Prison Labor and the Paradox of Paid Nonmarket Work

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Abstract

Purpose
To use insights from economic sociology to analyze how U.S. employment law understands and regulates the relationship between prison labor and conventional employment.

Methodology
Legal analysis of all published court opinions deciding whether federal employment laws such as the minimum wage apply to prison labor.

Findings
Courts decide whether prison labor is an “employment relationship” by deciding whether it is an “economic” relationship. Most interpret prison labor as noneconomic because they locate it in a nonmarket sphere of penal relationships. A minority of courts use a different conception of the economy, one which interprets prison labor as a form of nonmarket work.

Implications
The economic character of prison labor may be articulated using the same theoretical perspectives and analytical techniques developed to analyze family labor as economically significant nonmarket work. Doing so, however, too readily accepts the market/nonmarket distinction. Given the thoroughly social character of market work, prison labor’s highly structured, institutionally specific character does not preclude characterizing it as market work, and some of its features support interpreting it as such.

In this legal context, identifying practices as economic or not, and as market or not, has concrete consequences for the actors themselves. Rather than using market/nonmarket distinctions as analytical tools, scholars might treat actors’ designation of an economic practice as part of a market or not as a site of conflict, subject to institutionalization, and worthy of sociological study.
Prison labor presents a paradox for scholars studying the relation, and distinction, between market and nonmarket work. Inmates typically get paid an hourly wage and are tightly supervised. Their work situation possesses two features often used to define employment relationships: what in the social science literature Tilly & Tilly label “short-term monetization” and “time-discipline” (1998: 30-31) and what legal doctrine would call “compensation” and “control.” Moreover, prison labor lacks features prominent in discussions of nonmarket work, features often referenced as “intimacy”: work embedded in a highly particularized relationship among a small number of individuals and often characterized by the worker’s identification with or protection of the interests of those who benefit from her labor (Kittay, 1999; Zelizer, 2005c). Nonetheless, this chapter shows that U.S. courts consistently cast prison labor as a nonmarket activity and, they reason, therefore not “economic” in nature.

Such classificatory questions have concrete stakes. Because of its nonmarket character, courts exclude prison labor from the legal category of employment. Only employment relationships are subject to labor protections like the minimum wage. Therefore, courts’ account of economic action becomes linked to whether inmates can challenge working conditions such as prison wages at or below $1 per hour.

Judicial inquiry into prison labor’s economic character implicates questions prominent in economic sociology. Concepts developed by economic sociologists can illuminate legal disputes over the nature of employment relationships. In turn, these legal boundary disputes suggest fruitful extensions of sociological research into law’s role in constructing markets (Dobbin and Dowd, 2000; Edelman and Stryker, 2005).

Prison labor raises questions about the boundaries of employment that differ from those usually addressed by legal scholars or sociologists of work. Most research addresses distinctions
internal to labor markets. That is, when work crosses the line and exits employment, it nonetheless remains market work, albeit of a different form. Streeck, for instance, posits a labor market consisting of “contracts of employment” and “contracts of work” (2005), roughly tracking the legal distinction between employees and independent contractors. Similarly, casual, contingent, or informal work may lie outside employment and yet remain within the labor market (Portes and Haller, 2005). My topic here is a different boundary of employment, across which lies the domain of nonmarket work.

Conversely, scholarly analysis of nonmarket work rarely leads to interrogating the scope of “employment” or “labor markets.” Instead, the point, or premise, is that employment is simply one form of the more general, and basic, category “work.” Nonmarket work, especially household production, forms another “sector” external to the labor market (Abbott, 2005; Cameron and Gibson-Graham, 2003). What divides the sectors is the line between paid and unpaid work. On such an account, employment remains analytically untouched, though it must share the spotlight with nonmarket work.

My goal here is to analyze a form of subordinated work as economic by questioning how courts distinguish market from nonmarket work, rather than by simply expanding the economy “beyond the market” (Abraham and Mackie, 2005). To do so, I look at “nonmarket” work through the lens of economic sociologists’ accounts of “markets.” First, I illuminate the economic character of nonmarket activity and its integration into the workings of market institutions, drawing on the Polanyian critique of an autonomous market economic sphere (Krippner and Alvarez, 2007). That boundary crossing is what we see when prison industries advertise themselves as “the best kept secret in outsourcing” (Unicor Federal Prison Industries, 2008), a way to shift production between market and nonmarket modes. Second, the force of the
“non” in nonmarket work comes from its contrast with market activity imagined as asocial, arms-length bargains. That view of how markets operate runs afoul of the Granovetterian account of markets’ embeddedness in social ties (Krippner and Alvarez, 2007) and of social constructivist accounts of markets more generally (Bandelj, 2008).

If market work is socially embedded work, then what makes it “market” work nonetheless? And how can this criterion for “market” status distinguish “nonmarket” work without simply invoking the presence or absence of social embeddedness, which would provide no distinction at all? My suggestion is that market/nonmarket distinctions should themselves become an object of study rather than a tool of analysis. Perhaps there is a social process of differentiating institutions into market and nonmarket spheres that itself requires investigation, a process that risks being reified when “market” and “nonmarket” are used as simple terms of description.

To approach these questions, this chapter begins by reviewing basic concepts in economic sociology and feminist analysis of household labor that give rise to the notion of nonmarket work and identify activities as such. Next I use these concepts to interpret legal disputes over whether labor and employment laws apply to prison labor, disputes that turn on whether prison labor is an “economic” phenomenon. Prison labor may readily be characterized as economic by conceptualizing it as nonmarket work, contrary to courts’ reduction of the economy to markets. Doing so, however, preserves a sharp distinction from employment understood as market work. I question the stability of that distinction by suggesting how prison labor also could be interpreted as market work. The chapter concludes with brief reflections on the practical significance of market/nonmarket distinctions and the prospects for studying them sociologically.
Economic Sociology of Markets and of Nonmarket Work

As I will show, legal disputes over whether to characterize prison labor as an “economic” phenomenon largely reproduce social scientists’ notorious formalist/substantivist debate about the nature and scope of economic action. This section briefly reviews that debate (Polanyi, 2001 [1957]; Cancian, 1966; Granovetter, 2001) and related insights from economic sociology and allied fields. Of crucial importance are two complementary lines of argument that attack distinctions between economic and social action. The first emphasizes the social character of economic action within conventional markets; the second emphasizes the economic character of social institutions conventionally seen as separate from market relationships.

