The Impossibility of Work Law

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A. Introduction

To maintain its vitality and its virtue, labour law must reach beyond its traditional domain of employment relationships and grasp the full range of relationships that organize productive work.1 To that now-familiar call for ‘work law’, this chapter adds a decidedly pessimistic note. ‘Work law’ is indeed necessary, but it is also impossible. The very insights about the plasticity of work that make employment law look fatally narrow also imply that work law would be fatally shallow or, in avoiding that fate, would reproduce the narrowness it sought to escape. I reach these conclusions by considering how debates over the scope of the employment relationship, and the viability of broader and more complex categories, might be informed by consideration of nonmarket work.

B. Taking nonmarket work seriously

This section makes the case that labour law scholars, and policies regulating labour, need to include nonmarket work as an object of study and regulation. With the notable exception of the Supiot Report,2 even expansive treatments of labour law ‘beyond employment’ typically substitute a conception of ‘work law’ that encompasses market labour but goes no further. There are two broad reasons to revisit this limitation.

First, the techniques traditionally used to distinguish employment from other market work also are losing their ability to differentiate it from nonmarket work.


1 Eg, G Standing, Work After Globalization (Edward Elgar, 2009) 268; and B Langille, this volume.

To show this, I distinguish two dimensions – control and exchange – along which a boundary has been erected between employment and other work, and I show the permeability of both.

Second, the primary reasons for expanding labour law’s reach to other forms of market work are applicable to nonmarket work as well. These reasons are the displacement of protected employees by other unprotected workers and exclusion of these nonemployees from labour law’s protections. Both dangers arise from the relational flexibility of work: quite different social arrangements can yield similar economic outputs.

1. Breaking down the boundaries of employment

When nonmarket work is considered, domestic housework and caretaking within families typically provides the principal example. Using this site to conceptualize nonmarket activity as work and analyze its status within labour law risks confusion between two distinct ways to distinguish nonmarket work from employment.

First, family labour exists outside the supervisory structure of institutional control at the heart of conventional definitions of employment. There is no obvious ‘employer.’ For related reasons, family labour lacks employment’s temporal structure dividing ‘personal’ time from the ‘work day.’ Thus, along what I label the ‘control dimension’ of traditional tests for employee status, family labour seemingly falls far from the employee and close to the independent contractor.

Second, family labour occurs outside a conventional market relationship. There is no arm’s-length contract focused on mutual pecuniary gain by tightly linking payment and services. Instead, the work is integrated into intimate, multidimensional relationships with particular family members, distinctive motivations, and context-specific forms of valuation. These considerations are quite distinct from those sounding in control. Instead, they cohere with those conventionally used to distinguish employees from volunteers and students or trainees, who either receive no compensation from an employer or produce nothing for one. I refer to this as the ‘exchange dimension’ of employee status.

Figure 15.1 schematically presents four paradigmatic combinations of control and exchange considerations to clarify the two different modes of distinguishing employment from family labour. To be sure, one also could characterize family labour in a way that converged with conventional employment, translating traditional wifely duties into those of housekeeper, nurse, nanny, and prostitute. Here, I press in the opposite direction, starting with employment and making it look more like nonmarket work.

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3 Supiot, above n 2; Standing, above n 1; KB Silbaugh, ‘Turning Labor Into Love’ (1996) 91 Nw UL Rev p.
2. Following work across the market boundary

My research on prison labour in the United States reveals a class of cases in which, unlike family labour, any distinction from employment arises entirely along the exchange dimension. Inmate workers are as tightly supervised, controlled, and disciplined as one could imagine. Moreover, prison labour programmes often are designed to simulate the institutional arrangements typical of conventional employment. Nonetheless, US courts conclude, or seriously contemplate, that inmate workers are not ‘employees’ for various statutory purposes, not due to inadequate control but because of ‘a different boundary’ to the employment relationship. Thus, prison labour helps us isolate the exchange dimension and explore its contours.

