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BAD PRECEDENT:
MASTER-SERVANT TORTS AND THE END OF THE VICTORIAN ERA

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BAD PRECEDENT:
MASTER-SERVANT TORTS AND THE END OF THE VICTORIAN ERA

A DISSERTATION APPROVED FOR THE
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Dedicated to Rhonda, Sarah, and Freeman

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ABSTRACT

This work provides three distinct, yet inter-related theses: First, it explores the social influences and judicial process that gave rise to a pivotal legal decision in master-servant tort law, *Priestley v Fowler* (1837), which was raised to the level of precedent through later affirmations by English and American judges. Second, it demonstrates the causal relationship between this precedent and the grievances of workers which developed into organized agitation under the umbrella of the Trades Union Congress, and led to the landmark socialist legislation that was Workmen's Compensation. In so doing, this work bridges the gap between the individualistic 19th century and the sudden acceptance of collectivist solutions for persistent problems in the 20th in a way that has eluded social and legal historians alike. The final thesis places legal precedent in the context of Actor Network Theory as an actor whose role is often overlooked, yet as is shown here, can be indispensable in both disciplines of study and analysis.

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INTRODUCTION

An Accident in Elgin, Oklahoma

No one knows how Cliford Smith's accident occurred. He was fifty-six years old at the time, having grown up in nearby Pauls Valley, Oklahoma, where he attended school up to the middle of the eighth grade. He had lived in California and West Virginia, worked in restaurants, carnivals, as a truck driver, and in plastics manufacturing before he started his job at Burgess Engineering and Testing in Moore, Oklahoma.[1] That was where he learned to operate and maintain geotechnical drilling rigs, and where he helped his nephew, Derek Counts, get a job as a helper. On the morning of February 10th, 2010, the two men labored in a muddy field behind a large steel building in Elgin Oklahoma. The job was to take core samples at two, five, ten and fifteen-foot depths. While Derek tended to the first sample they had extracted, Cliford operated the controls that drove the auger, resembling a huge six-inch-diameter screw, back down into the earth for the second. A change in the sound of the auger behind him caused Derek to turn to the rear of the machine, where he saw a disembodied arm lying on the ground. As he rounded the back of the truck-mounted rig Derek saw a leg that had also been ripped from his uncle's body.[2] What remained of Cliford was wrapped around the still-spinning shaft, half-buried in the mud and blood that it continued to churn. The Iraqi war veterans who came to Cliford's aid from the steel building a few yards away did not expect him to survive. His horrific injury caused a stir in the local geotechnical drilling community, however it is Cliford's actions after his accident that concern the readers of this work. The story I tell here involves Cliford's first major decision as he lay in his hospital bed, trying to recover: to apply for worker's compensation under the

[1] Clifford Smith deposition in *Smith v Central Mine Equipment Co*., CIV-2010-0999HE, In the United States District Court for the Western District of Oklahoma, 2011: 5-18.
[2] Derek Counts deposition in *Smith v Central Mine Equipment Co*., CIV-2010-0999HE, In the United States District Court for the Western District of Oklahoma, 2011, 23-24.

statutes of the state of Oklahoma. The story will connect Cliford and his plight to the privileged son of an eminent plantation and slave owner in eighteenth-century Jamaica, James Scarlett, who eventually became a Law Lord on the Court of the Exchequer. It was from that position that Scarlett, as the freshly-minted Lord Abinger, set a precedent from the bench in 1837 that made the human cost of production virtually the sole burden of the employee in Britain for the next sixty years, and for the next seventy-eight years in America. It was a precedent which caused festering resentment until its overthrow brought about a revolution in public policy which altered the relationship not only between workers and employers, but between the larger public and government.

James Scarlett

James Scarlett was born to Elizabeth and Robert Scarlett in St. James Parish in 1769. By then the Scarletts had been established in Jamaica for five generations.[3] It was a Jamaica whose British slave-owning elites shared an increasingly complex relationship with the mother country as the rhythms, demands, and fears of island plantation life produced customs, moral attitudes, and events that would shock most of their counterparts in the metropole.[4] When James was six, the war with America broke out and made the Caribbean an important theater of war for the British, French, Spanish, and Dutch. Suddenly the concerns of the colonists were heightened by the potential for invasion from the sea, and the possibility of new and coordinated slave revolts

[3] Edward Foss, *The Judges of England; with Sketches of Their Lives, and Miscellaneous Notices connected with The Courts at Westminster. From the Conquest to the Present Time, Vol IX* (John Murray, 1864), 255.
[4] Christer Petley, *White Fury: The Jamaican Slaveholder and the Age of Revolution* (Oxford University Press, 2018), 64, 124, 141.

on land. At fifteen James was sent to England by his father to study law, with the expectation of his eventual return to Jamaica and the career advantages his father's influence on the island could provide him.[5] His arrival on the British scene in 1785 coincided with what social historian Boyd Hilton argued was the beginning of a dramatic break from the 18th century, marked by extreme volatility in politics, economics, culture, and demographics.[6] Scarlett had a front-row seat to all of it, interacting with leading figures in law and politics and rising to prominence as Lord Abinger in the post of Chief Baron of the Exchequer by 1834. What he experienced would help inform what was to be his most important legal decision, *Priestley v Fowler*, in 1837.

Priestley v Fowler, 1837

In May of 1835 a butcher named Thomas Fowler ordered his nineteen-year-old servant, Charles Priestley, to accompany a van supplied by Fowler and laden with goods at his shop in Market Deeping and heading to Buckden. Priestley's co-worker, William Beadle, had argued with Mr. Fowler about what he saw as excessive loading of the van before the journey, but was soundly rebuked in the presence of Mr. Priestley. When the van's axle finally failed some time later, the resulting crash broke Mr. Priestley's thigh. Laid up for five months and incurring 50£ of doctor's bills, he sued before Justice Parke at the Lincolnshire Summer Assizes on the basis that his master had a duty to provide safe working conditions. Believing Fowler could reasonably be found to be liable, Justice Parke allowed the case to proceed to the jury, which found in

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[5] Sir James Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger, Chief Baron of Her Majesty's Court of Exchequer : Including a Fragment of his Autobiography and Selections from his Correspondence and Speeches* (John Murray, 1877), 25.
[6] Boyd Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846.* (Oxford University Press, 2006), 5. Indeed, the span of Scarlett's life (1769-1844) is bracketed by Edward Royle and James Walvin's study, *English Radicals and Reformers, 1760-1848* (The University Press of Kentucky, 1982), 5.

Priestley's favor.[7] The award was 100£. However, the judgment was subsequently challenged on the basis that no existing law made the master liable to his servant for an injury, and it was brought before Lord Abinger in the Court of the Exchequer. Lord Abinger accepted the defense position that no precedent existed of a servant suing a master, and so determined he was "at liberty to look at the consequences of a decision the one way or the other" and decide the question on "general principles".[8] The servant, Lord Abinger noted, was not bound to risk his safety in service to his master, but rather stated that,

> "the plaintiff must have known as well as the master, and probably better, whether the van was sufficient…to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him [the master] against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."[9]

Abinger's decision to deny Priestley compensation for his injury was a dramatic performance of what has subsequently become known as judicial activism, grounded in Abinger's particular legal and political sensibilities. While Abinger himself made no further rulings of note on the subject, the *Priestley* precedent alternately inspired and constrained the judges who worked in its shadow. Abinger's peers at the Court of the Exchequer embraced its text and expanded its influence, while many judges outside the Court, especially in Scotland, attempted to reign in the absolutism of the legal theories that flowed from it. In the end these

[7] A. W. B. Simpson, *Leading Cases in the Common Law* (Clarendon Press, 1996), 104.
[8] Courtney Stanhope Kenny, *A Selection of Cases Illustrative of the English Law of Tort* (Cambridge University Press Warehouse, 1908), 89.
[9] Kenny, *A Selection*, 90.

rebellions were quashed, and workers were once again blocked from recovery at almost every turn. Once established, the legal theories spawned by *Priestley* were never successfully appealed or reversed in the courts; changing the outcomes for workers required a fundamental transformation of both English and American society in the form of controversial and socialistic no-fault workmen's compensation laws.

Mentioning *Priestley* to almost any social historian today is a reliable method to elicit a blank stare.[10] This is despite the fact that its legacy shattered *laissez-faire* political economy in both Britain and the United States and ushered in entirely new boundaries, not only between workers and employers, but between the public and governments around the world. A small number of legal historians have discussed the reasoning behind the ruling, but have not successfully contextualized the decision in its time, or connected its legacy to the larger social currents at the end of the era. Legal historian W.R. Cornish uncritically accepted Abinger's claim that no precedent was available, and suggested that the new issue of industrial wage labor influenced the outcome.[11] This alludes to the Subsidy Theory, which posits that 19th century jurists in Britain and America sought to provide a protected legal environment for nascent industrial interests. Legal scholar Terence Ingman claimed that Abinger was moved by a permutation of *volenti non fit iniuria*, translated as "assumption of the risk", which holds that anyone who has knowledge of a risk and proceeds with a course of action with this knowledge cannot seek damages from another. Legal historian A.W. B. Simpson saw the decision as simply

[10] This was not true just over a century ago, when the legality of worker's compensation was being hotly contested in American supreme courts and in the pages of *The Survey,* nor in Great Britain from before 1880 when the first Employer's Liability Act was passed until 1897, when the Workmen's Compensation Act was signed into law.
[11] W.R. Cornish, Stephen Banks, Charles Mitchell, Paul Mitchell, and Rebecca Probert, *Law and Society in England 1750-1950 2nd Ed*, (Hart Publishing, 2019), 1018.

based on individualistic notions of fault and responsibility.[12] R.W. Kostal and Michael Stein have attempted to explore the cultural influences of Abinger's decision, arguing respectively that Abinger was hostile to paternalism and was adhering to an "objectively correct" but "selectively applied" political economy.[13]

Here though, I contend that none of these positions withstand logical scrutiny, and no reliable historical evidence can be marshalled to support them. I show that the answer is bound up in Abinger's personal devotion to England, which for him was indivisible from the holy trinity of property, monarchy, and the aristocracy. He aligned with the British philosopher and statesman Edmund Burke, who championed a backward-looking and rigid adherence to continuity, and legal commentator William Blackstone, who placed the preservation of property above even life and liberty, because only property "so engaged the imagination and affections of men."[14] Accordingly, Abinger relentlessly defended property from what he saw as the corrosive ideas of democracy abroad and the prospect of universal suffrage at home. When presented with *Priestley*, Abinger saw the right of the servant to sue his master in court for workplace injuries as an emerging threat to property in the legal sphere, just as surely as the prospect of universal suffrage was in the legislative one. I also argue that Abinger's particular view of law and its practice was a critical factor that affected his ruling in *Priestley.* I will show that he considered law to be an exercise of immutable principles rather than the study of, and deference to, legal history and societal customs in the form of precedent. This resulted in his failure to recognize and apply the existing precedent of *respondeat superior*, which had been observed by English

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[12] Simpson, *Leading Cases*, 109.
[13] Michael Stein, "Victorian Tort Liability for Workplace Injuries," *University of Illinois Law Review* 2008, no.3, (2008): 937.
[14] Sir William Blackstone, *Commentaries on the Laws of England in Four Books*, *Vol. 1 Book II* (J. B. Lippincott Company, 1893), 2.

judges at least as far back at 1676. Translated as "let the master answer" or "the master must answer", *respondeat superior* assigned vicarious liability to the master for injuries caused by a servant acting on the master's behalf.

The *Priestley* Precedent and the Turn to Collectivism at the End of the Victorian Era

To begin to trace the connections between the *Priestley* precedent and the dramatic turn towards collectivism in Britain it is useful to contextualize this change within the extant historiography which has focused on the issues facing the Victorians in the final decades of the 19th century and the Workmen's Compensation Act of 1897. Contemporary legal and societal commentator, A. V. Dicey, characterized the period after 1865 as that of the turn away from Benthamite individualism and toward collectivism in Victorian Britain. Dicey, a Whig law professor and admirer of Bentham writing in 1905, identified four causes for this transformation: Tory philanthropy and the Factory Movement; the changed attitude of the working classes after 1848, the characteristics of modern commerce, and the introduction of household suffrage. Even so, Dicey did not see any of these factors as constitutive of a great modification to what he termed "legislative opinion".[15] This, he said, did not occur until the 1867 Reform Act, which was unlike the 1832 Act that had promoted the political power of a middle class dedicated to Benthamite common sense. The 1867 Act was instead an effort guided by and for collectivists. Dicey identified The Workmen's Compensation Act of 1897 as "a completely new turn" in

[15] A. V. Dicey, *Lectures on the relation between law & public opinion in England, during the nineteenth century* (Macmillan & Co., 1914), 249.

legislation, observing what he saw as the profound legal implication that “The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status”.[16]

In *Private Lives, Public Spirit: Britain 1870-1914* (1993), Jose Harris, former professor of modern history at the University of Oxford, addressed the conundrum she said has haunted modern historians of the period: was the collectivist arc that characterized 20th century Britain a function of the upheavals brought on by the First World War, or can its origins be found in the decades preceding that cataclysm as Dicey argued? In contrast to Dicey, Harris contends that the growth of the centralized state throughout the 19th century did not constitute a new collectivism, but rather that it represented a revamping and replacing of older organs of societal control and management that were found wanting in view of new market forces.[17] Consistent with Dicey, Harris sees the 1897 Workmen’s Compensation Act as a pivotal event that began the process of creating new contingent property rights through social welfare.[18]

Writing under the auspices of the Oxford Centre for Socio-Legal Studies, P.W.J. Bartrip and S.B. Burman looked for evidence to support their thesis of a sustained effort to effect safety in the Victorian workplace through economic deterrence, beginning in the 1830s and touching on

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[16] A. V. Dicey, *Lectures on the relation between law & public opinion in England, during the nineteenth century* (Macmillan & Co., 1914), 284.

[17] This assessment is consistent with David Roberts’ in *The Social Conscience of the Early Victorians* (Stanford University Press, 2002). Roberts states that the primary forces impelling the growth in government were the familiar ones: population growth, industrial revolution, and urbanization. Roberts notes that by the 1850s there were inspectors of railways, steamships, mines, and smokestacks but no associated large scale clashes of ideology. An 1849 bill empowering the safety inspection of mines was supported by no less than the ardent devotee of laissez faire, John Hume. Roberts observed that “Acts to make things safer and cleaner were a part of the technological imperatives of the industrial revolution” (406). Roberts also mentions the dissemination of science, knowledge, and increasing power of the middle and working classes as secondary contributors to the growth of governmental control.

[18] Jose Harris, *Private Lives, Public Spirit, A Social History of Britain 1870-1914* (Oxford University Press, 1993), 120.

Priestley (1837) as well as the New Poor Law (1834).[19] However, the authors treat these events as random details of the environment of compensation rather than events related to each other, or as causative in the later development of Workmen's Compensation. While they describe the 1897 Workmen's Compensation Act as the first installment of major socialist legislation in Britain, Bartrip and Burman contend that the Act can be seen as compatible with *laissez-faire* because it created no governmental apparatus of control, and also because the authors construe Workmen's Compensation as not so much a compensation scheme as a forum for workers to engage in bargaining for safety with employers.[20]

As demonstrated above, the unique nature of the Workmen's Compensation Act of 1897 has been recognized by the historians who address it. With the possible exception of Dicey, the authors above agree, as I do, that passage of the Act was not a performance of socialist politics by either side. I show that the Act only succeeded under the dictates of industrial interests, who had come to see the benefits of the *Priestley* precedent as essential to production. Faced with the prospect workers ultimately gaining equal access to the legal sphere, the industrialists chose those benefits over all else we have been told that mattered in late Victorian economic and cultural thought: political economy, *laissez-faire*, and property rights. Thus, as I demonstrate here, the Victorian century culminated not in the triumph of political economy over paternalism, or a creeping socialism over political economy, but in a deeply-felt spasm of fear on the part of industrial capitalists at the prospect of being held fully accountable for the human costs of production. This spasm forced open the gates of thought *and* politics to thoroughly socialistic problem-solving.

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[19] P.W. J. Bartrip, and S. B. Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy 1833-1897* (Clarendon Press, 1983), 3-4.
[20] Bartrip and Burman, *Wounded Soldiers*, 218.

From the workers' perspective, we find that the seminal socialistic solution that was the Workmen's Compensation Act can be seen, ironically, as the result of *individualism denied* and the enduring influence of a legal precedent on people and events. In no legislative proposal from 1872-1897 did the Trades Union Congress demand either compensation or safety. In every proposal they demanded the end of *Priestley* so that workers could have the same chance as the public had at court to win compensation based on the merits of each case. What they wanted, what they believed *Priestley* had wrongly deprived them of, and what the rest of British society already had, was for workers to be able to participate on an equal basis in the legal system.

Legal Precedent and Actor Network Theory

Social historians such as E.P. Thompson, Douglas Hay, and Boyd Hilton have written about criminal law in England in the 18th and 19th centuries. Hay pondered the juxtaposition of a British ruling class that legislated an explosion of statutes establishing the death penalty for offenses against property from 1688-1820, with a judicial system which executed fewer and fewer prisoners.[21] His arguments were focused on the threat and use of capital punishment as a

[21] Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson, and Cal Winslow, *Albion's Fatal Tree. Crime and Society in Eighteenth-Century England* (Pantheon Books, 1976). Linebaugh writes about the public hangings at Tyburn and the medical schools that vied for the corpses for dissection purposes. Winslow writes about smugglers, and John Rule writes about communities of 'wreckers' that laid claim to beached ships on their coast. Douglas Hay writes about poaching laws and the importance of game as a symbol of the power and patronage for nobility. Thompson emphasizes the ways in which the latter effect impacted the psychology of the laboring class in the midst of Jacobin incitement and reform-minded radicals at the end of the 18th and beginning of the 19th centuries. As evidence, Thompson points to the failed trails for treason against Thomas Hardy, a leader of the London Correspondence Society, at the height of Pitt's suppression. The favorable comparison of English to French law was employed in an attempt to re-center public debate in an era that included French invasion forces and mutinous English sailors. Economic histories of the era have paid more attention to law, but predictably focus on the rules of inheritance, finance, and corporate law to explain issues such as the perpetuation of

tool to create synthetic landscapes in which paternalism and deference could be performed. Hay pointed to the strict adherence to procedure in the courts which, in many cases, caused state prosecutions of even the lowest class of accused to fail. This, along with infrequent but well-publicized punishment of upper-class law breakers, served to cast a veil of impartial justice upon the institution. Hilton echoed Hay's analysis.[22] Thompson emphasized the ways in which the latter effect impacted the psychology of the laboring class in the midst of Jacobin incitement and reform-minded radicals at the end of the 18th and beginning of the 19th centuries. As evidence, Thompson pointed to the failed trials such as that for treason against Thomas Hardy, a leader of the London Correspondence Society, at the height of Pitt's suppression, and argued that the favorable comparison of English to French law served to help re-center the debate in an era that included French invasion forces and mutinous English sailors.[23] In these works Hay, Hilton, and Thompson have imagined the law as an adherence to statutes, albeit within a range of discretion on the part of the judge and interceders who might bargain for mercy toward the convicted. Seen in this way the parameters of law and consequence are defined outside of the legal system, with significant change occurring only at the legislative level.

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concentrations of landed wealth or the rise of capitalistic forms. David Sugarman and G.R. Rubin edited a collection of essays on economic dimensions of law, including "Family Settlements on Trust: Landowners and the Rising Bourgeoisie", "The Family, Strict Settlements, and Historians", "Commercial Expectations and the Guarantee of Law: Sales Transactions in Mid 19th-Century England", "The Family Settlements of the Sykes of Sledmere, 1792-1900", "Law, Poverty and Imprisonment for Debt", "The County Courts and the Tally Trade" in G.R. Rubin and David Sugarman, eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Professional Books, 1984).

22 Hilton, *Mad Bad*, 317.

23 E. P. Thompson, *Making of the English Working Class* (Vintage Books, 1963), 80. James Scarlett served as Hardy's prosecutor. Eric Evans, *The Forging of the Modern State: Early Industrial Britain 1783-1870* (Longman, 1983), 23-25.

While useful for the purposes to which they have been employed, with few exceptions these efforts fail to recognize the judge as an actor in social histories, treating him as a vessel for the will of Parliament. In doing so, they elide potent issues of judicial activism and legal precedent. Of course, judicial activism in the Victorian Era did not conclude with *Priestley*. The Barons of the Exchequer cemented *Priestley* as precedent, and built new precedents upon its foundation. In opposition, several judges in England, Scotland, and America mounted challenges to modify and reverse some of its impacts. Some of these activist efforts were successful, others were not. Set in motion by judges who were embedded in their contexts of class, race, gender, and social position, these precedents outlived their creators, and continued to shape the society they functioned within. They affected every aspect of life, interacting with people and institutions that came into contact with the legal sphere, as well as many who did not.

I argue that law should not be relegated to a separate sphere by social historians of the Victorian Era any more than politics have been.[24] As highlighted by Thompson and Hay, the sites and practices of criminal law-giving were worlds away from the sites of its law-making, and the multiplicity of differences and interactions between the two are rich in clues as to the nature of Victorian society. In Victorian civil law, the sites of law-giving and law-making were allowed to merge, making new power relations, new motivations, new politics, and new connections within and without the legal sphere, and indeed within and without the boundaries of the state. How should historians proceed? I argue that just as the role of discreet examples of technology

[24] Benjamin Cardozo, an American New York and Supreme Court Justice who would figure prominently in the ratification of Worker's Compensation statutes in the United States at the beginning of the 20th century, said as much in his 1921 lecture to law students at Yale. "We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics." Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 12.

have been re-evaluated and re-purposed by broadening and deepening of the notion of agency through Actor Network Theory (ANT), discreet examples of common law should be foregrounded and re-evaluated in a similar manner. If the courtroom was a crucible where evidence, values, and the role of law were fiercely contested, and it was, the judges' rulings forged there were critical nodes of culture, molded by the individual judge's class, race, gender, and politics. When they represented a significant change, those nodes contained the potential to ascend to a higher plane; that of a legal precedent. That transfiguration, however, required enrollment in all or at least parts of the ruling as applied to similar contexts by subsequent judges. Like any node, the precedent was subject to instability and negotiation. In each reification, the precedent could be transformed through new readings of the text, and imbued with new meanings influenced by new political realities and biases. Alternatively, it could be used to entrench the old and prevent the creation of new counter-precedents. By definition precedents exceeded the authority of their human creators, and gathered an authority all their own. As I demonstrate here, precedents often outlasted both their creators and the context of their creation, and constructed new contexts aligned with their own rationalities.[25] In all cases, the precedent exerted itself beyond the legal sphere in ways that were both visible and obscured. If a certain action was permitted, or if it was not, actors interacted with that knowledge as part of their spoken or unspoken calculations for the future. Through these calculations whole industries, technologies, trade union practices, political parties, legislation, riots, and family dynamics were shaped.[26] That is all to say that the legal precedent more than meets the definition of actor or

[25] In Cardozo's words, a precedent "is charged with vital power." and "is the source from which new principles or norms may spring to shape sentences thereafter." Cardozo, *Judicial Process*, 22.
[26] Cardozo was succinct: "The sentence of today will make the right and wrong of tomorrow". Cardozo, *Judicial Process*, 21.

actant within the scope of ANT analysis, and such analysis would be a useful tool in detecting its otherwise submerged influences on other actors.

The Structure of this Work

Before moving forward, it will be useful for the reader to have an overview of how I will develop these interconnected arguments. I do so in three parts; In part one, I introduce the case of *Priestley v Fowler* and the controversial ruling authored by Lord Abinger in 1837, before surveying the legal historiography which has sought to provide explanations of Abinger's internal motivations and legal reasoning as they relate to the themes of early 19th century English society and common law. I then argue that in contradiction of these explanations, Abinger acted in accordance with his strongly-held political belief about the inseparability of power and property in a free society, and in ignorance of the pre-existing precedent of *respondeat superior*. In order to make my case, I provide a comprehensive analysis of Abinger's context by stepping back to his early upbringing on a plantation in Jamaica as James Scarlett, and following him through the development of his education, pivotal friendships, professional life, and political connections in the tumultuous environment that was England during the French Revolution and up to the cusp of the Victorian Era. Utilizing the dominant social histories of the period as a framework, I locate Scarlett's considerable direct and indirect interactions with the leading figures, issues, politics, and ideas of his time. Having prepared the historical and personal ground for his decision as Lord Abinger, I revisit the assumptions and conclusions of the extant legal historiography in view of a close reading of the text of the ruling, the transcript of the oral arguments, his personal correspondence, and his body of public speeches in order to better evaluate Abinger's strongly held political beliefs and particular approach to the practice of law which combined to produce the *Priestley* precedent.

Part two begins with an overview of the social historiography which has provided rich and compelling narratives of the political currents and social themes, on the whole dominated by *laissez-faire* attitudes, that connected institutions and actors in the first seventy years of the English 19th century. However, at the same time these works exhibit serious limitations in explaining its final decades, and in particular the dramatic turn to widely-accepted collectivist solutions to social problems beginning in 1897. I provide a review of the social and socio-legal histories that have attempted to grapple with this phenomenon to various degrees before arguing that the arc of the Victorian Era cannot be understood without recognizing the role of Lord Abinger in crafting his decision in 1837, and the life of the *Priestley* precedent afterward as it affected the lives of thousands of injured British working class families and the calculations of the whole of British industry for the next 60 years. To further this discussion, I explore the meaning of *laissez-faire* under both paternalistic and political economy regimes of thought, and then examine the role of these themes in the context of the Factory Acts in an effort to evaluate to what extent factory regulations can be considered as early collectivist approaches. I then present the legal dogma of common employment, assumption of the risk, and contributory negligence constructed from the body of the *Priestley* ruling, of which Abinger's successor on the Court of the Exchequer, Lord Chief Baron Frederick Pollock, said "never was there a more useful decision."[27] I develop the history of *Priestley*'s reification as precedent, and follow its fallout in the public, legislative, legal, and industrial spheres as I focus on the efforts of

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[27] "The Liability of Employers for Injuries to Servants," *The Devizes and Wilts Advertiser*, March 20, 1879.

Alexander Macdonald, Henry Broadhurst, and the national Trades Union Congress to push for equal treatment under the law through a series of legislative attempts to undo what *Priestley* had wrought. I then analyze the shortcomings of existing scholarship addressing the creation of the Workmen's Compensation Act 1897, which has failed to draw the essential connection with the demonstrative goal of the workers: the restoration of their status as full citizens of the realm through equal access to the legal sphere, which the *Priestley* precedent had denied to them. Turning to other countries, I survey the common law and legislation of Europe and the Commonwealth, who uniformly rejected the premise of *Priestley*, and the Americans, who did not. For the American experience I follow the evolution of judicial and legislative outlook from the wholesale adoption of the tenets of *Priestley* by Massachusetts Supreme Court Justice Lemuel Shaw in *Farwell v The Boston and Worcester Railroad Company* (1842) through to the battle for an American worker's compensation solution that culminated with the New York Court of Appeals ruling in *Jensen* v *Southern Pacific Company* (1915), in which Justice Benjamin Cardozo concurred that "in industrial conditions, an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries".[28]

In part three of this work I argue that the legal precedent is particularly tractable to historical analysis through what has become known as Actor Network Theory (ANT). I deploy the examples of English Chief Baron of the Exchequer Lord Abinger and American Supreme Court Justice Benjamin Cardozo, presented in parts one and two, to sketch the broad principles of the philosophies of legal formalism and legal realism. These concepts provide a framework

[28] Edmund Ursin, "Holmes, Cardozo, and the Legal Realists: Early Incarnations of Legal Pragmatism and Enterprise Liability," *San Diego Law Review* 50, no. 3 (2013): 571.

for understanding the history of socio-legal writing by legal historians, which follows. For comparison, I recount the notable, but limited and now aged, efforts of prominent social historians to bridge the same gap. I then outline some of the core ideas of ANT and their application to legal historical objects such as *Priestley*. I include a discussion of the legal decision-making process, and highlight the pervasive nature of precedent making, unmaking, and re-imagining, including but not limited to *Priestley*, that may have gone unnoticed in the present work.

I conclude by briefly discussing the meaning and unprecedented results associated with the passage of the British Act of 1897, and the altered character of public discourse in terms of collectivist solutions to social problems in Britain and America. I follow this with an epilogue which draws comparisons between the history of workers agitating to overcome *Priestley* at the end of the 19th century with social historian E. P. Thompson's protesting moral economists at the end of the 18th, and sociologist Ulrich Beck's "ruptured" agents of reflexive modernity in the late 20th.

PART ONE

BIRTH OF A PRECEDENT

An Injury, a Ruling, a Verdict, and a Reversal

Mentioning *Priestley* to almost any social historian today is a reliable method to elicit a blank stare. This is despite the fact that its legacy shattered *laissez-faire* political economy in both Britain and the United States and ushered in entirely new boundaries, not only between workers and employers, but between the public and governments around the world. It all started simply enough, when a butcher named Thomas Fowler ordered his servant, Charles Priestley, to accompany a van supplied by Fowler and laden with mutton at his shop in Market Deeping and heading to Buckden. Priestley's co-worker, William Beadle, had argued with Mr. Fowler about what he saw as excessive loading of the van before the journey, but was soundly rebuked in the presence of Mr. Priestley. On the journey Mr. Beadle heard a crack, and stopped to examine the axle around midnight with a lantern he borrowed from an inn-keeper, but could not discern the cause of the sound. When the van's axle finally failed a mile further down the road, the horses yanked Mr. Beadle clear of the wreckage by the reins. Mr. Priestley was not as fortunate. He was caught under some of the heavy load as the van overturned, breaking his thigh and dislocating his collar bone.[29] Laid up for five months and incurring 50£ of doctor's bills, Priestley sued before Justice Parke at the Lincolnshire Summer Assizes on the basis that his master had a duty to provide safe working conditions. Several witnesses for the plaintiff agreed the load was unsafe for the van, while witnesses for the defense countered this determination. Upon examination, a coach maker opined that there was a flaw in the axle that compromised its strength. The attorney for Fowler, Serjeant Adams, argued that the case was distinct from that of a common carrier, or a

[29] "Priestley (Chas.) v Fowler (Thos.)," *The Lincoln, Rutland, and Stamford Mercury*, July 22, 1836. Coincidentally, the accident occurred in the Peterborough parish, where Scarlett would become an M.P. under Earl Fitzwilliam's auspices and the 1819 riot was to take place.

coach-proprietor, who under common law would be liable for any damages, and he believed no case law applied to a servant suing a master under these particular conditions. Assuming these suppositions to be true and relevant, he built upon the contention that the sole cause of the event was the hidden defect in the axle and argued it was unreasonable to hold any master responsible for such an unknown condition, and in any case the plaintiff should have refused to travel on the van if he thought it unsafe. Although Justice Parke did not disagree with Adams as far as the hidden defect was concerned, he was unconvinced that no precedent existed. He ruled that the overloading issue was one for the jury to decide. The jury found in Priestley's favor and awarded him 100£.[30] However, the judgment was subsequently challenged on the basis that no existing law made the master liable to his servant for an injury, and it was brought before Lord Abinger and the Court of the Exchequer.

Abinger accepted the defense position that no precedent existed for such a case, and so determined he was "at liberty to look at the consequences of a decision the one way or the other" and decide the question on "general principles".[31] Joining the *reductio ad absurdum* trial argument of the defense attorney, Abinger imagined a long list of liabilities that could befall masters due to the errors of their inferior agents. Unlike the trial attorney, Abinger did not limit his list to those arising from hidden defects in equipment. His list included simple negligence on the part of servants that may result in injuries to other servants:

> "If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill

[30] Simpson, *Leading Cases*, 104.
[31] Kenny, *A Selection*, 89.

> in the coachman ; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer, for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen: of the butcher, in supplying the family with meat of a quality injurious to the health ; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins. The inconvenience, not to say the absurdity of these consequences, affords sufficient argument against the application of this principle to the present case."[32]

While he admitted the master had some duty to the safety of his servants, he qualified this duty to the point that it was without effect. A master's duty for the safety of his servants, Abinger said, was defined by whatever the master deemed reasonable. Abinger then added a speculative discourse on the servant's agency and acumen:

> "In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as the master, and probably better, whether the van was sufficient…to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him [the master] against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."[33]

Abinger vacated the award for Priestley. The breadth of his decision to deny compensation for Priestley's injury was a dramatic performance of what today is known as judicial activism, grounded in Abinger's particular legal and political sensibilities. While Abinger himself made no further rulings of note on the subject, the *Priestley* precedent alternately

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[32] Kenny, *A Selection*, 89.
[33] Kenny, *A Selection*, 90.

inspired and constrained the judges who worked in its shadow. Abinger's peers at the Court of the Exchequer embraced its text and expanded its influence, while many judges outside the Court, especially in Scotland, attempted to reign in the absolutism of the legal theories that flowed from it. In the end these rebellions were largely quashed, and workers were again blocked from recovery at almost every turn. Once established, the legal theories spawned by *Priestley* were never successfully appealed or reversed in the courts; changing the outcomes for workers required a fundamental transformation of both English and American Society in the form of controversial and socialistic no-fault workmen's compensation laws enacted 60 after *Priestley* in Britain, and ratified 78 years after the decision in America.

Motives and Meanings

From the beginning, Abinger's ruling in *Priestley* has been considered by observers to be enigmatic at best. At worst it presented as a mash-up of disconnected ideas and personal bias. All of the modern historiography that attempts to parse Abinger's logic and motivations has been generated by legal historians, and much of that scholarship has been influenced by the analysis of R. W. Kostal, a law professor at Western University in Ontario.[34] Noting the incongruities between the facts presented in the *Priestley* case and the patched-together ruling Abinger finally authored, Kostal asserted that Abinger was responding instead to a theoretical fact pattern more important to him. Although the case did not involve a scenario of one servant injuring another,

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[34] R. W. Kostal, *Law and English Railway Capitalism, 1825-1875* (Oxford University Press, 1994). Kostal begins by assuming that his source for the trial narrative, Murphy and Hurlstone, is the true most complete narrative, and that the details it contains are crucial to an analysis of the decision. In this account Mr. Priestley is said to have inspected the van and argued with Mr. Fowler. Kostal notes that the declaration submitted by the plaintiffs in the appeal process failed to assert that Fowler knew that the van was overloaded (260-262).

Abinger had included a lengthy diatribe against the notion that masters should be liable under such a situation.[35] In spite of Abinger's agreement with the defense counsel that the case was a novel issue, there did exist a precedent that addressed the speculative scenario Abinger entertained. *Respondeat Superior* is a latin term which translates to "Let the master answer" or "The master must answer". It had been a common law maxim in England at least since 1676, during the reign of Charles II, and it made a master strictly liable for the harms caused by his servants in the performance of their duties, without limitation based the status of the injured party.[36] It is clear that Kostal knew of *respondeat superior* himself, recognized it should have been applied to Abinger's hypothetical, and assumed that Abinger knew these things as well.[37] Working from this assumption, Kostal reasoned that Abinger's true goal must have been to refute *respondeat superior* where master-servant relations were concerned. For an explanation of Abinger's motive for such machinations, Kostal turned to another passage in the ruling in which Abinger parroted the defense attorney's argument that Priestley could have refused to get in the van in the first place. Kostal fashioned this otherwise unrelated kernel into a bold statement on Abinger's part avowing the virtues of unfettered individual freedom and self-reliance for members of the working classes. To square the hole and transform this "interest" into a motive for the action, Kostal read into *respondeat superior* what he considered the antithesis of self-reliance: paternalism. The last piece of the puzzle in place, Kostal was ready to opine that Abinger's intension was to decisively "sever the present from the past" by refuting paternalism

[35] See above and Kenny, *A Selection*, 89. Jamie Bronstein also wonders at this disconnect. Jamie L Bronstein, *Caught in the Machinery: Workplace Accidents and Injured Workers in Nineteenth Century Britain* (Stanford University Press, 2008), 20.
[36] Charles Gershom Fall, *Employer's Liability for Personal Injuries to Their Employees* (Wright & Potter Printing Co., 1883), 7.
[37] Whereas Abinger never mentions *respondeat superior*, Blackstone, or hints at any pre-existing standard of vicarious liability, Kostal brings it up. Kostal, *Railway Capitalism*, 264.

as it applied to workplace relations.[38] To bolster his construct, Kostal cited Abinger's anti-slavery position and support for the New Poor Law as ostensible evidence of an interest and belief in workers' faculties for self-reliance and freedom of action.[39]

Law professor Michael Stein maintained that Abinger's lack of empathy for the lower classes was consistent with what he claimed was the era's upper-class ethos of political economy, which Stein ascribed to all the judges of Abinger's court as they subsequently built upon the *Priestley* precedent. He wrote that gentlemen of that time naturally held with its dictates with only "rare exception", and as evidence for this broad statement he cited the penetration of John Stuart Mill's *Principles of Political Economy*, which he said had become "the standard text for students".[40] In his analysis of *Priestley* legal historian W.R. Cornish acknowledged a pre-existing tradition of vicarious liability in English law, and put forth an argument for Abinger's motivation which did not rely on individualism or political economy; that it was the prospect of *expanding* a master's vicarious liability beyond servants to the actions of contract employees that was novel and alarming to Abinger.[41] Legal historian T. Ingman attributed the decision to Abinger's adherence to a contractual basis for barring recovery defined by *volenti non fit iniuria*, or assumption of the risk. Legal historian A.W. B. Simpson eschewed Ingman's contractual theory explanation, preferring Kostal's assertion that "individualistic notions of fault and responsibility" were at play in a setting in which servants were expected to be able to recognize all dangers and avoid them.[42]

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[38] Kostal, *Railway Capitalism*, 264.
[39] Kostal, *Railway Capitalism*, 265-266.
[40] Stein, *Victorian Tort*, 934.
[41] Cornish, *Law and Society*, 1016. This is view is shared by Christopher L. Tomlins, "A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850," *Law and History Review* 6, no. 2 (1988): 400.
[42] Simpson, *Leading Cases,* 109.

