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THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870. By *Robert J. Steinfeld.* Chapel Hill: University of North Carolina Press. 1991. Pp. viii, 277. $39.95.

Sooner or later in their first-year curriculum, most law students learn of the contracts doctrine that denies plaintiffs the remedy of specific performance for breaches of personal services and labor contracts.[1] Courts deny specific performance for a number of sensible reasons. The party in breach would be unlikely to perform the promise enthusiastically, and supervision by the promisee would create an awkward situation. But the courts occasionally mention another, more archaic reason for denying specific performance: forcing a defaulting employee to complete the contract would be akin to placing him into involuntary servitude, even slavery.[2]

Simply put, Robert Steinfeld's *The Invention of Free Labor*[3] uses

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1. *See, e.g.,* De Rivafinoli v. Corsetti, 4 Paige Ch. 264, 270 (N.Y. Ch. 1833); RESTATEMENT (SECOND) OF CONTRACTS § 367 (1981); WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT § 409, at 520-22 (Arthur L. Corbin ed., 5th ed. 1930).

2. *See, e.g.,* Arthur v. Oakes, 63 F. 310, 318 (7th Cir. 1894); RESTATEMENT (SECOND) OF CONTRACTS § 367 cmt. a (1981); OLIVER W. HOLMES, JR., THE COMMON LAW 235 (Mark D. Howe ed., 1963) (1881). Holmes rejects

> the superfluous theory that contract is a qualified subjection of one will to another, a kind of limited slavery. It might be so regarded if the law compelled men to perform their contracts, or if it allowed promisees to exercise such compulsion. If, when a man promised to labor for another, the law made him do it, his relation to his promisee might be called a servitude *ad hoc* with some truth. But that is what the law never does.

Id. For a modern critique of the indentured servitude rationale in the context of bankruptcy and family law, see Stewart E. Sterk, *Restraints on Alienation of Human Capital,* 79 VA. L. REV. 383, 431-32, 444-54 (1993).

3. Robert J. Steinfeld is a Professor of Law at the State University of New York at Buffalo School of Law.

this doctrinal backwater in contract law to reinterpret the history of Anglo-American labor law. On one level, Steinfeld offers an extended exploration of the recent development and mendacity of the no-specific-performance rule. The *Case of Mary Clark,* in which the Indiana Supreme Court declined to permit specific performance to enforce indentured servitude, is conventionally seen as a contract case, articulating the familiar common law rule against coercive performance.[4] Far from being a mere building block in the Langdellian world of contracts, the rule against coercive performance enunciated in *Mary Clark* and elsewhere was a fundamental element of the emerging nineteenth-century notion of "free labor." Equally important, the rule was a radical departure from long-standing common law doctrines of how employees ought to be governed. *Mary Clark* represented a critical turning point in labor law and in the social understanding of what it means to be a free worker and citizen.

Drawing upon legal material like the case of *Mary Clark,* Professor Steinfeld's book offers a complete reinterpretation of the evolution of labor law. It is a broad story, with its roots in medieval serfdom and its culmination in the "free labor" ideology of the nineteenth century. The argument is daring, for Steinfeld claims that the received understanding of labor law history is right about its starting point (medieval serfdom) and its conclusion (free labor), but little else. In particular, the traditional account completely misses both the importance of coercion in regulating labor and the absence, until relatively recently, of a modern understanding of free labor and persons.

Steinfeld traces the tenacity of coerced labor, including specialized relationships like indentured servitude and apprenticeship, and also the modern-style wage relationships of "servants in husbandry" (agricultural laborers) and craftsmen. Before the nineteenth century, a dissatisfied employee in any of these working relationships was not free to leave. Both English and colonial American law required employees to complete their contractual terms of service or the tasks for which they had been retained on pain of specific performance and criminal sanctions (pp. 8, 13, 40-52). In many instances, the law also required persons not already employed to find a "master" and enter into a long-term contract (pp. 22-23, 33). Steinfeld's analysis is original in that he takes the next step, combining this description of the forms of compelled labor with the seemingly unrelated fact that common law had long concluded that practically all Englishmen were personally free. The result is a new, complex picture of early modern freedom, illustrating the perfect consistency of legally free status, of which contemporaries were so proud, with a regime of harsh compelled labor.

Steinfeld also explores the legal collapse of these various forms of

4. Pp. 143-49, 156, 175 (discussing The Case of Mary Clark, a Woman of Color, 1 Blackf. 122 (Ind. 1821)).

coerced labor and their replacement with modern notions of "free labor" in the early nineteenth century. Henceforth, there would not be degrees of practical "unfreedom"; both labor and personal status were exclusively free or slave. Compulsion persisted longest in the institutions of indentured service and apprenticeship, chiefly on the rationale that, however coercive those institutions were, they were voluntary. Unfree labor was thereby consistent with contractarian individualism (pp. 90-91, 105-11). But if ideological accommodation permitted coerced labor to persist into the era of capitalism, it was also ideology rather than economics that led to its final rejection. Steinfeld argues that, in the early nineteenth century, the increasing opposition of working people to coerced labor forced common law judges to view even voluntary coerced labor as little different from slavery, and hence as illegitimate (pp. 94, 123-27, 159, 163).

To make this ambitious set of claims, Steinfeld relies on an impressive command of sprawling bodies of legal and historical scholarship — English and colonial and antebellum American. The result is an account that on the whole is compelling. Regardless of its ultimate success, the Steinfeld account is the most ambitious attempt in many decades to grapple with the intellectual history of Anglo-American labor law. In an age of scholarly monographs, Steinfeld has undertaken a task of almost heroic sweep.

I. The Traditional Account of Labor Law and Its Problems

What is the matter with the traditional account of labor law? It offers a smooth explanation of the legal shifts from thirteenth-century serfdom to nineteenth-century wage labor, largely by identifying legal change as a corollary to social, economic, and demographic trends. According to this account, laborers were largely unfree and immobile in the medieval period, but they secured legal freedom in the favorable economic climate of the late fourteenth and fifteenth centuries. After that time, most Englishmen worked for wages, and what quaintly became known as the law of "master and servant" was, for all but resident household servants and apprentices, the law of employer-employee. At the heart of this traditional account is the early date at which laboring men and women became legally free.

Before considering the difficulties — for both Steinfeld and this reviewer — with the traditional account, it is necessary to sketch out its major arguments more fully. In the High Middle Ages, English society was overwhelmingly agrarian, and labor was unfree. This characterization is axiomatic for serfs or "villeins," since the essence of their legal status lay in their being bound to the soil and obliged to provide their manorial lords with labor services. But even persons of

legally free status might owe labor services in exchange for their land.[5] While these free persons formally could withdraw their labor, as a practical matter few wanted to abandon their land.[6] Moreover, the separation of personal status and land tenure under early common law meant that personally free peasants could hold land by unfree tenure involving labor services. As a result, many medieval persons, whether legally free or not, lived under a regime of coerced labor.

All this began to change by the fourteenth century. A century of prosperity had brought rural England close to the Malthusian trap: too many mouths, overintensive cultivation, and declining crop yields.[7] Many lords commuted labor obligations, replacing serf labor with cheaper hired labor,[8] and elsewhere serfs fled in search of opportunity. The decline of manorial serfdom was accelerated by the Black Death, which carried off approximately one third of the population.[9] With labor suddenly scarce, both serfs and free peasants managed to cut better deals for themselves. In what was tantamount to a lengthy nationwide process of renegotiation and redistribution, peasants took on larger landholdings of better land and on more favorable terms, owing money rents rather than labor in kind — all backed by the new power of their actual or implicit threats to withdraw labor and move to a new lord. For some 150 years, the relative scarcity of labor gave the upper hand to smallholders and laborers.[10] Significantly, the peas-

5. *See, e.g.*, H. S. BENNETT, LIFE ON THE ENGLISH MANOR: A STUDY OF PEASANT CONDITIONS 1150-1400, at 103 (1937) (terming labor services by free tenants "exceptional"); EDWARD MILLER, THE ABBEY AND BISHOPRIC OF ELY 128-29, 141 (1951) (documenting free men owing similar services to those of unfree men, including labor); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 370-71 (2d ed. 1968) (stressing uncertainty of labor, rather than labor services, as a test of villein tenure); CUSTUMALS OF THE MANORS OF LAUGHTON, WILLINGDON AND GORING xxx, 3-8 (Arthur E. Wilson ed., 60 Sussex Record Socy. 1961).

6. John Hatcher, *English Serfdom and Villeinage: Towards a Reassessment*, PAST & PRESENT, Feb. 1981, at 3, 16-24.

7. *See* H.E. HALLAM, RURAL ENGLAND 1066-1348, at 245-64 (1981); Edward Miller, *The English Economy in the Thirteenth Century: Implications of Recent Research*, PAST & PRESENT, July 1964, at 21, 33-36.

8. The modern debate on commutation was begun by Professor Michael Postan. MICHAEL M. POSTAN, *The Chronology of Labour Services*, 20 TRANS. ROY. HIST. SOC. 169 (4th ser. 1937), *reprinted in* ESSAYS ON MEDIEVAL AGRICULTURE AND GENERAL PROBLEMS OF THE MEDIEVAL ECONOMY 89 (1973) [hereinafter POSTAN, *Chronology*]. *See* Evsey D. Domar, *The Causes of Slavery or Serfdom: A Hypothesis*, 30 J. ECON. HIST. 18, 29 (1970), *reprinted in* EVSEY D. DOMAR, CAPITALISM, SOCIALISM & SERFDOM 225, 235-36 (1989) (surveying thirteenth-century commutation and suggesting an economic model).

9. *See, e.g.*, PHILIP ZIEGLER, THE BLACK DEATH 238 (1969).

10. EDWARD P. CHEYNEY, AN INTRODUCTION TO THE INDUSTRIAL AND SOCIAL HISTORY OF ENGLAND 108-09 (rev. ed. 1929); CHRISTOPHER DYER, STANDARDS OF LIVING IN THE LATER MIDDLE AGES: SOCIAL CHANGE IN ENGLAND C. 1200-1520, at 216-17 (1989); PAUL D.A. HARVEY, A MEDIEVAL OXFORDSHIRE VILLAGE: CUXHAM, 1240 TO 1400, at 139 (1965); Michael M. Postan, *The Fifteenth Century*, 9 ECON. HIST. REV. 160, 166 (1939). Of course the picture is more complex than this sketch permits. *See, e.g.*, J.L. BOLTON, MEDIEVAL ENGLISH ECONOMY, 1150-1500, at 211-14 (1980) (demesne farmers prosper until 1370s); DYER, *supra*, at 231 (masters probably forced their increasingly costly labor force to work harder); HARVEY,

antry of England was able to win not only better economic terms, but also de facto or even legal freedom.

This wresting of legal freedom was not achieved without struggle. There had long been manorial and burghal rules forbidding free movement of labor and mandating customary wages (p. 28), and the Ordinance of Laborers (1349) and the Statute of Laborers (1351) adapted these rules for national application (pp. 22-23, 28-30). Through these acts, manorial lords and a national government responsive to their interests tried to restrain the mobility of labor and the level of wages. But legislation could not successfully restrain wages and labor mobility in the face of landowners who were interested in controlling their own workers and luring their neighbors' workers, and laborers who knew how to flee, purchase exemptions, resist forcibly, and use the litigation process.[11] Legislation also could not stand in the way of strong demographic and economic trends.[12] Since unfree peasants and laborers consistently sought free status, the decline of serfdom was inevitable.[13] By the late fourteenth century, serfdom was clearly on the wane, and by the mid-sixteenth century it was all but gone.

The decline of English serfdom did not mean that peasants and laborers continued to enjoy rising standards of living. On the contrary, living standards tended to fall from the early sixteenth century, dispossession of the peasantry accelerated, and the ranks of the landless and the poor swelled.[14] The traditional account of labor law was based in part on these findings. Indeed, the early twentieth-century

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supra, at 139-40 (small farmers were thrown back on family labor only, since hired labor was now too expensive); RODNEY H. HILTON, THE DECLINE OF SERFDOM IN MEDIEVAL ENGLAND 38-43 (2d ed. 1969) (lords attempted to reimpose feudal obligations and occasionally succeeded).