When, as is typical, courts find no employment relationship, they do so on the theory that employment is necessarily an economic relationship. They reason that prison labour is non-economic because it is thoroughly embedded in the social organization of imprisonment. The work is shaped by incarceration’s coercive context and by institutional goals that include matters of punishment, rehabilitation, and discipline. As one court explained, ‘work at the prison was merely an incident of incarceration.’ In contrast, another reasoned, ‘[a] true employer–employee relationship involves a ‘bargained-for exchange of labour for mutual economic gain’ between two free agents dealing ‘at arm’s length.’

Courts thus invoke considerations characteristic of employment’s exchange dimension in a context more challenging than that of volunteers or trainees. Unlike volunteers, inmates generally have been paid wages at a set rate, often hourly, tied

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9 Vansikke v Peters, 974 F 2d 806, 810 (7th Cir 1992) (USA).
10 See also C Fenwick, ‘Regulating Prisoners’ Labour in Australia: A Preliminary View’ (2003) 16 AJLL 284.
11 Morgan v MacDonald, 41 F 3d 1291, 1293 (9th Cir 1994) (USA).
12 Harker v State Use Industries, 990 F 2d 131, 133 (4th Cir 1993) (USA).
directly to time worked. And, unlike trainees, there is little doubt that they do useful work, though the form varies. Sometimes they produce goods and services contributing directly to prison or governmental operations – cooking meals in the prison cafeteria or fighting forest fires – and sometimes they produce for sale in wider markets, such as data entry of mail order catalog purchases or manufacturing of belt buckles.

Courts rely on classic separate spheres reasoning to distinguish inmate work that is ‘merely an incident of incarceration’ from employment’s ‘bargained-for exchange of labour for mutual gain.’ Consistent with a worldview identifying the economy with the market and opposing it to other major social institutions, courts characterize prisoners as ‘essentially taken out of the national economy’ and placed into ‘the separate world of the prison.’ The noneconomic sphere is the prison not the family, but the conceptual underpinnings are identical.

The prison labour cases provide a template for a much broader class. Other examples include work performed by welfare recipients as a condition of receiving their benefits, by people with disabilities as part of rehabilitative programmes, by graduate students who provide teaching or research assistance, and so on. The easy distinctions that apply to family labour do not explain these situations involving productive work with a temporal and supervisory structure quite similar to conventional employment. Consequently, employment classification disputes focus on the exchange dimension, and putative employers characterize the activity as internal to some noneconomic social sphere – as crime, as punishment, as rehabilitation, as care.

As an alternative to separate spheres, feminist scholars in sociology and other disciplines have developed competing accounts of economic life. These fully incorporate activities associated with women and domestic households, ranging across subsistence agriculture, food preparation, clothing production, housecleaning, and child care. To characterize nonmarket activity as ‘economic,’ the family labour literature identifies three important phenomena: circulation, substitution, and incorporation.

First, products of nonmarket activity circulate between nominally distinct institutional spheres. An industrial homeworker may sort beads or roll cigars at home to coordinate production with child care and mobilize familial relationships that enlist child or spouse in the work. Notwithstanding this domestic embeddedness, the products subsequently circulate in conventional markets just like those produced in a factory. Similarly, familial housework and caregiving enable current and future wage-workers to work in labour markets.

13 Vanskike v Peters, above n 9, 810; see also Hale v Arizona, 993 F 2d 1387 (9th Cir 1993) (USA); and Henthorn v Dept of Navy, 29 F 3d 682 (DC Cir 1994) (USA).
16 E Boris, Home to Work (Cambridge University Press, 1994).
17 R Rapp, ‘Family and Class in Contemporary America’ in B Thorne and M Yalom (eds), Rethinking the Family (Longman, 1982); N Folbre, The Invisible Heart (New Press, 2001); and J Fudge, this volume.
Second, work products may not circulate but still substitute for goods and services that otherwise would be obtained from conventional consumer markets. Subsistence agriculture substitutes for food purchases, home cooking for restaurants and take-out, parental child care for day care centers or nannies, and so on.18

