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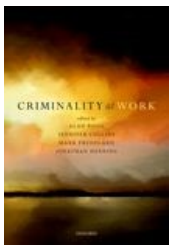

Criminality at Work

Alan Bogg (ed.) et al.

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CHAPTER

23 Class Crimes: Master and Servant Laws and Factories Acts in Industrializing Britain and (Ontario) Canada

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Abstract

This chapter compares the historical development and use of criminal law at work in the United Kingdom and in Ontario, Canada. Specifically, it considers the use of the criminal law both in the master and servant regime as an instrument for disciplining the workforce and in factory legislation for protecting workers from unhealthy and unsafe working conditions, including exceedingly long hours work. Master and servant legislation that criminalized servant breaches of contract originated in the United Kingdom where it was widely used in the nineteenth century to discipline industrial workers. These laws were partially replicated in Ontario, where it had shallower roots and was used less aggressively. At the same time as the use of criminal law to enforce master and servant law was contested, legislatures in the United Kingdom and Ontario enacted protective factory acts limiting the length of the working day. However, these factory acts did not treat employer violations crimes; instead, they were treated as lesser 'regulatory' offences for which employers were rarely prosecuted.

Keywords: master and servant laws, Factory Acts, United Kingdom, Ontario, Canada, labour law, criminal sanctions, regulatory offences, enforcement

Subject: Employment and Labour Law, Criminal Law, Criminology and Criminal Justice

A. Introduction

Historically, labour and employment law has played both a disciplinary and a protective function. In pre-modern England, the precursors to master and servant law fulfilled both these functions.[1] The disciplinary face compelled work for those without their own means of support and enforced obedience and effort through the threat of criminal sanctions. By contrast, the protective face provided workers with a summary civil mechanism to enforce their right to be paid. This asymmetry was deeply rooted in the social relations of a declining feudal regime, which inscribed the subordination of servants into a legal regime that classified them as members of patriarchal households but which, under the stress of the Black Death, required the ruling elite to call upon the state to enforce their traditional prerogative or 'police' powers.[2] Thus from an historical institutionalist perspective, the criminalization of employee breaches of the duty to obey might be seen as a path-dependent response to the challenges posed by the weakening of feudalism at a time when other means of contract enforcement were neither available nor feasible.[3] Criminalization of employer breaches of contract to strengthen worker protection, however, was inconceivable in the early modern era of English history. Industrial capitalism arose from this legal foundation, but operated in a different environment in which employers still sought to discipline wage workers through criminal sanctions and in which trade unionists and their supporters attempted to criminalize employers who endangered the lives and health of factory children.

We start our story of criminality at work in England's first industrial revolution not from a normative view of the appropriate scope of the criminal law but from a historical perspective that builds on an analysis of institutions, ideologies and, ultimately, class struggles over the construction of control and protective regimes at work. As industrial capitalism and its attendant ideology of freedom to contract reached its
p. 456 apogee in nineteenth century ↳ England, both the status relations of superiority and subordination *and* the paternalistic bonds of reciprocity of the old social order, upon which the law of master and servant was based, were disrupted.[4] Our focus is on how the coercive control of workers through master and servant law, on the one hand, and attempts to restrict and penalize masters' exploitation of economically subordinated workers through the factories acts, on the other, played out. We also add a comparative dimension to this analysis through an examination of English and Canadian (Ontario) developments so we can examine differences in historical trajectories, institutional structures, and social and class contexts, and thereby illuminate their effects on legal developments.

We begin with a brief foray into recent criminal law theorizing that illuminates its deep ambiguities regarding the scope of criminalization[5] and then recount the stories of master and servant and factory law on parallel tracks, returning to a comparison only in the conclusion.

B. The Role and Function of the Criminal Law

The notion that there is a neat conceptual or normative divide between wrongs that are *mala in se* or criminal and *mala in prohibitum* or regulatory offences has given way to the recognition that the distinction between 'true' and 'regulatory' crimes is ambiguous. The changing role of the state from its traditional focus on protecting the sovereign and political order to its modern concern with protecting and regulating the civil order and social life is a major reason for this ambiguity.[6] This shift occurred during the transition from a feudal to a capitalist social formation, which itself entailed the sharpening of the boundary between the political and the economic and the public and the private, in effect creating a civil order that was distinct from the political order.[7] A crucial dimension of this transition was the sweeping away of status-based relations that privileged a landed aristocracy whose authority was rooted in the patriarchal political order and the institutionalization of new hierarchies rooted in a privatized civil and economic order that privileged an emerging bourgeoisie.

This economic and industrial revolution not only undermined the traditional social order but also social reproduction, the daily and generational reproduction of human and social life, by unshackling the traditional restraints on exploitation and undoing the paternalistic bonds of reciprocity. As households lost direct access to land that provided them with subsistence, family members, including young children, were forced to sell their labour power on the market to survive.[8] In this context, a movement to construct a protective regime emerged.

Simultaneously, the breakdown of the hierarchical order and traditional patterns of work required the creation of a disciplinary regime suited to the new factory order, which required workers to work by the clock and obey the command of the overseer.[9] However, unlike the construction of a protective regime, which had to start nearly from scratch, the disciplinary regime could build on the old master and servant law.

Criminal law was central to both these projects. In part, this was an historical necessity. The early nineteenth century English state lacked a developed administrative capacity and relied heavily, if not exclusively, on the criminal law as a mechanism of rule. Nicola Lacey points to the undisputed increase in the statutory creation of summary offences in the nineteenth century, but notes its even earlier use to enforce employment contracts.[10] This expansion, however, was contested and conflict intensified over the course of the late eighteenth and early nineteenth centuries. Using the criminal law against subordinate classes was deeply rooted and widespread, although tempered by mercy, and reliance on local magistrates, appointed from local elites, reinforced traditional hierarchies.[11] So while prosecuting absconding and recalcitrant workers in local courts built on the existing edifice of criminal law, imprisoning workers for breach of contract was increasingly viewed as inconsistent with free labour and freedom of contract. Using the criminal law against masters to enforce protective laws was another matter. Was the gross exploitation of child labour a threat to the social order truly deserving of criminal punishment or was it a lesser wrong, merely an excess in what was otherwise the noble activity of profit maximization and private wealth creation?