Formalism identifies the economic with means-ends rationalizing behavior by individuals seeking to maximize the realization of their discrete interests; these interests are construed narrowly to prioritize material or financial concerns. In other words, economic action is the “economizing” behavior associated with market actors in modern Western economies (Cancian, 1966: 466). Insofar as institutions are characterized by other forms of action, they are not economic in nature. Standing apart from such institutions, the economy is understood as a self-regulating sphere governed by its laws of supply and demand.

Economic sociology rejects the formalist view, especially insofar as it defines rather than merely describes economic action. Instead, economic phenomena are conceived broadly as “that complex of activities which is concerned with the production, distribution, and consumption of scarce goods and services” (Smelser and Swedberg, 2005: 3; see also Zelizer, 2005c: 3, 13).

The first line of analysis opened up by this substantivist view is a sociology of markets (Fligstein and Dauter, 2007). This strand of economic sociology takes "bread-and-butter economic issues" (Swedberg and Granovetter, 2001: 6) as the objects of study and seeks to
understand them as fundamentally structured by, or “embedded” in, “ongoing social relations” irreducible to arms-length bargains between self-interested maximizers (Granovetter, 2001: 51). The quarrel here is over how to understand market economic action, not over what conduct constitutes “the economy.”

A second possibility opens up once markets no longer define the field: economic activity may exist outside conventional market institutions. This direction has been less prominent within economic sociology (Abbott, 2005; Zelizer, 2005b). Feminist scholars in sociology and other disciplines, however, have deployed a substantivist framework to incorporate into accounts of economic life various activities associated with women and domestic households, ranging across subsistence agriculture, food preparation, clothing production, housecleaning, and child care (Benería, 1988; Boydston, 1990; Folbre, 1982). The most adventurous work incorporates activities for which markets are suppressed or may not exist at all, such as sexuality, friendship, and maintaining kinship ties (Di Leonardo, 1987; Ferguson, 1989; Zelizer, 2005c).

To characterize nonmarket activity as “economic,” the family labor literature identifies three important phenomena that I will label “circulation,” “substitution,” and “incorporation.” The first way to articulate nonmarket activity’s economic character is to trace how work products circulate across what Arjun Appadurai labels “regimes of value” (1986) or between what Viviana Zelizer calls “circuits of commerce” (2005a). Consider an industrial homeworker who

1 Volunteering and other forms of (often gendered) civic participation also have been incorporated into the “care work” framework, which also overlaps with research influenced by Marxian traditions that take production of use value as basic and that consider work ranging from domestic production to forced labor (Tilly and Tilly, 1998; Tomlins, 1995).

2 These are not the same concepts, but their considerable overlap suffices for present purposes.
works at home in part to coordinate production with child-care and who mobilizes her familial relationship to child or spouse to enlist them in sorting beads or rolling cigars. The embeddedness of that work in home and family is compatible with its products’ subsequent circulation in wider markets (Boris, 1994). Similarly, when familial housework and caregiving enable wage-workers to do their jobs (either the next day or when they grow up), intimate activity helps reproduce the labor traded in markets as a commodity (Fineman, 2004; Folbre, 2001; Rapp, 1982).

Second, even if work products never circulate beyond their original context, they may substitute for goods and services that otherwise would be obtained from conventional markets. Thus, subsistence agriculture substitutes for food purchases, home cooking substitutes for restaurants and take-out, parental child care substitutes for day care centers or nannies, and so on (Abbott, 2005; Boydston, 1990; Folbre, 2001).

Circulation and substitution undermine the notion, long criticized by feminists, that there are analytically distinct, albeit complementary, “separate spheres” of market economy and intimate family (Olsen, 1983). Instead, we see actors participating in both, and in ways that interact via their economic character.

Thus far, the economically productive character of nonmarket activity remains grounded in its connection to market transactions. We know that when commercial restaurants hire workers to prepare meals to sell to customers, this is economic activity; therefore, when family members do something functionally equivalent, that must be economic, too. Moreover, because they are anchored in conventional market transactions outside a nonmarket institution, circulation and substitution tell us nothing about the character of relationships among
participants within that nonmarket institution. All we know is that these relationships can be characterized as economic.

The economic character of nonmarket work also resides within nonmarket relationships. As Zelizer notes more generally, one consequence of separate spheres thinking is an extensive "failure to recognize how regularly intimate social transactions coexist with monetary transactions: parents pay nannies or child-care workers to tend their children, adoptive parents pay money to obtain babies, divorced spouses pay or receive alimony and child support payments, and parents give their children allowances, subsidize their college educations, help them with their first mortgage, and offer them substantial bequests in their wills" (2005c: 27). Focusing specifically on family labor, legal scholar Joan Williams argues that “unpaid” housework and caregiving should be understood as one component of a larger complex she labels “domesticity” (2001). Domesticity institutionalizes an intra-household gendered division of labor between market and nonmarket work. It also structures (unequally) access both to the products of nonmarket work (by, paradigmatically, a wageworking husband and minor children) and wage income from market work (cf. Hasday, 2005).

These domestic relationships illustrate a third way to characterize nonmarket activity as economic: they incorporate quintessentially economic transactions involving the distribution (to the worker) of valuable goods, services, money, or other “media” of exchange (Zelizer, 2005c). Incorporation, in effect, is circulation in reverse: the stuff of conventional market transactions circulates beyond them and is incorporated into nonmarket relationships.

Examining how incorporation occurs requires us to confront the argument that understanding intimate relationships as economic reduces them to market transactions and thereby misrecognizes their nonmarket character. That critique relies on a shift back to
formalism. On the one hand, particularistic, affective, noninstrumental relationships among family members preclude characterizing them as economic. On the other hand, if we do treat family caregiving as an economic phenomenon, then we must interpret it as (implicitly) a market bargain between the caregiver and somebody, whether a spouse, the state, or the recipient of care. The latter, of course, is precisely the intellectual agenda that Gary Becker pioneered within neoclassical economics (1976). In Zelizer’s terms, the shift is from “separate spheres” to “nothing-but”: identifying a relationship as economic fully specifies its essential nature because being economic entails a specific (market) relational form, and nothing else (2005c).

