problem of labor contract law: who would judge whether a contract’s terms had been
fulfilled. If planters were allowed to do so, "every bad man will be empowered to
bring the laborers to his own terms, irrespective of any right of contract clauses;"
Houzeau pointed out. Consequently, the paper suggested the formation of courts of
arbitration based on the French \textit{counsels de prud'hommes}. These labor courts would

\textsuperscript{58}\textit{New Orleans Tribune}, September 24, October 22, November 30, 1864, October
13, 1865, December 31, 1867.
consist of a government-appointed chairman and two representatives each from employers and employees. They would adjudicate labor agreements "according to the contract and the principles of equity." In arguing for such an institution, the Tribune rejected the free labor ethic's assertion of the harmony of capital and labor. The editors declared that these courts had been instituted in places "where capital had taken sway over labor and had to be safely counterpoised" and that they would protect "the rights of labor against the invading propensities of moneyed men." The Economy Hall meeting resolved to suggest such a system to Hurlbut, but he rejected it out of hand as impractical. Yet the Tribune continued to advocate special labor courts as the best means of protection into 1867.59

By then, however, the paper was not sanguine about their adoption and advanced a new idea--free legal counsel. Charging that most Freedmen's Bureau agents had been co-opted by the planters, the editors claimed that the civil courts remained out of reach to freedpeople because of the cost of attorneys. If a laborer tried to pursue his case, he would be "crushed at once, on account of his ignorance of the law, by his opponent's lawyer." The journal claimed that northern states such as Pennsylvania had lowered fees so poor mechanics could gain access. The editors did not want the state to lower fees in this manner, but they did believe lawmakers in the upcoming constitutional convention should establish a system of free counsel.

59 New Orleans Tribune, November 26, 1864, February 7, March 18, 1865, March 28, 1865, March 30, 1865, October 31, 1867.
"Injustice should not triumph because a man is poor," the editors declared.60

These suggestions contradicted the paper's adherence to a completely free labor market. By 1867 the editors had begun to realize that power discrepancies could not be remedied without state intervention, a position they had held on more general civil rights for some time. In a broader sense the Tribune's other main alternative, land reform, also contradicted its laissez-faire rhetoric.

From the beginning of Reconstruction in Louisiana, the paper advocated confiscation and division of lands among freedpeople. In September 1864 it criticized federal policy on abandoned property, saying that these plantations should have been split into five-acre lots and distributed to freedpeople. If the government would not go this far, it should rent land. In the summer of 1865 Houzeau and Roudanez argued that if planters refused to cultivate land, the land could be "appropriated, under some form or another, as property, lease or trust, for the benefit of the freedmen." The paper maintained this position into the late 1860s, noting that without land the freedpeople would be "a roving people, driven hither and thither by the caprice of the planters or by the promise of higher wages."61

Roudanez, Trévigne, Houzeau and their followers did not simply call for government action. At first, they suggested that farms could be run by "new managers" from the free black elite or from white anti-slavery supporters. New

60New Orleans Tribune, October 31, 1867.

61New Orleans Tribune, September 10, 1864, July 22, 1865, January 8, 1869; Conner, "Reconstruction Rebels," 171-172.
Orleans's black community soon advanced a more radical proposal. It drafted a "Prospectus for a Farming Association" and made it available to freedpeople at the Third African Church in New Orleans. The prospectus called for families to farm in "associations" between themselves. While the formal proposal for these associations embodied a spirit of mutualism contrary to the free labor ethic and the Tribune's own laissez-faire position, it also contained free labor's assumptions about legal work discipline. "All persons going to work on this plan must agree not to abandon it until the expiration of the year," the document stipulated. "Any one party failing to do his just proportion of work shall be deducted in his share of the crop, and any member who is idle and will not work shall be expelled and reported to the authorities as a vagrant." The Tribune approved of this vagrancy regulation as a "great moral advantage" that would "make the laborer independent and accustom him to self-reliance." Pleased with this proposal, Roudanez, Trévigne, and Houzeau helped organize the New Orleans Freedmen's Aid Association to carry it out.\textsuperscript{62}

As these efforts demonstrate, members of the old free black elite spoke for the Louisiana African-American community with numerous voices. They often advocated radical departures from northern conceptions of free labor and legal labor discipline. Yet they could not escape their position in the economic elite. They held most firmly to the principles of free labor law when discussing vagrancy and the

\textsuperscript{62}New Orleans Tribune, January 29, 1865, February 2, 1865, February 24, 1865; Conner, "Reconstruction Rebels," 173-176. Conner notes that the "associations" drew on the ideas of French socialist Charles Fourier as well as German radical Franz Hermann Schulze-Delitzsch. It is unclear how successful the "associations" were.
general duty to labor for support. In the broader sense, whether they spoke of a radically open labor market, land for freedpeople, or special courts to protect their interests, the goal remained self-reliance. Their positions illuminate the power of the legal assumptions of free labor, even on individuals trying to leave them behind.

The Louisiana labor system illustrates the mixture of racial and class ideologies that influenced the developing course of Reconstruction during the war and after. Although conciliation may have been the general motive and the general result, it was not the main determinant of the emerging labor system's content. As inheritors of the poor law reform movement, Union officials saw suppressing vagrancy through forced labor as a perfectly normal action. They perceived emancipation as the sudden appearance of four million unemployed, unskilled agricultural laborers. This is not to argue that race did not enter their minds. While they claimed to be applying rules equally, they only did so in the most general sense. Still, they did view ex-slaves primarily as impoverished people, and their policies grew from that assumption. Radical abolitionists and southern planters, on the other hand, did not act from these bases. Planters, of course, saw the problem as racial control, though at times they mimicked reformers' language about the poor. Ironically, radical abolitionists also used a language of race, but one that posited an a priori equality between blacks and whites. More importantly, their laissez-faire views removed the restricting role of law. As such, they denied the pre-war free labor ethic more than they affirmed it, and they prefigured the coming changes in civil law in the post-war North.
The experience of free labor in Louisiana formed the immediate background of emancipation and prompted widespread discussion about the role of law in labor and social discipline, matters primarily confined to the courts, legislators, or reform community before the war. Similar concerns informed the simultaneous debate over the Thirteenth Amendment. As events in Louisiana unfolded in 1864, support for a constitutional amendment banning slavery grew in the North. On February 9, 1864, a petition lay on the table of the U.S. Senate. Bearing the signatures of 100,000 men and women, it prayed that Congress would "pass at the earliest practicable day an act emancipating all persons of African descent held in involuntary service or labor in the United States."\(^{63}\) As Senator Charles Sumner remarked, no reason was assigned for abolition. The petitioners' prayer, Sumner claimed, spoke for itself, and it asked "nothing less than universal emancipation; and this they ask directly at the hands of Congress."\(^{64}\)

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\(^{64}\)In the last thirty years however, some historians have taken a different course, seeing the Thirteenth Amendment as a truly radical text intended to bring about a revolution in federal-state relations and to broaden civil and political rights. Jacobus tenBroek, The Antislavery Origins of the Fourteenth Amendment (Los Angeles: University of California Press, 1951), 137-183; G. Sidney Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment, repr. from Houston Law Review (1976); Harold M. Hyman and William Wieck, Equal Justice Under Law: Constitutional Development, 1835-1875 (New York: Harper and Row, 1982), Ch. 10-11. For a different view, see Herman Belz, A New Birth of Freedom: The Republican Party and Freedmen's Rights, 1861-1866 (Westport, Conn.: Greenwood
The amendment was debated for the first time in the spring of 1864, having been introduced by James M. Ashley of Ohio in the House and Lyman Trumbull of Illinois and John B. Henderson of Missouri in the Senate. It passed the Senate in April 1864 but failed to receive the required two-thirds majority in the House. Reintroduced in the House in January 1865, the amendment passed on January 31 after lengthy debate. Republican members of the House "instantly sprung to their feet, and regardless of parliamentary rules, applauded...." The male spectators in the crowded galleries "waved their hats and cheered loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their handkerchiefs, participating in and adding to the general excitement...." The Thirteenth Amendment was on its way to the states for ratification, but what, precisely, had the Senators and Representatives accomplished? And particularly, what did it mean to prohibit "involuntary servitude"?

As Eric Foner has made clear, the ideology of free labor and its

Press, 1976), 113-134. Belz acknowledges that some Republicans saw the Amendment as granting rights to both blacks and whites, but he concludes that in 1864 and 1865, most Republicans did not conceive of it as altering federalism significantly or granting much beyond personal liberty. In view of southern resistance, however, Republicans broadened their views based on the amendment's implications.

65CG, 38/2, 531; tenBroek, Antislavery Origins, 138-139; Staudenraus, "Popular Origins," 114. The Amendment fell twelve votes short of the necessary two-thirds on its first House vote on June 15, 1864. The House managers managed to swing enough votes during the lame duck session in January of 1865 by persuading Democrats that the end of slavery was a fait accompli with the end of the war, that 1864 elections had ensured passage in the new session, and that Democrats could save face by voting for the measure. For example, see the speech of Democrat Anson Herrick of New York, who switched his vote. CG, 38/2, 526; Belz, New Birth, 123.
pronouncement of a slave power conspiracy sketched broadly what emancipation meant for most Republicans.\textsuperscript{66} In analyzing causes of the rebellion, Trumbull pointed to the clash between "the slaveholding aristocracy, who made the right to live by the toil of others the chief article of their faith, and the free laboring masses of the North, who believed in the right of every man to eat the bread his own hands had earned."\textsuperscript{67} The dignity of labor was invariably touted as a right in the North, but Trumbull did not mention the assumption that the working masses also had a duty to labor that was controlled by the state.

Senator James Harlan of Iowa, however, laid open northern assumptions about the legal side of free labor.\textsuperscript{68} He started by asking a deceptively simple question: How does one person obtain a property right to the labor of another? In classical political economy, rights to the product of labor lay with its producer. For support, Harlan invoked the labor theory of value, noting that "the increased value of possessions growing out of labor and skill on the part of the possessor belongs to the person who has applied the labor." The key involved how this right, or title, transferred to another. Harlan outlined two basic methods. The first involved contracts. Property rights in the labor of another, Harlan stated, "may be applied to the title or right of individuals to the service of another, whether claimed under an

\textsuperscript{66}Foner, \textit{Reconstruction}, Ch. 3.

\textsuperscript{67}CG, 1313. See also CG, 1320, 1369, 1440.

\textsuperscript{68}The following is taken from Harlan's speech in support of the Amendment in CG, 1437-1438. A lawyer born in Illinois and raised in Indiana, Harlan was a strong supporter of anti-slavery. Herman Belz, \textit{Reconstructing the Union: Theory and Policy During the Civil War} (Ithica, N.Y.: Cornell University Press, 1969), 57.
express or implied contract. That property may exist in the services of others will hardly be seriously questioned." Obligations under an express contract became void only if there were the lack of a consideration. Here was one kind of allowable servitude, when a laborer sold his or her rights in the marketplace. Harlan, and other Senators, had no intention of striking down contract law, the basis for the northern economy.

The second basic method of acquiring service in another rested on a much older conception, mutual obligation. Harlan cited first the example of parent and child. The child was "under obligation to serve his father and mother until he shall have restored to them the equivalent for the labor and means they have applied to him for his welfare during the period of his inability to serve and protect himself." Contained to parent-child relationships, this principle said little about servitude, or at least about a kind likely to be challenged. But, Harlan continued, "The same principle, I think, is involved in the title of the community to the service of paupers and vagrants. Having provided him with shelter, food, raiment and protection, the community acquires a right, a just title to the service of a pauper or the vagrant until it shall have received in return a just equivalent for the means applied for his benefit." Harlan connected vagrancy laws and contract doctrines.

Harlan's analysis represented a frank exposition of the northern legal system's suppositions about both labor and poverty. If the laborers maintained independent status, they retained the rights of labor in full. If they bargained it away through contract, these rights transferred to another and the laborer took on a justified
position of dependence and servitude to that individual. If laborers ignored the duty to work, they incurred an obligation to the community, which then had a right to their labor. The worker was again in a dependent relationship of service that elite and middle-class northerners took for granted.

How deeply embedded these ideas were in free labor ideology can be seen in Harlan's summary of the outcome of emancipation. From the activities of free blacks in the North and from soldiers' reports from the South, Harlan assured himself and his fellow Senators that "a vast majority" of the potential freedpeople were "capable of providing for their own wants." In other words, if freedpeople became independent laborers, as Harlan assumed they would, they would be entitled to the rights of independent labor. If they did not, if they slipped into dependent relationships, Harlan believed no new policies need be invented. "If any considerable portion of [freedpeople] would probably become paupers or vagrants, society can protect itself from danger by applying to them the same laws which are applied to paupers and vagrants in the white race," he declared. Every state in the Union, he continued, had laws that could "secure the application of the proceeds of the pauper or vagrant's labor for the promotion of his welfare or those legally dependent on him. This could not possibly occasion any shock to society, or endanger its peace or prosperity." Such assumptions ran so deeply in free labor ideology that Harlan believed poor and vagrant laws to be a virtual answer to all the problems of emancipation. "All will be made secure," he promised, "by applying to paupers and vagrants of African descent the same principles and laws now in force and applied in every State of the Union.
to paupers and vagrants of Caucasian origin."

Harlan’s address went a long way toward exposing ideas about the nature of servitude in northern thought. Service to another individual was not servitude so long as it involved the voluntary obligations incurred from a contract. Service to parents or to the community as a vagrant or pauper was not a form of servitude because it also involved a forfeiture of rights and the assumption of an obligation. All of these areas assumed either a voluntary servitude, as in a labor contract or as in a vagrant’s willful neglect of the duty to work, or in a servitude based on the dependency of the child or the pauper. None constituted an involuntary servitude, which was what the amendment prohibited.

In the broad sense, Republican sponsors of the Thirteenth Amendment did not intend to redefine the rights of blacks or whites in novel ways. The amendment’s proponents saw it as both a negative and a positive policy statement, negative in its removal of slavery and its "incidents" through equality before the law, and positive in its establishment of free labor as a precondition for rights. This assertion of policy did not represent a reordering of northern views; rather, it imposed Republican assumptions about labor, society, and the law onto the post-war South.69

In part the negative policy implications concerning servitude resulted from the

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69By negative and positive, I simply mean negative in the sense of subtracting something and positive in the sense of adding something. This division is partially based on Carl Shurz’s observation in 1866 that “The general government of the republic has, by proclaiming the emancipation of the slaves commenced a great social revolution in the south, but has, as yet, not completed it. Only the negative part of it is accomplished.” Shurz, Report, 38.
ways in which radical discourse envisioned slavery. Often, slavery was not a social, labor, or legal system, but a personality. While some speakers described the "Slave Power" as an aristocratic class in the South, most used the term slavery as an entity in itself.  

70 James M. Ashley of Ohio, the radical manager of the bill in the House, employed such rhetoric in his address for reconsideration:

It has bound men and women in chains, and even the children of the slave-master, and sold them in the public shambles like beasts. ...It has silenced every free pulpit within its control, and debauched thousands which ought to have been independent. It has denied the masses of poor white children within its power the privilege of free schools, and made free speech and a free press impossible within its domain; while ignorance, poverty, and vice, are almost universal wherever it dominates.  

71

The "it" in this case was the neutral person of slavery. In the Senate, Republican Daniel Clark of New Hampshire gave slavery a gender:

She has degraded labor and increased poverty and vice. She has reared an aristocracy and trampled down the masses, ...She has practice concubinage, destroyed the sanctity of marriage, and sundered and broken domestic ties. ...She has forbidden [slaves'] instruction, and mocked them with the pretense she was christianizing them through suffering.  

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The transformation of slavery into a physical being had significant implications for radicals in passing the amendment. They intended to eradicate this monster and all


71 CG, 38/2, 138.

72 CG, 38/1, 1369. See other examples, CG 38/1, 1320-24, 2949, 2955.
the damage it had done. Such action established nothing; it merely reaffirmed the Republican view about the nature of northern society.

For the South, this negative policy meant the abolition of the "badges" or "incidents" of slavery. Ever the moralist, Charles Sumner stated the case clearly. Sumner desired "first, to strike at slavery wherever [he could] hit it; and secondly, to clean the statute-book of all existing supports of slavery, so that it may find nothing there to which it may cling for life." According to Harlan, these incidents included interference with marital, parental, and property relations as well as civil rights such as testifying.73

Equality before the law supplied the means to this end. Sumner went so far as to introduce an alternative amendment based on this precept. His text for abolition read, "All persons are equal before the law, so that no person can hold another as a slave." The first clause operated as a conditional; equality before the law by itself produced emancipation. While Sumner may have had other ends in mind such as women's rights, slavery, not servitude or service in general, was the object being operated upon in the text. Although equality before the law could be revolutionary for radicals, for others it could be conservative and carry no implication of change. Godlove S. Orth, a Republican from Indiana, declared the amendment would "leave both classes [in the South] in the hands of God who created them, and giving each equal protection under the law, bid them go forth with the scriptural

73CG, 38/1, 1482, 1439.
injunction, 'In the sweat of the face shalt thou eat bread [sic]."  

Harmonizing southern society with northern law, as Shurz had implied, was a main goal of the amendment's supporters. In part, they envisioned application of the Somerset doctrine, the British decision that had been the basis of abolitionist legal challenges to slavery. Freedom was national; slavery had to be supported by positive, local law. Recently elected Republican Congressman John A. Kasson of Iowa outlined the basic difference between servitude and service. Speaking during House reconsideration of the measure in January 1865 Kasson quoted James Madison: "The former [servitude] being thought to express the condition of slaves, and the latter [service] the obligation of free persons."  

Elijah Ward, a Democrat from New York who spoke against the amendment but eventually voted for it, provided further clarification. Servitude would exist in all societies, he avowed, but "servitude rendered necessary by circumstances the servile party cannot control, [was] bondage." In other words, compulsion, not subordination, constituted

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74CG, 38/1, 1482; 38/2, 143.


76 CG, 38/2, p. 190. Italics and brackets in Kasson's original.
slavery. Other congressmen followed similar lines. For Union Party Representative Thomas T. Davis of New York, slavery consisted in personal ownership of labor, while Radical William Kelley described slavery as a "system of unpaid labor and property in human beings."\textsuperscript{77}

These definitions were not used clearly or consistently, but they did contain a common theme. Both Republicans and Democrats recognized slavery and "involuntary servitude" as separate from servitude or service generally. In debating emancipation, Congressmen were unwilling to examine the imbalances of power in labor contract bargaining. Unequal relationships of power were acceptable as long as entered with the knowledge and consent of the unequal party. Such definitions of workers' position in free society echoed Maine Justice Ether Shepley's comments about mutuality and generally followed conservative northern jurists' support for strict application of contract doctrines. Though compatible with northern laws and ideas, these principles were far from adequate for the needs of emancipated African-Americans.

Viewed another way, the Thirteenth Amendment's restrictions revolved around the connotations of "involuntary," and here drafters probably had something more specific in mind. Republicans in Congress seldom discussed examples of "involuntary" labor. Still, commentators outside it did, and the amendment's supporters must have imagined something similar. One thing that advocates of constitutional emancipation hoped to prevent was freedom on the British West

\textsuperscript{77}CG, 38/2, 154, 38/1, 2983.
Indies' apprenticeship model. In its final report the American Freedmen's Inquiry Commission had cautioned that emancipation could not set up apprenticeship as a half-way house between the dependence of slavery and the self-reliance of freedom. In July 1865, H.R. Brinkerhoff, a lieutenant colonel in the 52nd U.S. Colored Infantry, suggested that Mississippi planters intended to initiate "a system of apprenticeship, or some manner of involuntary servitude." In 1867 U.S. Supreme Court Chief Justice Salmon P. Chase drew from the amendment's power to strike down a Maryland law holding an African-American woman in a long-term apprenticeship. More salient was the example of Mexico. Shurz warned of planter plots to institute peonage, as did W.B. Stickney, one of Conway's subordinates in Louisiana. Treasury Agent John H. Pilsbury in Charleston, South Carolina, worried that state legislation could place African-Americans "in a state of actual peonage and submission to the will of the employer" and consequently "restore the former slave to, as nearly as possible, the condition of involuntary servitude." Concerns about peonage pushed Congress to outlaw the practice in New Mexico in 1867.  

Given these definitions, the involuntary servitude clause proscribed any

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positive law that would interfere with the voluntary act of wage bargaining. Individual workers must be free to choose individual employers, and the parties' negotiations over remuneration and conditions of employment must be unfettered. Once a contract had been voluntarily entered, however, contract doctrine presumed it could not be broken without penalty, no matter what conditions of labor it subsumed. Ultimately, the critical word in the phrase was not "servitude" but "involuntary."

Destruction of slavery and its incidents though equality before the law represented only one half the policy question in the Thirteenth Amendment. The second question concerning positive policy creation opened issues that ranged far beyond slavery or its incidents and helped to clarify the amendment even more. Democrats charged that the amendment would effect a broad social revolution. "Mere exemption from servitude is a miserable idea of freedom," declared Democrat William S. Holman of Indiana. Holman speculated that the radicals had more in mind, that they planned to gratify their "visionary fanaticism" through "the elevation of the African to the august rights of citizenship." Willard Saulsbury, an irascible Democrat from Delaware, spoke for many Congressmen when he claimed the amendment would grant the power to interfere with marital and parental relations and with all species of property. During both debates in the House, opponents reiterated these charges. Chilton A. White, lawyer and Democrat of Ohio, took the argument to its extreme. The amendment was "a leveling principle," he proclaimed, "It is agrarian in its character, and once entered upon there is no telling when to
Social leveling was not the intention of the Thirteenth Amendment. Many of the resolution's supporters did not even envision it securing civil and political rights for African-Americans, much less changing social relations for whites. John B. Henderson, the conservative Republican from Missouri who first introduced the resolution in the Senate, flatly denied that it offered blacks the right to vote. House Republican John F. Farnsworth of Illinois answered the charges by claiming rights rested on merit. "If, as a race, they shall prove themselves worthy [of] the elective franchise...they will enjoy the right," he predicted. "They will demand it and they will win it, and they ought to have it." However, to say the Thirteenth Amendment granted such a right appeared absurd to Farnsworth. "If political rights must necessarily follow from the possession of personal liberty, then all but male citizens in our country are slaves," he (rightly) pointed out. Even Kelly, a man who proclaimed freedom to be a permanent and universal institution, saw nothing new stemming from such an action. He would "trust the freed negroes to the care of God, under our beneficent republican institutions."

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\footnote{Holman, CG, 38/1, 2962; Saulsbury, CG, 38/1, 1366; White, CG, 38/2, 215. See also, 38/1, 2939, 2985, 2987 and 38/2, 151, 178; Belz, New Birth, 122. If taken to its ultimate conclusion under an expansive interpretation, the Thirteenth Amendment would produce a genuinely democratic revolution that would dissolve all servile relationships and institute a truly egalitarian society.}

\footnote{Ironically, the one speaker who both voted for the amendment and acknowledged any revolutionary effects was the influential Democratic Senator from Maryland Reverdy Johnson.}

\footnote{Henderson, CG, 38/1, 1465; Farnsworth, 38/2, 202; Kelley, 38/1, 2985.}
While the amendment's supporters did not mean to make a political or social revolution that would reach the North, they did intend to realize the goal of the Republican Party since its inception, the establishment of free labor. Ashley laid out this aim clearly in his major address on the measure:

It will be a pledge that the labor of the country shall hereafter be unfettered and free, and I need not say under the inspiration of free labor the productions of the country will be tripled and quadrupled. ...All thinking men have examined and comprehend the priceless value of free labor.\(^\text{82}\)

Free labor would draw northern and European workers to the South. Combined with the freedpeople, they would constitute a labor force that would give "security" to capital and "inspiration" to labor. This awesome power would "make the land blossom like a rose," speedily obliterating war-time destruction, rapidly increasing wealth, and quickly ensconcing secure and stable governments.\(^\text{83}\)

For radicals like Ashley, free labor supplied a panacea in 1865. Such men relied on what Republican ideology had taught them. One thing it told them was that slavery was economically backward. House Republican William Kellogg of Illinois demonstrated the stagnant nature of slavery with an impressive batch of statistics, arguing in addition that it blocked social mobility. Placing the argument in the more familiar terms of nineteenth-century morality, James W. Patterson of New Hampshire simply called slavery a "thriftless system." The shift to free labor would remedy these ills. Harlan believed that even "the wealth and prosperity of the ex-slaveholders

\(^{82}\text{CG, 38/2, 141.}\)

\(^{83}\text{Ibid.}\)
would be augmented by a change of their system of labor from compulsory to voluntary." House member Thomas B. Shannon of California had a broader vision, one reminiscent of Jeffersonian ideals. The "voting masses" of the country should be "an independent yeomanry the majority of whom are freeholders of moderate yet sufficient estate," who were well-educated and who bore "a fair share of the responsibilities of Government...." 84

In 1864 and 1865, Republicans believed their vision of a free labor society and the political and social rights that it produced could be easily established in the post-war South. Because they personified slavery, many Republicans assumed that destroying the evil eradicated its effects. With slavery gone, the value of free labor would be evident to slaveholders. Since the myth of free labor underlay the whole of Republican ideology, the main concern in 1864 and 1865 involved the freed slaves, not the former owners. A basic faith in the goodness of the freedpeople and their ability to undertake free labor united Republicans in 1864 and 1865. Harlan cited examples of free blacks supporting themselves in the pre-war North, while Farnsworth pointed to the brave service of black troops and the reliability of African-Americans in sheltering soldiers. Radical Josiah B. Grinnell of Iowa maintained that if slaves had supported both themselves and their masters, they could surely support themselves as freedpeople. Republican Glenni W. Scofield of Pennsylvania claimed that under the various border state abolition acts, former slaves demonstrated their

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84 Kellogg, CG, 38/1, 2620ff, 2955; Patterson, 38/2, 485; Harlan, CG, 38/1, 1440; Shannon, 38/1, 2948. The superior productive power of free labor had been a common theme in free labor ideology. Foner, Free Labor, 43.
worth. "The slaves...are leaving their old masters, forming new associations, seeking education, earning new homes, learning self-reliance, and thus creating barriers to the revival of slavery stronger than legislation itself."85

Reports such as this verified Republican assumptions about what should happen when the institution of slavery was removed. Since they conceived of slavery as a powerful subject, its removal would automatically call forth the morally virtuous system of free labor. Consequently, Scofield's scenario of emancipation was no mere list. Instead, it described a progressive process in three steps. First, slaves threw off the chains of bondage; next, they became virtuous citizens through voluntary associations (contracts by implication), education, and the establishment of home and family; finally, as the outcome, they became self-reliant. Thus, black men (but not women) achieved independence, which in Republican ideology allowed access to political and civil rights. In essence, Scofield's hierarchy of rights harkened back to what writers such as Tuckerman had asserted in the 1830s. Work and domesticity must precede political participation.86

In republican ideology, independent labor and independent relationships formed a social basis for rights. The right to work and the right to undisturbed family relationships laid the foundation from which all other matters of society and politics must proceed. The key was the absence of a dependent state of being. Harlan

85CG 38/1, 1438, 2980; 38/2, 144, 199, 200.

86Hyman and Wieck also see a hierarchy of rights but do not connect it as directly to ideas about work and family. Equal Justice, 396.
pointed to the inverse of this scenario, the right to the service of another that originated in some sort of dependent relationship. The dependence of women, children, and the poor fell under this category. So too did the dependence of vagrants who, according to social thinking, refused willingly to establish the necessary home and labor relationships. Finally, labor contracts for unskilled and semi-skilled workers involved a voluntary surrender of independence.

Regulation of these dependent relationships by a legal system formed an integral part of free labor. In theory, free labor rested on geographic, occupational, and social mobility. Paradoxically, for the ideology to work in practice, it needed both the operation of all three types of mobility, and, at the same time, the control of all three types. Laws that restricted mobility underlay the Republican and northern definitions of slavery versus service. Both were systems of social control and labor discipline based in dependent relationships. The crucial difference lay in the means. Ultimately, regulation of slavery depended on physical compulsion; regulation of service rested upon subtle social and cultural constructs and upon racially blind laws. Free labor could not have existed without this legal system or some other form of work discipline (in the more general sense). If the Republicans intended any positive policy statement in 1864 and early 1865, they meant to establish free labor and free labor law as the starting point for inclusion of freedpeople in the social and political institutions of the Union. These same concerns motivated Freedmen’s Bureau officials, who would attempt in the months and years after passage of the Thirteenth Amendment to transform its promises into realities.
CHAPTER 5
'THE INGENUITY OF WICKEDNESS':
LEGAL LABOR DISCIPLINE AND PLANTER RESISTANCE
IN ALABAMA, 1865-1868

While Congress debated the Thirteenth Amendment, it also worked on establishing a Bureau of Refugees, Freedmen, and Abandoned Lands, completing a one-year authorization act in March 1865.¹ In the next few years the bureau's state assistant commissioners, district sub-assistants, and local agents would be charged with the task of defining and implementing the northern system of labor. Scholarly evaluations of the bureau's success or failure in this mission have varied widely. Some have seen the bureau as an ineffective instrument of social change or as tool of planter domination.² Those interested in the origins of sharecropping emphasize


pure market forces, compromises between freedpeople and planters, or class domination.\(^3\) Newer works are more sympathetic to the bureau and sometimes blame the ambiguities of free labor itself.\(^4\)

For these more recent scholars, bureau labor policy was ambivalent because officials established laws restricting the wage bargain and the labor market. These

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regulations appear contradictory because they are measured against various ideological constructions of the free labor ethic, especially against the abolitionist view that advocated an unfettered market. As noted, however, northern jurists had only begun to translate this idea into law before the war. Though challenged by wartime experiences in Louisiana and elsewhere, many northerners kept their faith in labor contracts and vagrancy laws. Still, the particulars of that faith varied because of the divergent constructions of work discipline established by antebellum courts and legislatures. Bureau officials promulgated their labor codes without consistent models on which to draw. As a result, the bureau’s success often hinged on its numerous participants’ levels of commitment and ability to use labor law to either help or hinder African-American workers. Even when bureau officials applied northern labor law accurately, planter resistance forced them to search for solutions beyond received concepts. Yet northern ideology and law had left them ill-prepared to do so.

The bureau’s actions in Alabama illuminate how antebellum conceptions of free labor law both empowered and limited its mission. When Alabama planters and African-American workers adjusted to emancipation, they pursued relatively clear interests that affected their daily welfare. As historians of emancipation have pointed out, planters desired continued compulsory labor, while freedpeople wanted autonomy over their lives and institutions.\(^5\) Because its goal was to implement a system of labor that would emulate the northern model, the bureau had no material

stake in the outcome of this clash of interests. However, its ultimate aims brought the agency into conflict with the state's planters, for the Alabama bureau found means through which labor law could support freedpeople's rights. By 1867 Alabama Assistant Commissioner Wager Swayne fought consistently for the legal rights of the state's African-American laborers. Yet in the crucial period of late 1865 and 1866, his acceptance of nineteenth-century conceptions of labor and poor law inhibited his efforts.