These questions set off a decades long debate and contributed to a reconstruction of the criminal law that allowed for refinements between wrongdoing that was truly criminal (*mala in se*), requiring *mens rea*, and legal violations considered to be merely regulatory offences (*mala prohibitum*), which were strict liability and outcome based.[12] The resulting 'conventionalization of factory crime' helped resolve the legitimation problems facing England's rulers who felt compelled to respond to the most dysfunctional consequences of the first industrial revolution without at the same time treating as true criminals the powerful economic actors who were responsible for and who benefitted financially from these harms.[13] 'In doing so', according to Lacey, 'the Victorian legislature further embedded an elusive distinction between "real" and

"regulatory" crime—the latter realized through a parallel system of summary jurisdiction generally focused on outcome responsibility—which haunts English criminal law to this day'.[14]

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C. Master and Servant Law: Disciplining Workers

1. England

In the eighteenth and nineteenth centuries, master and servant laws built upon medieval notions of villeinage or serfdom, which were incorporated into the first labourers statutes of the fourteenth century and later into the Elizabethan Statute of Artificers. However, by the mid-eighteenth century the general understanding was that the Statute of Artificers had little or no application to industrial workers.[15] Specific groups of masters brought petitions to Parliament for legislation to address questions about the types of workers covered by the disciplinary system and to extend its scope over a broader range of workers and types of conduct. Beginning in 1747 Parliament began enacting a new series of master and servants acts.[16] Unlike their forebears, the new master and servant laws '[were] not an attempt to maintain in place a pre-industrial model of household employment. Instead, [they] aimed to impose a more rigorous system of work discipline on growing numbers of labourers, artisans and outworkers employed in manufacturing, as well as maintaining control of the agricultural labour market at a time of considerable upheaval.'[17] These laws granted employers the right to compel specific performance of employment contracts and to discipline reluctant workers with sanctions that included whipping and imprisonment.[18] At the same time, the laws abolished the paternalistic bonds of reciprocity including the wage-setting machinery of the Elizabethan statute.[19] The law also terminated the system of poor law settlements to mobilize labour supply and shift the labour market towards freedom of contract and away from traditional ethical constraints.[20]

However, the gradual embrace of freedom of contract did not mean that workers were free to quit their employment. Penal master and servant law became 'increasingly criminal in character' in the nineteenth century with the increasing carceral capacity and technologies—police, the arrest warrant, and prisons—of the central state.[21] Not only was the use of coercive criminal law seen as necessary to uphold the 'sanctity of contract', 'the criminalization of workers' unruliness through master and servant law was consistent with a belief in the criminal inclinations of the propertyless'.[22] While freedom of contract and economic laissez faire went hand in hand with industrial capitalism, in the realm of employment it could not deliver what employers wanted—virtually unfettered prerogatives combined with the workers' duty to obey.[23] The restrictive and coercive master and servant law provided the juridical basis for the duty to obey that is implied by law into every contract of employment distinguishing the legal relationship as one involving a 'not free contract but a hierarchical model of service'.[24]

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In 1823, Parliament extended and strengthened the coercive edge of the master and servant law, using 'broad language that could be read to cover the overwhelming majority of manual wage workers'.[25] It also established new crimes for workers, who could be charged by their employers for leaving work without notice or before the agreement expired, for refusing to begin contracted work, for being absent without permission, for performing work negligently or poorly, or for committing some broadly defined form of misbehaviour.[26] Workers therefore were bound to service for the duration of their initial agreements, which were prima facie a year in length. By contrast, workers were only entitled to sue their employers for failure to pay agreed-upon wages, dismissal without proper notice, or abuse.

Moreover, court procedure was much more favourable to employers than to workers. Most disputes under master and servant law were subject to the summary jurisdiction of local magistrates' courts or petty sessions, known as 'police courts', although the process and punishment for masters and servants differed greatly. Servants faced criminal charges and were commonly arrested by constables pursuant to arrest

warrants.[27] As a criminal defendant, a worker could not be a witness in her or his own defence. Workers appeared before a single magistrate and if convicted penalties included a fine, the posting of a surety for completion of the contract, or up to three months in prison at hard labour. If the court terminated the contract, the worker lost all claims to outstanding wages.[28] However, imprisonment for breach of contract did not automatically terminate the contract, and, if the contract was not cancelled, a worker who refused to re-enter service could be prosecuted again.[29]

Masters, on the other hand, only faced civil liability, liable to pay up to £10 in back wages. If successful workers could be released from their contracts, but since court costs were to be paid by the loser, workers risked owing their employer an amount equivalent a good part of a week's wages if their suit was unsuccessful. Moreover, employers could readily appeal the civil judgments against them, while workers had great difficulty in appealing their convictions and had to obtain a writ of habeas corpus to get out of prison.[30]

Not only was the content of the law biased against workers, by the end of the second quarter of the nineteenth century, in many regions so too was its administration.[31] The justices of the peace who oversaw petty sessions were generally either county magistrates on a circuit or borough magistrates whose social composition shifted in the early to mid-nineteenth century from landed gentry and the clergy to industrialists and their sympathetic professional allies.[32] Thus, magistrates were increasingly likely to be employers themselves, with an interest in the outcome of the dispute they tried. Although legally required to recuse themselves when cases came before the bench involving potential conflicts of interests, such as adjudicating a dispute within their own industries, magistrates were not monitored and rarely stepped aside. Moreover, even on the rare occasions when a magistrate did recuse himself, another from within the same social and political networks likely replaced him.[33] ↳ The appearance that employers were judges in their own cause fuelled a great sense of grievance by workers and their unions, as is illustrated by the following complaint from a potters' union periodical from the mid-nineteenth century:

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> He, as we have before stated, who would administer the law from vindictive, or class-regulated feelings, is a villain, and ought to be subject to some heavy, penal enactment. The judge who would act from passion, prejudice, or class interest, and not from the letter of the law, is a blot on jurisprudence of a country,—a moral pestilence in the very heart of social existence, that threatens the security of life, liberty, and property; and ought, consequently, to be removed, as the greatest possible evil of civilized society.[34]

This appearance of class bias in the administration of master and servant law undermined its legitimacy.

During the 1840s trade unions and Chartists attacked master and servant law and the lay magistracy.[35] The language of Chartism was ideally suited to address the injustice of master and servant law; criminalizing workers' breach of contract while treating employers' failure to fulfil agreements as civil matters exemplified class legislation, which Chartists argued was inevitable if workers were unable to play a role either in legislating or administering justice.[36] Unions and Chartists argued that employment contracts should be treated as all other contracts and, therefore, not liable to criminal enforcement. However, during the 1840s the more commonly used argument was that the enforcement of master and servant law 'by lay magistrates drawn increasingly from the class of industrial employers, who were often indifferent to legal formalities, represented a serious threat to the liberty of the subject'.[37]

Unions retained barristers to challenge convictions in the high courts on the basis of technicalities and several appeals were successful. The leading union barrister was WP Roberts, whose constant refrain was that untrained magistrates were violating the constitution in their administration of the master and servant law.[38] The high courts had much more legitimacy for unions and their allies than the summary powers of

magistrates. In an article titled 'Constitutional Law against Coal King Law: Good News for the Miners,' the Chartist journal the Northern Star reported on 23 December 1843:

> that while our readers are struck with the horrible picture we have drawn of 'club law', they will rejoice to find that in the Real Law there is yet protection for the poor. To get the law is the thing, and Mr. Roberts appears to have discovered the magical process by which this desideratum is to be achieved.[39]

p. 461 By the mid-nineteenth century, trade union lawyers were making life increasingly uncomfortable for employers and magistrates by discrediting the penal law.