In this work I demonstrate that an adherence to rigid notions of individualism or political economy does not serve as a valid explanation for Abinger's actions, but rather that Abinger saw the right of a servant to sue his master in court for workplace injuries as an emerging and unacceptable threat to property in the legal sphere, just as he interpreted calls for universal suffrage in the legislative one. In addition, I also show that his particular view of law and legal practice prevented him from recognizing the precedent of *respondeat superior* and applying it in his judgment. To support these claims I begin by tracing the social, educational, political, and professional connections which provide Abinger's context from his time in Jamaica through to his life in England, and up to the moment of his ruling in *Priestley*. I then examine his public speeches and private letters in order to detect his views of law and society. I conclude with an analysis of the *Priestley* ruling relative to those views and assess the alternative explanations that have been proposed above.

The Scarletts in Jamaica

James Scarlett was the second son born to Elizabeth and Robert Scarlett in St. James Parish, Jamaica in 1769. By then the Scarletts had been established in Jamaica for five generations. Francis Scarlett, a merchantman captain, had helped conquer the island for the British in 1656, and was rewarded with a thousand acres of land on its western end along the River Wagwater.[43] From that time to James' the Scarlett fortune had grown along with those of the island. The eighteenth century saw the West Indies become the most important economic engine of the Empire, and Jamaica was the lynch-pin of that machinery, dominating sugar

[43] Scarlett, *Memoir*, 15.

production as well as the slave trade.[44] It was, however, a Jamaica whose British slave-owning elites shared an increasingly complex relationship with the mother country as the rhythms, demands, and fears of island plantation life produced customs, moral attitudes, and events that would shock most of their counterparts in London.[45] The Tacky slave revolt of 1760-1761 was only narrowly defeated, and according to historian Trevor Burnard, forged a new attitude on the part of white Jamaicans toward the imperial metropole: one aligned with their "instinctive loyalism".[46] At the same time, many Britons on the far side of the ocean recoiled at the brutality meted out to the slaves who had survived.[47] These harsh punishments did not stop revolts from occurring. James' mother, Elizabeth, was widowed at sixteen when her first husband was murdered in her presence by slaves during a separate revolt in 1763.[48] She and Robert were married in 1765. When James was six, the war with America broke out and made the Caribbean an important theater of war for the British, French, Spanish and Dutch. Suddenly the concerns of

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[44] Petley, *Fury*, 142. Hilton, *Mad Bad*, 3, 21. This is a somewhat surprising result, as the original conquest of Jamaica was an afterthought in the wake of Cromwell's failure to take other islands in the west indies, and the initial management of the island was a disaster. See Bryan Edwards, *The History Civil and Commercial of the British Colonies in the West Indies to which is added an historical survey of the French colony in the island of St. Domingo / abridged from the history written* (Printed for B. Crosby, Mundell & Son, and J. Mundell, 1798). Trevor Burnard, *Jamaica in the Age of Revolution* (University of Pennsylvania Press, 2020).
[45] The governmental relationship between Jamaica and the mother country was fraught from the beginning, with Charles II and his successor withholding ratification of laws passed by the Jamaican assembly for the first fifty years of their rule until they acquiesced to demands for an annual grant of 8000£. By the late eighteenth century, however, the nature of the tensions had changed. Edwards, *Civil and Commercial*, 60.
[46] Burnard, *Age of Revolution,* 106. The Tacky revolt has been characterized as more likely a series of separate revolts by historian Maria Bollettino. Without invoking the term, Burnard describes how *laisse-faire* on the island in terms of dealing with the movement of slaves outside plantations and the capture of runaways suffered in favor of systematic central Jamaican control after the Tacky revolt was quashed (115).
[47] Burnard, *Age of Revolution,* 117.
[48] Frank Cundall, *Historic Jamaica* (The Institute of Jamaica by the West India Committee, 1915), 339.

the colonists were heightened by the potential for invasion from the sea, and the possibility of new and coordinated slave revolts on land. These fears further sharpened the loyalties of the Jamaican elite, who, outnumbered twenty to one by the people they owned, knew their lives and livelihoods hung in the balance. In 1777 James' grandfather died. In his will he provided for four mulatto girls, likely his illegitimate children, and gifted James' father Robert the plantation of Duckett's Spring and the estate of Success in St. James Parish.[49] As was common for those of his class, Robert Scarlett was made a colonel of a yeomanry calvary regiment, and during the invasion scare of 1782 even 13 year-old James was drilled to fire weapons and resist the enemy as may be required.[50]

Socially, Barrett family biographer and historian Jeannette Marks described the Scarletts as representing "much that was best of Jamaica" and adhering to a militant Puritanism.[51] Indeed the anti-slavery missionaries who began to appear on the island after 1780 would have had a receptive ear in the Scarlett household; Lord Abinger would later credit his grandmother for inculcating in him a high moral tone and "religious feeling" which led to an abhorrence of the system of slavery.[52] That was not to say that his family held slaves themselves in high esteem. James' parents sought to isolate him from slaves and those who worked in direct contact with them out of concern that he would be corrupted by their low manner of speech and low morals.[53]

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[49] Jeanette Augustus Marks, *The Family of Barrett*, *a Colonial Romance* (The Macmillan Company, 1938), 665.
[50] Scarlett, *Memoir* 23, 26.
[51] Marks, *Colonial Romance*, 219, 242.
[52] Scarlett, *Memoir*, 22.
[53] Marks, *Colonial Romance*, 272. Historian Sarah Yeh has pointed out in her thesis about the tensions between British and West Indian colonial identities, "A Sink of All Filthiness: Gender, Family, and Identity in the British Atlantic 1688-1763," *The Historian* 68, no. 1 (2006): 66-88, that West Indian colonists "were actually seen as less British [than other colonists], and it was precisely this insecurity about their identity that led them to cling so tightly to Britain. Unhappy with the reputation of the islands and anxious to avoid being tainted with the character of a West

His tutors were from Scotland and England, and he provided a brief account in his memoir of his ability to best his older brother in weekly math contests; "My elder brother, Philip, wrote much better and quicker than I could, and by this advantage at the first he surpassed me. I fell upon the expedient of working the problem in my head without writing the process, merely putting down the result. By this device I not only secured the prize, but acquired a facility for making calculations without notes, which I found of great use in my subsequent studies at Cambridge, and which to a great degree I still possess."[54] In 1785 Robert and Elizabeth Scarlett sent 15-year-old James to England to study law with the expectation that he would ultimately return to the island, and to the career advantages the elder Scarlett's connections would provide.[55] In his memoir he pointed to the threats of invasion during the American conflict as the most intense impressions of his youth. "Each [event] excited great alarm, but with these were mingled great enthusiasm, and a most determined spirit of resistance. Every other object was sacrificed to the means of defense, and there seemed but one feeling which pervaded the black as well as white population, that the enemy were to be opposed by every practicable means, to the last extremity. Happily the dispersion of the Continental fleets on both occasions left us nothing to remember but our courage, our loyalty, and the glory of the British navy."[56]

Indian, they sent their children to Britain, and made every effort to relocate there themselves once their money had been made" (87). While the Scarletts are seen to fit part of this pattern, it is only a partial fit. Although the did send James to England at a young age, it was with the expectation he would return and live out his days on the island as his parents had done. Yeh does not explore the additional factors of internal slave revolt or external invasion in leading the colonists to "cling so tightly to Britain" as Petley does (117). Petley describes the additional tensions that grew between the Jamaican Assembly and Britain as the abolitionist movement flowered and public sentiment toward the West Indies soured under withering attacks (189, 194).

[54] Scarlett, *Memoir*, 23.

[55] James' younger brother, William Anglin, became Chief Justice of the island. Scarlett, *Memoir*, 16.

[56] Scarlett, *Memoir*, 26.

The British Cauldron

When Scarlett stepped off the boat in 1785 the British scene was, according to social historian Boyd Hilton, in the throes of a dramatic break from the 18th century, marked by extreme volatility in politics, economics, culture, and demographics.[57] Hilton was responding to the prevailing view held by historians such as J.C.D. Clark and Richard Price that from the time of the glorious revolution of 1660 England was ruled by a troika of the monarchy, the church, and the landed elite, but that the situation suddenly changed when the "middle" class was enfranchised and these institutions were decisively weakened. From then on, the old regime was effectively challenged by religious pluralism, liberalism, and political reform, punctuated by the repeal of the corn laws. Hilton argued that this position relied on a misinterpretation of the revival of world views centered on theocracy and aristocratic paternalism, otherwise understood as "Throne and Altar" neoconservatism, as a continuity which was interrupted by the Reform Bill of 1832. Rather than the persistence of the *Ancien Regime*, Hilton argued this revival was a reaction to the American and French revolutions and progressive ideologies attached to them.[58] Hilton also rejected the efforts of economic historians to frame the period in terms of explanations for sustained economic growth on the supply side, when the more telling factor was the per capita basis. He observed that from 1783 to 1841 the British population more than doubled, and the average age of the populace was driven downward. This population growth was not evenly distributed, being most acute in newly formed towns and cities. The task of

[57] Hilton, *Mad Bad*, 5.
[58] Hilton, *Mad Bad*, 29.

integrating this enormous influx and weathering the attending social upheavals was, he stated, "a damned close-run thing".[59]

In his memoir, Scarlett wrote that after his arrival in England, an unnamed relation of his added a year to his age and arranged for his admission to the Inner Temple and Trinity College as a fellow commoner.[60] There he found himself "his own master", with unfettered access to his father's money and negotiating a heady atmosphere of ranks and classes unfamiliar to him. Feeling rebuffed after failing to solve a math problem posed by his tutor during the first class, James quit his first-year lectures altogether in favor of activities among the nobles and fellow commoners with whom he had begun to socialize.[61] Through these connections he became friends with the famous lawyer and politician, Samuel Romilly. Romilly advised Scarlett on his legal education, encouraging him to study Blackstone's *Commentaries on the Law of England* and Connyer's *Digest.* Scarlett found that the former "combines with the most profound learning and reflection a perspicuity and polished elegance of style which give life, grace, and interest to the driest subjects, and excite fresh pleasure, and admiration upon each perusal".[62] Sir William Blackstone was a lawyer and politician from 1746 until his death in 1780. His influential four-volume *Commentaries* was written between 1765 and 1769 and brought him renown and riches.[63] The works blended a survey of English common law with a whiggish history in which

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[59] Hilton, *Mad Bad*, 7. Other historians' timelines lend support to Hilton's base thesis, including Edward Royle and James Walvin.
[60] Scarlett, *Memoir*, 26. He abandoned his father's original plan for him to attend Oriel College, Oxford, under the care of the President, Dr. Eveleigh, for reasons he chose not to divulge in his memoir.
[61] Scarlett, *Memoir*, 29.
[62] Scarlett, *Memoir*, 44.
[63] The *Commentaries* provoked Jeremy Bentham to publish his criticisms of Blackstone: *A Fragment on Government; Being an Examination of what is Delivered, On the Subject of Government in General in the Introduction to Sir William Blackstone's Commentaries: with a Preface in which is given a Critique on the Work at Large* (Printed for T. Payne at the Mews-

Blackstone asserted that English law was a "rational science" which allowed its principles to be logically deduced, described the right and special place of the Monarchy, and observed that "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property".[64] These sentiments, as well as the legal and political implications that flowed from them, would emerge as the central tenets of Scarlett's world view.

It was also Romilly who convinced Scarlett to try his luck in England rather than entertain any thoughts of returning to Jamaica, and in June 1791 Scarlett was called to the Bar.[65] He began to practice in the Lancashire sessions, which included Preston, Wigan, and Manchester, and discovered a profitable business could be had in the volume of work. He also began cultivating his political interests; attending the debates in Parliament and admiring the oratory of Pitt, the arguments of Fox, and the thinking of Burke. With Romilly, Scarlett saw eye-to-eye on many issues, including criminal law reform and the abolition of slavery. Influenced by Romilly's admiration for Franco-Swiss political agitator, Pierre Dumont, Scarlett initially saw the French revolution as a positive development in at least that it thwarted the ambitions of the ruling French house, the Bourbons, whom Pitt considered "the disturbers of the peace of Europe for the last century".[66] However, Romilly's belief in a Democratic Assembly that would replace the House of Commons crossed a line with Scarlett, who was certain such a scenario would necessarily lead to the destruction of the Monarchy and the creation of a Republic.[67]

Gate; P. Elmoly opposite Strand-Street in the Strand, and E. Brook, in Bell-Yard, Temple-Bar, 1776).

[64] Blackstone, *Commentaries*, 2.

[65] Scarlett up to this time had been working under a lawyer named George Wood. When he vacated his position with Mr. Wood he was replaced by George Canning, a future close friend and Tory Prime Minister who would provide Scarlett with his first and only ministry post. Scarlett, *Memoir*, 47.

[66] Scarlett, *Memoir*, 56.

[67] Scarlett, *Memoir*, 54.

Historian Eric Evans has written detailing radical politics in Britain as they were stirred to a fever pitch in the 1790s through ongoing debates about civil liberties forced to the surface by the American and French Revolutions, the Irish situation, and the Catholic question.[68] Politician and philosopher Edmund Burke and revolutionary political theorist Thomas Paine argued opposing points of view in their dueling publications *Thoughts on the Revolution in France* 1790, and *Rights of Man* 1791-92. Attacking the Revolution and the Enlightenment, Burke was the voice of continuity and property. The living had no right to dismantle institutions inherited from the dead, he said, and making new ones predicated on untested theories was folly. He believed in the balance of a limited monarchy and limited representation.[69] Paine mocked the "English Constitution" for its heredity-based privilege and advocated Democracy. While there was a range of opinion among the many different radical groups that met across the country, most agreed on the issue of universal suffrage.[70] As the decade drew to a close the most extreme radicals had been largely driven underground through increasingly oppressive measures.[71] The renewed continental conflict of 1803 against imperial France temporarily sealed some of those fissures in British political life, and it was in this atmosphere that an ambitious James Scarlett had applied for a silk gown in 1807. The gown signified official recognition of his legal expertise, but he was not to be answered until 1816. In the meantime, Scarlett became frustrated

[68] Evans, *Debating the Revolution,* 22-25.
[69] Evans, *Debating the Revolution,* 17.
[70] The complex web of the franchise requirements in England, Scotland, and Ireland is outlined in Evans, *Debating the Revolution,* 9, 26.
[71] William Pitt's ministry suspended legal protections of dissent, encouraged violence and intimidation of radicals, and ultimately placed a tax burden on land to finance the Napoleonic war. The 1795 Acts included The Treasonable and Seditious Practices Act and The Seditious Meetings Act.. Evans, *Debating the Revolution,*, 22-27.

as other, and in his view lesser, barristers rose in the profession to political posts such as Attorney General or to appointments as judges while he was "still plodding at the Bar".[72]

The passage of the Corn Laws in 1815 along with the renewal of the Treason and Sedition Acts in 1817 once again increased the calls for reform, and as historian William Thomas observed, in some quarters the calls were for the overthrow of the government. In opposition to the Tory dominance in Parliament at this juncture, the Whigs strove to burnish their image as the friend of the common man, and entertained hopes of adding the more moderate members of the disaffected groups to their cause. Since his ascension to the post of Solicitor General and a knighthood in 1806, Sir Romilly had been an important voice in parliament for reform. His circle included Jeremy Bentham, James Mill, and Francis Place.[73] In 1818 Romilly gave a speech condemning the current Parliament's record regarding personal and political liberties and brought new revelations of the cruelty of West Indies slave owners to the House. The speech propelled him to the unexpected position of Whig candidate for Westminster, an election in which he prevailed over the well-known radical Sir Francis Burdett.[74] It was at this point that Romilly, distraught over his wife's recent passing, committed suicide in his house in London. As Romilly's political career came to a close, Scarlett's was about to begin. Having been frustrated in his attempts to secure a seat in the election for Lewes in 1812 and 1816, Scarlertt's fortunes turned in 1818 when the fourth Earl Fitzwilliam provided him the seat for Peterborough

[72] Scarlett, *Memoir*, 70-71.
[73] Bentham had known Romilly since 1788. All four families had spent time together at Ford Abbey in the fall of 1817. William Thomas, *The Philosophic Radicals: Nine Studies in Theory and Practice 1817-1841* (Clarendon Press, 1979), 15-27.
[74] Thomas, *Philosophic Radicals,* 15-45, and Royle and Walvin, *Radicals and Reformers,* 116-118.

following the death of William Elliot, an Irish politician who had won the election that year.[75] The Earl was one of the wealthiest men in Britain, a close friend of Burke, and had been a Whig political king-maker for decades.

Nine months later events converged to place Scarlett, now a member of government, at the epicenter of a political controversy: A rally of men, women, and children at St. Peter's Field in Manchester spiraled out of control into a melee with yeomanry calvary and regular troops on orders to arrest the featured radical orator, Henry Hunt.[76] When the carnage was over there were 11 dead and over 600 wounded, and the day came to be remembered as the "Peterloo massacre". Earl Fitzwilliam, reading the political scene, promoted the censure of the magistrates' handling of Peterloo on the grounds that the military should not have intervened in a civil matter. This could not be mistaken as an endorsement of the radical aims of universal suffrage, however, as Fitzwilliam had long established his steadfast opposition to parliamentary reform of any type.[77] While Hunt had advocated for the reform of Parliament as well as the repeal of the Corn Laws, and had ties to revolutionaries, he was not one himself. Like most of the factions advocating for or against expanding suffrage, he positioned himself as a champion of the "true British Constitution" rather than as an enemy of it.[78] Nevertheless he was charged with "conspiracy to alter the legal frame of the government" and attempting to "of his majesty's subjects against the

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75 Foss, *Judges of England,* 258. E. A. Smith, *Whig Principles and Party Politics: Earl Fitzwilliam and the Whig Party 1748-1833* (Manchester University Press, 1975), 378. With Fitzwilliam's blessing, Scarlett stood for election representing the University of Cambridge in 1822 and came in third. He returned for Peterborough. Scarlett, *Memoir* (100), and Henry Gunning, *The Poll for the Election of two Representatives in Parliament for the University of Cambridge*, (W. T. Clarke, Law Booksellers, 1826), 4.
76 Smith, *Whig Principles,* 346.
77 Smith, *Whig Principles,* 346-347.
78 Royle and Walvin, *Radicals and Reformers,* 118-119.

constituted authorities of the state".[79] Scarlett, who held the view that a public right to such reform could not be found in the collection of laws, usages, and practices that comprised the Constitution of England, was tapped to lead the prosecution.[80] The boy from Jamaica who had arrived in England 34 years earlier now stood as a man separated by at most one degree from the strident anti-parliamentary reform figures of Earl Fitzwilliam, and future Prime Minister Canning on one hand, and the leading reformers and radicals in the persons of Bentham, Mill, Place, Burdett, Cobbett and Hunt on the other. There was no question where Scarlett fell among these men. He worked against Cobbett and Hunt in trials for libel and sedition, and in 1827 agreed to be a Whig Attorney General in Canning's Tory ministry.[81] In his second appointment as Attorney General, this time under the Tory ministry of Duke of Wellington, Scarlett drew heavy criticism for what was seen as his over-zealous and vindictive defense of his Tory chiefs against attacks leveled in the press. His efforts in prosecuting the editor of the *Morning Journal* for libel were viewed by many as arbitrary and persecutorial, and the actions cost him favor with the Whigs,

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[79] *Trial of Henry Hunt Jno Knight, Jos Johnson, Jno Thacker Saxton, Samuel Bamford, Jos Healey, James Moorhouse, Robert Jones, Geo. Swift, and Robert Wylde, for an Alleged Conspiracy to Overturn Government Before Mr. Justice Bayley and a Special Jury at the York Lent Assizes, 1820*. T. Dolby, 1820, 5.

[80] Hunt acted as his own counsel, and was convicted of inciting British subjects to hatred of the Government and Constitution of the realm. His sentence was 30 months in prison. *The Trial of Henry Hunt*, 5, 308.

[81] Scarlett, *Memoir*, 206-208. Scarlett details the efforts of those in the Tory party to woo him away in 1826. He was told that the King himself supported a judicial position for Scarlett if he were to quit the opposition (133). Scarlett also served as prosecutor in a libel case against another noted reformer Thomas Wakley, who was a physician, politician, reformer, and creator of the journal *The Lancet.* The plaintiff, a surgeon named Bransby Cooper, sought 2000£ in damages. Wakley represented himself, and was ordered to pay only 100£. Thomas Wakley, *A Report of the Trial of Cooper v. Wakley for an Alleged Libel* (The Lancet, 1829), 146. Bransby Cooper was a friend and physician to Scarlett from at least 1831; Scarlett Memoir, 151. Wakley would also figure in history of the Fatal Accidents Act in 1846.

who saw him out of office when they won the elections of 1830.[82] Writing to Lord Holland, he complained that he had been abandoned, abused, and professionally embarrassed by the curt dismissal, and by being passed over for a position on the Court of the Exchequer when Wellington's Tory government ended.[83] He also found himself ideologically estranged from the new, younger cohort of Whigs that succeeded his Foxite generation. Earl Fitzwilliam had given way to his son, Lord Milton, whose views deviated from his father's. Milton championed the fight for the Reform Bill that eventually succeeded in expanding the franchise, in an incremental manner, beyond the landed gentry in 1832. Milton's efforts to bring Scarlett into the fold on the issue failed miserably, ending with Scarlett speaking in opposition to the measure.[84] With this dramatic flourish Scarlett publicly divorced himself from the Whig party, a move that paid dividends four years later when Tory Prime Minister Robert Peel formed his government and Scarlett finally received a position he deemed equal to his talents: Chief Baron of the Exchequer, and the peerage that accompanied it.[85]

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[82] Roebuck, John Arthur, *History of the Whig Ministry of 1830, to the Passing of the Reform Bill*, *Vol. 1* (Parker and Son, 1852), 324-329. Scarlett, *Memoir*, 116-117. Scarlett was decidedly hostile to the Press, writing in 1830 that "many of the irresponsible ministers of the Press are doing their best to destroy our prejudices in favour of our English forms of liberty" (*Memoir*, 125). That year Scarlett participated in a scheme under the Duke of Wellington to subject even *papers given away* to the stamp tax. Almost all small publications were to be included, and violators would be subject to a fine of 20£ per offense and imprisonment. *Taxes on Knowledge: Debate in the House of Commons On the 15th June 1832, on Mr. Edward Lytton Bulwer's Motion* (National Political Union, 1832), 36-38. In 1831 Scarlett wrote to his son "the press has learnt the secret of its power over the Government. I am very much mistaken if the reformed Parliament is not in the power of the editors"; Scarlett, *Memoir*, 152.
[83] Scarlett, *Memoir*, 134-135.
[84] Scarlett, *Memoir*, 142.
[85] Peel is considered a progenitor of the modern conservative movement rather than an agent of the old Tory establishment. Obviously, Scarlett's excess in punishing the *Morning Journal* in defense of Peel's predecessor did not harm his future with the Tories.

Lord Abinger

Just as with Peterloo, the timing of Scarlett's elevation to the Court of the Exchequer and the title of Lord Abinger coincided with events that would soon provide him a role in another pivotal moment. It was precipitated by the last major act of the Whig government under Prime Minister Earl Grey: The New Poor Law. Prior to its passage in 1834, a servant injured in the English workplace was cared for by the local parish under the direction of parish officers who, unlike his or her master, were under both moral and legal obligation to provide assistance.[86] This system had come under intense strain in the early years of the century as a growing population and changing demographics resulted in a twenty-fold increase in rates.[87] After 1834, the New Poor Law controversially enacted efficiencies in a number of ways. A central authority, the Poor Law Commission, was established to manage benefits under the leadership of Edwin Chadwick.[88] A protégé and former secretary of the famous utilitarian Jeremy Bentham, Chadwick was a tireless exponent of centralized control guided by expert bureaucrats supported by statistics, rather than party politicians.[89] Unions of parishes were created to better amortize the

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[86] Simpson, *Leading Cases*, 119.
[87] The New Poor Law was a primary lever that the government used to avert the demographic catastrophe as poor rates skyrocketed and the economy floundered in the turbulent wake of the Napoleonic Wars. Hilton, *Mad Bad*, 22.
[88] Simpson, *Leading Cases*, 123. Various historians give primary credit to Chadwick for masterminding the New Poor Law through the preliminary report on which it was based (Peter Mandler, "Cain and Abel: Two Aristocrats and the Early Victorian Factory Acts," *The Historical Journal* 27, no. 1 (1984): 94.), or to Nassau Senor (Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795-1865* (Clarendon Press, 1988), 243.), or stress their co-authorship (Peter Mandler, "Tories and Paupers: Christian Political Economy and the Making of the New Poor Law," *The Historical Journal* 33, no. 1 (1990): 81).
[89] David Englander, *Poverty and Poor Law Reform in Britain : From Chadwick to Booth, 1834-1914* (Routledge, 2013), 9. Englander contended that despite Chadwick's pretensions to rationality and a scientific approach, he and the other proponents of the New Poor Law started from preconceived conclusions and shaped the statistics to fit their case (12).

costs of medical treatment by eliminating ostensibly redundant contract physicians and by paying the remaining ones less. Treatment was to be offered only in the least hospitable setting possible: the workhouse. Under Chadwick's regime an injured laborer who was not already on the pauper list had to apply to the magistrates for relief beforehand, and was often offered a loan instead, or refused altogether.[90] The practical effect of this scheme was to shift the cost of work place injuries solely onto the worker, although it should be recognized that this was not Chadwick’s goal.[91] Indeed, in his 1842 report on labor in England, Chadwick had argued for shifting the burden from parishes, which could not exert influence on the accident rate, to employers who could. He said, “We conceive that it may be stated, as a principle of jurisprudence applicable to the cases of evils from causes which ordinary prudence cannot avert, that responsibility should be concentrated, or, as closely as possible apportioned on those who have the best means of preventing the mischief.”[92] The charges, he said, could be paid for by an incremental increase in the cost of goods. Until such a system was brought into being, workers deprived of the traditional parish-based remedy for their loss by Chadwick’s Commission had no option but to engage the

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[90] Simpson, *Leading Cases*, 123.
[91] Englander, *Poverty*, 13. Nor was it a Benthamite's natural goal, as they sought an increasing efficiency through aligning the interests of the laborer with what they saw as the common good. Chadwick hoped to accomplish this by incentivizing the 'able-bodied' by making pauperism as unattractive as possible as opposed to a Malthusian view of non-producers (the poor and injured) as an irredeemable drag on the rest of society. In his 1833 report on child labor in factories he demonstrated both a grasp of the problem, writing “One of the great evils to which people are exposed is the danger of receiving serious and even fatal injuries from the machinery…The greater carelessness of the proprietors in neglecting sufficiently to fence the machinery, and the greater the number of accidents, the less the sympathy with the sufferers.” Simpson, *Leading Cases*, 129.
[92] *Report to Her Majesty's Principal Secretary of State for the Home Department from the Poor Law Commissioners on an Inquiry into the Sanitary Condition of the Labouring Population of Great Britain, with Appendices* (Clowes and Sons, 1842), 443. Chadwick’s formulation of the solution to the problem of worker compensation anticipates the German system by 42 years, the British system by 55 years, and the ratification of the American system by 73 years.

civil court system.[93] The Priestley matter was the first of many to flow into the legal sphere by way of this new dynamic in Victorian healthcare.

Abinger's Child: Errors and Omissions

As we have seen, Abinger denied Priestley's claim, and by extension that of almost every other servant against a master for workplace injury, using multiple, unrelated bases. The motivations respectively offered by R.W. Kostal and Michael Stein revolve around an assumed disdain for paternalism, and an "objectively correct" but "selectively applied" political economy.[94] Such arguments beg a discussion of the nature of paternalism in relation to political economy and whether any permutation of the latter can be read into the *Priestley* ruling or detected in anything else that Abinger wrote, said, or did. Stein ascribed political economy to Adam Smith alone, and characterized it as the belief in the "absolute ability of individuals to determine their own employment terms in the benevolent conditions of a thriving laissez faire market" and stated that "by logical extension political economy also condoned replacing home-based charitable relief with degrading workhouses as an incentive to cure poverty."[95] As mentioned above, Stein further claimed that British gentlemen held with its dictates with only "rare exception", and as evidence he pointed to John Stuart Mill's *Principles of Political Economy*, which he said had become "the standard text for students".[96] Stein even interjected the

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[93] Ken Oliphant agrees with this assessment, stating "The first tort actions may therefore be seen as in a sense a move to fill a gap in a protection which had formerly existed Ken Oliphant, "Tort Law, Risk, and Technological Innovation in England," *McGill Law Journal* 59, no. 4 (2014): 832.
[94] "Objectively correct" and "selectively applied" are mutually exclusive in terms of an ethic for which the key characteristic is an assumption of equality of actors.
[95] Stein, *Victorian Tort*, 934.
[96] Stein, *Victorian Tort*, 967.

term “political economy” directly into the Abinger’s *Priestley* ruling, in which it does not appear, implied or otherwise.[97] Finally, Stein contended that Abinger’s public statements and political speeches clearly demonstrated his adherence to political economy in that he held the master to have no more duty to care for the servant’s well-being than to his own, considered contractual relations to be limited by privity, and supported reform of the Old Poor Law because it “dis-incented industriousness”.[98]

While Adam Smith’s *The Wealth of Nations* may be the common touchstone for the beginning of what became known as “political economy”, it was hardly the last word on the subject. Indeed, Adam Smith disagreed with later influential political economists such as Thomas Malthus and David Ricardo in that he placed laborers in an esteemed position in the hierarchy of wealth-generators, not at the bottom. Moreover, according to noted historian of the Victorian Era, David Roberts, the core beliefs of political economy were *laissez-faire*, free trade, small government, and discipline of the poor.[99] The second and third of these are permutations of the first: *laissez-faire*. The ideal of *laissez-faire* predated political economy and was shared, for different reasons, by paternalists. *Laissez-faire* for political economists meant non-interference in capitalistic endeavors by the government in the form of taxes, price controls, regulations, or the courts. *Laissez-faire* for paternalists meant a free hand in their local spheres of power, and according to Roberts it was paternalism, not political economy, that was the dominant British social ethic in 1837, the year *Priestley* was decided.[100] John Stuart Mill’s text would not be published for another 11 years, in 1848; 4 years after Abinger’s death. Antithetical to political

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[97] Stein, *Victorian Tort*, 947.
[98] Stein, *Victorian Tort*, 967.
[99] Roberts, *Social Conscience*, 79.
[100] Roberts, *Social Conscience*, 9.

economy, paternalism constructed society as authoritarian, hierarchic, organic, and pluralistic. Power and governance derived from real property, while factories were houses of bondage.[101] Poverty flowed from individual failings, and the harsh outcomes it produced were useful tools in teaching deference, which was crucial to the maintenance of the hierarchy.[102] As Hilton has written, postmillennial evangelical paternalists supported the poor law reform that came to be because it incentivized atonement for sins, not because it encouraged the poor to improve their station within a free market. These paternalists allied with utilitarians and bottom-line-oriented landed gentry to bring about the New Poor Law. Although the bill was introduced by the political economist Lord Althorp, he made it clear he believed that it was entirely inconsistent with that doctrine.[103]

The same is true of the legal barriers which the Barons of the Exchequer would later erect on *Priestley*'s legacy to block servants and workers from realizing any compensation for workplace injuries. In an era in which contract was sacrosanct in the legal sphere, the absence of one between servants and masters that established the bargains necessary to rationalize Abinger's ruling posed a problem for the judges who sought to cement *Priestley* as precedent, and expand upon its base. In an inversion of Abinger's argument, they were forced to assume an implied contract existed between master and servant, and one that they could construe to benefit only the master. This runs afoul of any "objectively correct" notion of political economy. In theory, Liberal political economy and laissez faire were about government non-interference in a self-regulating market economy in which rational agents were free to negotiate toward the true value of products and services. As such, the notion of an implied contract between master and servant

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[101] Roberts, *Social Conscience*, 31.
[102] Roberts, *Social Conscience*, 33.
[103] Roberts, *Social Conscience*, 109.

pertaining to the dangers of employment presented the judges with three possibilities of equal validity: either the relationship was one in which the employer indemnified the servant for any injury on the job, or that the risks were apportioned between the two parties on some basis, or that all of the risks were assumed by the servant. The Barons, led by Lord Abinger, used untested assertions about the attitude and knowledge of the servant to justify consistently enforcing only the last view while marginalizing the employer's responsibility with almost no explanation, and certainly no recourse to political economy. Conspicuously, they did not delve into the psyches of the masters as to what they knew or might be expected to contribute to the bargain beyond wages and the duty to select competent agents. While *laissez-faire* called for minimal governmental intervention, the Barons actively and unilaterally invented multiple new and invasive doctrines, imposing them ruthlessly to the exclusive benefit of the propertied class. Where Liberal political economy insisted free-market agents were free to bargain, it said nothing about workers presumably possessing infinite foresight into every danger. Neither did it explain why the negligence of one party to a contract, the employer, was weightless in the presence of any negligence on the part of the other party, the servant, or why juries were not to be trusted. At the same time Scottish judges, presumably no less privileged nor immune to the trappings of political economy, were resolute in placing upon the employer a primary obligation to protect his employees from faults of machinery or fellow workers until the House of Lords reigned them in.[104] Finally, a review of Abinger's speeches and letters does not uncover evidence of a political

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[104] Fall, *Employer's Liability*, 32. For there to be a contract there has to be a "meeting of the minds". In other words the parties must understand and agree to the terms. This means that in order to apply an implied contract judges must contend that they can infer the mind of the parties through logic, or custom, or must apply some principle of public policy (64). The English judges gave their reasoning for their interpretation of the implied contract between servant and master in terms of suspect logic cloaked in phrases like "naturally" and "no one can doubt". They did not

economist. In seven speeches on the New Poor Law, he expressed support for central control based on its promised efficiencies, but made no mention of political economy or paternalism.[105] In his speech to the 1839 Leicester Summer Assizes, Abinger held up the paternalist conception of *laissez-faire*, not the political economist version.[106] In his speech at the Cheshire Special Commission in 1842 he did not see master and servants as equal and rational actors, as Kostal implied, but explained that the industrious classes could not participate in government because their "infirmity of judgement" rendered them incompetent to judge the "principles or rights of property", or even the "questions in which their own prosperity is involved".[107] In his charge to the grand jury of Lancashire on the relationship between labor and capital that same year Abinger had every opportunity to veer into a discourse on political economy and its imperative of minimal government, but instead argued only against a government influenced by the working, meaning unpropertied, classes.[108] Further, the phrase "political economy" makes no appearance in Abinger's memoir of his personal, professional, and political life. As for Kostal's assertion that *respondeat superior* was the product of paternalistic thinking, there is no logic to support this interpretation. It was not part of a pact between employer and employee for benevolent indemnification, as the servant may have been held liable as well. And the relationship of the master to the injured party was not necessarily one of social superior to inferior. In fact, it was closer in its basis to individualistic political economy in that it was formulated according to the perpetrator's role as an agent working for the benefit and profit of

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admit a public policy basis, other than to say allowing victorious judgments would beget more actions.

[105] HC Deb. (3d ser.) (14 May 1834) (23) cols. 996-999.

[106] Scarlett, *Memoir*,173.

[107] Scarlett, *Memoir*, 176. This is a striking contradiction of his evaluation of a servant's ability to judge the safety of the workplace in *Priestley*.

[108] Scarlett, *Memoir*, 190.

his master, and in the eyes of the law, acting as the master's other self. For all these reasons, Kostal's and Stein's assertions of Abinger's motivation do not accord with the historical record.[109]

W. R. Cornish claimed that Abinger's ruling was framed around his intention of preventing an expansion of *respondeat superior* to contractors. This argument is clearly invalid, however, as Abinger's *reductio ad absurdum* includes situations in which the person causing the injury is a direct employee of the master, and as Cornish agreed, the progeny of *Priestley* were the fellow-servant defense, assumption of the risk, and comparative negligence. All of these apply equally to direct servants as they might to contract employees. Accordingly, a survey of master-servant tort cases decided in the wake of *Priestley* does not demonstrate any effort to distinguish servants from contractors along the lines Cornish implies. Cornish added that the fellow-servant rule arose out of some sort of policy decision related to the protection of "developing industry".[110] Although such rationalizing arguments have attended the convention in hind-sight, especially in the American context, this is not a viable candidate for its inspiration.[111] Priestley was the servant of a butcher, not a factory worker. No mention of factory work was made by Abinger in the ruling; only the work of those traditionally serving the landed gentry.[112] Indeed, only a fraction of the British economy was engaged in industrial endeavors in 1837.