While the Freedmen's Bureau supported labor discipline out of adherence to northern ideals, Alabama planters desired compulsory labor for more immediate ends. In many parts of the state in the summer of 1865, whites acted as if slavery still existed, whipping refractory laborers and terrorizing African-American communities in organized raids by local "militia." Near Tuskegee, bands of white men dressed in women's clothing or in black-face and intimidated African-Americans, young and old, men and women. In part this violence was intended for racial control as an end in itself. But in some parts of the state, armed bands of whites in 1865 and 1866 used violence to force freedpeople to sign labor contracts. At least one freedman was shot for refusing. Other planters formed unions to control both laborers and other

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employers. Some made agreements that forbade offering work to African-American laborers found more than ten miles from their former masters. In Tuscaloosa County, planters agreed to pay freedpeople no more than one-eighth of the net proceeds from the crop. When a local planter offered his hands one-sixth, the combination formed a committee that coerced him and his employees to accept their agreement.\footnote{HED 70, 292; Report of the Joint Committee on Reconstruction Four parts in one volume. (Washington, D.C.: Government Printing Office, 1866), 3:9.}

Still employing these extra-legal measures, Alabama whites also turned to legal coercion in late 1865. Passed in December 1865 and February 1866, the Alabama Black Codes created new laws governing vagrancy, enticement of labor, and apprenticeship. Although these acts were color-blind, the motive of labor coercion was unmistakable. The vagrancy law established a system of poorhouses, but its text made it clear that these were not to be benevolent institutions. The legislature sanctioned chain-gangs, stocks, solitary confinement, and "such reasonable confinement as a parent may inflict on a stubborn refractory child." A vagrant was defined as "a stubborn or refractory servant; [and] a laborer or servant who loiters away his time, or refuses to comply with any contract for any term of service without just cause." Such persons could be fined $50 and sentenced to the house of correction for up to six months, but that was not law's primary object. In lieu of this sentence, offenders could be hired out for cash, the sale to be announced with three days notice and the proceeds to go into the county treasury for support of the helpless in the poorhouse. Vagrancy arrests would thus control reluctant adults; the
apprenticeship law would supervise their children. It allowed the apprenticeship of orphans and, more importantly, children whom judges of the probate court determined could not be supported by their parents. While the law included nominal requirements for education, it gave enormous powers to masters. They could inflict corporal punishment, carry their wards to other states, and capture runaway servants who would then be punished as vagrants if they refused to return. In addition, the law gave preference to former masters when making indentures. Finally, to regulate stubborn planters, the state enticement law made hiring a laborer under contract to another master punishable by fines of $50 to $500.8

While similar in name to some northern laws and bureau regulations, the Alabama Black Codes enforced labor even more directly than their southern predecessors. Vagrants were not members of an undifferentiated underclass in general but individual plantation workers who refused to accede to plantation discipline. The laws did not coerce a general duty to labor. Instead, they reinstitutued compulsory performance of contracts, the very legal principle that Jesse Holman had rejected in Clark's case and that most northerners had abandoned in the first two decades of the century. The hopes the planter class placed in these particular statutes came abruptly to an end when Alabama Governor Robert Patton vetoed the bills and the legislature failed to override him. However, the antebellum vagrancy law remained in effect, and Alabama whites used it to procure convict laborers until it was repealed by the

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839th Congress, 2nd Session, Senate Executive Document 6: Reports of the Freedmen's Bureau Assistant Commissioners and Laws in Relation to the Freedmen, 170-174.
legislature in 1867.  

Though they retained hope for a new slave code, Alabama planters slowly accommodated to the contract system of the Freedmen’s Bureau. In fall 1865, before their attempt at legislation, planters expressed a desire for either indentures that would bind laborers for two to three years, or for no contracts whatsoever, which would free them to dismiss laborers at will. When forced to adjust to bureau policies, one recourse was to secure restrictive contracts. In the Eufala area in 1867 planters obtained various agreements that required freedpeople to pay for all lost stock, half the land tax, $12.50 per year for use of mules, and three to four times the values of work time lost. Near Huntsville, planters engineered an ingenious double-lease arrangement whereby freedpeople paid rent to a sub-lessee who then refused to pay rent to the owner, after which the owner attached the freedmen’s crop to cover his "loss." As late as 1868, contracts in the Demopolis area contained clauses stipulating forfeiture of wages for disobedience.  

While these sort of agreements intended to bind labor to the plantation, planters took the opposite action even more frequently, violating their agreements with African-American laborers. In 1865, 1866, and 1867, planters commonly drove

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9On Patton’s vetoes, see Report of Major General Wager Wayne, Assistant Commissioner for Alabama, for the Year Ending October 31st, 1866 printed copy in BRFAL-AL, Roll 2, 11-12 (cited hereafter as Annual Report). For examples of convict labor, see HED 70, 292; and Special Inspection Report of W.A. Arthur, October 13, 1866, BRFAL-AL, Roll 19.

laborers from their plantations when the heavy work of summer hoeing was done. On a Talladega plantation, freedpeople were driven off for going to town to celebrate Independence Day. In early 1868, planters across Alabama discharged laborers who voted in state elections. Dismissing laborers might seem to contradict the desire for labor control, but as one bureau agent reported, planters could hire women and children at harvest time at lower wages. When freedpeople sought redress for unjust discharges, planters sometimes disregarded orders to appear for settlement.11 Given such actions, one goal of the bureau’s labor contract system was to bind planters to their obligations.

While Alabama planters endeavored to maintain their authority over labor, Alabama freedpeople walked numerous avenues toward autonomous communities and lives. However, they themselves were not wholly unconcerned with labor discipline. The African-American middle class established its own institutions to deal with jobless freedpeople. In Mobile a freedpeople’s association established schools and churches and helped the unemployed find jobs. In fall 1865 a committee of African-Americans cooperated with the Freedmen’s Bureau in supplying workers for a railroad project, clearing Mobile’s streets of about sixty idle freedpeople. These

actions expressed a concern for order on the part of some African-Americans, but other organizations lobbied bureau agents to relieve freedpeople forced into harsh labor arrangements. In Selma a group of African-Americans who were "well-settled in business" complained to the bureau about local officials who arrested freedpeople for using abusive language, badgered them into pleading guilty, and put them on chain gangs when they could not pay the $100 fine.\textsuperscript{12}

Some ex-slaves fought planter power by seeking opportunities for land. In late 1865 in Alabama and across the South individual freedpeople refused to contract for 1866 in hopes that the U.S. government would grant land as it had promised. African-Americans also took collective action to acquire land and autonomy. For example, Horace King, a master mechanic from Russell County, Alabama, organized a settlement company for emigration to Georgia. His group planned to take subscriptions, obtain land, improve it, and divide it among heads of families.\textsuperscript{13}

Apart from seeking independence through land, African-American laborers


\textsuperscript{13}Report of T.M. Goodfellow, October 18, 1865, BRFAL-AL, Roll 18. Swayne to C.C. Sibley, August 24, 1867, BRFAL-AL, Roll 2. Of course, the eventual outcome for many African-Americans' search for land was their acquiescence in sharecropping arrangements, as many historians have demonstrated. See the works cited above in note 3. For an example of the freedmen's desire for share arrangements in Alabama, see Report of Bennett, February 2, 1868, BRFAL-AL, Roll 18.
in Alabama resisted planter control in several ways. Some resistance came on the plantation, reminiscent of the sort of quiet defiance practiced by slaves. African-American men kept their wives from field work, precipitating conflicts with planters unwilling to support non-producing freedpeople. Other freedpeople asserted their power to control work rhythms and the amount of work performed.\textsuperscript{14} Some pursued legal remedies available through the bureau. In early 1866 they filed "thousands" of complaints about unfair contracts, according to one bureau official. Between fall 1867 and summer 1868 various bureau agents in Montgomery heard twenty to thirty unjust discharge cases per month, and in a single month in 1868 Montgomery area freedpeople registered 280 complaints for planters selling crops without making share settlements.\textsuperscript{15} Freedpeople also engaged in collective action. At contract time in every year from 1866 to 1868, freedpeople in some parts of the state participated in informal "strikes" against planters. In 1866 African-American labor in Lowndes County held out against a local planter combination and eventually pushed up the wage level. African-American workers in the Eufala area informed planters in 1867 that they must have higher wages or larger shares or they would not work. A year later, freedpeople in several areas of the state withheld their labor in hopes that

\textsuperscript{14}Report of Shorkley, January 4, 1867; Report of Bennett, March 31, 1868; Report of McGogy, August 5, 1867, BRFAL-AL Roll 18.

elections would usher in a new government more amenable to their interests.\textsuperscript{16}

While organized labor actions were relatively rare, many African-American laborers simply left their jobs to work for other employers or dropped out of the labor market altogether. In actual numbers, a relatively small proportion of freedpeople actually abandoned contracts, for bureau agents often reported that few violations had occurred. However, numerous Alabama freedpeople found new employers at the beginning of 1866, asserting their separation from old masters. Even after they signed new agreements, some freedpeople refused to stay on plantations when they faced abuse, or when they could achieve better living conditions elsewhere. Although many freedpeople accepted the contract system in 1866 and 1867, by 1868 disaffection became widespread. Frustrated with their inability to collect wages, many African-American workers refused to contract. Economic hardship eventually forced most back to plantations, but in 1868, as in previous years, large groups of freedpeople withdrew from the labor force. Some lived under brush arbors in the countryside, some subsisted on garden plots, and others resorted to stealing and killing farmers' livestock. Although the bureau ventured to find steady employment for freedpeople, many continued to congregate in towns as casual laborers.\textsuperscript{17}

\textsuperscript{16}HED 70, 297; Report of Connelly, January 31, 1867; Report of Charles Bartlett, February 6, 1868; Report of Bennett, January 31, 1868, BRFAL-AL, Roll 18. Kolchin, First Freedom, 39, refers to these actions as a "mass general strike."

\textsuperscript{17}Report of Robert T. Smith, May 2, 1868. HED 70, 297. AAG to Hon. A.A. McMillan, June 10, 1867, BRFAL-AL, Roll 2. Report of Tracy, January 31, 1866; Reports of Connelly January 31, 1868, March 2, 1868; Reports of Blair, December 27, 1867, February 2, 1868, March 1, 1868; Report of Buckley, October 20, 1865; Report of Thomas L. Bevilt [?], April 27, 1868; Report of Gillette, June 26, 1868,
In asserting autonomy by leaving their jobs, African-American laborers acted as one strand of free labor ideology predicted they should, escaping unsatisfactory employers and responding to the market. Consequently, if Union army and Freedmen’s Bureau officials were the agents of abstract free labor ideology, they should have celebrated these actions. However, they limited the right to quit and restricted operation of a free market in labor. That they did so demonstrates the power of the evangelical version of free labor, which saw freedom as self-ownership. More importantly though, their actions reveal a construction of free labor that accepted legal labor discipline as normative.

Unlike states where the Union army established a presence early in the war, northern involvement in Alabama began only after Appomattox. However, labor policies there became immediately connected to those developed earlier in Louisiana. In April 1865 the Rev. Thomas W. Conway, Superintendent of Freedmen in the Department of the Gulf, assumed authority over Alabama. In May he adopted the labor regulations he had drafted for Louisiana under the authority of Major General Stephen Hurlbut. Conway considered these regulations essential to establishing order and to assisting the freedpeople. He noted than when he arrived in Montgomery he found "a perfect reign of idleness on the part of the negroes...." Conway blamed this state of affairs on planter violence, which "chills and disheartens the freedmen." He assured the planters that "the freedmen must work" but warned that "they must not

be persecuted and murdered because they are free."

Before the establishment of the Freedmen's Bureau as an independent entity in Alabama in July, Conway, his assistants, and other Union army officials began to establish labor and poor law in the state. Nearly obsessed with the specter of thousands of poor freedpeople, they tried to convince them to stay on the plantations. In May, Brigadier General C.C. Andrews told the freedpeople of Selma that they were "misinformed" that their best interests lay in leaving plantations for towns. "I do not believe you hazard your liberty by remaining where you are and working for such compensation as your employers are able to give," he advised them. Charles W. Buckley, Conway's assistant in Montgomery and later head of the bureau's educational program, was more direct. Speaking with men from the city's African-American churches, Buckley informed them that "they were not free to be insolent, to be idle, to pilfer, to steal, or do anything contrary to good order. They were free to come under the restraints of law; free to toil and claim the fruits of their own industry." He preached the binding nature of contracts and the need to seek employment. Reporting these sermons to Conway, he assured himself that the black leaders had "received it all with joy" and that his discourse had quieted the city, cleared the streets of idlers, and created "mutual confidence" between planters and freedpeople. Just to be sure, Buckley sent armed guards to plantations to secure order and diminish vagrancy. Samuel S. Gardner, a chaplain from Maine stationed

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in Selma, also sanctioned "such discipline as would be considered mild and humane under the old plan...especially with the young and thoughtless."\textsuperscript{19}

Oppressive as these actions might seem, they did not necessarily stem from racism or from an outright intention to support the planters. Rather, they emanated from the language of the nineteenth-century middle class. Andrews's rhetoric dripped Victorian platitudes. The freedpeople had already disproved those who claimed emancipation would result in indolence, violence, and cruelty, and they could earn love and respect by good behavior. "There is nothing [that] makes people so beautiful, whether they are black or white, as virtue," he solemnized. "Liberty alone is not happiness. Self-control and self-support are required to make it pleasant."\textsuperscript{20} Marxist historians might see such sentiments as a hypocritical facade, yet this sort of rhetoric carried a powerful, independent motive force for middle-class northerners. They applied it to their children, they applied it to their poor, and they applied it to the freedpeople.

Conway also used the standards of northern poor law reformers, but by mid 1865 he had begun to lose the confidence he possessed a year earlier. While advocating forced labor in colonies to prevent idleness, he maintained at the same time that the freedpeople were "not apt to be vagrants. They have fewer vagrants than can be found among any other class of persons, and by far the fewest beggars."


\textsuperscript{20}OR, XLIX (2), 729.
In fact, they lived "under the weight of oppressive vagrant laws, the force of constant opposition to their liberty, and the endless persecutions and sufferings inflicted by their late owners." When he had been in New Orleans, most freedpeople arrested by the police were "industrious and self-supporting," and he sought the release of "dozens" daily.\textsuperscript{21} For Conway, vagrancy was a real "crime" for which guilt or innocence could be ascertained. In agreement with poor law reformers, he identified begging as the most culpable deed and found freedpeople relatively guiltless of this activity that so discomfited the nineteenth-century middle class. Once the freedpeople passed this character test, Conway found them blameless and oppressed.

Conway soon left the scene, but the language of poverty persisted when Brigadier General Wager Swayne became the head of the Alabama Freedmen's Bureau. The son of Supreme Court Justice Noah Swayne, he grew up in Ohio, where his father had settled after leaving Virginia to escape the ideological burdens of slavery. Wager graduated from Yale, read law in Cincinnati, and entered his father's practice. Commissioned a major in the 43rd Ohio Infantry, Swayne received a lieutenant colonelcy after the Battle of Corinth and rose to the rank of brigadier general in the Army of the Tennessee. Near the end of the war he lost his right leg after being hit by a shell. Less than thirty years old, he became assistant commissioner in July 1865.\textsuperscript{22}

\textsuperscript{21}Conway, \textit{Freedmen of Louisiana}, 5-6, 35.

\textsuperscript{22}Kenneth B. White, "Wager Swayne: Racist or Realist?" \textit{Alabama Review} 31 (April 1978): 93-95. White contends that Swayne's legal education affected him little but that his military training gave him a reverence for regulations.
The bureau operated under Conway's program until Swayne issued a set of labor regulations in late August 1865. They required written contracts with heads of families to provide food, quarters, medical attention and "such further compensation as may be agreed upon." These agreements constituted a lien on the crop, not more than half of which could be marketed before payment. On the one hand, Swayne saw this program as unexceptional, suggesting that the "usual remedies" of forfeiture of wages by laborers and suits for damages against employers would suffice for contract violation. On the other, he noted that "many persons have not yet learned the binding force of a contract and that freedom does not mean living without labor." Consequently, he stipulated that freedpeople absent from plantations without leave for longer than a whole day or an aggregate of three days within a month could be proceeded against as vagrants and set to work on the roads by local authorities. Problems arose with this system almost immediately, prompting another order two weeks later. To deal with freedpeople driven off by their employers, Swayne forced employers to take them back until other work could be found and directed that crops could not be sold until planters concluded settlements satisfactory to bureau agents. In addition, Swayne had to remind agents to prevent corporal punishment.\(^\text{23}\)

Many of these enforcement problems originated in one of Swayne's initial acts as assistant commissioner. In early August he had designated sitting local magistrates as bureau agents who would hold power as long as they enforced the laws of

\(^{23}\text{General Order 12, August 31, 1865; General Order 14, September 15, 1865, BRFAL-AL, Roll 17.}\)
Alabama without distinction of color. He justified his action by declaring himself unwilling to set up courts in Alabama "conducted by persons foreign to her citizenship and strangers to her laws." This critical error precluded the "usual remedies" on which Swayne hoped to rely. Until the legislature amended or repealed them, local officials tried to control freedpeople by using the state's vagrancy, apprenticeship, and stay laws. Finally, in November 1867 Swayne issued an order giving labor a superior lien and allowing bureau officers to take possession of crops to settle contract disputes. About a year later the Reconstruction legislature passed a similar law.24 In the meantime, the bureau fought to protect freedpeople's interests from the depredations of the planters without ample legal or ideological power to do so.

In 1865 and early 1866 Swayne endorsed strict enforcement of labor and poor law policies similar to Conway's. While he warned the Mayor of Selma against assessing excessive fines and assigning freedpeople to chain gangs, he assured the sub-assistant commissioner in Tuskegee that he did not object to freedpeople being set to work as vagrants as long as they were not placed on half-rations. His office also stipulated that it would not enforce payments where no contract had been made unless the freedpeople had labored faithfully and had been driven off without means

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24 General Order 4, August 4 1865, BRFAL-AL, Roll 17. See also Elizabeth Bethel, "The Freedmen's Bureau in Alabama," Journal of Southern History 14 (February 1948): 51-53, 76, 87. By fall 1865, Swayne became aware of the deficiencies of using civil authority, and later attributed its failure to "class feeling." See Swayne to Howard, November 28, 1865, BRFAL-AL, Roll 2. Annual Report, 4. These "agents" should not be confused with the sub-assistant commissioners, whom I discuss below. The SACs were drawn mostly from the Union Army as in other states.
to survive the winter. Moreover, his office stated straightforwardly that "the Bureau assists Employers who comply with the regulations of this office by giving Civil Magistrates authority to arrest and punish Freedmen for violation of contracts."\textsuperscript{25}

Still, Swayne did not mean enforcement of contracts in the same way that the Alabama legislature did. He secured Patton's veto of the Alabama Black Codes, and his office tried to terminate repressive local curfew and pass laws and to interdict corporal punishment on plantations. His office also interfered with the detention of black families and the apprenticeship of African-American children whose parents objected or when the children were old enough to support themselves. In one such case, Swayne told a plantation mistress that if she did not release two freedpeople's families, he would send an armed force to free them and charge her for the expense.\textsuperscript{26}

These apparently contradictory policies originated in Swayne's peculiar formulation of free labor ideology and its relation to the law. Having found rural freedpeople taking a "lawless holiday" when he arrived in the state, Swayne explained

\textsuperscript{25}Assistant Adjutant General to Mayor of Selma, September 11, 1865; AAG to Capt. Andrew Geddes, September 8, 1865; AAG to L.T. Pasona, September 21, 1865; AAG to G.A. Washburn, May 10, 1866, BRFAL-AL, Roll 1. I have cited letters from the AAG without names, assuming they are transmitting orders from the assistant commissioner.

\textsuperscript{26}For Swayne's involvement with the Alabama Legislature and Governor concerning the Black Codes, see Annual Report, 5, 11-12; HED 70, 293-294; Wiener, Social Origins, 52. On other policy decisions, see AAG to G.L. Mason, Mayor of Wetumpka, November 20, 1865; AAG to Henry Brown, December 5, 1865; Swayne to Hon. M.L. Williams, December 9, 1865; Swayne to Judge J.M. Henderson, January 27, 1866; Swayne to County Judge, Lowndes Co., January 29, 1866; Swayne to Mrs. Thomas Harrell, April 18, 1866, BRFAL-AL, Roll 1.
his labor regulations as a response to idleness, which was "extremely prevalent." Like Conway or Buckley, Swayne would not abide freedpeople dropping out of work completely. Still, he did not try to enforce plantation labor alone, and on at least one occasion he helped employers find freedpeople willing to labor on railroads.\footnote{HED 70, 287; Swayne to Howard, July 24, 1865, August 21, 1865, BRFAL-AL, Roll 2; Annual Report, 5.} Swayne contended that his regulations did not compel anyone to contract, nor did his vagrancy order commit anyone to jail; it simply initiated investigations. His purpose, he claimed, was not to bind freedpeople to the land "but simply to be present during the hours of labor." Swayne intended to enforce work, not peonage or involuntary servitude.\footnote{Swayne to Howard, September 4, 1865, BRFAL-AL, Roll 2; HED 70, 287.}

Ideally, Swayne hoped that the "makeshift" contract system would fade away, leaving wages and working conditions to be regulated by the market, by material conditions, and by the common law. "The true incentives to labor in the free States are hunger and cold," he declared.\footnote{Annual Report, 9; HED 70, 298, 287. Emphasis in original. Both before and during the war, abolitionists had promoting the salutary influence of poverty in inducing labor. See Jonathan A. Glickstein, "'Poverty Is Not Slavery': American Abolitionists and the Competitive Labor Market" in Antislavery Reconsidered: New Perspectives on the Abolitionists, ed. Lewis Perry and Michael Fellman (Baton Rouge: Louisiana State University Press, 1979), 199.} If laborers found themselves abused, they had two remedies: common law suits for damages, or quitting. Swayne connected the "right to quit at pleasure" with the existence of money wages and found it to be the ultimate remedy. "The true security of labor, also, in the free States is that whenever
the laborer finds himself ill treated, or his wages insufficient or unsafe, he can quit without having to account to anybody," Swayne maintained. "This is more and better than all laws." The assistant commissioner's assertion of a right to quit embodied a central tenet of the radical position on free labor. Yet he could make this bold declaration only because his fears about idleness had been allayed. "I have no further fears of the wandering propensities of the negro," he assured Freedmen's Bureau Commissioner O.O. Howard. "The removal of forced restraint was naturally followed by a jubilee; but that is now over." 30 For Swayne and others, the right to quit an employer did not imply the right to quit the labor force.

Combining this wider belief in a free market with his training in law, Swayne began to secure freedpeople's rights more forcefully by fall 1866, discovering a source of authority in the Civil Rights Act of 1866. As soon as news of the Congressional override of President Andrew Johnson's veto reached Alabama in late April, Swayne's office tried to stop the use of the chain gang as in violation of the law. By September the general condemned the Alabama vagrancy law as operating "most iniquitously upon the freedmen. ...In terms the law makes no distinction on account of color, but in practice the difference is invariable." In October he made good on his new position by ordering the sub-assistant commissioner in Demopolis to investigate the case of a woman "sold as a vagrant" by a justice of the peace. He directed the agent to give the woman and her husband transportation to bureau headquarters and to collect information that would convict the JP under the Civil

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30 HED 70, 287-288.
Rights Act. In early 1867 Swayne's office again instructed the Demopolis bureau to hire local attorneys to sue a Justice Taylor for false imprisonment. The case involved two freedpeople arrested as vagrants after they had left work to be witnesses in a case of assault by a planter against one of his laborers. When a U.S. commissioner had been appointed in the area, the office was to proceed against Taylor under the Civil Rights Act. Swayne also used the Civil Rights Act to release three African-American apprentices.31

In late 1866 and early 1867 Swayne protected freedpeople's rights by other means. His office found a contract submitted for review to be "an unjust one, if not a deliberate attempt to swindle the freedmen," and Swayne directed the agent to contact attorneys in Mobile to attach the planter's cotton "that the rights of the freedmen may be established." In another case, bureau headquarters nullified a contract made by a drunken freedman and noted that he had "a perfect right to contract again with whoever he pleases." By late 1867 Swayne's office regularly

31AAG to S.S. Gardner, April 24, 1866; Swayne to Howard, September 1, 1866; AAG to C.W. Pierce, October 18, 1866; AAG to Pierce, January 11, 1867; AAG to Henry Livingston, January 4, 1867, BRFAL-AL, Roll 1.

For more examples of interference with vagrancy cases, see Swayne to Sheriff of Elmore County, April 27, 1867; Swayne to Probate Judge of Elmore County, April 27, 1867; Swayne to H.W. Clark, May 4, 1867; AAG to Peck, May 8, 1867, BRFAL-AL, Roll 2. Swayne did allow Clark to escape punishment if he forwarded an affidavit stating his ignorance of repeal of the law. Swayne to Clark, May 14, 1867, Ibid. In another case, Swayne refused to interfere because the committal occurred before repeal and because the freedman had won release on appeal to the county court. AAG to Shorkley, July 10, 1867, Ibid.

For more examples of interference with apprenticeships, see Swayne to Probate Judge, Meacon Co., April 11, 1867; Swayne to C.W. Pierce, April 13, 1867; O.D. Kinsman to Samuel S. Gardner, December 27, 1867, Ibid.
authorized sub-assistant commissioners to set aside unjust contracts and effect an 
"equitable settlement" in cases where laborers had been driven away without pay. In 
January 1867 the office used a ruling of the Alabama Supreme Court against itself. 
The court had declared that all cases coming before a justice of the peace had to be 
capable of appeal. Because the state’s vagrancy law contained no appeal provision, 
Swayne’s office pronounced it unconstitutional. Later that month, the assistant 
commissioner tried to convince the mayor of Montgomery to stop city police from 
threatening freedpeople with arrest as vagrants in order to compel them to 
contract.\footnote{Swayne to Howard, February 14, 1867, BRFAL-AL, Roll 1; General Order 3, 
April 16, 1867, BRFAL-AL, Roll 17; Bethel, "Freedmen’s Bureau in Alabama," 66-67.} By February 1867 Swayne had obtained repeal of the vagrancy law, and 
in April he ordered that "attempts which are still made to put it into execution will 
hereafter be the subject of \textit{military cognizance}.\footnote{AAG to Pierce, December 18, 1866; AAG to W.M.A. Mitchell, January 7, 1867; 
AAG to J.B. Healy, August 9, 1867; AAG to Connelly, September 7, 1867; AAG to 
Connelly, October 10, 1867; AAG to Mitchell, January 16, 1867; Swayne to Hon. 
Waller Coleman, January 22, 1867, BRFAL-AL, Roll 1.}"

Although he made some progress with these actions, Swayne believed the 
situation warranted an expansion of federal authority. To do so, he returned to the 
Civil Rights Act. The assistant commissioner argued the act was deficient because it 
allowed involuntary servitude for crime but lacked a clear definition of what 
constituted an illegal act. "Thus," he noted, "in Alabama to violate a labor contract, 
a purely civil matter for which the proper remedy is in damages at law, is punishable 
as a \textit{crime}." So too was enticing away a laborer, "not rightly punishable at all."
Florida had passed a law against freedpeople teaching school, while Mississippi had forbidden them to bear arms. As a remedy, Swayne suggested amending the Civil Rights Act to make it applicable to such cases. Doing so, he believed, "not only would itself be of great benefit, but would permit us to amend again with a convenience and celerity that might match the ingenuity of wickedness upon the other side."\(^{34}\)

By 1867 Swayne had moved considerably beyond the position he maintained in 1865, finding regulations his own office had established a year earlier to be detrimental. His rather tortured journey toward more forceful promotion of freedpeople's interests illustrates the limiting effect of contemporary ideas about labor, poverty, and in his case, federalism.\(^{35}\) Those ideas also circumscribed the efforts of the bureau's local emissaries. Many of these men were civilian agents, native Alabamans likely to advocate harsh labor discipline, although some of these were Scalawags who advocated freedpeople's rights strenuously. However, most bureau officials were Union army officers who remained in the South after the war. They brought with them varying conceptions of free labor ideology and the function

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\(^{34}\) Swayne to Howard, January 30, 1867, BRFAL-AL, Roll 1. In another letter to Howard on the same date, Swayne referred to the apprenticeship law as "apparently belonging rather to a statute which is greatly needed prescribing a punishment for the continuation of slavery and limiting to a strict and well defined construction of the term 'crime' for which involuntary servitude may be permitted."

of law within it.

Although constructions of free labor limited the actions of many agents, several assisted freedpeople liberally. One, Lt. James F. McGogy, helped some African-American workers obtain jobs on railroads and acted as other freedpeople's legal counsel in disputes with planters. When planters claimed in 1865 that they did not have to pay freedpeople without contracts, Capt. Andrew Geddes forced them to sign contracts back-dated to the time he felt freedpeople deserved compensation. Brevet Colonel John B. Callis refused to fix wage levels in 1866, but he stipulated that contracts must provide "fare living rates." Callis acknowledged the laborers' relative power circumscribed their ability to seek legal redress and found the civil law deficient in this area. Brevet Major C.W. Pierce, who complained to headquarters about the flaws of both the state vagrancy law and the civil courts, counseled freedpeople not to contract if they could not obtain fair bargains. Recognizing that in the civil courts "the poor man is always the looser [sic] and the rich man the gainer," Pierce endeavored to settle cases by calling the parties to his office.36

One of the most liberal agents was William Connelly, an Alabama Scalawag who had imbibed northern free labor ideology wholeheartedly. Connelly refused to approve contracts with disobedience clauses and ordered that liens could not be placed on laborers' shares unless they had contracted to allow them. He also invoked the entirety rule in favor of plantation hands, forcing their employers to pay the

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36 Reports of McGogy, March 2, 1868, May 1, 1868; Report of Geddes, September 7, 1865; Reports of Callis, October 31, 1866, January 31, 1867; Reports of Pierce, January 31, 1867, October 10, 1867, BRFAL-AL Roll 18.
whole value of long-term contracts when they drove away laborers. When some
planters turned to tenancy in late 1867, Connelly encouraged the transition. He
advised planters to abandon gang labor, break up their plantations, and invest in
railroads and factories. "Then every citizen will have an opportunity to secure a
homestead, and the latent wealth of the state will be brought to the surface and
distributed among the people," he argued. "Thus we will have a practical application
of the principles of the Republican Union Party, resulting in 'the greatest good for
the greatest number.'" \(^{37}\)

Connelly and his liberal colleagues managed as best they could to secure the
rights of freedpeople. When doing so, they used law as a source of power and found
avenues out of the dominant discourse. Ironically though, the native Republican
Connelly displayed more radical tendencies than many of his northern colleagues.
Their actions showed how a different version free labor could scuttle the best
intentions of more liberal local officials or even moderate assisitant commissioners
such as Swayne.

Although most Alabama agents were not pro-planter, some did occupy
conservative or racist positions. D.C. Rugg, a civilian agent in Huntsville, claimed
that the freedpeople's "minds were as dark as their skins" and warned them that their
only hope lay in being sober and industrious. Lt. Spence Smith, stationed in Tuskegee

\(^{37}\)Reports of Connelly, August 1, 1867, September 1, 1867, November 30, 1867,
October 1, 1867, BRFAL-AL, Roll 18. Quotes from latter report. Emphasis in
original. On Connelly's background, see Swayne to Howard, April 30, 1867, BRFAL-
AL, Roll 2. Swayne described "Judge Connelly" and another civilian agent as "men
of family and prominence."
in 1866, cautioned planters about enticing laborers under contract and informed them that he would commit recalcitrant freedpeople as vagrants as long as their contracts were approved by the bureau. First Lt. A.L. Bennett assured Demopolis freedpeople that their loss of wages would teach them prudence in future contract negotiations, while Colonel George D. Robinson in Mobile complained to Swayne that African-Americans' delusions about land were "rendering the work of a proper subordination and practicable regulations more difficult."\(^{38}\) Brevet Brigadier General F.D. Sewall reported in October 1866 that Mobile faced "considerable idleness, vagrancy, and thieving." When African-American workers informed him that they were afraid to return to plantations because of the violence being committed in the countryside, Sewall retorted with a lecture on his construction of freedom:

>This is no excuse for idleness, as plenty of labor can be had in the neighboring state of Mississippi or along the Railroads... Able-bodied persons...should in no instance be aided with rations, but should only receive the of the Bureau to teach them that idleness and vagrancy are not the immunities of citizenship, and that honest industry and frugality, will only secure to them, and their children, the benefits which their emancipation promised them.\(^{39}\)

Sewall summarized nicely the key points of a more conservative construction of free labor. Freedpeople could escape unsatisfactory employers by seeking jobs elsewhere, following the market. But they could not stop working, nor could they expect government aid if they did. For him, emancipation meant opportunity to struggle for

\(^{38}\)Reports of Rugg, May 31, 1868, August 31, 1868; Reports of Smith, February 3, 1868, February 10, 1868; Report of Bennett, January 321, 1868; Report of Robinson, January 17, 1866, BRFAL-AL, Roll 18.

\(^{39}\)Inspection Report of F.D. Sewall, October 30, 1866, BRFAL-AL, Roll 19.
social mobility.