Third, as Viviana Zelizer’s work has demonstrated, nonmarket relationships ubiquitously incorporate quintessentially economic transactions that distribute valuable goods, services, money, or other ‘media’ of exchange.19 Focusing specifically on family labour, Joan Williams interprets ‘unpaid’ housework and caregiving as components of a larger complex she labels ‘domesticity.’ Domesticity institutionalizes an intra-household gendered division of labour and structures (unequally) access both to the products of nonmarket work (by, paradigmatically, a wage-working husband and minor children) and wage income from market work.20

These tools easily can pick apart the notion that prison labour is noneconomic just because it is embedded in the prison. Economic circulation arises through prison labour’s downstream effects on conventional markets, most obviously when inmates manufacture goods that are sold in competition with those produced by conventional employees. Additionally, inmate workers may directly substitute for ordinary hired employees. When the governor of Iowa threw a holiday party featuring cookies baked by state prisoners, he didn’t have to hire a caterer.21 A federal prison labour programme advertises its services as ‘the best kept secret in outsourcing.’22 Finally, conventionally ‘economic’ goods, services, and money are incorporated into the relationship between prison and inmate, most directly when the prison pays an hourly wage.

Based on such arguments, some courts take the view that because prison labour is productive work, the relationship is economic in character notwithstanding its penal nature. Accordingly, they classify prison labour as employment. One judge reasoned, albeit in dissent, that: ‘The economic reality is that [the inmates] work. Their labour 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.’23

Understood in these terms, nonmarket work can easily breach the boundaries of employment along its exchange dimension. At root, the point comes from the long tradition in economic sociology and anthropology harking back at least to Karl Polanyi: markets are simply one way to structure economic activity, understood as ‘the production, distribution, exchange, and consumption of scarce goods and services.’24

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20 J Williams, ‘From Difference to Dominance to Domesticity’ (2001) 76 Chi-Kent L Rev 1441.
21 W Petroski, ‘Iowa Prison Inmates Bake Up Yuletide Cheer’ Des Moines Register (Des Moines, 24 December 2006) 1B.
23 Hale v Arizona, above n 13, 1403 (Norris dissenting).
3. Following work across the control boundary

Labour law scholars are busily developing conceptual frameworks that displace the traditional focus on a worker’s place in a supervisory hierarchy within one organization. Doing so highlights aspects of work irreducible to the issues of control or subordination. These frameworks break down the boundary between employment and independent contracting. Stated in their relatively abstract forms, they do the same for employment’s boundary with family labour along the control dimension. Despite this, scholars have assumed, implicitly or by stipulation, that the work lying ‘beyond employment’ remains work within labour markets. Nonetheless, they imply that going beyond employment entails embracing all ‘work.’ In other words, they take for granted employment’s boundary along the exchange dimension and fail to grapple with nonmarket work.

For instance, Guy Davidov distinguishes questions of supervisory subordination from those of economic dependence. The two together characterize employment, but the latter alone might justify certain protections associated with an intermediate category of ‘worker’ or ‘dependent contractor.’ ‘Dependency on a specific relationship – especially economic dependency, but also dependency for the fulfillment of social and psychological needs – justifies various kinds of regulatory protections.’

This description seems to fit someone in an intensive caregiving relationship and for whom meeting economic needs depends on maintaining either that relationship (to the recipient of care) or to others who support it (for instance, a co-parent or a state social service programme). Indeed, Martha Fineman characterizes caretakers as facing ‘derivative dependency.’ Davidov’s dependency criterion certainly fits prisoners, students, and aid recipients whose access to income, goods, and services is tied to activities that take up much of their daily lives.