11. For the various forms of peasant resistance, see HILTON, *supra* note 10, at 35-43; RODNEY H. HILTON, THE ENGLISH PEASANTRY IN THE LATER MIDDLE AGES 64-73 (1975); GEORGE C. HOMANS, ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY 276-81 (1941); Rodney H. Hilton, *Peasant Movements in England Before 1381,* 2 ECON. HIST. REV. 2 (2d ser. 1949), *reprinted in* 2 ESSAYS IN ECONOMIC HISTORY 73 (E.M. Carus-Wilson ed., 1962) *and in* RODNEY H. HILTON, CLASS CONFLICT AND THE CRISIS OF FEUDALISM 122 (1985). *But see* MICHAEL M. POSTAN, *Legal Status and Economic Conditions in Medieval Villages, in* ESSAYS ON MEDIEVAL AGRICULTURE AND GENERAL PROBLEMS OF THE MEDIEVAL ECONOMY, *supra* note 8, at 278, 283-84 (few peasants bothered to purchase formal manumission) [hereinafter POSTAN, *Legal Status*]; J.Z. TITOW, ENGLISH RURAL SOCIETY 1200-1350, at 58-59 (1969) (questioning whether various instances of peasant resistance were not exceptional).

12. *See, e.g.,* DYER, *supra* note 10, at 218-19 (legal regulation widely thought ineffective, though statutes possibly succeeded in deterring some labor mobility and wage demands); Domar, *supra* note 8, at 29 (legislation ineffective against economic forces). Indeed, modern free market disciples have often cited the late medieval statutes for the general proposition that wage-price controls never work to restrain market forces in the long run.

13. TITOW, *supra* note 11, at 58. *But see* I.S. Leadam, *The Last Days of Bondage in England,* 9 L.Q. REV. 348 (1893) (arguing that villeinage persisted until the late sixteenth century).

14. *See, e.g.,* A.L. BEIER, MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND, 1560-1640, at 18-24 (1985); HILTON, *supra* note 10, at 57; W.G. HOSKINS, THE AGE OF PLUNDER: KING HENRY'S ENGLAND, 1500-1547, at 60-72 (1976); JOHN POUND, POVERTY AND VAGRANCY IN TUDOR ENGLAND 3-25 (1971); PAUL SLACK, THE ENGLISH POOR LAW 1531-1782, at 11 (1990).

landmark histories of labor and poverty were typically written by reformers and social activists.[15] The reformers knew of the massive rural dispossession of the peasantry beginning in the sixteenth century — of which Sir Thomas More famously warned[16] — and of the dangers of an increasing population and price inflation in a subsistence economy. The reformers also knew of the contemporary perception that poverty and vagrancy were on the rise and that the highways, forests, and cities swarmed with "masterless men."

The traditional account of labor law provides, however, that English labor enjoyed legally free status from an early date, approximately the late Middle Ages.[17] When common law's only unfree status — villeinage — fell into desuetude in the century after the Black Death, all persons necessarily were free.[18] The enforcement of the late medieval labor statutes represented the attempt to extract labor from free men, and the governance of labor was a separate question from that of personal status. As for early modern labor statuses and institutions that bore the hallmarks of unfreedom — such as apprenticeship, servitude by annual retainer or indenture, impressment into military service, and bridewell work pursuant to the poor relief acts[19] — the traditional account holds that they did not imply unfree personal status. Only villeinage could constitute common law servitude, and, as Sir Thomas Smith wrote in the 1560s, "[n]either of the one sort [villeins in gross] nor of the other [villeins regardant] have we any number in England. And of the first I never knewe any in the realme in my time: of the seconde so fewe there be, that it is not almost worth the speaking."[20] In much the way that modern lawyers reconcile coercive institutions like prison labor and conscripted military service with the Thirteenth Amendment, traditional historians of labor law insist that the early modern institutions were temporary, voluntary, regulated by paternalistic oversight, or otherwise distinguishable from legal servitude. England had "too pure an air for slaves to dwell in,"[21] meaning

15. *See* the works cited *infra* note 89.

16. THOMAS MORE, UTOPIA 32-33 (Mildred Campbell ed., Walter J. Black, Inc. 1947) (1516).

17. *See, e.g.*, RICHARD H. TAWNEY, THE AGRARIAN PROBLEM IN THE SIXTEENTH CENTURY 43 (1912).

18. A famous assertion of this is found in antislavery cases like *Somerset*. There it was argued that English law knew only villeinage unfreedom, a slave was not a villein, therefore English law did not recognize slavery. Somerset v. Stewart, Lofft 1, 3; 98 Eng. Rep. 499, 500 (K.B. 1772).

19. *See, e.g.*, THOMAS SMITH, DE REPUBLICA ANGLORUM 137-38 (L. Alston ed., Cambridge University Press 1906) (1583) ("An other kinde of servitude or bondage is used in Englande for the necessitie thereof, which is called apprenticehoode. But this is onely by covenaunt, and for a time, and during the time it is *vera servitus* . . . . Besides apprentises, others be . . . called servaunts . . . which be not in such bondage as apprentises . . . .").

20. *Id.* at 130-31.

21. Pp. 96, 225 n.10. For similar legal talk in France, see ROBIN BLACKBURN, THE OVER-

that English labor, however oppressed in fact or in law, was fundamentally free labor, subject to regulation only at the margins.

Steinfeld bridles against this traditional account, and there is much to support his discomfiture. The peasants and laborers of medieval England were not uniformly unfree. Many, perhaps most, manors relied on hired work, often performed by landless men, in addition to the labor of serfs holding land by precarious customary terms.[22] These hired workers and their payments, in wages or grain ("liveries"), may seem like a distortion of classic feudal theory, but they were structural features of English manorialism, The picture of a largely unfree peasantry exchanging its labor for land is simply incomplete. Indeed, in the twelfth century, wage labor became a dominant form of labor, as lords and long-term lessees of manors ("farmers") commuted the labor obligations of peasants and replaced the serfs with hired laborers.[23] Twelfth-century lords were capable of behaving like profit-maximizing employers of free labor, rather than like feudal lords saddled with customary labor.[24]

Significantly, these hired laborers tended to be free, de facto and sometimes de jure.[25] Perhaps their freedom meant little more than that they were free to move when pushed and free to accept the least unattractive employment offer; if so, medieval hired laborers were free in a way that their nineteenth-century descendants might have found familiar. But the traditional account of labor also distorts medieval freedom more generally by presenting almost all labor as coerced, dependent, and ipso facto unfree. Long before the Black Death, money payments replaced labor service on many manors, such that even villeins often did not render labor under coercion; instead, their "labor service" was a measure of additional rent and a badge of their formal status. When lords sought to extract customary labor or pay below market wages, peasants often resisted, challenging both the obligation to work and its implication of unfree status.[26] In fact, we have only recently realized the profound complexity of legal status and personal

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THROW OF COLONIAL SLAVERY 1776-1848, at 41 (1988); DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE 46 (1966).

22. MICHAEL M. POSTAN, THE FAMULUS: THE ESTATE LABOURER IN THE TWELFTH AND THE THIRTEENTH CENTURIES 30-31 (1954); MICHAEL M. POSTAN, THE MEDIEVAL ECONOMY AND SOCIETY 148-49, 224-25 (1972); *see also* ALAN MACFARLANE, THE ORIGINS OF ENGLISH INDIVIDUALISM 148-50 (1978) (stressing importance of landless wage laborers and servants, as part of a larger argument that medieval England did not have a "peasantry").

23. POSTAN, *Chronology, supra* note 8, at 93-100.

24. *But see* Edward Miller, *England in the Twelfth and Thirteenth Centuries: An Economic Contrast?*, 24 ECON. HIST. REV. 1, 7-8 (2d ser. 1971) (arguing that lords often made the "wrong" — that is, unprofitable — decision in continuing to farm out their lands and in not retaining labor services for demesne farming, and that they did so for traditionalist reasons).

25. *But see* DYER, *supra* note 10, at 217-18 (landless serfs working for wages were not meaningfully free); MILLER, *supra* note 5, at 142 (landless serfs working elsewhere as servants still had residual value to their lords).

26. RODNEY H. HILTON, BOND MEN MADE FREE 154-56 (1973).

and tenurial freedom that existed from the late eleventh to mid-thirteenth centuries.[27] Certainly common law villeinage, as it was devised in the late twelfth and thirteenth centuries, was not simply a restatement of traditional unfree status. Rather, villeinage was a particular configuration of legal disabilities and tests, cast in new binary (free-unfree) form and imposed on at least some persons who had always considered themselves free or free enough.

Nor does the traditional narrative satisfactorily explain sixteenth- and seventeenth-century "free labor." The traditional account insists that labor institutions such as indentured servitude, apprenticeship, and military impressment operated on free persons and were consistent with their personal freedom. But these were coercive and frequently brutal practices, and in more candid moments contemporaries recognized that they differed little from slavery or serfdom (p. 101). Given the prevalence of these practices, there is little to gain from denying that the common law sanctioned certain forms of servile labor, and much to commend in characterizing early modern labor as significantly unfree.

If anything, coercive labor practices seemed to expand in the early modern period. It is very well to point, as generations of common lawyers have, to the short life of the notorious Vagrancy Act of 1547,[28] the only statute that expressly created a slave status for Englishmen. The act was repealed almost immediately after its enactment, and most commentators took its repeal to support the proposition that English law would tolerate no status but freedom. But the arrangements routinely made under the Old Poor Law for paupers, including forcible work in bridewells[29] and the placement of pauper children as "parish apprentices" (p. 120) in dangerous occupations, were harshly coercive.[30] Moreover, late Tudor evidence shows that men were consigned to the galleys as slaves and that, at least for

27. *See infra* text accompanying notes 92-109.

28. 1 Edw. VI., c. 3 (1547), *repealed by* 3 & 4 Edw. VI, c. 16 (citing the "extremitie of some [of such laws] have byn occation that they have not ben putt in [use]"). As Blackstone put it, "the spirit of the nation could not brook this [a slave's] condition, even in the most abandoned rogues . . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *412. For a general discussion of the act, see C.S.L. Davies, *Slavery and Protector Somerset: The Vagrancy Act of 1547,* 19 ECON. HIST. REV. 533 (2d ser. 1966).

29. 1 COUNTY OF MIDDLESEX: CALENDAR TO THE SESSIONS RECORDS: NEW SERIES, 1612-1614, at x, 400 (William Le Hardy ed., 1935) ("Two men in 1614 were sent to *Bridewell* to be whipped, shaved, and kept at *perpetual* labour") (second emphasis added). The possibility of perpetual coerced free labor is explored in Otto Kahn-Freund, *Blackstone's Neglected Child: The Contract of Employment,* 93 L. Q. REV. 508, 516-18 (1977) (discussing Blackstone and Bentham).

30. *See, e.g.,* JOHN C. COBDEN, THE WHITE SLAVES OF ENGLAND 117-18, 203 (Irish Univ. Press 1971) (2d ed. 1860); M. DOROTHY GEORGE, LONDON LIFE IN THE EIGHTEENTH CENTURY 224-31 (1965); JOHN L. HAMMOND & BARBARA HAMMOND, THE TOWN LABORER 1760-1832, at 155-67 (1977); JOHN RULE, THE EXPERIENCE OF LABOUR IN EIGHTEENTH-CENTURY ENGLISH INDUSTRY 102 (1981); SLACK, *supra* note 14, at 39-40.

those individuals, the law did not flinch from explicit slave status.[31]

The rapid growth of indentured servitude and Indian and black slavery in the colonies is, of course, even more damaging to the received picture of free labor. Colonial indentured servitude relied on certain formal doctrines from the English law of apprenticeship and servitude, but it was a radically different, and consistently more brutal, institution as practiced in the New World. Indeed, plantation slavery was wholly new to the common law. Granted, it is possible to differentiate metropolitan free labor from these colonial practices and to argue that colonial labor innovations did not affect the general proposition that at home all men and labor were free. The common law relied on this metropolitan-colonial distinction, and the courts of a number of Continental powers did so as well.[32] But this distinction was far from convincing, and servitude and slavery in the colonies coexisted uneasily with the notion that common law recognized only free labor and free status with the exception of "villeinage." As a result, the traditional proposition that all labor was free by the sixteenth century represents a circular legal description and an inadequate social description.