This position was elaborated further by two Union army Chaplains, who had served as agents under Conway and continued with the Freedmen's Bureau. Charles Buckley, confused and disoriented in Alabama, advanced a myriad of explanations for the behavior of emancipated African-Americans. While he saw a permanent racial barrier that would determine "social position," he attributed the freedpeople's unwillingness to contract to their "weak-willed" nature, to the effects of slavery, to humanity's natural tendencies to idleness, and to God, who was teaching southern whites that they depended on the freedpeople. Buckley's declared goal was to engender class harmony and an effective labor system, but, free labor could only succeed where there were no idlers. Consequently, when African-American workers violated contracts, Buckley arrested them and sent them back to plantations, or he put them on "forced labor" for a few days if they refused to return. These policies were among the harshest taken by any agent, but Buckley saw them as "controlling Negroes as white laborers are controlled."40

Samuel Spring Gardner, another transplanted parson, held similar views. Gardner grew up as the son of a ropemaker in Maine. His father's business supplied enough funds to support an education at Phillips Academy in Andover, Massachusetts; Bowdoin College; and Bangor Theological Seminary. Politically, Gardner had followed the Whigs into the Republican Party and had championed

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40Report of Buckley, August 1, 1865, BRFAL-AL, Roll 18; HED 70, 292-293; Report of a Tour of Eastern Alabama, January 27, 1866, BRFAL-AL, Roll 19.
both John C. Fremont and Abraham Lincoln. Gardner joined the Union army in 1864 and became the chaplain of two regiments of the United States Colored Infantry. In 1867 he sought and won election as probate judge in Butler County, Alabama, on a radical program of supporting suffrage for blacks and denying it to former Confederate officials. According to his biographer, Gardner was "decidedly 'radical'" by 1867.41

Yet this political radical viewed work discipline in terms similar to his colleague Buckley. He recognized the civil courts furnished an insufficient remedy for day laborers' whose claims for small amounts made all the difference, yet he told African-American laborers that abusive language used by their employers did not constitute sufficient cause to break a contract. Although Gardner acknowledged the burdens of racial "scorn" and "caste dislike," he recommended strong measures because "the Negro cannot be depended upon to fulfill his contract on his own accord." He found numerous freedpeople "restless and vagrant in their feelings, disliking perseverance, entertaining crude ideas of the opportunities of freedom." In addition, there was "a large class of lazy vagabonds, whose only thought is to live in some way without work." Consequently, Gardner suggested that sub-assistant commissioners be given "all the appliances of the Bureau, Home Colony, Local Depot, &c, so that all negroes without employment might be speedily disposed to

avoid their demoralizing influence upon the laborers."\textsuperscript{42} Gardner separated the issue of work discipline from other political concerns such as suffrage. While radical on some issues, he feared that freedpeople with "vagrant feelings" could undercut the success of the remainder and sought to isolate these offenders.

Gardner's interesting mixture of radicalism and conservatism exemplified the belief system of many northerners who found themselves trying to explain northern institutions. With varying commitments to suffrage and social equality for African-Americans, they maintained a version of free labor ideology that accepted the legal control of labor. While workers could exercise occupational mobility, they could do so only for a plainly sufficient cause. More importantly, they could not live "without visible means of support." As Swayne pointed out, the right to leave could only be countenanced if the "wandering propensities" of laborers had been controlled. Nevertheless, Swayne tried to go beyond antebellum discourse and secure a minimum of rights for African-Americans. His lack of overall success resulted in part from "the ingenuity of wickedness" the planter class employed to realize its goals. Swayne's ultimate failure also resulted from the varying versions of free labor ideology and law espoused by local bureau agents, a factor of failure even more apparent in the case of South Carolina.

\textsuperscript{42}Reports of Gardner, August 10, 1865, February 2, 1866, June 18, 1867, BRFAL-AL, Roll 18.
CHAPTER 6

"HONEST AND WORTHY SUFFERING":
LOCAL AGENTS AND LABOR
IN SOUTH CAROLINA, 1865-1867

That free labor is a success, there can be no doubt in every instance where it has been tested by practical and fair minded men, who were willing to treat the black men as laborers are treated at the north and in other parts of the country...¹

When Brevet Major General Robert Kingston Scott assessed his previous year's work as Assistant Commissioner of the Freedmen's Bureau in South Carolina, he used the standard of northern free labor. As seen in the case of Alabama, free labor ideology could be be used as a positive force to aid freed African-Americans. But implementing free labor in this manner rested on an assistant commissioner and staff who possessed a knowledge of labor law, or at least a commitment to using what they knew about it to secure the rights of laborers. Even then, field agents could undermine directives from headquarters. The influence of Freedmen's Bureau field agents in setting the terms of freedom through their labor regulations was crucial in South Carolina. Neither Scott nor his predecessor, Rufus Saxton, took the coordinated approach to labor law employed in Alabama. Saxton was certainly committed to the cause of the freedpeople, but like other radical agents, he was removed by late 1865. While Scott relied on free labor discourse like most other

assistant commissioners, he manifested neither Saxton's commitment to black rights nor Wager Swayne's legal training.

As a result, labor law in Reconstruction South Carolina depended to a large extent on the ideologies and policies of local bureau agents. Understanding this process requires analyzing army and bureau officials, whether at the top of the hierarchy or in the field, as people with an complex intellectual history. The ideology they carried into the South drew on common antecedents, but it was not monolithic. At least three overall positions emerged. "Conservatives" often supported coercive labor discipline without any belief in or even real understanding of free labor ideology. "Radicals" or "Liberals" clung to the free labor ethic while often remaining antagonistic to or unaware of the legal system. The "Moderate" majority tried to combine the two, seeing legal labor discipline as one of the best ways to achieve the ultimate result of social mobility.²

Looking at the ways in which they interpreted and implemented northern ideas about free labor explains in part the program and the ultimate failure of the Freedmen's Bureau. Faced with enormous levels of destitution, the Freedmen's Bureau in South Carolina often diverged from strict adherence to the principles of poor relief and labor law it inherited from the North. Yet within this context of experimentation, bureau officials at both upper and lower levels followed general concepts of contract, vagrancy, and poor law. Often they connected these sets of rules

²Michael Les Benedict has divided politicians during Reconstruction into these three groups though not on this basis. A Compromise of Principle: Congressional Republicans and Reconstruction, 1863-1869 (New York: W.W. Norton, 1974), 27-33.
explicitly in ways that had only been implicit in the antebellum North. By 1867, however, these concepts began to break down upon the insoluble social and economic problems of Reconstruction South Carolina and from an increasing reliance on experimental equitable remedies. By that time, some field agents began to abandon long-standing legal concepts concerning work and the poor. As such, their actions demonstrate how the failure of the Freedmen’s Bureau resulted not only from the rejection of its program by southern whites and blacks. It also came from the inadequacy of mid-nineteenth-century poor and labor law to confront a large scale social crisis. Before the war, this body of law had retained the power to shape social relations, but it often faltered when transplanted in the Reconstruction South.

While field agents in South Carolina were the ultimate conduit for free labor, their actions and ideas must be seen in the context of policies that originated at the top of the bureau hierarchy. Although reconstituting northern law became a central goal of the bureau in South Carolina by 1866, its first assistant commissioner, Rufus Saxton, did not initiate this focus. A career officer and son of a Massachusetts lawyer, Saxton had headed the Port Royal experiment with free labor during the war.\(^3\) When Saxton began operations of the bureau in July 1865, he did not structure labor as many of his contemporaries did. He saw the bureau as experimental, acting with "no past experience to guide us in the performance of the peculiar and delicate duties

which pertain to it." Saxton regarded the simple enforcement of emancipation as one of the bureau’s foremost tasks. "The Freedmen should understand their status as freemen at once, and must be protected in their newly acquired rights," he wrote to the acting assistant commissioner of Georgia. "The former owner must be informed that slavery is not recognized by the U.S. Government." Beyond this notification, Saxton considered settling the freedpeople on forty-acre tracts as the key. Landholding was tantamount to citizenship and a first step toward future progress. Ideally, Saxton hoped to skip the intermediate step of wage work that the free labor ethic envisioned and proceed directly to its end benefits, as did other radicals.

When Saxton did set up a labor program, he followed the Liberal/Radical line and made it as open as possible. He preferred agreements on shares split in halves and advised bureau agents to make contracts "that are fair and liberal," remembering the familiar Republican phrase that "the laborer is worthy of his hire." After President Andrew Johnson’s pardons of former Confederates made land unavailable, Saxton issued a short, simple form for "equitable contracts" that required planters to supply quarters, fuel, food, medical attention, and other necessaries, and to pay monthly wages. While he did not preach the sanctity of contract like many of his

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4Saxton to Mr. N.C. Dennet, August 15, 1865, BRFAL-SC, Roll 1. See also Saxton to Col. James C. Beecher, August 17, 1865, Ibid.

5Saxton to E.A. Wild, no date, [probably early July 1865], BRFAL-SC, Roll 1. Saxton also had control over Georgia and Florida for the first few months of his administration.

6Saxton to E.A. Wild, August 11, 1865, BRFAL-SC, Roll 1.
contemporaries, Saxton did counsel South Carolinians that "where fair and equitable contracts are made, they must be kept by both parties."^7

Throughout his short tenure as assistant commissioner, Saxton retained this experimental program. While he suggested that $10 per month was the lowest acceptable pay, he refused to fix the price of labor, preferring to "leave it to seek its own value in the market." When Col. J.J. Upham, an agent in Lawtonville, S.C., informed Saxton that he would arrest all freedpeople not under contract after January 1, 1866, as vagrants, the assistant commissioner suggested that he wait longer before enforcing the order. Saxton even supported the "river traders," peddlers who came up South Carolina's tidal waters to barter cheap goods with freedpeople in return for their crops. "In many cases the freedmen would probably be imposed upon by dishonest and unscrupulous men," he admitted, "but as freedmen they must be taught self-reliance."^8

Such openness originated in Saxton's trust in freed African-Americans. He informed Freedmen's Bureau Commissioner O.O. Howard that no danger of insurrection existed among the freedpeople, for "at the slightest show of kindness they seem to forget all their past grievances. ...If but simple justice is done to them, a more orderly, peaceful people could not be found than this same 'barbaric race."

^7 General Order 11, August 28, 1865; Circular No. 5, October 19, 1865, BRFAL-SC, Roll 37.

Even when the freedpeople learned that they would receive no land, Saxton maintained, "they will submit with the same patient resignation that they do to their other disappointments." This liberal position and his unwillingness to enforce Johnson's land policy placed Saxton in conflict with the president and with Howard. On October 19, 1865, Howard visited the Sea Islands of South Carolina and issued two special field orders that returned land to the former owners and enforced plantation labor. Even before then, Saxton had worried about the safety of his job, and in January 1866 he was replaced by Brevet Major General Robert K. Scott.

Even before Scott took over, the labor program in South Carolina came more in line with typical northern principles under an order issued by District Commander Major General Daniel E. Sickles. Born in New York City, Sickles had graduated from City University, studied law with Attorney General B.F. Battle, and gained admission to the bar, all in 1846. During the 1850s, he built a political career that culminated with his election to Congress in 1857. With the outbreak of the war, he helped raise New York's Excelsior Brigade and won fame at Gettysburg, losing a leg during the second day of fighting. Though he would later become a Radical, in 1865 and 1866 Sickles occupied a Moderate/Conservative stance. He had been a friend of South Carolina Governor James Orr since their days in the U.S. House. Sickles

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and Orr corresponded in December 1865 on the newly passed Black Code and reached an agreement about replacing it with rules that established color-blind laws.\textsuperscript{11}

As Commander of the Department of South Carolina, Sickles became involved in setting up its labor program. In December he informed the freedpeople that the government had no land to give away and that no rations would be issued to those who could work. Consequently, he directed officers to help freedpeople arrange "fair contracts to labor" while admonishing all concerned that cultivation must proceed if they were to "avoid the losses, privations, and sufferings, which must follow idleness on the one hand, and harsh and unreasonable exactions on the other." Any officer preventing or discouraging employment of the freedpeople would be arrested and punished.\textsuperscript{12} On January 1, 1866, Sickles issued a more comprehensive list of regulations, spelling out clearly his reasons for doing so:

To the end that civil rights and immunities may be enjoyed; that kindly relations among the inhabitants of the State may be established; that the rights and duties of the employer and the free laborer respectively defined; that the soil may be cultivated and the system of free labor undertaken; that the owners of the estates may be secured in their possession of their lands and tenements; that persons able and willing to work may find employment, that idleness and vagrancy may be disdained and encouragement given to industry and thrift; and


\textsuperscript{12}General Order 75, Department of South Carolina, Dec. 15, 1865, BRFAL-SC, Roll 337.
that humane provision may be made for the aged, infirm and destitute.\textsuperscript{13}

In specific, the rules ordered equal protection of the law and equal use of testimony, opened all occupations to all races, prevented combinations to suppress wages, provided for the old and infirm, and allowed planters to evict freedpeople who refused to work or who were "rightfully dismissed or expelled for misbehavior." Establishing civil rights and immunities and protecting free labor went hand in hand with suppressing vagrancy. Sickles warned officers not to encourage idleness when dispensing relief rations and empowered them to arrest and employ vagrants on public works with the proceeds going to orphan children. Vagrancy laws of South Carolina "applicable to free white persons" would apply to former slaves, but these statutes would not be enforced on "persons who are without employment, if they can prove that they have been unable to obtain employment after diligent efforts to do so."\textsuperscript{14} In effect, Sickles tried to erect the northern labor and poor law system whole cloth with one military order while tempering its potentially severe effects.

Scott adopted these rules as one of his first acts in setting up the bureau’s labor program.\textsuperscript{15} Unlike Sickles, however, Scott had not been trained as a lawyer. Born in Pennsylvania in 1826, Scott was a third generation American of Scotch-Irish descent. He went to the common schools in Pennsylvania, attended Central College of Ohio, and studied medicine at Starling Medical College. In 1850 Scott emigrated

\textsuperscript{13}Repr. in \textit{The Free American} (San Francisco), March 27, 1866.

\textsuperscript{14}Ibid.

\textsuperscript{15}General Order 5 (1866 series), Feb. 6, 1866, BRFAL-SC, Roll 36.
to California and engaged in real estate intrigues in Mexico and South America, returning in 1851 and settling in Ohio. For a few years he practiced medicine and then dabbled in real estate and merchandising. In 1861 Ohio Governor Dennison appointed Scott a major in the 68th Ohio, and he took part in action at Fort Donelson, Shiloh, and Corinth. He was later taken prisoner at Atlanta but was exchanged in Charleston in September 1864 and accompanied Sherman on his march through Georgia. By the time he took over the assistant commissioner's office in January 1866, he had been breveted major general. Although he expressed an aversion to politics, he resigned his command in July 1868 to become Reconstruction governor of South Carolina, gaining re-election in 1870. Surviving charges of fraudulent issue of state bonds, Scott left the governorship in 1872 to deal in real estate in South Carolina. In 1877 he returned to pursue the same occupation in Ohio, where he died in 1900.\textsuperscript{16}

Scott came to his the office of assistant commissioner in 1866 as a political Moderate and his labor policies followed the paths taken by others of that designation. He supported gradual abolition, believing it "would have educated and prepared both classes for the new regime and enabled the civil authorities to have anticipated the requirement of the new condition by appropriate and timely legislation." Yet Scott was not devoid of some advanced sentiments, for in 1867 he praised the president of the Charleston Rail Road Company for opening its cars to

\textsuperscript{16} National Cyclopaedia of American Biography, 12:175-176. On Scott's aversion to politics see his letter to the editor of the Great Republic, May 20, 1867, BRFAL-SC Roll 1.
blacks. Still, he felt that the war had "suddenly disarranged" social, industrial, civil and financial interests, and had "induce[d] antagonism of feeling between the two classes" in the South.17 Lacking the liberal attitude of Saxton and the legal training of Sickles, Scott tried to deal with what he saw as a social crisis by drawing on a vague concern for "equity" and a lay reading of northern state constitutions and laws.18

In February 1866 he began by issuing an elaborate form for yearly labor contracts. The sample agreement envisioned work by tasks or a ten hour day on shares. Not unlike the Black Codes recently passed by southern legislatures, Scott's contract enumerated numerous rules and fines to govern plantation life. Planters could deduct for time lost as well as for injury to farm animals. In addition, the hands were to select their own foreman who would report "all abuses, refusals to work, and disorderly conduct of the employees" to the owner and read this list to the laborers weekly. While these provisions practically revived rules under the slave codes, Scott did import the idea of apportionment, stipulating that discharged laborers be paid $5 per month for the time they had worked.19

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17Scott to Mr. J. Cordossa, Feb. 11, 1867; Scott to J.L. Riggs, May 4, 1867, BRFAL-SC, Roll 1.

18In 1867, Scott requested copies of state constitutions from Pennsylvania, Massachusetts, and Iowa. See Scott to Gov. John Geary of Pennsylvania, April 21, 1867, and accompanying note that similar letters were sent to the governors of the other two states, BRFAL-SC, Roll 1.

19Circular No. 5 (1866 series), Feb. 5, 1866, BRFAL-SC, Roll 36.
During 1866 Scott took further measures to enforce labor. In April he republished Commissioner Howard's orders that charity must be given to extreme cases only. In a June circular letter he noted that the season "when uninterrupted labor is absolutely necessary for the salvation of the crops" had arrived and numerous freedpeople were coming to bureau headquarters with small matters that could just as easily be brought by a representative. With such problems in view, he ordered officers to "discountenance any such proceedings on the part of the freedpeople, and enjoin upon them the necessity of steadiness of purpose" and to "advise them of the folly of litigation in trivial matters which they could settle themselves."

At the end of 1866 Scott assessed the outcome of this system. Where free labor had failed, he believed, it was due to "unfair contracts" that provided "small recompence [sic]." Scott claimed this proved that "a contract unfair to the laborer is unprofitable to the planter." More importantly, Scott blamed the failure on both the planters' and the freedpeople's misunderstanding of proper social relations. "Mutual distrust between the planter and the laborer has also contributed, the principle that the interests of capital and labor are identical, having been ignored by both contracting parties..." More problems had come from "misunderstandings concerning the requirements and stipulations of contracts." Denying his own form of a year earlier, Scott claimed that the simplest contracts were the best. Although the lack of capital might require recourse to a system of shares, Scott advised South Carolinians

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20 General Order 14 (1866 series), April 14, 1866; Circular letter of Scott, June 22, 1866, BRFAL-SC, Roll 36.
"to follow as nearly as practicable the labor system of the agricultural districts of the North and West paying each laborer fair compensation for his services by the day, week, or month as may be agreed upon." In addition, fines and penalties should be abolished because they did more harm than good and were not adaptable to free labor. Fired workers should be paid in full at the time of dismissal. Among the points that Scott tried to communicate in such statements was that "justice and equity" provided a more effective form of labor discipline than did compulsion. Scott advised planters that

[c]onsideration and respect for the rights of those employed by him will in no way impair or detract from his own; while acts of kindness will endear him to them and ensure a more faithful performance of labor than can be obtained by acts of coercion.

While Scott understood quite clearly the eventual results of the North's legal system, he continued to search for ways to implement it.

During 1867 and 1868 he issued several more orders defining the bureau's labor program. His 1867 form of contract provided for both shares and wages and removed the system of fines, though it retained deductions for time lost and provided for payment of wages upon discharge. In January 1867 Scott again ordered that no relief be granted to Sea Island freedpeople not under contract. Echoing this concern for uncontrolled relief, Scott directed officers making contracts to make sure workers received enough pay to keep them from depending on government aid after their

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22 Ibid.
contracts expired. In June he suggested that agents allow political meetings only in ways that would not interfere with farm work. Harsh as these provisions were, Scott also notified planters in September that he would bring charges against those who fired freedpeople in order to deprive them of their wages.23

Scott's generalization from the principles of "equity" appeared in the somewhat contradictory daily operations of his office as well. In early February 1866 he directed an agent to divide the crops on a plantation by halves, and, if he deemed the contract unjust, to give the whole crop to the laborers. But a few weeks later he ordered an officer to "make the 4 Freedmen who contracted with D. McCauley return to his plantation and live up to their agreement," and in March 1866 he stopped the enticement of laborers. In May 1866 the assistant commissioner allowed a black man to practice medicine, yet a month later he ordered that watermelons being grown by freedpeople amongst the cotton to be destroyed. On many occasions Scott ordered the investigation of freedpeople discharged without cause, and more than once he directed a local agent to seize crops and property to pay laborers.24

23Circular No.1 (1867 series), Jan. 1, 1867; Circular No. 2 (1867 series), Jan. 9, 1867; General Order 5 (1867 series), March 4, 1867; Circular letter, June 19, 1867; Circular letter, Sept. 13, 1867, all BRFAL-SC, Roll 36.

24Oliver D. Kinsman to D.T. Corbin, Feb. 1, 1865; Henry W. Smith to Commanding Officer, U.S. forces, Clarendon District, Feb. 28, 1866; Smith to Corbin, March 5, 1866; Smith to all whom it may concern, May 22, 1866; Smith to J.L. Heyward, July 31, 1866; Smith to A.P. Cavaher, August 11, 1866; Edward L. Deane to F.W. Liedike, March 31, 1867, BRFAL-SC Roll 1. Kinsman, Smith and Deane were acting adjutant generals in Scott's office. They usually signed correspondence carrying out his orders unless the addressee was a prominent figure. Kinsman, a native of Maine who enlisted in Iowa, later served as AAG in Alabama under Wager Swayne and played a key role in the operation of the labor program there. Henry
While Scott struggled to make the contract system work, he, like many of his subordinates, became increasingly skeptical of it. By early 1867 he suggested that

[i]n cases where the Freedpeople are inharmonious and, perhaps from want of knowledge and understanding, unsettled and Stubborn, prejudicial to their future welfare; all circumstances considered, where the terms of the Contract may not meet with your approval, insofar, that other inducements of many who have no capital or means to work their lands...You need not either approve or disapprove the contract leaving the matter open....²⁵

In advising such a course, Scott was careful to note that all agreements should not "work in any manner but that of Equity between the parties."²⁶

Scott's partial retreat from contract derived from his general goal of bringing "equity" to his labor program.²⁷ Scott recognized quite clearly that a central problem of Reconstruction was the conflict "between the landowner and the laborer, the former struggling to retain absolute control, and the latter determined to maintain his newly acquired freedom to its full extent." Equity provided Scott with a solution to this conflict. In fact, he reported, he had often voided contracts approved by local agents because they were "inconsistent with justice and the principles of free labor...It

Warren Smith was born in New York and enlisted in Michigan. See Francis Bernard Heitman, Historical Register and Dictionary of the United States Army, From Its Organization, September 29, 1789, to March 2, 1903 (Washington, Government Printing Office, 1903), 602, 899. I have no biographical information for any of the other South Carolina AAGs.

²⁵Edward L. Deane to Corbin, Jan. 27, 1867, BRFAL-SC, Roll 1. For similar actions by local agents, see below.

²⁶Ibid.

²⁷The influence of equitable concepts on the Bureau's program has been noted by Charles Hoffer, The Law's Conscience: Equitable Constitutionalism in America (Chapel Hill: University of North Carolina Press, 1990), 128-129.
was evident that the contracts were made by the planter with a sole view to their interests, and without reference to those of the freedmen..."\(^{28}\) For Scott the "principles of free labor" implied a looser construction than one derived directly from northern labor law, and he easily abandoned strict adherence to contract when called for by circumstances. He assured Governor Orr that he did not send agents to plantations "for the purpose of annuling [sic] equitable contracts or creating disaffection among the laborers but for the purpose of securing strict justice in the settlement of all contracts."\(^{29}\)

Scott stressed this balance of interests as the ideal on which free labor was based. When his directives reached local agents of the bureau, however, they took on several different meanings. Some agents went further than Scott, following lines similar to northern Radicals and Liberals. Others operated from simplistic Conservative and racial ideologies. The majority were Moderates. Like the bloc that controlled the dialogue over labor in Congress and in the nation at large, these men struggled to combine the legal system of free labor with the broader cultural ethic. Their actions, more than those of the radicals or the conservatives, eventually defined what free labor would mean at the local level in Reconstruction South Carolina.

Agents in the Radical camp relied for the most part on the cultural ideology of free labor and abolitionist desire to assist freedpeople. Unlike their Moderate counterparts, they were not overly concerned with northern labor or poor law or with

\(^{28}\) Scott to Howard, Nov. 1, 1866, Annual Report for 1866, BRFAL-SC, Roll 1.

\(^{29}\) Scott to Orr, Dec. 13, 1866, BRFAL-SC, Roll 1. Emphasis in original.
reconciling it to social conditions in the Reconstruction South. Rather, they identified with the real problems of freedpeople and tried to find the best expedients for easing their conditions.

While the Radical faction did not gain numerical superiority, it did contain two of the most prominent agents in the state, Martin R. Delany and John W. De Forest. Stationed on Hilton Head Island, Delany was one of the few black agents of the bureau in South Carolina. An emigre from the North, Delany had been an editor, physician, and amateur naturalist before the war and had assisted Saxton in raising black troops. During Delany's service on Hilton Head, he tried to protect the labor conditions of other blacks as much as possible. In July 1865 he spoke to freedpeople on the Sea Islands and urged them not to work for whites. Later, when agricultural labor had become inevitable after the restoration of lands to whites, Delany attempted to ensure freedpeople working on shares a fair settlement for their crops. By October 1866 he had set up a cotton depot on the Islands where freedpeople could obtain a fair weight for their produce. Delany's efforts brought a rebuking letter from Scott and a scolding that "The people must be free to sell when they think proper." After his tenure with the bureau, Delany continued to assist black workers through the South Carolina Bureau of Agricultural Statistics, a commission established by the Reconstruction legislature. In 1874 the Republican party nominated him as Lieutenant Governor on a fusionist ticket.30

30 Acting Adjutant General to C.H. Howard, July 22, 1865, BRFAL-SC, Roll 1; Scott to Delany, October 16, 1866, BRFAL-SC, Roll 1; Abbott, Freedmen's Bureau, 23, 34; Williamson, After Slavery, 28, 113, 354.
While Delany was clearly the most Radical of the South Carolina agents, De Forest also tried to pursue a liberal course. Born in Connecticut into a family descended from seventeenth-century Dutch settlers, De Forest traveled widely in Europe and the Levant before the war as part of his literary career. During the war as captain of the 12th Connecticut Volunteers he continued his writing, contributing articles to journals such as Harper's Monthly. As an officer of the bureau, he recognized his "native infamy as a Yankee," yet he attended numerous social events at the homes of South Carolina whites. While some officers were taken in by being feted by prominent planters, De Forest at least looked out for the interests of freedpeople. Unlike many of his colleagues, he upheld freedpeople's power as free agents in the market. As the time to contract for 1867 approached, De Forest advised freedpeople to contract for monthly wages instead of shares and to emigrate to other states if such terms could not be secured. On the issue of poverty, De Forrest thought the conduct of blacks better than "the idleness, shiftlessness and begging habits of a large part of the 'low down whites.'"31 Not an unqualified Radical like Delany, De Forest nevertheless worked to secure the broader cultural vision of free labor for blacks without strict adherence to its legal system. In addition, he applied the language of poverty to whites in equal, if not greater, measure.

31 De Forrest's reports repr. in Scott to Howard, November 1, 1866 (annual Report for 1866), BRFAL-SC Roll 1; and in Scott to Howard, May 23, 1867 (Monthly Report for April 1867), BRFAL-SC Roll 1; Abbot, Freedmen's Bureau, 24, 115, 127; Williamson, After Slavery, 37, 66 notes that De Forest continued to hold blacks above poor whites in his post-war writings, although his novels helped create and perpetuate the stereotype of the faithful house servant.
Other agents not so noteworthy as Delany or De Forest also pursued a liberal course in their districts. Pennsylvania native Orlando Hurley Moore, who had joined the Union army in Michigan, complained from Aiken in July 1866 about the treatment of freedpeople by their employers. Planters, he reported, were disposed to bring [the freedpeople] in their industrial relations as near to the condition of slavery as possible and exact from them unremunerative labor which was never contemplated by the freedmen when making the contract, and in case of ‘disobedience of orders’ they are charged with violating the contract and are made to leave their plantation and forfeit their share of the crop.

Under such circumstances, Moore placed "a just and liberal construction on the contract towards the freedmen" and tried to secure their wages.32

Like Moore, Brevet Brigadier General Benjamin P. Rankle was stationed in the Edgefield district, one of the most violent parts of the state. While some agents turned a blind eye to white violence, Rankle described the anarchic conditions that ensued with the return of civil law and removal of the army. Local citizens, he wrote, seized the opportunity to exhibit "a spirit of utter lawlessness and to show their hatred of the institutions established among them by the Govt and to wreak their vengeance upon the freedmen for no other reason than that the fate of war has made them free." Sensitive to the dire conditions under which freedpeople lived, Rankle also realized that many of their economic problems resulted from the actions of whites who cheated them out of their share of the crops. Freedpeople "thrust out and unjustly deprived of their earnings, destitute and desperate, resort to stealing and

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32 Report of Orlando C. Moore, July 31, 1866, BRFAL-SC Roll 34; Heitman, Register, 723.
thus give ground for complaint against them." Still, Rankle did not blame freedpeople for their destitution and like De Forest refused to view them as vagrants:

There are few vagabond negroes thru the country and if the employers would do but fair justice, much of the evil would be remedied at once. After all the blame of the existing state of affairs may be equally placed at the door of their former owners who seem to be utterly ignorant of the manner in which free labor ought to be managed and treated.

Rankle’s comments suggested some affinity with the dominant discourse in that he still used vagrancy as a measure and saw fair treatment simply as a way to "manage" free labor. Yet he, like his Radical/Liberal colleagues, did not follow these perceptions into practice. Perhaps he and Moore were overcome by the specter of violence in their districts. Yet it is more likely that they, like Radicals in Congress, accepted the cultural definition of free labor as a vague goal of equity and social mobility, while remaining ignorant of or opposed to its legal system.

On the other end of the spectrum stood Conservatives, who accepted the legal system of work discipline as normative while remaining opposed to the promises of the free labor ethic. Often acting from racial predilections as well, these men applied legal labor controls untempered by concern for the freedpeople, and they employed the most strident elements of antebellum discourse to depict the problems they faced.

In describing the poverty of the South Carolina freedpeople, no agent used the harsh images of the antebellum poor law reformers more effectively than Brevet Major Edward O’Brien. Unfazed by the fact that African-Americans in his area subsisted on green corn, pond lily beans, and alligator meat, O’Brien reported in September 1866 that the freedpeople of Christ Church Parish were (presumably as
a whole) "idle, vicious vagrants whose sole idea consists in loafing without working."

Being close to Charleston, these characters could obtain transportation to the city where they "become idlers and [then] return to this parish only to plunder for the purpose of indulging their vicious practices." A month later O'Brien was no more sanguine. At first he contended that freedpeople were "naturally improvident, having no foresight," echoing the racial ideology of southern and many northern whites. Then he reverted to the method of payment and finally back to the metaphors of poverty:

I find that there is not the same amount of diligence among the freedmen when they work on shares as there is amongst those who are working for monthly wages. Always accustomed to look upon freedom as immunity from labor, the majority prefer to wander about hunting and fishing neglecting everything that they ought to attend to and becoming idle worthless vagrants.

A mixture of racial and class hatred, O'Brien's perspective placed him at the other extreme from Radicals.33

Two more agents of unqualified Conservative views were George Henry Nye and James M. Johnston. Nye, native of Maine, rose from the rank of a second lieutenant in 1861 to brevet major general by the end of the war. Willing to recognize that freedpeople often declined contracts because they suspected treachery, he also noticed "many cases of insolence, disobedience and unruly conduct" and a disposition "to magnify trivial acts on the part of their employers to offenses of great magnitude." Moreover, he complained, freedmen and women did not seem to be

33Report of O'Brien, September 5, 1866, BRFAL-SC Roll 34; Report of O'Brien, October 24, 1866, BRFAL-SC Roll 34.
aware of the necessity of keeping contracts. Unable to correlate the reasons he assigned earlier for their reticence in forming agreements, Nye placed their non-performance within the images of voluntary poverty. "Many of them, too lazy too work, lie in the woods by day, and devote the night to stealing and marauding, being a source of alarm to the inhabitants, and tending to demoralize their kindred, who are otherwise quiet and well disposed." Here, Nye bordered on the animalistic imagery so often invoked by antebellum writers, seeing unemployed freedpeople as "marauders" who lurked in dark places and "demoralized" honest citizens.34

Provost Marshal Johnston employed similar arguments. Freedpeople refused to see that labor was in their interest and viewed any regulation as a threat to freedom. This attitude led ultimately to idleness, which in turn caused numerous evils. He reported that

[I]arge numbers of vagrant freed families who would not contract last spring have squatted on the abandoned plantations and are living in a state of idleness and gaining livelihoods by theft and robbery. Nothing is secure in the sections where they have congregated. The freedpeople who have contracted[,] labored and made a crop during the summer and are not more exempt from the depredations of these marauders than the white people, and their example as well as their associating with the Contract freedmen has had a most baneful influence.35

The freedpeople's "insolence," abandonment of plantations, and refusal to work could all be traced to these rogues, who "allege all things are retrenchments on their freedom and restraints upon their rights." Johnston stuck to the old line class-based

34Report of G.H. Nye, August 22, 1865; Report of G.H. Nye, November 1, 1865, BRFAL-SC Roll 34; Heitman, Register, 754.