Those normatively critical of markets worry that highlighting the economic character of nonmarket relationships will transform their meaning, experience, and social organization, disrupting or defiling them through “commodification” (Radin, 1996; Walzer, 1983; for a critical review, see Williams and Zelizer, 2005). This “commodification anxiety” (Williams, 2000) is triggered by feminist proposals to recognize and restructure nonmarket work’s economic character through such institutional changes as linking family caregiving to post-divorce entitlements, qualification for social security benefits, or contemporaneous state support. Such reforms seek to reverse the legacy of what historian Jeanne Boydston describes as the “pastoralization” of women’s housework as manifesting maternal nurturance (1990); this process of “turning labor into love” (Silbaugh, 1996) complemented men’s migration from household production into industrial wage labor in the antebellum United States. Underpinning the commodification critique is the notion that intimate relationships’ pastoral quality will be undermined by integration with economic transactions, particularly monetary ones; this concern reflects the “hostile worlds” notion that intimate and economic relationships are intrinsically incompatible (Zelizer, 2005c).
Zelizer’s work opens up a space in which a relationship’s incorporation of economic transactions yields no intrinsic push toward market meanings and forms; to the contrary, such transactions may be constitutive of particular forms of intimacy. Because it defuses the commodification critique, Zelizer’s analysis has been particularly important to feminist legal scholars seeking to enhance the economic entitlements linked to nonmarket work without stripping that work of its distinctive nonmarket character (Ertman and Williams, 2005; Hasday, 2005).

Notice, however, that this capacity simultaneously to recognize a practice’s economic character and to differentiate it firmly from the market blunts some of the force of calling it “work.” Both analytically and politically, the point of characterizing family caregiving or housework as “nonmarket work” is to identify their commonality with employment or “market work”: both are work, just in different market and nonmarket forms. Identifying this commonality, however, simply begs the question whether a shared status as “economic” or “productive” is more important than a differentiated status vis-à-vis the market form. Formalist distinctions between economic and noneconomic actions or institutions might simply be recast as distinctions among market and nonmarket forms. These would be two “substantive varieties” of economic action characterized by different sets of “political factors, cultural understandings, institutional arrangements, and social ties that shape different systems of economic organization” (Bandelj, 2008: 11).

I now turn to the concrete case of prison labor to illustrate how concepts of nonmarket work provide insights beyond the household context and to suggest how some of their limitations might be overcome.
Background: Prison Labor and Employment Law

Prison labor is a ubiquitous feature of incarceration in the contemporary United States. Of the nearly 1.5 million inmates in state and federal prisons, approximately half participate full-time in a work program. This work usually involves relatively low profile “state use” activities on government projects ranging from the iconic task of stamping license plates to baking cookies for holiday parties. Many inmates perform “prison housework,” doing the laundry, cooking the meals, and sweeping the floors, thereby maintaining the prison itself. The remaining 10-20% of inmate labor occurs in “prison industries,” through which either the prison or a contractor sells inmate-produced goods and services. The ultimate customer sometimes is another arm of government, which might purchase anything from office furniture to military body armor. Private firms also use inmate labor for tasks like taking telephone hotel reservations or stitching graduation gowns. Prison industries generate $2 billion in revenue annually. The value of state use projects has not been quantified systematically, but hiring equivalent labor probably would cost billions (Zatz, 2008).

Most prison labor programs pay hourly or daily wages, though some either add or substitute “good time” credit toward reduced sentence length. For instance, California inmates staff crews that fight forest fires, for which they receive $1 per hour and one day off their sentence for each day of work (Arnoldy, 2008). Although rates of pay vary widely, they almost always fall far below the federal minimum wage that applies to employment covered by the Fair Labor Standards Act (FLSA), which in 2009 will be $7.25 per hour.

The first FLSA challenge to such wages came from an inmate working for a Michigan military contractor stamping artillery shell casings during World War II (Huntley, 1948).³ No

³ My analysis here and throughout is based on my review of the 68 reported judicial opinions
further litigation appears in published court opinions until the early 1970s, when decisions began to address inmate work in pharmaceutical companies’ facilities within prisons (*Sims*, 1971; *Hudgins*, 1971; *Lavigne*, 1982; *Alexander*, 1983; *Gilbreath*, 1991).

Courts rejected these early claims on the ground that the inmates were not “employees” of the private entities being sued. Judges reasoned that the prison ultimately controlled the flow of inmate labor, deciding who could participate and reserving the right to terminate participation. Moreover, prisons negotiated many of the conditions under which inmates worked, including their rate of pay. These are standard legal considerations when deciding whether a worker is employed by one firm or another. In essence, the courts cast the defendant firms as customers of the prison, with the prison acting either as a subcontractor providing services to the firm or as a temp agency supplying workers (*Weiss*, 2001). The *Huntley* opinion explained that “plaintiffs were employees of the Michigan prison industries and not of the defendant [military contractor]” (116).

This line of analysis ran into two difficulties. First, it conflicted with legal developments meant to prevent firms from using subcontracting and temp agencies to avoid employment law obligations. Drawing on precedents involving building maintenance workers and home health aides, a federal appeals court in 1984 rejected the argument that a prison’s “ultimate control” precluded an employment relationship between an inmate and the organization for which he worked (*Carter*). Instead, an employment relationship might exist based on the defendant’s role in selecting inmate workers, structuring and supervising their activities, integrating them into its larger operations, and paying them. The court further held that so long as these conventional deciding cases brought by inmates and other detainees under federal employment laws or their close analogues. For a full listing, see Zatz (2008: 882-84).
indicators of employment were present, inmate status alone did not preclude FLSA protection because nothing in the statute specifically excludes prisoners from coverage.

The second vulnerability of the “ultimate control” analysis appears in Huntley’s characterization of inmates as employees of the prison. By the mid-1980s, technical changes in the FLSA statute and in federal constitutional law made it much easier to assert minimum wage claims against state government agencies of all sorts (Zatz, 2008). FLSA litigation began to target state-run work programs and name the prison itself as the defendant, unlike earlier suits against private corporations. The prison’s high level of control now supported finding an employment relationship.

Within a decade of Carter, the earlier doctrines had collapsed, and courts routinely accepted that considerations of organizational control and integration favored the existence of an employment relationship. Moreover, they adopted Carter’s holding that nothing categorically excluded inmates from the class of employees. Instead, FLSA coverage turned simply on whether an employment relationship existed as a non-technical matter of ordinary social description. With these barriers cleared away, several federal courts (and one dissenting judge) ruled in inmates’ favor at preliminary stages of litigation, both in FLSA minimum wage suits (Watson, 1990; Gilbreath, 1991; Hale, 1992) and also in an employment discrimination case presenting analogous issues (Baker, 1988).