Political opposition to master and servant law rallied against a bill, introduced by three Tory backbenchers in February 1844, designed to extend the scope of master and servant law to all wage employment with the exception of domestic service.[40] During the spring of 1844, Chartists, trade unionists, and short-time committees throughout England and Wales launched a large campaign against the bill.[41] Short-time committees that had been established to support Lord Ashley's ten-hour bill, which, as we will see, limited working hours for women and children in factories, held large rallies to oppose the coercive master and servant bill and advocate for protective factory legislation. Speakers often used the same language for both that emphasized masculine citizenship and the necessity of 'protecting our women and children'.[42] The suggestion that the master and servant bill presented new dangers to women, who were characterized as 'less than free agents' and, as such, especially vulnerable, was incorrect, as women were already covered and had been prosecuted under master and servant law.[43] Objection to the 1844 bill was also tied to support for the jury, even though jury members were unlikely to be peers of workers. This concerted opposition defeated the expansion of the criminal law to force workers to labour.

Parliament put a stop to trade union lawyers' strategy of appealing magistrates' decisions to the high courts for technical defects. In 1848 and 1849 the Jervis Acts, named for the Attorney General who sponsored them, were passed, which settled the form and procedures that magistrates were bound to follow, while preserving their discretion in respect of many matters.[44] This legislation, combined with changing priorities of the Queen's Bench, including a hardening attitude to labour unrest, made it much more difficult for labour's legal representatives to challenge magistrates' rulings.[45]

Not only did the 'taint of criminality' spread throughout master and servant act proceedings during the nineteenth century, the disciplinary function of the law also increased.[46] Although the proportion of workers sentenced to penal sanctions was never large compared with the number of employment contracts, prosecutions were exemplary.[47] In the preceding century, the ratio of wage recovery cases to employee discipline cases was nearly equal, or even more favourable to workers in some cases.[48] Yet, by the 1860s, employers were responsible for two-thirds of the master and servant cases and in many regions magistrates began to hand down heavier sentences.[49] Employers' increasing resort to coercive law reflected the growth in industrial employment; manufacturing and mining represented over 30 per cent of the workforce in 1811
p. 462 and over 40 per cent in 1851.[50] Employers used the ↳ law in a wide variety of industries, including shipbuilding, bottle making, iron moulding, brickmaking, hardware and cutlery, mining, cabinet making, the leather trades, and the building trades. The law could be an effective weapon against strikes by skilled workers who had strategic power in the production process and to enforce labour discipline in low-wage industries where turnover, absenteeism, and low productivity could be a problem in the absence of other means of sanctioning, supervision, or control.[51] However, the extent to which the law was used and its coerciveness depended on local cultures of work and social relations.[52] For example, the greatest use of master and servant law was in the places that witnessed the largest transfusions of mine owners, ironmasters, and textile manufacturers to the magisterial bench.[53]

In 1867, the master and servant law was partially reformed.[54] Symbolically, the law moved away from the criminal law and remedied some of the most egregious procedural inequalities. Fines became the standard punishment for breach of contract, the possibility of damage payments to employers was added and imprisonment was limited to cases of 'aggravated' offences on the part of workers.[55] Conviction required the presence of two magistrates, and workers could testify on their own behalf. But, at the same time, the 1867 reform allowed a magistrate to order an employee to return to work and provided for deductions from wages for breach of contract even if no civil claim for damages could have arisen. Although these changes were associated with a decrease in the fraction of prosecutions ending in a direct sentence of imprisonment, and an increase in the fraction of prosecutions resulting in a fine, imprisonment was the outcome for those workers unable to pay fines. As James Davis, a noted stipendiary magistrate and author of a text on the master and servant law, reflected: 'I have always found that the employers care little about the money, about getting actual compensation, and that they wanted labour.'[56] The Master and Servant Act 1867 was much used; in fact, '[t]he largest number of convictions was recorded in the last years of the law'.[57]

The repeal in 1875 of the Master and Servant Act 1867 abolished most criminal sanctions for a simple breach of contract. Prime Minster Benjamin Disraeli described the effect of the repealing Employers and Workmen Act in the following terms: 'for the first time in the history of this country the employer and the employed sit under equal laws. No one now can be imprisoned for breach of contract, while adequate civil remedies have been furnished for this occasion.'[58] However, the civil regime that replaced the criminal regime did not introduce contractual equality; magistrates continued to supervise the terms of the contract, require specific performance by the employee, and set off wages for breaches by the employee.[59]

2. Canada (Ontario)

When it became unclear whether English master and servant laws applied in Upper Canada, which in 1867 would become the province of Ontario in the federal state of Canada, a local master and servant act was enacted by the Legislative Assembly in 1847.[60] Originally designed specifically to assist timber industry employers in the Ottawa Valley to enforce labour contracts in a volatile labour market, the law also provided a mechanism for workers to obtain wages owed by employers.[61] Like its UK counterpart, workers were subject to criminal procedures and penalties, whereas employers faced only civil liability. In marked contrast to its English forebear, however, workers claiming wages brought the overwhelming majority, three-quarters, of cases heard between 1847 and the repeal of the penal provision in 1877. Ninety per cent of these cases were successful to the extent that employers either settled or were required to pay, although they were given time to do so and many simply failed to pay.[62] Of the cases brought by employers, the majority were against absconding workers, and among the cases with a known outcome, the vast majority of workers were convicted. However, workers convicted of desertion were rarely sentenced to imprisonment (only 3 per cent), although a larger group (16 per cent in total) ended up in jail because they were unable to pay the fine, which they, unlike employers, were required to do 'forthwith'.[63]

Wage claims and prosecutions for desertion tended to ebb and flow with the economy and industrial conflict, the former increasing during recessions and the latter rising during periods of labour unrest and trade union activity.[64] Workers' success rates in wage claims tended to mirror the economy, increasing during periods of recession, although over the entire period workers' success rate dropped from 70 to 60 per cent of cases. The opposite trend can be seen with regard to workers' longer-term success in defending against absconding and disobedience claims, which rose from about 25 per cent in the earlier period to better than 50 per cent by 1876.[65]

Unlike the UK, where only small numbers of claims under the master and servant laws were brought by workers, in Ontario and Upper Canada, the opposite was true. Although workers brought the vast majority of cases, as in the UK, there was a regional variation in the law's use. In Toronto, the largest and most

industrialized city, the years 1870 to 1873 saw the largest number of committals of workers under the master and servant law.[66] It appears that in the early 1870s employers, following the example of their British counterparts, used the law to respond to collective action by their workers.[67] During this period, marginal manufacturers were more likely than their more successful confreres to resort to legal coercion.[68] But, as was the case in the UK, the use of master and servant law against trade unions and collective action politicized the law. When the Ontario-based Canadian Labour Union ↳ and the Toronto Trades Assembly lobbied the Ontario legislature to repeal the penal provisions, the government declared it lacked authority to do so. It was a criminal law, a matter of exclusive federal jurisdiction under the British North America Act, which established the division of powers between the federal and provincial governments.