35Annual Report of J.M. Johnston, October 24, 1866, BRFAL-SC Roll 34.
argument that the underclass should be punished because it infected good citizens. While Johnston’s rhetoric was in part racially based like O’Brien’s, he widened it to include white ethnic groups as well. Johnston claimed that white applicants for relief were often Irish women who told "most thrilling tales of suffering" but if given clothing "for 'poor ragged and fatherless children' you can see it floating along the streets on the back of a robust drayman or other laborer." Images such as these lay grounded in race and ethnicity, but they contained the language of class as well. Importing constructs from antebellum writers on poverty, they made the condition of the subject group doubly damned.

Although none of these officers made identifiable efforts to translate cultural images into labor rules, their colleague, A.J. Willard, did. Willard bemoaned the "moral condition" on the plantations and advised Saxton that "it is certain that the freedpeople have an exhorbitant [sic] idea of the amount that they ought to receive, and have no just sense of the importance of persistent labor." In November 1865 Willard issued a circular of regulations for his Georgetown district. He informed officers that "the object of visiting plantations [was] to preserve order, prevent violations of law and to assist as far as practicable in enforcing the provisions of the existing contracts and inducing the Freed people to contract for another year." Willard's "Rules Relating to Work" all intended to help owners maintain plantation discipline. Officers were instructed to tell freedpeople they could be fired if they did not work in accord with their contracts, that if they refused to obey the owner or

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bureau agent they could be evicted, and that the government would decide what work their agreements obliged them to perform. In order to quell possible resistance to these harsh orders, Willard counseled officers that "care should be taken not to have too many people, at one time, removed from the plantation for disobedience [sic] of orders...." Willard's "Rules as to Plantations" went even further. They required anyone remaining on a plantation at the end of the season to work or leave. While that may have been realistic under a strict application of trespass laws, Willard also proscribed visiting of plantations for hunting or trading and ordered that any firearms used for hunting without permission or during work hours would be confiscated. Willard was willing to compel adherence to his rules. In December 1865 he reported blithely that "where misconduct is general upon a plantation," he rounded up two or three of the "leading spirits" and dealt with them on his own, "trusting the force of such an example to secure obedience [sic] to lawful authority on the part of the rest...."\footnote{Circular No. 1, November 10, 1865, 4th Sub-District, Georgetown, BRFAL-SC Roll 37; Report of A.J. Willard, November 13, 1865, BRFAL-SC Roll 34; Report of A.J. Willard, December 6, 1865, BRFAL-SC Roll 34.}

While agents like Willard have often been used by historians to point out the oppressive operation of the Freedmen's Bureau at the local level, his actions were not typical. Neither were those of more liberal agents like De Forest. Most agents in South Carolina were like Scott, Moderates who mixed parts of the free labor ethic with its legal constructs. Yet even these Moderates fell into different categories. Some were more like Conservatives, tempering their class and racial rhetoric only slightly. Others operated from a fairly equal balance of interest in the welfare of
freedpeople and adherence to cultural images of poverty. Still others followed a more liberal line, but one that was nevertheless restricted within the language of poverty.

Two good examples of those who leaned toward the Conservative side are J.E. Cornelius and James C. Beecher. With jurisdiction over part of the Sea Island lands, Cornelius found freedpeople there stuck jealously to the idea that these lands were theirs under Sherman's orders. He complained to Scott that "they have been preached to about 'their rights' until they are persuaded that nobody else has any rights, and until they learn better no dependence can be placed on them as laborers." Because of this, Cornelius believed, Sea Island freedpeople refused to contract, "asserting that they were now free and would work for no one but themselves and could not understand the relation between capital and labor." Cornelius drew from the free labor ethic its conservative conclusion, that the proper relationship between labor and capital was class subordination and disciplined work without protest. In fact, he contended that free labor could only be a success in places where "the owner had entire management of the crop and control of the labor." While these may have been euphemisms for collusion with whites, they suggest that agents such as

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38 Agents B.F. Smith, J.M. Johnston, and the German-born Eugene A. Kozlay might also fall into this category. On Smith, see Rept. of April 25, 1866 BRFAL-SC, Roll 34; Report of July 31, 1866, Ibid.; Excerpt in Scott to Howard (Monthly Report for June 1866), July 29, 1866, BRFAL-SC Roll 1. On Kozlay, see Rept. of January 29, 1866, BRFAL-SC Roll 34 in which Kozlay noted that he had ordered subordinates to employ unemployed freedmen on public roads as vagrants in order to enforce Sickle's General Order 1. Yet he put their idleness down to their sudden freedom and the tendency to dwell on it. See also his report of February 28, 1866, Ibid., in which he voiced his optimism in freedmen supporting themselves. Biographical information on Kozlay comes from Heitman, Register, 608.
Cornelius perceived the labor question in the post-war South in class terms borrowed as much as in racial ones. Moreover, while Cornelius believed in strict labor discipline, he did not slide completely into the Conservative camp. He did not conjure the violent imagery of Conservatives, and neither did he call for an unqualified application of the criminal law. If law were applied strictly, he warned, it would be "a persecution," for offenses such as adultery and theft would require punishment. In some ways, Cornelius sounded the racial tropes of the pro-slavery argument. Yet he did not see the behaviors he described as inherent. Rather, they resulted from "a long course of degrading servitude," and he felt certain that freedpeople were "rising rapidly above this condition but cannot be raised at once."

More problematic is the case of James C. Beecher. One of the more prominent and perhaps the strangest of all agents in the state, Beecher had impeccable credentials as a friend of the freedpeople. He was the seventh son of the Congregational minister Lyman Beecher and brother of the author of Uncle Tom's Cabin. Educated first at his father's Lane Seminary in Cincinnati, he graduated from Dartmouth in 1848. Ordained a Congregational minister in 1856, he spent the next several years as a missionary in China. In 1861 Beecher returned home and enlisted as the chaplain of the 1st N.Y. Infantry and then became a regular lieutenant colonel in the 141st N.Y. Infantry. He was put in charge of the 35th U.S. Colored Troops in

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39 Annual Report of J.E. Cornelius, October 23, 1866, BRFAL-SC Roll 34; Report of November 30, 1866, Ibid.
1863 with the rank of colonel. After leaving the military, Beecher returned to the ministry in New York. Suffering from mental problems, he took the water cure at Elmyra, N.Y., where he committed suicide on August 25, 1886.\textsuperscript{40}

Whatever his qualifications or mental state, Beecher's conduct can at best be described as odd. The behavior of the freedpeople at first surprised him and then led him to harsh and repressive measures as he had a seeming personal crisis about his command. Beecher's troubles began in the summer of 1865. In what was apparently a reference to Delany and others, he protested to Saxton in July that "persons, both white and black, have been instructing the freed persons that they are not obliged to make contracts, and the upland plantations are to be divided among them, as well as the low land...." He beseeched Saxton to send "a decent agent" if the commander did not believe his story. Trying to justify his letter, Beecher declared his loyalty to the freedpeople:

I am and have always been identified with the freed people and the colored troops. I have sacrificed all hope of promotion by coming in collision with my superior officers on this point, and do not regret it. I cannot bear to see them cut their own throats, and be assisted in doing so by the very organizations which are ostensibly for their salvation.\textsuperscript{41}

In September, Beecher explained freedpeople's reluctance to contract by their "sudden emancipation" and reckoned that "the majority need the Education of the

\textsuperscript{40}NCAB, 3:131.

\textsuperscript{41}Report of J.C. Beecher, July 28, 1866, BRFAL-SC Roll 34.
coming winter before they will understand the freedom to work for themselves means responsibility to provide for themselves.\textsuperscript{42}

By the time he made this report, however, Beecher had taken action to see that freedpeople as well as poor whites got their lesson. On August 5 he discontinued all relief to destitute whites. Noting that blacks were being drawn to the gratuitous rations, he ordered that any freedpeople who applied for rations would be arrested and sent to Port Royal. Planters wanting laborers and freedpeople needing work could register at his office. To make his point extremely clear to freedpeople, he informed them that "Any freed Persons from any plantations who shall apply for rations will be arrested and confined until they can be sent to the plantations where they belong."\textsuperscript{43} By 1866 Beecher's administration became more erratic. He began to disregard orders from Scott and advised people on the islands to do the same. He enforced the orders restoring lands with "more zeal, than judgement or humanity" according to Scott. Beecher forced freedpeople to contract within ten days or face eviction, and he allowed his officers to destroy land certificates and remove their holders from plantations. Scott eventually blamed this "unwarrantable action" for most of the problems on the Sea Islands, noting that "the freedmen do not feel themselves justly bound to abide by the provisions of a contract forced upon them at the point of a bayonet."\textsuperscript{44}

\textsuperscript{42}Report of J.C. Beecher, Sept. 7, 1865, Ibid.

\textsuperscript{43}Special Orders 15, Sommerville, S.C., August 5, 1865, BRFAL-SC Roll 34.

\textsuperscript{44}Scott to Howard, June 26, 1866, BRFAL-SC Roll 34; Scott to Howard (Annual Report for 1866), November 1, 1866, Ibid.
It is possible that Beecher's later policies as an agent of the bureau on the Sea Islands grew from his mental illness. But his earlier actions were in line with the desires of many northerners who labeled themselves as abolitionists and as "identified with the freed people." In fact, Saxton commended him on his handling of his office in the fall of 1865.45 When Beecher and others arrested able-bodied people who applied for rations, they acted the class-based hopes of reformers. They applied the Benthamite concept of "less eligibility" as they had learned it during the debate over poor relief.46 In essence, Beecher's disillusionment and turn to a harsh application of these ideas only mirrored a process that occurred more slowly for many abolitionists during the immediate post-war period.

While Beecher moved from a middle position to a more conservative one, other agents maintained a basic mixture of the free labor ethic and its laws. Garret Nagle explained to freedpeople that "if they failed in the performance of their agreement, it would be unjust to compel the planter to fulfill his with them." He actually went so far as to arrest a freedperson for "Non-fulfillment of contract," openly combining the entirety concept of the common law with the vagrancy concept of the criminal law. Yet at the same time he lectured planters on "the injustice of discharging their hands" without cause and "intimidated" them to take workers back.

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45Saxton to Beecher, September 16, 1865, BRFAL-SC Roll 1.

46"Less eligibility" was a concept derived from the English Poor Law debate of the early nineteenth century. Generally credited to Jeremy Bentham, it posited that poor relief, especially that in workhouses, should be made no more desireable than the lowest wage work. See Gertrude Himmelfarb, The Idea of Poverty: England in the Early Industrial Age (New York: Vintage Books, 1984), 80.
As he observed planters more, he became increasingly irritated at their treatment of laborers. "The pestilential avarice of some of them has led them beyond the limits of ordinary cheating," he observed in November 1866. While planters feigned concern for the freedpeople, Nagle felt that "their conduct bears a direct refutation to their hypocritical pretentions...." Niles acted as a "legal adviser" for freedpeople and considered their "crimes" the result of poverty. In early July 1866 he deemed their future "flattering" and declared that "they can support themselves as voluntary labourers, and I do not feel sorry that the freed women show a disposition to keep out of the fields as much as possible." Yet a few days later when freedpeople mounted a protest in Greenville, he arrested seven for rioting and threatened the rest with detention as vagrants. "The effect was of the most salutary kind," he boasted later. "It is rarely now that I see an unemployed freedman."

Not unlike Beecher had originally attempted, these two officers combined concern for the success of free labor and the welfare of the freedpeople with a strict adherence to law. While Nagle and Niles steered a position in the middle, several Moderate agents took a more liberal path. Eventually, some of them began to stretch the limits of labor law. Either in their administration of poor relief or in their operation of the contract system, they began to diverge from received concepts.

47 Annual Report of Garret Nagle, November 1, 1866, BRFAL-SC Roll 34; Report of Garret Nagle, November 30, 1866, Ibid.

George A. Williams, a native New Yorker and career soldier, combined a desire to achieve equity and fairness in labor settlements with concerns about the influence of vagrants. When the prospects for a crop under free labor looked dim in the fall of 1866, Williams put the problem down to a mix of freedpeople's migration, the weather, the system of shares instead of wages, and unscrupulous planters who took advantage of freedpeople. But he placed much of the blame on

the influence of a large vagrant class, who, having no other idea connected with the word Freedom than that of immunity from labor, refused to contract with anyone, squatted upon deserted rice plantations and in the woods, and spend their time hunting, fishing and stealing from both Whites and Blacks....

At the close of the year Williams recommended measures "to prevent the gathering of idle vagrant hands on the deserted plantations in Colleton District, as they are a source of terror to the citizens, and being without means of subsistence, live by depredation of the surrounding country." In 1867 Williams continued to complain about unemployed people gathering in Charleston and refusing to go to work in the country. Later that year, partly at the urging of Scott, he refused all aid to able-bodied workers. In trying to explain the failings of free labor, Williams utilized familiar imagery, but he also exhibited sensitivity to the exigencies facing freed slaves. In the same report where he condemned "idle vagrants," Williams sounded a note of class analysis in regard to the operation of the law. In his district, the civil law was "merely a source of power and oppression in the hands of the wealthy few, it being in this state an expensive luxury. There is no justice for poor whites or freedmen."

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49 Annual Report of George A. Williams, October 24, 1866, BRFAL-SC Roll 34.
Moreover, while Williams decried the freedpeople's "ignorance of the common duties of citizens," he also warned that if the government withdrew protection from the freedpeople, "their condition in a short time, would be much worse than under the old system of slavery."\(^{50}\)

Williams presents a complex case. He clearly supported free labor but at the same time felt sure measures should be taken to punish voluntary unemployment. Williams came to such positions because he believed "labor must be controlled by the same laws that regulate it at the North, before any permanent advance can be secured."\(^{51}\) While he was probably referring to the "laws" of the market as well in this remark, Williams saw the enforcement of vagrancy laws as one of the means through which labor was "controlled" and progress "secured."

Another agent who followed such lines of thinking was the Prussian-born Frederick W. Liedtke. Starting the war as a private in the 97th Pennsylvania Infantry in August 1862, Liedtke rose to the rank of captain by March of 1865. More than many other agents, Liedtke strove to implement the principles of antebellum poor laws he had apparently imbibed in his adopted home. In order that old and infirm freedpeople might contribute to their own support, he put them to work at handicrafts, making baskets, axe handles, and horse collars. When freedpeople

\(^{50}\)Ibid.; Report of George A. Williams, December 31, 1866, BRFAL-SC Roll 34; Scott to Williams, June 11, 1867, BRFAL-SC Roll 1; Excerpt in Scott to Howard (Monthly Report for June 1867), July 20, 1867, Ibid. Biographical information from Heitman, Register, 1040.

\(^{51}\)Williams' Annual Report.
contracted to work in groups and some of the parties refused to perform, Liedtke punished them with extra work on plantations because they "impair[ed] the interests of the others." However, Liedtke's hatred of idleness was relatively color-blind. While he reported the presence of "many idle and worthless people" among the freedpeople, he also accepted that they were "like the white population." Reviewing the destitution in his district, he stressed the existence of "a very low class of white people, male and female, who have intermixed with Negroes and Indians and who themselves as well as their offspring are so unwilling to work that charity expended to them would be the very inducement to make them lazy." Because of them, he recommended that no aid be given to anyone who had not contracted to do "reasonable work." In his district, he contended, there was "plenty of work for everyone willing to earn his bread honestly." Liedtke put these ideas into action as well, arresting freedpeople for "repeated breach of contract and theft" and compelling them to work on the public roads.  

Holding firmly to the principles of mid-nineteenth-century poor relief, Liedtke nevertheless tried to protect the wages of those freedpeople who did labor under contracts. When a Dr. Dwight complained about a freedman who refused to perform work not stipulated in a contract, Liedtke informed him that he must pay more for extra labor. When the planter tried to convince the officer that "plantation" meant

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land and all work connected to it, Liedtke informed him that "plantation" merely signified land under cultivation and that no amount of land could make one man wiser than another. Dwight grew agitated at these remarks, and Liedtke threw him out of the office. Based on this incident, Liedtke suggested an order forbidding the dismissal of freedpeople for absence without leave except in "aggravated instances." It was "unjust to take from any freedman his whole years work, for absence without leave for three days...." Such an order would "frustrate the designs of some evil disposed men whose hearts are set 'to keep the nigger down.'" Bringing these ideals into practice, Liedtke sponsored the case of Cuffy Glover who had a claim of more than one hundred dollars against his employer Nathan Guyton. The case eventually resulted in an order from Scott that confiscated property in order to recompense Glover for his time worked.53

Like Williams, Liedtke combined the concepts of poor relief with a concern for laborers. In addition, he sounded one of the shibboleths of the cultural free labor ethic. In the winter of 1865-1866 Liedtke visited plantations in his district around Moncks Corner, "explained to the freedpeople their position as free men, and...endeavored to impress upon their minds, that by honest, industrious and peaceable labor they would gradually become able to buy homes for themselves and become good citizens." Such statements presented the assembled freedpeople with an exact precis of the arguments of more prominent northerners about the genius of

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their society. For people like Liedtke, this formula produced individual upward mobility and general social progress. But similar to his counterparts in the North, Liedtke believed the general social ethic worked best when wedded to law.

Although Moderates such as Williams and Liedtke stayed fairly firm in their commitment to free labor ideology and its laws, others began to go beyond it, prefiguring the breakdown that would soon occur in the post-war North. One of these officers was Daniel T. Corbin, one of the few agents who entered Republican politics in South Carolina. Corbin, who averred that free labor depended on providing adequately for workers, became increasingly disenchanted with the prospects of the system as planters combined in 1867 to depress wages and freedpeople responded by refusing to contract. He decided that when "so much an organized antagonism between capital and labor existed it was considered best to allow the opposing elements to work out their own salvation, or at least to attempt it."

In reaching such a position, Corbin drew on the free labor ethic's prescriptive principle of the mutual interest of employers and laborers. But in the face of "organized" opposition to free labor's legal system, Corbin was willing to open the wage bargain and its results to the market. In other words, Corbin followed free labor ideology to a rejection of the contract constituents of its legal system.

James Durell Greene of Massachusetts followed it to an alteration of its vagrancy elements. Greene complained on more than one occasion about the

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54 Report of D.T. Corbin, May 31, 1866, BRFAL-SC Roll 34; Excerpt in Scott to Howard (Monthly Report for March 1867), April 20, 1867, BRFAL-SC Roll 1; Williamson, After Slavery, 364, 375, 394, 413.
problem of vagrancy in his district. In October 1866 he tried to explain its prevalence in terms that combined both the ideological and legal components of free labor. "A difference of opinion in regard to the contract system" had arisen between planters and freedpeople, he observed. Planters refused to bind themselves to contracts from "a want of confidence in the freedpeople," while freedpeople avoided contracts because they were "under the impression that justice could not be done there by the employer." Greene then tied this legal conflict over labor directly to the problem of poverty. Such conflicts "encouraged idleness, vagrancy, and theft, and [were] the main cause of half the destitution" in his district. By 1867 however, Greene had begun to realize that poverty might arise from other sources than conflicts over contracts. He reported that destitute blacks and whites included "those who are industrious and those who are exerting themselves to their utmost to raise their crops." In the growing famine of summer 1867, many people of both races were forced to leave growing crops to search for wage work. In the face of these conditions, Greene pleaded to go beyond regulations that denied aid to able-bodied persons in order "to relieve temporarily the wants of the working class."55

Greene and Corbin stretched the edges of mid-nineteenth-century discourse about labor and poverty. A final Moderate, G.E. Pingree, tried to do the same but kept having doubts about approaching new ideological territory. Pingree perhaps best exemplifies the complicated position of Moderates who tried to combined adherence to free labor ideology and law in the face of social conditions radically different from

55 Annual Report of J.D. Greene, October 1866, BRFAL-SC Roll 34.
the ones in which those concepts were grounded. Stationed at Darlington, Pingree wrestled with both the contract and vagrancy provisions of the bureau's program. In spring 1867 he noted that freedpeople were leaving verbal agreements "often without cause" but that he refused to send them back without written contracts. When planters fired laborers, Pingree compelled them to take them back, and if they had worked more than six months, he disallowed such discharges "unless it has been proved by black witnesses that the laborer is insolent and unworthy." In such cases, Pingree apportioned the contract, making planters pay six dollars a month for the time worked. While that was a low rate of wages, that Pingree allowed compensation at all to "insolent and unworthy" workers was out of step with his colleagues and with northern common law requirements for entirety.56

Pingree struggled as well when he tried to apply poor law concepts. In May 1867 he reported that, "I endeavor to discriminate justly and to issue provisions to those only who are really destitute and worthy."57 As food shortages increased in 1867, Pingree became more and more distressed about the prospects of widespread relief to the able-bodied:

In issuing rations this year I have fed many who are able bodied, but only because they had neither money or credit, their crops would have been abandoned without help, and I believed it to be better to assist


57 Excerpt in Scott to Howard (Monthly Report for April 1867), May 23, 1867, BRFAL-SC, Roll 1.
them in making a crop that they might not be objects of Charity next year. There is no doubt that I have been swindled in issuing in spite of all my efforts to prevent it, and idleness and laziness [sic] has been the result[:]; the people here have no pride in the matter, and will beg rather than work.\footnote{Excerpt in Scott to Howard (Monthly Report for July 1867), August 24, 1867, Ibid.}

When faced with massive human need, Pingree managed to go beyond the discourse of poverty in action but continued to justify his actions within its language.

Like many Moderates in the field, Pingree tried to implement free labor and its laws. However, the social conditions onto which such agents grafted northern ideology denied them success. Many experienced considerable intellectual dissonance when faced with a situation such as the Liberal De Forrest recounted when describing white poverty. After castigating poor whites for their "low down" condition, De Forrest had to admit that the war had caused "much honest and worthy suffering" among them. By 1867, massive poverty forced other agents to reach such conclusions about freedpeople.

Social conditions were not the only reason for abandonment of legal labor discipline. Reacting to the bureau's program, at least some African-American workers openly rejected the time rhythms of market discipline as did their counterparts in the northern working class. In general, coastal freedpeople completed assigned tasks by early morning and took the rest of the day off. Willard relayed a more telling example, one that demonstrated the clash of industrial and agricultural work rhythms that, in part, underlay the labor conflict. A sawmill owner who had
contracted for twenty-five dollars per month plus rations came to Willard to resolve a dispute. The two workers in question, "very intelligent and good laborers" in Willard’s opinion, claimed an hour off between 8 and 9 A.M. for breakfast and another between 12 and 1 P.M. for lunch. Trying to resolve the situation, Willard explained to them that "laborers at the North got less wages and worked from sunrise to sunset, this season of the year, only having an hour at noon. Their [the workers] answer was, ‘we want to work just as we have always worked.’" Looking back at this incident, Willard confessed that "the two parties of the contract [were] so widely separated in their ideas on this subject as to offer little encouragement than an early solution will be arrived at."\(^{59}\)

Willard was a staunch Conservative, so his comments must be taken with caution; but this incident does illustrate two important developments in the early years of Reconstruction. Freedpeople such as these often preferred agricultural work rhythms to those proffered by the bureau. More importantly, agents across the ideological spectrum began to doubt the capability of their intellectual and legal system to deal with the social and economic conflicts of freedpeople and planters. This doubt suggests that blacks and whites did indeed work out their own arrangements, but that development occurred in part after bureau officials began to

lose faith in pre-war northern conceptions of labor, poverty, and law. Still, even in places where the bureau stuck to a Conservative course, white and blacks managed to exploit labor law to their own ends, as was the case in Texas.
CHAPTER 7

"THE HIGHEST ENJOYMENT OF THEIR FREEDOM": CONSERVATIVE LAW IN THEORY AND ACTION IN TEXAS, 1865-1867

"The sudden emancipation of four millions of illiterate people, who had hitherto been slaves--a people without property, money, or book-learning--required some change of legislation," Texas Unionist lawyer George Washington Paschal remarked in 1867. The shock of the Civil War and the Thirteenth Amendment, he continued, distracted southern planters and "caused inventions, as to how labor should be controlled for the benefit of the old masters."¹ These "inventions" were embodied by southern legislators in laws known collectively as the Black Codes. Enacted in 1865 and 1866, some statutes restricted the civil rights of freed slaves, while contract, vagrancy, apprenticeship, and enticement laws defined the conditions of their labor. Southerners protested that their laws were modeled on northern examples, but northern newspapermen and Radical Republicans soon claimed these provisions constituted a return to slavery in all but name. In 1867 Freedmen's Bureau Commissioner Oliver Otis Howard identified the Texas vagrancy act as a one of several laws that would "occasion practical slavery."²

¹Timmins v. Lacy, 30 Tex. 120 (1867).

²On the Black Codes generally, see Theodore B. Wilson, The Black Codes of the South (University, Ala.: University of Alabama Press, 1969), passim. For Howard's comments, see 39th Congress, 2nd Session, Senate Executive Document 6: Reports of the Freedmen's Bureau Assistant Commissioners and Laws in Relation to the Freedmen, 2:3 (cited hereafter as SED 6). For an example of claims that Southern laws modeled the North, see Report of the Joint Committee on Reconstruction Four
Several historians since then have placed responsibility for these and other Black Codes directly on Howard's bureau. While this suggestion is correct in a general sense, the bureau's role in establishing coerced labor in the post-war South was not uncomplicated, as the experiences of Alabama and South Carolina show. In some places and at some times, assistant commissioners used inherited legal principles in both traditional and creative ways to secure labor's rights. Often, they failed because of the power of planter opposition. Ultimately, the success or failure of the assistant commissioners' programs rested on the legal knowledge and ideological commitments possessed by their field agents. If the Alabama and South Carolina agents were representative, those commitments varied widely.

Still, the bureau's culpability in the legal labor structures established during parts in one volume. (Washington, D.C.: Government Printing Office, 1866), 4:56.

3Donald G. Nieman, To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865-1868 (Millwood, N.Y.: KTO Press, 1979), 73; Theodore B. Wilson, The Black Codes of the South (University, Ala.: University of Alabama Press), 108. The most stinging indictment comes from Daniel A. Novak, The Wheel of Servitude: Black Forced Labor After Slavery (Lexington: University of Kentucky Press, 1978), 9: "...the Black Codes regulating labor were little more than local validations of the regulations initiated and enforced by the federal authorities."

For the Black Codes in Texas, see Wilson, Black Codes, 96-100, who describes them as among the most benign in the South. William L. Richter discusses the Texas Black Codes in "The Army and the Negro in Reconstruction Texas, 1865-1870," East Texas Historical Journal 10 (Spring 1972): 12, and in The Army in Texas During Reconstruction, 1865-1870 (College Station: Texas A&M University Press, 1987), 61. In the latter work, he calls them "an honest attempt by the legislature, blinded as it was by racial prejudice, to make what it thought was a workable system of free labor." The pre-eminent historian of the African-American experience in Reconstruction Texas argues that the Black Codes helped created an economic caste system. See James B. Smallwood, Time of Hope, Time of Despair: Black Texans During Reconstruction (Port Royal, N.Y.: National University Publications, 1981), Ch. 3.
Reconstruction requires attention, and the experience in Texas speaks to this issue. The Black Codes in Texas were among the last enacted, so by the time lawmakers passed labor regulations in fall 1866, the bureau’s labor program had been operating for more than a year. In Texas as elsewhere, the bureau had set out to organize freedpeople’s labor through a system of contracts enforced by legal compulsion. The agency also sanctioned legal force by state and local authorities as long as laws did not discriminate because of race. When the state legislators convened in Austin to pass laws on labor, they had learned from northern critics to leave statutes nominally colorless. But they had also learned from the state’s second assistant commissioner ways in which legal compulsion might be employed. As such, the case of Texas illustrates how ambiguous and malleable northern labor law and ideology was when imported to the emancipated South. In the hands of an amenable assistant commissioner, it could be used to coerce African-Americans into agricultural labor. At the same time, the ambiguities of the law meant that absolute control over labor could not be established through law alone.

Although Texas had been peripheral to the war, the context in which the bureau would operate was nearly as unsettled as in areas that had faced wartime destruction. Planters in the interior kept blacks as slaves after the end of the war and

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used violence to force their labor. In the northern and eastern parts of the state, slavery did not end until early 1866. Racial and class tensions were particularly high in Texas. Little experience with free blacks before the war left the state's white population with a particularly virulent form of racism. Returning Confederate soldiers and lower-class whites competing with blacks for work committed violence against freedpeople and threatened bureau officials. Planters inflamed this class hatred by refusing to sell grain to poor whites for fear they would thereby gain economic security and compete for black laborers. White migrants into the state also disrupted the economy. Men with money moved to Texas after the war, establishing new plantations and helping create a labor shortage. A seedier group of migrants also entered the state to swindle African-Americans out of the little cash they had.5

To northern bureau officials predisposed to fret about social order, these near chaotic conditions must have been alarming, and the activities of freedpeople would have heightened such feelings. As elsewhere in late 1865, rumors circulated that property and tools would be divided on Christmas or New Year's Day. Bureau officials tried to stop these stories, but they persisted. While whites feared a

freedpeople's insurrection if the distribution did not materialize, 1866 came without a rebellion. In addition, the movements of freedpeople after the war must have been worrisome. Some planters evicted freedpeople, and more often freedpeople moved toward towns and military posts to seek employment or to contact bureau officials. Many freed slaves sought out families and old homes after the war, and this reason for movement was even more acute in Texas. During the war, planters from war-torn states shipped between 100,000 and 150,000 slaves to Texas for "safekeeping." Most of these refugees left the state upon emancipation. In late 1865, one Union army official reported that the freedpeople formed "a constant stream passing through the interior of the state in an easterly direction towards Louisiana." Much of this must have appeared as mass vagrancy to white middle-class northern eyes. At the outset, then, bureau officials confronted a situation that to them seemed like a social crisis.

Before the Freedmen's Bureau was organized in Texas, the Union army stationed at Galveston governed the actions of freedpeople. On June 26, 1865, General Gordon Granger counseled freedpeople to stay with their former masters. He prohibited African-Americans from congregating around military installations and

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from traveling on "public thoroughfares" without a pass. The circular that contained these provisions also included a vagrancy-type regulation based on Granger's assumptions that idleness would lead to vice, and that immediate employment was needed to secure the crop. "No person, white or black, and who are [sic] able to labor, will be subsisted by the government in idleness," the general proclaimed. The Galveston Daily News reported that the army then put idle blacks to work on the roads, without pay. These actions provided the beginnings of a policy for General Edgar M. Gregory, the first assistant commissioner for Texas.

An abolitionist, Gregory started bureau operations in Galveston in September 1865. Until he was removed in May 1866, he combined military orders and personal persuasion to generate a system of free labor. He initiated the labor contract system, issued a vagrancy ordinance, and sent troops to force planters to pay wages and refrain from violence. Throughout his service, Gregory remained genuinely committed to freedom of choice for former slaves, though he would tolerate no idleness on their part.

The assistant commissioner introduced regulations for labor contracts on October 12, 1865. The freedpeople, he assured planters in this circular order, would "be enjoined to work," but they would labor under contracts entered into freely, approved by bureau agents, and breakable solely for "sufficient cause." Gregory

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instructed his agents to be sure the freedpeople understood their right to choose. "...[I]n all cases," he stipulated, "give the freedmen to understand that they are entirely free to contract to work where, and for whom, they please, and at the same time that a life of idleness will not be encouraged or tolerated." The lash, he declared, "must give way to law and moral power; man must learn to govern himself before he can govern others...." Self-discipline plus legal restraint would bring about a free wage system. For those not swayed toward self-control, Gregory issued a vagrancy order five days later. Such regulation was needed, the general said in preface, because "many persons have not learned the binding force of a contract and that 'freedom' does not mean 'living without labor.'" The order empowered local authorities upon an employer's oath to arrest any employee missing work two consecutive days or five in one month. Local authorities could put vagrants to work on roads or other labor or turn them over to the bureau. Like his colleagues elsewhere, Gregory was willing to combine openly the civil and criminal elements of northern law, at least at this initial stage.