These inmate victories were short-lived. The tide again turned against inmate employment claims even though courts never revived the pre-Carter analysis of control. Instead, they amplified and elaborated an intuition that previously had been articulated in a secondary, subdued fashion: the penal context itself renders inmate labor fundamentally different from ordinary employment. One influential opinion set out to theorize explicitly “our common
linguistic intuitions,” which are “at least strained by the classification of prisoners as ‘employees’” (Vanskike, 1992: 807). Previous analyses focusing on control, the court explained, explored only one boundary of the employment relationship, that between employee and independent contractor. Prison labor implicates “a different boundary” (810), the line between economic and noneconomic activities that is my topic here.

**Echoing Formalism: Prison Labor as Nonmarket and Therefore Noneconomic**

Courts today generally classify prison labor as a noneconomic practice and therefore not employment. Vanskike reasoned that inmates were “not in a true economic employer-employee relationship” (812). Instead, in oft-quoted language, incarceration itself means that “[p]risoners are essentially taken out of the national economy” and placed into “the separate world of the prison” (810; Hale, 1993; Henthorn, 1994).

This conclusion that prison labor is noneconomic relies upon a formalist equation of the economic/noneconomic and market/nonmarket distinctions. If an activity falls outside the market then it falls outside the economy. “A true employer-employee relationship,” courts insist, involves a “bargained-for exchange of labor for mutual economic gain” (Harker, 1993: 133). The concept of “bargained-for” is drawn from the classical contract doctrine of “consideration” and refers to a mutually instrumental interaction, one in which each party acts for the purpose of eliciting the other’s act and does so, furthermore, to obtain commercial advantage. Moreover, because this instrumental exchange exhausts the entire relationship between the parties, it necessarily occurs “at arms’ length” (Harker, 1993: 133), outside any ongoing social connection or shared institutional context. The FLSA only applies where “labor is exchanged for wages in a free market” (Hale, 1993: 1394).
Measured against this conception of “traditional free-market employment” (Villareal, 1997), prison labor easily falls short. Courts demonstrate separation from the market by pointing to embeddedness in the prison. An inmate’s work assignment is only one moment in an ongoing relationship of incarceration. Rather than an isolated arms-length encounter, it “arises out of the prisoner’s conviction for a crime” (McCaslin, 1996: 657) and his “status as an inmate” (Williams, 1991: 997). The relationship is not open to all comers willing to make a deal; instead, this “opportunity is open only to prisoners” (Danneskjold, 1996: 43).

Not only is the prison a bounded institution rather than an open market, but this institution is structured by motivations and interests irreducible to the economic maximization attributed to market transactions. Opinions finding no employment relationship are replete with references to the prison’s “rehabilitative or penological interest in inmate labor” (Danneskjold, 1996: 43-44) and denial of “pecuniary” interests (Hale, 1993: 1395): “Inmates perform work [for the prison industry] not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training” (Harker, 1993: 133). Outside the litigation context, too, prison administrators and supporters of inmate labor insist that the labor process provides inmates with valuable occupational skills, personal development, and dignity (Flanagan, 1993; Wignall, 2005). Even analysts less sympathetic to prison labor see it as shaping inmates into citizen-workers and not simply as extracting valuable work (Foucault, 1995; Melossi and Pavarini, 1981). Labor programs also provide a short-term disciplinary mechanism by occupying inmates’ time and by creating a perquisite that may be offered, continued, or withdrawn based on the prison’s judgment of the inmate’s “good behavior” (Carlson, 2004; Sykes, 1971).

Prison labor’s integration with the distinctive goals and structures of imprisonment also shapes how courts interpret inmates’ subjection to coercion, both in their work and in prison life
more generally. When prison authorities require inmates to perform particular work assignments, the involuntary nature of the work provides a relatively straightforward distinction from the bargains struck by “free labor” in the “free market.” Thus, a prisoner “legally compelled to part with his labor as part of a penological work assignment” has not “freely contracted . . . to sell his labor” (Henthorn, 1994: 686).

Courts adhere to this distinction between prison coercion and market freedom even if inmates possess some formal control over their work. When inmates exercise choice among possible work assignments, courts reason that inmates still “have not freely contracted to sell their labor. Choosing where to work is not the same as choosing whether to work” (Nicastro, 1996: 1447). Even in cases where inmates face no obligation to work at all, courts still conclude that “[v]oluntary work serves all of the penal functions of forced labor” and thus should be treated the same; after all, “the prisoner is still a prisoner” (Danneskjold, 1996: 43). Involuntariness rooted in the prison’s authority over the inmate simply provides a way of illustrating an underlying point: “his work at the prison was merely an incident of his incarceration” (Morgan, 1994: 1293).

Placing prison labor in a separate, noneconomic penal sphere also reflects courts’ understanding of the market economy. Market and penal relationships are perceived to be mutually exclusive only because courts imagine market encounters as arms-length, instrumental, financially-motivated bargains,. On this foundation, courts take what I have labeled an “exclusive market” approach to analyzing employment’s economic character: the presence of any penal character marks the absence of a market relationship (Zatz, 2008: 882).

The exclusive market approach is particularly visible when courts confront aspects of prison labor that might seem characteristic of market economic transactions. Judges relentlessly
rebut any suggestion of continuity with market labor by tying inmate work to its penal context.

As noted above, voluntariness has been dismissed as not detracting from the fundamentally penal character of inmate labor. One court goes further and argues that voluntariness reinforces that penal function. Why? Because voluntary work may “better serve[] institutional needs of the prison” when “the quality of performance is difficult to measure and may depend on motivation” (Danneskjold, 1996: 43). Here, a classic “market” rationale for incentive wages becomes a marker of penality.

Similarly, courts deny that prisons’ financial interests in inmate labor—from selling the products or from avoiding other expenditures—implies any pecuniary purpose. Sometimes they simply point to evidence of nonfinancial goals, as if the two could not coexist (Burleson, 1996). More aggressively still, these financial consequences can be characterized as advancing the institutional interests in effective punishment: inmate labor “offset[s] some of the cost of keeping them [imprisoned]” (Bennett, 2005: 410) and forces “prisoners [to] bear a cost of their incarceration” (Danneskjold, 1996: 43).

The prison labor caselaw shows a disembedded understanding of economic life to be a ubiquitous feature of judicial reasoning. Nonetheless, in courtrooms, too, there are alternative analyses of economic action, to which I now turn.