T. Ingman's contention that Priestley was decided on the issue of an implied contract that absolved the master; i.e., assumption not just a particular risk, but of all risks of employment, is

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[109] Simpson. *Leading Cases*, 109.
[110] Cornish, Law and Society, 1019. It is odd that Cornish's compendium fails to mention *respondeat superior*, as many legal writers in the 19th and 20th centuries recognized Common Employment as a striking exception to this rule.
[111] American Supreme Court Justice Oliver Wendell Holmes considered Shaw to have been responding to the "felt needs of his time" in his ruling in *Farwell*. Ursin, "Holmes", 550.
[112] Kostal notes this point as well. Kostal, *Railway Capitalism*, 265.

inconsistent with Abinger's statements that knowledge of a defect in the van by the master may have made him liable to his servant, and that the master was bound to provide for the safety of the servant, subject to limitations.[113] Abinger followed this with an exercise weighing hypothetical employees' knowledge of the dangers they may face against those of their hypothetical masters and pointing out that an employee need not accept the risk of a given task. By affirming some duty of care on the part of the master, and comparing the knowledge of master and servant in terms of avoiding injury, Abinger's stated reasoning rules out the notion of a contract in which the employee's acceptance of a task per se barred recovery. Under such a contract the liability question would be independent of the master's knowledge, as no duty would exist.

Likewise, if A.W.B. Simpson's vague attribution of the ruling to "individualistic notions of fault" is to be construed as a finding of causative responsibility on Priestley's part, it is not supported by Abinger's text. Although Abinger spent a portion of his decision speculating about the knowledge and alternative actions available to servants in general and Priestley specifically, he did not conclude that the case must fail because Priestley had been shown to be personally at fault for his injuries. Indeed, just as he noted his lack of available detail in regard to Fowler's knowledge of the defect, Abinger could not rely on any finding from the trial judge or jury as to Priestley's knowledge, and he could pose no questions to Mr. Fowler or Mr. Priestley. Instead, he provided two distinct policy bases: his interest in shielding masters from the burden of a general liability to their servants, and his conjecture that the cause of safety was better served by the

[113] That duty on the part of the master was limited to the care "he may reasonably be expected to do of himself", "to the best of his judgment, information, and belief". Kenny, *A Selection*, 89.

vigilance that only a lack of legal recourse would promote in servants. Neither basis is traceable to a "principle of law", as Abinger implied.[114]

Let the Master Answer

Blackstone affirmed the precedent of *respondeat superior* in the first volume of his *Commentaries on the Laws of England*: a master "may frequently be answerable for his servant's misbehaviour, but never shelter himself from punishment by laying blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong".[115] In *Priestley's* new framework the servant was placed in a superior position to his master in as far as knowledge and liability were concerned, and Abinger had given the impression that it might have been more just for the master to sue the injured servant for allowing his own injury to occur. Abinger made no mention of *respondeat superior* in his ruling, nor did he provide any legal explanation as to why the identity of the victim, or his employer, should nullify the precedent. What then of Abinger's failure to address

[114] Kostal recognizes this and rationalizes it by contending Abinger was deciding the case on "general principles", i.e. social policy reasons; Kostal, *Railway Capitalism*, 263. Certainly Kostal's identification of a policy basis relative to paternalism or political economy is not valid. The only policy basis supported by the text of the ruling is to shield masters from a class of liability which Abinger mistakenly considered to be novel.

[115] Blackstone, *Commentaries*, 432. In the trial, the defense attorney argued the case had no precedent by comparing it to situations of common carriers or coach-proprietors. The trial judge did not accept his proposition, but could not himself cite the previous case law "Priestley (Chas.) v Fowler (Thos.)." The principle of *respondeat superior* is also mentioned in other master-servant cases in different courts in England and Scotland after *Priestley*. See "Degg v Midland Railway Company," *The Bristol Mercury, and Western Counties Advertiser*, January 17, 1857, and "The Action Against the Police Commissioners," *The Glasgow Herald*, Jan 25, 1895, in which it is agreed by the Scottish court that *respondeat superior* applies to master and servant relations.

respondeat superior in his ruling at all? R.W. Kostal infers that Abinger was in fact cognizant of the maxim, and appears to rely on two indications in the Murphy & Hurlstone account of the hearing. The first one is in the text of the oral arguments in which the plaintiff attorney, Sarjeant Goulbourne, compares the duty of Mr. Fowler to Mr. Priestley to that of a coach owner to his paying passenger. The passenger represents a "stranger" rather than an employee, and so evokes the post-*Priestley* distinction of a master's duty to his employee versus his duty to a stranger, which was clearly a matter of *respondeat superior*. However, the argument Goulbourne makes is framed in terms of the contract of the passenger with the carrier, and he was arguing that a servant such as Mr. Priestley also has a contract for his travel in Fowler's van, for which he paid with his services. This was clearly not a reference to *respondeat superior*, as that maxim did not require contractual relations. This exchange gave rise to the second indication Kostal relied on: the sentence in Abinger's ruling that states "In truth, the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself", which Kostal mis-read as a reference to a paternalistic pact which Abinger was determined to break.[116] Of course, Kostal's supposition was also contradicted by Abinger's statement at the outset of his ruling in which he claimed the case was one of "first impression", and Kostal did not attempt to provide an explanation as to why Abinger wouldn't have been explicit in referencing *respondeat superior* if he had been aware of it.[117]

[116] Kostal, *Railway Capitalism*, 264.
[117] Francis Stack Murphy and Edwin Tyrrell Hurlstone, *Reports of Cases Argued and Determined in The Court of Exchequer, with A Table of the Names of Cases and a Digest of the Principal Matters* (Henry Butterworth, 1837), x2.

In parsing the text of his decision, it is curious that on one hand Abinger couched his arguments in *Priestley* so strictly in the context of servants and masters without touching on a master's liability when the identity of the victim was that of a member of the general public, but on the other hand it is almost impossible to believe that Abinger was cognizant of *respondeat superior* and yet chose to dispose of it without any discussion for the record. Was he consciously trying to obscure the issue, or did he simply fail to do his due diligence in the case? I argue that the evidence supports the view that Abinger was in fact ignorant of *respondeat superior*, and relied on his personal "store of knowledge", his excessive self-esteem, and his biases to decide the case. To this point, we are provided with telling insight by Abinger's account of his legal education and practice. Repeatedly referring to law as a "science", Abinger recalled reading the text of cases from Connyer's Digest as a law student and imagining himself in the judge's place:

> "As I grew more familiar with the principles [of law] which I gathered up as I went along I became bolder, and after reading the statement of the case and the arguments of the counsel on both sides with great attention, I laid aside the book and endeavored to apply my own store of knowledge to solve the question, by giving judgment on the case…At length I was overjoyed to find that I was right in the majority of instances, and what might have been a source of vanity to me, I generally found that I had hit upon the same system of reasoning as Mr. Justice Buller had adopted in his judgment. This of course gave me a high idea of that learned judge's superiority in legal learning and acuteness. This practice has been of great use in giving me the early habit of reflecting upon the principles and rules of the law, and applying them to new cases by my own reading; and I may here observe, what long course of experience has taught me, that the lawyers least to be depended upon are those who are in constant pursuit of cases in point [existing precedents] to govern their judgment, and who, therefore, seldom have sufficient knowledge of the principles to judge for themselves."[118]

In his professional career at the bar, his belief in his own intellect and mastery of the "principles" of law continued to supersede all else. Echoing the pride he felt so many years earlier when he bested his brother in math contests through the expediency of skipping the

[118] Scarlett, *Memoir*, 45.

formal process and announcing the result from his own inner calculations, Abinger considered the drudgery of reviewing case briefs in detail as unnecessary. Describing his method at court he wrote:

> "To make myself master of the points in each [case] by reading them was impossible. As to the law and the decided authorities I came well prepared, and required no study. The mode I adopted to obtain the facts was to interrogate the attorney when he came with his brief what was the fact in his own case on which he mainly relied. Next what he supposed his adversary's case to depend upon. Having made a short note of his statement on the back of the brief, I proceeded to discuss the appeal without further instruction or meditation, and I believe I may safely say that I did not read one brief in ten in the most important cases in which I was concerned at quarter sessions. In like manner, when I began to lead cases in the superior Courts, it was my practice to enquire of my junior counsel what were the points in the cause on both sides, and to make a minute of those on the back of the brief."[119]

Abinger's deficiencies did not escape the notice of his contemporaries. A contributor writing for *The Law Magazine, or, Quarterly Review of Jurisprudence* on the occasion of Abinger's death mixed laudatory phrases about his renowned career in the northern circuit as a litigator with an otherwise damning personal and professional critique, saying of Abinger:

> "Great success of course produced the defects which usually follow it, particularly where there is no lack of vanity in the original construction of the man; and those of Lord Abinger, when at the bar, seemed frequently to proceed from over-weening reliance on himself and contempt for his adversary. It was this, more than anything else, that led him into those extraordinary departures from good taste, which now and then, though but rarely, marked his career…In his later days, we think, this fault of an overbearing and contemptuous manner towards inferior antagonists must have grown upon him. It was painfully conspicuous in his conduct of the government prosecutions for libel as Attorney General…his singular sagacity and good sense compensated for the want of that thorough familiarity with legal detail which, in fact, he never attained…Though he had acquired much legal knowledge, he had no legal learning, properly so called, and did not particularly appreciate it in others…he never, so far as we know, went below the surface of a constitutional question, or employed his energies upon them, or appreciated such refinement."[120]

[119] Scarlett, *Memoir*, 62.
[120] *The Law Magazine, Or, Quarterly Review of Jurisprudence*, *Vol 1*. W. Benning and Co., Law Booksellers, 1844, 155, 156, 153, 160, 161.

The writer, who described himself as a lawyer and signed the essay H. M., demonstrated detailed first-hand knowledge of Abinger's professional career. Although H. M. allowed that Abinger had displayed some high qualities, he "was very far indeed from realizing the ideal of Judicial excellence."[121] According to H. M., the end result was a lack of legacy. Abinger, he maintained, had left "no single effort of eloquence or argument…not even a speech worth the paper on which it is printed…no series of judgements of sufficient importance to keep alive his judicial reputation."[122] Writing in 1844, H. M. could not have guessed at the import Abinger's decision in *Priestley* was later to assume.

Interstitial Space

The *Priestley* ruling was messy. It ignored an applicable precedent, had five separate statements and/or justifications, appeared to contain no unifying rationale, strayed significantly from the facts of the matter, and could not be reconciled with any existing legal principle.[123] As American Justice Benjamin Cardozo wrote in his 1921 address to Yale law school students, a judge must rely on himself and his understanding of larger societal goals when a matter before

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[121] *The Law Magazine*, 167. Abinger's entry in Foss' *The Judges of England with Sketches of their Lives* concurred: "His reputation as a judge did not equal his fame as an advocate. He had too much the habit of deciding which of the two parties in a cause was right, and arguing in his favour; while juries, who had been accustomed to be led by his pleadings as a counsel, refused to submit to his dictation as a judge. The consequence was that he frequently lost verdicts which, had he shown less bias, would have been conformable to his opinion." Foss, *The Judges of England*, 260.
[122] *The Law Magazine*, 160-161.
[123] Abinger's statements and justifications include that Priestley could have refused his task, the master's duty to safety exists but is limited to his best judgment, the relationship between master and servant does not imply a contract of liability on the part of the master, servants know the dangers they face better than masters, a servant's vigilance is the best tool to safeguard his body and his master's property, and a ruling for Priestley would open the door for an avalanche of absurd actions against masters in which servants harm other servants.

him falls in the interstitial spaces between existing statutes and precedents.[124] That is exactly where Abinger believed he had found himself in 1837, and the space could only be filled with Abinger's internal logic and biases. If Abinger's purpose could not be found in legal principle, or blithely assigned to stock explanations for Victorian behavior such as political economy, and bore no relation to paternalism, philanthropy, charity, self-help, religion, or radical politics, where did his true interests lie? As it happens, two other notable episodes in Abinger's life in which his passion overrode decorum and good judgment are illustrative of his convictions. While the ruling in *Priestley* appears disjointed and without a unifying theme when viewed in isolation, the result becomes part of a coherent pattern in consideration of these events.

The first episode was Abinger's, then Sir James Scarlett, decision to break with the Whigs in 1831, to do it in adherence to a specific principle, and to do it publicly in the midst of Parliamentary debate during which he argued against a Bill he knew was of supreme importance to his Party. Scarlett's action severed him from his long-time political benefactor and put him on the losing side of a central issue in British life. Certainly, Scarlett had not shown himself to be a rigid conservative ideologue up to that time.[125] As mentioned above, he admired Romilly, and agreed with him on criminal justice reform and slavery. His first reaction to the French Revolution was one of relief rather than revulsion.[126] However, for Scarlett the prospect of enlarging the British electorate inevitably meant an unacceptable violation of the one political position he held above all others: the inseparability of power and property. In response to a

[124] Cardozo, *Judicial Process*, 69, 75.
[125] At first Scarlett was considered a moderate Whig. Foss, *The Judges of England*, 259.
[126] Only after the excesses of the regime were made apparent did Scarlett inveigh against it. Abinger was more concerned with the threat of American-style democracy. Scarlett, *Memoir*, 55.

private letter from Lord Milton in 1829, Scarlett made his opinion clear on Parliamentary Reform:

> "The House of Commons, constituted as it is, affords a voice and a hearing to every class of opinions in the country, and above all to the minority; which notwithstanding the paradoxical length to which the late Mr. Wyndham pushed the argument, does in general comprise the best informed and most intelligent of the community Whereas, a uniform system of election would tend to confine the representation to the majority, and would exclude many classes, unless the scale of qualification descended so low as to approach universal suffrage, which would then lead to another objection, which is, that I can never approve of any system of representation that takes from property the power and influence necessary to protect it. I hold it as a maxim, that any Government which tends to separate property from constitutional power must be liable to perpetual revolutions. For power will seek property and always find it. The separation is a source of perpetual agitation till they unite. Now it must be owned that the mode in which property and power are combined in our present system presents many anomalies and many specious objections. But I am not sure that the disguised and irregular mode in which that connection now exists is not more useful and less odious, upon the whole, than a more obvious and systematic connection would be. At all events, I think it would not be worth the while to substitute an untried system, upon mere grounds of theoretical advantage, for providing the same connection in another form. Can the reason of man make any thing perfect? Does not the most perfect form of organized matter, the work of the most consummate artist, exhibit unsightly parts which are as essential to its functions as the most beautiful? What more can be effected in the conflict of human passions and interests, than a compromise of what is desirable with what is possible?"[127]

Scarlett allowed that he was, however, amenable to minor reform in terms of the redistribution of representation from small towns to large ones. Lord Milton attempted to mollify Scarlett, assuring him that their ideas of reform were similar. However, Milton said, he was more concerned for the "good will of the house" and the ultimate preservation of the Constitution than the exact extent of reform.[128] In July of 1830 Milton wrote again, raising the stakes:

[127] Scarlett, *Memoir*, 141-142.
[128] Scarlett, *Memoir*, 143.

> "I must earnestly beg that you will continue to support any general propositions that may be made or any details that are not manifestly absurd. The two questions I allude to are Parliamentary Reform and the Corn Laws. On the former, I consider that if not actually engaged *as a party* there are scarcely any of the whigs who are not agreed to support the general proposition and some measures of detail- such as John Russell's motion about Leeds, Birmingham, and Manchester."
>
> and
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> "If I were not to press those two points, I feel that the public might suspect that we were not thoroughly sincere in our professions upon them, and I know as I am sincere I think I have a claim to make such stipulations as will secure me from suspicion, and tend to promote objects to which I attach great importance."[129]

The pressure on Abinger to accede was considerable. Nevertheless, in December of 1830 Scarlett delivered a speech to his constituency in Malton, a post he owed to Milton's family, in which he publicly stated his positions as drawn out in his private letter to Milton the previous year. In March of 1831, Lord Milton, alarmed by what he implied were rumors that Scarlett intended to vote against the Reform Bill, wrote to cajole him and make sure "this foolish story" was untrue. Milton suggested Scarlett try any amendments to the measure he liked as long as he voted for it in the end, regardless of their passage. Scarlett replied that if the Bill did not come out of committee with extensive alterations, he could not support it.[130] In the debates that followed Abinger not only voted against the bill, he publicly denounced it, and then immediately published his arguments as part of an open letter to Milton, and triggered his acrimonious resignation from the Whig Party after 20 years of membership.[131]

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[129] Scarlett, *Memoir*, 145-146.
[130] Scarlett, *Memoir*, 149.
[131] Abinger wrote in his memoir that he "valued the friendship and connection with Lord Fitzwilliam and his family at a higher price than any office". Scarlett, *Memoir*, 147. *The Law Magazine*, 162-163.

The second event began in the fall of 1842 when Abinger was tapped as head of a Special Commission overseeing the prosecution of participants in unlawful meetings, riots, and work stoppages the previous summer in Cheshire and Lancashire counties where Chartist involvement was known to have been a factor. As historians Dorothy Thompson and Chris Vanden Bossche have written, Chartism began when a small group of reformers submitted what they called the People's Charter to Parliament in 1838.[132] The six demands it contained included voting by secret ballot, annual Parliaments, equal representation, salaries for members of Parliament, the elimination of the property requirement for election, and most importantly, universal suffrage among men. The Chartists became prolific and relentless in petitioning Parliament with their grievances, and as their influence grew they began to have internal debates about the best method of action. As a movement they believed in legislative solutions to societal problems, but a growing segment of members also entertained methods of physical force and disruption to achieve change.[133] The elite press characterized Chartists as mindless mobs who would destroy the nation and themselves, while the Chartists claimed to be restoring a universal suffrage that had been stolen after the Norman conquest by the same Parliamentary factions that opposed them now.[134] The accused in 1842 were suspected of being part of mob actions instigated to augment strikes that were taking place across the country through, among other things, intimidating workers who might otherwise have gone to work in the local mills or coalfields. The prisoners were brought before Abinger in a

[132] Dorothy Thompson, *The Chartists: Popular Politics in the Industrial Revolution* (Pantheon Books, 1984). Chris Vanden Bossche, *Reform Acts: Chartism, Social Agency, and the Victorian Novel 1832-1867* (Johns Hopkins University Press, 2014).
[133] Thompson, *The Chartists*, 1.
[134] Vanden Bossche, *Reform Acts,* 33.

Special Commission of the Cheshire Assizes where he addressed the grand jury members assembled to pass judgment on the men. In part, Abinger said:

> "we cannot view without emotions of compassion the situation of the industrious classes, who, not having a competent knowledge to form a judgment of their own as to the principles or the rights of property, or upon the questions in which their own prosperity is involved, imagine that they can by force and violence dictate terms to their masters."[135]

Abinger then explained to the jury that "the manufacturing classes have been of late the dupes" of the Chartists, and launched into a lengthy discourse on the evils the Charter would entail, particularly that:

> "What a strange effect, then, would the establishment of a system of universal suffrage produce; for under it every man, though possessing no property, would have a voice in the choice of the representation of the people! The necessary consequences of this system would be, that those who have no property would make laws for those who have property, and the destruction of the monarchy and aristocracy must necessarily ensue."[136]

Again, in Lancashire, Abinger pontificated on the same issues that had moved him so strongly. The press were outraged.[137] The editor of *Bell's Life in London and Sporting Chronicle* complained that "The people of this country look to the judicial seat for law and not politics", and that while they denounced the perpetrators involved, they could not

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[135] Scarlett, *Memoir*, 177.
[136] Scarlett, *Memoir*, 178.
[137] Abinger must have known the peril to which he was exposing himself. Writing about criminal jurisprudence in the eighteenth century, historian Douglas Hay observed that judges were bound to strictly observe the rights of the accused, and a judge "leaning against the prisoner" was good grounds for a pardon, for legal counsel to the defendant was not allowed in felony cases. Sir John Hawkins noted "in courts of justice, the regard shown to offenders falls little short of respect...it is an exercise of compassion that costs nothing, and is sure to gain the applause of vulgar hearers"; Hay, *Albion's Fatal Tree*, 32.

"look with satisfaction on their trials being preceded by a political homily from the man whose office it is to judge them by what is the law, not by what might be the consequences of another form of law."[138] *The Morning Herald* likened Abinger's comments to those of "political controversialists" and said that "The Lord Chief devoted but small portions of his addresses to an exposition of the law; he rushed at once to political considerations, indulged in disquisitions on the tenets of 'a kind of men called Chartists' – declaimed against democracy generally -- declared the adoption of the Charter to be the equivalent to the destruction of the monarchy – suggested that the Government was most lenient in not instituting indictments for high treason in many of the cases to be tried."[139] *The Morning Advertiser* called Abinger's charges in Chester and Liverpool "a disgrace to the Bench" and a "liberticide harangue".[140] *The Macclesfield Chronical* condemned Abinger for his "bigotry and violence of language".[141] The debacle culminated in the House of Commons in 1843 when Chartist politician Thomas Duncombe rose to demand an inquiry into Abinger's conduct. Abinger, he said, had discharged his duty in a partial, unconstitutional, political, and oppressive manner at the expense of those who had been brought before him, and had "failed in the duty which attached to him as a judge, of being counsel for the prisoner, not an advocate for the Crown."[142] Duncombe went on to describe Abinger's attempts to sway the verdicts, and being successful, the harsh sentences he applied. In contrast of this, Duncombe praised

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[138] "Lord Abinger's Charge," *Bell's Life in London and Sporting Chronicle,* October 16, 1842, 2.
[139] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1040.
[140] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1041.
[141] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1041.
[142] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1060. The centrality of his duty has been outlined by Douglas Hay. See note 135.

the conduct of Justice Tindal at Stafford, who had given no political speeches, and had gone so far as to nullify the local Sheriff's order barring Chartists from the courtroom, saying "Throw open the doors immediately. We know nothing of Chartists here."[143] The Attorney General, Sir Frederick Pollock, rose to defend Abinger. Pollock could find no fault in Abinger's charges, and praised him as "one of the brightest ornaments" of the profession and that as a judge "none had brought more temper, abundant learning, acuteness, and ready adaptation of those qualities to the bench."[144] After much debate the inquiry was denied by a vote of 228-73, which drew more attention from the press. *The Political Examiner* ran an editorial mocking those among the House who they saw as duplicitous apologists for Abinger's conduct, saying "we fancied we had one faulty Judge and a dozen good ones. We find out we have one pattern of judicial perfection, and we see that the others have not the slightest resemblance to him."[145]

There was, in fact, a central organizing factor that connected Abinger's otherwise disconnected statements in his *Priestley* decision, and which connected *Priestley* to his resignation from the Whig Party and to his speeches in the Cheshire and Lancashire Assizes. In all three events Abinger defined the competing interests in terms of their identities as the propertied and the unpropertied. In each episode Abinger conspicuously, almost flamboyantly, exceeded his mandate while focusing on a singular belief: that the separation of power from property was an existential threat to British governance, therefore a danger to the best hope for liberty in the world. In each case he acted

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[143] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1047.
[144] HC Deb. (3d ser.) (21 Feb. 1843) (66) col. 1087. Pollock succeeded Abinger as Chief Baron of the Exchequer upon his death the following year.
[145] "The Model Judge," *The Examiner,* February 25, 1843.

accordingly to preserve that sacred relationship. He forfeited his hard-won generational political ties rather than cast a vote to dilute the political power of the propertied in 1832, even when his vote would not have made any difference. Ten years later he courted professional censure by delivering lengthy, vitriolic, and wholly unnecessary discourses from the bench railing against the Charter, and its promise of an even more comprehensive danger to property, universal suffrage, in two Special Commissions. Between those events, in 1837, Abinger appended a fictitious fact pattern to his ruling in *Priestley* so as to allow him to fashion a rule that protected property from what he saw as a new and potentially pervasive threat from the unpropertied under common law: tort liability actions brought by servants against their masters. Allowing unpropertied members of the laboring classes to extract capital from their masters on their own terms was, by Abinger's calculus, to separate power from property, and so threaten liberty itself.[146] Abinger's motivation in deciding *Priestley* was bound up in his devotion to his personal conception of England, which for him was indivisible from the holy trinity of property, monarchy, and the aristocracy. In this he aligned closely with certain aspects of Throne and Altar conservatism, and with cultural theorists such as Edmund Burke, who

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[146] Writing about criminal law, the growth of death penalties for crimes against property, and the English gentry's aversion to a standing police force, historian Douglas Hay has argued that the propertied classes felt relatively secure from external dangers. After all, they had large numbers of servants to safeguard their property and families. "Their problem was not attack from without but disloyalty within their houses". Hay identified the greatest vulnerability of the gentry to financial loss was from theft of their land, which had been addressed by increasing the number of statutes for various financial crimes. Abinger's decision in *Priestley* can be viewed as recoiling from adding to this vulnerability, but his overall motivation cannot be reduced to defending the existing structures of power. To wit, his alignment with Samuel Romilly and against Burke and Paley as a proponent of rational criminal law reform, when the status quo provided a more useful lever for control of the lower classes. Hay, *Albion's Fatal Tree*, 59.

championed a backward-looking and rigid adherence to continuity, and Sir William Blackstone, in as far as he placed the preservation of property above even life and liberty.

PART TWO

LIFE OF A PRECEDENT

The Victorian Arc

The defining characteristics of nineteenth century British politics, law, and economics were paternalism and political economy, both set within a common framework of a *laissez-faire* ethic that functioned to preserve power relations under either regime. While paternalism was built upon dependency and entailed a reciprocal responsibility of the landed elite to those who lived in their communities and worked on their estates, political economy reduced the analogous relationship of worker and factory occupier to a cash nexus and rationalized the abrogation of social responsibility on the part of factory occupiers through a theory of individualism and self-reliance to be borne entirely by workers. The constant was a general adherence to *laissez-faire*, which in practice did not mean a lack of government as much as a visceral aversion to diminishing the existing power structures. These issues passed through all of the currents that shaped the Victorian world: the fears of revolution, radical politics, demographic upheavals, and riots from 1790-1830, the expansion of the franchise, the end of slavery, the rise of centralized administrative government, the New Poor Law, the Factory Acts, and the rise and fall of Chartism from 1830-1848, and the industrial revolution, second reform bill, rise of trade unions, development of the working class, and the resurgent fears of instability due to the failures of the New Poor Law, the church, education, philanthropy, and charity to conquer persistent social problems from 1848-1897. This is how the histories of the Victorian Era as collectively written by eminent social historians such as David Roberts, Boyd Hilton, E.P. Thompson, Dorothy Thompson, Patrick Joyce, Robert Grey, Eric J. Evans, Chris Evans, Edward Royle, James Walvin, David Englander, Catherine Hall, Keith McClelland, Jane Rendall, and Chris Vanden

Bossche end.[147] However, it was at this moment that the Victorians took the path least expected, and with the most shocking result. Sacrosanct property rights and *laissez-faire* were willingly sacrificed in order to pass a series of socialist Acts to address social problems, and Britain would never be the same again. How and why did this startling transformation occur at this time and what conditions enabled it to take place?

The issue I raise in part two of this dissertation rests at the intersection of at least seven fields of historical study: the social history of the Victorian Era, the political history of the Victorian Era, social history of the Pre-World War I Era, the legal history of tort law, the history of labor relations, the history of the welfare state, and the history of British socialism. Still, even among such a wide historiography, only a few works have touched on the collectivist turn in Great Britain at the cusp of the 19th and 20th centuries. They include social historians Oliver MacDonagh, Jose Harris, and Gareth Stedman Jones and socio-legal historians P.W.J. Bartrip, S.B. Burman, and A.V. Dicey. Late 19th century legal and societal commentator, A. V. Dicey, characterized the period after 1865 as that of the turn away from Benthamite individualism and

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[147] Boyd Hilton, *A Mad, Bad, and Dangerous People? England 1783-1846.* (Oxford University Press, 2006). Patrick Joyce, *Visions of the People: Industrial England and the question of class 1848-1914* (Cambridge University Press, 1991). Chris Vanden Bossche, *Reform Acts: Chartism, Social Agency, and the Victorian Novel 1832-1867* (Johns Hopkins University Press, 2014). David Englander, *Poverty and Poor Law Reform in Britain : From Chadwick to Booth, 1834-1914* (Routledge, 2013). Boyd Hilton, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought, 1795-1865* (Clarendon Press, 1988). Robert Gray, *The Factory Question and Industrial England 1830-1860* (Cambridge University Press, 1996). Chris Evans, *Debating the Revolution: Britain in the 1790s* (I. B. Tauris & Co. Ltd., 2006). Eric Evans, *The Forging of the Modern State: Early Industrial Britain 1783-1870* (Longman, 1983). Catherine Hall, Keith McClelland, and Jane Rendall, *Defining the Victorian Nation: Class, Race, Gender and the Reform Act of 1867* (Cambridge University Press, 2000). E. P. Thompson, *Making of the English Working Class* (Vintage Books, 1963). Dorothy Thompson, *The Chartists: Popular Politics in the Industrial Revolution* (Pantheon Books, 1984). E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books, 1974). Edward Royle and James Walvin, *English Radicals and Reformers, 1760-1848* (The University Press of Kentucky, 1982).

toward collectivism in Victorian Britain. Dicey, a Whig law professor and admirer of Bentham writing in 1905, identified four causes for this transformation: Tory philanthropy and the Factory Movement, the changed attitude after 1848 of the working classes, the characteristics of modern commerce, and the introduction of household suffrage. Dicey contended that the efforts of men like Lord Ashley, who engaged in the fight for improved conditions of factory workers which resulted in Factory Acts in 1833 and 1844, amounted to an unwitting and unintended legitimization of socialist theories in Britain.[148] The new attitude of the working classes Dicey described was the dissolution of the Chartist movement and the subsequent invigoration of trade unionism; a more explicitly collectivist endeavor. In terms of modern commerce, Dicey lamented the passage of power from individual owners of industrial concerns to boards managing corporations which had to obtain certification through the British government. Even so, Dicey did not see any of these factors as constitutive of a great modification to what he termed "legislative opinion".[149] For Dicey, this did not occur until the 1867 Reform Act. Unlike the 1832 Act which promoted the political power of a middle class dedicated to Benthamite common sense, Dicey argued the 1867 legislation was instead an effort guided by and for collectivists. Dicey identified the Workmen's Compensation Act as "a completely new turn" in legislation, and expressed concern with what he saw as the profound legal implication that "The rights of workmen in regard to compensation for accidents have become a matter not of contract, but of status."[150]

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[148] A. V. Dicey, *Lectures on the relation between law & public opinion in England, during the nineteenth century* (Macmillan & Co., 1914), 238.
[149] Dicey, *Lectures,* 249.
[150] Dicey, *Lectures,* 284. I would say he had the case almost precisely backward. It had been Abinger who had invented a fictitious contract based on status in 1837, and the 1897 Act finally resolved the immense social calamity and untenable dynamic that his demonstrably flippant decision created.

Historian Oliver MacDonagh, writing in 1958, considered Dicey's work the only serious effort up to that time which addressed the "catastrophic and very general collapse of political individualism in the last quarter of the nineteenth century" in Britain.[151] MacDonagh set himself the task of developing an alternative to Dicey's thesis which would attempt to explain the change in character of the Victorian state in more historical terms.[152] MacDonagh arrived at a progression based not on ideology, but on an escalation of trial-and-error solutions aimed at persistent social problems. His five steps began with the recognition of an "intolerable evil", followed by legislative actions designed to eliminate or mitigate the associated social problems, recognition that the legislation had proved inadequate, the creation of state agencies to monitor compliance, a further recognition that the evil persisted and an effort to close loopholes in the legislation, and finally the granting of expanded and enforceable regulatory powers to the agency involved.[153] This summed up MacDonagh's model for what he termed "administrative momentum", which accounted for the growth of British government in the absence of collectivist intentions.[154]

Socio-legal historians P.W.J. Bartrip and S.B. Burman, writing about the history of workplace safety and compensation, did not take issue with characterizing the Workmen's Compensation Act of 1897 as "the pioneer system of social security" but argued that because the Act did not greatly alter the financial position of the workers, did not result in dramatically fewer

[151] Oliver MacDonagh, "The Nineteenth-Century Revolution in Government: A Reappraisal," *The Historical Journal* 1, no. 1 (1958): 57, 62.
[152] MacDonagh referred to Dicey as a lawyer and student of ideas, but no historian. MacDonagh, "Reappraisal", 55.
[153] MacDonagh, "Reappraisal", 59-61. A reaction against this process and its attending repository of power to limit capitalist interests for the protection of larger social interests was at the heart of conservative efforts to undermine and eliminate regulatory functions of government, most famously under Thatcher, Reagan, and currently under Trump.
[154] MacDonagh, "Reappraisal", 65.

injuries, and did not increase government intervention, it was an open question whether it could be considered socialist legislation.[155] They asserted that the application of MacDonagh's model to Workmen's Compensation was problematic for several reasons; Was the Act an example of the initial legislative approach, or a later stage of legislative action relative to the Factory Acts? Or an aberration arising from inadequacies in tort law? Moreover, the sequence of government growth MacDonagh predicted could not be detected in the history that unfolded. Administrative intervention had not been the culmination of the observed process.[156] Addressing the views of writers such as sociologists Karl Polyani, and O.R. MacGregor, historian H.L. Beales, and diplomat E.H. Carr, who have argued that collectivist solutions were inevitable responses to industrial life and the trajectory of unbridled individualism, Bartrip and Burman disagreed with that conclusion on the bases that it relied on belief in counterfactual proofs, and their claims that the advent of the Workmen's Compensation Act was evidence in support of this thesis could not be sustained. Far from inevitable, Bartrip and Burman noted, the *laissez-faire* solution for employer's liability might easily have been enacted in a slightly different political environment, and was actually preferred by workers. However, they acknowledged that the provisions of the

[155] Bartrip and Burman, *Wounded Soldiers,* 214, 218. I contend that any Act which directly intervened in business relations by defining a critical part of the contract between capital and labor and enforced a transfer of wealth without due process must qualify, even without state administration. Harold Perkin argued for thinking in terms of a continuum of individualism and collectivism with strict *laissez-faire* (0) on one end and nationalized industries (7) on the other. In Harold Perkin's lexicon, the Factory Acts would be either step 1 or 2 on the scale. The Workmen's Compensation Act 1897, with its interference in contracts, is not represented. Harold Perkin, "Individualism Versus Collectivism in Nineteenth Century Britain: A False Antithesis," *The Journal of British Studies* 17, no. 1 (1977): 105-118.

[156] Bartrip and Burman, *Wounded Soldiers*, 217. Indeed, if the Workmen's Compensation Act 1897 was a later stage related to the Factory Acts, then the sequence was recognition, legislation and inspection, piece-meal expansion of the legislation, increased inspection, new legislation to limit legal barriers, new legislation with no-fault compensation and insurance.

Act which established a responsibility of employers to injured workers and introduced schemes of social insurance served as an inspiration for the collectivist legislation that followed.[157]

In *Private Lives, Public Spirit: Britain 1870-1914*, Jose Harris examined the extent to which post-World-War I Britain should be considered a continuation of the 19th century or if it is better seen as a clear break with what had come before. She acknowledged that "the dichotomy between individualism and collectivism continues to haunt social analysis of the period" and made a case for increasingly pluralistic, contested, and diffuse conceptions of property, as well as the relationship between property and civil rights, as an explanation for the drift from previous ideas of citizenship which had served to insulate Parliament from popular opinion. This diffusion, she argued, weakened the public understanding of government's primary goal as guarantor of property rights solely for individual rather than community aims. In support of this she cited legal decisions and statutory Acts that appeared incongruent with the most conservative interpretations of property and *laissez-faire*. At the same time, however, she joined the critique of A.V. Dicey's position that he had glossed over examples of state intervention in the early Victorian period, and that he had additionally failed to assess these interventions as largely due to technological imperatives bound up with industrial growth and the loss of forms of social control that originated in the paternalistic structures of the past.[158]

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[157] Bartrip and Burman, *Wounded Soldiers,* 219-221.

[158] Harris, *Private Lives,* 11-12. This latter view is echoed by Roberts, and is similar to Polyani, Beales, Carr, and MacGregor, at least as far as Acts prior to 1897 are concerned; Bartrip and Burman, *Wounded Soldiers*, 219. I find that Harris must walk a fine line to stake out these three positions, and sometimes that line disappears. She states that the 1867 Reform Act, combined with legal interpretations which grew the definition of household, the revival of compounding, and the addition of rural labourers to the franchise in 1884 created an atmosphere in which "the mere fact of citizenship increasingly challenged property, moral character, education, and economic independence as the basis of civil rights" (Harris, 13). But of what audience is she speaking? E.P. Thompson's "crowd" at the beginning of the 19th century did not see themselves as without civil rights, nor did an argument relying on newly realized rights lead to the

Gareth Stedman Jones discussed the contemporary reassessment of classical views of economics from 1860-1890 in the face of middle and upper-class fears attached to persistent and pervasive poverty among the lower strata. His point of focus was the casual laboring class, increasingly seen by theorists in terms of a dichotomy contrasting "hopeless loafers" and otherwise respectable, or at least redeemable, souls for whom the degrading conditions of city life had a corrosive effect on their morals.[159] This view led some to the conclusion that the harsh realities flowing from the individualistic ethos could be a root cause of pauperism for many, rather than the path out of it. In any case, Stedman Jones wrote, leaving this fraught issue to the unmanaged hand of *laissez-faire* and charity had proven ineffective. Various interventionist solutions arrived from both the left and right. These included ideas of segregating the casual "residuum" from the rest of society in labor colonies as championed by social commentators Charles Booth, Samuel Barnett, and Alfred Marshall, as well as lip service paid to the notion of public works by Conservatives such as Joseph Chamberlain and Lord Salisbury.[160] Stedman Jones conceded that these sentiments did not surface in any form in Parliamentary legislation, where "political economy easily stemmed the still weak currents of collectivism", and that the casual poor were not converted into ideologues of socialism.[161] He leaves off the topic with the

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Workmen's Compensation Act of 1897. Both the rioters and the workmen saw their rights embedded in their existing sense of themselves as full citizens of the empire, and fought for those rights by citing obligations enshrined in law and tradition centuries before. Even if we narrow Harris' thesis to the assertion that the definition of property rights was becoming more elastic and a once-rigid commitment to individualism was flagging, it does not explain the 1897 Act. Workers built their claim in terms of old rights that had been abrogated by *Priestley*, and in perfect alignment with the most conservative notions of individualism and *laissez-faire.* Bartrip and Burman agree with the latter part of this statement (Bartrip and Burman, *Wounded Soldiers,* 221).