Judy Fudge calls for extending labour protections to all ‘personal work arrangements.’ She would jettison the bilateral model of employer/employee or user/contractor relationships and apply a flexible, multidimensional analysis of relationships between a worker and an ‘enterprise.’ An enterprise is ‘an economic unity that brings together physical, technical, and human resources oriented toward the achievement of a productive goal, whether the production of goods or services.’ Labour law would regulate this relationship according to the principle that an ‘entity that exercises control should be responsible for the risks and liabilities created’ and that ‘enterprises should share the risks inherent in socially useful activity.’

25 For an exception addressing the continuity between informal employment and unpaid family labour, see K Sankaran, ‘Informal Employment and the Challenges for Labour Law,’ this volume.
26 G Davidov, ‘Who is a Worker?’ (2005) 34 ILJ 57, 63.
27 MA Fineman, The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies (Routledge, 1995); see also E Feder Kittay, Love’s Labor (Routledge, 1999); AL Alstott, No Exit (Oxford University Press, 2004); and Folbre, above n 17.
29 Ibid 640.
programmes, or the broader complex of family–state interaction to be enterprises that achieve productive goals (the delivery of socially valuable caregiving) and in so doing create certain risks and vulnerabilities. More generally, the forms of paid nonmarket work described above all appear to take place within such enterprises. Nonetheless, Fudge restricts her analysis to ‘workers who sell their capacity to work.’

Mark Freedland offers a similarly capacious concept of the ‘personal work nexus’: ‘the connection or connections, link or links, between a person providing service personally and the persons, organizations or enterprises who or which are involved in the arrangements for or incidental to the personal work in question.’ Again, family caretaking fruitfully could be conceptualized within this apparatus. For instance, Freedland’s discussion of work’s temporal structure suggests ways in which a given form of market work may be more similar to a given form of nonmarket work than to other instances of market work. In some respects, home-based self-employment may be closer to family caretaking than to an assembly-line job. To his credit, Freedland tentatively steps away from paradigmatic ‘market’ relationships by briefly considering public officeholders and volunteers in the course of introducing into his analysis matters of motivation or purpose, non-contractuality, and ‘incidental’ arrangements. Nonetheless, these remain quite marginal; there is no suggestion that his broadened conception of work would require tackling major social institutions generally thought to be outside the purview of either labour or commercial law.

4. What is at stake? Misclassification, displacement, or exclusion?

A core concern about the growth of independent contracting, subcontracting, triangular employment, informal employment, and related phenomena is the sense that work is migrating from employment into these forms and thereby escaping labour law’s grasp. A common refrain is that labour law was designed around the ‘old’ workplace and needs to be updated to grasp ‘new’ forms of work. On a certain naïve view, all the fuss is puzzling. After all, if labour law’s raison d’être is to address problems specific to a particular relational form (employment), then the decline of that form and the growth of others is no cause for worry. The old problems continue to be addressed where they occur, and the new forms fail to present these problems. Three types of reason might explain why work outside traditional employment should provoke a shout rather than this yawn. In order of increasingly profound challenge to an employment-centered ‘idea of labour law,’ these are misclassification, displacement, and exclusion.

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30 Ibid 635.
32 KVW Stone, From Widgets to Digits (Cambridge University Press, 2004).
a. Misclassification

The narrowest framework analyzes alternate work arrangements as simple mislabeling or *misclassification*.33 Notwithstanding the presence of all essential features of employment, the employer dresses up the relationship as something else. On this view, employment is indeed the appropriate object of regulation, and the problem is simply one of clarifying and applying the appropriate definition of it. Some heroic efforts have been made to achieve this clarification,34 but the balance of opinion appears to be that getting employment right is not enough; we must supplement it with additional categories35 or altogether dislodge it from the center of labour regulation.36

b. Displacement

Diagnoses more capacious than misclassification see genuine variations in form, not mere window dressing, yet identify another type of regulatory evasion. Work that would have been organized as employment instead is structured otherwise, thereby escaping labour law’s reach. At this point, we face a fork in the road. One worry about nonemployment work structures is that they threaten displacement of employees. Insofar as the nonemployment form offers advantages – including nonapplication of labour law – employees may be pushed aside, their shoes filled by others working under conditions favourable to would-be employers who now obtain labour through other means. This displacement can occur either within the firm (laying off employees and shifting work to contractors) or between firms (organizing work in an alternate form that drives employment-based firms out of business). More subtly, labour standards within employment relationships may face downward pressure from the threat of such displacement.