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After the British government repealed its penal provisions in 1875, trade unionists urged the federal Minister of Justice to follow suit, characterizing the offending clause as against '[t]he modern spirit of the law ... '[69] Hoping to bolster the legitimacy of his government after the Prime Minister's controversial intervention in a railway strike and to resolve a constitutional quirk, the federal Justice Minister introduced a bill sharply limiting criminal breach of contract to breaches of employment contracts that were 'wilful and malicious' and that caused harm to the public. Ordinary contract breaches by employees, which included desertion and disobedience, were now under provincial law. While provincial master and servant acts could make such breaches punishable, resulting in both fines and imprisonment, they were not true crimes.[70] In any event, the law ended the formal inequality in the treatment of employers, who were subject to civil law, and workers, who had been subject to criminal law.[71]

In contrast to England, where the coercive aspects of master and servant law were instrumentally useful to employers in many industries and locales to control labour mobility and discipline workers, in Ontario the law had only a symbolic effect, and even then the symbolism was attenuated.[72] While exemplary prosecution could serve to reinforce the superior–subordinate relationship inscribed into the employment contract, its too-frequent use could undermine the legitimacy of the contract of employment. Absent the long history of patriarchal relations that was deeply embedded in English society and Canada's proximity to the United States where free labour was a rallying cry for white male workers, the use of penal law against workers but not against masters was prima facie unjust.[73] Moreover, as we will see with the Ontario factory act, the division of powers in the Canadian constitutions forced provincial and federal governments to be explicit about the nature of penal laws in employment relations.

D. Factory Acts

1. UK

The struggle to achieve 'the modest Magna Charta of a legally limited working day'[74] was an extended one that involved ongoing debates over the scope of protection and the means of enforcement. Child labour and hours of work were the principal health and safety issues ↳ of the first industrial revolution because profitability depended on the absolute extraction of surplus value through the lengthening of the working day and the employment of young children, especially in the textile industries of northern England. An early source of child labour were the parish apprentices, who were often ruthlessly exploited by their mill-owner masters, required to work up to fifteen hours a day, and subjected to corporal punishment for inattentiveness. Patriarchal control was near absolute.[75] Conditions were so appalling that they attracted the attention of Manchester's doctors and magistrates, and socially concerned elites. Sir Robert Peel's involvement as the sponsor of the first factory act in 1802, the *Health and Morals of Apprentices Act*, was arguably strategic, aimed at avoiding more radical measures harmful to his extensive manufacturing interests.[76]

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The Act prohibited the apprentice children from working more than twelve hours a day or at night and obliged employers to provide for their basic physical and moral well-being. The enforcement of these requirements built on the criminal and local government jurisdiction of the justices of the peace who were to appoint visitors to inspect the factories in their district and report on their findings. The Act also made it an offence to obstruct a visitor or to 'willfully act contrary to, or offend against, any of the provisions of this Act'. Those convicted were subject to modest fines, half of which was paid to the informer. Prosecutions commenced by an information and were conducted before two justices of the peace.

Over the next two decades, Parliament extended coverage of factory laws to free children, who had become the largest group of children employed in cotton factories, often through family employment. The law prohibited employment of children under the age of nine and night work for those under twenty-one, while also limiting hours of work to twelve for those under sixteen (later raised to eighteen). Manufacturing interests fiercely resisted these laws, which were diluted to secure their passage.[77]

There is widespread agreement that these laws went virtually unenforced. However, researchers have paid little attention to the attempts by trade unionists to initiate prosecutions. This effort took place in context of spreading trade unionism among adult male textile workers in the early nineteenth century, often inflected by popular radicalism embracing an alternative political economy based on the equalization of labour and capital's power.[78] A reduction in the hours of work would increase workers' bargaining power and the operatives formed short-time committees as early as 1814 with the initial goal of reducing the working hours of children.[79] The short-time committees also pressed for improved enforcement. Led by trade unionist John Doherty, they attempted to take matters into their own hands by pressing manufacturers to
p. 466 comply and, when that failed, seeking informants ↳ whose evidence could support prosecutions. Although Doherty and his associates obtained a few convictions, they faced 'a bewildering variety of legal objections and technicalities to frustrate them, a good deal of abuse both in court and in the press, and widespread intimidation of witnesses on whom they depended'.[80] The situation did not improve even after an 1829 amendment that prevented the dismissal of cases for technical defects.[81] As Carson noted, 'the question of conventionalization was scarcely at issue. Employers could break the law at will without any real likelihood of prosecution and without any substantial possibility of being adjudged criminal.'[82]

The operatives' agitation for stronger factory laws received a boost in the 1830s when Tory radicals such as Michael Sadler, Richard Oastler, and John Fielden took up the cause.[83] Driven in part by abolitionism and Anglicanism, and by conflict between old landed elites and an emerging industrial bourgeoisie,[84] Tory radicals worked closely with the short-time committees, sometimes condemning mill owners' actions as criminal, rhetorically and at times literally.[85]

Sadler proposed factory legislation to the Commons in March 1832. Political support for the measure had grown, leading the government to delay by referring the bill to a Select Parliamentary Committee.[86] Oastler pressed the case for criminal punishment:

> I think it would be a very good thing, instead of having fines as the punishment for the breach of the law, to make it imprisonment, and flogging and pillory; 1 have no doubt that would keep them to it; I think that would be a most excellent thing.[87]

The Sadler Committee provided a rare forum for the workers themselves to speak publicly of their embodied experience.[88] Without expressly characterizing their employers' behaviour as criminal, their descriptions of the terrible conditions reinforced the narrative of the short-time committees and the Tory radicals that 'white' or 'factory slavery' was literally robbing workers of their property in their labour and their physical and moral health.[89]

Lord Ashley became the legislative sponsor after Sadler's 1832 election loss. In an effort to take control of the issue, the government established a Royal Commission to investigate factory conditions. The Commission, dominated by Benthamite reformers, proceeded on a very different model than Sadler's Committee, more akin to a quasi-judicial investigation than a forum that provided workers with a platform
p. 467 to speak their truths. Not surprisingly, ↳ it also produced a very different perspective on factory work, one that defended the factory system while acknowledging the need to regulate the specific problem of excessive child labour.[90] The Commission did not see the problem as a criminal matter, but as one best addressed by the creation of a system of government inspection.[91]

While in retrospect the shift from crime to regulation is clear, the reality was messy and contested. First, there was a political contest over how to characterize violations of the law. Lord Ashley's bill spoke of miller owners' 'culpable negligence' in failing to guard dangerous machinery and provided the occupier was to be committed for trial for manslaughter at the ensuing Assizes if a child's death resulted.[92] As well, if culpable negligence resulted in grievous injury, the employer was liable to face a penalty between £50 and 200, to be paid to the victim.[93] The Royal Commission's report, however, criticized the Bill's penal clauses (44) as

> of a nature so vexatious and so arbitrary as, if sanctioned by the Legislature, would create a serious objection to the investment of capital in manufacturing industry in this country.