[159] Gareth Stedman Jones, *Outcast London: A Study in the Relationship Between Classes in Victorian Society* (Verso, 2013), 289.

[160] Stedman Jones, *Outcast London*, 297.

[161] Stedman Jones, *Outcast London*, 312, 341.

vague observation that "Once it is seen that these types of proposals were as much an integral part of collectivism as the better-known visions of social security, then the nature of the decline of *laissez-faire* capitalism in the later nineteenth century will be better understood."[162]

I argue that there was a singular catalyzing event for this phenomenon in the form of the first truly socialist legislation in Britain; the Workmen's Compensation Act of 1897. I show that this legislative act was not the result of a culmination of a long-term trend toward socialist remedies for social ills, or of a groundswell of socialist sentiment unleashed by the 1867 Reform Act. In support of that argument I demonstrate that even up to the last vote, the issues at stake could have been settled in a manner wholly consistent with traditional individualistic principles, and that it was the *industrialists*, paradoxically, who pushed through the socialist solution. Once this veil had been pierced, a cascade of previously inconceivable socialist Acts became realities in the succeeding decades. How could this vital thread have been missed by the preeminent scholars of the period? I argue that it is not possible to understand the hard left turn at the end of the Victorian period without an understanding of the legal precedent of *Priestley v Fowler*, and

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[162] Stedman Jones, *Outcast London*, 314. Stedman Jones' analysis struggles as an explanation for "the decline of *laissez-faire* capitalism in the later nineteenth century" in Victorian England on four crucial fronts. First, the unspoken premise is that whatever old calls for socialist solutions to the plight of the lower classes had been circulating, they were newly joined in the 1880s by conservative schemes of intervention, signaling a cross-party paradigm shift in social orientation. However, the interventions proposed in the 1880s arguably do not surpass the 1834 New Poor Law in terms of their apparent abrogation of *laissez-faire*, an Act which famously had conservative support. Indeed, the proposals Stedman Jones described can be viewed as suggestions for tinkering with that landmark legislation that came to nothing. Secondly, any attending concessions to collectivism were considered the lesser of two evils rather than an alternative ethos, and were envisioned as narrowly applied under exceptional circumstances to only the lowest strata of society. Thirdly, Stedman Jones' work is limited to the particular circumstances of non-factory labor in London. Moreover, Jones' analysis does not lead us to any of the concrete changes which penetrated the walls of Westminster and became law in the 1880s and 1890s.

the judge who created it in 1837, Lord Abinger. Neither appear in the dominant cultural histories of the period.

To make my case, I begin with a discussion of the nature of *laissez-faire* and how it functioned in the Victorian Era, before moving on to provide an overview of the policies entailed in the series of Factory Acts enacted between 1802 and 1895 in order to demonstrate that they did not represent progressive steps toward collectivism. I follow this with an examination of the *Priestley* precedent and its successor decisions between 1837 and 1897, as they created and legitimized legal theories which factory occupiers came to view as essential to industry, and which workers viewed as a rank injustice. With this background established, I discuss the efforts of the Trade Unions Congress (TUC) under Alexander Macdonald and Henry Broadhurst, and define the boundaries of the public debates which led to the first successfully legislated attempt to deal with the inequities that flowed from *Priestley*, the Employer's Liability Act of 1880. In the following section I detail the work of the next generation of TUC leadership and the political maneuvering of H.H. Asquith and Joseph Chamberlain leading to the abortive Bill of 1894 and to the successful passage of the Workmen's Compensation Act of 1897. At this point I step back to survey the socio-legal contexts in which worker injuries were addressed in the nations that stood as direct competitors to British commerce as well as other members of the commonwealth: Spain, France, Germany, Prussia, Belgium, Denmark, Switzerland, Italy, Austria, Sweden, Norway, New Zealand, and Australia. I include a survey of major paintings by European artists in the social realism movement which depicted the injured worker in society, before concluding with the experience in America, the only other country to accept the premise of *Preistley*.

Laissez-faire in Victorian England: Ancient and Dominant but Never Absolute

Historian David Roberts has pointed out that the ethic of *Laissez-faire* predated political economy, was integral to paternalism as well, and was never about individual freedom as much as it was about preserving local power arrangements.[163] Under the paternalistic world view that Roberts asserts was dominant up through the 1830s, dependency was therefore not something to be overcome, but the cornerstone of the providential social order. The landed elite controlled the lives of those in their sphere almost down to their every move, thanks to their entrenched positions as the primary source of employment and as givers of law through their titles as local magistrates. This power, however, was accompanied by traditions of responsibility on the part of the property-owner toward his charges. By 1848 the Chartist effort of pressuring Parliament to expand on the Reform Act of 1830 had burned itself out, and the cash-basis of political economy had overtaken and replaced paternalism in the calculations of the Victorian conscience.[164] In this evolving environment the primacy of property rights and the centrality of *laissez-faire* continued. However, citing The New Poor Law, the Factory Acts, and thousands of other acts passed by Parliament, Roberts has also pointed out that there never was a pure *laissez-faire*. Historian Boyd Hilton discussed the New Poor Law of 1834 in terms of the government's effort to reduce financial pressures on the landed aristocracy and post-millenarian evangelicals' hopes of institutionalizing mechanisms for the promotion of moral rectitude among the lower classes through the righteous suffering they endured. Of the apparently tortured relationship between the New Poor Law and historians' notions of liberal political economy and *laissez-faire*, Hilton

[163] Roberts, *Social Conscience*, 79.
[164] Thompson, *The Chartists,* 324, and Roberts, *The Social Conscience*, 90. The definition and privileges of property had expanded beyond land to encompass the industrial wealth.

contended that historians had failed to distinguish between the administrative and social contexts of the phrase. Hilton held that the ostensible chief architect of the Poor Law, the Benthamite utilitarian reformer Edwin Chadwick, was in favor of increasing the centralization of government rather than its overall power over individuals.[165] As Roberts observed, the repeal of the Corn Law was immediately followed by a Drainage Act benefitting landowners in terms of low interest loans. The repeal of the Navigation Act was followed by the interventionist Merchant Marine Act.[166] Even the stalwarts of political economy, John Stuart Mill, Nassau Senior, and J. R. McCulloch agreed on a lengthy list of exceptions from a strict *laissez-faire* economy, including a state-held responsibility for education, public health, roads, harbors, protecting factory children, and more.[167] Roberts rightly saw the exceptions as random, and therefore irresolvable into a coherent theory of collectivism. In spite of the exceptions, however, *laissez-faire* remained the dominant feature of Victorian socio-economic thought.[168]

Paternalism, *Laissez-faire*, and Factory Regulation

Over thirty Bills were passed by parliament between 1802 and 1895 that fall under the broad umbrella of the Factory Acts. The 1802 Act was concerned with clean work areas, fresh air, separate sleeping quarters for men and women, education, religious observance, and defining due process for violators of the act, but most importantly it established the twelve-hour work

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165 Hilton, *Mad Bad*, 590.
166 Roberts, *Social Conscience*, 398.
167 Roberts, *Social Conscience*, 394.
168 Roberts, *Social Conscience*, 404. Alfred Marshall would support this, writing in 1885 that the "Economic institutions are the product of human nature, and cannot change much faster than human nature changes. Education, and the raising of our moral and religious ideals, and the growth of the printing press and the telegraph have so changed English human nature that many things which economists rightly considered impossible thirty years ago are possible now." Jones, *Outcast London,* 9.

day.[169] Short-time advocates were not satisfied, however. As the historian Robert Gray has shown, the Tory evangelical, Lord Ashley, argued for a common ten-hour workday for mill workers across the board as well as the establishment of safer working conditions. In doing so, Ashley injected a strident and popular paternalistic appeal in which he highlighted the plight of women and children as a rhetorical mechanism to push forward this goal.[170] Although Ashley's efforts in this regard did achieve some measure of improvement, the 1833 Act served as a defeat for Ashley's broader program in that it only limited the hours worked by children under eighteen to between nine and twelve hours a day, and even this did not apply to certain industries and tasks. Significantly, the Act said nothing about adult workers, the safety of machinery used in the factories, or who might be held responsible for injuries sustained during the performance of work. Undeterred, and serving as the chairman of the 1840 Select Committee that was charged with reviewing *The Factory Act 1833,* Ashley employed William Dodd, a former child factory laborer, to make a survey of factory conditions in 1841. Dodd reported to Ashley in the form of letters on numerous accidents involving crushed bodies and torn limbs that would have been avoided if the hazards had been "boxed off".[171] Dodd described work practices that required young men, girls, and children to oil and clean machinery while it ran and detailed the maiming and death that too often followed. One such story was that of Mary Bucktrout.

Mary Bucktrout was fourteen years old when she was removing waste flax from around the machine she was charged with keeping clean in Holdsworth's flax mill in Leeds. It was running at the time, but she had been threatened with a fine if the job were not done straight

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[169] Thomas Tapping, *The Factory Act* (Shaw and Sons, 1856), 2.
[170] Robert Gray, *Factory Question*, 9.
[171] William Dodd, *The Factory System Illustrated: in a Series of Letters to the Right Honorable Lord Ashley* (John Murray, 1842), 25.

away. When they finally extricated her from it, the machine had taken her right arm above the elbow and the thumb of her left hand. For this her master gave her 1s and remanded her to the care of her father, who had four other children to care for as well. Dodd quoted Robert Baker, superintendent of factories in Leeds, who spoke of other accidents in which revolving shafts caught the clothing of female workers and then tore them "to atoms".[172] Speaking specifically to questions of responsibility, Baker agreed with Dodd that the responsibility for guarding these hazards lay squarely with the manufacturers. Ashley saw to it that the letters he received from Dodd in which these injuries and opinions were described in detail, were published in 1842. They proved to be a sensational addition to the debate over the Acts, and in some ways too sensational: Dodd's veracity in respect to his own life-story as an ill-treated factory worker was viciously impugned in the parliamentary debates that followed. Nevertheless, Dodd's point was made. Three of the seventy-three clauses in the subsequent *The Factories Regulation Act 1844* addressed the protection of textile workers from some of the hazards of the technology they worked with or near.[173] Mill gearing was not to be cleaned by children or young persons while it was in motion, and power transmission apparatus, located where children or young persons might pass by, were to be guarded while the equipment was engaged in a manufacturing process.[174] The penalty for failing to guard these dangers was not less than 5£ and not more than 20£. In addition, inspectors were empowered to put owners on notice of any machine-related hazard they identified, regardless of the identity of the exposed workers.[175] In the case that the mill owner challenged the inspector's judgment, experts would be engaged to arbitrate. The

[172] Dodd, *The Factory System*, 25.
[173] Tapping, *The Factory Act,* 81. Textiles defined as cotton, wool, hair, silk, flax, hemp, jute, or tow.
[174] Tapping, *The Factory Act*, 44.
[175] Tapping, *The Factory Act,* 67.

penalty ranged from 10£ to 100£ for an injury flowing from a hazard that had been so identified beforehand, up to half of which could be awarded to the injured worker at the discretion of the Secretary of State. Inspectors were able to direct legal suits against employers on behalf of injured workers, but such prosecutions must have been chilled by the personal risk to the plaintiff and inspector in the instance where an action failed in front of the justice assigned to the case, as the Act provided that the employer could counter-sue them for his legal expenses.[176] Writing in 1856, Thomas Tapping, a lawyer and editor of a legal volume of the Acts and cases filed under them, found that the Acts had failed to significantly reduce deaths and mutilations, recording that more than 7,000 occurred annually in the textile industry alone. Roughly half of these were attributed to unguarded machinery. Tapping blamed the ridiculously low fines, the lack of criminal penalties, the legal exposure of inspectors who brought actions against employers, and the ease and frequency with which civil courts blocked judgments.[177] He urged the next session of Parliament to remedy the situation.

Historians have argued about the meanings of the Factory Acts, which to later observers seemed to stand in contrast to the precepts of *laissez-faire* politics. A.V. Dicey viewed collectivism and individualistic liberalism in absolutist terms: any exercise of domestic power by the state was, by his definition, collectivist. He saw the Factory Acts as an extension of the anti-slavery movement for which the motivating sentiments were not collectivist, but which nevertheless served as a battlefield where Benthamite Liberalism "suffered its earliest and severest defeat".[178] In spite of this hyperbolic rhetoric, Dicey simultaneously contended that the Acts did not constitute a "great modification to legislative opinion", but had seeded a future in

[176] Tapping, *The Factory Act,* 52.
[177] Tapping, *The Factory Act,* vi.
[178] Dicey, *Lectures,* 237.

which socialistic ideas could be legitimized.[179] More recent historiography criticizes Dicey for having glossed over a number of complicating issues, particularly the varied forms of collectivism and individualism his analysis failed to distinguish or register.[180]

Robert Gray has written about the impact of industry on the social history of England and, conversely, the social, political, and cultural influences on the industrial landscape. The post-war historiography of the Factory Acts, he explained, was largely a Whiggish construction of gradual and inevitable social progress toward democratization that culminated in a collectivist framework that reigned in the excesses of *laissez-faire*. Gray acknowledged the role of evangelical paternalism, exemplified by the likes of Lord Ashley, but undermined the notion of a simplistic and stable Tory-Radical alliance, and instead focused on working class short-time organizations and characterized the episode as a factor in the making of a working class. He observed that paternalistic rhetoric helped forge alliances across party and ideological lines, and at the same time converged with the interests of those who feminist scholars, such as Wally Seccombe, Marianna Valverde, and Silvia Walby, have considered as standing to benefit from limitations on women and children in the workplace. This attribution of interests is complicated by the fact that the undisputed aim of the short-time legislation was also to limit men's hours, and often the economy that drove worker interests was a family economy. While Gray contended that “The Factory Acts constitute a classic case-study in state intervention in the framework of economic and political liberalism” and in so doing raised the question of the “boundaries of employment contracts”, he did little to parse these issues.[181]

[179] Dicey, *Lectures*, 224, 249. Although Dicey does believe that William Sadler interjected ideas that pointed toward collectivism into the factory act debates. Dicey, *Lectures,* 226.
[180] Harris, *Private Lives*, 12.
[181] Robert Gray, *The Factory Question*, 5, 7, 8.

In her own work on the topic, historian Jose Harris considered the growth of the centralized state throughout the 19th century as not constituting a new collectivism, but rather as a revamping and replacing the older organs of societal control and management that were found wanting in view of new market forces. This assessment is consistent with historian David Roberts' consideration of the topic in his *The Social Conscience of the Early Victorians* (2002). Roberts stated that the primary forces impelling the growth in government were the familiar ones: population growth, industrial revolution, and urbanization. Roberts pointed out that by the 1850s there were inspectors of railways, steamships, mines, and smokestacks but no associated large scale clashes of ideology. An 1849 bill empowering the safety inspection of mines was supported by no less than the ardent devotee of *laissez-faire*, radical M.P. Joseph Hume. Roberts held that "Acts to make things safer and cleaner were a part of the technological imperatives of the industrial revolution."[182]

In truth, the Factory Acts did not function as instruments of new socialistic control any more than the common laws and traditions of paternalism that had constrained the activities of masters in the past. They did not define the mode of production or the nature of contracts between capital and labor. Instead, their aims were centered around minimum standards for the workplace and providing for the maintenance of morality among factory workers. Where there

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[182] Roberts, *The Social Conscience*, 406. Roberts also mentions the dissemination of science, knowledge, and increasing power of the middle and working classes as secondary contributors to the growth of governmental control. Bartrip and Burnam offer considerable detail of the lack of effectiveness of clauses 24 and 60 of the 1844 Factory Act, which provided a theoretical path to compensation for injured workers who happened to be injured by equipment previously flagged by inspectors. Batrip and Burman, *Wounded Soldiers*, 54-68. These provisions allowed for public money to be spent on compensation, or compensation derived from fines levied on factory owners, but in reality were almost never used due to the difficulty in establishing culpability, and the meager pay-out even if they were successful. The 1856 Act further weakened the position of injured workers, and no new clauses were instituted in the 1864 or 1867 permutations to counter this.

was a dispute over violations of the Acts, they incorporated a robust due process that offered more than an even chance for the factory owner to avoid being held responsible.

The Priestley Precedent

> "The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself: and in most of the cases in which danger may be incurred, if not all, he is just as likely to be acquainted with the probability and extent of it as the master. In that sort of employment, especially, which is described in the declaration in this case, the plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely. In fact, to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him [the master] against the misconduct or negligence of others who serve him, and which diligence and caution, while they protect the master, are a much better security against injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford."[183]
>
> -Chief Baron Lord Abinger in *Priestley* (1837)

In this passage from Lord Abinger's decision in *Priestley* are the clear foundations for all the defenses the Court would use to block recovery by injured workers from their employers for most of the rest of the century. The first sentence applied the basis of *assumption of the risk* to the worker within the context of work-related injuries.[184] Embedded within the notion of assumption of the risk was the idea of an implied contract between servant and master which the English courts would rely on to contend that workers had in fact evaluated all the risks of

[183] Kenny, *A Selection*, 90.
[184] There was no basis provided as to why only the worker had agreed to assume the risks of employment, and the employer had assumed none of the risk of employing people.

employment and bargained for their pay accordingly.[185] Under this logic, to pay a worker for his losses after an injury would be to pay him twice. The second sentence compared the knowledge of the hazard on the part of the servant and the master, and only found culpability on the part of the servant, thereby providing the basis for *contributory negligence* as it was used thereafter in the nineteenth century. That is to say, if the worker's actions, in view of his assumed knowledge of the danger, could be seen to have contributed to his injury in even the slightest way, no amount of gross negligence on the part of his employer could trigger a liability. The last sentence introduced the identities of the injured person, and the ostensible immediately negligent party, as fellow servants under the employ of the same master, and invented a duty on their part to protect the master's interests against injuries servants might receive from each other's actions, and claimed that this arrangement was the most effective guarantor of future health and safety for all. Thus was the defense of *common employment* birthed, whereby the status of claimants as working-class persons was used to deny them the same right of recovery from their employer for injuries caused by company agents, as was enjoyed by the general public. All of these ran counter to the established common law of *respondeat superior*, which had consistently placed full liability on the master when his agent caused an injury to another through the course of his activities.

The cases that established *Priestley* as a controlling authority came before the court thirteen years later, and six years after Abinger's death: *Hutchinson v. the York, Newcastle, and Berwick Railway* and *Wigmore v Jay*. In the first case Joseph Hutchinson's widow, Jane, brought

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[185] While this notion was used contemporaneously by period actors as well as subsequently by some historians to apply a gloss of political economy to this ruling, it is a misnomer here. Political economy and contract law can be related but are not synonymous, and an implied contract, construed and enforced to the exclusive benefit of one party while being repudiated by the other, had no logical place in either.

an action in the aftermath of her husband's death following a collision between two trains owned and operated by his employer, the York, Newcastle, and Berwick Railway. Joseph, traveling as a passenger from Viego Bank Foot to South Shields at the behest of the rail company, was crushed during the impact, and then lingered for three more hours before dying of his injuries. He left six children. Attorneys for the railway asserted that the employees responsible acted without their authorization or knowledge. In the second case, C.R. Wigmore worked for a builder constructing an addition to The London University in 1848. The defendant's foreman knowingly used an "unsound and decayed" ledger pole as part of some scaffolding on which Mr. Wigmore was working as a brick layer. The scaffolding collapsed, casting Wigmore to the ground. He ultimately succumbed to his injuries, leaving two infant children to the care of his widow. The court, seeing that the two cases intersected the same issue, chose to take additional time and deliver the verdicts jointly.

Rectifying Abinger's omission in *Priestley*, Baron Alderson, the presiding judge in *Hutchinson*, acknowledged the basis of *respondeat superior* at the outset of his decision. Alderson then attempted to construct a rationale that reconciled the divergent results of the old and new precedents. To do this he began by observing that it was obvious that a master could not be made to automatically answer for the result of *every* negligent action by one of his servants, lest he be deemed liable in the narrow circumstance that arose when his servant caused his own injury.[186] Next, Alderson considered the scenario in which multiple servants were involved in the chain of events, and one of them, rather than a stranger, was injured. Without explaining why

[186] It is unclear if Alderson believed that his observation of the difficulty in applying *respondeat superior* in this narrow circumstance had disposed of *respondeat superior* in all circumstances involving servants. If not, the observation presents itself as an odd non-sequitur. If so, such a result was not rigorously evaluated or explicitly stated by Alderson.

respondeat superior did not apply when the injured co-worker was blameless, Alderson and his Court resorted to the same implied contract Abinger's ruling required, where every servant was assumed to have recognized and agreed to all risks associated with working along-side fellow servants. In this unspoken contract the only requirement of the master was that he must have selected co-workers of "competent care and skill".[187]

While the overwhelming majority of contemporary observers recognized the origin of the common employment doctrine within the *Priestley* decision, some modern authors such as Michael Stein, V. Markham Lester, P.W.J. Bartrip, S.B. Burnam, and R.W. Kostal have sought to contend that the true precedent lies in *Hutchinson*, or in the American case *Farwell v The Boston and Worcester Railroad Company* decided by Massachusetts judge Lemuel Shaw in 1842, instead.[188] Kostal argued that the *Priestley* decision was poorly received by contemporaries and therefore not considered an authority.[189] He thought that *Hutchison* was the actual progenitor. His only evidence to support this position, however, is a single case called *Armsworth v South Eastern Railway* (1848) in which Baron Parke held that a company could be liable in a fellow

[187] "Recent English Decisions." *The Monthly Law Reporter* 3, no. 8, (1850): 379. Alderson's justification of the defense of common employment was an amalgam of the three unrelated defenses embedded in Abinger's ruling in Priestley. Likewise, it went beyond anything in Shaw's ruling in *Farwell*, 1842.

[188] Attorney E. Powell, in a published series of articles on the law, pointed to *Priestley* as the "leading case on the subject" of a servant's ability to recover from a master when his injury is caused in his master's service. E. Powell, "The Law of Master and Servant in Cases of Negligence," *County Courts Chronicle,* September 1, 1857, 162. A.D. Provand, in his brief historical review of the issue, ascribed common employment to *Priestley* without reference to *Hutchinson*. A.D. Provand, "Employer's Liability," *The Nineteenth Century* 34, no. 201 (1893): 698-720. Augustine Birrel, an M.P. and professor of law speaking for the mining union, said of common employment, "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave the increase"; "Workmen (Compensation for Accidents) Bill,*" The Morning Post*, Tuesday 18, 1897, 2. Sheriff Spens introduced *Priestley* in 1886 this way: "I now quote Abinger's ruling which has ruled the law in England and America ever since" Sheriff Spens, "Employers and Employed," *The Glasgow Herald*, February 1, 1886, 9.

[189] Kostal, *Railway Capitalism*, 266, 267.

servant action, with no reference to *Priestley*. However, what Kostal and the other authors failed to observe was that in *Wigmore*, the companion case to *Hutchinson*, *Priestley* was cited by the defense to great effect.[190] In the Court of the Exchequer, Chief Baron Pollock stated that "It is impossible to distinguish [*Wigmore*] from that of *Priestley*" and ruled accordingly. In addition to *Wigmore*, I am aware of eleven other cases between 1850 and 1897 in which *Priestley* was cited as an authority.[191] In only two of those cases did any reference to *Hutchinson* appear.[192] As for *Farwell*, the lawyers for the defense cited *Priestley* in the case. Indeed, when the matter came under intense scrutiny by the 1877 Select Committee investigating the propriety of the common employment doctrine for Parliament, *Priestley* was identified as its progenitor.[193] Finally, it is

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[190] *The Monthly Law Reporter*, 379.
[191] *Couch v Steel* in "Unseaworthy Vessels-Liability of Ship-Owners," *Belfast Mercantile Register and Weekly Advertiser,* December 13, 1853, *Burton v Walker* in "Burton v Walker," *County Courts Chronicle,* March 1, 1856, *Roberts v Smith et al* in "Roberts v Smith and Another," *County Courts Chronicle,* June 1, 1857, *Vouse v Lancashire and Yorkshire Railway* in *The Standard*, "Vouse v Lancashire and Yorkshire Railway Company." November 6, 1857, *Bennett v The Great Northern Railway Co.* in "The Court of Common Pleas Jan 15: Bennett v Great Northern Railway," *The Lincoln, Rutland, and Stamford Mercury*, January 18, 1861, *Turner v Midland Railway Co.* in *Morning Advertiser*, November 7, 1865, *Saxton v Hawksworth and Ellison* in "Important Question Affecting Manufacturers and Others," *The Birmingham Daily Gazette*, May 30, 1871, *Griffiths v Earl of Dudley* in *Birmingham Mail*, June 14, 1881, *Griffiths v The London and St. Katherine's Docks Co.* in "Griffiths v. The London and St. Katherine's Docks Company. Appeal from the Queen's Bench Division," *County Courts Chronicle,* January 1, 1885, *Johnson v Lindsay* in "Johnson v. Lindsay," *County Courts Chronicle,* October 1, 1891, M'Kinney v. The North Western Railway Company in "Reports of Cases Decided in all the Courts of Equity and Common Law in Ireland and in the House of Commons." *The Irish Jurist (1848-1867)*, Vol. 18, 1866: 228-232.
[192] Kostal wrote about railway capitalism from 1825 to 1875, and may have been exposed to a misleading number of common employment rulings referencing *Hutchinson* alone. This is because unlike Priestley, Hutchinson was in the employ of a railroad when he weas injured, and such a case would be more likely to be cited in follow-on railroad-related litigation.
[193] Fall, *Employers Liability*, 45. The genesis of the confusion that spread among these authors may be the testimony of C. P. Ilbert during the 1876 Select Committee hearings. As a barrister, he personally found *Priestley* to be too vague in its writing and logic to rise to the level of an authority, and considered *Farwell* a better candidate for that designation. Since Ilbert acknowledged that *Priestley* was cited in *Farwell*, the distinction appears to be a semantic one. *Report from the Select Committee on Employer's Liability for Injuries to their Servants; together*

notable that Baron Parke was also the trial judge who had decided that Fowler could be found liable before Abinger arrested the judgment.[194] Thus, Parke's ruling in *Armsworth* is historically significant, not as proof that *Priestley* was not recognized as a worthy precedent, but in demonstrating that up to that point English judges retained sufficient agency to maintain a contrary point of view, and that *Armsworth* represented the last chance for English courts to choose a different path before *Priestley* was cemented as the law of the land in *Hutchinson*.[195]

Parke was not the only one with reservations. The editors of the *Bombay Gazette and Indian Daily News* read the ruling in *Hutchinson* with disgust, writing "This may be very good law, for anything we know to the contrary; but, to use a vulgar phrase, it is poor justice. Why should an individual, by becoming a servant of a particular Joint Stock Company, lose any of the rights of citizenship which he had before joining it, and which sacrifice is not necessarily required by the nature of his service? The thing is quite irrational, unjust and absurd."[196] As late

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with the Proceedings of the committee and Minutes of Evidence (Henry Hansard and Son, 1876), 20-21.

[194] Kostal did not address the implication arising from the fact that Baron Parke had been the judge in the original Priestley trial, which provides an answer to Kostal's query as to why *Priestley* was not cited in *Armsworth* by the plaintiff attorney, the defense attorney, or the judge, in a way that diffuses the logic of Kostal's argument; The plaintiff attorney would have avoided it as it would have undermined his case. The judge never agreed with it, as he had ruled in the original trial that Priestley could be able to recover from Fowler, and since *Priestley* had not yet been affirmed as a precedent, he was free to rule as he saw fit. The defense attorney must have been ignorant of it, as he would not have hesitated to cite it to help his case regardless of his feelings about it. Kostal, *Railway Capitalism*, 268.

[195] The contrast in the rulings of Parke and Abinger strikes at the core of arguments pressed by later historians that *Priestley* was motivated by political economy, or any policy imperative to protect industry. *Priestley* was decided in the favor of masters in the context of estate servants in the era of paternalism, eleven years before John Stuart Mill's *Principles of Political Economy*. *Armsworth* was decided by a contemporary of Abinger in favor of workers in the context of industrial wage-labor at the apex of political economy, the same year that Mill's book was published.

[196] "The Court of the Exchequer, Wednesday, May 22," *The Bombay Gazette and Indian Daily News*, July 6, 1850.

as 1857, Sergeant Plgott argued in front of the Court of the Exchequer in *Degg v The Midland Railway* that it mattered not whether his client was a servant of the railroad when he was killed, because the law lay in *respondeat superior*, and the master was liable for the negligence of his agents.[197] In this case and others, the Barons tried to span the divide by splitting an imagined hair between negligence and simple “mistakes”. Servants of whom it could be argued possessed “ordinary skill” could only be guilty of mistakes, and surely the master could not be held responsible for those. To many it seemed a distinction without a difference. The new doctrine was not accepted by any continental country, and not even in Scotland until the House of Lords overruled the judgment for the plaintiff in *Bartonshill Coal Company v Reid* (1858).[198] Another revolt regarding the definition of co-workers of unequal status sprang up the following year with a case called *Flannigan v Peters.* It was argued by the plaintiff attorney that *Bartonshill* was inapplicable to *Flannigan*, because the former case did not address the negligence of the master vis-à-vis his “immediate representative, such as a foreman or manager”.[199] Ruling against the plaintiff in *Hall v Johnson* (1865), Chief Justice Erle allowed that where one worker had authority over others the “person called a fellow laborer should rather be considered to stand in the position of a deputy master,” in which case the actual master may be liable.[200] This loophole was closed in England and Scotland by three Law Peers: Lord Cairns, Lord Cranworth, and Lord Chelmsworth, ruling in *Wilson v Merry & Cunningham* (1868).[201] When plaintiffs asserted the

[197] “Degg .”
[198] Fall, *Employer's Liability*, 29. Twenty-five judges in Scotland had ruled against the precedent of *Priestley* before they were brought in line.
[199] “Flannigan v Peters,” *The Glasgow Daily Herald,* November 4, 1859.
[200] Stein, "Victorian Tort”, 954-955. “Master and Servant-Injury by Accident,” *County Courts Chronicle,* April 1, 1865.
[201] Stein., "Victorian Tort”, 955. Alexander Macdonald, a mining representative and the future leader of union-backed efforts to destroy the common employment defense, funded the plaintiff’s case. Bartrip and Burman, *Wounded Soldiers,* 119.

master's hand could be visible in arranging for negligent procedures that his workers were bound to follow, Justice Willes justified blocking *Saxton v Hawksworth* (1871) from a jury on the grounds that "This was one of a great number of cases where only after an accident occurs does the plaintiff discover the employer's systemic failings."[202]

In the wake of the Factory Acts of 1844 and 1856 there were glimmers of recognition of the special role that machinery played in some of the workers' injuries. Lord Cranworth, in overturning the Scottish verdict for the plaintiff in *Bartonshill*, had held that employers would have been liable if they failed to exercise due care in having their machinery "in a safe and proper condition so as to protect the servant against unnecessary risks."[203] Four years later, in *Holmes v Clarke,* the plaintiff won a case when it was shown that his manager had knowingly neglected to repair fencing around a machine in a mill which would have prevented his injury. The defense appealed on the grounds that the plaintiff had accepted the risk because he had continued to work on the machine after he knew the fence was broken.[204] Justice Byles, upholding the plaintiff's verdict, sought to flesh-out the rule Cranworth had sketched in *Bartonshill*; "I am anxious that this decision should repose on what seems to me the true ground. I do not rest the right of the plaintiff to recover on the statutable obligation incumbent on the master to fence the machinery, nor yet on the personal knowledge of the master that the machinery was improperly left unfenced...But I think the master liable on the broad ground, to wit, that the owner of dangerous machinery is bound to exercise due care that it is in a safe and

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[202] Stein, "Victorian Tort", 947.

[203] J. Mitford Morison, John Lorimer, and James Paterson, *The Scottish Jurist: Reports of Cases Decided in the Supreme Courts of Scotland, and in the House of Lords on appeal from Scotland* (Thomas Constable and Co., 1858), 604.

[204] "In the Exchequer Chamber. Appeal from the Court of Exchequer. Feb. 7th, 1862. Holmes vs. Clarke," *The American Law Register (1852-1891)* 11, no. 2 (1862): 112.

proper condition."[205] Byles went on to opine that the principles of *Priestley v Fowler* were limited in their scope to simple domestic activities and "ought not be strained so as to regulate the rights and liabilities arising from the use of dangerous machinery."[206] He believed that the workman could not be expected to accurately judge the condition of a complex machine "wielding irresistible mechanical power", or the degree of risk attached to its use, but that the master would generally be able to evaluate both.[207] Byles admitted that not all previous cases had been decided in a way consistent with this rule, but as this was a Court of Error they were entitled to decide on principle. In this, he said, they were buttressed by a higher authority - ie: Lord Cransworth in *Bartonshill*.[208]

The Trades Union Congress and the Employer's Liability Bills of 1876-1880

Within a year of the second reform bill, and in the shadow of the Royal Commission studying the activities of trade unions, thirty-four delegates representing 118,367 members came together at the Mechanics' Institute at Manchester to create a national organization called the Trades Union Congress (TUC).[209] The agenda presented at the inaugural meeting included the necessity and legalization of trade societies, political economy, the working hours of labor, apprentices, technical education, courts of arbitration, and the inequality of laws for conspiracy, picketing, and coercion.[210] Subsequent meetings were held in different strategically-important

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[205] "In the Exchequer Chamber", 116.
[206] "In the Exchequer Chamber", 116.
[207] "In the Exchequer Chamber", 116.
[208] "In the Exchequer Chamber", 117.
W.J. Davis, *The British Trades Union Congress: History and Recollections* (Co-operative Printing Society Limited, 1910), 1. Trade unions would be legalized in 1871.
[210] Davis, *History and Recollections*, 4. In 1869 John Stewart Mill was listed among the distinguished friends of the movement (9).

areas of the country each year, and membership grew to 63 societies and over a quarter-million members by 1872.[211] That year the meeting was held in Nottingham, where the members lifted opposition to *common employment* to among the top action items on their agenda. By 1873 membership had tripled to 750,000 and the Parliamentary Committee of the TUC, Chaired by Alexander Macdonald, had crafted a questionnaire for vetting political candidates that included a question about their willingness to vote for the right of workmen or their families to sue after an accident.[212] Macdonald had been president of the Miners' National Union since 1863, and was present at the founding of the TUC.[213] In 1874 he won a seat in the House of Commons as a member of the fledgling Liberal-Labour movement. He wasted no time in launching his campaign to undo what *Priestley* had wrought.[214]

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[211]B. C. Roberts, *The Trades Union Congress, 1868-1921* (Harvard University Press, 1958), 379.
[212] *The Fifth Annual Trades Union Congress*, 1873, The Library Collections, London Metropolitan University: 4.
[213] Davis, *History and Recollections*, 2.
[214] An 1874 bill introduced by railroad interests titled "A Bill to amend the law relating to compensation for injuries suffered by persons in the course of their employment" raised the eyebrow of the editor of the *Bristol Mercury, and Western Counties Advertiser*. The editor noted that the common employment defense represented a notorious system that worked to the great advantage of employers, and questioned why a prominent railway magnate might be eager to do away with it. The answer was in the language of the Bill, which in addition to offering limited compensation to workers, severely curtailed railroad liability to the general public. The bill failed. "Railway Passengers Beware," *The Bristol Mercury, and Western Counties Advertiser*, Saturday, June 6, 1874. Other bills which ultimately failed were proposed by different actors, but my purpose is not to catalog each one. I will follow the thread of those efforts attached to the TUC in order to arrive at the most accurate picture of the interests of workers, whose opinions spurred the movement in the first place, and mattered the most when the final Workmen's Compensation compromise was finally forged.