II. STEINFELD'S REINTERPRETATION OF FREE AND COERCED LABOR

Steinfeld responds to the traditional picture of free labor by presenting a radically different model, consisting of three related arguments. First, most labor was governed by coercion — the legal obligation to work and finish one's work on pain of specific performance, imprisonment, or other forms of legal compulsion. In that sense, labor was unfree in practice until at least the eighteenth century, in both England and its American colonies (chs. 2-4). Second, nobody conflated the coercion of labor with the slave status of plantation blacks because the common law assumed that all (whites) were free and because the modern free-unfree dichotomy is itself an anachronism that has little applicability until the late eighteenth century (pp. 10, 13, 53-54, 99-104). Third, the replacement of the unfree labor paradigm with the new "free labor" model was not an inevitable byproduct of eighteenth- or nineteenth-century capitalism, but rather resulted from ideological struggles in which republicanism, the American Revolution, and the persistence of the increasingly odious institution of black slavery (pp. 137-46) impelled average American working men and women to act (pp. 123-27, 181).

Behind this ambitious argument is Steinfeld's premise that early

31. *See* A.F. POLLARD, ENGLAND UNDER PROTECTOR SOMERSET 224 n.1 (1966); Davies, *supra* note 28, at 548 n.3; J. H. Baker, The Roots of Modern Freedom: Personal Liberty Under the Common Law, 1200-1600, at 20-21 (1992) (unpublished manuscript, on file with author).

32. BLACKBURN, *supra* note 21, at 42.

modern "freedom" is best understood as the interaction of labor regulations and social institutions, and not as the formal ascription of common law "free" status. Traditional legal historians would find this first step to be strained and doctrinally wrong, since by its own terms the common law defined free status not in terms of legal disabilities on labor, but rather as the opposite of villeinage. Steinfeld's aim, however, is not to account for doctrine in its traditional common law pigeonholes, but to use doctrine to explain larger legal and social structures. Having decoupled his inquiry from reliance on the law of villeinage or the practices of manorial serfdom, Steinfeld proceeds to assemble his case for the unfreedom of labor prior to the nineteenth century. He emphasizes a careful parsing of the two principal regulatory statutes, the Statute of Laborers (1351) and the Statute of Artificers (1563), and an analysis of their enforcement (pp. 22-23, 28-30, 77-78).

Through this point in his argument, Steinfeld's presentation is original in two senses. First, his claim that the regulatory scheme was not merely oppressive, but also defined a regime of coerced labor, goes considerably further than the claims of previous progressive historians.[33] Second, he makes this argument by emphasizing certain little-remembered but critical provisions of the two major labor statutes. Earlier studies of labor regulation have consistently focused on other provisions of these statutes, chiefly those addressing wage-fixing and mandatory apprenticeship,[34] perhaps because enforcement of these provisions seemed most amenable to quantitative testing. In contrast, Steinfeld stresses the general statutory requirements that various classes of persons seek work and that anyone obligated to work complete his term or task on pain of imprisonment or forcible specific performance (pp. 22-24, 30-31, 36-37). He thereby succeeds in using familiar evidence in a novel way, anchoring the statutes in the context of unfreedom.

Steinfeld's general claim that labor and persons were meaningfully "unfree" in terms of being subject to coercion (p. 102) is both original and correct, but some of Steinfeld's legal arguments rely on evidence that is more ambivalent in practice than he allows. Consider the Statute of Artificers (1563), a central element in his treatment of labor law (pp. 23-24, 31-33, 38-40). Steinfeld should not be faulted for assembling a relatively small body of case law to support his contention that, under the Statute's sections 2-6, local officials were able to force persons to enter or complete terms of service. As he notes, the incomplete state of local recordkeeping prior to the seventeenth century

33. *See, e.g.*, MARC LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE 51-55 (1989).

34. *See, e.g.*, WAGE REGULATION IN PRE-INDUSTRIAL ENGLAND (W.E. Minchinton ed., 1972) (including works by R.H. Tawney and R. Keith Kelsall, and citing other literature).

partly explains the dearth of record entries, as does the fact that certain enforcement steps could be taken by one or two justices acting informally.[35]

But the Statute of Artificers' ideological support for a regime of unfree labor is undermined by evidence that some masters denounced the act and that other provisions of the statute were at times popular with working people. Legislators and magistrates often opposed the statute's apprenticeship provision as a cause of unemployment and economic stagnation,[36] thus anticipating Adam Smith's later views.[37] Conversely, for at least some struggling journeymen, the statutory requirement that persons serve apprenticeships before entering certain trades was protective rather than burdensome, since it prevented a flood of newly admitted competitors leading to the impoverishment of all.[38] Similarly, the wage-fixing provisions of the Statute have been widely denounced by later scholars, both Left and Right.[39] Contemporaries, however, saw wage fixing differently. On some occasions paternalist Tudor-Stuart governments pressed local magistrates to raise wages.[40] Well into the eighteenth century many working people viewed statutory assessments not as coercive but benevolent, and they sought new assessments to raise wages.[41]

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35. Pp. 29-30, 229 n.63; *see also* ROBERT B. SHOEMAKER, PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, c. 1660-1725, at 38-39, 54, 83, 87, 174, 184-85 (1991). The legal authority of masters to beat their errant household employees frequently made resorting to formal sanctions unnecessary and also explains the lack of cases. Pp. 32, 44-46.

36. *See, e.g., Notes of the Lords' Committee on the Decay of Rents and Trade, 1669, reprinted in* SEVENTEENTH-CENTURY ECONOMIC DOCUMENTS 68, 70 (Joan Thirsk & J.P. Cooper eds., 1972) (citing Mr. Childe, Nov. 4, 1669); *see also* T.S. ASHTON, AN ECONOMIC HISTORY OF ENGLAND: THE 18TH CENTURY 224 (1955) (parliament opposes statute); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA 66, 68 (1975) (local justices and investors realize the statute's year-long service provision discourages employment); JOHN U. NEF, INDUSTRY AND GOVERNMENT IN FRANCE AND ENGLAND 1540-1640, at 41, 47-48 (1940) (local magistrates not interested in enforcing law); E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 274-75 (1963) (eighteenth-century judges dislike act).

37. ADAM SMITH, THE WEALTH OF NATIONS 225-26 (Andrew Skinner abr. ed., Pelican Books 1970) (1776).

38. *See, e.g.,* RULE, *supra* note 30, at 96; JOHN STEVENSON, POPULAR DISTURBANCES IN ENGLAND 1700-1870, at 120 (1979); THOMPSON, *supra* note 36, at 253, 527.

39. For condemnation by free market economists, see, for example, SMITH, *supra* note 37, at 245. For arguments from prolabor economists, see E.H. PHELPS BROWN, THE ECONOMICS OF LABOR 116, 118, 124, 203-04 (1962); LINDER, *supra* note 33, at 46, 51-55; *see also* WAGE REGULATION IN PRE-INDUSTRIAL ENGLAND, *supra* note 34, at 14 (citing condemnation by Thorold Rogers).

40. *See, e.g.,* CICELY HOWELL, LAND, FAMILY, AND INHERITANCE IN TRANSITION: KIBWORTH HARCOURT 1280-1700, at 168 (1983); RICHARD H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM 177 (1926); *see also* WAGE REGULATION IN PRE-INDUSTRIAL ENGLAND, *supra* note 34, at 14 (citing W.A. Hewins' view that seventeenth-century assessments had the effect of raising wages).

41. G.D.H. COLE & RAYMOND POSTGATE, THE COMMON PEOPLE 1746-1946, at 208 (4th ed. 1949); JOHN L. & BARBARA HAMMOND, THE VILLAGE LABOURER, 1760-1832, at 133-44

The more general problem with reading the Statute of Artificers to imply a regime of coerced labor is that labor in the Tudor-Stuart period was notoriously unsettled. The geographic mobility of English laborers, servants, youth, and the poor is well documented.[42] Admittedly, the Steinfeld model can tolerate high levels of geographic mobility, because coerced labor is consistent with laborers and servants moving seasonally, annually, or at other intervals (pp. 27, 34), provided that at each new job the same statutory framework and premises applied. But the high levels of geographic mobility might rather point toward a regime in which labor discipline was challenged and labor freedom asserted against Steinfeldian unfreedom. From this viewpoint, criminal sanctions and specific performance for labor contracts existed chiefly on paper, and local magistrates devoted more energy to moving the poor and underemployed to other parishes than to keeping laborers in place.[43]

In fact, much of the best social history of the past thirty years describes people who did not lead orderly, settled lives regulated by the work regimen of the Statute of Artificers.

> Beneath the surface stability of rural England, then, the vast placid open fields which catch the eye, was the seething mobility of forest squatters, itinerant craftsmen and building labourers, unemployed men and women seeking work, strolling players, minstrels and jugglers, pedlars and quack doctors, gipsies, vagabonds, tramps: congregated especially in London and the big cities, but also with footholds wherever newly-squatted areas escaped from the machinery of the parish or in old-squatted areas where labour was in demand.[44]

(1911); ROBERT W. MALCOLMSON, LIFE AND LABOUR IN ENGLAND 1700-1780, at 123 (1981); ESTHER MOIR, THE JUSTICE OF THE PEACE 99 (1969); RULE, *supra* note 30, at 161.

42. MALCOLMSON, *supra* note 41, at 71-74; MIGRATION AND SOCIETY IN EARLY MODERN ENGLAND (Peter Clark & David Souden eds., 1987); Peter Clark, *The Migrant in Kentish Towns 1580-1640, in* CRISIS AND ORDER IN ENGLISH TOWNS 1500-1700, at 117 (Peter Clark & Paul Slack eds., 1972); M.J. Kitch, *Capital and Kingdom: Migration to Later Stuart London, in* LONDON 1500-1700, at 224 (A.L. Beier & Roger Finlay eds., 1986); John Patten, *Patterns of Migration and Movement of Labour to Three Pre-Industrial East Anglian Towns, in* PRE-INDUSTRIAL ENGLAND: GEOGRAPHICAL ESSAYS 143 (John Patten ed., 1979); Paul Slack, *Vagrants and Vagrancy in England, 1598-1664,* 27 ECON. HIST. REV. 360 (2d ser. 1974); *see* PETER LASLETT, FAMILY LIFE AND ILLICIT LOVE IN EARLIER GENERATIONS: ESSAYS IN HISTORICAL SOCIOLOGY 50 (1977) (presenting the argument that English villages saw high structural turnover of their populations).

43. "Probably most local authorities at any time showed more enthusiasm about harassing vagrants than in more constructive efforts." J. P. Cooper, *Social and Economic Policies Under the Commonwealth, in* THE INTERREGNUM: THE QUEST FOR SETTLEMENT 1646-1660, at 121, 128 (Gerald E. Aylmer ed., 1972), *reprinted in* J.P. COOPER, LAND, MEN AND BELIEFS: STUDIES IN EARLY-MODERN HISTORY 222, 229 (Gerald E. Aylmer & John S. Morrill eds., 1983). For types of selective enforcement of the labor laws, see CYNTHIA B. HERRUP, THE COMMON PEACE: PARTICIPATION AND THE CRIMINAL LAW IN SEVENTEENTH-CENTURY ENGLAND 161-62 (1987) (availability of labor laws as additional sanction against poor and laboring defendants who had been acquitted by juries); SLACK, *supra* note 14, at 37-38 (provisions against labor mobility rarely applied against arriving young males whose labor was needed).