Orders from Galveston notwithstanding, the contract system was still not functioning in Texas by late fall 1865. Continuing rumors of a year-end land distribution and poor treatment had prompted African-Americans to adopt a wait

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9HED 70, 147.

10Smallwood, *Time of Hope*, 40, 53; Richter, "Army and the Negro," 13; Circular letter of October 17, 1865, United States Bureau of Refugees, Freedmen and Abandoned Lands, Records of the Assistant Commissioner for Texas, 1865-1869, Roll 1 (cited hereafter as BRFAL-TX; all citations are to Roll 1).
and see attitude. Fearing the demise of free labor in its infancy, Gregory left Galveston on November 10 to exhort the freedpeople. Traveling more than 700 miles into the interior, Gregory estimated he met with more than 25,000 planters and freedpeople. In tiny villages, often at night in conjunction with religious services, the assistant commissioner intoned the virtues of free labor. He urged freedpeople to make contracts for the coming year and supplied them with a sample form. He suggested that they settle on a plantation, preferably near where they were born and raised, near "all their family ties and associations." To make official these suggestions, Gregory issued a circular on December 9 recommending that freedpeople enter contracts for the coming year by January 1.11

The effectiveness of Gregory's labor program is open to question. The assistant commissioner's reports to bureau headquarters described success. In December 1865 he sent word of the good crop produced by free labor. Like Congressmen who trumpeted statistics about northern versus southern productivity, the assistant commissioner deemed free labor to be more productive. Although he admitted that in some counties forced labor still existed, Gregory believed that planters were recognizing that free labor could increase their wealth and "infuse a spirit of enterprise, industry and thrift." In January 1866 he noted that high cotton prices had stimulated the demand for labor, and freedpeople were willing to work if the bureau enforced promises made them by the planters. Furthermore, Gregory

11HED 70, 148; SED 27, 82. Earlier, Gregory had suggested contracts with heads of households. Circular letter of October 17, 1865, BRFAL-TX.
contended, he was winning the battle against idleness. Never before had "inducements to labor" been higher. "As a result," he claimed, "in the more orderly potions of the State, theft, idleness and vagrancy have almost become things of the past." He asserted that 90 percent of the freedpeople worked under contract. I.J.W Mintzer, the Surgeon-in-Chief for Texas, seconded Gregory. Mintzer maintained that in the small towns "there is not an idle freedman to be found. The inducements to labor have swept all clean." Violence against freedpeople continued, but equality under the law would eventually bring peace to the state.\(^\text{12}\)

Gregory's reports were overly optimistic, for Texas remained in turmoil. Inspector General William E. Strong, who had visited the northern and eastern parts of Texas in November, recounted a starkly different state of affairs. While the cities showed improvement, Strong described "a fearful state of things" in the interior with frequent acts of violence against the freedpeople. Planters had little faith in free labor, thinking the freedpeople "idle and worthless" with "no dispensation to work." In the planters' eyes, blacks were "wandering around the country utterly demoralized...plundering and stealing indiscriminately from citizens." Strong disputed this description, noting a good harvest, but he added that the planters had only paid about a third of their laborers, those wages being disbursed over bayonet points. In the worst areas, freedpeople were still held in slavery but without the institution's

\(^{12}\)HED 70, 148; SED 27, 78-79. At this time, wage rates ranged from $8 to $15 per hour plus provisions; share contracts stipulated a 1/4 to 1/2 share plus provisions.
constraints on violence by whites.\textsuperscript{13} Probably a more accurate description of Texas in late 1865, Strong’s report reveals how Gregory’s assessment was an exercise in wishful thinking. Gregory did not understate the facts; he merely made them fit his ideology.\textsuperscript{14}

The belief system that underlay Gregory’s reports and his labor regulations rested on his views of free labor, law, and race. Gregory’s reports constantly vaunted central tenets of the free labor ethic. Ideally, labor sprang from an internalized spirit of industry, a work ethic. Material incentives aided this spirit’s development, and freedpeople would respond like humans everywhere. Correctly assessing the immediate goals of many ex-slaves, Gregory believed they wanted social mobility through the avenue of landowning or small proprietorships. The general hoped that eventually northern society could be reproduced in the South. What Texas needed was "a change in the system of industry.... The spirit that has made the great states of the Northwest [i.e., the modern Midwest] must be at work in Texas, and villages and small farms, the steam engine and the water wheel, the school house and the church shape its society."\textsuperscript{15}

Law and the doctrine of contracts also formed that society. Gregory worked

\textsuperscript{13}{\textit{SED} 27, 83-84.}

\textsuperscript{14}For example, if ninety percent of the freedmen were under contract, ten percent were not. In a state with almost no free black population prior to emancipation, where slavery meant nearly one hundred percent plantation employment, this must have been shocking to the planters. On the free black population, see Ira Colby, "The Freedmen’s Bureau in Texas," 171-173.

\textsuperscript{15}Gregory to Harris, January 20, 1866; Gregory to Howard, April 18, 1866, BRFAL-TX.
hard to establish a workable contracts and to make planters and freedpeople accept them as inviolable. Law would replace pain to enforce these agreements. "The lash and corporeal punishment," Gregory reported enthusiastically in October 1865, "are fast giving way to law and moral power in controlling and regulating the conduct of the freedmen." He affirmed the harmony of capital and labor through the means of voluntary association in contracts. If freedpeople would "settle down and enter into contracts with the planters...labor is applied to capital, future want and its attending evils will be driven from our midst, and the freedmen will become a educated and prosperous and happy race." Gregory maintained that the bureau's only real goal was equal protection under the law, but equality of law meant application of northern laws that upheld free labor. In response to a complaint about vagrant freedpeople in Panola, the general advised: "Apply the vagrant and criminal laws of the state to blacks and whites alike, and meet out [sic] to each offender the stern discipline of justice." Legal compulsion was justified if applied evenly.

Gregory's views on controlling of the unemployed of both races through equal laws formed part of a general commitment to racial equality, at least if conceived in nineteenth-century terms. Though not thoroughly radical, the assistant commissioner's views on race were certainly advanced for his time. Although he believed blacks "particularly adapted by nature and training as a tropical race" for agriculture, he openly professed a "friendly spirit for the freedmen." Gregory stressed genuine

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16HED 70, 150; Gregory to Howard, October 31, 1865, BRFAL-TX; Gregory to Harris, cited above.
freedom of choice in labor and deemed freedpeople capable of social and economic mobility. Moreover, he recognized the depths of white racism. "I sometimes think that long after the oppressed race shall rise into rights, duties and capacities so haughtily denied, the dominant class will not have overcome the contempt for the Negro," he wrote. "Its roots will even then exist and trouble the land."\textsuperscript{17} For all his paternalist preaching, he took his duty to help freedpeople seriously, and his efforts to aid African-Americans brought his mission to an end.

Because Gregory championed equality and used the military to force payment of wages, Texas planters and politicians engineered his removal. Complaints poured into the Galveston office, and Commissioner Howard began to investigate them. David G. Burnet, former president of the Republic, fueled the controversy in a \textit{Galveston Daily News} article in January 1866. Burnet charged that Gregory's speeches to freedpeople were inciting rebellion. Gregory requested a rejoinder, and Burnet wrote another article in March asking for the assistant commissioner's removal. President Andrew Johnson learned of Burnet's charges, notified Howard, and Gregory was promoted into an inspector general's position on April 2, 1866.\textsuperscript{18}

Joseph Barr Kiddoo, Gregory's replacement, took over operations in Galveston on May 14, 1866. Having entered the Union army as a private, he had worked his way up to a brevet major general, receiving a spinal injury along the way.

\textsuperscript{17}Ibid.; Gregory to Howard, March 17, 1866, BRFAL-TX.

Planters saw Kiddoo as an improvement over Gregory.\textsuperscript{19} The new assistant commissioner continued Gregory's program, but he displayed a greater willingness to use legal means to force freedpeople to labor. Kiddoo insisted that blacks be taught the inviolability of contracts and the need to be industrious. His more conventional views on race diminished restraints about using compulsion to achieve this goal.

Kiddoo toured the state soon after arriving and concluded that contracts were being violated. Freedpeople distrusted planters and remained unwilling to sign agreements. Their intransigence bothered Kiddoo, who believed firmly that the freedpeople's path to improvement lay directly through labor. Examining the contract system, he concluded that one of its central problems was that planters enticed workers to break their labor agreements. To Kiddoo, enticement was "not only dishonourable and a flagrant violation of the law of contracts, but also destructive to the energetic system of labor the bureau desires to establish, and detrimental to the agricultural interests of the state...."\textsuperscript{20} Whatever the effect of enticement on the bureau's labor system or the state's agriculture, this statement either ignored or wilfully misread the common law of labor contracts. Although an occasional case or comment appeared on the subject in English and American law, no American body

\textsuperscript{19}Richter, "Army and the Negro." 8; Elliot, "Freedman's Bureau in Texas," 11.

\textsuperscript{20}SED 27, 141.
of law on enticement existed in the 1860s.21

Nevertheless, the assistant commissioner prevented the practice. Planters who enticed laborers to break contracts with better wages or claims that a bureau-approved contract was illegal were fined $100-$500. Bureau agents could put a lien on crops or other property to force payment. Freedpeople who allowed themselves to be enticed faced a $5-$25 penalty. A lien could be placed on "the future wages of the freedman, garnished in the hands of the employer." This part of the order fell equally on freedpeople and planters, but Kiddoo added a section aimed squarely at African-American laborers. The problem was "a prevailing disposition on the part of the freedmen to disregard, and in many instances, to violate their contracts to labor by abandoning without cause their plantations and engaging themselves to others at the critical period in the progress of the crop...." To stop this behavior Kiddoo ordered a $50 fine for any freedman who voluntarily left an employer who had done nothing to annul the contract. The fine could be collected as a lien on wages. To make his intent abundantly clear, Kiddoo reiterated the sanctity of contracts.

21 Very few enticement cases reached the appellate level in the pre-war North. Based on these few litigations, it seems Northern courts had sometimes allowed enticement actions in cases of apprentices or domestic servants, but refused to apply the rule to industrial cases. See James v. Le Roy, Bayard, & McEvers 13 Johns. 274 (N.Y., 1810), an apprentice on a ship; Haight v. Badgeley and Wife, 15 Barb. 499 (N.Y., 1853), a domestic; Campbell v. Cooper, 34 N.H. 49 (1856), another domestic; Boston Glass Manufactory v. Binney et al., 21 Mass. (4 Pick.) 425 (1827). On this last action, see Christopher Tomlinson, "The Ties That Bind: Master and Servant in Massachusetts, 1800-1850," Labor History 30 (Spring 1989): 218-219. Tomlinson sees the dicta in this case as yet another example of judges importing master-servant discourse to empower the industrial employment relation. For the role of enticement in post-war labor law, see Chapter 8.
Freedpeople must "maintain inviolable the provisions of so solemn a legal document as a written contract. If the employer fulfils [sic] his portion of the contract as to wages, rations, and treatment, the laborer must fulfil his portion as to time and labor."\textsuperscript{22}

Though probably based more on exigency and the demands of planters, Kiddoo's orders revived a part of labor contract law long since dead. Though still available in England in the nineteenth century, direct penalties for enticement had not been used in the United States since the eighteenth century. In ways far more direct than many used elsewhere, Kiddoo invoked labor law nearly forgotten in the North for the purpose of assisting the planter class. During the summer of 1866 he guaranteed that these regulations were carried out. Continual rains fell in June and July, fields became clogged with grass, and Kiddoo worried again about freedpeople absconding. To secure their labor, he ordered bureau agents to explain "the justice of the [enticement] order, the nature of a contract, and the importance of fulfilling it in good faith." Kiddoo claimed this action made the planters see "that the bureau was working in their interest as well as that of the freedmen." When rain threatened the harvest, he repeated this measure.

While Kiddoo used more force against former slaves than Gregory, he did make motions to aid them. Because he had more troops to back him, Kiddoo prosecuted violent crime against freedpeople more actively. He also tried to make sure planters paid for the labor they received. In August 1866, he made unpaid wages

\textsuperscript{22}SED 27, 141-142.
a first lien on planters' crops and other property and stipulated that wages had to be paid in specie. In the fall his office directed agents to review share contracts, determine the amount of crop due, and help laborers market it. However, he qualified this order by advising agents not to interfere in "private agreements or book accounts, except in extreme cases." An agent's "legitimate duties" pertained only to written, bureau-approved contracts. Once again, the general allowed planters more leeway than freedpeople in controlling the employment relation.23

By summer of 1866 Kiddoo had placed the bureau in Texas on a path that empowered planters at the expense of African-American laborers. Just as Gregory's more liberal program had its roots in his views on the meaning of free labor, the law, and race, so too did Kiddoo's more conservative policies. Rather than a means of social mobility, Kiddoo conceived of labor as an end in itself. He intended to teach African-Americans that "the highest enjoyment of their freedom is through the means of labor, diligence, industry, frugality and virtue." While Kiddoo suggested that freedpeople had a better chance of acquiring land in Texas than elsewhere, he did not actively advocate landholding. He meant that getting land would keep African-Americans working within the state, not that it would lead to property ownership as Gregory had intended. As a result, he did not put much effort into circulating Homestead Act information among African-Americans. By keeping them working, the assistant commissioner maintained he was helping the freedpeople, who shared a common interest with planters. "It has always and will be my policy," he wrote, "to

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23SED 27, 142-144.
give all the legal and moral force of the Bureau to advance rather than retard the agricultural and industrial interests of the state...." He reiterated that he would do so because freedpeople's best chances lay "in the immediate channel of labor and industry." Similar to conservative reform writers such as Edward Everett, Kiddoo saw freedom in work, rather than through it.

Even though he upheld equality before the law, Kiddoo took a conservative position on the use of legal compulsion. Like most people of his day, Kiddoo sustained a solid faith in the sanctity of contracts. Unlike legal writers, however, he did not even pretend to view contract as a egalitarian tool. As his use of criminal penalties suggests, Kiddoo saw contracts primarily as a means to guarantee freedpeople's faithful labor, confessing that he "found it necessary to restrain [freedpeople] by every means in my power from shifting from one other employer to another on flimsy pretexts...." He judged that he was successfully reproducing free labor in Texas, but he reported that it had required "much exertion on the part of the planters and the bureau to induce the freedmen to work." Nonetheless, Kiddoo did apply legal compulsion to planters, requiring them to pay wages and insisting continually that "no distinction in color be made in legislation." In other words, he saw his role and the role of law as enforcing both sides of the employment relation, while openly recognizing the power disparities it contained. Without the limiting

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24 SED 27, 142, 147; Kiddoo to Richardson, December 19, 1866, BRFAL-TX.

25 SED 27, 157; Kiddoo to Howard, July 23, 1866, William Sinclair to Phillip Dunn, August 14, 1866, Kiddoo to Dunn, August 21, 1866, BRFAL-TX.
force of equalitarian discourse, Kiddoo took extraordinary measures against both planters and laborers to attain his goals.

While he believed in a rough functional equality of blacks and whites before the law, Kiddoo possessed all the racial stereotypes of his time. To him, African-Americans were "as a class, perfect children, intellectually" and were "too often restless, shiftless and suspicious of all restraint." Following the environmentalism of the middle nineteenth century, he blamed these characteristics in part on slavery, but nevertheless, he saw African-Americans' destiny as fixed in agriculture. This status did not mean Kiddoo was unwilling to protect African-Americans. "I grow sick at heart," he wrote, "and wonder at the war power of the government leaving this unfortunate race of people whom it liberated by force to the violence of chagrined and live-long enemies." If the general's views did not hinder his duties, they did block the course toward equality that Gregory had pursued.26 Combined with his conservative position on work and the law, Kiddoo's beliefs on race let him deny African-Americans genuine freedom of choice in labor and helped clear the way for greater use of legal compulsion. Texas legislators took these suggestions to heart when they passed the Texas Black Codes.

By October 1866 the Eleventh Texas Legislature had begun to act on labor and race issues. Although the general was in Washington when the laws passed, he

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26SED 27, 157; Kiddoo to Howard, August 8, 1866, BRFAL-TX. Kiddoo's racism even extended to everyday matters. In May 1866, he requested from the Army "one intelligent and reliable white soldier for duty as [an] orderly and one black soldier for the purpose of taking care of the government's horses." Kiddoo to E.M. Mason, May 26, 1866, BRFAL-TX.
monitored lawmakers and tried to influence their actions. He informed the sponsor of a guardianship bill that "all laws pertaining to apprenticeship, vagrancy, paupers and guardianship are to be recognized and enforced by the Bureau provided they make no distinction of color." Some legislators may have taken the assistant commissioner seriously for an early draft of the contract law required contracts for "all common laborers." Kiddoo also recommended to Governor James W. Throckmorton that the legislature pass laws protecting African-Americans from violence by lower-class whites.

The laws approved in Austin tightly controlled labor and race. A contract law regulated agricultural work and gave planters wide authority to deduct from pay for offenses including sickness, abuse of animals, breakage of tools, and even indecent language. The enticement law adapted parts of Kiddoo's order and added a provision for a certificate proving contract fulfillment. Legislators also sanctioned apprenticeship for children not supported by parents. Another law defined freedpeople's civil rights and required non-discrimination in criminal matters. This act stipulated, however, that African-Americans' civil rights did not include interracial marriage, jury duty, public office-holding, voting, and testimony in cases involving whites. The vagrancy act empowered the county court, justice of the peace, mayor,

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27Kiddoo was having other problems with Austin at this time. Legislators had established a joint committee to investigate the charges of violence contained in his monthly reports. See Kiddoo to James W. Throckmorton, September 13, 1866, BRFAL-TX.

28SED 27, 146; Kiddoo to M.W. Dunn, August 21, 1866, BRFAL-TX; Kiddoo to Throckmorton; Wilson, Black Codes, 109.
and town recorders to arrest a variety of offenders. The law granted broad powers to both planters and whites in general. Warrants could be issued by a county judge, or a magistrate plus a mayor or recorder acting together. More importantly, the law allowed citizens' arrests: any "credible person" who filed a formal complaint could also obtain a warrant, and such citizens could serve warrants "if no peace officer [could] be conveniently procured." Convicted vagrants faced fines of $10 plus costs. Local authorities could regulate convict labor and compel prisoners to work for $1 per day to pay the fine.29

In theory, the Texas Black Codes did not recognize distinctions of color, but these laws affected freedpeople almost exclusively. Kiddoo realized as much and tried to void the contract law. The Texas District commander, General Samuel P. Heintzelman, supported the codes and tried to remove Kiddoo while the assistant commissioner was in Washington. Kiddoo returned to take command, but he resigned in early 1867 after Congress combined the offices of district commander and assistant commissioner. The editor of the Galveston Daily News believed the departing general "had managed the Bureau rather satisfactorily which we think is more than can be said of any other heads of the Bureau."30

The editor's claim rested on a sound basis, although Kiddoo did not please all the state's planters, politicians, and publishers. Assumptions about free labor and law motivated Kiddoo as they did Gregory, but he occupied a far more conservative

29Wilson, Black Codes, 109-111; Laws of Texas, 1866, 103-104.

position. The elements of free labor ideology that he emphasized and especially his views on race made him more tolerable to Texans and to the Texas legislature. Coercion as it appeared in their laws did not directly copy the bureau regulations. Rather, legislators used to their advantage the general principles Gregory and Kiddoo had imported: contracts, legal force, and equality in the letter of the law. White Texans did not accept free labor, but they readily adopted its coercive mechanisms. Gregory and Kiddoo failed to realize that these procedures meant little without the internalized values they symbolized.31

Relying on the laws themselves as the whole of this story would fail to recognize how Texas's postbellum labor regulations worked in action and would overlook much of the complexity of the clash between planters, freedpeople, and the legal system. A full treatment of this question would require comprehensive research in Freedmen's Bureau and local court manuscripts, but the extensive record contained in a Texas Supreme Court case, *Timmins v. Lacy*, recounts how one group of actors resolved these issues. Decided in April 1867, the case involved several prominent figures of Texas Reconstruction as well as three families in northeast Texas, and it reveals the plasticity of the seemingly rigid labor laws of Reconstruction Texas. In the course of the litigation, at least three different positions emerged. Paschal, as reporter of the court, used the occasion to discuss free labor in the South. The individual litigants exploited the laws and the courts to structure work and family. Finally, the secessionist judges coupled formalist arguments with a domestic

ideology that undermined the goal of governing freedpeople's labor.

Timmins v. Lacy arose as a test of an October 1867 apprenticeship statute. In its first section, the act retained family control by allowing parents to bind out their minor children over age fourteen. A second provision empowered local officials to apprentice "all indigent or vagrant minors" within their jurisdictions. The law required masters and mistresses to furnish food, clothing, and medical attendance, to treat their charges "humanely," and to teach them some trade or occupation, but it also authorized them "to inflict such moderate corporeal punishment as may be necessary and proper." Servants who ran away could be chased and captured. Although apprentices could receive a discharge for "good cause," lawmakers sanctioned punishment of runaways as vagrants until they agreed to return. The law was also connected to the enticement statute, stipulating $5-per-day fines paid directly to the master or mistress for anyone luring away an apprentice.32

Although such laws drew criticism from northerners because they portended separation of parents and children in a manner reminiscent of slavery, the Texas apprenticeship law survived. Texas Unionist John L. Haynes denounced the act as a form of slavery, but conservative governor James Throckmorton defended it as based on an earlier Massachusetts statute. Since it made no specific reference to race, this law, like the vagrancy statute, was approved by Texas Freedmen's Bureau

32Laws of Texas, 1822-1897 (Gammel, 1898), 5:979.
officials.33

The statute received extended comment from Paschal in his report of Timmins v. Lacy. His Southern Intelligencer had already condemned the labor contract law as a "legislative monster" that would "make labor synonymous with crime and...degrade the free laborer to the condition of a slave." In commenting on the apprenticeship statute, Paschal displayed a Jacksonian concern for idleness and vagrancy that aligned with the opinions of Freedmen's Bureau officials, Republican Congressmen, and social welfare reformers of the middle nineteenth century.34

Providing background for the report, Paschal defended the South against charges of idleness and upheld the tenets of free labor. Apprenticeship, he averred, could be found only twice in the previous laws of Texas. These acts remained dead letters because the early marriage of widows, the kindness of relatives, and the values of self-reliance all provided for orphans. Such children grew up quickly, becoming farmers, mechanics, merchants, doctors, lawyers, or ministers. Consequently, "the sufferings of orphans or begging by them was unknown" in the Old South. Paschal wished "to repudiate the 'great lie,' that to work was degradation in the south, and that orphan children grew up in idleness or as vagabonds." He believed that such a

33Foner, Reconstruction, 201; Richter, Army in Texas, 61; Robert A. Culvert, "The Freedmen and Agricultural Prosperity," Southwestern Historical Quarterly 76 (1972): 465; Ramsdell, Reconstruction in Texas, 123.

34Southern Intelligencer, October 4 and 11, 1866, quoted in Ramsdell, Reconstruction in Texas, 123. On Paschal as a Jacksonian, see Jane L. Scarboroogh, "George W. Paschal: Texas Unionist and Scalawag Jurisprudent," (Ph.D. dissertation, Rice University, 1972), ii-iii.
favorable situation obtained because the Old South was not controlled by planter aristocrats but by "the learned professions and men in commercial life." Indeed, few men rose to prominence "who, as boys, did not labor on the farms, or in some other manual way, which gave constitutions and habits of application and conscious self-reliance." Paschal interpreted *Timmins v. Lacy* and the Black Codes within the ideology of free labor. He demonstrated the same devotion to manual work and self-reliance and the same fear of idleness and vagrancy as his northern counterparts in the Texas Freedmen's Bureau.

For the actual litigants in the case, the rarefied ideology of free labor played little role. Their concerns centered around work discipline and family economy. The suit encompassed three families, the Timminses, the Popes, and the Lacys. The plaintiff, Mary B. Timmins, and her son, Robert, operated a plantation in Cherokee County about thirty miles from Tyler in northeastern Texas. Prior to the war, Harry Pope had been her slave. In the early 1850s Harry Pope married Sarah Lacy on Timmins plantation "after the usual fashion of slave marriages." The couple had three children, including Elkin (the child in question in the case), another boy named Chuff, and a girl, Leney. Eight or nine years after the marriage, Harry abandoned Sarah because she had a child by another slave. Both Harry and Sarah remarried, Harry to a woman not named in the record, and Sarah to Moses Lacy, with whom

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35 *Timmins v. Lacy*, 118-119.

36 The following narrative and analysis of the litigants is taken from the records of the county and district courts that were reproduced in the case report on pp. 123-130.
she had three more children.

At the end of the war, both black families still lived in the vicinity of the Timmins plantation, although Harry had been separated from his children by sale. After emancipation, he returned to Mary Timmins and contracted to labor for her in 1866. He also contracted with her to keep his three children for 1866, 1867, and 1868, if she approved of the arrangement year by year. Moses and Sarah Lacy had also contracted to work for the Timmins family in 1866, but in December 1865 they abandoned the agreement and worked instead for Harmon Carlton, hiring Elkin and Chuff to G.W. Pearson. The day after this latter agreement was concluded, Robert Timmins rode to Pearson's farm and repossessed the children with a double-barreled shotgun.

By the end of 1866 the Lacy family had accumulated $50-$60 of "provisions," and they sought to increase their earnings by a mixed family economy. Moses Lacy contracted with William Parks for $10 per month plus a house and food. The agreement permitted Sarah to work for herself, and the couple believed they could, with the help of their children, "take care of themselves." Following this intention, Sarah hired Elkin back to Harmon Carlton for $40 per year, Chuff to E. Morgan for $30, and Leney to John T. Murray for $35. The contracts required each child's employer to supply food, clothing, and medicine.

Once again, the Timmins family disrupted the Lacy family's plans. In January 1867 Mary Timmins obtained an order from the Cherokee County Court authorizing

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37Quote at 128.
her to hold Elkin and Chuff until the last Monday in January when the county court pertaining to estates would consider their case. Robert Timmins again seized the children and carried them back to his mother's farm. This time the Timmins family had the power of the state's new apprenticeship law on their side. On December 27, 1866, they had persuaded Harry Pope to bind Elkin, Chuff, and Leney to them until each reached 21. One condition of the agreement probably convinced Harry Pope to return his children to his former master. Mary Timmins had agreed to give each child one hundred acres of land upon his or her majority.

This narrative depicts complex relationships between work, family, and the law in the immediate aftermath of emancipation. In late 1865, the Timmins family believed they still had the right to use physical force to exact the labor of freedpeople. By late 1866 they had learned to use the law instead. The Popes and especially Lacys also assimilated the use of law to control their economic futures and their family lives, and their stories demonstrate that African-Americans were not passive victims in the legal process. Both Sarah and Harry followed the familiar pattern of freed slaves who tried to re-establish family life and provide for their future. The Lacys attempted to do so by using the contract system set up by the Union army and the Freedmen's Bureau. By operating a planned family economy, in a way reminiscent of urban-ethnic working-class families, they hoped to live free from the control of their former masters. Harry Pope, on the other hand, was willing to manipulate the Black Codes to his and his children's benefit. By taking advantage of the Timmins's desire for labor and full control, Harry Pope aspired to obtain
land. In doing so, he acted in accord with other freedpeople.\textsuperscript{38}

The conflict began its trip to the Texas Supreme Court when Mary Timmins applied to the Cherokee County Court on January 14, 1867, to make the apprenticeship binding under state law. On January 29 the Lacys, probably with the aid of Leney’s employer, John Murray, filed a bill of exceptions.\textsuperscript{39} They claimed Harry was not Elkin’s legal father. They also portrayed themselves as residents with a "comfortable home," who could earn $200 a year "if they can be let alone and are permitted to have the management and control of [their children]." If Elkin must be apprenticed, they requested that it be to a different master of their choosing.\textsuperscript{40} At its January term, the county court overruled the exceptions. The Lacys then obtained a writ of certiorari that removed the case to the Ninth District Court of Reuben A. Reeves, where it was tried \textit{de novo}.

Reeves was an unlikely source of aid for the Lacys. Born in Kentucky, Reeves was a former slaveholder who had been a secessionist and a captain in the Confederate army. He was removed from the bench by Major General Philip Sheridan under military authority, but he served as an associate justice of the Texas


\textsuperscript{39}Murray's name appears as one of the Lacy's attorneys in the Supreme Court argument.

\textsuperscript{40}Quote at 125.
Supreme Court after Redemption. Nevertheless, Reeves found Sarah Lacy to be the children's natural guardian, revoked the county court's order, and returned them to her care.

The Texas Supreme Court heard arguments in the case during its April 1867 term in Tyler. The Timmins's attorney contended that the county court retained exclusive jurisdiction over apprenticeship and guardian cases, that the law of guardian and ward gave preference to the father, and that the apprenticeship law intended to cover precisely this type of case. The Lacys brief was not preserved, but somewhere in the judicial process they had retained the services of one of the state's more prestigious law firms, Bonner and Bonner. Micah Bonner had been born in 1828 in Alabama. He gained admittance to the bar in Mississippi in 1848, emigrated to Texas in 1849, and established a practice in Rusk in Cherokee County with his brother. Described as "of a decidedly religious turn of mind," Bonner was a literary man and a teetotaler. He later succeeded George F. Moore, the chief justice of the Texas Supreme Court, before whom he argued the Lacys' case.  

Moore, who delivered the court's opinion, also seemed to present a dismal prospect for relief. The son of a prosperous Georgia planter, Moore spent his childhood in Alabama. Educated at the universities of Alabama and Virginia, he

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41Biographical information on Reeves is from Ramsdell, Reconstruction in Texas, 89; and Randolph Campbell, "The District Judges of Texas in 1866-1867: An Episode in the Failure of Presidential Reconstruction," Southwest Historical Quarterly (January 1990): 361.

42James D. Lynch, The Bench and Bar of Texas (St. Louis: Nixon-Jones, 1885), 116-118.
studied law in Talladega, obtained a law license in 1844, and moved to Texas in 1846. He practiced law in Austin and Nacogdoches and coedited the twenty-second through twenty-fourth volumes of Texas Reports. During the Civil War, Moore held the rank of colonel in the Seventeenth Regiment of the Texas Cavalry. He became an associate justice of the Texas Supreme Court in 1862, soon delivering an opinion that upheld the Confederate conscription law. After the war, Moore was elected as chief justice under the 1866 constitution.\textsuperscript{43}

In a strange twist of events, the chief justice examined the issue of black marriages under slavery and freedom and found the authority to place Elkin with his mother. He rejected the argument that Harry Pope’s authorization of the apprenticeship was enough to keep Elkin with the Timmins family. Because all slave marriages were not recognized by law, Elkin was legally a bastard, and it was "a universally recognized principle of the common law, that the father of a bastard has no parental power or authority over such illegitimate offspring."\textsuperscript{44} Moore cited a previous decision that held that manumission granted civil rights to a slave and validated any marriage existing at that time. On these grounds, emancipation legitimated Moses and Sarah Lacy’s marriage, and they became Elkin’s legal guardians.

Moore was not willing to let his opinion close on a such a narrowly formalist base. Even if the father were legitimate, he declared, it would be unreasonable to

\textsuperscript{43} Ibid., 97-98. Scarborough, "George W. Paschal," 73.

\textsuperscript{44} Timmins \textit{v.} Lacy at 135.
construe the apprenticeship statute so "that this child could be taken from its mother against her consent, and apprenticed solely at his (the father’s) will and pleasure."
The law intended to give control of children to their rightful parents. Moore reiterated the point:

Surely it is not to be supposed that merely because the father, when discharging his duties as such, is regarded as the head of the family, may, after years of desertion and abandonment, during which he has left his wife to struggle unaided for their support, rob her, by means of this law, of the society of her children, and this add to the injury already done her the severest blow which can be inflicted upon a woman, whatever may be her condition or sphere of life.\textsuperscript{45}

Moore used the ideals of domesticity and motherhood to deny the authority of a black father, a white plantation mistress, and a state labor law. Ironically, he also imported a central tenet of vagrancy law that punished fathers who abandoned homes, wives, children, and domestic responsibility.