Nor were the commissioners keen on criminal prosecution as a mode of enforcement. Rather, they recommended the appointment of inspectors, vested with the power to enter factories that employed children, a state intrusion into private space to be sure, but a far preferable alternative to hauling manufacturers into the public space of the court.

Ashley's bill was defeated after the release of the Commission's report and the government passed its measure, implementing the Commission's recommendations.[94] The law clearly tilted away from a 'true' criminal law approach towards a regulatory one, including regulatory offences. Employers who 'offend against any of the provisions of this Act' were liable to be fined between £1 and 20 '[p]rovided nevertheless, that if it shall appear to such Inspector or Justice that such Offence was not wilful nor grossly negligent, such Inspector or Justice may mitigate such Penalty below the said sum of One Pound, or discharge the Person charged with such Offence'.[95]

As this clause indicates, the legislation did not fully resolve the juridical nature of violations of the Act, leaving ambiguity about their criminal or regulatory character. The law created what we now characterize as a strict liability offence, where the crime is complete on proof of the *actus reus*, but it also provided for the mitigation of penalty or complete discharge if the act was not wilful, thereby reintroducing a mental element, to be applied at the discretion of the inspector or magistrate. Thus, we can see the government feeling its way toward a resolution of the contradiction it faced. Child labour was widely recognized as unacceptable, even for political economists who otherwise celebrated and defended market freedom, but so too was the criminalization of the capitalists who benefited from it.

p. 468 The law was deeply unsatisfactory to operatives and their political supporters for many reasons, one of which was its failure to treat child labour as the crime they believed it to be. John Fielden, one of the Tory radicals, wrote a pamphlet, 'The Curse of the Factory System' in which he argued:

> [Just as] Parliament is distinctly told … it is part of their duty to make laws to protect men from the arm of the murderer, laws of the same protecting kind are necessary in the case of these children, where the murder is as certain as in any other instance, and more cruel, because the death is more lingering.[96]

John Doherty also continued to press for stronger legislation based on the criminal law model that included a penalty of 'three months to the treadmill' for third-time violators.[97] However, the push towards criminalization failed and did not revive for over 150 years.[98]

Once criminalization failed, the question of how the inspectors would enforce statutory offences of an ambiguous character arose. Robert Ricketts, one of the first inspectors, provided an answer:

> From the peculiar circumstances of this division, studded as it is with mills, where offences and evasions of the Act may be so easily committed with impunity, and where the impunity of one transgressor is an inducement to many others to follow his example, the difficulty of enforcing its provisions was of no ordinary cast; and where dissatisfaction on the first introduction of this Act was so loudly and generally expressed, a discreet and conciliatory conduct on the part of the inspector became as indispensable to the success of his proceeding as the powers vested in him by the Act itself.[99]

Inspectors did not view themselves as factory police on a mission to root out crime but rather as advisors promoting compliance through education and persuasion.[100] The inspectors did not entirely abandon prosecutions, but narrowly reserved them for the few wilful or reckless employers who flouted law or betrayed the trust of the inspector.[101] By introducing *mens rea* into their discretionary judgments, inspectors effectively carved out a small zone of 'true' criminality in a strict liability regime so that prosecutions were reserved for only the most egregious cases of employer defiance of the law and of inspector authority. In the result, most violations were tolerated or, in Carson's terms, 'conventionalized'.[102]

p. 469 The 'decriminalization' of factory law and its transformation into regulatory 'criminal' law was perfected in the legislation of 1844, which for the first time regulated the employment of adult women in factories.[103] Section 41 provided that an occupier of a factory who violated the act was 'deemed in the first instance … to have committed the offence', but allowed for a due diligence defence. The employer could defend himself by 'prov[ing], to the satisfaction of the justices, that he had used due diligence to enforce the execution of the Act' and that an agent, servant or workman had committed the offence 'without his knowledge, consent, or connivance'. In effect, the legislation refashioned factory act violations as modern strict liability offences, complete upon proof of the act, to which a defence of due diligence was available. This technique enabled the British state to respond to the harmful consequences of the first industrial revolution without truly criminalizing those who were responsible.

This was the law on the books, but the question of how inspectors exercise their enforcement discretion remained to be determined. Cleansed of the taint of 'real crime', inspectors could have chosen to step up their use of prosecutions and, indeed, there was a small spike in prosecutions in 1845 and 1846. However, their enthusiasm quickly waned and from 1847 prosecutions were rare.[104] Inspectors' strongly preferred persuasion and conciliation, reserving prosecution only for the most defiant employers. In the end, regulatory offences, too, were conventionalized and prosecutions were reserved for those who defied the authority of the state, not those who simply violated workers' rights, thus bringing law enforcement back within the traditional criminal domain of defending state order.

2. Canada (Ontario)

The Canadian story of factory legislation begins in the 1870s at the time of Canada's much later industrial revolution.[105] While industry tended to cluster in major urban centres there were pockets in some smaller cities. One of these was Cornwall, which attracted a large number of textile manufacturers, and its Member of Parliament, Dr Darby Bergin, cloaked in the mantle of Tory radicalism, launched a lonely crusade for factory legislation in 1879. Despite initial failure, Bergin persisted and his later efforts attracted support from a renascent labour movement, leading to the appointment of a commission of inquiry in 1881. Its report, issued in January 1882, found the employment of children and women working long hours was widespread. It also found dangerous machinery, inadequate ventilation, and unsanitary conditions present in many factories. The government introduced a factory bill in the Senate in April 1882 where, for the first time, the question of the federal parliament's jurisdiction was raised.[106] As noted previously, under the British North America Act (BNAA), the federal government has exclusive jurisdiction over criminal law. It also has a more general power to legislate for 'peace, order and good government of Canada' (POGG), while
p. 470 the ↳ provinces have jurisdiction over property and civil rights.[107] Sir Alexander Campbell, the federal Minister of Justice, defended the government's measure under its POGG power, not as criminal law.