Concerns about displacement recur throughout treatments of prison labour and other nonmarket work. For many, the danger that prison labour competes with and undermines conventional employment itself becomes a reason to classify prison labour as employment, so as to remove the incentive for regulatory arbitrage. This rationale for inmate coverage facilitates denial of concern for the inmates themselves. Instead, such coverage is declared necessary to the protection of ‘free labour’, much as labour rights for unauthorized migrants have served as a proxy for protecting citizen workers.37 Inversely, courts ruling against inmate coverage insist, often implausibly, that prisoners’ work does not threaten ordinary employees because of various restrictions on its form.38 In these ways, substitution and displacement are tightly linked, and the challenge they present is how to reconcile

33 ‘Working Beyond the Reach or Grasp of Employment Law’, above n 9.
35 Davidov, above n 4.
36 Freedland, above n 31; Fudge, above n 28; and Standing, above n 1.
seemingly significant differences between work relationships – including the social status of the workers – with the fungibility of work products.

On the surface, antidisplacement arguments keep employment central to labour regulation. Extending protections to nontraditional forms of work, perhaps even by labeling them ‘employment,’ protects traditional employees. But what about these traditional employees calls out for their defense, and what about these nontraditional workers makes them so threatening? One might have thought that competition from other forms of labour would be treated as just another factor in the competitive environment that affects labour market conditions. After all, employment levels and labour standards also are affected by commodity prices, consumer demand, trade regulation, the tax structure, and so on.39

Herein lies a difficulty in viewing labour law narrowly, or in antidisplacement rationales. If labour law simply remedies pathologies intrinsic to a specific relationship – employment – then it is difficult to understand why labour law should concern itself with threats to employees above and beyond those threats directly regulated by labour law within employment relationships. Antidisplacement reasoning treats employees as a favoured class, one with a protected interest not only in how they are treated if employed but also in remaining employed and, moreover, in being the ones who receive protections as opposed to others.

Unsurprisingly, antidisplacement rhetoric inevitably invokes a less technocratic conception of labour law, one that protects not merely people who happen to be employees but instead the state’s paradigmatic political subjects: ‘free labour,’ ‘hard-working, law-abiding citizens,’ and so forth. Inversely, arguments against employment status for nonstandard workers routinely diminish their desert by highlighting personal characteristics differentiating them from the paradigmatic citizen-worker, casting them as foreign, as criminal, as irresponsible, as not having family responsibilities, as in need of supervision, as ‘secondary workers.’40

Embracing a richer conception of whom labour law is for leaves open ample room for pragmatic debate: are the paradigmatic citizen-workers better protected, and honored, by sharply distinguishing them from potential interlopers, or must the latter receive protection precisely to make them unattractive as substitutes. For my purposes, however, what matters is that antidisplacement concerns open the door to analyzing the scope of labour protections in broader terms than internal features of an employee–employer relationship. By doing so, they beg deeper questions about why traditional employees are the proper subjects of labour citizenship and whether the criteria linking the two might properly apply beyond employment.

c. Exclusion

Misclassification and displacement provide reasons for labour law to concern itself with work that crosses, or at least confounds, the boundaries of employment, yet

39 Howe, this volume.
these reasons remain grounded in the protection of employees. A quite different line of argument focuses on the putative nonemployees. As with misclassification, the problem is that these workers do not receive the protections or support they deserve. However, they deserve these not because they are really employees but because employment is underinclusive of the work relationships that merit protection or support. In other words, an employment-centered labour law unfairly excludes these workers because, despite working outside an employment relationship, they nonetheless share with employees whatever factors appropriately trigger labour law coverage.