The 1876 Bill

By February of 1876 Macdonald had presented a bill to eliminate common employment in the House of Commons for its first reading. The TUC leadership, in the person of Secretary Henry Broadhurst, issued a "special and urgent appeal" to its membership to actively support the measure, which he said was "of the greatest importance to the working people of the United Kingdom" and now stood "first on the list of our parliamentary programme."[215] Broadhurst stressed that the bill did not ask for any special treatment for workers, but would instead repeal an "exceptional exclusion of [workers] from the ordinary protection of the law."[216] He added that the state of the law, as it was, removed any motive on the part of employers to exercise careful control over dangerous equipment and processes. The proposed law, titled *The Bill to Amend the Law Relating to the Liability of Employers for Injuries Negligently Caused by Persons in their Employment*, was more simple than its title implies: It nullified the defenses of common employment and assumption of the risk. Contributory negligence was retained as a defense, and a time limit for bringing such an action was imposed. A trust to manage funds for injured minors was also to be provided.[217] At the meeting in Newcastle, TUC member John Burnett said the issue was the most important subject that could be raised that week, and that it was only common sense that "if one man had a remedy at law, surely every other man ought to have exactly the

[215] Henry Broadhurst, Letter to Membership, February 22, 1876. The Library Collections, London Metropolitan University.
[216] *Report of the Ninth Annual Trades Union Congress* (Owen and Jeffrey, 1876), 2.
[217] *Ninth Annual Trades Union Congress Report*, 2-3. The bill was backed by Dr. Cameron, Mr. Meldon, and Mr. M.T. Bass. M.T. Bass, of brewery fame, had argued for abolition of common employment as part of a railway bill in 1871. In that debate the focus had been on railway passenger deaths, but Mr. Bass illuminated the issue of deaths on goods trains (ie, workers). HC Deb. (3d ser.) (15 March 1871) (205) cols. 34-38.

same remedy" but that the present law denied any remedy to the workman.[218] He proposed a resolution thanking the Parliamentary Committee for their efforts. Mr. Banks, of Preston, said he came from an area where many people were cotton workers exposed to complicated and dangerous machinery, and in fact four injuries had occurred within the last week. They took great interest in the matter. Mr. Culgar, of London, added that whole families were put at risk.[219]

The press reported the details of Macdonald's effort to gain a second reading of his bill. He began with an oblique reference to *respondeat superior* and then launched into a series of harrowing anecdotes before trying to preempt and diffuse any hyperbolic claims about the deleterious impact such a bill would make on British industry. Noting that the Home Secretary, Richard Cross, had advised him that the whole weight of the Government would be brought to bear against the bill, Macdonald replied that the question must be settled sooner or later, adding "Every home that was rendered desolate, every hearth which has been rendered vacant, every child that was left without a father or a mother through these accidents, added to the army which was crying out 'How long is this doctrine of non-responsibility to last?" and even made a veiled threat: "every home which had been deprived of an inhabitant was left with some man or woman who was ready to enter the House on complaint, by petition and otherwise, against the present unsatisfactory state of things" and confront the "patrons of non-responsibility."[220] The Attorney General, Sir John Holker, responded that the employer was already liable through the acts of a servant who was carrying out his commands, but not for accidents that happened to those engaged in the same employment. He said that many considered this burden on the employer to "amount to an injustice because they [employers] were liable for the acts done by others over

[218] *Ninth Annual Trades Union Congress Report*, 10.
[219] *Ninth Annual Trades Union Congress Report*, 11.
[220] "Liability for Employers for Injuries Bill," *The Potteries Examiner*, Saturday, May 27, 1876.

which they had no control."[221] The question before the House, he asserted, was whether the employer's liability should be carried even further.[222] Mr. Simon thought the bill too sweeping in its language, but acknowledged that an otherwise competent foremen might perform in a negligent manner, and the injured subordinate worker should then have a path to compensation. He thought the bill could be properly amended in committee. Mr. Pease admitted that common employment was not well defined, but that the bill would serve to increase accidents rather than decrease them, calling it a compulsory system that would reduce wages. Mr. Rodwell also admitted the shortcomings of the existing state of the law, but thought the bill went too far and was the wrong approach in any case. He suggested a Royal Commission.

The response in the press was varied in its perspective, and uneven in its accuracy. The editor of *The Midland & Northern Coal & Iron Trades Gazette* wrote that Macdonald's bill made employers liable even for the self-inflicted injuries of workers, even though it said the opposite.[223] The editor of the *Birmingham Post* simply held that the existing precedent which granted a remedy only if the owner had personally intervened in a negligent way was the only just system.[224] The *Liverpool Weekly Courier* was probably correct in calling out Macdonald's inexperience: "The House of Commons were engaged on Wednesday upon a typical example of amateur law-making. A wrong prevails which everybody is desirous of rectifying. Mr. Macdonald proposes to rectify it by a reform which will establish a multitude of wrongs in lieu

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[221] "The Employer's Liability for Injury Bill," *The Morning Post*, May 25, 1876.
[222] Lacking in the Holker's analysis was the fact that the bill did not impose any liability on the employer- it removed barriers to recovery should a jury find such liability.
[223] "Employer's Liability for Injury," *The Midland & Northern Coal & Iron Trades Gazette*, May 3, 1876.
[224] "Mr. Macdonald's Employer's Liability for Injury Bill," *The Midland & Northern Coal & Iron Trades Gazette*, March 29, 1876.

of one, and in a way which everybody objects to."[225] In his evaluation of the 1876 bill, the poet, lecturer, journalist, and editor of *The Saturday Review,* Walter Herries Pollock, found himself at odds with the legacy of his famous grandfather. Sir Frederick Pollock succeeded Lord Abinger as Chief Baron of the Exchequer in 1844 and helped cement *Priestley* as precedent through the *Wigmore* decision in 1850, saying of *Priestley*, "never was there a more useful decision."[226] Now his grandson's paper featured a carefully crafted analysis that posited situations in which one might side with either the employer or the workman depending on the merits of a case, but was firm in the position that no case should be barred by the "empty plea of common employment."[227] Even Home Secretary Cross said he did not disagree with Macdonald that the law as it stood was wrong, but this did not mean he viewed the proposed bill as the right solution. Moreover, Cross desperately wanted to avoid creating a public impression of a clash between classes over the issue. In the end, Macdonald saw no chance of a second reading and accepted the Home Secretary's offer to appoint a Commission to investigate the subject.[228]

The Select Committee of 1876-1877

The path to the 1880 bill started where the fight for the 1876 bill left off. The reports from the *Select Committee on Employers Liability for Injuries to their Servants* were developed over the remainder of the 1876 and 1877 sessions of parliament. Witnesses from the mining, railway, manufacturing, and legal professions were questioned by the committee, which included Sir John Holker, Mr. Lowe, Mr. Wyndham, Sir Henry Jackson, Mr. W. Stanhope, Shaw Lefevre,

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225 "Workmen's Compensation," *The Liverpool Weekly Courier*, May 27, 1876.
226 "Injuries to Servants."
227 "Liability of Employers," *The Saturday Review*, May 27, 1876.
228 "House of Commons," *The Daily News*, Thursday, May 25, 1876.

Sir Daniel Gooch, Mr. Mundella, Mr. Knowles, Mr. Tenant and Mr. Macdonald. On July 14th 1876, the Committee questioned the distinguished barrister, C. P. Ilbert. Ilbert had been asked by the Board of Trade to evaluate the law on employer's liability in 1871. He found that the original law was *respondeat superior*, which he deemed to be occasionally harsh but nevertheless just. Common employment and other barriers to employer liability for the actions of his servants against others, including fellow servants, were a bad exception to this law.[229] Giving the wider view, Ilbert testified that "No trace of *Priestley* is to be found in French, Italian, or German law."[230] In the French Napoleonic Code, article 1384 made a man "liable not only for the damage he causes by his own act, but also for that caused by the act of the persons for whom he is answerable, or of the things in his custody" and "for the damage caused by their servants and servants in the functions to which they have employed them."[231] When the issue of an interaction between fellow servants resulting in injury came before a French appeals court in 1841, the judges removed any doubt as to the application of this article: "The master is liable for the injury which one of his servants or workmen has caused by negligence to another servant or workman in a work which they were charged to carry out in common."[232] Going on, the French judges anticipated and refuted any idea of an implied contract, nine years before Alderson invented one in *Hutchison,* writing "The wages agreed upon between the servant and his master cannot exempt the latter from his liability towards the party injured."[233] Anticipating another tactic to undermine the employer's liability which was soon to loom large in the English experience, at

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[229] *Select Committee* (1876), 20-21.
[230] *Select Committee* (1876)*,* 28. Ilbert noted that in one of two cases the lower courts in France had found the master not liable, but when one went up on appeal in 1841 the opposite principle, of affirming master liability in cases of fellow servants, was upheld unequivocally (26-27).
[231] *Select Committee* (1876), 26.
[232] *Select Committee* (1876), 27.
[233] *Select Committee* (1876), 27.

least as early as 1871 the German Commercial Code explicitly forbade contracts that sought to mitigate the employer's legal exposure for workplace injuries.[234] The Italians followed the Napoleonic Code as France did, and Scotland upheld the opposite rule from England until they were forced to acquiesce through the final ruling in *Bartonshill*. *Priestley*, in Ilbert's opinion, could not be defended on grounds of law, equity, or policy.[235] Turning decades of judges' arguments on their head, he stated that the only rational application of such an exception would be in the circumstance where the negligent perpetrator was under the control of the plaintiff.[236]

Ilbert was followed by another lawyer, Joseph Brown. Brown had given a speech at the Social Sciences Association entitled *The Evils of Unlimited Liability for Accidents of Masters and Railway Companies, especially since Lord Campbell's Act*, and was the author of *The Dark Side of Trial by Jury*.[237] Brown's view differed in almost every way from Ilbert's. He thought *respondeat superior* unjust and unprincipled, and tried to draw it as a policy-driven anomaly in English law rather than a maxim.[238] He approved of the law as *Priestley* had made it, and saw no reason to change it.[239] He counseled against letting juries decide the issue, as some of them might not agree that an implied contract existed between employer and worker.[240] When asked

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[234] *Select Committee* (1876), 27.
[235] In terms of law and contract, Ilbert detected and dismantled the faulty privity argument used by Shaw in *Farwell*, which Charles Gershom Fall also noted in his 1880 review for the State of Massachusetts. *Select Committee* (1876), 28.
[236] *Select Committee* (1876), 31.
[237] Joseph Brown, *The Evils of Unlimited Liability for Accidents of Masters and Railway Companies, Especially Since Lord Campbell's Act* (Butterworths, 1870). Joseph Brown, *The Dark Side of Trial by Jury* (William Maxwell, 1859).
[238] *Select Committee* (1876), 38.
[239] *Select Committee* (1876), 39.
[240] *Select Committee* (1876), 40. Brown makes two mutually exclusive arguments against juries: First he says that they will not produce consistent determinations from one case to the next, and therefore sow uncertainty about the law. He follows this by saying that he has little doubt most juries would side with the injured worker out of sympathy and bias. That, he said, would be unacceptable to the judges.

questions that went to potential measures to address the hardships caused by the law, Brown presented only obstacles. He steadfastly maintained that the term *common employment* defied definition, and therefore limitation, by the legislature. The only possible justification for banning contracting out of any measure, Brown contended, was a determination that workers were not free to make contracts due to their control and coercion by employers.[241] He argued that changing the law would make men less safe at work without enhancing the safety of employers, on the premise that the latter were already motivated to do everything possible by virtue of their vested interests in their equipment and their concern for humanity.[242] Brown did not think employers should be liable at all as long as they delegated the duties of management, something he reasoned they generally must do, since most were untrained in the labor of their enterprises. However, if any modification of the law was to be made, he allowed it could be in allowing for liability when the master's appointed manager was negligent.[243]

Two draft reports were created by the Committee. Mr. Lowe's report found that *Priestley* had been a break with the common law, relied on an implied contract that could not be verified, and had grown beyond all anticipation by its instigator. "Had the law been laid down at once in the full extent to which it gradually advanced, public attention would doubtless have been awakened, and the whole question fairly considered by Parliament."[244] Mr. Lowe's recommendations offered a remedy in terms of a contraction of the definition of those engaged in common employment to co-workers who were involved in actual labor, rather than superintendence. Sir Henry Jackson's draft was the one accepted by the majority of the

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[241] *Select Committee* (1876), 42.
[242] *Select Committee* (1876), 43.
[243] *Select Committee* (1876), 42.
[244] Fall, *Employers Liability,* 45.

committee. In his telling, *respondeat superior* was a Roman notion that had never applied to English law, and was unjust in any case. Unlike Lowe, Jackson did not acknowledge an implied contract was operative, much less one troubling in its terms. Jackson did allow that liability could attach to the master if he failed to offer safe equipment, and that masters or corporate boards which delegated their whole authority to a superintendent could held liable for the actions of their deputy. Lastly, Jackson opposed the practice of including contractors under the umbrella of common employment.[245]

The Railway News, keenly interested in the outcome, implied that injuries were principally the fault of the injured workers themselves, and promises of compensation would do nothing to make them less reckless. Workers, they said, should be made to contribute to insurance-backed entities such as The Railway Benevolent Association, which would be the mechanism of any compensation. Predictably, *The Railway News* recounted the *Hutchinson* and *Bartonshill* cases and the rulings of Barons Alderson and Cairns that blocked injured workers' claims on the basis that workers had implicitly bargained in view of the dangers they might face.[246] Once again, *The Saturday Review* followed the situation closely. Editor Walter Pollock came out against Mr. Jackson's rendition of the historical basis surrounding the argument, and in favor of Mr. Lowe's position for a solution. Further, Pollock repudiated the notion of even an explicit bargain that would shield the masters from all liability: While Mr. Lowe had contended that as competent agents of their own affairs, workers ought to be free to decide for themselves if they wanted to "contract out" of any provisions of future legislation that held their masters liable, Mr. Pollock pointed out that many of the dangers the workers faced were hidden from them until

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[245] Fall, *Employers Liability,* 51.
[246] "Compensation to Railway Servants," *The Railway News,* Sept. 30, 1876.

the accident laid the defects bare. It was better, he wrote, to lay blame on employers if they had, or should have had, sufficient knowledge to avoid the accident altogether.[247]

In 1878 *The Times* published a series of volleys between critics and allies of Mr. Lowe's position in the debate. A writer identifying himself as "A Judge of the Supreme Courts in Scotland" began the skirmish by challenging Mr. Lowe's characterization of the development of common employment as an ad-hoc creation with the sole purpose of protecting masters, and claiming, incorrectly, that "all hands" at the debate had agreed *respondeat superior* was unjust, even as applied to strangers injured by a master's servant. The workers, he insisted, should pay to insure themselves.[248] *The Times* editorial reply found that Mr. Lowe's perception was more reasonable than the Judge allowed, and proposed that the principle of the Bill should be to place the burden at the feet of those who could best minimize future repetition of a given accident. That depended on where the particular fault lay; in supervision, or in the personal vigilance of the worker.[249] Mr. Lowe also responded to the Judge, writing that "everyone knows that the doctrine of common employment does not rest on any principle at all", but that the *Hutchison* ruling attempted to draw it as the outcome of an implied contract which was entirely the creation of Baron Alderson's mind. Of this, he stated that "the Judges have no power by virtue of their office to create false contracts, and then to enforce them as if they were true."[250] Lowe also attacked the inconsistency inherent in the latest prevailing rationalizations of judges such as Bramwell and Cairns, who now held the position that the issue never rested on an implied contract made and was instead based on the proposition that no liability had ever existed because

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247 "Liability of Employers," *The Saturday Review,* July 7, 1877.
248 *Employer's Liability for Injuries, Correspondence and Articles Reprinted from The Times* (Wall, 1878), 4.
249 *Employer's Liability for Injuries*, 8-12.
250 *Employer's Liability for Injuries*, 12-13.

the master had never contracted to accept it. The one thing that was consistent, Lowe observed, was that however the judges juggled the facts, the workers lost. Another participant, signing his letter "F", also addressed this point. He countered that one of the landmarks of English law was that "a man is liable, both civilly and criminally, for the acts of those whom he employs in the course of their employment", because, as Justice Williams had said, "men carry on business for their benefit and advantage by the hands of others, and therefore, the law holds them liable for injuries caused by the hands of those they employ if arising through their negligence."[251] This being the rule, it was the burden of those who would exempt the master from responsibility to argue their case in terms of a valid exception to it.[252] *The Times*, on March 18, 1879, agreed that *Priestley* had not been based on precedent or any maxim of law, but claimed it was based on policy. Policies change however, the writer observed, and few would agree with Justice Pollock's exaltation of the ruling now. It was further agreed that the notion of the implied contract was fraught, but that the country needed to find a solution that was not covert socialism.[253]

The 1880 Employer's Liability Bill

In the wake of the 1877 report, the government submitted a bill to the House of Commons in 1879 that defined "servant in authority" for the railways, mining operations, and "other manufacturer or works" and made only the negligence of these top lieutenants actionable. Lord De La Warr and Mr. Brassey countered with bills in the House of Lords and House of

[251] *Employer's Liability for Injuries*, 26-27.
[252] This mirrored C. P. Ilbert's argument in the Select Committee hearings. *Select Committee* (1876), 28.
[253] "Injuries to Servants."

Commons, respectively, that recognized a liability attached to the actions of sublieutenants all the way down to the level immediately above that of the worker. To this they added liabilities for injuries caused by following company rules or by-laws, and defects in equipment supplied to the worker.[254] Macdonald reintroduced his original bill.[255] In the jockeying that followed, Lord Cairns announced the government would not support De La Warr's bill. The Earl expressed his hope that the government would act in good faith on an issue which commanded the interest of no less than 500,000 people, and agreed to withdraw his bill to try his luck with the Select Committee on the government proposal.[256] The TUC committee found the government's bill wholly insufficient, and Macdonald proposed an amendment in its second reading that reconciled it with the principles of his bill. After Mr. Brassey agreed to back Macdonald's amendment, the government quietly withdrew their bill to minimize public attention. Macdonald's bill had reached a second reading in April, but the change in government following the 1880 general election cut short its path forward.[257]

Within the TUC questions were raised about Macdonald's approach. Mr. Evans, there at the behest of the Railway Servants' Amalgamated Society, asserted that Macdonald's "conduct had been a greater impediment to the passage of a measure than anything he knew."[258] He went on to say that those he represented "were anxious above everything that a measure be passed which should enable them, or their wives and children, to receive compensation where, through the wrong action of those who employed them, they were injured, and their wives and children, it

[254] "Employers' Liability Bills," *The Saturday Review,* February 14, 1880. *Report of the Twelfth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1879), 7.
[255] *Twelfth Annual Trades Union Congress*, 7.
[256] HL Deb. (3d ser.) (12 Feb. 1880) (250) col. 487.
[257] "Common Employment," *The Examiner*, April 20, 1878.
[258] *Twelfth Annual Trades Union Congress*, 17-18.

might be, left destitute."[259] Evans, taking the side of the railway owners, rejected the idea that an employee of a railroad could "in any sense of justice" be considered to stand in the "same relation to the company as a passenger" and complained bitterly against the idea that a company should be held accountable for the momentary forgetfulness of a fellow servant.[260] He argued for a "more practical, sensible measure" that might garner more support in the House.[261] Mr. Knight, a convention attendee from Liverpool, rose to say he "failed entirely to see where Mr. Evans had made out a good case against Mr. Macdonald's bill", and was met with applause.[262] Macdonald rose, and recounted Mr. Evans' lack of reservations about the proposed bill in the past, the progress that had been won in convincing members that alterations to the law were necessary, and an episode in which Evans had asked him to introduce a separate bill for railway servants alone, which Macdonald refused to do.[263] Several other members came to Macdonald's defense, and a motion to thank Mr. Macdonald for his efforts, past and future, passed unanimously.

In April, the Liberals won the general election of which it was said no less than 400 candidates expressed support for an Employer's Liability Bill.[264] Gladstone replaced Disreali as Prime Minister, and Palmer took over from Cairns as Lord Chancellor. The debate over the Bill continued to rage over twelve sessions in the Commons from May to July, before being presented in the Lords in August.[265] While Conservatives objected to the Bill on various grounds,

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[259] *Twelfth Annual Trades Union Congress*, 17-18.
[260] *Twelfth Annual Trades Union Congress*, 17-18.
[261] *Twelfth Annual Trades Union Congress*, 17-18.
[262] *Twelfth Annual Trades Union Congress*, 17-18.
[263] *Twelfth Annual Trades Union Congress*, 17-18.
[264] "Employer's Liability Bill," *The Standard*, June 4, 1880.
[265] The editor of the *Northern Whig* commented on the Bill, "This foolish notion of common employment, on which so much injustice for nearly half a century has been founded, will have to be given up, like those obsolete prejudices against combinations of workmen in restraint of trade, when those artisans were only doing what their employers did, and had long done" and of the government, "There is something more than a change in men: there is a great change in

the results of the election had separated their courage from their convictions; none were emboldened to attempt to block it from a second reading. Macdonald's stance did not soften. He continued to reject any proposal that preserved common employment as a bar to recovery. Mr. Inderwick seconded Macdonald, and talked of a compulsory insurance fund controlled by the government but paid for by employers, excepting those who wished to face unlimited liability in the court system. Mr. Balfour spoke in favor of equalizing the workman with the general public, but principally by reducing the liability of companies to the latter. Mr. Jackson imagined a limited liability that could be insured against.[266]

Opening the August 25 session with a lengthy speech, the new Lord Chancellor struck a far different tone than had his predecessor. Addressing those like Balfour, who championed a retrograde action that would strip the public of their right to recover under vicarious negligence actions, he stated that he believed *respondeat superior* to be just law, and in any case settled law. He then assailed the creation and growth of the common employment doctrine as murky and ill-considered to the point that legislators were left to wonder how it was possible this "superstructure" of non-liability came to be. Indeed, he said that other countries held the opposite view. France and any country that followed the Napoleonic Civil Code held masters liable for worker acts and injuries. Germany had essentially the same rules for railways, mines, and factories. In the United States, which had initially adopted the premise of common employment, support was eroding. The state of Missouri had passed laws that mirrored the Bill now before the Lords. New York had made changes as well. His personal opinion was that neither party should

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measures, and in the whole spirit of legislation and administration." *The Northern Whig, Belfast*, June 7 1880. The editor of the Essex Times called the doctrine "a figment of the legal mind" and a "casuistical cobweb" *The Essex Times.* August 28, 1880.

[266] "Employer's Liability," *North British Daily Mail*. Saturday, July 3, 1880.

be held to clauses not in their contract, and he did not believe workers were already compensated for the danger of their jobs. Rather, their wages were simply based on supply and demand. He quoted Scottish judge Lord Deas, who said that any implied contract should require both the master and worker to do their part, not merely shield the master. Palmer was against compulsory insurance and said that passing the bill would bring Britain into concurrence with the rest of Europe.[267] Conservative critics attempted to shunt the Bill back to another Select Committee, and argued that insurance against the losses from injuries, paid for in part or in whole by workers, was the best solution. The list of those who argued for insurance was long: Mr. Vivian, Mr. Knowles, Mr. Craig, Mr. Warton, and Mr. Jackson among them. Macdonald claimed that German Parliament members had told him that insurance was an encouragement to destroy life. Broadhurst argued that insurance would give employers a free hand without moral responsibility for accidents, and pointed out that it did not follow that insurance precluded legal action. If insurance was to be had, however, it should be paid for entirely by employers. Overall, Broadhurst said, workers viewed the measure as a weak one. Mr. Knowles called the Bill "a measure of confiscation" and the most revolutionary ever submitted to the House. Mr. Warton, foreshadowing products liability that would not develop until the next century, asserted that machinery manufacturers should be held liable for defective machinery rather than employers.[268] The editor of the *Daily News* called out the hypocrisy of those who bemoaned government interference that burdened masters while championing compulsory insurance to be paid by workers. Commenting on Baron Bramwell's faulting of workers for not securing a contract with their employers to protect themselves, the editor doubted whether ignorant workers could make

[267] "Employer's Liability Bill," *The Mail*, August 25, 1880.
[268] "Employer's Liability Bill," *The Standard*, June 4, 1880.

that a reality. *The Cornish Telegraph*, however, held an opposing view. They considered trades unions as the tyrants, condemned the Factory Acts, and falsely claimed the continental countries had laws that favored employers, and would therefore out-compete British industry if the Bill passed.[269] Bramwell said what Abinger only implied- that it would be more just if injured workers were liable to the master for the mischief they allowed to take place, not the reverse.[270]

After attempts to modify it were largely beaten back, the core benefit of the Bill fell largely along the lines of the De La Warr and Brassey proposal from 1879.[271] The Act swept away the despised common employment defense, at least for actions brought under its provisions, of which it was said "Lord Abinger planted it, Baron Alderson watered it, and the Devil gave it increase."[272] It specifically allowed for recovery against an employer due to negligence by other workmen in positions of authority or in position to convey orders to the plaintiff, as well as for defects in the work environment, equipment, and procedures.[273] Compensation was limited to three year's salary for like employment in the same geographical region. Assumption of the risk and contributory negligence were maintained as defenses, but in 1891 Lord Esher affirmed earlier rulings in cases like *Clarke v Holmes* (1862) that mere knowledge of the danger did not constitute assumption of the risk.[274] It was reserved for a jury to

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[269] "The Employer's Liability Bill," *The Cornish Telegraph,* July 14, 1880.
[270] *The Daily News.* July 3, 1880.
[271] *Report of the Thirteenth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1880), 8.
[272] Kenny, *A Selection*, 90. It was 1948 before the defense was finally formally abolished in all of common law. V. Markham Lester, "The Employer's Liability/Workmen's Compensation Debate of the 1890s Revisited," *The Historical Journal* 44, no. 2 (2001): 487.
[273] Kenny, *A Selection*, 46.
[274] Formerly Lord-Justice Brett, who considered Lord Abinger one of the greatest advocates at the bar, and whose mastery of analogies he credited with the ruling in *Priestley*. Sheriff Spens, "Employers and Employed," *The Glasgow Herald*, February 1, 1886.

decide if the plaintiff fully appreciated the extent of the danger and assented to his exposure, and if the employer had violated any statutory obligations.[275]

In a striking demonstration of the changes in opinion and strategy that were growing in conservative thought, however, ex-Lord Chancellor and ex-justice Cairns suddenly ceded common employment and the implied contract on principle, but with a crucial catch: In his letter to the London *Times*, he observed that regardless of how the terms of the implied contract had been construed in the decades since Abinger's ruling, no term equating to the assumption of the risk of injury by the actions of a fellow workman could be considered to exist when one side consistently repudiated it. Instead of replacing the implied contract that deprived the worker with an explicit statutory one that burdened the master, however, Lord Cairns was in favor of expressed contracts between them.[276] "Contracting out", as had been brought up by Ilbert and Brown in the 1876-77 Select Committee, and alluded to by Brabourne and James during the debates, and was seen as the antidote to Labour's momentum on the issue.[277]

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[275] Arthur Robinson, *Employer's Liability under the Workmen's Compensation Act, 1897, and the Employer's Liability Act 1880* (Stevens and Sons Limited, 1898), 76, 78.
[276] Fall, *Employer's Liability*, 106-108. This was a response more in line with a consistent application of political economy than the Barons can be credited with. No stranger to denying equal treatment under the law to workers, Cairns had notoriously pushed an amendment to a criminal act bill in 1871 that made picketing by trade unionists criminal offenses while it was only a civil offense for the general public. W.J. Davis, *The British Trades Union Congress: History and Recollections* (Co-operative Printing Society Limited, 1910), 21.
[277] "Employer's Liability Bill," *The Mail*, August 25, 1880. It was also possible for employers to side-step liability by presenting the negligent co-worker as a subcontractor rather than a direct employee of the master. The courts continued to address dangerous machinery in light of the Act in a fairly progressive fashion. A case in 1893, *Stanton v Scrutton*, held that a defect was said to exist if a machine lacked any sufficient safeguard against danger arising from an ordinary and probable occurrence, such as a worker losing his footing near the machinery. This was taken to include guards that had been temporarily removed (*Tate v Latham & Son, 1897*), and power transmission apparatus serving an otherwise fit machine (*Morgan & Hutchins, 1890*). Robinson, *Employers Liability,* 50.

The 1894 Bill

If the 1880 Act was nothing else, it was controversial. On January 11, 1881, Alexander Macdonald gave an address to the Miners' National Union in Manchester. Recounting the path to the present state of affairs, Macdonald observed that "the employers had prided themselves for a long time on their benevolence, their humanity, their desire to help the widow and fatherless; and it had come to this, that when a little legal obligation was placed on their shoulders the whole fabric of benevolence turned out to be a sham."[278] He cited Lord Cairns as the leading author of the new-fangled notion that employers merely had to appoint a manager to avoid even the least liability.[279] After that "they would have all the profits and workers would have all the slaughtering."[280] The Factory, Workshop and Mines Acts, he said, had been the only check on the carnage. The biggest danger now, he said, was the contracting out scheme of the masters', which meant "Permit us to kill and maim and contract out of it, in order that we may continue."[281] Mr. Foreman proposed a resolution stating it would be criminal to contract out by any mutual agreements through permanent relief societies or any other means because to do so would be to "declare that, as a class we do not desire protective legislations."[282] Mr. Cowey, arguing against contracting out, said it was not money, but safety they sought. Mr. Jenkins and Morgan agreed that it was an installment of the protection sought by the men. Others asked what "contracting

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[278] "Miners' National Union," *The Manchester Courier, and Lancashire General Advertiser*, January 12, 1881.
[279] Macdonald had personal experience with this. Cairns had ruled against the widow in *Wilson v Merry & Cunningham* (1868) using this basis, a case for which Macdonald himself had donated the funds for the plaintiff's action. Bartrip and Burman, *Wounded Soldiers,* 119. However, the principle is more properly assigned to Baron Alderson in *Hutchinson* (1850).
[280] "Miners."
[281] "Miners."
[282] "Miners."

out" really meant. The Chairman then explained that in some mines, merely showing up to work under certain "conditions of employment" would lose workers the benefits of the Act. Several speakers declared strong opposition to contracting out, as it made the whole effort of gaining legislation on the matter pointless. Mr. Bryson, however, moved to amend the resolution that men "be at liberty to make such arrangements if they thought them best" as the resolution jeopardized customs in Northumberland from time immemorial, and would not add to their safety.[283] His amendment found no takers. In response, Mr. Frith, of South Yorkshire, proposed an amendment urging the committee to pass a bill making contracting out illegal. Bryson contended that in his district the miners already had something better than what the Act provided. Mr. Wilson doubted Mr. Bryson's assessment.[284]

Soon after, a public dispute over the efficacy of the Act erupted between Lord Justice Bramwell and Sir Edwin Chadwick. First, Lord Bramwell authored a pamphlet attacking the Act as sure to have the effect of depressing wages and ruining businesses. Chadwick responded in his pamphlet *Employer's Liability for Accidents to Workpeople,* published in *Fraser's Magazine* in May1881.[285] Characteristically relying on statistics, Chadwick noted that the number of workers killed in mines, factories, on railways, and by steam power was around 5000 per year, or five times the total number of land and sea combat deaths in the war against Napoleon. With a circular logic, the 1877 Select Committee studying the prospect of establishing employer liability had stated that they could not put it better than American Jurist Lemuel Shaw. Shaw, following *Priestley*, ruled in *Farwell v The Boston and Worcester Railway Company* (1842) that workers,

[283] "Miners."
[284] "Miners."
[285] Edwin Chadwick, "Employer's Liability for Accidents to Workpeople," *Fraser's Magazine* 23, no. 617 (1881): 680-692.

constantly watching themselves and each other, and prepared to leave service if their employer did not rectify safety concerns they identified, would achieve better security for their safety than any legal recourse against their common employer. Chadwick flatly rejected this pronouncement as thoroughly unrelated to the reality he had witnessed as a part of the 1833 Commission looking into child labor practices. He turned the employer's claims that accidents were unavoidable against them: if the accident was but a regrettable part of the operation, then it was the ultimate consumer who shoulder such necessary costs of production, not the injured workers and widows. He cautioned that full insurance "weakens the motives to care" for the safety of operations which might avoid injuries. To make this point he cited the perfect record of the self-insured Cunard line, which had "navigated through the icebergs and the fogs of Newfoundland" for thirty years and never lost a ship or passenger. He distrusted juries, not because they too often identified with the claimant, but because they too often capitulated to "the blind verdict of accidental death" that served employers who wanted to avoid liability so well.[286] Chadwick refuted Baron Bramwell's assertion that by exposing the employer to liability for safety the Act would reduce wages with reasoning and examples of the dual benefits of safety and efficiency flowing from economic pressures that made better trained workers and safer machinery viable. In doing so, he explicitly called into question the qualifications of judges to enact "judge-made law", as they were ill-equipped to comprehend the larger implications of their rulings.[287]

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[286] Chadwick, "Accidents to Workpeople", 684.

[287] Chadwick, "Accidents to Workpeople", 692. In 1921 American Supreme Court Justice Benjamin Cardozo noted a continental movement to the opposite effect: "Today a great school of continental jurists is pleading for a still wider freedom of adaptation and construction. The statute, they say, is often fragmentary and ill-considered and unjust. The judge as the interpreter for the community of its sense of law and order must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision 'libre recherche scientifique.' That is the view of Gény and Ehrlich and Gmelin and others. Courts are to 'search for light among the social elements of every kind that are the living force behind the facts they deal with.'

At a meeting of the international and municipal law section of the jurisprudence department of the National Association for the Promotion of Social Science in 1883, G. P. Macdonell spoke to a small audience on amending the 1880 act to prevent contracting out and employer insurance.[288] He was against monetary limits and in favor of juries having free reign on that subject, and against time limits on pursuing a claim as employers could hold out hope of settlement until it was too late. Contracting out, he said, ignores the fact that worker's family also has a stake in that decision, but are not necessarily consulted or agree to it. Lawyer Frank Stafford argued the 1880 Act was illogical and litigious: to be logical they must abolish liability of masters to servants and the public, or abolish common employment. He favored the latter, as there was no basis to shield masters and it was absurd to think wages were calculated to cover the risks run by servants, who had no way to estimate them. Commissioner Miller contended that *Priestley* was rightly decided, but that "a misfortune inseparable from the manner in which a decision in one case becomes a precedent for another" had carried its application by subsequent judges to cases beyond its proper principles.[289] He agreed the general principle should be *respondeat superior*. It was a product of a defect in British legislative processes that this principle had not been laid down and the judges left to sort the details, rather than the ad hoc commandments of the 1880 bill been made law. He favored a narrow view of common

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The power thus put in their hands is great, and subject, like all power, to abuse; but we are not to flinch from granting it. In the long run 'there is no guaranty of justice,' says Ehrlich, 'except the personality of the judge.'". Cardozo, *the Judicial Process*, 16.

[288] "The Employer's Liability Act," *The Leeds Mercury*, Oct 9, 1883. The NAPSC was a reformist group created in part by Lord Brougham in 1857. Brougham had started as a Whig instrumental in Reform act of 1832 and abolition in 1833, later took positions against his former political allies. The NAPSC ceased to be by 1886. Lawrence Goldman, "Hastings, George Woodyatt (1825–1917), social reformer and politician." *Oxford Dictionary of National Biography.* 23 Sep. 2004.

[289] "Liability Act," *The Leeds Mercury*, Oct 9, 1883.

employment and railed against the example of letting men out of contracts just because the results were a hardship. He thought masters needed protection from workers, not the reverse. While H.N. Mozley disliked the act, W.B. Odgers thought it was a step in the right direction, but favored criminal penalties for negligent workers.[290]

By 1886 the Employers' Liability Act (1880) was nearing its original seven-year termination date. A Select Committee, chaired by Sir Thomas Brassey, sat to study its amendment and renewal. On April 2nd, 1886, the Committee met to hear testimony from their first witness, Samuel Woods. Woods, 20, was a miner's agent for Ashton and Haydock who had been a miner from age 7.[291] He explained to the Committee that mining was more dangerous than railways because no vetting of miners is done, and railway defects are apparent to the public. After a major explosion in 1878, a relief fund had been created. In the past year the employers contributed 5115£ to the fund, and 7054 workers, or 20%, had been disabled. Of these, 93 were deaths. In the death cases the fund paid full single members 20£, while married ones got 10£. The collieries pay just over 20% of what the men pay, he said, while the North Western Railway pays 5/6. He told the members that in the immediate aftermath of passage of the 1880 Act, employers in Lancashire had tried to force miners to accept contracting out by issuing a condition of employment in which workers gave up all rights to hold them accountable for injuries under the Act and indeed under any circumstance. This figured into a strike of some 60,000 men, and he estimated that 28-30,000 workers ultimately agreed to the employer's terms. The men who didn't relinquish their rights were fired, except for those working at a mine owned

[290] "Liability Act," *The Leeds Mercury*, Oct 9 1883.
[291] *Report from the Select Committee on Employer's Liability Act (1880); together with the Proceedings of the Committee, Minutes of Evidence, and Appendix* (Henry Hansard and Son, 1886). According to the Mines Act of 1842, boys were not supposed to be allowed to work underground until age 10.

by Colonel Blundell in Wigan. The Committee pressed Woods about Colonel Blundell's approach in which he gave his men the option to opt out of the Act for a 25% contribution to the relief fund or retain their rights under the Act and get 10%. Woods believed that if all the collieries had the same plan, the men would generally be satisfied.[292] As it was, however, hundreds of meetings have been had on the Act and there was almost universal dissatisfaction. The frustration for the miners, Woods said, was more about safety than compensation.