> It is because this bill relates to subjects so important as that, subjects which go far beyond contracts between master and servant, which in their indirect effects concern the whole community, and on which, to a certain extent … the future of the country very much turns—whether we shall have a strong, healthy and moral population, likely to be creditable to the country … I say if these subjects do not affect the peace, order and welfare of the whole community it would be hard to say what does.[108]

The government subsequently withdrew the bill in the face of vigorous opposition from the manufacturers. Another bill introduced the following year, met the same fate.[109]

The failure of the Dominion Conservative government to act left a political space for the Ontario Liberal government to pursue its expansive view of provincial jurisdiction and to consolidate support among working-class voters. In 1884, it enacted the Ontario Factories' Act, which borrowed heavily from the UK legislation, including its penalty provision. Contraventions of the act were summary conviction offences punishable by a fine up to $50, and in default of payment a gaol sentence of up to three months. However, the Act also provided that the employer could escape conviction by showing that despite due diligence another person not under the employer's control was responsible for the violation.[110]

The BNAA explicitly empowered provinces to impose these kinds of penalties for *non-criminal* regulatory offences provided it was legislating within its powers.[111] The constitutional question was whether factory law was a matter of 'property and civil rights in the province' or a matter of exclusive federal jurisdiction. The answer to the question was not obvious and the province did not immediately declare the Act in force, providing Darby Bergin with an opportunity to reintroduce his federal factory act in 1885. He emphasized the protection of children;

> their health, their life, their faith and their morals are at stake, and they ask us to given them all the aid and all the assistance which it is in the power of this Parliament to give … that the factory boy may grow up strong and vigorous … a good citizen and a valuable member of society; that the factory girl may grow up an intelligent and a virtuous woman, a true wife and a loving mother of healthy children … that they may … not be killed through over work … that they may not , through cupidity on the part of their masters, be maimed or crippled for life by machinery … that they may not become victims of the moloch gold, as was the case in England … these are among the objects of this Bill.[112]

p. 471 Given this characterization of the harm employers were causing, the bill arguably fell within the federal government's criminal law powers. David Mills, a Liberal member of Parliament from Ontario and a respected constitutional law expert (who had been retained by the Ontario government to assist in an anticipated Factory Act reference), however, challenged this characterization. He drew a sharp distinction between 'police powers' and the federal government's criminal law powers.

> All those regulations which a community find it necessary to make in order to prevent one man from interfering with the comfort and well-being of another in the use of that freedom which the law allows him are police regulations, and are part of that department of jurisprudence embraced with the division, designated— 'Property and Civil Rights.'
>
> ... Criminal law in section 91 of the British North America Act ... embraces those wrongs committed against society which are in themselves bad, and which are prosecuted and punished in the name of the Sovereign. It was never intended to embrace within the limits of the criminal law ... those police and municipal regulations which are established for the purpose of promoting morality, decency and good health.[113]

From Mills' generally laissez-faire perspective, the law 'propose[s] to deal with the relations between the employer and the employed ... It interferes with the freedom of contract.'[114] Real crimes were not being committed here, although he recognized that the constitution empowered the provinces to punish those who violate police regulation, which he described as 'Provincial Criminal Law'.[115]

The issue came up again three years later in the context of a debate over funding for a Royal Commission into relations between labour and capital.[116] The Commission heard evidence of factory children in Montreal working fourteen-hour days, leading one Member of Parliament, Richard Cartwright, to compare their conditions as 'in no degree removed from white slavery' and to call for 'our criminal law ... to be amended, and most stringent penalties should be inflicted not merely on the overseers and the factory hands, but on the responsible directors, or at least on some of those who are managers'.[117] George Casey, another Member of Parliament, agreed: 'if we cannot declare such acts' as 'killing children by compelling them to perform inordinate labor' or 'assaulting and flogging half grown up girls' to be 'criminal, we cannot declare any offence against the person to be criminal, whether it is committed inside or outside of a factory'.[118] David Mills opposed the demand for stiffer penalties. While admitting that 'it is not easy to draw the line where police regulation ends and where ordinary criminal regulation begins', and conceding that in some cases, such as 'flog[ging] children inordinately' the criminal law might apply, he insisted that legislation touching on working conditions was a matter of police regulation within provincial jurisdiction. The Minister of Justice, John Thompson agreed and no action followed,[119] ↳ ending political debates over the use of
p. 472 criminal law to protect the health and safety of workers for almost 100 years.[120]

What then of the enforcement of 'Provincial Criminal Law'? Apart from Mills' use of the term, this characterization of regulatory offences never gained legal or popular purchase. Even though regulatory offences sometimes are referred to as 'quasi-criminal', almost no criminal taint attaches to those convicted. Notionally, as in the UK, because the law lacked the moral connotation associated with real crime and was legally constructed as a strict liability offence subject to a due diligence defence, Ontario's factory inspectors might have felt freer to prosecute employers who violated the law. Nevertheless, as in the UK, the factory inspectors adopted the view that resort to prosecution was only to occur after persuasion had clearly failed. In effect, the inspectors read a mental element into their discretionary judgements about when to prosecute a strict liability offence. Wilful disobedience or defiance of the inspectors' authority was generally required, and even then prosecutions were rarely pursued. As in England, violations of police regulation were conventionalized.

E. Conclusion

Putting criminal law to work in the construction of disciplinary and protective labour regimes in the early nineteenth century followed two different trajectories but converged over the course of the century around the view that employment relations were private matters of contract law, and not a concern of public order and 'true' crimes. Master and servant law was available in England as a legal and cultural foundation upon which to reconstruct disciplinary authority in the first stages of the industrial revolution, but not all masters needed or could easily mobilize the criminal law to discipline their workers. Parliament was not averse to recriminalizing worker breaches of contract to teach the industrial class to understand and respect the beauty of freedom of contract and, for the most part, local legal institutions did not balk at putting the criminal law to work. Workers were eventually able to throw off the yoke of criminal master and servant law, but that happened remarkably late in the development of the so-called free labour market, the 'very Eden of the innate rights of man' where '[t] here alone rule Freedom, Equality, Property and Bentham'.[121]

In Canada, on the other hand, the master and servant regime's roots were much shallower. By the time of its industrial revolution in the second half of the nineteenth century reliance on the criminal law to discipline the new industrial working class lacked widely shared legitimacy. In any event, by that time employers were actively developing other labour control strategies less directly dependent on law and the state.

When it came to building protective labour rights, most politicians were loath to criminalize employers who ruthlessly exploited child labour and extended hours of work for all at the expense of their lives and health. This was manifestly the result of freedom of contract. As Marx observed ironically, 'The contract by which he sold to the capitalist his labour-power proved, so to say, in black and white that he disposed of himself freely.'[122] ↳ Thus, protection was a violation of freedom of contract. While legislators could ignore the reality of the massive inequality between workers dependent on owners of capital to secure subsistence, it was more difficult to justify children's or women's working conditions as the result of a free exchange between juridical equals. These vulnerable workers were deserving of a measure of protection, provided it did not impinge too greatly on employer profits and did not criminalize the employing class. The challenge, therefore, was to construct protection without stigmatizing employers as criminals at a time when criminal law was one of the few legal technologies available to the state. Out of this tension weakly enforced regulatory law was born.

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Notes

1 The legal centrepiece of the corporative system of regulation was the Statute of Artificers of 1562, which consolidated and extended a number of regulations deriving from early legislation, most notably the Ordinance of Labourers of 1349 and the Statute of Labourers of 1351. In combination with the Poor Relief Act of 1601 these laws constituted the formal origin of justices' powers to set wages and to regulate the service relationship. Douglas Hay, 'England, 1562–1875: The Law and Its Uses' in Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562–1955* (University of North Carolina Press 2004) 59–116; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 62.

2 Markus Dirk Dubber, *The Police Power* (Columbia University Press 2005) especially 51–53.

3 Marc W Steinberg, *England's Great Transformation: Law, Labor and the Industrial Revolution* (University of Chicago Press 2016).