Timmins v. Lacy illustrates how the Texas Black Codes worked in action and how the issues differed for each group involved. For the Cherokee County planters, the Black Codes provided a way to govern their former slaves. Two black families saw in the legal arrangements set up by the Freedmen’s Bureau and the state legislature different paths by which to escape planter control. Moore’s opinion and the decision of Judge Reeves suggested that even secessionists and Confederate soldiers could complicate the regulation of labor by formalistic applications of law and by values that contravened harsh domination of the freedpeople. Paschal’s commentary on Timmins v. Lacy demonstrated how some southerners accepted

\textsuperscript{45} Timmins v. Lacy at 138-139.
central tenets of the free labor ethic.

Finally, this litigation combined with the actions of the Freedmen's Bureau and legislature exposed both the power of free labor law to shape emancipation and the internal elements that led to its ultimate failure. If applied with enough force by assistant commissioners such as Gregory or Wager Swayne or by radical local agents, labor law could do more than oppress. Even if used ambiguously as it was by moderate local representatives or top officials such as Robert Scott in South Carolina, legal control of labor might afford some positive benefit to African-American workers through the enforcement of equitable principles of contract. In the hands of officers such as Kiddoo or conservative bureau subassistant commissioners, labor regulations became little more than a powerful mechanism of planter domination. The actions of this final group presaged what would happen in the Redeemed South, when states passed even draconian vagrancy and convict labor laws. They also predicted the coming crisis of northern labor law in 1870s. By 1880 the vagrancy laws of the Freedmen's Bureau would look mild by comparison.

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CHAPTER 8

"THE UTTER ABSENCE OF RESPONSIBILITY":
THE TRANSFORMATION OF FREE LABOR LAW
IN THE POST-WAR NORTH

At 2:00 o'clock in the afternoon on June 5, 1879, Mrs. Alfred Winegar latched the front door of her farmhouse near Millerton, New York. A "very estimable woman" between 60 and 70 years of age whose husband had recently passed on, she and an 80-year-old friend had been spending the afternoon talking as men worked the fields nearby. Moving to the back entrance, Mrs. Winegar was affronted by "a man of advanced age with long, gray whiskers." The stranger yanked her from the entrance and pushed her toward one of the farm's buildings. Roused by the commotion, her friend ran from the house and chased the scoundrel from the premises, but she was too late to save Mrs. Winegar. "The fright and over exertion so affected her that she died instantly." It was clearly a case, the New York Times informed its readers the next day, of "Death From a Tramp's Violence."\(^1\)

Whatever the man's intentions or Mrs. Winegar's medical condition, the incident formed part of the pervasive fear of tramps that had developed by the late 1870s.\(^2\) A product of the industrial depression that started with the Panic of 1873,

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\(^1\)New York Times, June 6, 1879.

industrial tramping created a period of crisis for free labor and free labor law in the post-Civil War North. While northerners tried to implement antebellum legal principles in the Reconstruction South, those doctrines were being tested, altered, or discarded at home. By 1880 northern labor law had reached an oddly paradoxical stage. The prewar doctrine of entirety eroded, diminishing the role of binding contracts in governing the conditions of labor, while simultaneously northern legislatures enacted criminal tramp laws with the potential to constrict workers' movements severely. In part, growing intellectual criticism of entirety's ability to oppress led to its diminution, but in a broader sense, its decline resulted from the simple fact that employers no longer wanted binding, long-term agreements. Farm mechanization increasingly made them unneeded for farmers, and they had never proved especially useful for craft or industrial work. Now, both employers and the courts invented new ways to secure labor discipline, but ways that did not significantly restrict workers movement in the labor market. At the same time, tramp laws directly limited industrial mobility by establishing penitentiary terms for not working. A departure from prewar vagrancy statutes, these laws nonetheless drew on prewar roots in reform discourse about work, gender, and domestic discipline. Spurred by fears of downward mobility in an uncertain economy and by growing antimodernist longings for release from the restraints of industrial and domestic life, reformers secured laws that were considerably harsher than their antebellum or Reconstruction antecedents.

(Lincoln, Neb.: University of Nebraska Press, 1984).
During and after the Civil War, northern courts retreated from the doctrine of binding labor contracts, adopting instead the equitable remedy of apportionment laid out by Joel Parker in Britton v. Turner. At the level of legal doctrine, this slow change represented the ultimate triumph of market relations in free labor. Removing the penalty of wage forfeiture allowed workers to leave contracts and circulate freely. In the broader sense, however, the decline of entirety went hand in hand with the rise of the at-will employment doctrine, which helped employers secure more power in constructing the employment relation. At least in some cases, courts had previously upheld the sense of obligation and job security for workers inherent in entire contracts. Apportionment left both workers and employers almost completely free of court interference, a situation not advantageous to a weaker party.

Although on the wane, entirety had still its supporters in the post-war North. One of the most fervent defenses came from Horace Gray Wood, who published an American treatise on the law of master and servant in 1877. Wood represented the antebellum school of thought about labor contracts, freely adopting English master-servant discourse on the employment relation. While English writers confined "servant" to menials and domestic, Wood wrote, Americans conceived of it as any employee. Wood argued that the master-servant relationship arose from contract, but he spurned the fiction of equality in bargaining. Servants were defined as people "subject to the direction and control of another in any department of employment or business." Wood advocated application of full performance of fixed contracts without deviation, even after one day's absence from work. While he noted (rightly) that
Britton had been adopted in some places, he asserted (wrongly) that it was not favored generally and that most states had adopted entirety. For Wood, entirety stood as "sound public policy, and in the industrial interests of the country." If workers could depart at will, "the interests of employers would be constantly at the mercy of employees." Wood argued that entirety was not detrimental to workers, but not in the usual way of asserting the employer's mutual obligation. Instead, he pointed out somewhat ruefully that in England the criminal law enforced contracts.3

Entirety found supporters in the courts as well. The New Jersey court in 1870 disallowed a maid's suit for a month's wages, claiming that because her contract was for a fixed period it was "not apportionable either in law or in equity." In 1876 the Wisconsin Supreme Court denied recovery to a farm worker and his wife, who had worked as a maid, even though her pregnancy was what prevented fulfillment of the contract. Wisconsin's judges faced the question again Diefenback v. Stark (1883) with the same result. A minor farm hand had left a six-month contract after four months because his employer refused to pay in installments, as the boy had understood the agreement. Acknowledging the growing number of decisions in favor of quantum meruit, the court nevertheless declared the remedies suggested in Britton to be "against the current authority in this country and in England, and certainly against reason" as well as "quite inadequate to indemnify the employer under the ordinary rule of damages." As in the prewar period, the nature of employment influenced the

terms of the contract and the outcome of the case. If the farmer had wanted only a month to month worker, he would not have stipulated a six-month term and would have paid less wages, the opinion argued. In other words, if the employer had no desire to control his employee’s participation in the labor market, he would not have offered an entire contract. Moreover, the contract was not apportionable "because the several month’s service may and quite likely is to be of very different benefit and value." Farm work (or other non-industrial labor) did not possess the constant value intrinsic to the industrial labor process. The employer supported the laborer through slack times to ensure his or her presence when needed.⁴

Like their southern counterparts, northern and western farmers used contracts in the post-war period to bind agricultural labor. In common with prewar practice, Frank Halsey signed on at Axle Weaver’s place in Illinois from March 1, 1877 "until after corn picking." Jeremiah Baker, contracted with Solomon Duncan to work for 7 months at $15 per month on Duncan’s farm in southeastern Kansas. William Thrift paid William Payne $20 per month for work on his Macon County, Illinois farm from March through November. Payne’s job also indicates that some seasonal laborers were not simply a rural proletariat, for he gained permission from Thrift in late September to gather a hay crop of his own.⁵

⁴Beach v. Mullin, 34 N.J. Law (5 Vroom) 344-346 (1870); Jennings v. Lyons, 39 Wis. 553-558 (1876); Diefenback v. Stark, 14 N.W. 621-625 (1883).

⁵Weaver v. Halsey, 1 Ill. App. 558 (1878); Duncan v. Baker, 21 Kan. 99 (1878); Thrift v. Payne, 71 Ill. 408 (1874). As it turned out Halsey was not a model worker. After he had worked for Weaver two weeks, Weaver’s other two servants were ready to leave. In that short span, Halsey had complained about the food, tried to get the
Although farmers were still using these sort of arrangements, the farmers' need for bound labor decreased after the Civil War. The most important reason for this change was the growth of agricultural mechanization. Long-term arrangements had always been used primarily to hold laborers for the harvest. Now farmers relied increasingly on contract harvesters like Azariah Huls who owned a threshing machine that he took around Kane County, Illinois, working at the rate of $2 per bushel of seed separated. By employing men like Huls, farmers could get the crop in without supporting workers for the whole year. As a result, the minor sons of other farmers seem to have replaced the adult farm worker of the prewar period. Adult farm workers who remained were not the bound servants of the pre-machine age. Some were like William Payne, who used his wages to supplement the income from his own farm. Others worked out informal agreements, such as the one between Thomas McComber and Frank G. Parcell, to avoid waiting until the end of the season or the year for payment. Although McComber and Parcell agreed to a price of $195 for a year’s work, Parcell testified that McComber "had been working for me before, and he drewed money whenever he wanted it."6

6_Garfield v. Huls, 54 Ill. 427 (1870); Thrift v. Payne, 71 Ill. 408 (1874); Parcell v. McComber, 11 Neb. 209, 212 (1881). This last case is another example where I cannot be certain the worker was a farm hand. I have assumed he was because of the term and time of making the contract (in October for a year), the place (a rural county in Nebraska’s Platte River Valley), and the low level of wages. On the point that farm mechanization took hold only after the Civil War, see David E. Schob, Hired Hands and Plowboys: Farm Labor in the Midwest, 1815-1860 (Urbana: University of Illinois Press), 69, 108-109. On hired boys generally, see Ibid., 173-190, 261. My point about hired boys is based on the fact that cases such as Diefenback
The declining need for agricultural labor control helped the courts abandon entirely, but it was not the only, or even the main, reason for the changing construction of labor contracts. After the Civil War, jurists and law writers rejected both the formalist and functional arguments of entirety's supporters and advocated the adoption of Britton because of its equity. In his treatise on damages, George Washington Field noted that Britton had been adopted in several states and that "in view of its manifest justice, is likely to grow in favor until it becomes universally recognized." Iowa Justice John F. Dillon declared in 1864 that though inconsistent with "the more technical and more illiberal rules of the common law found in the older cases," the New Hampshire rules were "bottomed on justice and right on principle...." George and Joseph Chandler, attorneys for farm worker Jeremiah Baker also saw apportionment as equitable: "This rule wrongs neither party. The best reason approves it. It does exact justice to both."

In particular, advocates of apportionment rejected distinctions based on the labor process or the nature of work, valuing all labor as Parker and other prewar liberal jurists had done. The issue arose because of the prevalence of quantum meruit and other equitable remedies in cases involving craft workers. As Wisconsin Judge William P. Lyon maintained in a case involving a boilermaker, "no arbitrary

\[v. Stark,\] in which entirety was applied to minors, appeared after the war. Before the war, courts had ruled that minors were not bound by contract doctrines. See Chapter 1. In contrast, Schob implies that proletarianization of farm workers was taking place in the Civil War period. See pp. 210, 267-272.

\[7\] Field on Damages quoted in Duncan v. Baker, 106; McClay v. Hedge, 18 Iowa 68 (1864); Parcell v. McComber, 210.
rule of law...in violation of every principle of natural justice" could allow an employer to enjoy the fruits of his employee’s labor and then not be bound to pay for it. Conservative judges admitted that apportionment might be allowed in such cases because the labor product (house, mill, etc.) had been accepted voluntarily, with an implied promise to pay.\(^8\) Echoing Parker’s reasoning in Britton, judges and attorneys desiring equity rejected this voluntary acceptance as a test. Field asserted it was generally recognized that if employers accepted a benefit, "voluntarily or from the necessity of the case," then workers could recover for the work done. Considering Jeremiah Baker’s case, Kansas Justice David M. Valentine refused to accept that this rule applied only to building cases. Employing an analogy that would fit into rural life in Kansas, Valentine pointed out that if a person contracted to haul a thousand bushels of grain but delivered only five hundred, the recipient still received some value and was bound to pay for it. As long as some benefit accrued, he concluded, personal service contracts should be treated the same way.\(^9\)

As before, supporters placed themselves in the van of progress. Dillon admitted that Britton had been repeatedly criticized as "good equity, but bad law" but claimed it was gradually gaining acceptance by judges and lawyers. Valentine admitted that entirety was certainly undergirded by the bulk of older decisions, but he maintained most recent cases supported it. Nebraska Supreme Court Justice Amasa Cobb went a step further, declaring that apportionment was a settled


\(^9\) Duncan v. Baker, 108; Field quoted in Ibid., 106.
principle in the western states. Cobb also hinted that popular pressure prompted changes in the law of labor contracts. Apportionment had gained so much support from the profession and from the people, he averred, that it "would be unsafe to adopt" the arguments for entirety.\textsuperscript{10}

Cobb was correct in his assessment of trends in labor contract law. By 1880 most western states had adopted Britton and several eastern and midwestern states had either followed the same course or had diluted entirety in some manner.\textsuperscript{11} In other words, the courts were finally beginning to create the true conditions of free labor. In states where wage forfeiture crumbled, the last barrier to free movement in the market fell along with it; for employers no longer possessed a direct, legal means to bind workers for long periods of time. In the important sense of day to day survival, workers certainly benefited from this development, but employers gained as well. Now they were no longer shackled with any contractual obligation to pay their workers or keep them on during a period of business decline. This outcome was certainly not the intention of equitable jurists in apportionment cases, but it was the aim of judges and law writers who developed another doctrine out of entirety: at-will hiring.

Although the basic idea of at-will employment could be found in some prewar

\textsuperscript{10}Duncan v. Baker, 105; McClay v. Hedge, 68; Parcell v. McComber, 212.

\textsuperscript{11}For a tabulation of these decisions, see Peter Karsten, "'Bottomed on Justice': A Reappraisal of Critical Legal Studies Scholarship Concerning Breaches of Labor Contracts by Quitting or Firing in Britain and the U.S., 1630-1880," American Journal of Legal History 34 (July 1990):241-243.
farm contracts, in southern overseers' agreements, and in early litigations such as Costigan v. Mowhawk Railroad, the concept is usually attributed to Horace Gray Wood. In his 1877 treatise, Wood declared that general, indefinite hirings were "at will" and could be terminated by either party at their pleasure. Adopted definitively by the New York court in Martin v. New York Life Insurance Co., the at-will employment rule became a common element of U.S. labor law in the twentieth century. As Jay Feinman has argued, the new rule concerned primarily the emerging class of middle-level managers. Although they may not have had the grand designs on owners power that Feinman attributes to them, these accountants, clerks, superintendents, and others presented the immediate problem of using entirety to seek damages or compensation after being dismissed from their jobs. The at-will doctrine solved this problem, and it aided industrialists another important way, allowing them to dismiss any sort of laborer when an economic downturn or a problem of shopfloor discipline dictated it.12

Whatever the ultimate intention, the practice of at-will hiring vastly strengthened capitalists' powers over managers and others, and it radically undermined the security of their employees' lives. As Wood noted, a yearly salary was not the same thing as a yearly contract, and under such agreements, this "mere

hiring at will...may be put to an end by the master at any time...." By the 1870s employers such as the Kansas Pacific Railroad Company saw this sort of arrangement as normal. The company employed its agents "so long as they gave satisfaction or their services were required...." Such terms of contract left middle-class employees in a precarious position. As a Philadelphia judge noted in 1863, they would not easily give up one situation for another without the assurance in contract that it would continue. A Pittsburgh judge put the matter more succinctly a year earlier in King & Graham v. Steiren, a case involving the superintendent of the chemical department at a soda ash company. Professional or scientific labor could not always find a purchaser, the judge wrote. "A man of this class may go unemployed for many months, notwithstanding the most untiring efforts to procure a place." Without the guarantees of entire contracts and decisions following Costigan, middle-class professionals could easily slip into the ranks of the poor. Eventually, Edward Steiren recovered his $900 salary, but a decade or two later he may not have been so lucky.\footnote{Wood, Master and Servant, 272-274; Kansas Pacific Ry. Co. v. Roberson, 3 Colo. 144 (1876); Coffin v. Landis, 5 Phila. 177 (1863); King & Graham v. Steiren, 44 Pa. 99, 101, 105 (1862).}

Whether the at-will rule helped employers control actual industrial workers is open to question. For the most part, they simply did not need the at-will rule to exercise labor discipline, for they had developed other means. Some employers continued to use entire contracts to limit workers, but when they did so the nature of their labor process had more in common with the agricultural world than the
industrial one.

Two cases involving litigants on the edge between the craft and industrial worlds illustrate both the influence that the character of work had on contract and the ambiguity with which jurists still approached industrial discipline in the 1870s. In spring 1878 a Chicago hat dealer corresponded with a Peoria milliner about employing her for the season at $15 a week plus travel expenses. Thinking she had been hired from April through July, the milliner went to Chicago, brushed up on the recent innovations in the trade, and sought her prospective employer. Because he had not received a definite reply, the dealer had since traveled to Peoria and hired another worker. Finding herself in Chicago without employment, the milliner sued, claiming the hat dealer had made a special contract with her. In upholding the lower court decision in favor of the dealer, the high court noted the urgency of the season. Given the lateness of the year and the danger to the dealer's business, Justice John Scholfield argued, the dealer had not acted improperly when he engaged another milliner. In dissent, Justice T. Lyle Dickey argued for a strict application of contract in the milliner's favor, stressing that "she kept her promise" and that the dealer could not be released from his agreement.¹⁴

In another Illinois case, the superintendent of a children's clothing factory had been detained in jail twelve days during the company's January busy season. Again, the Illinois court faced the question of whether a servant's unavoidable absence during a busy time released the master. In the usual manner of late nineteenth-

¹⁴ McClay v. Harvey, 90 Ill. 525 (1878).
century judges, the court tried to erect a "reasonableness" standard. Scholfield asserted that whether the worker was gone for "an unreasonable length of time" depended "on the nature and necessities of the business in which the servant is employed." Scholfield made it clear that employers would determine what those necessities were. The question to be asked was "does the delay so affect the interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for[?]."\footnote{Leopold et al. v. Salkey, 89 Ill. 423 (1878). The court denied recovery in the case.}

These two cases were on the margins of industrialization, in a trade that had experienced the decline in skill and status similar to all artisan-based labor.\footnote{On skill decline in industrialization, see Bruce Laurie, Artisans into Workers: Labor in Nineteenth-Century America (New York: Hill and Wang, 1989), Chs. 1-2; E.P. Thompson, The Making of the English Working Class (London: Penguin, 1963); and William Sewell, Work and Revolution in France: The Language of Labor from the Old Regime to 1848 (Cambridge: Cambridge University Press, 1980), esp. Chs. 9-10.} As such, the courts were not forced to deal with litigants who were truly industrial workers.

Most industrialists did not want restrictions on the market, anyway; instead, they wished to control the labor process or the wage bargain. Such goals did not fit easily with common law precedents, nor with the emerging laissez-faire doctrines of the late nineteenth century. As a result, judges found it difficult to respond to industrialists' demands.

Problems in reconciling these competing principles of legal labor discipline
became especially clear when employers tried to invoke the common law tort of enticement. Enticement had been suggested by Freedmen’s Bureau officials in the South and continued to be used by southern planters to control the labor market after the departure of federal authority. In addition, enticement had a basis in English law. Similar to the antebellum period, however, industrial employers employed only occasionally. More commonly, enticement concerned domestic servants. Even then, it seemed to contradict the very basis of free labor, for it hindered a worker’s freedom of movement. In a New Hampshire litigation in the early 1870s, the defendant’s attorneys made precisely this point. Albertina Larson of Gottenburg, Sweden, had been brought to the United States as a domestic by a labor agent. When the agent placed her with a different employer than the one for whom she was intended, the latter man sued for enticement. Not only was such a contract void because it lacked mutuality, the defense argued, Larson also “had the right upon her arrival here to go where and engage with whom she pleased...” Still, the court found Larson’s employer liable.

Domestic servants fit readily into English and American master-servant discourse, but industrial workers did not. When the Massachusetts Supreme Court heard a rare enticement action against a shoemaker in 1871, it ruled the suit legitimate, but only after a tortured discussion. The plaintiff, Samuel Walker,

\(^{17}\)Wood, Master and Servant, 450-477. Outside the South, Wood lists only a handful of enticement litigations that reached the appellate level.

operated a shoe and boot factory in Milford, Massachusetts, and in January 1869 his competitor, Michael Cronin, induced several factory operatives and about forty-five outworkers to leave Walker and work for him instead. When the superior court accepted Cronin’s defense, the Massachusetts Supreme Court had to decide whether this sort of competition in the wage bargain was actionable. Justice John Wells, who wrote the opinion upholding Walker’s claim for enticement, went to great pains to harmonize enticement with an open market. "Everyone has the right to enjoy the fruits of his own enterprise, industry, skill, and credit," Wells wrote, echoing one of the shibboleths of the free labor ethic. Still, no one had the right to protection against the vicissitudes of the competitive market. Harm that resulted from free competition would be *damnum absque injuria*, damage without wrongdoing, a staple of laissez-faire legal doctrine. Entrepreneurs did have a right to protection against harm from wanton acts that did not result from competition or from some valid purpose. Nevertheless, Wells was not willing to base the action solely on this older idea, nor on the master-servant relation itself. Instead, he reverted to contract language, arguing that "everyone has an equal right to employ workmen in his business or service" and that no harm was done by inducing workers to leave--unless a contract existed. Only then might employers sue.19

While Wells sought a consistent basis for the litigation, he overlooked Walker’s purpose in bringing it. The Milford shoe manufacturer was not concerned with his general rights in the market, but with more specific elements of his business.

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When his workers went over to Cronin, Walker lost several "who were skilled in the art of bottoming boots and shoes." Apparently, Walker wanted control over this particular type of worker and this particular segment of the labor process. More important, the workers' action had disrupted Walker's wage agreement with his other employees. Because Cronin had offered the workers "greater than the usual market price for such work," Walker's remaining employees forced him to raise their wages as well, presumably under the threat of walking out.²⁰

Although they might prove useful to industrialists such as Walker, enticement litigations were an extreme measure. By the post-Civil War period, northern employers had developed a standard practice to meet the same ends Walker sought in his claim for damages. In textiles and iron, and perhaps elsewhere, employers required between ten days' and two weeks' notification before leaving. Workers who did not "work out their notice" forfeited wages due them. This practice worked well because of the manner in which workers were paid. Although they might be employed at daily wage or a piece rate, workers received a pay packet only once a month. In addition, some companies left a gap between the end of the pay period and the time they gave workers their pay envelopes.²¹

Notification had originated in the Massachusetts textile mills during the 1830s

²⁰Walker v. Cronin, 557.

and 1840s, so by 1870s the courts had considered the question several times. Consequently, judges were willing to legitimize the practice but not without some reservations. As in most prewar labor contract litigations, the courts recognized sickness as a valid excuse for being absent from work, the reason being that acts of Providence could not be foreseen. In an astonishing decision, the Massachusetts court in 1865 declared that an arrest and conviction for adultery also fell under the same general rule. Notification clauses, Chief Justice George T. Bigelow wrote, implied a right to leave work, and the only way the forfeiture provisions could operate was by "some voluntary act of imprudence or carelessness" that led directly to abandonment of the contract. Bigelow admitted that adultery might be viewed in this light but maintained that it was the arrest that caused the abandonment, not the sexual indiscretion. In another surprising opinion, the New Jersey court in 1881 decided that a weaver's skipping work to "go down to the river on a pleasure excursion" did not constitute abandonment without notice. Even though the company's attorneys argued that one day's absence was as detrimental as permanent abandonment, the court found notification provisions to cover only the latter contingency. In a broad sense, decisions such as these sustained the general liberal discourse of contacts. The key was whether the worker's act had been either voluntary or intentional, whether the worker had disregarded the supposed mutual agreement in the original contract.

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22See Chapter 1.

Nevertheless, the workers did receive their wages, and the companies did not achieve their goals.

This concern about lack of mutuality in employment contracts was also the central doctrinal issue in more standard litigations in which a worker left voluntarily. As they did in antebellum courts, workers' attorneys argued that lists of rules containing notification clauses did not constitute a contract, especially if the employee had no knowledge of the rules. Furthermore, a weaver's lawyer suggested in an 1876 case, a company's notification rule "imposes a penalty unequal and uncertain in extent, and therefore cannot be enforced as a contract...." In 1874 the Massachusetts court accepted the first part of this argument, that a worker had to know about the rule before forfeiture could apply. Such a decision was in line with prewar principles on notification and was almost inevitable under contract doctrine. To accept the company's logic that an individual assented to a penalty simply by continuing to work would have baldly exposed the fiction of equality in contract.²⁴

Knowing the rules was the crux, for two years later the same court denied recovery to a weaver who knew of the notification requirement, even though he had signed no contract to that effect. Justice Charles Devens, Jr., accepted the employer's contention that assent could be found in silence or in the act of continued work. Devens went considerably further, however, rejecting want of mutuality as fatal to the contract. Echoing the rationale of Senator John Harlan during the Thirteenth

Amendment debates, Devens suggested that equality could be bargained away. "It is competent for either party to give to the other the right to terminate the contract abruptly while he himself agrees only to do so upon notice...." When faced with a direct challenged to liberal discourse, jurists such as Devens made no real attempt to mystify power structures. They had accepted unequal bargains before the Civil War, and they continued to do afterwards.

As with enticement, these doctrinal questions were not employers' main concern. Notification had several purposes, but the relatively short time requirments confirm that its overall purpose was not to restrict the labor market in the broader sense, as was the case with farmers. One main function was preventing disruption in the labor process. When the Fall River Iron Works lost Daniel Naylor in 1873, they claimed damage because of the loss of his skill. Naylor's job "consisted in taking the iron as it came through the furnace and passing it through the rolls, and...this could not be done by a green hand." The Massachusetts Court accepted this reasoning, "considering the nature of the work and its relation to the other operations in the defendant's business...." Continuous process industries such as iron and steel required some skilled workers and their loss could disrupt the entire operation. In some ways, preventing interruption resembled the farmer's worry about harvest, but in the latter case, the employer wanted to bind unskilled workers for long periods to ensure their presence at a specific moment plus to avoid paying higher day wages in the end. An

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iron and steel company intended to secure skilled workers for their role in ongoing production; they wanted only to stabilize the supply of skilled labor on a daily or weekly basis, and did not want to interfere with the individual wage bargain.  

In some instances, however, notification regulations were aimed at breaches of shopfloor discipline or collective action by workers. Some New England textile mills tied notification requirements to "honorable discharges" as they had done in the prewar period. The gentlemen's agreements between company supervisors not to hire an operative without such an endorsement continued in the late nineteenth century. As the century progressed, some companies also considered notification a direct anti-strike tool. In 1887, the Pennsylvania Supreme Court upheld a wage forfeiture on this basis. Requiring two weeks' notice constituted "an entirely proper and reasonable means of protection against wanton and ruthless injury" caused by "a sudden and extensive strike of the men."  

Often, employers sought legal support for more than one means of labor control, but the courts did not always oblige them effortlessly. The complicated role of the courts in contract-based management appeared in a series of litigations involving Illinois coal miners. Although coal production had burgeoned in Pennsylvania in the 1840s, miners opened Illinois fields only in the 1870s and  


after.\textsuperscript{28} With increasing production, owners sought greater control over their workers and turned to the courts for support. One way mine owners exerted labor discipline was through pit-bosses, much like prewar slave owners had done through overseers. In October 1877 the DuQuoin Star Coal Mining Co. fired its pit-boss, John Thorwell, and then sued him for $2,500 in damages for his poor performance. When the case came before the Perry County Circuit Court, sixteen miners trooped in to support the company, "several of them showing much feeling in the manner." In what the company must have viewed as a reverse turn of events, the jury granted Thorwell $330 in wages due. In 1879 the Fourth District of the Appellate Court of Illinois overturned the decision, finding in the colliers' testimony "overwhelming" evidence of just cause for the discharge.\textsuperscript{29} In an odd turn of events, the judges upheld the company, but in doing so, they relieved the workers of a boss they apparently despised.

Two other industrial cases considered the contracts of actual colliers employed by Wilmington Coal Mining and Manufacturing Co. in Will County about fifty miles south of Chicago. In governing their miners, the owners invented an ingenious contract that incorporated both entirety and the emerging at-will doctrine. The


\textsuperscript{29}DuQuoin Star Coal Mining Co. v. Thorwell, 3 Ill. App. 394 (1879). The state created this court after the Civil War as an intermediate step between the circuit courts and the state supreme court.
contract stipulated service from June to May, but it also contained a clause stating that any employee could be discharged without notice and that any employee could leave "in good faith" without notice. Signing the agreement also bound the miner not to be absent from work except for sickness, to abide by all company regulations, and to "keep his roadway properly brushed down, and his room in good working order."

Most importantly, the contract employed the "yellow-dog" clause. Anyone wanting work at the Wilmington Mining Co. had to agree to

not stop work, join any strike or combination for the purpose of obtaining or causing the company to pay their miners an advance of wages, or pay beyond what is specified in the contract; nor will he in any way aid, abet or countenance any such 'strike,' combination or scheme, for any purpose whatever, during the time specified in the first clause of said contract.

In constituting the employment relation, the company had used every means at its disposal.

The different conceptions of worker rights contained in entire, at-will, and yellow-dog contracts clashed when Wilmington's miners pressed claims for wages in court. The company wanted to construe the contract both ways, dismissing unruly or organized workers at will, but then withholding their wages as if they had signed a special contract. However, when John Barr quit the company, the circuit court

\[\text{\footnotesize \text{30} Yellow-dog contracts" forced workers to renounce participation in unions or union activities as a condition of employment. They originated in England in the early nineteenth century. American companies began to adopt them in the 1870s. Joel I. Seidman, The Yellow Dog Contract (Baltimore: Johns Hopkins University Press, 1932), 11-38.}\]

\[\text{\footnotesize \text{31} Wilmington Coal Mining and Manufacturing Co. v. Barr, 2 Ill App. 86-87 (1878).}\]
granted him $140.02 in wages due. On appeal to the Appellate Court of Illinois in June 1878, the panel upheld Barr's right to leave under the at-will clause. Nevertheless, it remanded the case because the circuit court judge refused to allow the company's attorneys to investigate whether Barr had participated in the May 1877 Braidwood miners' strike. Striking, the court suggested, could be seen as a bad faith violation of the contract.32

When an identical suit reached the state's high court in September, Justice Alfred M. Craig went even further. The mine owners may have been damaged when the collier abandoned the contract, he acknowledged, "but when the contract gave him the right to leave at any time he saw proper, the damages could not be set off against the amount which was due [him]."33 In this case, an ambivalent supreme court confronted directly the issue of industrial work discipline and disallowed use of a contract set up to control workers. Of course, it could be argued that this decision came easy for the court, for there was "no proof that [the miner] quit in bad faith or for any evil-disposed purpose." In other words, he had no connection to organized labor. Moreover, such occasional decisions can be seen as solidifying the hegemony of liberal law by demonstrating its supposed equality and thus further shrouding power structures.34

32Ibid., 88-89.

33Wilmington Coal Mining and Manufacturing Co. v. Lamb, 90 Ill. 465 (1878).

34For an example of this kind of argument, see Wythe Holt, "Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law," Wisconsin Law Review (1986-1987), 728. Holt even sees Britton and its progeny in
In any event, such decisions demonstrate that expressions of class power in labor contract cases were not uncomplicated. By the late nineteenth century, extractive industries depended on a mobile proletariat, but industrial work discipline more often involved regulation of the work-place itself.\textsuperscript{35} Within certain limits, the courts legitimized the rules set up by particular industries, but in doing so, they paid attention to the means of production as much as to contract doctrine. Even then, the effect of these decisions was often limited, for state legislatures began to redress the power imbalance in the wage relation. By 1920 about thirty states had adopted some statutes mitigating notification requirements. Some gave workers the right to demand wages due when they quit, while others penalized employers who fired workers without notice.\textsuperscript{36}

In the broader sense, the 1870s saw the decline of common law doctrines that had been in place since the early part of the century. The intellectual attack on entirety, the rise of the at-will doctrine, and even some elements of industrial cases all signalled the courts’ retreat from enforcing labor contracts. In many cases, judges this light, claiming these decisions "operated to lull workers into a false sense of equality and security." Although he acknowledged that Britton can be seen as a victory of class struggle "from the standpoint of the worker," his position seems rather odd for someone professing "a strong passion for humanity's cause," Ibid, 706, 723. After all, the workers in these cases received compensation for their toil and that probably mattered more to them and their families than did the deconstruction of liberal discourse.