In its report, the Committee wrote that the fears of extensive litigation flowing from its enactment had proved groundless. As for the committee's recommendation on the question of eliminating contracting out, the vote was split 7-7 with the chairman casting the deciding no. However, that contracting out should require a substitute compensatory agreement was passed 10-4. That the definition of supervisor should extend to include fellow laborers in command passed by 13-1 and eliminating the cap on damages was defeated 8-6. Completing the list of issues forming the Committee's vision for the "groundwork for future legislation" was that provident societies should be allowed to act as alternative to the 1880 Act as long as the employer pays at least half, independent sub-contractors should have recourse if they are injured due to defective machinery provided by employers, defects in notices of injury should not be an automatic bar to an action but subject to judicial review, awards may exceed 3 years wages up to a maximum of 150£ if the judge or jury find it inadequate, a trial by special jury may be ordered

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[292] *Select Committee Report Employers' Liability Act (1880) Amendment Bill* (Henry Hansard & Son, 1886), 20. On the 19th of April, Colonel Blundell was invited to join the Committee. Blundell supported giving power to the judge to modify accident reporting requirements, opined that contractors should be treated as employers, and argued that districts in which the Act was operative experienced far fewer injuries, and that in such districts litigation had not increased significantly. He also inquired of William Pickard, president of the Lancashire federation of miners, about the solvency of relief societies if the Act was made compulsory. Pickard replied that it would be very difficult to continue, and the ongoing support they currently provide to workers, widows and families would cease. *Select Committee* (1886), ii, 170, 171, 195, 255, 320.

by the presiding judge, the Act should be extended to seamen, omnibus and tramway servants, and seamen at away ports should only have actions in regards to defective machinery.[293]

By the early 1890's the TUC had passed into the hands of new leaders. Alexander Macdonald, a founding member of the TUC and the first member elected to Parliament, had died in late 1881. Henry Broadhurst resigned as secretary of the Parliamentary Committee in 1890 and was replaced by Charles Fenwick. In 1892 the Liberals won the general elections, and Samuel Woods followed in Macdonald’s path by winning a seat in parliament as a Lib-Lab candidate.[294] Workmen's compensation continued to be a perennial issue in elections in a parliament increasingly sensitive to the growing labor vote.[295] In November *The Nineteenth Century,* a monthly literary magazine, published the Conservative framework for the compensation of injured workers in an article titled “The Labour Question”.[296] In it, Joseph Chamberlain, a force in British politics who had made a stir as a radical Liberal before breaking

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[293] *Select Committee* (1886), xi-xiii. The notice issue had worked particular hardships on the families of dead workers, as the time limits and jurisdictional requirements of the 1880 Act interacted with Lord Campbell’s death Act to thwart workers in both attempts; pursuing one and failing could cause the second action to fail because the time limit had passed. “Our London Correspondence,” *The Liverpool Mercury,* June 1, 1888.

[294] Woods rose to win a seat as a Lib-Lab in Parliament in 1892, taking the seat from Colonel Blundell, who won it back in 1895. He served as secretary of the TUC parliamentary committee from 1894, taking over for Charles Fenwick, and seeing through the 1897 Act, serving up to 1904. He wrote *Visions of the Mine: Sketches of Real Life at our Collieries* (J. Starr, Printer and Bookseller, 1891). A song, ‘The Miner’s Lock-Out” honored Woods for his work on behalf of miners during the 1893 lock-out. D. Anderson, *Blundell’s Collieries, The Progress of the Business. An original article from The Historic Society of Lancashire and Cheshire* (The Historic Society of Lancashire and Cheshire, 1964), 142.

[295] At that point the issue had been a part of every Queen's Speech since 1888. Lester, "The Employer's Liability", 471. John Burns, Thomas Burt, H. H. Champion, J. Keir Hardie, and Sam Woods, "Labour Leaders Respond to Mr. Chamberlain's Programme," *The Nineteenth Centur*y 32, no. 190 (1892): 869.

[296] *The Nineteenth Century* was founded in 1877 by James Knowles, also a founder of the Metaphysical Society. Both of these circles intersected with that of William Gladstone. Laurel Brake and Marysa Demoor, *Dictionary of Nineteenth-Century Journalism in Great Britain and Ireland.* (Academia Press 2009), 456.

with Gladstone over Home Rule for Ireland, made a calculated effort to drive wedges between workers and the rapidly consolidating but still nascent Labour Party. Simultaneously he made an appeal designed to shear voters away from that bloc. Chamberlain began his discourse on what the TUC had called Employer's Liability since 1880, and which he called Compensation for Injuries and Abolition of the Doctrine of Common Employment, by asserting that the trade unions intended to legally compel employers to pay compensation in all cases in which common employment currently barred them from it.[297] In so doing, Chamberlain repeated a misrepresentation made by the Conservative opposition since 1872. The bills proposed by the workers never forced compensation; they merely gave the workers the ability to try their case in front of a jury. The jury, of course, was never obliged to rule in their favor. Elided by this approach was the two-tiered justice system *Priestley* had created and which no worker, and increasingly few members of the upper classes, found to be justifiable.[298] Just as importantly, Chamberlain's rhetorical scheme recast the issue as one of compensation, which his scheme could address without altering the status quo in the legal sphere. Chamberlain proposed a system

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297 Joseph Chamberlain, "The Labour Question," *The Nineteenth Century* 32, no. 189 (1892): 693.

298 A.D Provand contended that the injustice of *Priestley* was generally agreed on and he summarized the worker's demands as the elimination of common employment for all workers without contracting out or a compensation limit. While Provand acknowledged many workers' aversion to insurance schemes, he disagreed with them, noting that insurance increased safety if premiums were tied to losses. He also recognized that a proportion of the unions had enjoyed better guarantees through local relief societies than the proposed bills offered, and that those workers did not wish to lose these gains under a blanket ban on contracting out. A.D. Provand, "Employer's Liability", 702-703. Finally, as Chamberlain had, Provand maintained that the core issue was compensation, writing "The object aimed at is to prevent, or at least alleviate, the distress which in many cases comes upon a family through the sudden extinction of their income by the death or injury of the breadwinner" and "no plan can give a final settlement of the question that does not secure compensation to workmen for every injury, however caused, that happens to them while engaged in their usual occupations, without their requiring to have recourse to the law courts." (719-720).

based on what he deemed the chief virtue of the German compensation system: universal compensation regardless of fault. Without a determination of fault, compensation would be made a charge to production, and a minimized one at that.[299] There would be no question of large verdicts in civil courts. Ignoring the history of employer complacency and apathy regarding injuries in the English workplace, Chamberlain argued that even though his system ensured that the employer would never pay out of pocket for any injury, they would be motivated toward safety because accidents were costly in other ways, and in any case the alternative was economic Armageddon.[300]

The following month John Burns, Thomas Burt, J. Kier Hardie, and Samuel Woods provided Labour's response. Thomas Burt noted that anticipation for Chamberlain's paper had been developed and magnified through summaries and articles published in various papers long before it arrived. When it did arrive, he found the writing clever, smart, cynical, and dogmatic. It was, Burt deemed, not so much a dispassionate treatment of important issues as an electioneering manifesto designed to garner the votes of working men. Burt recounted Chamberlain's role in creating and defending the 1880 Act, which Chamberlain now called "half-hearted", "uncertain", "defective", and "doubtful".[301] The notion of spreading the cost of compensation as a charge to

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[299] Chamberlain, "The Labour Question", 695. According to Arthur Larson, the German worker's compensation system developed under a premise promoted by philosopher Johann Fichte that misfortunes were social, rather than individual, in nature. Bismark, responding to recent political inroads by Marxist politicians, put forward the German plan over the period 1883-1887. The German system was distinct from the American version in that it relied on joint worker and employer contributions to worker's insurance. Arthur Larson and Lex K. Larson, *Larson's Worker's Compensation Law: Cases, Materials, and Text, Third Edition* (Matthew Bender and Company, 2000), 2-11.

[300] Chamberlain did not sense any real crisis in worker safety that needed fixing, and certainly none that could be remedied by imposing difficulties on the employer when it was the worker himself or his fellow employee who should be more careful. Lester, "The Employer's Liability", 483.

[301] Burt, "Labour Leaders Respond", 869.

production was worth consideration, Burt said, but it had nothing to do with an Employer's Liability Act. Workers, he wrote, want nothing to do with any scheme for relieving employers of the legal obligation to pay compensation.[302] He reiterated the worker's goal of being treated equally to the public.[303] J. Kier Hardie echoed Burt in saying that Chamberlain conflated employer's liability with accident insurance and that workers would not agree to any system that freed the employer from responsibility. Hardie added to this a condemnation of putting the costs of injuries through as a charge on production on the grounds that it was yet another way to force the worker to compensate himself, because employers would reduce wages to offset the cost.[304] The Press, as always, followed events closely. *The Speaker* felt that democracy was winning out, as both the government and labour were responding to each other with sincerity. The weight of the moment was not lost on their editorial writer, who added "Everyone who is capable of feeling the trend of events knows we are now at a great turning point in our social and political history."[305]

In 1893 H. H. Asquith, the new Home Office Secretary, put forward an Employer's Liability bill which eliminated common employment, assumption of the risk, liability limits for employers, and contracting out.[306] Chamberlain's opening gambit was to propose an amendment demanding blanket no-fault compensation for all injuries workers did not self-inflict. The move put Asquith on the defensive and helped to define the debate in the terms of Chamberlain's 1892 critique of the Liberal position. He argued that the government Bill would not otherwise meet its

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302 Burt, "Labour Leaders Respond", 872.
303 Burt, "Labour Leaders Respond", 873.
304 J. Kier Hardie, "Labour Leaders Respond", 886.
305 "The Government and Labour," *The Speaker,* January, 1893.
306 Lester, "The Employer's Liability", 480. The company schemes required contributions by workmen, which would be forfeit if they quit their jobs. Union leaders saw this as a mechanism to bifurcate worker loyalties.

intention, which he alleged was to provide compensation to every injured man. Trying to control and pressure his adversary, as well as posture for Labour votes, Chamberlain went as far as proclaiming that it was the House's moral obligation to do so. His only objection was that it would be clearly unjust to accomplish all this at the employers' expense. The implication Chamberlain created was that his plan of universal no-fault insurance would meet all ends equitably, while Asquith's would not. The TUC weighed in on Asquith's side, clarifying that Chamberlain's amendment was not consistent with their goal for the present legislation, and they opposed it.[307] Tacking away from this course, Chamberlain withdrew his amendment, saying it had served its purpose.[308] He then turned to contracting out and did his best to drive a wedge between the unions that supported it and those that didn't. In the House of Lords, Lord Dudley added an amendment that made contracting out an option for those factories where 2/3 or more of the workers voted for it in a secret ballot. Having inherited a substantial fortune that included several collieries, Dudley was not a stranger to the benefits of contracting out from the employer's perspective. In 1882 one of his workmen, Mr. Griffiths, was killed when a hoist stopped short of lifting him out of a hole in which an explosive charge had been set. He leapt for his life toward the pit bank and instead fell down the shaft to his death. His widow sued the Earl in Dudley County Court for three year's wages, or 150£.[309] The defense pointed to the colliery's conditions of employment which Griffiths had signed, and argued that he had contracted out of his rights to sue. Recognizing the importance of the first legal challenge to the practice, justice

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[307] *Report of the Twenty-Sixth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1893), 20.

[308] David Hanes, *The First British Workmen's Compensation Act 1897* (Yale University Press, 1968), 65. Judging by the substantial subsequent efforts to reconcile the Dudley amendment with Labour wishes, Chamberlain's amendment appears to have been made with sincere expectations.

[309] "Important Case Under the Employer's Liability Act," *The Midland & Northern Coal & Iron Trades Gazette*, May 31, 1882.

Sir Rupert Kettle granted the full award to the widow. Payment was suspended, however, until the likely appeal had run its course. The widow lost the appeal, and contracting out was legally affirmed.[310] The final version of the 1894 amendment required a minimum contribution by the employer to an alternative relief fund or society of 33% compared to 67% for workers, and allowed the worker to release himself from the contract if the fund proved inadequate and the employer refused to make up the difference.[311] Union leaders decried the majority-rule tyranny the plan created at the expense of worker solidarity, and in any case were never going to endorse a plan that maintained the two-tier legal system and allowed employers to again escape being held accountable. Gladstone spoke against the amendment on the basis that it impaired the independence and agency of the worker "in the face of his employer".[312] In other words, it deprived him of the basic benefits of individualism in the legal sphere. Chamberlain's efforts to divide the workers did not alter the course of the Bill, which was rejected on the basis of Lord Dudley's clause in February of 1894.[313]

The Workmen's Compensation Act 1897

As it passed into law, The Workmen's Compensation Act 1897 began with the pronouncement that "If in any employment to which the Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as herein-after mentioned, be liable to pay compensation in accordance with the First

[310] The case continued to be cited in law journals under waiving of statutory rights into the 20th century. Herbert Schreiber, "Waiver of Statutory Rights in Israel Labour Law: A Comparative Analysis in Light of English and American Law," *Israel Law Review* 13, no. 1 (1978): 41-85.
[311] Hanes, *The First British*, 80.
[312] Hanes, *The First British*, 81.
[313] Lester, "The Employer's Liability", 480.

Schedule to this Act."[314] On the face of that sentence, one might expect that a powerful Liberal-Labour alliance had dictated to a conservative minority in disarray the stark terms of an unequivocal employer's liability law to the final satisfaction of workers and trade unions, and to the utter dismay of every industrialist. One would have gotten it entirely wrong. A month after the failure of the 1894 Bill, Gladstone's government fell. In the 1895 elections the Unionists won an overwhelming victory that carried with it an outright majority of 152.[315] Lord Salisbury handed the reigns of the workmen's compensation legislation entirely over to Chamberlain, who had no obstacles before him. Asquith tried to amend the measure to eliminate common employment, without success. On the other side, the conservatives tried to actually reduce the employer's liability in court by adding "willful and wrongful" language to the Bill so as to increase the threshold for legal action by the worker. This was also defeated.[316] The trades unions were lukewarm to the Act. The industrialists, on the other hand, had won the day by accepting a compromise they could live with rather than risk a future they feared they could not.

How has modern scholarship sought to explain this outcome? Writing for the Social Science Research Council Centre for Socio-Legal Studies, researchers P.W.J. Bartrip and S.B. Burman saw the Workmen's Compensation Act through the lens of what they construed as previous efforts to achieve safety through economic deterrence rather than simply as compensation for injured workers. They found it surprising that the unions ultimately favored a classically *laissez-faire* solution over the socialist Act that the conservatives authored in 1897.[317] Historian David Hanes probed the political dynamic leading up to the passage of the Workmen's

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[314] W. Addington Willis, *The Workmen's Compensation Act with Copious Notes, and an Appendix containing the Employer's Liability Act 1880 2nd Ed* (Butterworth & Co., 1897), 1.
[315] Hanes, *The First British*, 92.
[316] Lester, "The Employer's Liability", 484.
[317] Bartrip and Burman, *Wounded Soldiers,* 220-221.

Compensation Act 1897 by paying particular attention to the backgrounds of H.H. Asquith and Joseph Chamberlain in an effort to detect embedded motivations for the positions they took in the debates. In doing this he insisted that one need look no further than the Parliamentary record of the 1893 debates, Chamberlain's brand of radicalism, and H.H. Asquith's tangential connections to political theorist T.H. Green.[318] Hanes fiound himself puzzled by the TUC's support of Asquith in the face of Chamberlain's attempt to insert no-fault insurance into the 1894 debate, Asquith's stubborn refusal to accept contracting out even with the relatively generous stipulations offered by the House of Lords, and the unions' tepid response to the 1897 legislation. He waived away these apparent anomalies by suggesting the TUC was being "backhanded" in 1894 and petulant in 1897, and attributing Asquith's position to an unflinching adherence to the principles "orthodox Liberalism" inculcated in him by Green.[319] That is to say, Hanes attributed to Asquith a disdain for a solution that gave preferential treatment to any class of person, which in the case of Dudley's amendment meant the benefit to workers of allowing them the right to break their contract under certain circumstances.[320] For Chamberlain, Hanes drew a background of utilitarianism and nonconformity that led to an ideologically flexible view of property rights and *laissez-faire*. From his 1885 "Ransom" speech to his 1892 speech on miners' hours,

[318] Hanes highlights Asquith's friendship with Green beginning in Asquith's time at Balliol College. Asquith attended Green's lectures and engaged him as a tutor. Green, Hanes wrote, believed government's role was that of promoting freedom through enabling moral choices of the individual, rather than that of merely removing all restraints. Removing all restraint for one individual would inevitably lead to interference in the like freedom of others. Hanes extrapolated this to employer/employee contracts and tied Asquith's refusal to accept common employment, contracting out, and Dudley's amendment to Green's views of equality of freedom for all parties. Hanes, *The First British*, 3, 51-54, 85.
[319] Hanes, *The First British*, 84, 104-105. Hanes misconstrues the TUC's corresponding denunciation of Chamberlain's amendment as somehow 'backhanded' support of Asquith, when in fact it was perfectly congruous with their position all along (63-64). Hanes imagined the unions must have wished they had proposed Chamberlain's solution themselves.
[320] Hanes, *The First British*, 84,

Chamberlain had demonstrated a willingness to set limits on both when the greater good was at stake.[321] Historians Sir Arnold Wilson and Professor Hermann Levy viewed the union position of insisting on the elimination of common employment and restoration of employer responsibility as "unenlightened".[322] The Labour leaders of that time, they said, could not grasp the essential principle that would go on to form the basis of Worker's Compensation across the world. For Asquith's part, Wilson and Levy credited him with developing a brilliant critique of *Priestley* that must have been seen as new and revolutionary for the time,[323] and contended that he only resorted to older union arguments based on safety and economic deterrent as an expediency to deal with Chamberlain's efforts to wall off all liability within an insurance scheme.[324] Like Hanes, Wilson and Levy ascribed to Asquith a motive to preserve *laissez-faire* as an explanation for his actions.[325] The authors praised the final Bill as a monument to the truest principles of Tory radicalism, and Chamberlain for taking "the bolder course".[326] Socialist writers, they thought, had failed to credit Chamberlain for all his services to the working classes.[327] Historian V. Markham Lester accepted Bartrip and Burman's thesis that the core issue for Asquith and the unions was worker safety rather than compensation, and argued with Wilson and Levy's characterization of their resistance to Chamberlain's solution as backward and lacking vision.

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321 Hanes, *The First British*, 99.
322 Sir Arnold Wilson and Herrmann Levy. *Workmen's Compensation* (Oxford University Press, 1939), 53.
323 Wilson and Levy, *Workmen's Compensation*, 58. They were not new or revolutionary, and would have appeared well-worn to contemporary observers of the rhetoric contained in TUC Reports, in previous debates, in select committees, and in newspaper articles.
324 Wilson and Levy, *Workmen's Compensation*, 60.
325 Wilson and Levy, *Workmen's Compensation*, 60.
326 Wilson and Levy, *Workmen's Compensation*, 64-65.
327 Wilson and Levy, *Workmen's Compensation*, 59. Chamberlain actually tried to insert language into the bill that would reduce employer liability. It was defeated. Lester, "Employer's Liability", 484.

Evaluating the Labour position in view of injury statistics subsequent to the passage of the 1897 Act, Lester found that the workers were vindicated by the facts.[328]

Each of these theses contains insurmountable difficulties, however. Bartrip and Burman's contention that safety was the real purpose of worker's agitation is undermined by the content of the Factory Acts, contradicted by the text of the Employer's Liability Acts they proposed, and refuted by the majority of voices at the Trades Union Congress before 1880. From 1871 to 1880 the TUC reports of the annual meeting minutes headlined the issue as "Compensation for Accidents", "Compensation to Workmen Bill", "Workmen and Servants Compensation of Injuries Bill", and the "Compensation Bill". The agendas for the TUC parliamentary committee in 1877 and 1878 were clearly stated: "To Amend the Law of Compensation in cases of Accidents, so that workmen, or their families, may recover from an employer in the event of injury or death from accidents due to negligence". How was the matter discussed among TUC members? A qualitative analysis reveals that speakers employed four distinct rhetorical strategies when justifying their positions for legislative change: the need for a path to compensation through the restoration of their rights vis a vis the general public, increasing safety in the workplace, the injustice of the current system, and their status as humans rather than assets in a manufacturing enterprise. A quantitative analysis further reveals the relative penetration of each of these ideas. Up to 1880 a path to compensation and restoration of rights accounted for 68% of the stated reasons to support the measure. Safety was a distant second place at 17%.[329] Bartrip

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[328] Lester, "Employer's Liability", 473, 490.

[329] R. S. Kirk, *The Second Annual Congress of Trades Unions*, 1869, The Library Collections, London Metropolitan University. *The Annual Trades Congress*, 1871, The Library Collections, London Metropolitan University. *The Fourth Annual Congress of Trades Societies,* 1872, The Library Collections, London Metropolitan University. *The Fifth Annual Trades Union Congress*, 1873. *Full Report of the Sixth Annual Trades Congress*. Salford Steam Printing Company Limited, 1874. *The Eighth Annual Trades Union Congress*, 1875, The Library Collections,

and Burman note that the first instance of compulsory insurance can be traced to a paper by Joseph Brown delivered to the Social Sciences Association in 1878.[330] Early notions of insurance were to be funded primarily if not totally by the worker themselves, while later versions placed more weight on employer contributions. In both cases the workers vigorously resisted such plans. As for creating a safer workplace, workers never expressed any expectation that the various dangers they faced could be effectively eliminated. If safety been their true goal, then concentrating their political capitol on expanding the meager safety clauses of the Factory Act 1844 would have been the obvious plan of action. No new ground in law or governance would have needed to have been broken, just an appeal made to the available statistics of increased injuries, the testimony of more-than-willing factory inspectors, and an expose of the pathetically low fines then applied to offending employers. This was not done. A much harder path was chosen and single-mindedly pursued for 25 years, and when Chamberlain offered to include increased safety measures as part of the 1894 Compensation Bill the workers still rejected it. Neither the Employer's Liability Act of 1880 nor the Workmen's Compensation Act contained a word devoted to safety, and period actors did not see the 1897 Act in that way; Asquith and his allies noted there were no provisions in it meant to increase safety, and Chamberlain admitted

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London Metropolitan University. *Report of the Ninth Annual Trades Union Congress* (Owen and Jeffrey, 1876). *Report of the Tenth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1877). *Report of the Eleventh Annual Trades Union Congress* (Co-operative Printing Society Limited, 1878). *Report of the Twelfth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1879). *Report of the Thirteenth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1880). *The British Trades Union Congress: History and Recollections* (Co-operative Printing Society Limited, 1910). W.J. Davis, *The British Trades Union Congress: History and Recollections* (Co-operative Printing Society Limited, 1910). B. C. Roberts, *The Trades Union Congress, 1868-1921* (Harvard University Press, 1958).
[330] Batrip and Burman, *Wounded Soldiers*, 140.

that he never contended that the Act would greatly affect safety precautions.[331] The same difficulty necessarily applies to Lester's analysis of worker's goals and the nature of the Act.

Bartrip and Burman are correct, however, in pointing out that several speakers in the House of Commons and within the TUC made a point to draw the issue as one of economic deterrent, at least from 1880 forward. The best explanation for this is found in Wilson and Levy's observation that this rhetoric was used as an expedient to fend off the push for an insurance solution.[332] David Hanes' thesis incorrectly relies on the premise that Asquith was the author of his position in the debates rather than a faithful conduit of the arguments consistently made by the unions for years before his involvement.[333] Finally, the various points of confusion

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[331] Lester, "Employer's Liability", 483.

[332] Wilson and Levy, *Workmen's Compensation*, 60.

[333] Unfortunately, Hanes, who did not cite any TUC Reports and only one newspaper article in the Times, convinced himself unions were too busy trying to survive and hence applied no direct influence on the Workmen's Compensation Act; Hanes, *The First British*, 3. Without knowledge of the lengthy and detailed involvement of the TUC Parliamentary Committee from 1872 onward, Hanes built his thesis around the premise that Asquith was the author of his positions rather than merely a faithful conduit of the wishes of workers developed years before Asquith came to Parliament in 1886. On this error Hanes assigns the rhetoric that "workers be treated equally with the public" in any proposed new legislation as owing to Green's orthodox Liberalism rather than flowing from workers' visceral repudiation of a legal past dominated by *Priestley*. In terms of resisting contracting out, Hanes again extrapolates to Green's attitudes toward Government's rightful role as intervenors in circumstances of unequal bargaining for Asquith's motive, rather than the workers' direct experience with the inequality between 1880 and 1897. Moreover, there is a simpler explanation at hand, and one which is supported by evidence: the workers and their leadership were never going to be satisfied with a system which made workers largely insure themselves for the negligent acts of their employer and ultimately maintained their legal status as second-class citizens. In addition, Hanes grossly misrepresents the Factory Acts as safety-oriented, incorrectly asserts that legislators thought injuries could be effectively eliminated by proper procedures, and misinterprets the 1893 Bill as an effort to "legislate accident prevention"; Hanes, *The First British*, 5. Hanes erroneously states that negligence was a nascent concept in this era and that it was only mentioned under "implied contracts" by Blackstone. In fact the relevant cite of Blackstone is in *Book the First: of The Rights of Persons* under *Chapter XIV: Master and Servant* (Blackstone, *Commentaries,* 432). Unaware of the long legal history of *respondeat superior*, Hanes mistakenly characterizes Asquith's position as "surprisingly modern", and casts it as policy-based rather than morality-

encountered which I have highlighted above may seem random at first glance, but are in fact a defect common to all of the works: None of the authors correctly identified or considered the overriding motivation of the workers, which can be sifted from the rhetoric by focusing on the legislative proposals offered by the TUC from the beginning of their organized resistance in 1872 up to the passage of the Act in 1897. In no legislative proposal did the TUC demand either compensation or safety. In every proposal they demanded the end of *Priestley* so that workers could have the same chance as the public had at court to win compensation based on the individual merits of each case. What they wanted, what they believed *Priestley* had wrongly deprived them of, and what the rest of British society already had, was for workers to be able to participate on an equal basis in the legal system. Over and over again they had told the history of the law before and after *Priestley* to each other, and to the members of Parliament that would listen; how *respondeat superior* made the master liable to those who suffered wrongs caused by his servants since the time of Charles II up to the time of Abinger, and how in 1837 this avenue for redress was stripped from them solely upon their identities as members of the English working classes. From that moment onwards, they felt that there was not one English law for all, but one for the general public and a lesser one for workers. When employers consolidated around the idea of insurance schemes during the debates of 1880, the TUC recognized they were being out-flanked. The insurance schemes being proposed would have satisfied simple calls for a right to compensation at the price of leaving *Priestley* intact, and in so doing frustrate the true goal of the workers: The restoration of the workers' status as full citizens of the realm before the courts

based Hanes, *The First British*, 60-61. This is debunked by reading Blackstone on *Master and Servant.*

of England. Only from 1880 did the rhetoric inside and outside the TUC pivot to safety.[334] By re-casting safety as an indispensable aim of reform, proponents could stymie insurance-only proposals on the basis that they would have the undesirable effect of insulating employers from any motivation to commit capital to improvements. It didn't hurt that the argument simultaneously allowed them to re-position themselves more firmly on the moral high ground of the issue by championing human life rather than the pursuit of mammon.

By the late 1890s the formulation of the insurance solution had matured into a compulsory system entirely funded by employers with pre-determined rates and schedules, and it was clear that this would form part of whatever agreement was to be made. However, by then such solutions were couched within the existing framework of the 1880 Act, which included a mechanism to circumvent the trappings of *Priestley*, at least in principle. This did not alter the central goal of workers, as was made plain by John Mallinson during his presidential speech to the TUC on September 8, 1896, in which he warned:

> "The main principle involved in the Bill is in danger of being lost sight of and mixed up with insurance and compensation. We must therefore make it clear that we do not ask this legislation solely with a view to securing compensation for injuries, but that we chiefly aim at making the employer liable for injuries caused by his not taking every possible precaution against accident. In this we are not seeking any privilege for the worker, but rather the removal of a disability, so that, in relation to the employer, he may be placed on the same footing as the ordinary citizen. No objection can be taken to employers and workmen mutually agreeing to any fair scheme of insurance, but we cannot admit that, because of the existence of any such scheme, the worker should suffer any limitation of his legal rights."[335]

[334] Before 1880 safety appeared in only 17% of the calls for legislative action recorded in TUC Reports, compared with 68% for the restoration of workers' rights. In the 1880 TUC Report safety rocketed up to 40% of the reasonings cited for supporting reform, compared to 50% for worker's rights. See TUC Reports, 1868-1880.

[335] *Report of the Twenty-Ninth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1896), 31.

Mallinson's emphasis was on liability for injuries that had already occurred, not preventing future ones, and the "disability" he referred to was *Priestley*. What of the employers' motivations then? I concur with Haynes, who pointed out that Chamberlain's bill was the best deal they were going to get. While the conservatives had the votes to push through their solution in 1897, in the future they were likely to find themselves at the mercy of a Liberal government that would enact a liability bill that destroyed *Priestley* without any recourse to contracting out or insulating insurance.[336] That, they deemed, was the worst of all worlds.

The Workmen's Compensation Act of 1897 eliminated all defenses and rendered moot the contract out issue in exchange for limited liability set by schedules. Under the Act employers could provide an alternative form of insurance to their workers, but only if it were determined by the Registrar of Friendly Societies to be no less favorable to the worker, and as long as the worker was not obligated to enroll as a condition of employment. Subcontract employees were covered as if they were direct employees. Compensation could be sought in court from responsible third parties or from the employer under the Act, but not both. The pay schedule provided compensation for the death of a worker with dependents of between 150£ and 300£, depending on his salary history. Incapacity could bring up to fifty percent of a worker's salary but not to exceed 1£ per week. After six months a lump sum payment could be agreed upon or determined by an arbitrator. Workers were guaranteed compensation under the Act unless they opted to sue the employer under the pre-existing legal guidelines of the 1880 Act.[337]

[336] Hanes, *The First British*, 101.
[337] Willis, *The Workmen's Compensation Act*, 9.

The Continent and Beyond

In the winter of 1891-1892 W. A. Hunter, editor of *The Weekly Dispatch* and a Liberal M. P. from Aberdeen, published a series of editorials providing a comprehensive survey of the issues surrounding the employer's liability and workmen's insurance debates. An ardent critic of "the peculiarity of the English Common Law" that gave the employer unlimited liability to strangers on one hand and then awarded him "total immunity from such responsibility towards his own workmen" on the other, Hunter included in his analysis a review of continental countries' laws on the matter. England, he showed, was alone among European countries in following the precedent of *Priestley*. France, Belgium, Holland, and Italy adhered to the Napoleonic Code for liability, which since 1804 made employers responsible for the actions of their servants regardless of the injured party's status as a stranger or fellow servant. In France, the state subsidized suits against the employer by providing an attorney to represent plaintiffs and waiving court fees. In 1838 both the Swiss and the Prussian legislatures enacted laws which explicitly made certain employers liable for injuries to employees just as they had for strangers unless the employees were themselves negligent, or injured through an act of God. The burden of proof was placed on the employer, and the risks inherent in workers' jobs could not be used by the courts to rule that the accidents were inevitable.[338] As Germany industrialized, the myriad difficulties in bringing a liability action, even under these laws, were recognized as turning the promise of renumeration into an illusion.[339] Strictly from the point of view of compensation, something more was needed.

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[338] Adna Weber, "Employer's Liability and Accident Insurance", *Political Science Quarterly* 17, no. 2, (1902): 261, 276.
[339] Weber, "Accident Insurance," 262.

A form of no-fault worker's compensation had been in place in Belgium since 1840, where a private association of mining employers had created a system of annuities for miners. Sickness, injury, and death were covered by the plan, which was funded by local provincial government and employers, with a 0.5% contribution by the worker.[340] The Germans introduced statutory worker's compensation in 1871 and modified it in 1884. In 1887 Austria developed compensation laws similar to that of Germany and Prussia which covered both sickness and injury. For disablements that lasted less than 13 weeks, the employer paid 1/3 of the contribution to sick clubs. For total disablements the compensation system provided an annuity for life amounting to 2/3 of the worker's salary. In the case of death, the widow received 20% of the worker's salary based on his last year's income until she died or remarried. Children received 15%, with the total not to exceed 60% of his wages. Contracting out was not allowed, and the state guaranteed the solvency of relief funds.[341] The Austrian variant allowed the employer to deduct 10% of his premiums from worker's pay, and required the employer guarantee the solvency of the funds. In Spain the Social Reform Commission met from 1889-1893 and published a report on working and living conditions based on accounts from social workers, employers, and workers. The scrutiny that ensued led to intense debates inside and outside of the Spanish Parliament.[342] The British Act seems to have triggered world-wide action on the issue: Spain, France, Denmark, Sweden, Norway, New Zealand, Australia, and Italy all passed comprehensive compensation laws from 1897-1901.[343]

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[340] Wilson and Levy, *Workmen's Compensation*, 23.
[341] W. A. Hunter, "Pensions for Old Age and Provident Insurance for Working Men", *The Weekly Dispatch* January 3 (1892), and W. A. Hunter, "Pensions for Old Age and Provident Insurance for Working Men", *The Weekly Dispatch* January 10, 1892.
[342] Javier Silvestre, "Workplace Accidents and Early Safety Policies in Spain, 1900-1932," *Social History of Medicine* 21, no. 1 (2008): 67.
[343] Weber, "Accident Insurance," 256-276. Silvestre, "Safety Policies in Spain," 67.

Historians Wilson and Levy sketched the earliest systems of relief for workers in Germany, which were provided by a combination of local municipalities and gilds dating back to the 1400s. In 1845 the legislature had empowered and encouraged gilds to form relief organizations, which then worked to bring the community of workers for groups of employers, called *Berufsgenossenschaften,* into a single society.[344] While Bismark suppressed trade unions from 1883-1887, he maintained the system of support for sick and injured workers that had by that time been woven into the German conception of democracy. Co-ops and guilds had lasted longer in Germany than England, and everywhere that guilds lasted longer, they wrote, social assistance fared better during the transition to industrial society.[345]

[344] Weber, "Accident Insurance", 265.
[345] Wilson and Levy, *Workmen's Compensation*, 7-9.

Imaging the Injured Worker

The issue of workplace injuries spilled onto the canvasses of several prominent European artists known for their contributions to the social realism movement; a reaction against idealism with its grandiose, often wealthy subjects, which sought to represent everyday life with all its difficulties and ugliness. In Spain, this tradition included Vicente Cutanda y Toraya, Jose Jiminez Aranda, Joaquin Sorolla, and Aurelio Arteta. Erik Henningsen was Danish painter, and both Johann Bahr and Emil Doepler were artists in Germany.

Vicente Cutanda y Toraya's *Lienzo* shows a worker straining against the pain as a doctor works on his wound next to large furnaces, probably for iron or steel production in the town of Lienzo. While some workers help the doctor, some watch, and another keeps working.

Figure 1. Vicente Cutanda y Toraya, *Lienzo*, 1893, oil on linen, 51 x 104 cm

Jose Jiminez Aranda's 'Una desgracia', or 'A disgrace', pictures the immediate aftermath of an accident in an urban setting (Figure 2). A worker has been injured due to a scaffolding collapse, a leading problem of the time. Aranda has been praised for his bold decision to hide the injured person from view, which magnifies our engagement with the image as we try to search among the bystanders to capture a glimpse of victim. We are unable to see his fate. Instead we learn about the attitudes of the community surrounding him, from those striving to see to those who look away, to those who dispassionately discuss the event at a distance. For some it is a tragedy, and for others it is a momentary interruption in a busy day.

Figure 2. Jose Jiminez Aranda, *Una desgracia*, 1890, oil on linen, 106 x 150 cm

Joaquin Sorolla's 'Aun dicen que el pescado es caro!', or 'And They Say the Price of Fish is High!', shows us the broken body of a seaman who has paid quite a high price for his livelihood (Figure 3). Seamen were often excluded from initial employer liability and workmen's compensation bills because the measures would not have been able to survive the assault of the powerful shipping lobby that would have swung into action against them. This man is quietly attended to by his compassionate fellow seamen, who seem experienced with such injuries to their shipmates and resigned to the risks of life aboard ship.

Figure 3. Joaquin Sorolla, *Aun dicen que el pescado es caro!*, 1894, oil on linen, 151.5 x 204 cm

Aurelio Arteta's 'Accidente de trabajo en una fabrica de Vizcaya', or 'Work Accident in a Factory in Vizcaya', pictures fellow workers springing into action after another worker has suffered a serious injury among the palpably hellish conditions of his employment (Figure 4). The unforgiving surroundings are a confusing and threatening mass of metal, heat, and fumes set in stark contrast to the bared, unprotected flesh of the men. The Vizcaya region was famous as an industrial center with iron, steel, and chemical factories, and for massive demonstrations by workers fighting for better conditions in 1892.

Figure 4. Aurelio Arteta, *Accidente de trabajo en una fabrica de Vizcaya*, 1902, oil on linen, 110 x 140 cm

Erik Henningson, a Danish painter, presents another dimension of industrial carnage in his *An Injured Workman*. A woman, presumably the family of the injured man, is shown distraught at his side. The workman lies on a stretcher, having been just bandaged by an attending doctor, who is cleaning his hands. The government is present in the form of a constable who appears to be there in an official capacity. The man comforting her may be a company man for the mining works in the distance.

Figure 5. Erik Henningson, *An Injured Workman*, 1895, oil on canvas, 131.5 x 187cm.

German artist Johann Bahr, a former machinist, created *Unfall in der Maschinenfabrik*, or *Accident in an Engineering Works*. It was published in *Illustrirte Zeitung* as a promotion for the Allgemeine Ausstellung für Unfallverhütung, General German Exhibition for Accident Prevention, held in Berlin in 1889. The event drew more than a million visitors, including 300,000 workers. As with Henningson, we see the injured man being attended by a doctor, and his concerned family nearby. Some workers are investigating the machine that caused his injury, which is in a state of partial disassembly. Other workers appear agitated in the background.

Figure 6. Johann Bahr, *Unfall in der Maschinenfabrik*, 1889, colored wood engraving.