Claims of exclusion need not apply uniformly across all aspects of labour law. Davidov, for instance, argues that some aspects of labour law attach to subordination and others to dependency; the latter could appropriately apply to work relationships lacking the control characteristic of employment. By teasing out multiple features of the paradigm case of employment, scholars have reimagined labour law as concentric circles or related geometries. These devices use a method of subtraction. They start with employment as the paradigm case and then conceptualize other forms of work as employment minus some crucial feature. The latter merit protection by the subset of labour law responsive to the remaining employment-like features.

A formally similar but broader perspective on exclusion focuses on labour law’s place within the modern welfare state and on employment’s relationship to citizenship within that state. TH Marshall famously interpreted economic inequality as a barrier to full and equal social citizenship, treating labour market differentiation as the source of inequality and participation in the consumer economy as the measure of belonging. Labour law and social welfare policies together could reconcile egalitarian citizenship with market-generated inequalities.

Marshall’s implicit assumption of universal labour market participation is, however, fatally flawed, and for reasons closely related to his failure to consider matters of economic relations within households. As feminist critics have long noted, modern welfare states tend to reflect and reinforce a family wage system, in which the normative household consists of a wage-earning man married to a woman who keeps house and cares for the couple’s children. The male ‘breadwinner’s’ market production brings resources into the household for consumption by his ‘dependants.’ Insofar as labour law and complementary social welfare policies aim to support the breadwinner’s wage and facilitate dignified access to it, they attach social citizenship to the role reserved for men within the family wage system.

Feminist critics of employment-based social policies have argued that privileging market over nonmarket work is arbitrary, because what matters to social citizenship

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41 Davidov, above n 26.
42 Supiot, above n 2; and Davidov, above n 4.
44 T Skocpol, Protecting Soldiers and Mothers (Belknap, 1992); A Kessler-Harris, In Pursuit of Equity (Oxford University Press, 2001); L Gordon, Pitted but Not Entitled (Free Press, 1994); and N Fraser, ‘After the Family Wage’ in Justice Interruptus (Routledge, 1997) 41–68.
is the social contribution inherent in productive activity. In doing so they mimic standard formulations of labour’s law rationale that invoke not merely internal features of employment relations but instead the dignity of the working person as a productive citizen. This understanding of labour law echoes in its common gloss as the law of ‘workers,’ as if to call it merely the law of employment relations would miss much of the point. Picking up this ball and running with it, Fineman argues that: ‘Taking care of someone such as a child while they are young, until they “become their own person,” is work, represents a major contribution to the society, and should be explicitly recognized as such.’ Similar formulations are legion, including variations that conceptualize childrearing as producing a ‘public good’ that economically benefits others or as satisfying collective responsibilities for children’s well-being and development. At their most ambitious, such arguments lead toward a ‘caregiver parity’ model in which nonmarket care equals market employment in affording access to social citizenship. Nancy Folbre once called for financial supports for caretakers ‘equivalent to what he or she would receive at a well-paid job’.

Here we see the pressure toward inclusion that arises when work-based regulation is understood to promote an egalitarianism among producers. Returning to the method of subtraction, the intuition is that what makes labour law special – and not merely a sector-specific elaboration of contract law – is its foundation in human work, and that feature of employment is the one most widely shared. Observations of economic substitution highlight this point: if work is the medium of equal citizenship, then it is especially troubling when two people do ‘the same work’ but are treated differently.