\textsuperscript{35}On work-place control, see David Montgomery, \textit{The Fall of the House of Labor: The Workplace, the State, and American Labor Activism, 1865-1925} (New York: Cambridge University Press, 1987).

\textsuperscript{36}Karsten, "Bottomed on Justice," 251, note 133.
took these actions in opposition to the demands of industrialists. Nevertheless, these common law decisions did release workers from many of the remaining vestiges of English master-servant law and created a laissez-faire market in labor. At the same time, they relieved employers of any legal obligation to workers, be they steelworkers or chemical plant managers. Individual workers could now sell their labor power without legal interference, but they did so in an atmosphere of radical uncertainty about the employment relation.

It was in this climate of insecurity that most states across the U.S. adopted new criminal laws controlling unemployed workers who tramped on foot or rode the rails in search of work. Although grounded in the prewar language of poverty, the tramp laws of the 1870s went considerably beyond their antebellum or wartime antecedents. As detective Allan Pinkerton pointed out in 1878, the need to tramp in search of work had been common a century earlier, but seeing tramping as in need of restrictive laws was new.\textsuperscript{37} Pinkerton was essentially correct. Most of these new

\textsuperscript{37} Allan Pinkerton, Strikers, Communists, Tramps, and Detectives (New York: G.W. Carleton, 1878), 31. For another acknowledgement of the novelty of these laws, see Francis Wayland and F.B. Sanborn, "Report on Tramp Laws and Indeterminate Sentences," Seventh Annual Conference of Charities and Corrections (Boston: A. Williams, 1880), 278. I have used Pinkerton's ambivalent account liberally below. Pinkerton was a complicated figure. The symbol of managerial oppression of the working class, he nevertheless had experienced both working-class life and poverty. Born in Scotland, he supported his family as a cooper's apprentice and became active in the Chartist Movement. After the family immigrated to the U.S., Pinkerton settled in Illinois, building a successful business in his trade and becoming active in the underground railroad. When he helped uncover a counterfeiting ring, Pinkerton moved into detective work, first in rural Illinois, then in Chicago. By 1855, he had founded a detective agency that would become the tool of the country's rising managerial class. Both his background in the working class and this connection to the new middle-class managers was crucial for the tensions that pervaded his views on
laws were passed in a compressed period between 1876 and 1880, yet some of the
groundwork for their enactment had been laid in the years since the end of the war.

In the same year that former abolitionists decried the Black Codes and
Congress passed its first Civil Rights Act, Massachusetts lawmakers enacted the
state's first separate vagrancy code. Central to reform of the state's poor laws was
Samuel Gridley Howe, the third member of the American Freedmen's Inquiry
Commission. During the war, the governor of Massachusetts had appointed Howe to
head a State Board of Charities, the first of its kind and a model for other states.
Howe professed belief in the hereditary sources of poverty, decried the congregation
of paupers in large state-run almshouses, and warned that vice could not be
conquered by the "social ostracism of the vicious." Howe encouraged other reformers
to take the pauper's point of view, but his suggestions contained little real empathy:
"The pauper is to be legislated for and about, and he is to be disposed of and
treated, as seems best from the class above pauperism; and this should be so mainly,
but not entirely." Howe reached this position because of the firm faith in self-reliance
and personal agency that had undergirded the AFIC's reports. He supported paupers'
rights to work and enjoy the fruits of their own labor, but he acknowledged a role for
the state in securing this end. A central goal of his program was "a better
classification of the dependent and criminal classes, to diminish their number, and

tramping. Pinkerton was charged with policing people of his own heritage, while
trying to maintain the same middle-class respectability that his employers sought.
Frank Morn, "The Eye That Never Sleeps": A History of the Pinkerton National
Detective Agency (Bloomington: Indiana University Press, 1982), ix-ix, 19-25.
to secure a better means for their restoration to the ranks of industrious life." Howe occupied the ambivalent position of wanting to classify the poor in this manner, while at the same time, he fretted about the severance of social ties through institutionalization.38

It is unclear how much direct influence Howe and the State Board of Charities exerted on the legislature, but when it passed its new vagrancy act in 1866, the effect was to implement part of Howe's program of classification. Although prewar Massachusetts had been home to some of the more strident poor law reformers, it does not seem to have split vagrancy completely from the general system of poor laws. The new law enumerated clearly what constituted vagrancy. Gone were the antiquated British definitions; in their place was a description of underclass life, probably copied from New York's prewar statute. In addition to the usual idlers and beggars, the law denominated "all persons wandering abroad and visiting tippling shops or houses of ill fame, or lodging in groceries, out-houses, market places, sheds, barns, or in the open air, and not giving a good account of themselves" to be guilty of vagrancy. Equally important was the provision that these offenders should be sent to houses of correction, workhouses, or houses of industry. Whether legislators had heard from Howe specifically or not, they agreed with his

general desire to categorize the poor.\(^{39}\)

The Massachusetts law was not a tramp act, but it did move toward the more specific definitions employed a decade later and toward the separation of a clear class of offenders. Lawmakers in Pennsylvania pursued a similar course, even as they clung to the state's benevolent tradition. Acting in ways similar to Massachusetts, the legislature altered the state's hundred year-old vagrancy law by extending coverage specifically to public places such as railroad depots, steamboat landings, banks, restaurants, taverns, and gambling houses. It created a special constable's office to police these areas and authorized these officers to conduct searches of vagrants' luggage and other belongings if they suspected such people were thieves, gamblers, burglars, or pickpockets. Evidence produced from these searches could lead to an $100 fine and three months in the county jail. A local law two years later indicated that the incidence of vagrancy continued to increase in the immediate postwar era. Its preamble noted that the number of "vagrants and wanderers" requiring support in Northampton county had "largely increased" and that no uniform rule existed for supplying their needs. "Justice requires that the rule should be uniform," the legislature added. To meet this need, lawmakers enjoined the county to "take care" of these wayfarers by providing food and lodging. It also prohibited summary

\(^{39}\)Laws of Massachusetts, 1866, 229-230; Amy Dru Stanley, "Contract Rights in the Age of Emancipation: Wage Work and Marriage in Post Civil War America," (Ph.D. Dissertation, Yale University, 1990), Ch. 3. Stanley wrongly believes that with this law Massachusetts was "the first of the Northern states to enact a compulsory pauper labor law."
convictions for vagrants unless they were drunk.\textsuperscript{40}

Caring for wayfarers in Pennsylvania constituted part of the response to the upsurge in vagrancy and begging caused by the war itself. The war created a large group of disabled veterans who begged subsistence in the streets of northern cities. Despite organized efforts to assist them, they and other vagrants clogged northern relief agencies even before the depression overburdened social welfare providers. By the early 1870s northern police stations initiated the practice of lodging and feeding homeless people, much to the dismay of charity reformers.\textsuperscript{41}

The war had also orphaned numerous children, and reformers took steps to assist them and separate them from the rest of paupers. Pennsylvania headed the post-war relief effort, providing both support and education. State boards of charity and other organizations also removed children from what they saw as the demoralizing effects of adult dependents. In New York this culling process drew on antebellum roots. In 1862, the state allowed local magistrates to drain juvenile delinquents into the House of Refuge that had been established in 1824 by the Society for the Reformation of Juvenile Delinquents in the City of New York, an offshoot of the New York Society for the Prevention of Pauperism. In 1867 it transferred to houses of refuge teenage prostitutes who were arrested or who appeared voluntarily, "professing a desire for reform." Finally, in 1878 lawmakers outlawed placing children in the poorhouses, moving them instead to orphan asylums

\textsuperscript{40}\textit{Laws of Pennsylvania}, 1866, 259-260; \textit{Laws of Pennsylvania}, 1868, 1031-1032.

\textsuperscript{41}\textit{Bremner, Public Good}, 147, 174-175.
and reformatories. New York legislators also tried to remove able-bodied adults from the poorhouse on a local basis. In 1862 the legislature authorized justices of the peace in Ontario County to convey any "improper person to be sent to the poor house" to Syracuse's workhouse in neighboring Monroe County.\(^{42}\)

Yet legal developments during the 1860s were not accompanied by the extreme rhetoric of a decade later. Before the middle seventies, existing charity organizations seemed able to take care of the problem. In 1865 the New York City Police found the streets filled with vagrant children "in training to recruit the fearful armies of vice and crime." The report was noticed, but it did not spark great anxiety. "We have most confidence in the existing voluntary institutions which need only to be liberally supported and enlarged to sweep the city clean of childish vagrancy and poverty," the New York Times commented. Four years later the paper declared that the city's 8,000 ragpickers were industrious souls. They lived in "very neat" houses, stayed free of vice and disorder, and aided the economy. As late as September 1873 the paper remained convinced that distribution was the chief problem with poor relief and that the system could be improved easily.\(^{43}\)

By 1874 opinion was changing. In that year Boston passed an ordinance to require vagrant children to produce proof of school enrollment, and New York City considered a similar regulation to implant "the love of industry and self-respect" in

\(^{42}\)Laws of New York 1860, 401-402; Laws of New York, 1862, 393, 980-981; Laws of New York, 1878, 483-484; Bremner, Public Good, 148-149, 158-163.

\(^{43}\)New York Times, January 12, 1865, November 21, 1869, September 30, 1873.
its truants. Municipalities across the nation discovered "a vast fringe of destitute humanity [that] hangs on the edge of the busy, bustling, and industrious life which constitutes the heart of the City." In New York the police classified between 10,000 and 15,000 persons as vagrants. Boston logged 58,000 homeless lodgers at station houses in 1874. The secretary of the Chicago Relief and Aid Society reported an astounding 150,000 lodgers in 1874, many of them "rounders," repeat visitors. The police chief of San Francisco raided the city's wharves, arresting vagrants who endangered hay bales with their pipe ashes.\footnote{New York Times, June 3, 1874, July 24, 1874, October 7, 1874.}

These concerns, however, did not always produce immediate action. In 1876, the same year that the wave of tramp laws began to pass northern legislatures, Pennsylvania reformed its poor laws in a manner out of step with the general trend. A series of two laws separated the poor law from the vagrancy law, but both stressed provision over punishment. The poor law act, which aimed for uniformity in poorhouse erection, began with a general injunction to benevolence. "It is the duty of society to make provisions for the comfortable maintenance of those upon whom fortune has frowned who are found to be destitute and void of the means of support," the preamble read. The act retained many of the features of earlier laws, including the binding out of poor children as apprentices and the discretion to grant outdoor relief as long as it did not exceed the cost of indoor support. In trying to enact humanitarianism, the legislature commanded poorhouse directors to visit poorhouse apartments monthly, "see that the inmates are comfortably supported," listen to
inmates' complaints, and see that they were redressed.\textsuperscript{45}

The vagrancy law passed on the same day preserved and in ways extended Pennsylvania's benevolent tradition. It retained the 1767 definitions, but changed the administration significantly to incorporate increasing demands for work in return for support. The act required vagrants to labor at county farms, on roads or highways, or in work houses, poorhouses, houses of correction, or common jails for one to six months. Unlike some other states, the law aimed to meet specific needs by stipulating that labor should be "suited to the proper discipline, health and capacity" of offenders. Lawmakers required local officials to house vagrants in "comfortable lodging" and feed and clothe them "in a manner suited to the nature of the work engaged and in the condition of the season." Custodians who neglected this duty could be find $100 and jailed for up to three months. Another section allowed local officials to assist offenders in paying their own way back home by finding private employment for them. In addition, the law allowed time off for good behavior, provided certificates exempting a released offender from arrest for five days, and authorized officials to give money to aid vagrants in leaving the county.\textsuperscript{46}

Pennsylvania's new law represented a final attempt to envision the tramp crisis within the purview of antebellum conceptions of vagrancy. By the time it passed, sentiment for draconian laws was becoming widespread. "Crimes" perpetrated by tramps presented one stimulus for restriction, and they seemed to be occurring on

\textsuperscript{45}\textit{Laws of Pennsylvania, 1876}, 149-154.

\textsuperscript{46}\textit{Laws of Pennsylvania, 1876}, 154-156.
all levels of society--individual, municipal, corporate, and interstate. Reports about women and girls being attacked by tramps flooded the press. In an typical story, Carrie Roberts, a servant girl in Cincinnati, discovered a tramp trying to lift a box of her mistress’s jewelry. Carrie turned out to be the heroine, scaring the intruder off with shots from a revolver. Others, like Mrs. Winegar, were not so lucky. So, it appeared, tramps were attacking individuals; they were also raiding villages. In January 1876 "eighteen of these Bedouins of civilization ... joined together in a raid upon the unsuspecting town of Belvidere, [New Jersey]," probably prompting the first true tramp act. After this event, the New York Times predicted "a very little effort would collect in almost any part of the Northern States a body of tramps large enough to capture and sack any of our smaller villages...." In July 1878 the Baltimore Gazette reported that a band of fifty tramps boarded a B.&O. Railroad Company train and threw the freight off to waiting companions. In the summer of 1878, a group of tramps commandeered a train in Iowa and rode it to Wisconsin.47

Political considerations also figured in the tramp panic and the push for laws. After a group of reformers convened in Ohio to consider legislation, the New York Times predicted wryly that the tramps would respond in kind by organizing a political party. Five months later, in April 1876, the paper detected a convergence of tramps on Cleveland for said convention, suggesting that the alleged conference would adopt

47New York Times, April 27, 1879, January 11, 1876, June 18, 1878, June 19, 1878, October 24, 1879, January 31, 1880; Baltimore Gazette, July 22, 1878, repr. in New York Times, July 28, 1878. This so-called “train stealing” in Wisconsin may have been the reason the state’s legislature denied tramps the right to assemble.
a "broad platform of more greenbacks and fewer large housedogs." Tramps were becoming associated with paper money reformers. By October of that election year the Times was convinced that tramps were traveling in to cast their votes "to exert their influence for Tilden and Reform." A midwestern novelist seconded these fears, asserting that proper laws controlling tramps could not be passed "as long as political tricksters are permitted to profit by the votes of this element of venality." After the rail strikes of 1877 tramps became increasingly linked to labor radicalism, syndicalism, and Communism.48

Support for measures to punish tramps was widespread. Newspapers took the lead in calling for restrictive legislation. "Benevolent country and city folk in the Eastern states begin to believe that they must repress in some manner this odious and steadily increasing nuisance," the New York Times editorialized in February 1875. Lawyers and jurists also added their backing. Seymour D. Thompson, legal editor and later a justice of the Missouri Court of Appeals, recommended "stringent vagrant laws...under which persons who go about the country begging shall be arrested and put to work." Another public official who promoted a tramp law was

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Governor Allen of Ohio. "The matter of professional vagrancy is one worthy of your attention," he informed the legislature.49

Tramp laws should not be seen as a coming wholly from the elite. Luther Stephenson, Jr., chief of Massachusetts detectives, sent two men to investigate tramps in the western part of his state. Based on their research, Stephenson reported to the governor that: "Instances have been brought to my notice where people who live in the outskirts of towns are compelled to leave their homes to avoid the dangers and troubles from this cause." Vigilance committees formed to patrol railroads and scare off hoboos. In Baltimore, a two-day convention in 1877 drafted a tramp act and appointed a committee to "memorialize the Legislature to enact such laws as may be deemed best for the suppression of vagrancy." The Lima, Ohio, city council initiated a state convention that met December 8, 1875, at Columbus. Attended by seventy-eight delegates from twenty-five towns and cities, the conference considered the power to arrest vagrants and commit them to the workhouse. In New Haven, Philadelphia, and Detroit, local charity organizations issued relief tickets on the prewar model of the New York Association for Improving the Condition of the Poor. Portland, Maine, instituted a registry for the poor, while Lowell, Massachusetts, set

49New York Times, Feb. 6, 1875, Feb. 12, 1877, January 9, 1876; "The Tramp Nuisance," Central Law Journal (St. Louis) 2 (September 3, 1875): 365; National Cyclopedia of American Biography, 19: 28. Unlike many others, Thompson recognized that "whatever will remove hard times and give work to thousands of laboring men" was also needed.
up a "Ministry-at-Large" to beggars.\textsuperscript{50}

Popular suppression was in keeping with the general American tradition of extra-legal violence.\textsuperscript{51} Still, grass-roots efforts were not always successful, sometimes leading toward assistance instead of repression. In Boston, local officials helped an Italian family who begged start a fruit stand business. One telling incident involved an attempt in Montgomery County, Pennsylvania, to establish a local vigilance committee to arrest tramps along the Pennsylvania Railroad. In calling the meeting, local citizens responded to tramping laborers who congregated at a deserted building outside the Montgomery county village of Bryn Mawr. At the time of the meeting in July 1877, this group of tramps numbered near fifty and included a barber, a tailor, and a carpenter, as well as common laborers. These men intended to make money in the summer's harvest and then return to their usual occupations. Ultimately, the move for a Citizen's Protective Association failed as the president of the meeting argued that the "all tramps were not habitual vagrants" and that the depression had thrown many out of work. The local committee, he believed, could devise a plan to


protect the town's citizens "but also to rescue the tramp from the degradation which was consequent upon his unfortunate position."[^52]

A final source of support for new laws came from charitable societies, who lobbied actively for laws to help cement the distinction between worthy and unworthy poor. The charge of some historians that the New York Tramp Act was essentially a plot by charity organizations is surely simple-minded. But these organizations did wield considerable influence in Albany and in other state capitals. They wanted legislation that would help remove charity from localities to the state, and that would define clearly who deserved help and punish those who did not. In the end the charities got less than they wanted, but their members helped shape the bills that finally became law. In a general sense also, organized charity's goal of classifying the poor helped secure the more precise definitions of "crime" contained in tramp laws.[^53]

With such broad agitation, state legislatures acted quickly in the last few years of the 1870s. By 1880, when the tramp scare began to subside, states' powers under


older vagrancy statutes had been extended through the new tramp acts. These laws restricted movement by making misdemeanors like loitering into felonies when committed by a tramp and provided for long terms of incarceration at hard labor. New Hampshire led the way with a revised vagrancy statute in 1875; New Jersey came next with the first real "tramp" act in 1876.\footnote{The New Jersey law is generally given credit as being the first "tramp" act because it used the term for the first time. However, the New Hampshire law was recognized as a response to the tramp problem. See Central Law Journal (St. Louis) 2 (September 3, 1875): 365.}
While these laws varied in their particulars, they employed similar definitions and punishments and can be considered as a group.\footnote{In the following section I have given specific citations only when quoting. My generalizations are drawn from: Laws of Pennsylvania 1879, 33-34; Revised Statutes of Maine (1884), 925; Revised Statutes of Delaware (1915), 1629-1632; Annotated Code of Iowa (1897), 1981-1982; Revised Statutes of Wisconsin, Supplement (1883), 332-336; Revised Statutes of Ohio (1879), 1654; Revised Statutes of Illinois (1885), 425; Laws of Indiana, Special Session, 1877, 80-84; Laws of Maryland, 1880, 43-45; Laws of Massachusetts 1880, 231-233; Revised Laws of Vermont (1881), 768-767; General Statutes of Connecticut (1887), 346-347; Revised Statutes of New Jersey (1877), 1208-1219; Laws of New York, 1880, 296-297; Laws of New Hampshire, 1875, 610-611 for the 1875 law; "The New Hampshire Tramp Law," New York Times, September 2, 1878. For the general state of tramp laws through the late 1890s, see Harry A. Millis, "The Law Affecting Tramps and Immigrants," Charities Review 7 (September 1897): 587-594. Helpful secondary sources are Harring, "Class Conflict," 873-881; and Davis, "Forced to Tramp," 161-165.}
A primary purpose of these laws was to define a tramp as something different from the vagrant or sturdy beggar of colonial and antebellum days. The principle attributes were mobility, homelessness, and reliance on public or private charity. Representative of other states, Pennsylvania described a tramp as "any person going about from place to place begging, asking or subsisting upon charity, and for the purpose of acquiring money or a living and who shall have no fixed place of residence or lawful occupation in the county or city in which he shall be arrested." 56 Legislators took pains to say who was not a tramp. Nearly all states exempted females, minors, and the blind. Some added people who were differently abled. Lawmakers intended to restrain a particular problem: adult, able-bodied males who had rejected work and home for the open road.

In addition to this "'common tramping,'" most states added sections punishing severely a specific list of behaviors. The New Hampshire law, similar to those in other states, imposed a maximum two year confinement at hard labor in the state prison for any tramp who entered a house without permission, lit a fire in the roadway or on private property without consent, carried a weapon, or threatened to injure people or their property. For tramps who did "willfully and maliciously" harm people or their real or personal property the maximum penalty rose to five years. With varying precision, other states copied these harsh provisions. Some went even further. Wisconsin, for example, added a novel clause that allowed two year's imprisonment for "any five or more tramps who shall assemble or congregate

56 Laws of Pennsylvania, 1879, 33-34.
together...for...encouraging vagabondage.\textsuperscript{57}

While intent and definition were similar in most states, administrative practices were more diverse. Though longer than those for antebellum vagrants, terms of incarceration and the use of fines varied widely. So too did the power to arrest. In some states, citizens were authorized to haul in tramps. In others, the legislature mandated the creation of special tramp constables. Still others left capturing the offenders up to established local officials, some of whom received a fee for each tramp they cuffed. Punishment usually remained tied to local enforcement. Only in New England did the matter become entirely the function of the state. Many states employed some mix of local and state action. Common tramping was more often treated at the local level, while those committing the enumerated offenses were sent to the state penitentiary. Some states, most notably New York, provided state funding for local administration.

These generalizations describe the tramp laws of the industrial Northeast and Midwest, but at least five states in the South and three in the West also enacted similar legislation. The southern laws are deceptive. They all used the word "tramp" and employed some of the same restrictions of definition used in the North. In addition, the Tennessee and Alabama statutes confined punishment to fines or incarceration in jail or the workhouse. Mississippi, however, was more vague. It prescribed imprisonment and fines, but stipulated that the offender "when committed shall be dealt with as other convicts." Perhaps this clause was intended to sanction

\textsuperscript{57}New York Times, September 2, 1878; Revised Statutes of Wisconsin, 333.
hiring out. North Carolina acted most peculiarly of all. In 1879, the state passed a tramp act that was a near replica of northern laws. Yet at the same time, it affirmed the vagrancy statute that had been voided by the Freedmen's Bureau in 1866. This section proscribed general idleness, neglect of family, and "sauntering about without employment." The fines and prison terms were lower in this section, but it also allowed other punishments that were "not to exceed the above mentioned."  

Phrases used in these statutes suggest several explanations for the southern tramps acts. In part, they were the product of Redeemer governments' desire to control African-American labor. Still, the southern enactments had some connection to the social crisis in the North. Some tramping laborers went South in the winter in search of work and shelter. Southern editors complained about this onslaught bitterly. "Louisiana is too poor to feed tramps and vagabonds from the Western and Northern States," the New Orleans Picayune protested. "We have no surplus for the Communists and vagabonds of other states." Transient laborers within the South might also have been the target of the laws. Young, male laborers, especially later in the century, moved across the South, following the labor market. A final possibility is that southern lawmakers passed "tramp" laws in response to the Black Exodus of late 1870s. Working through organized colonization societies, thousands of African-

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58Code of Tennessee (1884), 396-397; Code of Alabama (1907), III: 954-957; Code of North Carolina (1883), 586-587; Revised Code of Mississippi (1880), 772-773. Missouri also passed a law in 1879, which was revised in 1889, and astonishingly declared unconstitutional under the Thirteenth and Fourteenth Amendments in 1893. The state re-enacted a vagrancy statute in 1899. See In re Thompson, 117 Mo. 83-92 (1893).
Americans left the South for Kansas and other western and northern states. Peaking in 1879, their movements may have been the "tramping" to which southern lawmakers reacted.\textsuperscript{59}

The western laws, enacted over the course of the decade, resembled older vagrant statutes. Definitions included common drunkards, common prostitutes, gamblers, loiterers, and rowdy boys. Penalties included fines and hard labor at the county level. Conspicuously absent were the specific offenses and exemptions of northern and midwestern statutes. In the West, legislators used traditional vagrancy rules to bring order to mining camps and the frontier towns that supported them. As easterners went west, they took the regulations of urban life with them.\textsuperscript{60}

The southern and western enactments responded to specific circumstances, but the genuine tramp acts of the North and Midwest came from deeper cultural sources.


\textsuperscript{60}Compiled Laws of Nevada (1900), 945-947; Penal Code of California (1909), 358-360; Revised Statutes of Colorado (1908), 551-552. For more on attempts to bring urban order to the frontier, see Duane A. Smith, Rocky Mountain Mining Camps: The Urban Frontier (Bloomington: Indiana University Press, 1967).
Still, social critics in the 1870s suggested numerous specific causes. Some located the source of tramping in the Civil War. Cut loose by the war, a writer in *Scribner's Monthly* claimed, demoralized men had become "rovers, nominally looking for employment but really looking for life without it." They threatened to become "a huge brood of banditti who will ultimately become as monstrous and as disgraceful to our country and to Christian civilization as the banditti of Greece or Southern Italy."\(^{62}\)

Social scientists also sought to clarify the problem by turning to heredity and environmentalism. The New York Board of State Charities, headed by Charles Hoyt, provided statistical data on the nature of tramps, finding them to be primarily young, male immigrants. John V.L. Pruyn, who collated the data, concluded that the "army of tramps" was growing and becoming permanent. "All these young and vigorous men will transmit to their children their own debased habits and character of life," he warned. Charity reformer C.S. Watkins of Davenport, Iowa, contended that pauperism originated and spread in degraded households, and this state of affairs justified "the forcible entry into the domestic sanctity of even such a home" to protect its children. The most influential argument for environmentalism and heredity came from Richard Dugdale. Visiting a rural jail in Ulster County, N.Y., in 1874, Dugdale noticed a high prevalence of poverty and crime among a family he called "the Jukes."

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\(^{62}\)"Disease of Mendicancy," 416-417. See also Pinkerton, *Strikers*, 47.
Investigating the family's history, he found it had been dominated by paupers, criminals, and prostitutes for five generations. Dugdale's conclusion, readily accepted by his readers, was that degeneracy was hereditary.\(^6\)

Some writers pushed these conclusions to the extreme. One constructed an elaborate racial theory, describing tramps as a "tribe." As civilization proceeded, some people resisted, "retaining their old instincts and propensities, a residuum as it were of the older savage type." In the past the state had simply exterminated these "failures of civilization," thereby contributing an "essential factor of progress." Humanitarian concerns had prompted the abandonment of this "weeding out" and had left social scientists searching for the best way to reinstate the process. Based on Dugdale's and Hoyt's reports, the writer concluded that a new "thoroughbred" strain of the "predatory tribe" had developed and that "this tribe must be throttled, or-it


Katz re-analyzed the Pruyn's and found that, in fact, tramping was primarily the temporary movements of casual laborers. *Poverty and Public Policy*, 157-181. John Schneider reaches similar conclusions: "Tramps were mostly unmarried white men in the prime of life who worked at manual labor and were either natives of the United States or immigrants from the British Isles or Canada," John C. Schneider, "Tramping Workers, 1890-1920: A Subcultural View" in Monkkonen, *Walking to Work*, 226. On casual labor in late nineteenth-century America, see Montgomery, *Fall*, Ch. 2.
will throttle us!"[^64]

Occasionally, more perceptive social observers blamed the depression or industrial growth itself. One *New York Times* editorialist claimed that New England tramping grew from "the social change that has taken place in that region within the memory of the past generation." Manufacturers had introduced "a new element in the population" that differed from the former inhabitants of the "Land of Steady Habits." Edward Everett Hale, speaking to the Conference of Boards of Public Charities in 1877, also associated tramping with industrial changes. An "oversupply of labor," he noted, could "remove many unskilled laborers from the places where they had made their homes." In a more radical vein, Montgomery Blair, president of the Maryland Prison Aid Society, suggested that "the wealth of the Stewarts and the Astors" set men to tramping. Pinkerton believed the main cause for the tramp crisis was the Panic of 1873. It had turned people out of work and made tramping the only way to subsist outside the poorhouse. "Their rapid increase, which is so alarming to certain kid-gloved social scientists, is the direct result of unprecedented hard times and conditions which a great and protracted war has left us as a legacy," he wrote. When economic prosperity returned, tramping would subside.[^65]

Not only did Pinkerton suggest remarkably modern causes for tramping; along

[^64]: What Shall We Do With Our Tramps?* New Englander and Yale Review* 37 (July 1878): 521-532.

with others, he criticized legal punishment as a way to deal with the problem. "If you throw a man in prison as a vagabond, you leave the prison taint upon him, and forever he is embittered and at war with his fellows," the detective warned. Both the Ohio and New Hampshire tramp laws received criticism as being too stringent, and in Cleveland, the Ohio act was nearly a dead letter because of it. In some places, criticism came from the legal community itself. In 1883, a Luzerne County, Pennsylvania judge dismissed a tramp act detention because it involved summary conviction. The judge relied on the 1876 vagrancy act to argue that "no person can be convicted of vagrancy unless he has committed some act forbidden" under that law.66

Voices in favor of more specific explanations or against repressive measures were in the minority. Most of the men and women who commented on the issue looked to the general shortcomings of tramps. As they fumbled for explanations, they occasionally touched the social and cultural fears that spawned laws to manage the North's labor crisis.

Work itself constituted the starting point for their discussions. As Daniel Rodgers had noted, the tramp crisis represented a crisis in the work ethic, but arguments about tramps and work went beyond the moral dimension of free labor. The key for reformers was that tramps had willfully rejected the social duty to work. The tramp's profession was indolence; he had "deliberately planned to live without

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66Pinkerton, Strikers, 66; Sanborn, "Year's Work," 25; Wayland and Sanborn, "Tramp Laws," 280-281; The Luzerne Legal Register, 12 (1883), 220.
work." Nothing could be offered that would induce tramps to return to labor, for "every month of idleness confirms them in their vagabond life, makes them more unfit for useful labor, and increases the danger to the community because of their presence." The Rev. A.P. Peabody of Harvard spoke for many when he declared that "the major part of these people are, no doubt, idlers by choice." 67 Scribner's stated the case more bluntly:

> If anything is notorious now, it is that ninety-nine tramps in a hundred...would not work at any rate if they could. ... They scorn work and scout the idea of engaging in it. They coolly propose to live upon the community, and to "eat their bread in the sweat of other men's faces," and to do this in perpetuo. 68

Indiscriminate alms added to the problem by removing the incentive to work, these commentators believed. If tramps could survive without work, declared New York State Board of Charities member Martin Anderson, "more and more will join them until vagabondage shall grow to be an unendurable nuisance." 69

For many reformers, tramps had not just rejected work in general, but the steady, rationalized toil of industrial life, and these writers feared a general breakdown of society as a result. Levi L. Barbour, president of the Detroit


68 Once More the Tramp," 882.

Association of Charities, believed that although insufficient demand for labor sometimes caused unemployment, vagrancy usually came from "the inability or unwillingness of the person to adapt himself to any kind of labor steadily." Vagrants had no regard for the future, nor did they realize the value of money. If their number continued to grow, predicted C.W. Chancellor, Secretary of the Maryland State Board of Health, "the result would be general impoverishment, and if they continued to increase, general ruin."  