*Echoing Substantivism: Prison Labor as Nonmarket but Economic Nonetheless*

Although the exclusive market approach dominates the prison labor caselaw, it has been challenged by what I have termed the “productive work” approach to employment’s economic character (Zatz, 2008: 883). In substantivist fashion, it identifies economic activity with the production and exchange of goods, services, and money rather than with market dynamics. As a
result, it resists dividing “the economy” from other institutions and instead shows how prison labor interacts with conventional labor and product markets.

Exemplifying the productive work approach is the last major opinion broadly endorsing employee status for inmate workers. In *Hale v. Arizona*, the U.S. Court of Appeals for the Ninth Circuit adopted an exclusive market analysis and concluded that prison labor “is penological, not pecuniary” (1993: 1394-95); Judge Norris dissented vigorously. Joined by one colleague, he reasoned that “[t]he economic reality is that [the inmates] work. Their labor produces goods and services that are sold in the channels of commerce. And [the prison industry] pays them for their efforts. Common sense tells us this relationship is both penological and pecuniary” (1403).

The productive work approach characterizes prison labor as an economic exchange (if not necessarily a bargain) of financially valuable work and monetary payment. The attribution of an “economic” character rests on linking the prison-prisoner relationship to the prison’s interactions with actors operating in conventionally recognizable markets.

What provides these links are processes of circulation and substitution, the same ones so central to analysis of nonmarket family labor. Prison labor’s products are fungible with the products of conventional market labor, and thus inmate workers are fungible with conventional employees. The prison mediates between two different forms of economic activity.

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4 In related contexts, one court has rejected an “artificial dichotomy” in which “one must be either a welfare recipient or an employee and cannot be both” (*United States*, 2004: 94); another tribunal, though subsequently overruled, held that nothing prevented workers from being employees “simply because they also are students” (*New York University*, 2000: 1209). On the relationship between the prison labor cases and employment law analysis of paid nonmarket work more generally, see Zatz (2008).
Judge Norris’ dissent relentlessly focuses on the wide circulation of prisoner-made goods. The inmate workers in question produced clothing, raised livestock, manufactured belt buckles, and answered customer telephone calls. These products and services either were sold in conventional product markets or were consumed by private firms that otherwise would have acquired substitutes from such markets. On his analysis, “[t]he fact that prisoners are forced to work is irrelevant because the unfair competitive effect is the same regardless whether the worker is forced to work or free to work” (1403).

Although only a dissenting view in Hale, a similar analysis carried the day in the most prominent employment law victory for inmate workers. In Watson v. Graves (1990), another federal appeals court applied the FLSA to the relationship between inmate workers and a private construction contractor. The arrangement was part of an ad hoc work-release program orchestrated by the local sheriff, who happened to be the contractor’s father-in-law. The court emphasized how inmate labor interacted with the local construction market: “Obviously, [other] construction contractors in the area could not compete with [the defendant’s] prices because they had to pay at least minimum wage for even unskilled labor . . . . [J]ob opportunities for non-inmate workers in the area [were] severely distorted by the availability of twenty dollar per day workers from the parish jail” (1555).

At the heart of Watson is the observation that circulation allows substitution to occur at steps removed from the initial context of work. If an inmate produces a garment that the prison sells in the market, then this circulation causes substitution vis-a-vis the purchaser’s alternative source of garments. The purchaser substitutes the prison’s products for the products of another (market) garment supplier, and thus the prisoners’ labor substitutes for the alternative supplier’s employees.
Prison labor’s integration into wider markets is most obvious when tangible products circulate outside the prison, but prison labor also affects external markets by substituting for them and thereby reducing demand. This, of course, is the mechanism behind the cost-savings often touted as an advantage of prison labor. When its inmates fight forest fires, California saves $80 million a year, in large part because it avoids having to expand its regular workforce paid $10-12 an hour or to extend the hours (and potentially incur overtime) of its existing employees (Arnoldy, 2008).

Even services internal to the prison yield substitution. Consider the analysis offered by inmates whose work as prison law clerks was integral to the prison’s constitutionally mandated provision of legal services to other inmates: “if no qualified inmates had been available in the inmate population, the prison would have had to turn to the outside market in the general legal community [and] therefore the State derived a pecuniary benefit from appellants' work” (Jovanovich, 1995, *2). Similarly, laundering inmate garments and sweeping prison floors are tasks that private contractors or noninmate workers could be hired to do. Indeed, the Vanskike opinion recognized this point but rejected the entire line of argument from substitution because of its sweeping implications: “carried to its logical conclusion, prisoners must be paid minimum wage for anything they do in prison that can be considered ‘work’” (1992: 811).

In contrast to Vanskike, most courts attempt to reconcile their exclusive market approach with an acknowledgment that prison labor’s interaction with conventional markets sometimes gives it an economic character. To do so, they seek to differentiate those forms of inmate labor that do and do not affect wider markets. Courts routinely assert that services consumed in the operation of the prison do not raise “the possibility of ‘unfair competition’ between prison and
private labor” (Danneskjold, 1996: 44). Some even assert that no substitution occurs when prison industries sell their products to other units of government, rather than to private firms (Harker, 1993; Miller, 1992).

Opinions written in the exclusive market vein also dampen their conflict with productive work approaches by downplaying prison labor’s productivity. In terms redolent with the racialization of work and crime, courts figure prisoners as economically incompetent, presumptively unemployed prior to entering prison, and fated to idleness if they finish their

5 Similarly, even opinions using a productive work approach to find an employment relationship may limit their reach to cases involving circulation of prisoner-produced goods. Watson suggested that any work done “within the confines of the prison” would avoid competition with “workers in job markets outside the prison” (1990: 1555). Another judge would have found an economic relationship when inmates produce goods for sale but not when they perform “prison maintenance or produce goods used solely by the state” (Gilbreath, 1991: 1334). Courts considering other forms of nonmarket work have been more expansive, finding employment relationships where institutional maintenance work was “useful” or conferred “economic benefits” on the employer (Souder, 1973: 813; United States, 2004: 97; Zatz, 2008)).