44. CHRISTOPHER HILL, THE WORLD TURNED UPSIDE DOWN 48-49 (1975).

We have learned to look for these "masterless men," in forest, heath, and waste, on the roads and in markets, in coastal and wealden villages, in mining and weaving areas — in all the dark corners of the land where men could "live out of sight or out of slavery";[45] in alehouses everywhere;[46] in open parishes; in urban sanctuaries where the king's writ did not run;[47] and even in southeastern and midlands champion-country villages with resident gentry.

This undisciplined quality of early modern labor was not merely the consequence of administrative weakness and local recalcitrance. On the contrary, it grew out of the structure of the premodern English economy. Most persons, regardless of their legal or labor status (servants in husbandry, hired laborers, smallholders, craftsmen, the working poor) were sometimes unemployed and often underemployed.[48] Of necessity, they turned to second occupations,[49] small gardens, petty industrial production, a range of craft skills, and such undesirable activities — in the eyes of men of property — as keeping tippling houses,[50] begging, and committing crimes. This need to develop other sources of income was strongest in pastoral and woodland areas, but dual employment and multiple occupations were characteristic responses everywhere to endemic underemployment in a subsistence agrarian economy. Like geographic mobility, chronic underemployment and multiple employment undermined the statutory regimen of a dependent, stable workforce working twelve hours (excluding breaks) in summer and from dawn to nightfall in winter, under annual or six-month retainers, for masters who possessed quasi-feudal rights of jurisdiction over their employees.

However uncoerced English working life may have been in prac-

45. *Id.* at 46 (citing Gerard Winstanley).

46. ALAN EVERITT, CHANGE IN THE PROVINCES: THE SEVENTEENTH CENTURY 41-42 (1972); Peter Clark, *The Alehouse and the Alternative Society, in* PURITANS AND REVOLUTIONARIES: ESSAYS IN SEVENTEENTH-CENTURY HISTORY PRESENTED TO CHRISTOPHER HILL 47 (Donald Pennington & Keith Thomas eds., 1978) [hereinafter PURITANS AND REVOLUTIONARIES]; Clark, *supra* note 42, at 140-41.

47. 2 THE REPORTS OF SIR JOHN SPELMAN 339-46 (J. H. Baker ed., 94 Selden Socy. 1978); James R. Hertzler, *The Abuse and Outlawing of Sanctuary for Debt in Seventeenth-Century England,* 14 HIST. J. 467 (1971).

48. ASHTON, *supra* note 36, at 203; MALCOLMSON, *supra* note 41, at 37-38; MORGAN, *supra* note 36, at 63-67; D.C. Coleman, *Labour in the English Economy of the Seventeenth Century,* 8 ECON. HIST. REV. 280, 289-91 (2d ser. 1956), *reprinted in* 2 ESSAYS IN ECONOMIC HISTORY, *supra* note 11, at 291, 301-03.

49. P. 35; ASHTON, *supra* note 36, at 202-03; Alan Everitt, *Farm Labourers, in* 4 THE AGRARIAN HISTORY OF ENGLAND AND WALES: 1500-1640, at 396, 425-29 (Joan Thirsk ed., 1967); MALCOLMSON, *supra* note 41, at 38-46; RULE, *supra* note 30, at 12-16. The leading authority on new agricultural and industrial alternatives is Dr. Joan Thirsk, some of whose relevant work is found in JOAN THIRSK, ECONOMIC POLICY AND PROJECTS: THE DEVELOPMENT OF A CONSUMER SOCIETY IN EARLY MODERN ENGLAND (1978), and in chapters 13, 15 and 16 of JOAN THIRSK, THE RURAL ECONOMY OF ENGLAND (1984).

50. Clark, *supra* note 46, at 47, 49, 52-53 (poor craftsmen and husbandmen keeping alehouses).

tice, such freedom does not undermine Steinfeld's position that a stable, coerced labor force was the legal ideal. "It is not uncommon for a society to be torn between ideal and reality, and the people of early seventeenth-century England experienced this tension to an unusual degree."[51] For Steinfeld, the reality was that labor was coerced when necessary. The significance of the statutory labor regime is thus the availability of coercion rather than its consistent application. But it also is likely that the government officials and men of property who drafted and enforced the Tudor-Stuart scheme of labor regulation recognized the divergence between ideal and reality and knew that stable labor was, at best, a dated medieval ideal that grew less practical with each decade.[52] If so, rather than embodying, recapitulating, or reasserting a particular legal or social theory, Tudor-Stuart labor regulation may instead represent the government's short- and middle-term, ameliorative efforts to respond to a series of perceived domestic social-welfare crises.

Thus, Steinfeld reads the Statute of Artificers as an attempt to reassert and extend the notions of tied, coerced labor articulated in earlier legislation, notions that local justices applied as needed for almost two centuries and masters and employers accepted everywhere (pp. 63-64). But other historians see the Statute as an attempt to respond to short-term crises, particularly in the wool and textile industries.[53] They see the Statute as part of larger, ongoing legislative programs to address crime, poverty, vagrancy, squatting, unchecked urban expansion, unlicensed alehouses, price inflation, depression in the textile and other industries, unemployment and underemployment, silted harbors, agricultural instability, rural depopulation and enclosure, failure to attend church, ignorance about matters of faith, unsupervised preaching, misdirected charitable impulses among the gentry, and so on.[54] Many of these programs, and much of the economic theory of the time, stressed the need to put the poor to work.[55] But this impulse often did not take

51. DAVID UNDERDOWN, REVEL, RIOT, AND REBELLION: POPULAR POLITICS AND CULTURE IN ENGLAND 1603-1660, at 9 (1987).

52. *See* DYER, *supra* note 10, at 224 (suggesting that fifteenth-century labor regulation was intended to have an effect, but that it was highly impractical and says more about ruling-class social anxieties than about how labor was in fact regulated); *see also* Elaine Clark, *Medieval Labor Law and English Local Courts*, 27 AM. J. LEG. HIST. 330, 346-47 (1983) (suggesting that medieval labor law was applied with some flexibility).

53. WAGE REGULATION IN PRE-INDUSTRIAL ENGLAND, *supra* note 34, at 10-11, 16-17.

54. *See, e.g.*, THOMAS G. BARNES, SOMERSET 1625-1640, at 172-202 (1961) (enforcement of poor relief and related laws, including labor laws, temporarily intensified to comply with comprehensive Caroline Book of Orders); MOIR, *supra* note 41, at 37-46, 59-64 (poor laws and labor oversight part of larger framework of social welfare legislation); SLACK, *supra* note 14, at 22-25 (reaching similar conclusions); TAWNEY, *supra* note 40, at 260 (making similar arguments).

55. JOYCE O. APPLEBY, ECONOMIC THOUGHT AND IDEOLOGY IN SEVENTEENTH-CENTURY ENGLAND 140-46 (1978); ASHTON, *supra* note 36, at 203; CHRISTOPHER HILL, SOCIETY AND PURITANISM IN PRE-REVOLUTIONARY ENGLAND 266-67 (1964); MORGAN, *supra* note 36, at 67, 320-25; SLACK, *supra* note 14, at 27, 39; Coleman, *supra* note 48, at 291-92, 298, 301-03.

the form of enforcing the work regimen set out in the Statute of Artificers. Historians have argued about the mix of coercive, humanitarian, and rhetorical impulses that infused the Statute and Tudor-Stuart legislation and enforcement generally.[56] But it is clear that in practice the Statute of Artificers was not uniformly applied to coerce labor. The political-administrative interpretations of other historians are not incompatible with Steinfeld's longer-term ideological and analytical claims, but they do suggest very different values and aims for the labor regulation of the period.

Regardless of the strength of the evidence supporting Steinfeld's claim that labor was significantly coerced or that legislators, judges, and employers thought it could be coerced, his focus on coercion and "unfreedom" is strikingly important. Legal freedom and unfreedom were concepts at war with one another. There were three elements to this seventeenth-century paradox. First, most workers in early modern England were formally under some legal compulsion, as Steinfeld stresses (pp. 15-121, 243 n.36, 244 n.46). Second, the contrary notion that all Englishmen were free was widespread and increasingly important — indeed, contemporaries saw freedom as a defining characteristic of English law and English identity (pp. 95-101). Yet, third, English traders and settlers over the seventeenth century accommodated themselves to a labor regime of slavery — total unfreedom. Steinfeld's discussion of how English labor practices were reconciled with the growing ideology of English freedom is one of his finest (pp. 101-21). The reconciliation of the ideology of freedom with the new practice of colonial slavery is a matter outside the scope of his book; it is perhaps a more difficult issue, and one whose legacy is familiar and tragic for Americans.

The ideological emphasis on the freedom of the English was central to the legal definition of early modern freedom. Granted, pride in the freedom provided by common law was not new. All over medieval Europe, the doctrine arose that town air made one free, and English law applied a version of this.[57] *Bracton,* the great legal treatise of the early to mid-thirteenth century, contains references to the law's "favour for freedom" in dubious cases involving status,[58] and such eminent later jurists as Fortescue adopted *favor libertatis* as a proof text of the virtue of English law. But we now know that this medieval doctrine merely represented borrowed Roman learning, and that its value to medieval theory lay in protecting free men from wrongful degrada-

56. SLACK, *supra* note 14, at 67-76 (including bibliography to the standard works); Valerie Pearl, *Puritans and Poor Relief: The London Workhouse, 1649-1660, in* PURITANS AND REVOLUTIONARIES, *supra* note 46, at 206-11 (citing Leonard, Webbs, Tawney, Hampson, James, and Jordan on the impulses behind poor relief and government policy).

57. 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 36-37 (George E. Woodbine ed. & Samuel E. Thorne trans., 1968).

58. *Id.* at 300; 3 BRACTON, *supra* note 57, at 91, 109 (1977).

tion to servitude, rather than in fostering freedom as such.[59]

By contrast, the Tudor-Stuart talk of freedom and common law rights was an important extension, in emphasis, volume, and consequences, of medieval rhetoric (pp. 95-101). "Rights-talk" and the perceived threat of enslavement were discussed in varied contexts. In some contexts, the argument held that an oppressed English group had already been "enslaved."[60] More often, the argument centered on one or another enemy seeking to enslave the virtuous English, who had managed to retain their birthright of freedom. Nor was this discussion of rights and freedom the exclusive domain of the political elite or of constitutional theorists. Litigation involved even laborers and husbandmen, and they too spoke the language of common law rights and freedom.[61]

Somehow contemporaries reconciled the widespread notion that the English were free with the palpable fact that English men and women toiled in coercive labor. The traditional account of labor law, however, simply distinguishes personal status from labor institutions, thereby avoiding the question of how contemporaries accepted such dissonant answers. Steinfeld's subtler and more convincing approach frames an ideological model of freedom that rejects the dichotomy between free and unfree, borrowed from modern law.[62] Instead, his map of early modern status ranges from free (men of property), to coerced but free (all English labor), to rightless (aliens), to unfree (slaves, as well as subjects of foreign despots) (pp. 99-104). The elegance of Steinfeld's argument derives from his illustration that contemporaries viewed laborers and servants simultaneously as free and coerced, but that coercion did not imply that the laborer was unfree in the sense that a slave was unfree (pp. 95-101). As Hobbes noted in a related

59. JOHN FORTESCUE, DE LAUDIBUS LEGUM ANGLIE 103-05 (Stanley B. Chrimes ed. & trans., 1942) (c. 1468-1471). Sir Edward Coke followed Fortescue's use of the doctrine. 1 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND § 193, at *124b. The Roman origins, Bractonian formulation, and medieval uses of the doctrine are set out in PAUL HYAMS, KINGS, LORDS AND PEASANTS IN MEDIEVAL ENGLAND: THE COMMON LAW OF VILLEINAGE IN THE TWELFTH AND THIRTEENTH CENTURIES 203-19 (1980). The doctrine's later evolution is traced in Baker, *supra* note 31, at 11-12, 14, 17-18.