Nearly all the conservative commentators agreed on one element of the solution. Tramps should be put to work. The opinion of E.L. Godkin, editor of the Nation, was typical. "The spectacle of a goodly number of professional vagrants being promptly arrested and made to work, and work hard, for their board and lodging," he wrote in 1878, "will greatly encourage the rest to efforts at voluntary and honest labor." Praising the 1879 Pennsylvania tramp act, Pennsylvania charity organizer Diller Luther suggested establishing district workhouses in which "a system of compulsory labor may be conducted, to be under State control...." As a last resort, Barbour contended "the strong arm of the law [must] be invoked and this persistent blot on the face of society be placed perforce where he shall be compelled to work,

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70 Levi L. Barbour, "Vagrancy," Eighth Annual Conference of Charities and Corrections (Boston: A. Williams, 1881), 132 (quote, emphasis mine), 134; C.W. Chancellor, Report on the Public Charities, Reformatorys, Prisons, and Almshouses of the State of Maryland (New York, Arno Press, 1976, fasc. repr. of 1877 edition), 29. John C. Schneider has suggested that while most tramping was caused by the volatile labor market of the late nineteenth century, some tramps may have taken to the road to escape industrial regimentation. Schneider, "Subcultural View," 221.
and the community relieved from the incubus of his presence."\textsuperscript{71} Based on these general suggestions, states, charity organizations, and municipalities started various programs to compel labor in return for support. Stephenson, the Massachusetts detective, supported a system of registration for vagrants. \textit{Scribner's} proposed that "a standing commission of vagrancy should be instituted in every large city, and every county of the land; and institutions of industry established for the purpose of making these men self-supporting...."\textsuperscript{72}

Given statements such as these, it would be appealing to see tramp acts as directly enforcing labor contracts through the criminal law.\textsuperscript{73} But just as in the Reconstruction South, adherents of these ideas did not speak with one voice. Support for compulsory labor was almost universal, but when charity reformers tried to justify

\textsuperscript{71} \textit{Nation} (January 24, 1878), 50; Diller Luther, "Causes and Prevention of Pauperism," \textit{Seventh Annual Conference of Charities and Corrections} (Boston: A. Williams, 1880), 248; Barbour, "Vagrancy," 136.


\textsuperscript{73} Stanley has suggested that this was the purpose of tramp laws in "Contract Rights," Ch. 3. She argues that post Civil War reformers faced the task of explaining compulsory labor in the growing language of contract. To do so, they conceived of work tests as a \textit{quid pro quo}, casting charitable giving in terms of the market relation. They divorced the contract principles of consent and reciprocity and transformed the dependence of poverty into the independence of contract. While it is true that some reformers used this justification, it was not novel in the post-war period as Stanley would like to argue. Mutual obligation as the basis for work had been suggested since at least the 1830s and had been a common element of wartime thinking on vagrancy.
these schemes, unanimity broke down. Some reformers did see work tests as market discipline. Pruyn in New York made this basis explicit: "When 'tramps' throughout the State are obliged to work, and to render an equivalent by their labor for the aid they receive, it is believed that they will take measures to provide for themselves, preferring to work on their own account rather than to labor, under compulsion, for the public." Others simply wanted tramps to go away. Massachusetts authorities posted the tramp acts in towns and along roadways in hopes of scaring tramps off. Brooklyn reformer Seth Lowe also suggested tramp acts effectively put the nuisance out of sight. When subjected to the work-test, "the number of tramps and vagrants diminished almost as rapidly as the snow-banks of winter before the suns of spring." Francis Wayland, Jr., of Yale upheld compulsory labor for various reasons. Tramps "should be placed in a situation which will provide for their necessities, compel them to perform useful work, prevent them from committing crime, render it impossible for them to propagate paupers."74

Like their antebellum counterparts, reformers based arguments about work in different assessments of its social value. Those who saw charity as a contractual relationship envisioned labor as a commodity and clung to the prewar concept of self-ownership. Others, even some of the most conservative, emphasized skill as the value of labor. Henry Pellew, vice president of the New York Association for Improving the Condition of the Poor, argued that a main cause of tramping and pauperism was

that young men no longer acquired a skilled trade. For Barbour, one problem was that "a vagrant has no trade, no business, no aim in life, but to satisfy his daily wants at the expense of the public." Connecting ironically with artisanal criticisms from earlier in the century, people such as Pellew and Barbour recognized the relationship between deskillling and poverty, although not following it to its conclusion. Yet the idea of value in work itself had not been abandoned. Sounding like Edward Everett or Joseph Kiddoo, Anderson suggested that humans needed physical labor to live, for "Man is constituted, bodily and mentally, that happiness is found only in connection with constant systematic labor."75

Fear about rejection of industrial work discipline was one central motivation behind the transformation of vagrancy laws into tramp acts, but these arguments about work usually did not appear outside the context of gender. Tramps, especially male ones, defied nineteenth-century middle-class gender roles. Moreover, they evaded the force of domestic discipline, which middle-class northerners viewed as the ultimate basis of social order. Already available in antebellum discourse, these concerns about gender and domesticity came to the fore in the postwar period.76


76 Although they do not explore the issue in depth and deal with a somewhat later period, the following works are suggestive of this point: Monkkonen, "Regional Dimensions," 207; Schneider, "Subcultural View," 223; Lynn Wiener, "Sisters of the Road: Women Transients and Tramps, 1880-1910" in Monkkonen, Walking to Work, 178-179.
Work played a central role in mid-nineteenth-century constructions of masculinity, and tramps' lack of it deeply troubled social critics. Anderson explicitly linked work to gender, ironically harking back to Jacksonian artisanal language. Labor created a sense of well-being because as the worker witnessed his crops or manufactures taking shape each day, he knew he created something useful. In doing so, "he becomes conscious of a new accession of manhood, and, ...develops a desire to provide for himself, to be his own master." In other words, self-reliance and personal mastery constituted central elements of masculinity. Viewed this way, those dependent on handouts or public support appeared to be its antithesis. As the New York Times put it, "...the tramp slouches through life, a continual reproach to the inscrutable Providence that has permitted him to exist, yet has not made him a crawling thing.... He does not lift his feet and set them down again as a man does...."

For the Iowan Watkins, "[P]auperism is the last stage on the downhill journey of manhood, and when once reached, the victim is then and thenceforth sans pride, sans self respect and sans ambition."77

Masculinity was not only a product of labor; it was also defined by its supposed opposite. As in the story about Mrs. Winegar, charity reformers placed degraded male tramps in opposition to weak women. C.D. Warner of the Hartford Courant boasted that through its tramps law his state had rid itself of "the hordes of worthless vagabonds who made their living without work by preying on the

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community, robbing and assaulting defenseless women, and being a continual terror on the rural population.\textsuperscript{78} Wayland made a similar point:

Indeed, [the tramp] seems to have wholly lost all the better instincts and attributes of manhood. He will outrage an unprotected female, rob a defenseless child, or burn an isolated barn, or girdle fruit trees, or wreck a railway train, or set fire to a railway bridge, or pilfer an umbrella with cruel indifference, if reasonably sure of equal impunity.\textsuperscript{79}

Such images had a double value. They helped portrayed tramps as outside the bounds of manhood, and they established respectable middle-class males as protectors of women.

The situation of female tramps was more complicated. While not numerous, women did take to the road. Although they often performed domestic roles in tramp camps, their freedom placed them well outside Victorian constructions of femininity. Female tramps as well as female vagrants presented particular problems of explanation for middle-class writers. Like her male counterparts, Josephine Shaw Lowell connected poverty to the breakdown of gender roles. Jails and almshouses degraded women "until the last trace of womanhood has been destroyed." Lowell cited numerous examples of unwed mothers living in poorhouses with several illegitimate children. Some appear to have been prostitutes, but most were not. Dr. Elisha Harris, corresponding secretary of the New York Prison Association, reversed the imagery, seeing women vagrants as weak victims, open to ridicule and rape by

\textsuperscript{78}Quoted in Wayland and Sanborn, "Tramp Laws," 279. Harris also employed this imagery in \textit{Man Who Tramps}, 269.

\textsuperscript{79}Wayland as quoted in \textit{New York Times}, September 7, 1877.
sheriffs and their deputies. Yet these images could not overcome vagrant women's working-class status. Anderson envisioned training child vagrants in ways that would remake the Jacksonian social structure that was beginning to fade. Boys should be taught a skilled trade or farm work, while girls should be trained in sewing, cooking, and other housework with a view toward becoming domestics. Lowell believed vagrant women had a "deep-seated repugnance to labor" and that they needed to be taught to work. As might be expected, she wanted them to learn housekeeping skills, but she also hoped they might be trained in outdoor chores such as gardening or milking.80

Worries about tramps and the destruction of gender roles gained force because they originated ultimately in fears about domestic discipline. Domestic ideology provided a way for the Victorian middle class to adjust to the rigors of modernity. Supposedly it would provide a respite from cruel competition and uncertain fortune and would reign in the independence and excess of Americans, especially of men. Joseph Dacus, who chronicled the 1877 strikes, asserted that most Americans would not accept anarchy because they had homes or expected to get them. People with domestic connections upheld social order, "but neither government nor social order can be maintained when the majority of the people are homeless and hopeless." According to Luther "home influences may reclaim the prodigal

wanderer.\textsuperscript{81}

To reformers, tramps had abdicated domesticity. By legal and popular
definition, they were the homeless. The mendicant, Chancellor noted, "has no fixed
place of abode, and when darkness overtakes him, he begins to look about him at
random for lodging and shelter...." Courts were likely to agree with the definition. In
Pennsylvania, the Cumberland County Court of Common Pleas released a man
named David Warner from a tramp act arrest because he certified that he lodged
with his mother within his home county.\textsuperscript{82}

Beyond legal terms, the tramp's homelessness meant that he had severed the
cords that bound him to society. Pinkerton described a group of tramps encamped
along the Boston and Albany Railroad as "utterly homeless, and in the wide world
[they] have no spot that they may go and claim an interest in...." According to an
editorialist in the \textit{New York Times}, the tramp had escaped from one of the controls
over that "American recklessness which has been justly charged with so many of our
vices." In short, the tramp was truly independent. He had released the bonds of
middle-class life. "Other people have someone more or less dependent upon them,
in one way or another," the paper declared. "The tramp has not even the

[repr. of 1877 ed.], 18, 24 (quote on 18); Luther "Causes," 246. In general, see Russell
Lynes, \textit{The Domesticated Americans} (New York: Harper and Row, 1957); and
Christopher Lasch, \textit{Haven in a Heartless World: The Family Besieged} (New York:
Basic Books, 1977). Although Lasch is talking about a later time period, the
argument seems to fit here. See also Schneider, "Subcultural View," 223.

\textsuperscript{82}Chancellor, \textit{Report}, 27; \textit{The Lancaster Bar}, December 27, 1879, 120.
responsibility which binds the sparrow to its mate.\textsuperscript{83}

For this reason, the re-creation of domestic roles and emotions was essential. Lowell suggested that vagrant women should be placed in reformatories, but these institutions should not be prisons. "They must be homes--homes where a tender care shall surround the weak and fallen creatures who are placed under their shelter, where a homelike feeling may be engendered, and where, if necessary, they may spend years." Among other things, reformatory inmates must "be induced to love that which is good and pure, and to wish to resemble it; they must learn household duties; they must learn to enjoy work...." Journal of Social Science editor Franklin Sanborn hoped tramp laws would "convert the modern tramp into a home-keeping citizen, or a fast prisoner."\textsuperscript{84}

Reformers' focus on the home also helps explain their obsession with tramps' apparent refusal to accept middle-class material culture. Over and over again, reformers indicted tramps for the way they dressed, walked, and especially smelled. In the words of the Times, a tramp was "foul to the eye, loathsome to the nostrils, revolting the moral senses of all decent people who behold him." Robert Givins, author of a novel about tramping, placed intemperance within these images as well. One of his characters, a former journalist reduced to tramping, had worked in slaughterhouses, drank beer, and slept with his dirty working-class companions because his "sense of pride did not allow me to carry my drunkenness and my

\textsuperscript{83}Pinkerton, Strikers, 39; New York Times, August 24, 1877.

\textsuperscript{84}Lowell, "One Means," 198; Wayland and Sanborn, "Tramp Laws," 278.
disgusting appearance among men with whom I should associate." Barbour decried beggars who sent "dirty, ragged, half-naked children through the streets from door to door to beg even for castaway food."\textsuperscript{85}

The middle- and upper-class supporters of tramp laws, then, found the tramp reprehensible on a deep cultural level. He rejected both sets of values, home and work, that blended independence and dependence at the vital core of late nineteenth century culture. Hatred for tramps' inversion of dependence and independence sometimes appeared in the same text. Barbour's description of vagrants was an especially clear embodiment of these tensions. For him, vagrants were dependent to the point of disgust:

What a life, to filch each mouthful of food from a stranger's hand by means of a whining lie, through cowardly servility to obtain each garment, to cringe and crawl for each necessity of life, which with the least leaven of manhood could be as readily had as a swallow of water or a of breath of air! ...Can there be drawn a more revolting caricature on God's noblest creation; a more cutting satire upon civilization than that it has produced such a being?\textsuperscript{86}

Yet Barbour believed vagrants could not just be ignored because of their "vicious desire to be let alone." Pinkerton recounted the case of a Chicago newspaper business manager who lost his job through a change in the paper's ownership. The


\textsuperscript{86}Barbour "Vagrancy," 133.
last time he saw the man, Pinkerton reported, he was "shuffling" in "animated degradation," yet seemingly cheerful and content, "as though he derived some satisfaction from the reflection that he could go no lower."87

Nowhere was the relationship between the loss of home, the rejection of work, and the attendant social ills illustrated better than in The Man Who Tramps, probably the earliest tramp novel to appear in the United States. Published in 1878 by Lee O. Harris, an obscure midwestern writer, the story reveals many of the deeper fears that underlay the severity of tramp legislation. The Man Who Tramps narrated the adventures of Harry Lawson. Orphaned as a boy, he was taken west by a charity organization to live with a farm family. John Shannon, his adopted father, was kind and gentle, but his mother, Jane, possessed a "naturally petulant and tyrannical disposition." She beat and scolded the boy constantly. Finally, he ran away, not because of any "antipathy to labor" on the farm, but because of Jane's "petty tyranny." His natural mother dead, his adopted mother a moral failure, Harry left the protection of the home.88

Finding himself alone on the road, friendless and hungry, he found a day's work with a wheat farmer, who took him for a vagabond and warned him that nine times in ten boys who left "comfortable homes" became tramps. As they worked in

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87Ibid., 134; Pinkerton, Strikers, 50. See also Comments of Dr. Charles Hoyt during debate on Reynolds, "Prevention," 41; Givins, Millionaire Tramp, 44; Pinkerton, Strikers, 36.

88Harris, Man Who Tramps, 5-14. Harris's work was part of a broader group of novels that responded to the 1877 strikes. Bruce, 1877, 319.
the fields, the farmer lectured Harry on home and work:

Whatever may be the troubles at home, it is generally better to bear them than to throw yourself upon the world, without resources, to depend upon charity or chance for your support. Quit the tramping.... If you have a home, return to it at once. If not, get into some employment, however humble, at the very first opportunity. Do not wait for work to suit you, but make yourself suit the work.\footnote{Harris, \textit{Man Who Tramps}, 35.}

After Harry left the farm, he concluded that the farmer may have been right. "I am travelling almost aimlessly," he reflected. "I shall be compelled to sleep out of doors...."\footnote{Ibid., 38.}

Farther down the road, Harry met another man, called Black Flynn. Flynn made no excuses for his position. "I am a tramp," he boldly proclaimed. "[A]nd my business is to beat the world out of a living, but I take from those who are able to give." Flynn was not bound by the regimen of industry: "When I'm weary I rest." Flynn professed that tramps were "content with what they eat and wear, without troubling themselves about the source from which it comes." And one day, all the world would be like this. "[Tramps] are the beginning of the new order of things," Black Flynn prophesied. "[A]nd the time will come when they no longer will be vagrants but rulers in the land. Then out of this will come the equality of all men in all things." If the lesson was not clear, Harris interjected the author's voice bluntly later on. The labor unrest of 1877, Harris alleged, did not come from true workingmen, but from "the irresponsible floating populace, who have no home ties..."
to bind them to society.\textsuperscript{91}

Many themes in The Man Who Tramps were familiar. The relationships between poverty, work discipline, gender, and domesticity had antecedents in the language of antebellum reformers. However Black Flynn's sense of contentment outside industrial discipline suggested a newer third element of the post-war discourse, the fragility of middle-class status itself. Some prewar commentators had edged toward this position, but with the depression, both trepidation about downward mobility and the desire to escape middle-class restraints became more prominent.

In reality, most tramps came from the working class, but reformers and social critics often focused on members of the middle class slipping into poverty. In Givins's novel, The Millionaire Tramp, several characters had elite or middle-class origins. As noted above, one was a journalist; he had been educated at "a leading university" and had held jobs as a foreman, bookkeeper, and manager. The main figure of the story was an English aristocrat who, after he thought he had killed a man on his estate, fled to America and lived a tramp's life. His main companion, Old Tom, was born into a wealthy New England farm family. Trained as a clergyman, he worked at many jobs throughout life. When he considered his tramping life, Old Tom compared himself with people of higher station: "This is a period of the world's history when millionaires become paupers; when the tide of adversity runs against rich as well as poor. I am no worse off, never having had anything, than the man

\textsuperscript{91}Ibid., 40-45, 267.
whose income of hundreds of thousands has been depleted to a pittance."  

Old Tom was not alone in his assessment. Chancellor of Maryland also realized as much. "Nothing is so generally dreaded as poverty," he wrote. It exposed people to contempt, obscured personal virtue, and left its victims without a clear way out. Pinkerton expressed these fears without evasion. If readers culled their minds, he submitted, the could think of

...men and women...at one time enjoying a good position or good social standing, have, by some fault of their own, perhaps, but still oftener through ill-fortune, been bereft of their means of support, and, as a consequent, their friends, and in due time became wanderers and vagrants of the road. ...It is also quite true that the growth of tramps has been by no means confined to men and women of the working classes,... men occupying the highest of positions have in some way fallen...  

To middle-class observers, tramps presented an unpleasant reminder of what "decent people" might become if their fortunes fell.

At times, tramps prompted middle-class commentators to reflect on the top of the class structure. When a pauper accepts public support, an Iowa reformer pointed out, "he acknowledges himself beaten in the game of life, willing to accept the crumbs that fall from the rich man's table." If they recognized their own delicate class position, members of the middle class could have easily viewed this situation as

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92Givins, Millionaire Tramp, 41, 45-46 (quote), 51, and passim. Emphasis in original.

93Chancellor, Report, 25-26, 29. See also Dacus, Annals, 19.

94Pinkerton, Strikers, 48. For another example from Pinkerton, see Ibid., 39.
potentially theirs as well. At least one reformer expressed middle-class hatred of the elite by turning to the image of tramping. Anderson comforted his readers (and himself) by pointing out that people who subsisted on investments and trust funds were in actuality the unhappiest of all people. Because they did not work, the idle rich became "whining hypochondriacs" or traveled about "with no well-defined purpose except to kill time." Because of such behavior, these sections of the wealthy were "the analogues respectively of the chronic grumbling pauper and the professional tramp."95

More often, though, middle-class critics did not focus on the actual power of the elite but on the supposed power of tramps, vagrants, and beggars. Barbour saw vagrants as "pirates" on public charity and warned his listeners to be wary of the "cunning" of beggars. To Anderson, paupers were "swindlers," who took the taxes of honest working people. Another image, which became common after the 1877 strike, rendered tramps into an "army." Dacus portrayed tramps and the idle in general as a major force behind the strikes of 1877. In Chicago, tramps came "Marching in by Hundreds." In general, the strikers were aided by "a nondescript class of the idle, the vicious, the visionary and the whole rabble of the Pariahs of society." Because the nation lacked a standing army, "these classes absolutely controlled the country." In the nation's cities, thieves, vagrants, and tramps stayed "on the alert, ready to plunder, burn, and cut throats at the slightest provocation." After the strike, Wayland

declared that "large detachments of our standing army of professional tramps," not
the strikers, perpetrated destruction of property. Tramps, *Scribner's* noted, "Stand
waiting, a great multitude to join in any mob that will give them the slightest apology
for pillage."96

For the most part, these images of collective power were linked to the strike
and the fears of social revolution it generated. The military metaphor portrayed
middle-class anxiety about working-class consciousness and activism, but it also
embraced a subtext of admiration for the alleged power of tramps acting together.
Other common images also conveyed an embedded fascination with power. As in
prewar discourse, reformers again transliterated poor people into animals, diseases,
or forces of nature. As noted above, Lowe compared tramps with snow banks. Luther
defined tramps as a the pests of society and as wandering predators, who preyed on
the community. Wayland and Sanborn recommended strict enforcement of tramp
laws, "for tramps, like other migratory creatures, will again return." Harris warned
that with tramps around the homes of respectable people were no safer than the
abodes of the pioneers, which were "surrounded by a wilderness, harboring ravenous
wolves and skulking savages." Even Pinkerton, who defended tramps, noted that

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96Barbour "Vagrancy," 131, 137; Anderson, "Labor in Institutions," 260; Dacus,
*Annals*, 307 (first quote), iv (second quote), 57 (third quote); Wayland as quoted in
*New York Times*, September 7, 1877; "Once More the Tramp," 883. See also *State
of New York, Tenth Annual Report of the State Board of Charities* (Albany: Jerome
B. Parmenter, 1877), 32.
vagabond beggars had so increased in numbers that they now "travel in herds."97

Tramps and vagrants were also seen as a disease or carriers of it. While the state controlled infectious diseases such as smallpox and diphtheria, Mrs. W.P. Lynde of the Milwaukee Industrial School believed, its laws did nothing to stop the spread of moral vice by the female vagrant (presumably a prostitute). Instead, the legal system "sent the contagious pestilent forth to exercise her baneful influence wherever-poor, hunter, wounded animal,--she may hide or flee." Barbour also employed medical analogies, counseling that "heroic remedies are sometimes as necessary in the suppression of vagrancy as in surgery and medicine." His "heroic measures" included breaking up families, sending fathers and mothers to workhouses and children to reform schools.98

These images of tramps' potency served complex purposes in post-war language. On the most visible level, they turned relatively powerless people into a revolutionary social force that could be controlled outside the American tradition of civil liberties. Also, like their antebellum counterparts, they dehumanized the poor so harsh remedies would not contradict humanitarianism directly. Reformers' qualms about falling into poverty themselves, however, complicated the matter. The

97 Luther, "Causes," 242, 247-248; Wayland and Sanborn, "Tramp Laws," 218; Harris, Man Who Tramps, 269; Pinkerton, Strikers, 42.

Jacksonian class structure had fostered considerable mobility in both directions; now, in the uncertain economic and legal world of the 1870s, the potency envisioned in tramps and their poverty may have been an expression of the power potential pauperism held over the middle-class reformers itself.

Some writers were undoubtedly repulsed by their own metaphors, but others seem to have been drawn irresistibly toward the alleged contentment and irresponsibility of tramping. These texts revealed what historian Jackson Lears has called a deep "ambivalence" about industrialization, urban life, and modern culture among the elite. Pressed too strongly by the tension between the work ethic and the nurturant values of the home, members of the elite rebelled.99 This allure also suggests the role of an unstable class structure in calling forth new legislation.

Though Lears locates this anti-modernist impulse a few decades later, it first surfaced in the 1870s. Both Lowe and Barbour alleged that beggars made a better living than those who worked. Barbour claimed he knew of a Detroit man who had begged $2.50 worth of quarters in a few evening hours, when he could have only earned between $1.25 and $1.50 at prevailing daily wages. The inevitable conclusion was: "Mendicancy is a business, that, viewed in a certain light, pays." Even though he hated tramps as much as the next person, Harris portrayed Flynn as contented. Givins' Old Tom admitted that times were bad in the winter, but confessed summer tramping had its temptations: "There are times when I rather enjoyed myself strolling

around the country breathing the fresh air, scenting the clover from meadows, and sleeping soundly under the pine trees," he told his English comrade. "Why, sir, there is a world of freedom in certain phases of a tramp's life in summer...." This liberty, some reformers conceded, could not be given up easily. As one New Yorker put it, once a person entered the tramping life they seldom left it.100

The most open acknowledgement of the benefits of tramping came from Pinkerton, whose entire account constituted an apologia. While he paused occasionally to protest that he did not mean to defend the bad variety of tramp, he did just that. Pinkerton sang the praises of walking for pleasure, of journeyman tramping, and of historical tramps, who included Abraham, Jesus, Sir Walter Scott, Charles Dickens, and Ben Franklin. He penned a hymn to the sheer adventure of the road, to the joy of seeing people in their everyday lives, and to the pleasures of discovering which hayracks offered a safe bed or which dogs were friendly. He intimated that tramping offered an almost instinctual feeling of satisfaction, for, "No person can ever get a taste of the genuine pleasure of the road and not feel in some reckless way, but certainly feel, that he would like to become some sort of tramp." He also declared flatly that departing middle-class life was one of the main reasons for wandering. One example was the case of a successful criminal lawyer who suddenly and inexplicably left everything behind for a career of vagrancy. More important, Pinkerton suggested that the lawyer's action was not atypical. When

"business adversity" overtakes men, he asserted, "they naturally turn to the road and
discover its pleasures, its freedom from care of any grave character, and the utter
absence of responsibility, that they have found an easy solution to all their
difficulties."\textsuperscript{101}

Such anti-modernist feelings arose ultimately from tensions within the middle
class and its culture. Pinkerton himself did not want anti-tramp laws, yet he had
recently climbed into the middle class and did not appear particularly pleased with
what he found there. In this respect, he spoke more plainly about feelings that his
cohorts could only intimate. That neither Pinkerton nor other writers were accurate
in their descriptions of middle-class tramps strengthens this point. They knew when
they wrote that their portrayals were not correct. Available data from charity
organizations, newspapers, and social scientists identified tramping with the working
class, yet these writers imagined its sources within their own social stratum. Their
images belied their own worries about impoverishment and their hopes of release
from the burdens of their own class and its culture. In the 1870s, they were not
willing to express these feelings candidly, nor were they ready to act on them
personally. Suppressing tramps offered one way to lay these emotions to rest.
Journalist C.D. Warner perhaps said more than he realized when he wrote that the
Connecticut tramp law had "added a feeling of security" far beyond its savings in

\textsuperscript{101}Pinkerton, \textit{Strikers}, 27-28, 33-36, 26 (first quote), 49, 30 (second quote).
money to the state.¹⁰²

Explanations based on a collective unconscious can easily be pushed too far. Tramp "crimes" against person and property, popular pressure, labor unrest, and the work of charity associations and social scientists may have been enough to bring about restrictive legislation. Also, the depression caused unemployment on a scale that the nation had not witnessed before. Huge numbers of men and women out of work and moving about the country on the rails confirmed the formation of an American industrial working-class, precisely what prewar republican ideologues hoped to avoid. Still, the country had experienced widespread unemployment in 1819, 1837, and 1857. Elements of the imagery and language used by advocates of new laws had existed since at least the turn of the nineteenth century, but previous legislatures did not go further than amending existing statutes. Even the wartime vagrancy codes of the Union army and the Freedmen's Bureau had fit (although uncomfortably) within antebellum conceptions of free labor law. Immediate causes account for neither the tramp laws' severity nor the state of panic in which they were enacted. Ultimately, the deeper cultural tensions about work, gender and domesticity, and class structure embodied in tramps underlay these new laws, and in particular, their timing.

In the decades after the Civil War, the relationship between work and law underwent a major transition. Farmers and some other employers still clung to the idea of binding laborers in entire contracts, but workers and the courts successfully

destroyed the remainders of master and servant law. Apportionment gave workers their wages, while at-will hiring let capitalists rid themselves of unwanted employees without incurring legal penalties. In addition, industrialists developed new means of legal labor discipline with notification clauses and yellow-dog contracts. These measures had almost no connection to the concerns that characterized labor law at the beginning of the century or even in 1865. In the post-war years, the courts, employers, and employees used the civil law to legitimize a free market in labor. At the same time, however, the criminal law moved the opposite direction. The tramp acts resurrected the centuries-old use of law as a direct means of labor discipline. More important, the laws designated the tramp as an important figure in late Victorian culture, creating a social persona that inherited some traits from prewar vagrants but achieved considerably more explanatory power. With these changes, most of which were complete by around 1880, the antebellum system of free labor law had become altered beyond recognition.
CONCLUSION:
WORK, LAW, AND SOCIAL CHANGE

By the late nineteenth century the civil and criminal law had helped bring about the transition to the labor relations of industrial capitalism. The point reached by 1880 was the product of a long period of change that did not resolve the question of general work discipline definitively. Some nineteenth-century Americans continued to believe that the material incentives of money wages and possible starvation would convince people to produce what they needed to live. Nineteenth-century poor reformers, for instance, often denied aid to workers, both North and South, with a view toward internalizing rhythms of industrial life. Even at the height of nineteenth-century acceptance of classical political economy, however, market forces, starvation, or the traditional work ethic were not the only available methods of inducing work. The words and actions of African-Americans in the South, for example, offered one other avenue: work ordered more communally or at least with some concern for economic justice. Many nineteenth-century Americans, especially those in the prewar North, accepted neither of these points of view. To them, law supplied the best means of ensuring labor discipline. Vagrancy and tramp laws helped to internalize the desire to work, while contract rules cemented the wage bargain, also convincing people to toil for their subsistence.

Many nineteenth-century Americans also accepted the place of law in securing work discipline in the more narrow sense of employers' powers over their workers. In the antebellum period most northerners assumed that the wage negotiation itself
should be equal; no one could be literally forced to choose a specific employer or level of remuneration. But they also presumed that after the wage bargain itself, mutuality was no longer a concern. Once hired, the threat of wage forfeiture secured employer control. Ideally at least, entire contracts also protected workers from being thrown capriciously on the public for support. Vagrancy laws served a similar structural function of enforcing labor for subsistence.

Antebellum legal developments, as well as those that came later, were not merely a reflection of changes in American society. Rather, law interacted with structures of labor, domesticity, and class. Prewar employers, workers, and courts all sought to manipulate law in ways related to different modes of production, even in the South. Yet law retained independent power in this process. Long-term labor contracts froze the employment relation, limiting individual agency in breaking work relationships. In much the same way, vagrancy laws crystallized new meanings of work, gender, and class. In regional perspective, these statutes did mirror the larger patterns of northern and southern society. Still, they had transforming effects in both regions; colonial transgressors against the poor laws became morally defined nineteenth-century beggars.

The autonomous power of law became clear as the nineteenth century wore on. During emancipation, importation of northern ideas empowered some options but foreclosed others. In the middle 1860s labor law still offered means to protect rights of workers, means that would be gone two decades later. Though constrained by the dominant language about labor and poverty, some army and Freedmen’s Bureau
officials realized as much and used apportionment, entirety, and other doctrines experimentally to produce equity. However, when used by Conservatives or even by Moderates casting about for new ways to organize work, contracts and vagrancy laws embraced assumptions about labor that hindered African-American workers' chances of securing the promises of the free labor ethic. At the constitutional level as well, the belief of Moderate Congressmen that voluntary servitude was compatible with freedom restricted the meaning and power of the Thirteenth Amendment.

In postwar North the creative potential of law interacting with society was especially important. Changes in labor contract law occurred at least in part because of criticism from within the legal world itself, yet this legal development had considerable impact on the meaning of work and class. When coupled with at-will employment, courts left industrial workers, farm hands, and particularly the managerial class without confidence in their jobs. By 1880 the courts erased the last vestiges of mutual obligation, the hallmark of master-servant relations. For workers this change was a mixed blessing. They were now unrestricted in the market, but so were their employers. Connected to open labor market relations was egalitarian discourse, which posited an individual's unfettered agency. It, too, possessed ambivalent value. Although it did hide power structures, it also served workers well on occasion. As numerous contract litigations show, workers pressed for their rights as long as they existed, and in many cases they won. Moreover, the actions of Southern planters or Conservative Freedmen's Bureau officials suggest what the employment relation might look like if stripped of both liberal and master-servant
constructions.

In addition, post-war changes show that the civil law's part in propagating a free market in labor should not be seen apart from criminal law. With regard to work discipline specifically, legislators used the tramp acts to augment the force of the state in defining the work relation at the very time that jurists were decreasing it. In part, the fluidity generated by the civil law may have prompted the tramp acts. Whatever the specific stimulus, the tramp acts allowed a middle class uncertain of itself to define its place vis-à-vis an emerging industrial working class and, simultaneously, to prop up Victorian constructions of gender and domestic discipline, both for the working class and for the middle class itself.

Viewed in broader perspective, late nineteenth-century changes in the criminal law were less conclusive than those in the civil law. The vagrancy acts of antebellum American and the tramp laws of the 1870s formed part of an long Anglo-American dialogue about legal control of the underclass. Even in the last decade, Americans have witnessed both an increase of homeless people and a reversion to nineteenth-century language in public discussions of them. Living in a liberal legal world that affords little personal control over the terms of employment, Americans remain anxious about prospects embodied in the beggars produced by their society.
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