6 These efforts to separate prison labor from conventional markets are not solely matters of judicial discourse. They are institutionalized in the rules and practices that structure inmate labor programs, employment law aside. The Depression-era Ashurst-Sumners Act criminalizes sale of inmate-produced goods in interstate commerce. By barring circulation, this process of “enclaving” (Appadurai, 1986) partially separates prison labor from “the economy.” This ban does not prevent other mechanisms of substitution, however, and there are numerous exceptions (Zatz, 2008).
sentence without newfound skills. Prison labor thus “trains prisoners in the discipline and skills of work” (Danneskjold, 1996: 43) and thereby “make[s] them less likely to return to crime outside” (Bennett, 2005: 410). Such assessments of inmates complement the assertion that the prison only “has a rehabilitative, rather than pecuniary, interest in [the inmate’s] labors” (Harker, 1993: 133). Additionally, courts elide prisons’ receipt of valuable work from inmates by treating their labor as disembodied, unmediated by inmates’ agency, and already in the prison’s possession from the start. Ubiquitous throughout the prison labor caselaw is the notion that “[an inmate’s] labor belongs to the prison and is at the disposal of the prison officials” (Watson, 1990: 1553).

To complete its characterization of prison labor as an economic exchange, a productive work approach highlights the fact that, as Judge Norris observed, the prison “pays [inmates] for their efforts” (see also Villarreal, 1997). The prison-prisoner relationship thus incorporates the quintessentially economic medium of money. Moreover, prisons pay in a form denoted a “wage” and structured as one: a fixed amount per time worked. As Zelizer has shown, the form of monetary payments often significantly shapes their role as “definers of symbolic meanings and social relations” (1996: 486). Indeed, in related legal controversies over workfare, volunteers, and training programs, courts have placed great weight on the existence of payment in the form of compensation (Zatz, 2008). Sociological research on welfare work programs likewise emphasizes conflict over whether to characterize payments to participants as wages or welfare benefits (Goldberg, 2007). Even courts ruling against inmates rarely resist characterizing their payments as wages, though some have analyzed them as “gratuities” (McGinnis, 1975: 1224 n.2 & 1238; Harris, 1968: 1016-17; cf. Henthorn, 1994: 686). Indeed, one recent appellate case held that inmates have “a property interest in payment for their labor,”
albeit in a dispute where the existence of an employment relationship was not at issue (Allen, 1996: 261). Furthermore, although inmates’ wages are integrated into a distinctive system of prison accounts subject to restricted access and mandatory deductions (Zatz, 2008), courts do not rely heavily on this form of earmarking to distinguish prison labor from market work.

Instead, courts integrate wage payments into an exclusive market analysis by focusing on how these monies are incorporated into inmates’ lives after payment is received. Contemporary opinions denying employment status consistently emphasize that the prison provides inmates with basic necessities of food, shelter, and clothing (themselves often incorporated from extra-prison economies). This, in turn, differentiates inmates from ordinary employees who rely on wage income to put food on the table through consumer purchasing. At the most technical level, this point questions whether the goals of a minimum wage apply to inmate labor. More broadly, it differentiates inmate labor from employment, where employment is understood as an institution that connects the employer-employee relationship to specific patterns of consumption and family life. Employment, in other words, is not just about earning compensation, it is about “earning a living” (Bennett, 2005: 410; cf. Kessler-Harris, 1990).7

The irony here is that the paradigmatic “free labor situation” cannot be reduced to a socially isolated instrumental bargain in which “labor is exchanged for wages in a free market” (Hale, 1993: 1394). Instead, “free labor” links the receipt of wage payments to a broader, and specific, form of life involving market consumption and maintenance of an independent household (cf. Stanley, 1998). Thus, what renders paid nonmarket work conceptually possible is

7 Prison labor thus provides a particularly striking illustration of Zelizer’s thesis that monetization does not necessarily marketize a practice’s meaning and displace its contextual significance (1997).
not simply inmate labor’s embeddedness in the prison, as opposed to a disembodied market, but also its deviation from the “substantive variety” (Bandelj, 2008) of embeddedness associated with the labor market and yet not reducible to “market” mechanisms.

Prison Labor as Market Work

The productive work and exclusive market approaches to prison labor have fought to a conceptual draw. On the one hand, inmates surely participate in economic relationships in which they perform productive work. On the other, conceptualizing their efforts as nonmarket work admits a basic difference from conventional market employment, a difference that resides in the space for a multiplicity of economic forms.

At this juncture the study of nonmarket work would do well to rejoin the economic sociology of labor markets. After all, the preceding discussion largely has taken for granted the concept of “market work.” The labor markets described by economic sociologists bear little resemblance to the caricature held up by courts adopting an exclusive market approach, and characterizing inmate labor as nonmarket work leaves that caricature unchallenged. The carework literature does somewhat better on this point. It occasionally notes that some specific “nonmarket” feature of carework can be found routinely in the labor market (Williams, 2001), or vice versa (Zatz, 2006), but it rarely casts a critical eye on the market/nonmarket distinction itself (Cameron and Gibson-Graham, 2003).

This section offers as a thought experiment an analysis of prison labor as market work, something courts and commentators have not considered previously. Such an would make a

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8 In some cases, arguments for continuity between nonmarket and market carework rely upon treating market carework as exceptional in its deviation from arms-length market bargains (Kittay, 1999: 95).
stronger connection between conventional employment and prison labor than simply characterizing inmates as “workers” engaged in productive activity. My purpose is not to argue that prison labor really is market work. Instead, I hope to direct critical attention toward market/nonmarket distinctions by showing their flexibility once informed by economic sociological accounts of market embeddedness and nonmarket economies.

The case for treating prison labor as market work rests on two complementary arguments. The first disputes the account of market work to which prison labor is compared. Conventional employment possesses many of the “nonmarket” features attributed to prison labor, and so these features do not differentiate the two. The second, affirmative argument is that prison labor possesses many of the features (beyond productivity alone) used to place conventional employment in the market domain.

The first point relies on scholarship that Streeck summarizes well: “Generally, sociological research and theory maintain that the labor market is not really a market, in the sense of a universalistic, impersonal, color- and gender-blind mechanism matching supply of, and demand for, labor. . . . More generally still, economic sociologists have argued that not only are labor markets not the sort of markets that economists believe they are, but they would not function if they were” (2005; see also Tilly and Tilly, 1998).