60. *See, e.g.*, PURITANISM AND LIBERTY 61 (A.S.P. Woodhouse ed., 1992) (Oct. 29, 1647 comment of Col. Rainsborough in Putney Debates that "the old law of England . . . enslaves the people of England . . . ."); SEVENTEENTH-CENTURY ECONOMIC DOCUMENTS, *supra* note 36, at 183-84 (citing Richard Baxter's 1691 view of "the poor enslaved husbandmen . . . for none are so servilely dependent (save household servants and ambitious expectants) as they are on their landlords"); TAWNEY, *supra* note 40, at 254 (citing Gerard Winstanley's complaint that, despite victory over the king, "we . . . remayne slaves still to the kingly power in the hands of lords of manors").

61. James Sharpe, *The People and the Law, in* POPULAR CULTURE IN SEVENTEENTH-CENTURY 244, 245 (Barry Reay ed., 1985).

62. Not that the dichotomy is exclusively a modern formulation. It is found, for instance, in JUSTINIAN, INSTITUTES I.3 and in 2 BRACTON, *supra* note 57, at 29. Steinfeld's premise is that, unlike their nineteenth-century analogues, the earlier formulations in fact created hybrid statuses of persons free but subject to coercion.

context, "Feare and Liberty are consistent . . . ."[63]

This redefinition of the spectrum of freedom has considerable significance, both for Steinfeld's argument about free labor and for an understanding of the first steps the English colonies took toward adopting slave labor. By viewing early modern labor as free, that is, by taking its rhetorical claims seriously, we can understand the potency of the common law, even to the poor, and the availability of that common law as a resource that might occasionally support their claims against men of property.[64] By viewing early modern freedom as compatible with coercion, we can make sense of long-abandoned doctrines such as specific performance and criminal sanctions for breach of labor contracts. Labor coercion as a part of early modern freedom also helps explain the consistent use of assigned labor service, bridewells, and parish apprenticeships in England's unique, nationwide poor relief scheme. Finally, by appreciating the existence of coercion in English notions of freedom, we can begin to understand how the common law accepted racial slavery in the English colonies and, arguably, in England for a while.[65] By virtue of its contribution to the intellectual and legal underpinnings of the move to slavery in the common law world, this redefinition of the spectrum of early modern legal status is among the most important contributions of Steinfeld's book.[66]

III. STEINFELD'S ARGUMENT FOR THE INVENTION OF FREE LABOR

The other part of Steinfeld's argument explains how the early modern paradigm of coerced labor yielded to the modern notion of free labor over the course of the later eighteenth and early nineteenth centuries. At this point, his emphasis switches to colonial America and American evidence. He contends that early English settlers borrowed their notions of labor from English law, so that all (white) seventeenth-century laborers in the colonies worked under the same regime of practical unfreedom as in England. But by the early eighteenth century hired laborers and craftsmen in the colonies were accepted as free and mobile; the law ceased to enforce specific performance or criminal sanctions against their failure to find or complete work (pp. 50-51, 112-13, 121, 230 n.72). Only servants and apprentices remained sub-

63. THOMAS HOBBES, LEVIATHAN 262 (Crawford B. Macpherson ed., Penguin Books 1968) (1651).

64. John Brewer and John Styles, *Introduction,* AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 11, 14-20 (John Brewer & John Styles eds., 1980); Douglas Hay, *Property, Authority and the Criminal Law, in* ALBION'S FATAL TREE 17, 39 (Douglas Hay et al. eds., 1975).

65. SEYMOUR DRESCHER, CAPITALISM AND ANTISLAVERY 35 (1987).

66. For the leading interpretations, see, for example, DAVIS, *supra* note 21; WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812 (1968).

ject to coercion. Steinfeld completes his argument by explaining how, as part of a contentious and politicized process in the nineteenth century, certain labor institutions came to be seen as unfree and therefore illegitimate.

Why legal coercion was already deemed inappropriate for laborers and craftsmen by the eighteenth century, however, is a difficult question, and a definitive answer may come from social and economic rather than legal history. Perhaps the new freedom related to the relative availability of land. With a declining birthrate and rising real wages in late seventeenth-century England, opportunities were less bleak at home, and it grew harder to entice prospective migrants to the colonies.[67] Moreover, there was little incentive for colonial laborers, especially freedmen, to remain under a coercive labor regime, with land already taken or exhausted in the areas of old colonial settlement in the Tidewater and a growing native-born population.[68] New land was suddenly available because the frontier pushed into Indian lands in the early eighteenth century. Under such circumstances, it would have been difficult to keep laborers by relying principally on the stick of legal coercion. The materialist explanation, however, raises as many questions as it answers. For instance, it may be that eighteenth-century America paradoxically was characterized not by abundant land, but rather by overcrowding and diminished opportunity.[69] If so, masters relaxed their disciplinary rights because they had market-based alternatives to legal coercion. On the other hand, accepting the traditional view that land and opportunity were abundant, we describe circumstances that, in other cultures, have led to intensified labor discipline.[70]

A better explanation for the new freedom of colonial wage laborers

67. ALLAN KULIKOFF, THE AGRARIAN ORIGINS OF AMERICAN CAPITALISM 190 (1992); Russell R. Menard, *British Migration to the Chesapeake Colonies in the Seventeenth Century, in* COLONIAL CHESAPEAKE SOCIETY 99, 108-11 (Lois G. Carr et al. eds., 1988) [hereinafter Menard, *British Migration*]; Russell R. Menard, *From Servants to Slaves: The Transformation of the Chesapeake Labor System,* 16 S. STUD. 355, 374-80 (1977) [hereinafter Menard, *Servants to Slaves*]; *see also* DAVID HARRIS SACKS, THE WIDENING GATE: BRISTOL AND THE ATLANTIC ECONOMY, 1450-1700, at 282-302 (1991) (suggesting that a decline in religious persecution eased pressure on English servants to emigrate).

68. ALLAN KULIKOFF, TOBACCO AND SLAVES: THE DEVELOPMENT OF SOUTHERN CULTURES IN THE CHESAPEAKE, 1680-1800, at 36-42 (1986); Lois G. Carr & Russell R. Menard, *Immigration and Opportunity: The Freedman in Early Colonial Maryland, in* THE CHESAPEAKE IN THE SEVENTEENTH CENTURY 206, 224 (Thaddeus W. Tate & David Ammerman eds., 1979); Menard, *British Migration, supra* note 67, at 111-12; Russell R. Menard, *From Servant to Freeholder: Status Mobility and Property Accumulation in Seventeenth-Century Maryland,* 30 WM. & MARY Q. 37 (3d ser. 1973); Lorena S. Walsh, *Servitude and Opportunity in Charles County, Maryland, 1658-1705, in* LAW, SOCIETY, AND POLITICS IN EARLY MARYLAND 111 (Aubrey C. Land et al. eds., 1977).

69. Kenneth Lockridge, *Land, Population and the Evolution of New England Society 1630-1790,* PAST & PRESENT, Apr. 1968, at 62.

70. *See* Robert Brenner, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe,* PAST & PRESENT, Feb. 1976, at 30, 38-41, *reprinted in* THE BRENNER DEBATE 10, 20-23 (T.H. Aston & C.H.E. Philpin eds., 1985); Domar, *supra* note 8; *see also* Menard, *Servants*

relates it to the spread of slave labor, which exploded in numerical importance, especially in the southern colonies.[71] Suddenly, restraining white laborers and craftsmen was less important for masters because they had slaves as an alternative workforce. It was also harder to coerce white laborers because the ideological foundations of slavery became exclusively racial; by definition white labor was free, though the precise definition of freedom had yet to be developed. But under any view, the result of the new freedom of laborers and craftsmen was that only servants and apprentices were still unfree in the traditional sense (pp. 121, 130-33, 159-60).

Meanwhile, the legal theory justifying the practical unfreedom of servants and apprentices continued to be based on a combination of traditional property and jurisdictional notions. Steinfeld devotes considerable effort to showing that both common law (pp. 55-87) and early American law (pp. 55-57, 87-91) deemed coercion to be permissible because employers had both a leaselike property interest in the labor of their employees and jurisdictional rights to govern of those who labored under them.

Steinfeld's two alleged rationales for labor coercion — property and jurisdiction — did not entirely persuade me. His emphasis on the writ of covenant as a basis for the proprietary view of human labor distinguishes too sharply between covenant and other real actions on the basis of the alleged passing of property (pp. 28, 73-74, 157), and it slights the fact that employers increasingly used personal actions of the trespass and case families.[72] The intriguing claim that late medieval labor was a community resource characterizes a few, isolated cases (pp. 5, 61, 63), but the typical suit against fugitive laborers alleged that they had abandoned obligations to particular employers, not to the manorial community. Steinfeld's effort to classify labor as a leaselike interest is suggestive, particularly in explaining the terminology of standard-form eighteenth-century indentures,[73] but it is far from conclusive. Similarly, the use of "wardship" in the sixteenth century does not, despite Steinfeld's claims (pp. 69, 72), prove that the common law conceived of property interests in persons, but rather was one of many examples of "fiscal feudalism" by which the Tudor-Stuart Crown sought to extract new taxes and levies based on serviceable ancient

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to Slaves, supra note 67, at 356-58, 388 (speculating whether the free land thesis explains American servitude).

71. KULIKOFF, *supra* note 68, at 40, 45, 64-66, 320; MORGAN, *supra* note 36, at 299-309.

72. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 360-80 (3d ed. 1990); Gareth H. Jones, *Per Quod Servitium Amisit*, 74 L.Q. REV. 39, 45-53 (1958). For modern echoes of this proprietarial approach, see I.R.C. v. Hambrook, [1956] 2 Q.B. 641, 660-66 (C.A.) (Denning, L.J.); Jones Bros. (Hunstanton) Ltd. v. Stevens, [1955] 1 Q.B. 275, 282 (C.A.).

73. Pp. 75-76, 81-87, 156-57; *see also* Carr & Menard, *supra* note 68, at 229 (reference to residential freedmen as "belonging to" their former masters).

legal doctrines.[74]

As for Steinfeld's jurisdictional rationale, patriarchal jurisdiction was clearly in decline, as shown by its failure to account for the masterless men of the Tudor social landscape, but patriarchy revived in a variety of contexts well after 1750. Early captains of industry, such as Ambrose Crowley and Josiah Wedgwood, sought to impose labor regulatory schemes that rested exclusively on the rights of governance appurtenant to a head of household,[75] and jurisdiction and household governance were critical elements in the nineteenth-century support for slavery. Accordingly, patriarchal jurisdiction was a consistent, but very nuanced, theme in legal thought. Steinfeld insufficiently develops its relationship to the changing discourse about labor.

These are small points, however. Steinfeld is utterly persuasive about the compatibility of the property rationale with the capitalist ethos of the eighteenth century. He rightly begins by stressing enclosure, by which laborers lost common lands and rights.[76] At the level of high theory, the counterpart to this carving up of the remaining commons was the new "possessive individualism." One might expect that individualism, which acknowledged the juridically equal property and contract rights of all persons, would imply an ideology of "free labor" similar to that of the nineteenth century (pp. 105-06). But eighteenth-century individualists did not blush at continuing to coerce labor from their servants, apprentices, and slaves. Paradoxically, it may have been easier for individualists to accept slavery. Since blacks entered the English world from abroad, racism and xenophobia allowed theorists simply to ignore claims of humanity. As for legal considerations, the Romanesque doctrine of enslavement by captivity, which long occupied a wholly ornamental place in English law,[77] seemed sufficient to justify plantation slavery — even after most slaves were born within the colonies. But the coercion of servants was harder to explain in an age of possessive individualism: servants were not outsiders but English, and they and their labor ought to have been fully free.

Steinfeld's contribution to intellectual history deepens with his explanation of how coercion of formally free labor was consistent with the new capitalist ethos. Possessive individualism held only that each person had a property interest in his own labor; nothing constrained

74. Joel Hurstfield, *The Profits of Fiscal Feudalism, 1541-1602,* 8 ECON. HIST. REV. 53 (2d ser. 1955).

75. ASHTON, *supra* note 36, at 212.

76. *See* pp. 34-35; 1 JOHN H. CLAPHAM, AN ECONOMIC HISTORY OF MODERN BRITAIN 114-27 (2d ed. 1930); MALCOMSON, *supra* note 41, at 23-27, 32-34..