German illustrator Emil Doepler made the poster to announce the *General Exhibition of Accident Prevention* held in Berlin in 1889. The dominating female figure is a Norse goddess of protection, possibly Hlin. She rises from the heat and smoke to stand above the workers below, holding a shield which is deflecting a lightning bolt away from them. The different industries depicted include mining, metal working, wood working, railways, seafaring, and farming.

Figure 7. Emil Doepler, General Exhibition of Accident Prevention poster, 1889, copper printing, 104.5 x 77cm.

The American Experience

Only one other country in the world willingly adopted the doctrines Lord Abinger had spawned. Argued in the light of *Priestley, Farwell v The Boston and Worcester Railway Co.* enshrined common employment into American jurisprudence. Mr. Farwell joined the Boston and Worcester Railway as a machinist in 1835 and worked his way up to engineer by the time of his accident on October 30th, 1837. On that day his fellow employee, a switchman named Whitcomb, left a rail switch in the wrong position. When Farwell's train arrived it was derailed, and Farwell's arm was crushed in the accident that followed. Although Boston and Worcester had a provision by which Farwell could make a plea for their modest largesse, he chose to bring suit against them for a larger sum.[346] The plaintiff attorney argued that the implication of the contract between Farwell and his employer should be one of liability. The defense responded that the example of *respondeat superior* was that of a shrewd policy decision intended to safeguard the traveling public, an intention which would be undone if the judge ruled for Farwell. In other words, if rail workers felt indemnified for their injuries they would take less care in their actions and thereby endanger the paying passengers. As for the implied contract, the defense cited *Priestley* and asserted that Farwell had assumed the risks of his employment.[347] Lemuel Shaw, ruling for the Supreme Judicial Court of Massachusetts, stated that this action was one of first impression to this court and of great significance. Doing what Abinger had failed to do, Shaw

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[346] Christopher L. Tomlins, "A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850," *Law and History Review* 6, no.2 (1988): 415. Farwell's attorney had recently been successful in trial for another injured worker of the same company, winning $3000 (377). The case was not a case of record, however, and was not considered in Shaw's ruling.
[347] Francis H Bohlen*, Cases on the Law of Torts* (Bobbs-Merrill Company, 1915), Appendix A, 5-6.

recognized *respondeat superior*, however he rejected its application because of the privity of the implied contract he considered to exist between Farwell and his employer. Shaw's unique argument went like this: He first asserted that the Plaintiff was constrained to file under contract or tort, not both. If he sued under contract it must fail, because the employer had not signed a contract in which the company accepted liability. If he sued under tort it must also fail, because the worker-employer relationship is defined entirely by contract.[348] Then, as Abinger had vaguely implied, Shaw assumed an implied contract in which Farwell must have assumed the "natural and ordinary risks incident to his employment".[349] The statement, sounding reasonable, might have led one to expect the operative phrase "natural and ordinary" to have become a definition for juries to evaluate on a case-by-case basis. Instead, Shaw ruled in a way as to purposely conflate "natural and ordinary" with "any", couching his interpretation as a refusal to create precedent.[350] Again following Abinger, Shaw moralized his decision by asserting the constant vigilance of the workers, alert to every peril including each other, was the best way to

[348] *Select Committee* (1876), 21.
[349] Bohlen, *Law of Torts*, Appendix A, 8.
[350] Tomlins, "A Mysterious Power", 412. Tomlins argues that Abinger and Shaw actually sought to prevent widening of tort law rather than to intentionally narrow it. To support this he contradictorily observes that the jurists deemed the area of torts between employers and employees to be without precedent (400, 409, 412), while simultaneously asserting that scattered cases involving employee illness in England and America are revealing of the true precedent of "no liability" (396). If there was a default, then there must have been precedent. If there was no precedent, then there can be no widening or narrowing. Tomlins' argument is further undermined by his inability to say that the lawyers or judges in either case referenced any of the examples he produces in their argument or decision. In any case there does exist an obvious candidate for precedent: *respondeat superior*, which placed liability on the master for injuries caused by his servants. This is what the plaintiff argued in *Barnes v Boston & Worcester Railroad*, resulting in a victory before the court (395). Abinger and Shaw can only be considered to have proactively narrowed tort law relative to *respondeat superior,* either unwittingly or for personal perceptions of public policy needs. Tomlin's argument based on 'scattered cases' conflates illness and accident with injury due to negligence on the part of the employer or his agents, and does not consider that the policy of poor relief by local parishes prior to 1834 obviated the need for employer liability.

secure their safety. Shaw concluded his opinion by making it clear that he was not settling the question of willful acts on the part of the employer, or in the case of defective machinery supplied to workers, for which there might be an "implied warranty of goodness and sufficiency."[351]

Lemuel Shaw was born to a minister father who tutored him in their small parsonage in the rural north of Cape Cod, preparing Shaw for his entrance exam to Harvard at fifteen years old.[352] After university Shaw followed his interest in law and studied under a local attorney until he was called to the bar in 1804. From there progress in his profession was slow and inauspicious. While Lord Abinger was purported to have scarcely lost a case in private practice, biographers have been hard-put to highlight cases that Shaw won.[353] But if Abinger had enjoyed a brighter career than Shaw in private practice, their experiences as judges were inverted. While both were considered influential, even dominating, among their peers on the court, Abinger's resume was considered to be lack-luster.[354] Even *Priestley* was not recognized as an important decision in his lifetime. Shaw, on the other hand, placed his mark on an array of important decisions that permeated the national legal community. He redefined the jury instruction for criminal guilt: *Commonwealth v Webster* (1850), and established "separate but equal" as a premise for legal segregation of education: *Roberts v. Boston* (1849), and supported the notion of eminent domain in cases where the state deemed it had an overriding interest: *Commonwealth v. Alger* (1851), even in cases in which emerging private industrial concerns displaced existing

[351] Bohlen, *Law of Torts*, Appendix A, 13.
[352] Samuel Savage Shaw, *Lemuel Shaw: Chief Justice of the Supreme Judicial Court of Massachusetts* (John Wilson and Son, 1885), 54.
[353] Scarlett, *Memoir*, 71.
[354] G.F.R. Barker and Elisabeth Cawthon, "Scarlett, James, First Baron Abinger (1769–1844)," Oxford Dictionary of National Biography.

businesses: *Hazen v. Essex Co.* (1853). Justice Oliver Wendell Holmes later saw Shaw's decisions in cases such as *Farwell* as demonstrations of his wholly appropriate willingness to respond to the "felt needs" of his time, writing: "few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred."[355]

If, indeed, Shaw had policy in mind when he ruled in *Farwell*, many state legislatures refuted his right to make it. In 1856 Georgia became the first state to write into law statutes that set the railroad employee on equal footing to passengers where railroad liability was concerned. Iowa followed Georgia in 1862, making railroads liable for injuries to fellow servants. The courts resisted the legislature by ruling in *Hunt v Chicago and North Western Railroad Company* that while railroads were by statute liable to both passengers and employees, the railroad's duty of care to employees would be less than for passengers. In 1880 the statute was rewritten to prevent railroads from contracting out of their liability "connected with the use and operation of any railway."[356] Once more, the courts construed the law as narrowly as possible to the benefit of the railroad interests by ruling that an employee's duties that did not amount to "operating a railway" would not fall under the law.[357] The Kansas legislature enacted an 1874 law that made railroad companies liable in fellow servant scenarios. Wisconsin did the same in 1875, but

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[355] When the felt needs revolved around economic development, Shaw's body of rulings suggested a hierarchy of state interests, commercial interests, and individual interests. Within that hierarchy, new industry was favored over older, agrarian modes of commerce. Ursin, "Holmes", 550. Legal historian Morton Horwitz has questioned the social efficiency and implications of such a possible preference for industry, concluding; "whether or not legal subsidies to enterprise were optimally efficient or instead encouraged overinvestment in technology, it does seem quite likely that they did contribute to an increase in inequality by throwing a disproportionate share of the burdens of economic growth on the weakest and least organized groups in American Society." Morton Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977), 101.
[356] Marland Hobbs, "Statutory Changes in Employer's Liability", *Harvard Law Review* 2, no. 5, (1888): 217.
[357] Hobbs, "Statutory Changes", 217.

reversed itself in 1880. In the territory of Wyoming an 1876 law made the railroad employee equal to a passenger and precluded contracting out. Montana territory passed a similar law in 1879.[358] The legislature in Maine passed a law that railroads were liable to "any person" sustaining damages through the neglect of the railroad's servants or engineer. The courts there ruled that even this was not specific enough, and refused to allow that "any person" included railroad employees.[359]

Forty-one years after the decision, *Farwell* and its descendants continued to define the legal landscape of employer liability in most of the United States. Following on the English Employer's Liability Act of 1880, the Massachusetts legislature chose to revisit the issue in 1883. Attorney Charles Gershom Fall was charged to examine the validity of the assumptions underpinning common employment and political economy as they applied to implied contracts between employees and employers.[360] Shaw, he determined, had made a basic mistake in law when he contended that a *respondeat superior* theory of liability was precluded by privity, and Fall produced several examples in law to the contrary.[361] Furthermore, Fall found that the judges had apparently done little to answer the questions their rulings begged. What had been done in reports to parliament undermined the judges' theses: the wages of several types of employment,

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358 Hobbs, "Statutory Changes", 220.

359 Hobbs, "Statutory Changes", 214. The fact that so many legislatures made targeted attempts to deny railroads the benefit of Shaw's ruling provides an interesting counter to those who look back on the record of pro-business legal rulings in this era and retrospectively superimpose a conscious and reasoned attempt to nurture nascent industrial interests; the "economic theory" of jurisprudence.

360 Fall, *Employer's Liability,* 59.

361 Fall, *Employer's Liability,* 51-52. Ilbert had similar misgivings about Shaw's ruling in Farwell. *Select Committee* (1876), 21. Judges elsewhere in America were souring on the Farwell ruling as well. Judge Earl of the New York Court of appeals opined in *Crispin v Babbitt*, 1888, that "To enforce the supposed public policy, a fiction has been invented by which a servant is said to assume all the risks of the service in which he engages" Weber, "Accident Insurance", 257.

from collier to joiner to railway shunter to railway engineer were compared without discovering any correlation between risk and reward.[362] The realities of the laborer's inferior position before and during employment was shown to belie the notion that workers could effectively serve as guarantors of their own safety, as Shaw had proposed.[363] Fall observed that while protectionist policies had been commonly used to shield American business from foreign labor, these judge-made laws served to protect American business "at the expense of our own laborers".[364] He urged the legislators to restore the traditional tort action under *respondeat superior* that had been denied to employees by Abinger and Shaw. Where contract law was considered, he suggested it was scandalous that transporters of merchandise, livestock, and chattel were assumed to operate under an implied contract of liability for damages, while corporations were under no such threat when it came to the human life of workers going to work on company trains.[365]

By the turn of the twentieth century the United States was, according to law historian John Fabian Witt, "in the fifth decade of an accident crisis like none the world had ever seen and like none any Western nation has witnessed since."[366] From 1889 to 1906 the railway injury rate doubled, and industrial accidents were claiming 35,000 lives and 2,000,000 injuries every

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[362] Fall, *Employer's Liability,* 60.
[363] Fall, *Employer's Liability,* 62.
[364] Fall, *Employer's Liability,* 65.
[365] Fall, *Employer's Liability,* 149.
[366] John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press, 2004), 2. Witt focuses on four modes of accident compensation: litigation, employee self-insurance, private employer relief funds, and compulsory state-controlled compensation plans. Witt seems to conflate a swell of personal injury cases by the general public in the late nineteenth century in America with the issues of worker compensation, but these cases apparently had little effect on employer behavior; explicit testimony of other period actors demonstrates that interest in workplace safety was virtually non-existent before worker's compensation plans became dominant.

year.[367] In 1907 iron and steel workers were killed and injured at a rate of over 24%. That same year President Teddy Roosevelt gave a speech complaining that "the great increase in mechanical and manufacturing operations **. . .** means a corresponding increase in the number of accidents to the wage-workers employed therein…it is a bitter injustice that it should be the wage-worker himself and his wife and children who bear the whole penalty."[368] In 1910 The New York legislature, following Roosevelt's lead, tried to address the epidemic of industrial injuries to workers by passing a worker's compensation act of their own, only to be thwarted by state judges who took a static, or "formalist" view of the law. The New York Appeals Court ruled in *Ives v Boston Railroad Company* that the act would likely be in violation of due process, assured by the fourteenth amendment of the United States constitution.[369] After *Ives* Theodore Roosevelt railed that *"Dred Scott* was worse in degree, but not in kind."[370] The furor over the ruling played out in the pages of the progressive periodical *The Survey*, where several contributors saw the Triangle Shirtwaist Factory fire in Greenwich Village as an horrific if timely exemplar of the need for such legislation.[371] Some one-hundred and forty-five workers lost their lives. Their families were

[367] Ursin, "Holmes", 546. Ursin argues that Shaw, Holmes, and Cardozo were pragmatists in the vein of judge Richard Posner, and that the basis of enterprise liability commonly associated with the aftermath of the Second Restatement of Torts in 1964 can be witnessed in the rulings and commentary of these earlier judges.
[368] Ursin, "Holmes", 547.
[369] Years earlier, in his well-known *Lochner v New York (1905)* dissent, Holmes had attacked such strict limitations on state police powers under a formalist view of the law. Lochner had challenged a New York law limiting the number of hours his bakery employees could work in a given week. The Supreme Court overturned the lower court decisions by essentially finding a "freedom from state interference in contracts" in the fourteenth amendment. Seeing the majority decision as based in the economic theory of *laissez-faire*, Holmes famously wrote that the "Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statistics." Ursin, "Holmes", 548.
[370] Ursin, "Holmes", 560.
[371] Miles Dawson, "The Next Step in Workmen's Compensation," *The Survey* 26, no. 2 (1911): 91.

initially deprived of even the prospect of compensation, as the *Ives* ruling had been handed down only the day before.

Walter S. Nichols, the editor of the *Personal Injury Law Journal,* defended the decision, saying that the changes being proposed in the form of mandatory worker's compensation interfered with personal liberty, and that instead the worker should insure himself. The editors of *The Survey* were relentless in their criticism, comparing the courts to the House of Lords in England and stating "The doctrine that employees tacitly assume the risks of their trade is good law, for the judges since Abinger in the *Priestley* case, and Shaw in the *Farwell* case have said it. No legislature had ever laid down such a principle...But behold, what the judges did without difficulty at the expense of the defenseless workers, even the sovereign legislature cannot do, at the expense of the industry. Why? Because, it appears, this is taking property, without due process of law."[372]

The editors cited the recent ruling by the Supreme Court under Oliver Wendell Holmes in the case of *Noble State Bank vs. Haskell* (1911). In this case the state of Oklahoma had imposed a mandatory tax on banks for the purpose of creating an insurance fund against the possibility of any single bank becoming insolvent. The owners of the bank refused on the grounds of the fourteenth amendment, complaining that the scheme took property for private use without compensation. Holmes wrote in his majority opinion against the bank's position:

> "We must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to

[372] "Social Forces: Industrial Accidents Like that in Washington Place," *The Survey* 26, no. 1 (1911): 1.

> mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter *a nolumus mutare* as against the lawmaking power."[373]

Raynal Bolling, Assistant General Solicitor of the United States Steel Corporation, found the responses by the editors of *The Survey* to be shrill and found fault with the New York plan's opt-out remedy in civil court for demonstrably negligent manufacturers; a remedy Asquith had fought fervently for in the British debates of 1894-1897. Bolling asked "Upon what basis can it be claimed that when the workman is at fault his fault should be disregarded, but when the employer is at fault the workman should be allowed to make this the basis of endeavors to obtain exorbitant damages from a jury?"[374] But Louis Greeley, an attorney in Chicago, asserted that it was impractical to impose eighteenth century notions to the industrial system facing the country and its workforce in the twentieth century.[375] Morris Hillquit, an attorney in New York, observed the special conditions that existed in America had so far been attended by a marked lack of legislative innovation, saying "In the United States labor is more intense and hazardous than anywhere else in the world: the American industries exact the most appalling toll upon the lives and limbs of the employees, and the American workers are used up with frightful rapidity. But with all that the United States is the only civilized country which has not adopted a single form

[373] *Noble State Bank v Haskell* 219 U.S. 104, (1911).
[374] Raynol Bolling, "The Court of Appeals Decision," *The Survey* 26, no. 5 (1911): 188. Raynol Bolling would go on to participate in the First Safety Congress of the fledgling National Safety Council in 1912. U.S. steel was the most prominent business to stress safety before the safety movement, but as Mark Aldrich notes, they began their efforts under a cloud of negative publicity; Mark Aldrich, *Safety First: Technology, Labor, and Business in the Building of American Work Safety 1870-1939* (Johns Hopkins University Press, 1997), 91.
[375] Louis Greeley, "The Court of Appeals Decision," *The Survey* 26, no. 5 (1911): 192.

of social insurance for its workers. The situation is so anomalous that even the inert American public has finally been aroused."[376]

It was another attorney in New York who would help to reverse the impact of *Ives* in 1915 and make himself famous for judicial innovation in several landmark cases thereafter. Like Lemuel Shaw, Benjamin Cardozo entered university at the age of 15. Unlike Shaw, he did not have the support of his parents, both of whom had died by that time. His father, Albert Cardozo, had been a judge in New York City at the pleasure of the Tammany Hall political machine and had resigned on the eve of his impeachment for corruption decades earlier. The extent to which Benjamin's career was an effort to expunge the family name can only be guessed at, but by the time Oliver Wendell Holmes' seat on the United States Supreme Court was offered to him in 1932 his reputation was such that he was the nearly unanimous choice, lauded by Democrats as well as Republicans. Cardozo began building that reputation as a new member of the New York Supreme Court in 1914. He not only participated in the reversal of *Ives*, but the reversal of the judicial basis for evaluating legislation in general. While the same Court had ruled in 1911 that the admittedly beneficial social consequences of worker's compensation legislation were irrelevant to the legal process, Cardozo's Appeals court ruled that such considerations were instead central to the issue. The re-enacted worker's compensation legislation was affirmed in *Jensen* v *Southern Pacific Company* (1915), in which the court wrote "in industrial conditions,

[376] Morris Hillquit, "The Court of Appeals Decision," *The Survey* 26, no. 5 (1911): 193. Mark Aldrich's research bears out Hillquit's characterization of American industry as uniquely dangerous. His statistics demonstrate a markedly worse record of injury in specific industries compared to their European counterparts. Aldrich, *Safety First*, 23.

an opinion has gradually developed, which almost universally favors a more just and economical system of providing compensation for accidental injuries."[377]

[377] Ursin, "Holmes", 571. Ursin discusses the sharp differences between Cardozo and the legal formalists that ruled in *Lochner*. Formalist views dominated through the 1940s.

PART 3

HISTORICIZING PRECEDENT

The Legal in the Social

The precedents of *Priestley* and its descendants caused rancor and division for the next sixty years in England, and for seventy-eight years in America. Overcoming them brought about major cultural shifts in both countries, yet legal activism and the effects of the common law precedents it generated are alternately missing entirely from the social histories of the period or, in the few examples I have found, poorly understood. In part three of this work I argue that the legal precedent is particularly tractable to historical analysis through what has become known as Actor Network Theory (ANT). I begin by deploying the examples of Chief Baron of the Exchequer Lord Abinger and Supreme Court Justice Benjamin Cardozo, presented in parts one and two, to sketch the broad principles of the philosophies of legal formalism and legal realism. These concepts provide a framework for introducing the history of socio-legal writing by legal historians, whose works have come farther in realizing a synthesis of social and legal history than their social historian counterparts. For comparison, I recount the notable, but limited and now aged, efforts of prominent social historians to bridge the same gap. I then provide an outline of some of the core ideas of ANT and discuss their application to legal historical objects such as *Priestley*. I include a discussion of the legal decision-making process, and conclude by highlighting the pervasive nature of precedent making, unmaking, and re-imagining, including but not limited to *Priestley*, that may have gone unnoticed in the present work.

Law as Science

Law held many meanings and served many purposes in the Victorian Era. It was the reservoir for a cultural legacy, the means to establish and also limit the rights of men, women, children, workers, masters, and slaves, an instrument of social control for the ruling class, and a means to protect the boundaries of property. It was also, of course, a profession. Among the period legal practitioners I studied, one can book-end my analysis with the decisions of English Chief Barron of the Exchequer Lord Abinger in *Priestley v Fowler* (1837) and American Appeals Court Justice Benjamin Cardozo in *Jensen* v *Southern Pacific Company* (1915). Tellingly, both judges invoked personal notions of "science" to describe their labors. In his memoir Abinger deployed the term to buttress his view of law as a set of immutable principles.[378] For him law was deductive, and mastery of those principles would eliminate the need to interrogate the outside world, past or present, in arriving at the correct ruling. In fact, he considered it was the mark of a poor lawyer to do so.[379] Cardozo, however, likened the correct activities of a judge to "free scientific research". Insisting on an inductive process, Cardozo drew on the theory of relativity, stating that "the teaching of Einstein is that absolute rest and motion are meaningless for physical science, and that motion can signify only the changing position of bodies relative to one another." [380] From this he analogized that both law and standards of behavior are in constant

[378] Upon leaving college Abinger undertook to acquaint himself with the "principles of the science" before encountering the "jargon of the Special Pleader's Office" Scarlett, *Memoir*, 44. Speaking of his mentor, Mr. Wood, Abinger wrote "He did not take much trouble with his pupils, but left them to learn, by alterations he made in their drafts, the rules and principles of the science." Scarlett, *Memoir*, 46. American constitutional historian Michael Kamman has likewise associated the seemingly timeless truth of Newton physics with the dominant view of the American political structure in the first 100 years after its principles were drawn in the constitution. Even as Darwin's work undermined the static models of nature across larger society, constitutional law remained resistant to its influence until the reversal of *Lochner* (1905). Horwitz, "The Constitution of Change: Legal Fundamentality without Fundamentalism", *Harvard Law Review* 107, no. 1 (1993): 41. Woodrow Wilson declared in 1908 that "government is not a machine but a living thing…accountable to Darwin, not to Newton". Woodrow Wilson, *Constitutional Government in the United States: A Study in American Politics* (Columbia University Press, 1908), 56.
[379] Scarlett, *Memoir*, 45.
[380] Benjamin Andrew Zelermyer, "Benjamin N. Cardozo: A Directive Force in Legal Science," *Boston University Law Review* 69, no. 1 (1989): 214. Cardozo, *the Judicial Process*, 22-23.

motion, and the changes in their relationship must be incorporated into legal determinations.[381] The internalist aspect of Abinger's view was compatible what became known as legal formalism, while Cardozo, along with American justices such as Oliver Wendall Holmes and Roscoe Pound, are seen as progenitors of its antithesis: legal realism.[382] Some theorists consider legal formalism to have become a conscious doctrine after 1870.[383] Others would argue that it is impossible for jurists to remove themselves from their own social context, hence legal formalism can never be truly practiced. Legal realists sought to emulate the social sciences, and so locate law in human behavior and interactions. In view of this, it perhaps makes sense that the writing of legal history has largely, and often self-consciously, paralleled the paths traveled by historians of science, technology, and medicine.

Legal Historians on the Social

Law professor and legal historian Robert Gordon has surveyed the landscape of American legal historiography from 1900-2017. He described an endeavor that was structurally constrained in its early iteration, first by its narrow application to the study and practice of law, and later by the subversive implications which a more liberalized approach held for the profession as a whole. From 1900-1930 the case method style of learning, which focused on isolating institutional practices, pushed legal philosophy, political science, and American history out of

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[382] Pound later abandoned realism. Robert Gordon, *Taming the Past : Essays on Law in History and History in Law* (Cambridge University Press, 2017), 39.

[383] Sanford Levinson has written about the Protestant influence, whose beliefs in the primacy of the text of the bible over the interpretations of Catholic priests informed the formalists' strict textualism with regard to constitutional 'truths'. Sanford Levinson, *Constitutional Faith* (Princeton University Press, 1988).

law school curricula.[384] When lawyers did look to the past, it was to justify contemporary arguments in terms of an often-fictional continuity with earlier forms. This usage was consistent with the "internal" view of law as an autonomous sphere in which self-contained modes of reasoning produced a legal tradition called the common law, which was an expression of inevitable ethical ideals. This made history writing simple, as only distinctly legal sources needed to be interrogated. It also served the profession, the identity and prosperity of which was built upon the mastery of this esoteric body of knowledge. The second view of legal history arose with the legal realists in the first three decades of the 20th century, and positioned law as a set of responses to external forces. To this way of thinking, while change might be resisted, it could not be prevented. As a result, the best use of historical study was to identify laws for which the original context had ceased to exist, so that past forms of law did not needlessly shackle the present and future.[385] However, such a permutation posed a threat to a legal professionalism predicated on its role as the mediator of a stable, received tradition. Furthermore, it decentered the judge as the carrier of that tradition, and democratized the role of legal scholar by opening its borders to various non-legal expertise. Legal historians would not be exempt from the chaos, as their purview and responsibilities would be widened far beyond their current training and experience. It was the prospect of these explosive outcomes, Gordon believed, which stayed the pens of most of the progressive-era legal writers, and delayed the creation of earnest socio-legal histories.[386]

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[384] Gordon, *Taming the Past*, 26.
[385] Gordon, *Taming the Past*, 34.
[386] Gordon, *Taming the Past*, 37. The exception is Willard Hurst, who broke with the internal history of law around 1945.

The exception was pioneering legal historian Willard Hurst, who as early as the 1940s held that "The study of general history illuminates the dynamics of law, and the study of legal history illuminates the dynamics of social evolution. To bring about this interpenetration of law and other social sciences is one of the main tasks of education."[387] It was not until the 1970s that legal writers like Morton Horwitz followed Hurst's socio-legal lead. Horwitz's 1973 critique of Roscoe Pound's later works questioned his deployment of "law as science" to reinforce an ahistorical picture of jurisprudence, one drained of all politics and power relations. Horwitz considered Pound's attacks on codification in the defense of the common law as a strategy to preserve and solidify a position of deference for the jurist in the face of more utilitarian modes of law-making. Common law was comparatively complex and comprised of judge-made precedents which had been reified for so long that their origins had become murky. Legal historians of Pound's ilk sometimes searched for these origins, but were careful not to find them in the capricious mind of a singular political creature sitting on a bench. Instead, they were rationalized in terms of dispassionate reason which had been passed down to the present as a gift from earlier generations to form the basis of an ever-advancing structure of pure knowledge. Reacting to this view, Horwitz found striking similarities between writing the history of law and that of science, quoting from Kuhn's *The Structure of Scientific Revolutions* to expose the instrumental use of history in constructing teleological narratives of progress in law.[388]

By the 1980s a third view emerged in which law was understood to make society as much as society makes law.[389] Historians of technology will recognize this turn as analogous to the

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[387] Willard Hurst and Lloyd Garrison, *Law in Society: A Course Designed for Undergraduates and Beginning Law Students. Vol I* (College Typing Company, 1941), 219.
[388] Morton J. Horwitz, "The Conservative Tradition in the Writing of American Legal History," *The American Journal of Legal History* 17, no. 3 (1973): 282.
[389] Gordon, *Taming the Past*, 10.

Social Construction of Technology (SCOT), popularized in the same period by authors such as Weibe Bijker and Trevor Pinch.[390] In law, the upshot was that the same act could be protected or condemned, or the same tort sustained or dismissed, depending on the dominating social agenda of the judges. Gordon was of this movement, writing that the law participates "in the construction of the social world, populating it with creatures of law's own devising, abstract self-determining individuals and artificial corporate persons, ascribing interests to them and deciding when their suffering are recognizable harms."[391] Exploring law, society, and economics, G.R. Rubin and David Sugarman wrote of the law as a range of mechanisms that enabled both legal and non-legal solutions, the latter allowing other entities, such as family members, communities, employers, and social networks to exert control under certain conditions.[392] Importantly, they observed that abstractions in the form and content of law, as they applied to the identity of the actors involved, could have the effect of obviating context, and so facilitate the embedding of systematic inequalities within the process.[393]

Parsing the US Supreme Court ruling in *Planned Parenthood v Casey* in 1992, Horwitz found a manipulation of context, intertwined with an instrumental use of legal precedent, deployed to save appearances for the Court, their conservative ideology, and the legitimacy of the legal sphere itself. Still haunted by the damage to the court's public image and to the cause of

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390 W. E. Bijker and Trevor Pinch, *The social construction of technological systems: new directions in the sociology and history of technology* (MIT Press, 1987), W. E. Bijker, *Of Bicycles, Bakelites, and Bulbs: Toward a Theory of Sociotechnical Change* (MIT Press, 1995), Trevor Pinch and Nellie Oudshoorn, *How Users Matter: The Co-Construction of Users and Technology* (MIT Press, 2003).
391 R. W. Gordon, "Historicism in Legal Scholarship." *Yale Law Journal* 90, no. 5 (1981): 1035.
392 G.R. Rubin and David Sugarman, eds., *Law, Economy and Society, 1750-1914: Essays in the History of English Law* (Professional Books, 1984), 47.
393 Rubin, *Economy and Society*, 49. They add that "at its best the history of law and economy will add to our knowledge of the lives of those touched by the law (directly or indirectly) in much the same way as the best works of historians, sociologists and anthropologists" (59).

formalism inflicted by the need to reverse two landmark cases decided in the late 19th and early 20th centuries, *Plessy v Ferguson* (1896) and *Lochner v New York* (1905), the conservative authors of *Casey* upheld the precedent of *Roe v Wade* (1973) not on its merits, but on a convenient reverence for *stare decisis* which facilitated their self-conscious and self-serving effort to avoid the impression of judges, and law, as thoroughly social, cultural, and political products.[394] The judges disingenuously assigned the earlier reversals not to the biases and errors of their originating courts, but to a laudable and logical application of new, improved facts available only to the revising courts. Again turning to Thomas Kuhn's *The Structure of Scientific Revolutions*, Horwitz saw this turn to constitutional history as a signal of instability in the paradigm of formalism.[395]

Although this passage pertains immediately to American constitutional law, it performs work useful for the purposes of my analysis. It demonstrates a continuing professional investment by legal actors in an ahistorical image of their role in society. It also presents a potent example of the active and durable role of legal precedent. However, the use to which this example is put by the legal historian remains internal to law; the history of the precedent's interaction with wider society is not on the menu. While the recognition of a social context for judges and rulings is implied, it is not made explicit and is not the subject of the piece, hence the specific personal biases that informed what were later seen as incorrect rulings were not investigated. The hardships worked on citizens living under the precedent, and any agitation,

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394 This was attended by the great consternation of those in the Reagan administration who thought they had successfully engineered the court to achieve their political aim of reversing *Roe*. Horwitz explains that the Reagan-era abortion 'litmus test' for nominating justices was unprecedented in constitutional history. Horwitz, "The Constitution of Change", 35.
395 Kuhn stated that the resort to contextual history occurs when 'truths' underpinning the paradigm are no longer as self-evident as they had once appeared. Thomas Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962), 137-138.

organizing, or wider cultural reactions and interactions remained marginalized or invisible. This pattern of omission can be found in most socio-legal histories produced by legal-oriented historians. Again, there are exceptions. In 1994 legal historian R.W. Kostal wrote a much-referenced book detailing the nuts-and-bolts workings of the legal industry as it participated in the growth of the English railway industry in the middle of the Victorian Era.[396] From 1998-2004 historian and law professor John Fabian Witt incorporated tort law as part of a broader set of responses to industrial injuries in America at the beginning of the 20th century.[397] Kostal,

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[396] Kostal is often cited by legal writers referencing Abinger and *Priestley*. John Fabian Witt cites Simpson who cites Kostal. V. Markham Lester and Michael Stein also reference Kostal on this point.

[397] Echoing Sugarman's loose definition of law as a range of legal and non-legal modes of addressing conflicts and facilitating control, Witt contends that his entire work is "emphatically a *legal* history"; John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Harvard University Press, 2004), 17-18. However, as far as I am concerned it is an exemplar of integrated socio-legal history writing. Having said that, there are serious problems with Witt's analysis. Like almost other legal historians, he does not complicate the role of judges in terms of bias and errors of law. Instead, he characterizes late 19th century accident law as a product of "experimentation" (6) in which the profession "struggled to rationalize tort law" (9) according to the principles of liberal political economy, influenced by some sort of pathology revolving around the need to distinguish free labor in contrast to slave labor (30-31). This effort was ultimately abandoned, he contends, because it could not effectively compensate for the surge of injuries and tort actions at the end of the century (44), many of which he asserts were without any fault attached (63-64). We can take these in turn: Late 19th century industrial accident law was characterized not by value-free experimentation, but by crumbling of support for the regime of legal defenses to worker tort actions originating under Abinger and imported by Shaw in the early 19th century, as evidenced by a growing number of states which limited their application or refuted their bases entirely. Those defenses were never consistent with political economy or the notion of individualism invoked by "free labor" because they accrued only for the benefit of one party to a fictitious contract; the employer. No action without a possibility of determining fault would have been brought under any tort regime, and so would not stress the legal structures already in place. In chapter 2 Witt goes into great depth discussing a series of dilemmas he represents as germane to the relevant tort law without attempting to connect any of them to the thought processes of Shaw or Abinger in *Farwell* or *Priestley,* which he detaches from the legal defenses they originated. His survey of these dilemmas fails to acknowledge the precedent of *respondeat superior* and misrepresents Blackstone as not addressing civil "unintentional harms" (6). When he does briefly addresses Abinger and *Priestley*, he misrepresents political economy, the new poor law, Abinger's politics, and the *Priestley* ruling (13). He asserts that alternative schemes of injury

Christopher Tomlins, W. R. Cornish, and Michael Stein have offered social explanations for Abinger's ruling in *Priestley* as minor passages of larger works. Feminist legal scholars Mary Shanley and Kellie Toole have investigated law, marriage and violence in the Victorian era.[398]

Social Historians on the Legal

During the 1970s revival of socio-legal studies for legal historians, historians on the social side began to delve into statutory criminal codes and the performance of what the social of quasi-religious ritual, and politics of patronage that surrounded them.[399] Responding to the

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compensation such as employee self-insurance and private company sponsored insurance were American inventions when they already had centuries-long histories in Europe (41). In his 1998 article, John Fabian Witt, "The Transformation of Work and Law of Workplace Accidents, 1842-1910," *The Yale Law Journal* 107, no. 5 (1998): 1467-1502, Witt frames the rulings in *Farwell* and later cases solely in terms of a conscious debates about worker autonomy vs developing managerial control in the workplace (1470), and implies that workers somehow endorsed the reasoning used against them in court because they buttressed the idea of workers' agency, which he tied to the "moral value of work" and their claims to self-governance beyond the workplace (1481). To the extent that any judge supported the claims of the plaintiff, Witt saw his ruling not as a recoil from *Farwell*, but a vote in favor of expanded managerial control (1483). Witt states that workers and employers alike finally found the old common law defenses unworkable (1484) and agreed to workers compensation because of the pragmatic benefits and aspirations to social efficiencies, respectively. Resentment, injustice, greed, and the eminent loss of those defenses as multiple states began to neutralize them were not unpacked from the word "unworkable" by Witt. Witt draws the conclusion that labor leaders were satisfied with the status quo from 1842-1868 because it wasn't until then, at the 3rd annual congress of the National Labor Union, that employer's liability became a top issue (1482). He seems unaware of the arguments raging in Britain beginning at that same time, and therefore ponders no connection between the TUC and their American counterpart as an explanation for this timing.

398 Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895. 1st ed.* (Princeton University Press, 1989). Kellie Toole, "Self-Defence and the Reasonable Woman : Equality before the New Victorian Law," *Melbourne University Law Review* 36, no. 1 (2012): 250-286.

399 Douglas Hay argues that in 1970s and 1980s neo-liberal notions of *laissez-faire* and political economy were re-introduced into elite law schools in America, Canada, and Australia, and their proponents began to choke off other conceptions of law such as those represented by Critical Legal studies (CLS), including all assertions about concentrations of power and its attending inequities. Douglas Hay, Peter Linebaugh, John Rule, E.P. Thompson, and Cal Winslow,

several Marxist critiques of the rule of law as merely a capitalist superstructure, E. P. Thompson, who was in the process of redefining his own approach to Marxist historical analysis in light of the revelations about the Stalinist era made by Nikita Kruschev in his 1966 speech to the 20th Congress of the Communist Party, saw the institutions, personnel, ideology, ritual, and logic of Victorian law as exceeding the boundaries of ruling class interests both in fact as well as rhetoric. He observed that on occasion the poor were protected, or the powerful brought to heel. Although the text of *Whig and Hunters* was focused on illuminating the self- and class-serving acts of bad judges, Thompson maintained that:

> "The oligarchs and the great gentry were content to be subject to the rule of law only because this law was serviceable and afforded to their hegemony the rhetoric of legitimacy. This paradox has been at the heart of this study. It was also at the heart of eighteenth-century society. But it was also a paradox which that society could not in the end transcend, for the paradox was held in equipoise upon an ulterior equilibrium of class forces. When the struggles of 1790-1832 signaled that this equilibrium had changed, the rulers of England were faced with alarming alternatives. They could either dispense with the rule of law, dismantle their elaborate constitutional structures, countermand their own rhetoric and exercise power by force; or they could submit to their own rules and surrender their hegemony. In the campaign against Paine and the printers, in the Two Acts (1795), the Combination Acts (1799-1800), the repression of Peterloo (1819) and the Six Acts (1820) they took halting steps in the first direction. But in the end, rather than shatter their own self-image and repudiate 150 years of constitutional legality, they surrendered to the Law."[400]

Historian Douglas Hay pondered the juxtaposition of a British ruling class that legislated an explosion of statutes establishing the death penalty for offenses against property from 1688-1820, with a judicial system which executed fewer and fewer prisoners.[401] Attacking the first

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Albion's Fatal Tree. Crime and Society in Eighteenth-Century England (Pantheon Books, 1976), xxxiii.