C. Against homogeneous work regulation

Labour law cannot ignore nonmarket work, but what should it do once it starts paying attention? I offer nothing close to a full answer. Instead, this section argues that the same conceptual move that batterers the market boundary of employment – appreciating the multiplicity of ways in which economic activity is woven into specific relationships and institutional arrangements – necessarily militates against

46 Fineman, above n 27, 9.
49 Alstott, above n 27; and Feder Kittay, above n 27.
50 Fraser, above n 44.
52 Langille, above n 1.
approaches that would purport to regulate work *qua* work, or workers *qua* workers, without regard to relational and institutional context. This point introduces the temptation to fall back to ‘the labour market’ as a unit of analysis that eliminates such contextual complexity, but that will not do either.

1. The social specificity of work and work regulation

Attacks on the market boundary of employment rely upon an important corollary to the point that markets are simply one way to organize work: establishing that a relationship or institution has some noneconomic purpose or function, or that it is structured by nonmarket norms or practices, tells us nothing about whether work is taking place. The converse is also true: establishing that a practice involves work tells us nothing about the other features of the relationship or institution in which it occurs. Simply knowing that work is involved leaves open who participates, what the time structure is, what authority relationships obtain, what other practices are systematically implicated, what it means to participants, and so on. The intensive, well-bounded labour of the industrial working day differs radically from the more fluid boundaries characteristic of both the freelancer and the family caregiver. Both actual and, most would say, appropriate authority relations vary as between parent and child, employer and employee, and prison warden and inmate.

In short, work is never just work. It always is a particular form of work. Similarly, one who works is never simply a ‘worker.’ It can be otherwise only if the designation ‘worker’ smuggles in far more specific content than it lets on with its invocation of work.

If work is never just work, then there cannot sensibly be a homogenous law of work. As applied, work law always regulates some specific form of work, and there is always more to that practice than its productive character. Furthermore, there are many different ways in which work is always more than only work. Therefore, labour law must in some combination (a) attempt a uniform regulation of work not predicated on any particular relational context, (b) regulate uniformly but based on relationally specific considerations drawn from a subset of work forms, or (c) proliferate into multiple variants responsive to particular forms of work.

Family caretaking and prison labour again illustrate the challenges of regulating diverse forms of work. Consider the ‘commodification anxiety’ 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, to qualification for social security benefits, or to contemporaneous income. The worry is that highlighting the economic character of nonmarket relationships will transform their meaning, experience, and social organization, disrupting or defiling them by imbuing them with market character.

Commodification critiques generally assume that intimate relationships possess a pastoral quality that will be undermined by integration with economic transactions,

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53 Williams, above n 20.
particularly monetary ones. This concern reflects both romanticism about family life and the ‘hostile worlds’ notion that intimate and economic relationships are intrinsically incompatible.  

Treating family caregiving as an economic phenomenon implies interpreting and structuring it as a market bargain between the caregiver and somebody, whether a spouse, the state, or the recipient of care. In Zelizer’s terms, the flip side of ‘hostile worlds’ is ‘nothing but’: identifying a relationship as economic (rather than intimate) fully specifies its essential nature because being economic entails a specific (market) relational form, and nothing else. By showing how a relationship’s incorporation of economic transactions yields no intrinsic push toward market meanings and forms, Zelizer’s work opens up a way out of the commodification critique. Indeed, she shows that such transactions may be constitutive of particular forms of intimacy.

This capacity to differentiate among relational forms – all of which involve work – blunts some of the prescriptive force of calling them ‘work.’ Both analytically and politically, the point of characterizing family caregiving or housework as ‘nonmarket work’ has been to identify their commonality with ‘market work,’ and thereby to cast doubt on practices that differentiate the two forms of work. Identifying this commonality, however, simply begs the question whether what matters for regulatory purposes is a shared status as ‘work’ or a divergent relationship to markets. Exclusions formerly justified by economic/noneconomic distinctions might simply be recharacterized to rest on market/nonmarket distinctions.