Although different in their particulars, prototypical employment relationships possess the same general characteristics that courts attribute to prison labor in order to contrast its social and institutional specificity with market work. Ordinary employees work against a backdrop of compulsion, including legal compulsion, in their immediate relationships to employers, their general participation in the labor market, and their background access to economic resources (Atleson, 1983; Tomlins, 1995; Zatz, 2008). The matching of workers and jobs is highly
structured by social networks, mediating institutions, and workers’ status locations (Granovetter, 1995; Tilly and Tilly, 1998). Rather than a discrete market transaction between individual actors, employment itself is a historically specific, highly institutionalized form the shape of which has been influenced pervasively by state policy (Jacoby, 1995; Piore and Safford, 2006; Stone, 2004). And various actors—owners, managers, employees, unions, and the state—participate in and shape these institutions in ways irreducible to instrumental financial self-interest. Instead, employment relationships are influenced by the assertion or development of occupational identities, commitments to an interplay between work and family roles, beliefs in work’s redemptive value in daily life, promotion of employment as a basis of democratic citizenship, and prevention of social disorder (Abbott, 2005; Kessler-Harris, 1990; Schultz, 2000; Streeck, 2005).

Put simply, the thoroughgoing social character of prison labor is consistent not only with being (substantively) an economic relationship but also with being a market practice. Moreover, the social specificity of different forms of employment (and employers and employees) defies the universal abstraction of “market work.”

None of this denies that employment exhibits processes ordinarily identified with markets, that financial incentives matter, that supply and demand affect prices, and so on. So if those processes were absent from prison labor, a clear distinction might still exist. But that is not the case.

“Market” processes are omnipresent in prison labor, though sometimes it takes some looking to see them and sociological research on contemporary inmate work programs is limited. Most obviously, when inmates work directly for private firms, there is every reason to think that those firms approach these workers roughly as they do ordinary employees. Operators explain
their participation in terms of access to low wages, low turnover (because workers cannot simply quit to take another job), and low pressure to provide job security (in part because layoffs do not generate unemployment insurance claims), in combination with average work quality (Reynolds and Rostad, 2005; Weiss, 2001). Programs operated directly by the state often seem to have similar goals; frequently they are mandated to simulate private business organizations and turn a profit. Similarly, cost-savings from substitution often explicitly motivate prison labor programs, as with the California firefighters discussed earlier. In another case, those prisoners working in a county-run labor program were excluded from a group of inmates transferred from county to state custody because hiring employees to replace their work as janitors and cooks would have cost the county $1 million per year (Rupp, 2006). These “market” considerations are not necessarily the exclusive or dominant ones; the point is simply that they are present and significant.

In terms of how inmates’ work is organized, the most obvious market feature is the use of wages as a financial incentive to work effort. As one prison industry supervisor straightforwardly put it, “It doesn’t matter how well you treat them. These guys will never work hard unless they get paid. Would you?” (Gray and Meyer, 1996: 130) Indeed, in settings where multiple work programs exist, privately-run programs use higher wages, in combination with their ability to select among applicants, to attract the better-skilled and more productive inmates (Miller and Crieser, 1986). Implicit in these phenomena, of course, is that inmates approach work assignments in part as a financial proposition and adjust their behavior to increase earnings.

Finally, recall that U.S. law actually does treat inmate work as market employment in a narrow, somewhat vaguely defined set of circumstances. Legal authorities classify inmates as employees when “the prisoner voluntarily works outside the prison for a private company that
supervises and directly pays the prisoners” (Barnett, 1999: 2). Inmates in work-release programs with such characteristics have been treated as employees for purposes of the minimum wage (Barnett, 1999; Reimonenq, 1996; Watson, 1990), employment discrimination law (Walker, 1994; Baker, 1988), collective bargaining by labor unions (Speedrack, 1997), and credit toward social security eligibility (U.S. Department of Labor, 1999). Even courts ruling against inmate employment claims generally accept the results of these work-release cases, treating them as exceptions that prove the general rule that inmate labor is a noneconomic relationship. An opinion by prominent judge and law & economics scholar Richard Posner recently explained that “[t]hose prisoners weren’t working as prison labor, but as free laborers in transition to their expected discharge from the prison” (Bennett, 2005). Another leading opinion characterized the work-release cases as ones in which inmates “freely contracted with a non-prison employer to sell [their] labor” (Henthorn, 1994).

Courts’ classification of work-release programs as market employment illustrates the flexibility of market/nonmarket distinctions. These programs easily could be characterized as nonmarket work, like other prison labor. Each of the factors typically offered to classify work-release as market employment—voluntariness, physical location, work for the imprisoning government versus an independent entity—can be and has been interpreted to reach an opposite result or rejected as arbitrary (Dansksjold, 1996; Henthorn, 1994). I noted this above in Dansksjold’s account of voluntariness. Similarly, although courts tend to see an ordinary commercial contract in work-release, one readily could reinterpret the program as one piece of larger penal project. The “simulate[d] private business working conditions” in prison industries have been characterized as serving the goals of rehabilitation, not establishing similarity to market labor (George, 1993: 586). Indeed, one court held that although an inmate on work-
release had an employment relationship with the private firm where he worked, the prison itself was not a “joint employer” because “the purpose of the program is to prepare inmates upon release from prison to function as responsible, self-sufficient members of society” (Reimonenq, 1996: 476). In fact, all the rationales offered for prison industries’ nonmarket “penological purpose” are routinely used to justify work-release, too (Flavin, 2005; Turner and Petersilia, 1996).

These penal aims, moreover, play an important role in structuring work-release programs. As in other inmate work programs, the prison often retains partial or total control over the inmate’s wages, deducting sums for victim restitution, prison costs, or child support.

Notwithstanding courts’ characterization of work-release as “voluntary,” inmates may be disciplined by the prison for quitting work without good cause or refusing to work overtime. And the prison exercises control over which inmates get to participate, when they participate, with what employer, and so on.

All of these points have been raised by employers to argue that work-release participants are not their employees. Courts have rejected them (Walker, 1994; Speedrack, 1997), even though analogous arguments are used to place other forms of inmate work outside the market economy. Moreover, this work-release exception has ill-defined boundaries that have shifted over time. One decision from the 1970s held that because work release is authorized by statutes governing inmates, nothing in employment law “convert[s] such status to that of an employee” (Worsley, 1976). The pivotal Carter decision discussed earlier continues to be cited as an example of work-release employment, and yet a later case with indistinguishable facts was decided differently by the same court (Danneskjold, 1996).
Nonetheless, courts continue to reaffirm that inmates on work-release are employees in the labor market, even if they do not agree on precisely when or why. The puzzle is how and why work-release and other forms of inmate work get assigned to different sides of a market/nonmarket divide.