[400] This passage is relevant to 2025 America, in which the choice must be made again and the ultimate decision is uncertain. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Pantheon Books, 1974), 269.

[401] Hay, *Albion's Fatal Tree*, 22.

issue, reformers like Jeremy Bentham and Samuel Romilly fought for a more proportional and rational basis for punishment, while conservative pragmatists such as Archdeacon William Paley and statesman and philosopher Edmund Burke saw value in calculated demonstrations of violent consequence contrasted with those of benevolent forgiveness as a measure of insurance that elite "opinion" would continue to prevail over the "physical strength" of the masses.[402] From this point of view, Hay said, Victorian law was best understood as an exercise in control performed through visible acts of majesty, justice, and mercy. Majesty was accomplished through pomp and circumstance, with the courts analogous to churches and the reading of the charges as sermons to the congregation, reminding them of the will of the deity and their place in his plan.[403] As for justice, it was crucial that the legal process be seen as bound to its own internal rules rather than as a tool for the capricious and willful exploitation of power.[404] Its bureaucratic idiosyncrasies were an important strength, in Hay's analysis, especially when they foiled the best efforts of the prosecutors of common men. When the state did triumph, the machinations of mercy provided a stage upon which to perform paternalism in public, and to test the sinews of power and patronage in private.[405] All of these various functions acted together, Hay contended, some as ad-hoc solutions to immediate problems and others as true conspiracies, in a way that balanced terror and magnanimity in order to maintain a public impression of legitimacy for law, and by extension the state.

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[402] Hay, *Albion's Fatal Tree,* 26, 50.
[403] Hay, *Albion's Fatal Tree,* 27-28.
[404] Hay, *Albion's Fatal Tree,* 33.
[405] Paternalism meant debt and deference, and could be practiced by the victim who brought the charges, by gentlemen who offered testimony on the prisoner's behalf, or by aristocrats who intervened in the sentence. Hay, *Albion's Fatal Tree,* 45.

Ironically, these well-received works now serve as something of an indictment of the discipline as much as a high point. This is due to the facts that they are over 50 years old with no worthy heirs, and the authors never plumbed any distinction between criminal statutes and the vast body of living, mutating, non-legislated civil jurisprudence.[406] The only notable excursions into this intersectional space I am aware of include P.W.J. Bartrip and S.B. Burman's exploration of their theory of economic deterrence as a consistently-pursued program to increase safety in the Victorian workplace across various legislative efforts spanning more than 60 years. In their work they discussed worker interactions with the Factory Acts, analyzed the political battles leading to the Workmen's Compensation Act of 1897, and touched on the legal defenses attributed to the *Priestley* case, comprised of the doctrines of common employment, contributory negligence, and assumption of the risk.[407] In 2008 Jamie Bronstein theorized that the British experience of workplace injury was not defined by legal barriers to compensation, but by a "combination of public sympathy, trade union activism, and political responsibility assumed by governing classes without a specific financial interest" which culminated in the Employer's Liability Act in 1880. The 1880 Act, Bronstein claimed, represented a new way of thinking in which "society" accepted responsibility for worker injuries.[408]

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[406] E. P. Thompson, *Whigs and Hunters,* 258-269.

[407] Bartrip and Burman, *Wounded Soldiers,* 103-106, 123.

[408] Jamie L Bronstein, *Caught in the Machinery: Workplace Accidents and Injured Workers in Nineteenth Century Britain* (Stanford University Press, 2008), 6. Bronstein's additional theses were that the cultural meaning of injuries was a factor in injuries because the expectation of safety and protection were viewed as unmanly by workers, and that the 1880 Employer's Liability Act was the seminal event in addressing compensation. None of her theses were accurate. Certainly the Parliamentary debates over the Act were not advanced by anyone uninfluenced by specific financial interests. She refers to the 1880 Act as "workers' compensation" (3) when in fact it only limited the legal defenses that had allowed masters to automatically win workplace injury liability lawsuits up to that time. Workers still had to prove the master or his superintendent were negligent before a court, and any award was paid by the offending company, not the public. Hence, there was no question of society taking responsibility

Actor Network Theory, Law, and Social History

In the early 1980s there arose a critique of sociology, or social sciences, which attacked all inclinations toward a priori assumptions, beginning with the linguistics of the words social, society, and to a lesser extent, science. Sociologists Bruno Latour, Michel Callon, John Law, Marilyn Strathern, and Madeline Akrich were early and well-known contributors to what became known as Actor Network Theory (ANT). Notoriously difficult to apply as a strict or comprehensive program of analysis, it has produced important and useful disruptions of previous regimes of categorization in several disciplines. The notion of generalized symmetry in ANT is the most striking for its radical result of decentering humans as the only visible actors in a social network and elevating almost everything else to the same plane: objects, technology, texts, animals, natural phenomena, etc. "Society" is not a given, but something to be detected by tracing ephemeral connections between actors. The import of a given trace is in doubt if it does not demonstrate durability. Durability is achieved through the enrollment and mobilization of other actors into the network. Power relations within the network cannot be assumed, so each analysis must begin in a "flat" state, meaning without a pre-determined hierarchy. Power is

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for workers' injuries. She accepts Abinger's statement that there was no precedent for third party injuries in 1837 without analysis or engagement with legal histories that refute that conclusion (20). Having stated that there was no precedent for *Priestley*, she asserts that common employment was always the law, again without engaging with considerable legal history literature that refutes the claim (27-28). She reduces the *Priestley* and *Farwell* decisions to assumption of the risk (20), fails to complicate the implied contract, and states that contributory negligence "struck a balance" between workers and masters (29). Rather, the usage of contributory negligence at that time was that if the worker could be construed as having any level of fault, then the master's negligence was moot. There was no balance. Bronstein does not consult any of the speeches contained in the annual Trades Union Congresses which would have eliminated the idea that workers considered safety unmanly. She fails to address the central issue of contracting out, by which employers coerced workers to give up their rights under the Act. Finally, she fails to mention the ensuing 17 years of vitriolic agitation culminating in the 1880 Act's supersession by the true seminal event, the Workmen's Compensation Act of 1897.

indicated by the persistence and pervasiveness of networks.[409] Above all, everything is in flux and relational. ANT, as described, is dedicated to detection, not explanation. Once the analyst crosses over into explanation, they have exited the confines of ANT.

There has been activity in legal circles exploring the opportunities of ANT for socio-legal studies. Legal scholar Annelise Riles used inspiration from ANT in "broadening her attention to the role of legal documents as agents within complex networks, and as co-producing realities through technicalities."[410] Feminist scholar Maria Puig de la Bellacasa has sought to grapple with aspects of ANT that can serve to obscure issues relating to the politics of exclusion in law, and proposed an approach referred to as "speculative commitment" to address this problem in which issues of positionality are considered, but without superimposing a priori explanatory frameworks.[411] Emilie Cloatre, Co-Director of Social Critiques of Law with the Kent Law School, has written about the application of Actor Network Theory to law in the 2000s and 2010s.[412] Cloatre expressed concerns that the particular nature of law as practice and as an institution may suffer in translation under the application of classic ANT parameters, and argued for unpacking those particularities at "sites of friction where they are less obvious and, maybe, less dependent on legal institutions' own claims" in which law is "only evoked or is reimagined, impacts in ways that were not expected, sees authority being re-read, travels where it shouldn't be or indeed is derided" in order to more fully evaluate *what* and *where* law is.[413] The human

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[409] Emilie Cloatre, "Law and ANT (And its Kin): Possibilities, Challenges, and Ways Forward," *Journal of Law and Society* 45, no. 4 (2018): 653.
[410] Cloatre, "Law and ANT", 655.
[411] Cloatre, "Law and ANT", 655.
[412] Latour briefly mentioned law and even precedent as a site of ANT analysis in earlier works. Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory*, (Oxford University Press, Oxford, 2005), 7. Latour subsequently wrote a book fully devoted to law. Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, (Cambridge, 2009).
[413] Cloatre, "Law and ANT", 658.

actors in law, Cloatre said, "can be reimagined as particular forms of cyborgs, whose ability to circulate are conditioned by legal possibilities that are themselves often inherently colonizing, gendered, and exclusive."[414]

I argue that law should not be relegated to a separate sphere by social historians of the Victorian era any more than politics have been.[415] As highlighted by Thompson and Hay, the sites and practices of criminal law-giving were worlds away from the sites of its law-making, and the multiplicity of differences and interactions between the two are rich in clues as to the nature of Victorian society. In parts one and two of my analysis I have drawn attention to the particularities of Victorian civil law, in which the sites of law-giving and law-making were allowed to merge, making new power relations, new motivations, new politics, and new connections within and without the legal sphere, and indeed within and without the boundaries of the state. How should historians proceed? I argue that just as the role of discreet examples of technology have been re-evaluated and re-purposed by broadening and deepening of the notion of agency through ANT, discreet examples of common law should be foregrounded and re-evaluated. The obvious initial candidate is the case ruling. If the courtroom was a crucible where evidence, values, and the role of law were fiercely contested, and it was, the judges' rulings forged there were critical nodes of culture, molded by the individual judge's class, race, gender, and politics. When they represented a significant change, those nodes contained the potential to ascend to a higher plane; that of a legal precedent. That transfiguration, however, required enrollment in all or parts of the ruling as applied to similar contexts by subsequent judges. Like

[414] Cloatre, "Law and ANT", 662.
[415] Benjamin Cardozo said as much in his 1921 lecture to law students at Yale. "We must apply to the study of judge-made law that method of quantitative analysis which Mr. Wallas has applied with such fine results to the study of politics." Cardozo, *the Judicial Process*, 12.

any node, the precedent was subject to instability and negotiation. In each reification, the precedent could be transformed through new readings of the text, and imbued with new meanings influenced by new political realities and biases. Alternatively, it could be used to entrench the old and prevent the creation of new counter-precedents. By definition, precedents exceeded the authority of their human creators, gathered an authority all their own, and as I have shown, often outlasted the context of their creation and created new contexts aligned with their own rationalities. In all cases, the precedent exerted itself beyond the legal sphere in ways that were both visible and obscured. If a certain action was permitted, or if it was not, actors interacted with that knowledge as part of their spoken or unspoken calculations for the future. Through these calculations whole industries, technologies, trade union practices, political parties, legislation, riots, or family dynamics were shaped. That is all to say that the legal precedent more than meets the definition of actor or actant within the scope of ANT analysis, and such analysis would be a useful tool in detecting its otherwise submerged connections to other actors.

The possibilities for the application of ANT to the analysis of precedents are manifold. Madeline Akrich's work with scripts provides one avenue of approach. While the creators of technology attempt to build in their expectations for the use of a piece of equipment, users and bystanders bring their own uses and expectations of the technology and change its function and cultural meaning. Crises develop when technology fails to meet a stake-holder's expectations, and the script is contested. Precedents can be similarly analyzed when the original text of the precedent is found to be flexible enough to admit more than one script, new realities or linguistic usages undermine the previously fixed meaning of a passage, or subsequent rulings add text and meaning, and possibly controversy, to the body of the precedent. As Emilie Cloatre observes, under ANT power is something to be constructed by detecting its mode of circulation. I contend that precedents serve as "valves" which permit, deny, or direct the circulation of power relations. An activity may be allowed or disallowed, or an action may be rewarded or penalized, under the conditions defined by the text. Power may be blocked, enabled, or reformulated, resulting in the creation of new political connections or the destabilization of old ones. If "the role of social analysis is to explain how a particular set of connections happen to become stable and durable", as Cloatre says, a legal precedent can be a critical component of the explanation, as well as a site of connection to other actors and pathways that illuminate the network.[416] In some cases, the creation of the precedent may be the genesis of the network itself, allowing power relations to flow in an entirely new direction. A reversal of the precedent may signal the end of the network, or its radical transformation. From a practical standpoint, the precedent is particularly tractable to analysis because it is memorialized in legal documentation, as are the circumstances of its creation, including the identity of many of the human, technological, environmental, and other actors which converged to bring it into existence. Moreover, the record explicitly states the philosophies marshalled for or against the form which the network finally assumed.

Precedent and the Judicial Process

> "What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions. I am not concerned to inquire whether

[416] Cloatre, "Law and ANT", 653.

> judges ought to be allowed to brew such a compound at all. I take judge-made law as one of the existing realities of life."[417]

This is the black box of the common law judge wide open. As Cardozo readily admitted in 1921, and the Rehnquist court refused to acknowledge in 1992,

> "every one of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals...We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."[418]

While this was strictly true, there was frequently an opportunity for a judge to view the issues of a strikingly similar case with other "eyes", mediated through the text of an applicable precedent. Parsing the rulings of earlier courts provided a point of departure.[419] The task of the judge was then to project the directive force of the precedent along the lines of logic, history, custom, justice, morals, and social welfare.[420] Logic meant consistency with the principle embedded within the previous ruling and a sense of symmetry with similar cases, adjusted only in the presence of relevant variances of fact.[421] The purpose of history, in Cardozo's approach, was to illuminate the differences between past and present forms of life, and prevent laws based on lost contexts from paralyzing the present, or the future.[422] In other words, the result of historical review was to enable a process of evolution in law, not deter it. Custom meant accepted

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417 Cardozo, *the Judicial Process*, 10.
418 Cardozo, *the Judicial Process*, 11.
419 Cardozo, *the Judicial Process*, 19.
420 Cardozo named the logical approach philosophy, the historical approach evolution, the custom approach tradition, ang grouped justice, morals, and social welfare under the title sociology. Cardozo acknowledged, through a quote from Lord Halsbury, that "law is not always logical at all". Cardozo, *the Judicial Process*, 31-32.
421 Cardozo, *the Judicial Process*, 32-34.
422 Cardozo, *the Judicial Process*, 54.

and expected patterns of behavior not flowing from logic, but growing out of habit; either imposed on legal decision making, or originating there.[423] Cardozo grouped justice, morals, and social welfare together and believed that "The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence."[424] The mode of expressing this aim was one of public policy, and the role of the judge was that of a legislator, operating between the boundaries of existing statute and precedent. In this interstitial space, the judge must direct his ruling toward his understanding of the larger ends of society.[425] Cardozo thought that any calculation of the interests in logic, history, and custom must not work to subordinate and sacrifice this outcome, and pragmatism should guide the growth of law.[426] Of course there was much that argued for adherence to existing precedent.[427] Beyond the potential dimensions of logic, history, and custom which a precedent may have offered, continuity was a virtue in its own right. This was because law, like science, was used by society for predictive purposes; What was permitted yesterday would be permitted tomorrow, and what was sanctioned last month would be sanctionable a year from now. However, there were various formulations which could support breaking with precedent to one degree or another. In the main, he said, precedent should be observed, but not when the uniformity it provided became a "uniformity of oppression".[428] It is important to note that Cardozo, like Holmes, did not intend for a judge to sacrifice his

[423] Cardozo, *the Judicial Process*, 60.
[424] Cardozo, *the Judicial Process*, 66.
[425] Cardozo, *the Judicial Process*, 103.
[426] Cardozo, *the Judicial Process*, 102. 103.
[427] Cardozo, *the Judicial Process*, 34.
[428] Cardozo, *the Judicial Process*, 113.

understanding of overarching needs on the altar of doing perfect justice in the immediate case.[429] In fact, the temptation of the latter was not to be allowed to interfere with the former.[430]

Precedents Made, Unmade, and Attempted

The history I have presented in this work takes as its centerpiece the precedent of *Priestley v Fowler*, which exerted itself by checking the power of servants to extract compensation from masters in almost every instance of work-related injury. However, this has not been the saga of a single precedent standing at one end of 60-year odyssey with a singular legislative response at the other. The tale is riddled with precedents throughout. Some were narrowed, some expanded, some were still-born, and others were killed in the House of Lords. The story even manages to catch the moment of contingency, when two legal philosophies held equal but opposite promise until one was chosen, a precedent was forged, and history was changed.

Respondeat Superior translates as "let the master answer", or "the master must answer", and meant that a master was to be held strictly liable for injuries caused by his servants when they acted on his behalf.[431] In other words, under those conditions the servant was seen by the law as "another self" of the master.[432] The principle was so long established that its origin case

[429] Cardozo, *the Judicial Process*, 103.
[430] Cardozo's screed was largely bent to his purpose of championing legal realism and pushing back against "demon formalism". In the 1980s Morton Horwitz noted that formalism could be used to entrench laws in a mode favorable to hegemonic interests, but could also serve to shield individualistic interests, specifically from corporate concentration. Gordon, *Taming the Past,* 138.
[431] Strict liability is contrasted with negligence, where the particular actions of the person to be held liable are taken into account. In strict liability those considerations are moot.
[432] The principle is reflected in Blackstone, *Commentaries*, 431-432. Fall, *Employer's Liability*, 6. This may have interesting ramifications for ANT analysis. Where humans may be considered

was not known with certainty. It dated in England to at least 1676, when James Mitchell and his wife successfully sued William Allestry for the actions of his servant, Thomas Scrivener.[433] Scrivener had tried to tame a wild horse in a public place, Little Lincoln's Inn Fields in London, leading to the severe injury of Mary Mitchell. Allestry was not personally present, yet was held by justices Wilde, Twisden, and Raynsford to be as liable as his servant, Scrivener. The same premise guided the Lord Chief Justice of England, Sir Lord Holt, when he ruled in *Jones v Hart* (1698) "whomever employs another, is answerable for him, and undertakes for his care to all that make use of him."[434] If the reasoning underpinning British *respondeat superior* had been nascent in the 17th century, by 1765 it had been clearly enunciated and memorialized by famed lawyer and politician Sir William Blackstone in his *Commentaries on the Law of England*: "[a master] may frequently be answerable for his servant's misbehaviour, but never shelter himself from punishment by laying blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong."[435]

In 1837 Abinger ruled in *Priestley* without any recognition of *respondeat superior*, *Mitchell v Allestry*, or *Jones v Hart*. Feeling free to make his own precedent, he did not engage any of the logic put forward by Blackstone, Holt, Wilde, Twisden, or Raynsford. Where these

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as cyborgs with technology, a human whose agency is shared with another human might be thought of as a "clone" or "entangled".

433 Fall refers to this case as *Michael v Allestree*, Fall, *Employer's Liability*, 7.

434 Holt was consistent in *Hern v Nichols; A Report of All the Cases Determined by Sir John Holt, Knt., From 1688 to 1710, During Which Time He Was Lord Chief Justice of England: Containing Many Cases Never Before Printed, Taken from an Original Manuscript of Thomas Farresley ... : Also Several Cases in Chancery and the Exchequer-Chamber. The Whole Alphabetically Digested Under Proper Heads : With Three Tables: The First of the Names of the Cases; the Second of the General Titles; And the Third of the Principal Matters,* printed by E. and R. Nutt, and R. Gosling (assigns of E. Sayer) for J. Hazard, 1738, 462, 642.

435 Blackstone, *Commentaries*, 432.

five judges had applied strict liability to the master, Abinger construed the master's exposure as limited to his direct negligence, and then equivocated even on that. Inverting the conventional assumptions of authority and power, Abinger mused that the servant's knowledge of the dangers involved was probably superior to his master's, and that it was the servant who was responsible to protect the master from losses due to the actions of fellow workers.[436] The servant's own safety would naturally flow from such vigilance, he contended. Abinger's reasonings culminated in an *reductio ad absurdum* polemic against the unacceptable litigation that would befall all masters if a servant was allowed to prevail in a case such as *Priestley*. From this womb the defenses of common employment, contributory negligence, and assumption of the risk were born into the realm of master-servant torts. However, *Priestley* was not yet a precedent, and other judges held competing notions of the future.

In 1848 English Justice Parke heard *Armsworth v South Eastern Railway.* The facts of the case were straight-forward; James Armsworth was killed in a railway accident due to the negligence of a co-worker. Under the recently passed Lord Campbell's Act, the deceased man's family was allowed to sue for his death. Parke was uniquely positioned in the threads of history to pass judgment in the case; He had not only served as the trial judge who allowed the Priestley's plaintiff's verdict to stand, he had subsequently sat as a member of the appeals panel in which Abinger reversed him. Crucially, no other court had followed *Priestley* to that point, and there would be no reversal by Abinger, who had died in 1844. Parke could rule as he saw best. He instructed the jury that if the company's directors *or their servants* had been negligent in a

[436] Fall has discussed the possible ancient origins of *respondeat superior* as flowing from the absolute power that Roman and Greek masters held over their servants, who were slaves. Here Abinger reverses those assumptions completely. Fall, *Employer's Liability,* 8-9.

way that caused their co-worker's injury, then the company was liable.[437] Just as in Priestley's original trial, the jury found for the plaintiff.

From this moment, the history of English law, carrying with it the relationship of British corporations to every employee, was balanced on a cusp, and could have tipped in either direction. Would injured workers have the same access to the courts as the general public, or would the cloak of corporate structure serve as an impenetrable shield, behind which no act of negligence could be brought to a reckoning? The window of equipoise lasted for two years. *Hutchinson v. the York, Newcastle, and Berwick Railway* and *Wigmore v Jay* were decided by judges Alderson and Pollock in 1850, and their rulings lifted *Priestley* to the status of legal precedent and seemed to close the argument. Victory, however, is never final, or complete. Judges in England continued to try to create new precedent around the edges of the case. The ruling in *Skipp v The Eastern Counties Railway Co*, 1853, narrowed *Preistley* by asserting the master's responsibility in the selection of competent co-workers. If it could be shown that that he had selected poorly, the plaintiff could prevail. *Brydon v Stewart*, 1854, further narrowed the precedent relative to dangerous machinery. If the machinery was not maintained in good repair, a case could proceed on that basis. In *Wiggett v Fox*, 1856, the definition of common employment was expanded to include subcontractors. *Holmes v Clarke*, 1862, narrowed the parameters of assumption of risk. The mere knowledge of an existing danger in machinery was not sufficient to conclude the risk of working near it had been willingly accepted.[438]

The Scottish experience was different. The year after *Priestley* was decided a case came before Scottish Justice Lord Ordinary; *Sword v Cameron*, decided in 1839. David Sword, a

[437] Kostal, *Railway Capitalism*, 267-268.
[438] "In the Exchequer Chamber", 116-117.

quarry worker, sued his employer after a large rock struck and mangled his leg to the point that it had to be amputated. The rock had been ejected during a planned detonation which had been carried out by Sword's co-worker, a man named Duff. Sword claimed Duff had not given enough warning and had not covered the shot sufficiently. Lord Ordinary rejected the plaintiff's knowledge of the practice as a defense, and ruled that as a point of law, employers were liable for the rashness of their employees when it resulted in injury to others. The identities of Sword and Duff as fellow workmen did not merit any mention, and neither did *Priestley*. Ordinary stated "The master of a work is not entitled to conduct it in such a way as that his people suffer unnecessarily in limb or life."[439] The Scottish court of appeal confirmed Ordinary's decision. In 1852 the Scottish judge in *Dixon v Rankin* acknowledged the English precedent of *Preistley*, but refuted it as far as Scotland was concerned. Ruling in the manner consistent with *Sword*, Lord Justice Clerk turned the issue of an implied contract in which the servant agreed to risk life and limb for pay on its head, stating "The master's primary obligation in every contract of service in which his workmen are employed in a hazardous and dangerous occupation for his interest and profit, is to provide for and attend to the safety of his men. That is his first and binding obligation; I should say paramount even to that of paying for their labor."[440] In *Gray v Brassey*, decided that same year, the result was the same. Lord Cunningham cited *Dixon* before saying "The law of Scotland on this point has been long established and acted on" and that "the reasons assigned in the English cases…do not appear altogether satisfactory or reasonable".[441] Legal researcher Charles Gershom Fall, working in 1883, counted as many as 25 Scottish cases decided

[439] James T. Carey, "Employer's Liability in England Prior to the Act of 1880", University of Pennsylvania Law Review and American Law Register 58, no. 5, (1910): 265.
[440] Fall, Employer's Liability, 31-32.
[441] Fall, Employer's Liability, 32.

in a way consistent with *respondeat superior* before *Bartonshill Coal Company v Reid* and *Bartsonshill Coal Company v McGuire* in 1858.[442] After eight years of defiance, the English courts would brook no more dissent from the North. In an exercise of national sovereignty, the House of Lords reversed the unanimous rulings of the Scottish judges granting plaintiff's verdicts in the *Bartonshill* matters, and Scottish precedent-making in contradiction of the broad issues developed from *Preistley* was vanquished.[443] As with the English courts, smaller-scale efforts to modify *Priestley* continued.[444]

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442 Fall, Employer's Liability, 33.

443 Fall, Employer's Liability, 15-16. *Bartonshill* did, however, reaffirm the narrowing of *Preistley* by *Skipp*, in requiring the master select competent co-workers and *Brydon*, in requiring that machinery be kept in good order.

444 In 1868 English justice Lord Cairns squelched Scottish rulings complicating the definition of "fellow worker" in terms of workplace hierarchy by reformulating the issue along the old lines of implied contract in which the servant assumed all risks and the absence of any explicit contract to the contrary in *Wilson v Merry*. "Important Decision on the Law of Master and Servant," *The Glasgow Daily Herald*, June 4, 1868.

CONCLUSION

Collectivism from Individualism Denied and Fear of the Legal Sphere

As demonstrated in these pages, the unique nature and impact of the Workmen's Compensation Act of 1897 has been all but ignored in the important social histories of the Victorian Era, and only recognized as part of a few niche works from the socio-legal, political, legislative, and pre-World War I veins. Even these have failed to provide a satisfactory account of the basis for this inflection point in British as well as American politics, law, industry, labor, and culture. This is largely due to the limiting agendas and perspectives each author brought to the task, but it is also a function of a blind spot that all the histories share: that of the intense and profound interaction between legal precedent and human actors. In an age predicated on individualism legitimated by an ideal of equal treatment under the British rule of law, *Priestley* had deprived workers of both. The leaders of the TUC built their claims in terms of old rights that had been abrogated by Abinger, and in perfect alignment with the most conservative notions of *laissez-faire*, they asked only that they be given the same chance before the courts of law as the public had always enjoyed. Significantly, it was the employers who demanded the landmark socialistic solution, and they did so not based on new notions of property or *laissez-faire*, but in order to avoid the alternative and deeply threatening prospect of seventeen million workers having unfettered access to the legal sphere.[445] It is of some interest to contrast this development with E. P. Thompson's conclusion about the effect of the rule of law in *Whigs and Hunters*. Thompson observed that although they had dallied with the Two Acts, the Combination Acts, repression at Peterloo, and the Six Acts from 1790-1832, the rulers of England ultimately shrank from abrogating the rule of law and surrendered to it. In the Workmen's Compensation Act of

[445] R Thomas and N Dimsdale, "A Millennium of UK Data," Bank of England OBRA dataset, (2017). http://www.bankofengland.co.uk/research/Pages/onebank/threecenturies.aspx.

1897, they found a third choice: contracting a huge block of the citizenry out of their rights under the rule of law based on their identities as workers.[446]

Priestley outlived its creator by over 100 years, driving legal strategies as well as business decisions, and affecting the lives of more individual workers in from 1867-1897 than it had from 1837-1867. If a single working class was formed in the late Victorian period, *Priestley* was a central factor in uniting the different sectors of the laboring populace, as the top legislative item of the TUC Parliamentary platform from 1872-1897. Indeed, its direct effects did not abate in 1897. Common employment continued to affect workers in Britain until 1948, while assumption of the risk survives as a defense in strict products liability injury lawsuits in America to this day. No-fault worker's compensation programs that shield employers from the full effects of the legal sphere continue to be a fixture in almost all industrialized countries. The indirect effects related to *Priestley* are incalculable. In the immediate wake of the Act, TUC president J. O'Grady wondered aloud if health care and pensions for workers might be "a considerable step nearer realization."[447] He wasn't wrong. The Old Age Pensions Act passed in 1908 and the National Insurance Act became a reality in 1911. These joined the Unemployed Workmen Act of 1905, the Trade Board Act in 1909, and others. In America, the Worker's Compensation Acts from the 1910s served as the blueprint for the Social Security Act passed in 1935.[448] This astounding cascade of socialist outcomes can be traced to the unintended consequences of a flawed ruling by an activist conservative judge whose strongest belief was in the preservation of power in the hands of the propertied. In constructing legal defenses that barred Priestley the man

[446] E. P. Thompson, *Whigs and Hunters,* 269.
[447] *Report of the Thirtieth Annual Trades Union Congress* (Co-operative Printing Society Limited, 1897), 31.
[448] Ursin, "Holmes", 559.

from accessing the legal sphere, Abinger denied him the essence of individualism and citizenship in a law-based society. Once subsequent judges cemented *Priestley* the ruling as precedent, it continued to act on generations of industrialists and workers. Faced with a reckoning in 1897, the industrialists chose the benefits derived from the precedent over all else we are told that mattered in late Victorian economic and cultural thought; political economy, *laissez-faire*, and property rights. The Victorian century culminated not in the triumph of political economy over paternalism, or a creeping socialism over political economy, but in a deeply-felt spasm of fear on the part of industrial capitalists at the prospect of being held fully accountable for the human toll they had exacted. This spasm forced open the gates of thought *and* politics to thoroughly socialistic problem-solving.

One might say that Britain and America were never the same, and that is true as far as it goes. However, in the 128 years since the British Act, and 110 years since the Supreme Court decision legalizing worker's compensation in the United States, corporations have been working relentlessly to weaken compensation laws, as well as the product liability laws that flowed from their legacy.[449] Even in terms of general negligence actions brought by members of the public, the assault is fiercer than ever. Lawyers defending recent cases against Disney and Uber in 2024 have relied on contracting out provisions exhumed from 19th century Britain and re-animated as trojan horses within intentionally complex end-user license agreements (EULAs). Just as thousands of English workers in 1880 were stopped at the gates of factories until they signed a paper that forfeited all rights to sue, today users are denied the services of one branch of a

[449] W. P. Munsell Jr., "Technology on Trial: The Social Framework of Safe Design," in *Proceedings of the ASME 2018 International Mechanical Engineering Congress and Exposition,* vol. 5, *Engineering Education* (American Society of Mechanical Engineers, 2018). https://doi.org/10.1115/IMECE2018-87017.

conglomerate unless they relinquish their rights to legal recourse against all branches of it, for any future injury, in perpetuity. The development of this strategy has been long, methodical, and coordinated by corporate defense theorists such as those working with the U.S. Chamber of Commerce Institute for Legal Reform which has been holding annual summits since 1999. At the 2009 summit, Emory University Law Professor Paul Rubin made clear his preference for a future in which general liability to the safety of the American public would be subdued by the details in user contracts, which would "determine what rights they have."[450] We now inhabit the future he imagined, and in the aspect I have described, it replicates a past already lived. There is one important difference, however: the workers in 1880 knew what they were signing.

[450] *Hot Coffee*, directed by Susan Saladoff. (2011; HBO), Film.

EPILOGUE

E. P. Thompson's Moral Economy, Ulrich Beck's Reflexive Modernity, and the Workmen's Compensation Acts

In his landmark article, "The Moral Economy of the English Crowd in the Eighteenth Century", E.P. Thompson decried the lack of sophisticated analysis that accompanied the blending of economic and social histories.[451] His subject was the series of social disturbances by poor Britons in times of food scarcity and inflated prices at the end of the 18th century and the beginning of the 19th. Previous historians, to paraphrase Thompson, had reduced the actors involved to a three-letter word: "mob", their actions to a four-letter word: "riot", and their motivations to a six letter word: "hunger".[452] Through pamphlets and contemporary reports Thompson re-assessed these actions and their motivations in terms of long-standing but "eroded" statute law and custom, and found in the evidence not a blind and instinctive reaction to ephemeral conditions, but what he called a continuing tradition of a "moral economy" that had been preserved in the memory of the "rioters" at least since the *Book of Orders* in 1630.[453] By "moral economy" he meant to draw a contrast with the well-known notions of 19th century Liberal political economy, from which the paternalistic compacts between the poor and the upper strata of British society had been drained.[454] The parallels between Thompson's protesting moral economists at the beginning of the nineteenth century and the workers agitating for access to the legal system at its end are, I believe, striking: Both groups were composed of blocs of the lower social classes fighting against what they perceived to be a denial of long-held rights which were

[451] E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past & Present*, No, 50, (1971), 77.
[452] E. P. Thompson, "Moral Economy", 77.
[453] E. P. Thompson, "Moral Economy", 83, 108-109, 132.
[454] E. P. Thompson, "Moral Economy", 89-90.

central to their identities and status as citizens. The rising prices of food in the first case were replaced by the rising cost of factory work in terms of lives and limbs in the second. The *Book of Orders* and *respondeat superior* both carried doctrines that dated back to at least the 1600s, and represented for each group the clear moral and legal bases for those perceptions.

Writing fifteen years after Thompson's article, sociologist Ulrich Beck's *Risk Society* introduced his concepts of scientism, loss of trust, the risk society, and reflexive modernity. Beck contended that industrial society, in which the production of goods was virtually synonymous with scientific progress and wealth-generation in the public mind, had given way to a bifurcation that included something he called the risk society. In the risk society, the hazards of new technologies such as nuclear power and large-scale chemical processing plants had de-centered traditional wealth-goals in the public perception of production, and caused a loss of trust in science itself. Faced with the unacceptable, unbounded, and uninsurable outcomes associated with such hazards, he said, certain affected members of society would experience a "rupture" from their pre-existing lives and become agents of correction, who, through acts of reflexive modernity, would in turn restore trust in science and preserve the modern project. These acts of reflexive modernity would be assaults on hegemonies that sought to propagate and normalize risks, marshalling science to refute the claims of risk producers. As with Thompson, studying Beck raises questions about the wider application of his thesis. Why should one confine Beck's analysis to the nuclear and chemical industries, or to unbounded and uninsurable dangers? What might be gained from mapping his insights onto other historical convolutions?

Historian Jean-Baptiste Fressoz considers these questions and challenges Beck's narrow application in his article "Beck in the 19th Century: Towards a Genealogy of Risk Society". Fressoz cites several episodes of uncertainty and controversy involving actual and anticipated harms generated by technological systems in 19th century France.[455] While Fressoz draws comparisons between his evidence and Beck's discussion of contested scientific expertise in areas of publicly perceived risks, I focus on the parallels evident in terms of individuals suffering ruptures that separate them from the status quo and becoming agents who attempt to correct an industrial system of production, which for them had come to represent a constant danger to their bodies, and therefore their property, as much as a way to make a living. As Beck observed, it is only when apparently isolated harms are connected to larger social processes that they demand political solutions.[456] That, of course, is an apt description of the individually experienced injuries of Victorian workers and the emergence of the Trades Union Congress which made the them visible to each other, connected their harms to larger structural issues embedded in the legal sphere, and channeled that demand into a political resolution. From this perspective, Workmen's Compensation legislation can be seen as a profound expression of reflexivity in Britain and America at the turn of the century, struggling not to repair the modern project, but to reconcile the industrial one with the true costs of production. The implications of Beck's work also raises questions associated with Thompson's most famous work, *The Making of the English Working Class*. Thompson's 1963 classic fostered lengthy and continuing debates about the definition and indications of class formation. Beck contended that risk society actively destroys class boundaries, and that risk and its management becomes a new organizing "class factor".[457] If as

[455] Jean Baptiste Fressoz, "Beck Back in the 19th Century: Towards a Genealogy of Risk Society," *History and Technology* 23, no.4 (2007): 333–350. Fressoz also foregrounds the writings of 19th century French philosopher Eugene Huzar, who argued in his *La Fin du monde par la science*, published in time for the 1855 Universal Exhibition in Paris, that industrial science blindly creates unintended consequences that generate harms on industrial, even limitless scales.
[456] Ulrich Beck, *Risk Society: Towards a New Modernity* (Sage Publications. 1992), 31.
[457] Beck, *Risk Society,* 47.

E.P. Thompson contended, class only comes into being contingent upon an actors' intentional identification of shared interests, then classes were being simultaneously constructed and deconstructed by the privations associated with industrialization and by notions of individualism associated with political economy. What then, was the effect of legal precedent in general, and the *Priestley* decision in particular, in contributing to class formation? And how do other mechanisms of law affect the formation of class and the emergence of reflexive modernity?[458]

As my final thesis, I argue that both E.P. Thompson's application of moral economy to the actions of food rioters at the beginning of the 19th century, and Ulrich Beck's notion of reflexive modernity to describe how actors behave under conditions of hegemony and a loss of trust in the late 20th century, could be utilized to recontextualize the laborers, their unions, and the outcome of the political battles in the decades intersecting both. Such an analysis would drive an expansion of the definition and understanding of both sociological models of motivation and interaction beyond their current parameters.

[458] For example, the anti-Leninist questions, prompted by Thompson, of whether members of a class must recognize each other, their membership in a given class, or even the existence of the classes to which they belong, take on new connotations when legal tools such as non-disclosure agreements and class-action lawsuits, designed to obscure or illuminate the reality of shared conditions, respectively, are considered.

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