77. 2 BRACTON, *supra* note 57, at 30-31; *see* Guyora Binder, *Masters, Slaves, and Emancipation,* 10 CARDOZO L. REV. 1435, 1441 (1989) (discussing what he terms "the cowardly contract").

the right of an individual to give, sell, or lease his own labor.[78] Steinfeld shows that theorists of possessive individualism could justify the alienation of one person's labor to another in institutional forms that entailed coercion precisely because labor had long been legally regulated by analogy to property interests.[79] Accordingly, individualists could conclude that an apprentice or servant was fully free. By entering service, he voluntarily alienated, as any property owner could, the commodity within his ownership — his labor.[80] Steinfeld nicely fills out the possessive individualist thesis by explaining the older legal arguments available to eighteenth-century individualists. His argument, moreover, is consistent with the emergence of the individualist justification of plantation slavery. In *De Jure Naturae et Gentium,* Pufendorf conceded the weakness of the familiar "capture in just war" doctrine and instead revived the more obscure doctrine that "self-sale" legitimated slavery.[81]

Steinfeld next shows how the map of free and unfree labor fell short of the modern, dichotomous picture of free and slave as late as the American Revolution and after. Landowners and wage workers were free, blacks slaves were not free, and servants and apprentices remained in between — free but subject to considerable legal disabilities and coercion. Somehow, however, in the fifty years after the Revolution, indentured servitude and apprenticeship came to be perceived as forms of slavery. Upon losing their institutional legitimacy,

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78. *See generally* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 214-20 (1962). *But see* KEITH TRIBE, LAND, LABOUR AND ECONOMIC DISCOURSE 50, 51 (1978) (criticizing possessive individualism for failing to distinguish between sale of labor and sale of the capacity to labor, and thus for failing to distinguish the servant from the slave).

The famous examples of whether suicide or self-sale into slavery was permissible, on the grounds that they represented alienation or disposal of the property interest in oneself, illustrate the outer bounds of possessive individualism. Theorists rejected both options. As for slavery, theorists wondered what infinitely large consideration could suffice for such sale — especially since the money received for one's freedom would inevitably revert to the payor in his capacity as slaveowner. Pp. 100-01. As for suicide, natural law arguments about the sacredness of life were invoked to forbid it, thus rescuing individualism from its own logic. JOHN DUNN, THE POLITICAL THEORY OF JOHN LOCKE 88-89, 125 (1969); MACPHERSON, *supra,* at 220.

79. Pp. 5-6, 90-91, 105-11. Consistent with this, the individualist theorists often built their arguments around property metaphors. DUNN, *supra* note 78, at 255.

80. Pp. 79. 99-101. For examples of the market in indentured labor, see, for example, DAVID W. GALENSON, WHITE SERVITUDE IN COLONIAL AMERICA 102-13 (1981) (indentured servants enter labor market voluntarily; terms and length of service vary with their skills, gender, and destination); Menard, *Servants to Slaves, supra* note 67, at 107-08 (indentured servants bargain for different lengths of service and destinations). *But see* Farley Grubb, *The Market for Indentured Immigrants: Evidence on the Efficiency of Forward-Labor Contracting in Philadelphia, 1745-1773,* 45 J. ECON. HIST. 855 (1985) (arguing against the sensitivity of labor markets in the eighteenth century). For the operation of an efficient labor market for nonindentured wage labor, see pp. 108-11, as well as Carr & Menard, *supra* note 68, at 212-14 (varying terms for freedmen's labor and sharecropping contracts).

81. SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM 935-36 (C.H. & W.A. Oldfather trans., 1934) (1688). For the wide availability of Pufendorf in the colonies, see WILLIAM H. BRYSON, CENSUS OF LAW BOOKS IN COLONIAL VIRGINIA xviii, 29 (1978).

they were quickly and quietly abolished in the first third of the nineteenth century.

Steinfeld concludes his argument with the little-known story of the antebellum emancipation of compelled free labor (pp. 147-72). He attributes this legal emancipation — and it was almost exclusively legal, because the number of apprentices and indentured servants had already declined sharply — to the ideology and behavior of early nineteenth-century working people. Drawing on the scholarship concerning early nineteenth-century urban craftsmen and American class formation generally, a body of work to which he has already contributed,[82] Steinfeld shows that working people absorbed some of the radical, antihierarchical ideas of the Revolution and deployed these ideas to challenge indentured servitude (pp. 123-27). The crux of Steinfeld's argument is that indentures and apprenticeships disappeared because of ideological rejection, not because the market for them changed significantly. Indentured servants continued to be brought to the middle colonies, with interruptions only for the Revolution and the Napoleonic Wars, and masters continued to purchase them, even in states where slavery was unpopular or prohibited (pp. 11-13, 164-65). Steinfeld reconciles antislavery sentiment with the increasing repudiation of indentured servitude by unpacking a number of fascinating encounters between employers, supported by legal precedent, and republican journeymen, sometimes backed by lawyers and merchants (pp. 164-77). A form of trickle-up emancipation resulted, and by the 1820s legal authorities began to reject the ancient forms of coerced labor.

What are we to make of this engrossing narrative? Once again, there are a few unanswered questions. Indentured servants continued to be imported, as Steinfeld says, but the composition of the servant pool changed over the eighteenth century. Increasingly, arriving servants were skilled craftsmen, German families, or convicted English felons.[83] Steinfeld acknowledges this (pp. 89, 226 n.20), but he does not address whether and how the identity of the servants affected legal formulations of their status. For instance, did the fact that German families typically arrived under a different legal form of indenture[84] color the views of either the courts or the ideologically engaged urban workers? Given the nativist strand in early nineteenth-century cul-

82. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic,* 41 STAN. L. REV. 335 (1989); *see* Gary J. Kornblith, *The Artisanal Response to Capitalist Transformation,* 10 J. EARLY REPUBLIC 315 (1990) (surveying the literature).

83. A. ROGER EKIRCH, BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES, 1718-1775 (1987); SHARON V. SALINGER, "TO SERVE WELL AND FAITHFULLY": LABOR AND INDENTURED SERVANTS IN PENNSYLVANIA, 1682-1800 (1987); David W. Galenson, *The Rise and Fall of Indentured Servitude in the Americas: An Economic Analysis,* 44 J. ECON. HIST. 1, 12-13 (1984).

84. Pp. 164, 198 n.6; KULIKOFF, *supra* note 67, at 193.

ture, did the German arrivals face initial indifference to their status, and did these immigrants articulate their own notions of freedom?[85] In view of the importance of the rural nexus of American capitalism to recent scholarship, was there opposition to indentured servitude from farmers as well as urban craftsmen, and, if not, why did rural republicanism develop differently from its urban variant?[86]

These mere quibbles, however, did not prevent this reader's enjoyment of Steinfeld's original, vigorously argued position. Refreshingly, the book does not end on a note of triumphant whiggery. Steinfeld stresses the centrality of the judicial repudiation of slavery-related cases, such as *Mary Clark,* in which indentures had been forced on freed slaves.[87] He steers clear of an encomium to the rejection of coerced free labor, instead devoting his last substantive discussion to midcentury peonage. Not surprisingly, such institutions as Chinese coolie labor and Indian peonage in the territories conquered from Mexico were only hesitantly abolished.[88] Steinfeld's brief survey of the latter in particular is a reminder of the racial and ethnic context in which freedom was inscribed. It offers an appropriately ambiguous note on which to end the history of a legal ideology of unfreedom.

IV. STEINFELD AS CRITICAL LEGAL HISTORIAN OF FREE LABOR

Twenty-five years ago *The Invention of Free Labor* would not have been written; sixty to one hundred years ago, many comparable books were written. The turn-of-the-century scholarship differed in many ways from Steinfeld's work, most importantly in that it sought to address labor relations and poverty through legal evidence rather than to address legal ideas directly. Given the extraordinary archival wealth of English law, the social and economic historians necessarily turned to legal evidence, and their efforts resulted in a body of distinguished scholarship on the legal history of labor and poor laws.[89]

For the better part of this century, however, labor historians spurned legal evidence as crude or, at best, only a starting point. Historians learned to go beyond the statutes, cases, and legal handbooks that, along with literary evidence, had formed the trellis for Fabian

85. Steven J. Ross, *The Transformation of Republican Ideology,* 10 J. EARLY REPUBLIC 323, 330 (1990).

86. *See generally* KULIKOFF, *supra* note 67.

87. Pp. 177-79; *see also* PAUL A. FINKELMAN, AN IMPERFECT UNION 88, 92, 96 (1981); Paul Finkelman, *Evading the Ordinance: The Persistence of Bondage in Indiana and Illinois,* 9 J. EARLY REPUBLIC 21, 35-48 (1989).

88. Pp. 179-84; Galenson, *supra* note 83, at 15-24.

89. CLAPHAM, *supra* note 76; HAMMOND & HAMMOND, *supra* note 41; MARGARET JAMES, SOCIAL PROBLEMS AND POLICY DURING THE PURITAN REVOLUTION 1640-1660 (2d ed. 1965); E.M. LEONARD, THE EARLY HISTORY OF ENGLISH POOR RELIEF (1900); SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY: PART I, THE OLD POOR LAW (1927).

labor histories. Later historians turned to new evidence, ranging from parish registers to handbills and other accounts that captured humble Englishmen in their own words. Historians learned the tools of other, related disciplines, ranging from demography and development economics to cultural anthropology and feminist theory. With new evidence and tools, there seemed no need to base the history of work and working people on legal records, legal institutions, and gentry perceptions. For two generations, scholars offered fine reconstructions of labor and the world of those who labored but little on how the law conceived of labor.

Steinfeld's book is important in part because of its renewed attention to specifically legal issues. Steinfeld views labor law not for its use as social evidence, and not as a set of doctrines that are interesting for their own sake, but rather as the embodiment of competing social and ideological ideas shaping beliefs and actions. From this perspective, Steinfeld is able to examine five centuries of labor law and to make meaningful generalizations about it. Steinfeld's aims and perspective identify his work as part of the critical legal studies (CLS) tradition, and this book represents a leading contribution to the growing body of ambitious CLS legal histories.[90]

As CLS history, the book comes with a few signature features. Most obvious is the vocabulary. Like many CLS authors, Steinfeld writes of "appropriating" concepts and doctrines (pp. 90, 94, 169); the law in action is termed "experiential" (pp. 101, 160); ideas are "operationalized" (pp. 5, 94, 160, 163, 170); notions and legal formulations mediate the "contradictory" (pp. 94, 137, 160, 186-87) pressures and deep "tensions" (pp. 105, 131); answers are "contingent" (p. 160); and the "play of interest" leads to any final result (pp. 155, 171). But beyond its terminological influence, Steinfeld's legal history includes two valuable CLS themes. First, in his narrative, legal formulations are contingent, provisional, and contested. Second, Steinfeld focuses on the changing contours of notions like "free labor" as a fundamentally *American* story, in which American workers and, secondarily, courts were the critical agents of legal change. I will consider the implications of each claim.

To some, contingency is no longer a theme, but a historiographic cliche. To others, the notion of freedom being contingent or contradictory seems itself unclear. After all, to adherents of Whiggish history, there is little contingent or contradictory about the unfreedom of the medieval serf, the American plantation slave, or the Czech or

90. Along with Steinfeld, a leading CLS labor historian is William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767. Many of the best known historical CLS works are cited in Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019, 1031 n.73 (1993) (reviewing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992)).

Hungarian living under the Stalinist boot. But Steinfeld's examination of eighteenth- and nineteenth-century labor coercion is a fine case study for the argument that freedom and servitude are not inevitable or unchanging, and that they are not dependent on particular economic stages or institutions — in short, that freedom is contingent. Freedom is a socially constructed, ascribed category, and its legal formulation is the result of mediation by different actors and interests.