4 Alan Fox, *History and Heritage: The Social Origins of the British Industrial Relations System* (George Allen & Unwin 1985) 5

5 Lindsay Farmer, 'The Obsession with Definition: The Nature of Crime and Critical Legal Theory' (1996) 5 Social & Legal Theory 57; Nicola Lacey, 'Historicising Criminalisation: Conceptual and Empirical Issues' (2009) 72 Modern Law Review 936; Alan Norrie, *Crime, Reason and History* (3rd edn, CUP 2014) 9–38.

6 Farmer, 'The Obsession with Definition' (n 5); and Lindsay Farmer, *Criminal Law, Tradition and Legal Order* (CUP 1997) especially 123–28.

7 Ellen Meiksins Woods, *The Origins of Capitalism* (Verso 2017).
8 Nancy Fraser, 'Contradictions of Capital and Care' (2016) 100 New Left Review 99.
9 EP Thompson, 'Time, Work-Discipline and Industrial Capitalism' (1967) 38 Past & Present 56.
10 Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests and Institutions* (OUP 2016) 90.
11 Douglas Hay, 'Property, Authority and the Criminal Law' in D Hay and others (eds) *Albion's Fatal Tree* (Pantheon 1975) 17–63.
12 Nicola Lacey, 'The Rule of Law and the Political Economy of Criminalization: An Agenda for Research' (2013) 15(4) Punishment and Society 349, 351.
13 WG Carson, 'The Conventionalization of Early Factory Crime' (1979) 7 International Journal for the Sociology of Law 37; Norrie (n 5) 104–09
14 Lacey, *In Search of Criminal Responsibility* (n 10) 90. Nineteenth-century criminal commentators on the criminal law, such as Sir James Stephens, shared the view that regulatory offences were not truly criminal law. Later theorists have debated this point. For an interesting account, see Jeremy Horder, 'Bureaucratic Criminal Law: Too Much of a Bad Thing?' in RA Duff and others (eds), *Criminalization: The Political Morality of the Criminal Law* (OUP 2014) 101–32.
15 Lacey, *In Search of Criminal Responsibility* (n 10) 36.
16 ibid 63.
17 Deakin and Wilkinson (n 1) 62.
18 Christopher Frank, *Master and Servant Law: Chartists, Trade Unions, Radical Lawyers and the Magistracy in England, 1840–1865* (Ashgate 2010) 6.
19 Deakin and Wilkinson (n 1) 45. The only remnant was the right of workers to bring a civil action to pursue unpaid wages under the Master and Servant Act.
20 Deakin and Wilkinson (n 1) 34; Fox (n 4) 101.
21 Hay 'England' (n 1) 106.
22 Doug Hay and Paul Craven, 'Introduction' in Hay and Craven, *Masters, Servants, and Magistrates* (n 1) 35.
23 Fox (n 4) 6.
24 Deakin and Wilkinson (n 1) 65, 107
25 4 George IV, c 34; Robert J Steinfeld, *Coercion, Contract, and Free Labor in the Nineteenth Century* (CUP 2010) 47.
26 Deakin and Wilkinson (n 1) 63.
27 Frank (n 18) 4; Hay, 'England' (n 21) 106.
28 Frank (n 18) 181–82,
29 ibid 6.
30 Marc W Steinberg, 'Marx, Formal Subsumption and the Law' (2010) 39 Theoretical Sociology 173, 181.
31 Frank (n 18) 5.
32 Steinberg, 'Marx, Formal Subsumption' (n 30) 184.
33 ibid 184.
34 Steinberg, 'Marx, Formal Subsumption' (n 30) 184, quoting *The Potters' Examiner and Workman's Advocate* (vol 1, 12 December 1843) 29.
35 Hay and Craven, 'Introduction' (n 22) 8.
36 Frank (n 18) 76.
37 ibid 14.
38 ibid 51.
39 ibid 51, quoting 'Law against Coal King Law: Good News for the Miners' *Northern Star* (23 December 1943) 4. On Roberts' successful challenges to master and servant convictions, see Raymond Challinor, *A Radical Lawyer in Victorian England* (IB Taurus 1990) 143–46.
40 The precise legal wording of the 1823 statute arguably excluded task contract and casual hiring from its scope, and the 1844 bill was designed to remedy this 'defect'.
41 Frank (n 18) 73.
42 ibid 74
43 ibid 75.
44 ibid 241.
45 ibid 243.
46 Hay, 'England' (n 1) 106–07.
47 Hay, 'England' (n 1) 107.
48 Frank (n 18) 83.
49 ibid 83. Statistics were only available after 1858 and their reliability is questionable. However, they indicate that for the last two decades of the master and servant act usually over 10,000 workers were prosecuted for breach of contract,

Steinberg, *England's Great Transformation* (n 3) 41.

50 Deakin and Wilkinson (n 1) 45.

51 Frank (n 18) 110; Steinfeld, *England's Great Transformation* (n 3) 61, 71; Hay, 'England' (n 1) 116

52 Steinfeld, *England's Great Transformation* (n 3) 62.

53 Frank (n 18) 6.

54 Known as Lord Elcho's Act, the 1867 Master and Servant Act is 30 and 31 Vict c 141.

55 Steinberg, 'Marx, Formal Subsumption' (n 30) 181.

56 Quoted in Steinberg, 'Marx, Formal Subsumption' (n 30) 81, from a submission to the Royal Commission considering reform of the laws, PP 1867 XXXII [3873] pp 322–323.

57 Hay, 'England' (n 1) 108, 116.

58 Deakin and Wilkinson (n 1) 75.

59 Hay, 'England' (n 1) 74.

60 Jeremy Webber, 'Labour and the Law' in Paul Craven (ed), *Labouring Lives: Work and Workers in Nineteenth-Century Ontario* (University of Toronto Press 1995) 133–36. Can [Prov]) 10&11 Vict c11 (1847). An 1851 statute provided broadly similar terms to apprentices (Can [Prov]) 14&15 Vict c 11 (1851)). The master and servant act was extended to skilled workers in 1855 (Can [Prov]) 18 Vict c 136 (1855)).

61 Paul Craven, 'Canada, 1670–1936' in Hay and Craven, *Masters, Servants, and Magistrates* (n 1) 197.

62 ibid 198–99.

63 ibid 198.

64 ibid 199.

65 ibid 201.

66 ibid 200–201.

67 ibid 201.

68 ibid 202.

69 Debates of the House of Commons of the Dominion of Canada, 4th Session, 3rd Parliament, 524 (Edward Blake). Paul Craven, '"The Modern Spirit of the Law": Blake, Mowat and the Breaches of Contract Act 1877' in C Blaine Baker and Jim Phillips (eds), *Essays in the History of Canadian Law, Vol VIII* (University of Toronto Press 1999) 142.

70 Constitution Act, s 92(15).

71 Craven, 'Canada' (n 61) 203.

72 ibid 215

73 ibid 291. Apprentices were another matter, and the labour movement did not object to their imprisonment for desertion.