Would economic sociologists achieve greater consensus on whether work-release programs are a “market” phenomenon, and why? Such questions seem to have received little attention. The term “market” remains in use to characterize objects of study—“sociology of markets”—even while the field rejects economists’ descriptions of how these markets operate. Scholars direct their empirical and theoretical energies toward understanding the phenomena already taken to be “market” institutions and practices, not toward investigating how that market designation is produced or justified by the social actors in question or by the researcher. Indeed, sociologists have noted the absence of a clear definition of “the market,” primarily as a critique of the conceptual foundations of economics (Lie, 1997). But within economic sociology, too, the question arises of what, if anything, is the content of this still-ubiquitous category.

In their recent review, Fligstein and Dauter grapple with this problem and offer a sociological definition of markets as a distinct economic form: “[M]arkets imply social spaces where repeated exchanges occur between buyers and sellers under a set of formal and informal rules governing relations between competitors, suppliers, and customers” (2007: 113). This definition is quite capacious if terms like “buyer,” “seller,” “supplier,” and so on are deployed in a non-question-begging way. Certainly there are repeated exchanges between inmates and their putative employers in both work-release and other prison labor programs, and these exchanges are structured by formal and informal rules. Moreover, those exchanges occur within a broader social space that links relationships among the prison, inmate, buyers of inmate-produced goods
and services, and outside entities that contract with prisons to operate work programs; the state participates as a regulator, a funder of prisons and work programs, and as the initial supplier of inmates through the criminal justice system.

Competition might seem to be the crucial characteristic of markets (Fligstein and Dauter, 2007; Swedberg, 2005) arguably lacking from prison labor. But perhaps not. As already noted, there is some competition among inmates for selection into work programs and some competition among work programs for selection by inmates. Moreover, the dynamics of substitution mean that prisons place inmate labor into competition with alternative suppliers of goods and services to the prison, including conventional firms and conventional employees. Similarly, the dynamics of circulation mean that private firms place their conventional “market” suppliers of goods and services into competition with prison industries and prison inmates. In effect, “market” and “nonmarket” sources of goods, services, money, and labor “compete” with one another when actors bridge these social fields (Zelizer, 2005a) and when these actors also control the manner and extent to which they draw from one field or the other.

Of course, the “formal and informal rules” that structure these processes of exchange and competition differ in important ways from those at play in conventional labor markets. But that point simply exemplifies the key idea in economic sociology that there is no singular market logic but instead a plurality of markets (Swedberg, 2005).

Thus, the interactions between prison labor and conventional labor markets easily could be conceived as a relation between two different markets rather than between market and nonmarket spheres. Similarly, a building contractor making an election between hiring unionized tradespeople and streetcorner day laborers bridges two differently structured labor markets. The day laborer may be excluded from the union and the tradesperson may not be
welcome on the streetcorner, yet surely they are in competition in the sense relevant to encompass them both within some larger market field. The puzzle then is why we would group together day labor and unionized trades as species of the abstraction “market labor” and yet exclude prison labor. Instead, we might either dispense with “the labor market” as an overarching category or include within it all three forms of work organization (and many others).

**Conclusion**

Whether work-release, prison industries, or prison housework is “market” work might matter little were no more at stake than bounding an academic subdiscipline like the sociology of markets. But in the legal disputes I have examined, quite concrete consequences flow from whether a relationship is labeled market employment or not. To some extent, this reflects courts’ assimilation of the widespread but misguided view that economic activity occurs exclusively within markets and that it does so solely on the basis of asocial, profit-motivated, means-ends rationality. Insights from economic sociology undermine that view and provide some support for courts’ construction of the productive work alternative: prison labor involves processes of circulation, substitution, and incorporation, not radical separation from “the economy.”

Furthermore, the law hardly seems unique in rendering significant a practice’s designation as a market phenomenon. The very fact that actors understand their action to occur in a “labor market” may serve to authorize those goals and forms of action associated with “markets” and to delegitimize others (Bandelj, 2008). Likewise, this fact may shape both participants’ and observers’ interpretations and experiences of their action (Albiston, 2007).

For these reasons, it should be unsurprising that an institution’s social designation as part of “the market” may itself be an object of struggle. That is one important lesson to be taken from Chad Goldberg’s fascinating recent study of work-relief and workfare programs, in which quite a
lot turned on “classification struggles” over whether participants in these programs were “workers” in the labor market or “welfare recipients” in the domain of state assistance (2007; see also Krinsky, 2007b). Similar issues arise in contention over paid home care (Boris and Klein, 2007) and graduate student labor (Singh et al., 2006). In each case, market/nonmarket distinctions mediate conflict over who is a “worker” (Krinsky, 2007a).

Such struggles are not open-ended, and so with time the “market” or “nonmarket” status of a particular practice may come to be stabilized and institutionalized. I have argued elsewhere that labor and employment law itself participates in that process (Zatz, 2008). Subjection to a particular form of regulation (or not) differentiates certain practices (like prison labor and ordinary employment) and groups others together (like various forms of employment) in ways that further affect the “formal and informal rules” by which they operate. For instance, the regular payment of cash wages and the separation of employer-employee from supplier-consumer relationships (versus payment in credit at the company store) is itself partly a requirement imposed by employment law (Steinfeld, 2001; Zatz, 2008); yet the form and basis of payment also plays an important role in differentiating employment, which is subject to such laws, from “nonmarket” work and “independent contracting,” which are not.

Of course, law’s influence here likely will be mediated and transformed by other intra- and inter-organizational processes, as the burgeoning literature on corporate antidiscrimination and antiharassment policies has shown (Dobbin and Kelly, 2007; Edelman et al., 1999). It would be fascinating to know how organizations that employ multiple forms of labor—conventional employees, inmates on work-release, inmates within prison facilities, student workers, volunteers, and so on—go about deciding how to classify them for a variety of different purposes, how they structure working arrangements that differentiate among workers or create
similarity, and so on. Analogous studies have begun with regard to differentiation between “core” employees and those hired through temp agencies or employed by subcontractors (Smith, 1998; Walsh and Deery, 2006), but these address only distinctions among what all would regard as varieties of market work.

A mainstay of sociological analysis of markets, including labor markets, is that they are produced and institutionalized over time as “a social and political project that begins without stable relationships” (Fligstein and Dauter, 2007; Jacoby, 1995; see also Streeck, 2005). Employment law disputes over prison labor suggest that there also may be much to learn from studying the social and political project and process of institutionalizing labor practices as market or nonmarket work.

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