This argument will be familiar to devotees of CLS history and unconvincing to many of its critics. What I found most persuasive about Steinfeld's reconstruction of freedom and unfreedom is how well it fits with another, controversial area of legal history that few CLS have addressed: medieval freedom.[91] A brief outline of English medieval legal status serves to underscore the extent to which Steinfeld's description of freedom as a disputed, multiplicitous, and shifting notion can enrich the analysis of an earlier period.

At the time of Domesday Book (1086), there were a few slaves *(servi);* nationally, the figure was approximately ten percent.[92] A variety of occupational and regional classifications served to label peasants, but most were free in that they were full members of a village community — the opposite of a slave. At the same time, however, "the [Domesday] *villanus* both is and is not a free man,"[93] for the term "free man" also appeared in contemporary records to indicate a person entitled, unlike most *villani*, to direct access to public institutions, most notably the courts of shire and hundred. Other, local status compilations also portrayed an agrarian world with numerous status classes of dependent persons that ranged from fully free men to chattel slaves.[94]

Over the course of the twelfth century, this broad middle range of status classes was squeezed until the legal writers saw a world of only free and serf. A series of local processes that left no single "smoking gun" seems to have emancipated Domesday's slaves while degrading the larger class of "free" peasants.[95] By the early thirteenth century,

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91. *But see* Guyora Binder, *Angels and Infidels: Hierarchy and Historicism in Medieval Legal History,* 35 BUFF. L. REV. 527 (1986).

92. HALLAM, *supra* note 7, at 22; H.B. Clarke, *Domesday Slavery (Adjusted for Slaves),* 1 MIDLAND HIST., 37, 39-42 (1972) (reviewing THE DOMESDAY GEOGRAPHY OF MIDLAND ENGLAND (H.C. Darby & I.B. Terrett eds., 2d ed. 1971)).

93. FREDERIC W. MAITLAND, DOMESDAY BOOK AND BEYOND 43 (1966); *see also* Hatcher, *supra* note 6, at 28; Rodney H. Hilton, *Freedom and Villeinage in England,* PAST & PRESENT, July 1965, at 3, 4-5, *reprinted in* PEASANTS, KNIGHTS AND HERETICS 174, 175-76 (R.H. Hilton ed., 1976).

94. *See, e.g.,* ENGLISH HISTORICAL DOCUMENTS: 1042-1189, at 813-33 (David C. Douglas & George W. Greenaway eds., 1953) (agrarian and manorial surveys); MAITLAND, *supra* note 93, at 36-46, 327-32; P.D.A. Harvey, *Rectitudines Singularum Personarum and Gerefa,* 108 ENG. HIST. REV. 1 (1993); David A.E. Pelteret, *Two Old English Lists of Serfs,* 48 MEDIEVAL STUD. 470, 474-75 (1986).

95. MAITLAND, *supra* note 93, at 35; 1 POLLOCK & MAITLAND, *supra* note 5, at 430-31; TITOW, *supra* note 11, at 57. Hatcher has recently challenged whether this meant any change in

the new common law defined freedom to exclude perhaps most of the peasantry.[96] *Villanus* no longer referred to the ordinary villager, as it had in Domesday, but to the unfree villager or common law villein, while *servus* implied the serf or villein rather than Domesday's chattel slave. Meanwhile, local histories show that the meaningful distinction in reality may not have been between free and unfree peasants, but rather between peasants, free or not, with guaranteed access to land on favorable customary terms and the growing class of legally free landless laborers and cottagers.[97] But whatever the advantages of manorial membership, even on unfree terms, we also know that peasants resisted and occasionally purchased their way out of unfree personal status and its stigma.[98]

Moreover, the overlap between personal status and land tenure, and the new jurisdictional definitions imposed by the common law complicated the map of legal freedom.[99] By the mid-thirteenth century, the new common law system defined unfreedom or villeinage largely as the denial of access to the common law courts. It was circular for judges to say "a man is free if he can come into royal court and can come into court if he is free," but the judges had no other choice. Every other legal test of freedom — liability to various kinds of feudal dues or work obligations, biological descent, common repute — proved inadequate to describe the range of tenurial and status relations in the thousands of English manors.

Serfage was the paradigm of unfreedom, but full access to the common law was denied to other groups as well, including foreign merchants, forest dwellers, inhabitants of certain franchisal lordships, the conquered Irish, and the Jews. Each of these groups experienced the shared disability of alternative courts and law — the serf his manorial lord, the Irishman his feudal lord and the local Irish chancery and parliament, the townsman his chartered borough court, the foreign merchant his chartered liberties, the monk his Ordinary and the church courts, the Jew his religious court *(beth din)* and the royal Ex-

practice for the *villani.* Hatcher, *supra* note 6, at 29-32; *see also* EDWARD MILLER & JOHN HATCHER, MEDIEVAL ENGLAND — RURAL SOCIETY AND ECONOMIC CHANGE 1086-1348, at 126 (1978).

96. The timing and causation of this shift is explored in HYAMS, *supra* note 59, at 221-65; Hilton, *supra* note 93, at 174.

97. HARVEY, *supra* note 10, at 120; MILLER, *supra* note 5, at 152-53 (consolidation of free and unfree manorial tenantry into single peasant class). In the land-hungry years of the later thirteenth century, to be an unfree person holding land on favorable customary terms was often economically preferable to the poverty of the free, landless cottager. HOMANS, *supra* note 11, at 244, 248; Hatcher, *supra* note 6, at 16-24.

98. *See supra* notes 11, 26. For serfs purchasing freedom, see MILLER, *supra* note 5, at 142. *But see* POSTAN, *Legal Status, supra* note 11, at 283-84 (medieval court rolls and charters indicate freedom less valuable than land); Hatcher, *supra* note 6, at 25 (few villeins purchase manumission, indicating that free personal status was deemed of little value).

99. MILLER & HATCHER, *supra* note 95, at 112-13, 118, 127; MILLER, *supra* note 5, at 129, 142; TITOW, *supra* note 11, at 55-61.

chequer of the Jews. No one considered any of these persons a *servus* in the sense of a tied agricultural laborer, though contemporaries occasionally employed the vocabulary of servitude.[100]

In this emerging common law framework, legal vulnerability and exclusion, rather than labor coercion as such, were the hallmarks of unfreedom, even for serfs. In time, certain rights of alien merchants were recognized in the Magna Carta and elsewhere, but such protection was of little practical import as their legal privileges fluctuated with royal need.[101] As for the Jews, the repeated confiscatory taxes of the thirteenth century and their eventual expulsion from England in 1290 illustrate the price of legal exclusion. Lacking the protection of custom, the excluded groups were among the few royal resources taxable without limit at a time when other, "free" groups succeeded in imposing limits on the reach of Angevin government.[102] Jurisdiction and legal protection served as the basis of the new definition of freedom, and outsiders were meaningfully unfree.

One hundred years earlier, however, freedom meant not access to the common law — of which there was none yet — but having one's own law.[103] Almost everybody had the privilege of a special legal "deal." This was the essence of the early medieval and Carolingian notions of freedom and fairly describes English notions until the late twelfth century. The foreign merchants, townsmen, and Jews secured charters of protection guaranteeing the right to inherit at customary reliefs, assess and collect their own taxes, be exempt from judicial visitations, have their fellows on juries when they were sued, select their own leaders, and be governed generally by their own customary rules. Being outsiders to a nascent royal legal system meant little hardship. If an outsider needed to opt *into* royal law, he might do that too — the earliest Pipe Rolls document suitors buying the discretionary boon of royal justice.[104]

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100. *See* Jonathan A. Bush, The Invisible Man: The Jew in Medieval English Law (1992) (unpublished manuscript, on file with author); Robert C. Stacey, 13th Century Anglo-Jewry and the Problem of the Expulsion 5-6 (1991) (unpublished manuscript, on file with author). *But see* Gavin I. Langmuir, *"Tanquam Servi": The Change in Jewish Status in French Law About 1200, in* LES JUIFS DANS L'HISTOIRE DE FRANCE 25 (Myriam Yardeni ed., 1980), *reprinted in* TOWARD A DEFINITION OF ANTISEMITISM 167 (1990).

101. MAGNA CARTA, 41 (1215), *reprinted in* SELECT CHARTERS 297-98 (H.W.C. Davis ed., Oxford: The Clarendon Press 9th ed. 1913) (William Stubbs ed., 1870), *and in* 1 SOURCES IN ENGLISH CONSTITUTIONAL HISTORY § 41, at 115, 121 (Carl Stephenson & Frederick G. Marcham eds. & trans., 1937); TERRENCE H. LLOYD, ALIEN MERCHANTS IN ENGLAND IN THE HIGH MIDDLE AGES 9-34 (1982); 1 POLLOCK & MAITLAND, *supra* note 5, at 458-67.

102. J.C. HOLT, MAGNA CARTA AND MEDIEVAL GOVERNMENT 156, 171 (1985). Recall, however, Aquinas' view that kings should not tax the nonusurious assets of their Jews beyond customary levels. Thomas Aquinas, *De Regimine Judaeorum, in* AQUINAS: SELECTED POLITICAL WRITINGS 84 (A.P. D'Entrèves ed. & John G. Dawson trans., 1970).

103. For this discussion, I am indebted to Stacey, *supra* note 100, at 8-11; *see also* Hilton, *supra* note 93, at 176.

104. R.C. VAN CAENEGEM, ROYAL WRITS IN ENGLAND FROM THE CONQUEST TO GLANVILL 228 n.7, 254-55 (1959); *Pipe Roll of Henry I, in* 1 SOURCES OF ENGLISH CONSTITU-

By the mid-thirteenth century, however, to be kept outside the expanding common law — still to be unfree — was to be isolated and vulnerable rather than privileged. Milsom has written of "a transformation of elementary legal ideas"[105] with respect to property in the late twelfth and thirteenth centuries, and the same processes created new notions of law, royal power, and freedom in England, and perhaps elsewhere.[106] "Like serfs, Jews were one of the groups in the kingdom which failed to make the transition in the late 12th century from a basically Carolingian legal world of liberties to an essentially modern legal world which regarded liberty as a matter of civil rights guaranteed by a common law."[107]

In short, the medieval concept of freedom was Steinfeldian. Notions of freedom changed, and different authorities had distinct understandings of freedom. Persons could be free in one setting and unfree in another. Persons disputed the status ascribed to them and adhered to earlier normative understandings of their legal disabilities. Freedom sometimes meant "free from" or "so free that";[108] at other times it embodied a more absolute notion; in other contexts it had political overtones, as with Jews and alien merchants.

Moreover, the common law's own doctrines of freedom and villeinage embodied the complex fit between different social and legal understandings of freedom. As Maitland pointed out, English villeinage was no ordinary doctrine of serfdom.[109] Instead of defining a class of partly free laborers bound in serfage — a straightforward legal task — common law set out a slippery set of doctrines in which a serf was simultaneously wholly unfree (with respect to his lord) and wholly free (with respect to the world). Consequently, medieval freedom is complex not only because it represented a moving line or unrealistically corresponded to social divisions, but also because, at least in its common law formulation, it was relative and contingent. Freedom was a line running through each serf, defining him as free or unfree depending on what he was doing and with whom. This is a startlingly modern conception, and likely it was too theoretical for judges to

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TIONAL HISTORY, *supra* note 101, at 49, 54 (extracts from 1130 Pipe Roll). *See generally* J.C. HOLT, MAGNA CARTA 49-61 (1st ed. 1965) (tradition of buying rights and exemptions).

105. S.F.C. MILSOM, THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM 37 (1976). For another view of early thirteenth-century legal change, see Robert Palmer, *The Origins of Property in England,* 3 LAW & HIST. REV. 1 (1985).

106. Paul Freedman, *Catalan Lawyers and the Origins of Serfdom,* 48 MEDIEVAL STUD. 288, 289, 293, 297, 300, 302-04 (1986); PAUL FREEDMAN, THE ORIGINS OF PEASANT SERVITUDE IN MEDIEVAL CATALONIA (1991) (expanding upon *Catalan Lawyers and the Origins of Serfdom, supra,* and drawing similar conclusions for Spain).