74 Karl Marx, *Capital: Vol 1* (Progress 1867) 195 <www.marxists.org/archive/marx/works/download/pdf/Capital-Volume-I.pdf> accessed 7 August 2019.

75 Katrina Honeyman, *Child Workers in England, 1780–1820: Parrish Apprentices and the Making of the Early Industrial Labour Force* (Ashgate 2007) especially ch 9.

76 Joanna Innes, 'Origins of the factory acts: the Health and Morals of Apprentices Act, 1802' in Norma Landua, (ed), *Law, Crime and English Society, 1660–1830* (CUP 2002) 230; JT Ward, *The Factory Movement 1830–1855* (Macmillan 1962) 19; 42 Geo III, c 73 (1802).

77 BL Hutchins and A Harrison, *A History of Factory Legislation* (Franklin 1903) 1.

78 John Foster, *Class Struggle and the Industrial Revolution* (Weidenfeld and Nicolson 1974) 8; Gareth Stedman Jones, *Languages of Class* (CUP 1983) 25; Robert Gray, *The Factory Question and Industrial England* (CUP 1996) 21. On the role of gender, see Mariana Valverde, '"Giving the Female a Domestic Turn": The Social, Legal and Moral Regulation of Women's Work in British Cotton Mills, 1820–1850' (1988) 21(4) Journal of Social History 619; Colin Creighton, 'Richard Oastler, Factory Legislation and the Working-Class Family' (1992) 5(3) Journal of Historical Sociology 292.

79 RG Kirby and AE Musson, *The Voice of the People: John Doherty, 1798–1854: Trade Unionist, Radical and Factory Reformer* (Manchester University Press 1975) 346.

80 ibid 357. Also, see Stewart Field, 'Without the Law? Professor Arthurs and the Early Factory Inspectorate' (1990) 17(4) Journal of Law and Society 445.

81 10 Geo IV c 51 (1829).

82 Carson (n 13) 41. Also see his 'The Institutionalization of Ambiguity: Early British Factory Acts' in Gil Geis and Ezra Stotland (eds), *White-Collar Crime: Theory and Research* (Sage 1980) 142.

83 Cecil Driver, *Tory Radical: The Life of Richard Oastler* (OUP 1946); Stewart Angas Weaver, *John Fielden and the Politics of Popular Radicalism 1832–1847* (Clarendon Press 1987).

84 Patrick Joyce, *Work, Society and Politics: The Culture of the Factory in later Victorian England* (Rutgers University Press 1980) 1–41.

85 Richard Oastler, *Eight Letters to the Duke of Wellington* (London, 1835) 40–41, reproduced in *Richard Oastler: King of the*

Factory Children; Six Pamphlets, 1835–1861 (British Labour Struggles: Contemporary Pamphlets, 1727–1850 (Arno 1972).

86 Ward (n 76) 32–59.

87 *Report from the Select Committee on the Bill to Regulate the Labour of Children in Mills and Factories* (1831–32 Parliamentary Papers, vol 15) 460.

88 Nob Doran, 'From Embodied "Health" to Official "Accidents": Class, Codification and British Factory Legislation 1831–1844' (1996) 5(4) Social & Legal Studies 523.

89 Gray (n 78) 37–47; Kirby and Musson (n 79) 366–79; Stedman Jones (n 78) 57–59.

90 *First Report of the Central Board of His Majesty's Commissioners for Inquiring into the Employment of Children in Factories* (1833) (RC).

91 Oliver McDonagh, 'The Nineteenth Century Revolution in Government: A Re-Appraisal' (1958) 1(1) The Historical Journal 52.

92 A Bill To regulate the Labour of Children and young Persons in the Mills and Factories of the United Kingdom (5 March 1833, 9 Will IV—Sess 1833) s 29.

93 ibid ss 30, 34-35.

94 An Act to Regulate the Labour of Children and Young Persons in Factories, 3 & 4 William IV, c 103 (1833).

95 ibid s 31; Carson (n 13) 41–42.

96 John Fielden, *The Curse of the Factory System* (Cobbett 1836) 14. Also, see Weaver (n 83) ch 5.

97 Kirby and Musson (n 79) 392–94.

98 Steve Tombs and Dave Whyte, *Safety Crimes* (Willan 2007); Paul Almond, *Corporate Manslaughter and Regulatory Reform* (Palgrave Macmillan 2013).

99 *Report of Inspector Rickards* (Parliamentary Papers, 1835, XL) 694, cited in PWJ Bartrip and PT Fenn, 'The Evolution of Regulatory Style in the Nineteenth Century British Factory Inspectorate' (1983) 10(2) Journal of Law & Society 201, 204.

100 ibid 205.

101 Rhys Jones, *People/States/Territories: The Political Geographies of British State Transformation* (Blackwell 2007) 128.

102 Carson (n 13). Other obstacles to prosecutions included limited resources and (inaccurate) perceptions of magisterial bias. See AE Peacock, 'The Successful Prosecution of the Factory Acts, 1833–55' (1984) 37(2) Economic History Review 197; Peter Bartrip, 'Success or Failure? The Prosecution of Early Factory Acts' (1985) 38(3) Economic History Review 423; AE Peacock, 'Factory Act Prosecutions: A Hidden Consensus' (1985) 38(3) Economic History Review 431.

103 An Act to amend the Laws relating to Labour in Factories, 7 & 8 Vict c 15 (1844). For an insightful discussion, see Valverde (n 78) and Creighton (n 78).

104 PWJ Bartrip and PT Fenn, 'The Administration of Safety: The Enforcement Policy of the Early Factory Inspectorate, 1844–1864' (1980) 58 Public Administration 87.

105 Bryan D Palmer, *Working-Class Experience* (2nd edn, McClelland & Stewart 1992) 81–87.

106 Eric Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850–1914* (University of Toronto Press 1990) 82–90.

107 Constitution Act, 30 & 31 Victoria, c 3 (UK)(1867), ss 91, 91(27) & 92(13), 92(15).

108 Canada. Debates of the Senate (19 April 1882), 367.

109 Tucker (n 106) 90–96.

110 47 Vic, c 39, ss 31–34. A federal factory bill introduced at about the same time as the Ontario bill was later withdrawn.

111 Constitution Act, s 92(15).

112 Canada. House of Commons Debates (1 April 1885) 881 (Bergin).

113 ibid 882–83 (Mills).

114 ibid 883. On Mills' background Robert C Vipond, *Liberty & Community: Canadian Federalism and the Failure of Confederation* (State University of New York Press 1991) *passim*.

115 Canada. House of Commons Debates (1 April 1885) 884.

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117 Canada. House of Commons Debates (21 May 1888) 1659.

118 ibid 1661.

119 ibid.

120 Harry J Glasbeek and Susan Rowland, 'Are Killing and Injuring at Work Crimes?' (1979) 17 Osgoode Hall Law Journal 506.

121 Marx, *Capital* (n 74) 123.

122 ibid 195.

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