107. Stacey, *supra* note 100, at 11.

108. *See, e.g.,* MILLER, *supra* note 5, at 129; Hilton, *supra* note 93, at 182.

109. 1 POLLOCK & MAITLAND, *supra* note 5, at 415-21, 429-30; *see also* DAVIS, *supra* note 21, at 39 (qualifying Maitland's "relational freedom" model); HYAMS, *supra* note 59, at 125-60 (same).

implement fully. But its mere formulation suggests how far medieval freedom was from an inherited legal status, clear to all observers and changeable only by flight or manumission.

Steinfeld's model of contingent labor freedom holds important lessons for reconstructing the changing, disputed notions of medieval freedom. Narrowly, Steinfeld focuses on how early modern labor was coerced and yet still understood as free, and how this changed in the nineteenth century. But in broader terms, Steinfeld constructs a model of freedom that rejects straight-line Whiggish evolutionism, denies the iron force of economic determinism on legal categorization, and uses legal material to escape the common law's stated categories of free and unfree. Steinfeld uses the insights of CLS to present a nuanced model of early modern labor freedom. He succeeds in developing the disputed and multiplicitous meanings of legal freedom. His argument and methodology will be instructive for those who seek to extend his efforts to a period before his mid-fourteenth-century starting point.

Those who turn to Steinfeld's work for its English common law teachings should be warned of one final point, however. Like much CLS scholarship, Steinfeld's book is infused with a heavy dose of American essentialism. His focus simply switches to America when the narrative reaches 1700. The best parts of Steinfeld's story unfold on this side of the Atlantic. Both the actual removal of specific performance and criminal sanctions from hired labor in the eighteenth century (pp. 112-13) and the invention of the idea of modern free labor in the nineteenth century (pp. 159-60) take place in America. Steinfeld follows the recent practice of stressing the rediscovered American Revolution, which languished for so long in progressive historiography as a distant afterthought to the French, Russian, and even the so-called English Revolutions. Steinfeld's craftsmen and yeomen struggle for and achieve the final repudiation of the ancient institutions of labor servitude, partly because they are awakened by the Revolutionary experience and its ideology (pp. 123-27, 167). Of course, Steinfeld is far too careful a historian to argue that England remained a nation of deferential laborers with attitudes typified by the laborers in Ronald Blythe's evocative *Akenfield.*[110] But he clearly concludes that practical and ideological changes unfolded first in America.

There are good reasons for focusing on American developments, but Steinfeld's analysis of the emancipation of labor may be persuasive enough to apply to English labor as well. He cites the work of Douglas Hay in support of the proposition that labor coercion stayed on the books in English law until as late as the 1870s (pp. 115-16, 243 n.36, 244 n.46, 248 n.82). Clearly it did.[111] In fact, much of the old regula-

110. RONALD BLYTHE, AKENFIELD: PORTRAIT OF AN ENGLISH VILLAGE 110-15 (1969).

111. David Philips, *The Black County Magistracy, 1835-60,* 3 MIDLAND HIST. 161, 180-81

tory labor framework remained, strengthened by the newer Combination Acts (1799 and 1801). But even in the early nineteenth century, when the Combination Acts were in effect, laborers could seek higher wages by way of a wage reassessment under the Statute of Artificers; strangely, one of the decaying Tudor act's chief uses was to shield this form of collective labor activity.[112] As the nineteenth century wore on, important parts of the Combination Acts were repealed, as were other oppressive labor rules.[113] Even during the early nineteenth-century heyday of coercive labor, the statutes were imperfect vehicles for labor coercion, and English judges occasionally determined that the common law of riot and conspiracy also failed to provide the tools to crack down on a particular labor activity;[114] another instance of law constraining those who made it.[115] In short, English labor law may have been "contested" in much the same way as American law.

Nor was the configuration of English labor law chiefly the result of legal weakness or political benevolence, as some have argued.[116] We have a rich scholarship on English class formation and labor resistance — including hundreds of strikes — in the eighteenth century.[117] As long ago as the Webbs, scholars traced the fledgling but continuous workingmen's institutions that were the seedbed of the union movement.[118] These scholars found that working people were not only the passive victims of industrialization, but that they formed institutions that actively articulated their aspirations. As for the criminal sanc-

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(1976); Daphne Simon, *Masters and Servants, in* DEMOCRACY AND THE LABOUR MOVEMENT 160 (John Saville ed., 1954); D.C. Woods, *The Operation of the Master and Servants Act in the Black Country, 1858-1875,* 7 MIDLAND HIST. 93 (1982); *see also* Ralph Shlomowitz, *On Punishments and Rewards in Coercive Labor Systems: Comparative Perspectives,* 12 SLAVERY & ABOLITION 97, 100 (1991) (criminal sanctions in Australia as well).

112. RULE, *supra* note 30, at 116-18.

> These famous enactments [the general Combination laws] by forbidding trade unionism for straightforward wage demands, made a *legal* issue such as the enforcement of 5 Elizabeth [the Statute of Artificers] especially valuable. To organise journeymen for the purpose of petitioning Parliament, or for the purpose of funding prosecutions under the law [i.e., prosecutions of employers for violating 5 Elizabeth] could not be regarded as illegal . . . .

Id. at 116; *see* COLE & POSTGATE *supra* note 41, at 175-76; DOROTHY MARSHALL, INDUSTRIAL ENGLAND 1776-1851, at 145 (1973).

113. For a useful chronology, see John V. Orth, *The Law of Strikes, 1847-1871, in* LAW AND SOCIAL CHANGE IN BRITISH HISTORY 126 (J.A. Guy & H.G. Beale eds., 1984), and John V. Orth, *The Legal Status of English Trade Unions, 1799-1871, in* LAW-MAKING AND LAW-MAKERS IN BRITISH HISTORY 195 (Alan Harding ed., 1980) [hereinafter Orth, *The Legal Status*].

114. THOMPSON, *supra* note 36, at 507, 526 (Statute of Artificers as basis for criminal prosecutions); Orth, *The Legal Status, supra* note 113, at 197-99.

115. *See supra* note 64.

116. *See, e.g.,* LINDER, *supra* note 33, at 103-04 (prolabor provisions in English law result from concessions by the ruling class, while the driving force behind prolabor provisions in American law was the working class itself).

117. RULE, *supra* note 30, chs. 4, 6, 7; STEVENSON, *supra* note 38, at 113-35; THOMPSON, *supra* note 36.

118. RULE, *supra* note 30, at 149-51 (citing Webbs' limited definition of unionism and eighteenth-century examples).

tions, those whom the law punished for leaving work were frequently not errant individuals, but individuals and groups participating in strikes, particularly in the mines and the iron industry.[119] In other words, the English criminal sanctions are best seen as a peripheral feature in the larger context of a collective class struggle. That the criminal sanctions lasted longer in England is less important than the fact that, in both countries, organizing and collective work stoppages were illegal and remained so, and that working people challenged this illegality against the odds. They did so by using the rhetoric of rights and revolution, even if English activists did not use the rhetoric of popular republicanism that historians have identified in the American discourse.

The parallel evolution of English and American labor law also existed in areas outside of the direct regulation of wage labor. Thus, the abolition movement against slavery began its uneven rise in the late eighteenth century in both England and America. Among whites, it began as a cause of the middle classes, but abolition also gained modest acceptance among working people in both countries.[120] Both countries abolished the slave trade and then slavery, in stages. Finally, after black emancipation in both the British Empire and America, employers attempted to employ Asian contract labor; in other words, as Steinfeld concludes in the American context (pp. 177-84), it was still not inevitable that coerced labor was deemed to be slavery or that the abolition of the latter meant the end of the various forms of peonage.[121] Overall, both English and American law repudiated slave labor over the course of the nineteenth century, and in both countries working people, and eventually the law as well, came to view all forms of coerced labor as uncomfortably akin to slavery. The picture that emerges is one of parallelism, not American innovation, giving Steinfeld's model of labor emancipation even broader application than he attempts.

In fact, the question might better be framed not in terms of whether legal change occurred first in America, but why CLS legal history focuses on change here. The explanation lies at the heart of

119. A.H. MANCHESTER, A MODERN LEGAL HISTORY OF ENGLAND & WALES 1750-1950, at 328 (1980); Simon, *supra* note 111, at 171-72, 190, 194-95; Woods, *supra* note 111, at 93, 98, 111.

120. PHILIP S. FONER, BRITISH LABOR AND THE AMERICAN CIVIL WAR (1981); Eric Foner, *Abolitionism and the Labor Movement in Antebellum America, in* ANTI-SLAVERY, RELIGION AND REFORM 254 (Christine Bolt & Seymour Drescher eds., 1980). *But see* Patricia Hollis, *Anti-Slavery and British Working-Class Radicalism in the Years of Reform, in* ANTI-SLAVERY, RELIGION AND REFORM, *supra,* at 294 (intense English working-class distrust of middle-class abolitionists).

121. Pollock v. Williams, 322 U.S. 4, 11-13, 18-20 (1944) (reviewing repeated efforts of state legislatures to devise constitutionally acceptable servitude); Taylor v. United States, 244 F. 321 (4th Cir. 1917) (forcible return to contractual terms of service is not within antipeonage statute); Peonage Cases, 123 F. 671, 681-82, 685-90 (D. Ala. 1903) (allowing certain terms of compelled labor).

CLS. A major strand of CLS scholarship is devoted to unpacking, even deconstructing, mainstream legal doctrine. Special emphasis has always been devoted to legal history in general, and to late nineteenth-century formalism in particular, to explain legal change under American industrial capitalism.[122] If this can be done at the expense of "straight" scholarship, so much the better — hence the CLS tradition of "trashing."[123] The result has been entertaining and important analytic work but also a perceived reluctance to articulate a positive program, a failure for which even sympathetic observers have criticized the movement.[124]

Like earlier radicals, however, at least some in the CLS movement have found a provisional agenda in modern, radicalized readings of foundational American legal texts, notably the Declaration of Independence. This is why so many scholars want to appropriate Thomas Jefferson and his legacy.[125]

Perhaps the obscure case of *Robertson v. Baldwin*[126] holds the clue to Steinfeld's focus on the American invention of free labor. The Supreme Court held that runaway sailors could be seized and compelled to finish their terms of service, notwithstanding the Thirteenth Amendment. Steinfeld cites the case to illustrate the persistence of traditionalist notions of coerced labor (p. 251 n.36). But Justice Harlan's Jeffersonian dissent speaks more directly to Steinfeld's project: Who cares about inherited common law structures? We are Americans, new men, created and, in the Reconstruction Amendments, recreated as a nation under the sheltering wing of new emancipatory ideas. We can do better. It is this fundamental American vision that continues to animate the work of Steinfeld and others.

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122. Guyora Binder, *What's Left?*, 69 TEXAS L. REV. 1985, 2002-07 (1991) (explaining the focus on late nineteenth-century formalism); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984) (discussing CLS interest in doctrinal legal history).

123. Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (explaining the trashing technique).

124. Eugene D. Genovese, *Critical Legal Studies as Radical Politics and World View*, 3 YALE J.L. & HUMAN. 131, 134-48 (1991) (reviewing MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)) (leftist critique of CLS); Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 281-89 (1984) (liberal critique of CLS).

125. "It is a curious phenomenon of American scholarship that everyone wants Jefferson on their side." Joyce Appleby, *Historians, Community, and the Pursuit of Jefferson: Comment on Professor Tomlins*, 4 STUD. AMER. POL. DEV. 35, 41 (1990), *cited in* Ernst, *supra* note 90, at 1062 n.284. Outside of legal scholarship and CLS, see, for example, the essays collected in JEFFERSONIAN LEGACIES (Peter S. Onuf ed., 1993), especially Paul Finkelman's passionate *Jefferson and Slaves: "Treason Against the Hopes of the World," in, id.* at 181.

126. 165 U.S. 275, 293-97, 302 (1897) (Harlan, J., dissenting).