This difficulty dissolves if bare status as ‘work’ authorizes specific claims, regardless of relational context. Just such an argument often is made on behalf of nonmarket caretakers: those who receive benefits (‘society’) should not get ‘something for nothing’ but instead should share the economic benefits they receive from productive work (or, in what amounts to roughly the same thing, share its economic burdens). Without such payments, caretakers ‘subsidize’ the rest of society. Although caretaking remains his primary example of nonmarket work, Guy Standing explicitly generalizes the principle to advocate ‘a floor of rights for everybody doing all types of work.’

Social contribution theories of caretaker entitlements risk reverting to a ‘nothing but’ account of economic action. Not coincidentally, they often treat parental care for children in tandem with elder care, volunteering, political activism, and sometimes education. They do so by relying on the bare status as ‘work.’ With respect to the affirmative argument for economic entitlements, the distinctiveness of caretaking drops away, and we are left to recognize its ‘economic’ aspects in isolation. Consider one of the concluding passages to Nancy Folbre’s wonderful recent book, offered in rebuttal to a variation on the commodification critique: ‘Commitments to raising the next generation may be intrinsically satisfying. Economically, however,

54 Zelizer, above n 19.
55 Alstott, above n 27; and Folbre, below n 58.
57 Standing, above n 1, 268; see also IM Young, ‘Autonomy, Welfare Reform, and the Meaningful Work’ in E Feder Kittay and EK Feder (eds), The Subject of Care (Rowman and Littlefield Publishers, 2002).
they go largely unrewarded.\textsuperscript{58} This divide between intrinsic and economic rewards reintroduces a separate spheres analytic. But once we embrace the existence of myriad ‘substantive varieties’ of economic relationship,\textsuperscript{59} why should we assume that their fairness can be evaluated by tallying up ‘economic’ gains and losses in isolation from other aspects of the relationship?

As stated, social contribution theories like Folbre’s imply that those who benefit economically from others’ productive work always wrong these workers if the beneficiaries do not reciprocate \textit{in kind}. That view seems plainly overbroad. For instance, it would imply eliminating unpaid volunteer work and condemning children’s household chores as intrinsically exploitative. These activities may well be ‘productive,’ but allowing that label to decide their employment status requires us to ignore everything else that might matter about them. Nor can the control dimension solve the problem, because the institutional integration and supervisory control that characterize employment may well be present. Any differentiation from employment – and minimum wage law – must occur along the exchange dimension. None of this denies that economic entitlements ought to be linked to caretaking or any other specific from of nonmarket work; it only denies that characterizing them as work goes far enough to justify such entitlements, even though it may get the ball rolling.

Similar difficulties can be seen in the regulation of authority. Standing argues that: ‘All people doing all forms of work should have an equal right to freedom of association and freedom to bargain collectively.’\textsuperscript{60} Consider inmate labour unions, once a major feature of prison activism in the United States. In \textit{Jones v North Carolina Prisoners’ Labor Union, Inc,}\textsuperscript{61} the Supreme Court allowed North Carolina to suppress an inmate union on the ground that it would threaten prison discipline, especially through possible work stoppages. A strike’s obvious economic significance cannot be hermetically sealed off from other aspects of imprisonment, in particular considerations of authority and discipline. Inmates might strike, for instance, over prison conditions outside the workshop. And even a strike over working conditions or wages could alter the dynamic between inmates and prison authorities by asserting prisoner power and fostering organization and solidarity.

Whether welcome or not, such shifts in authority relations would be inextricably intertwined with regulating prisoners’ work. This is the core insight of opinions dismissing inmate employment claims for lack of a market character, opinions that often are concerned principally with employment regulation’s impact on penal policy and administration. Those concerns may be misplaced, but simply reiterating the economic nature of inmate labour cannot tell us why. A substantive account of prisoner autonomy might well support union rights, but not just because they ‘work.’ The latter view also would imply unions of children who do household chores. Of course, there are legitimate concerns about use of power in parent–child

\textsuperscript{58} N Folbre, \textit{Valuing Children} (Harvard University Press, 2008) 191.

\textsuperscript{59} N Bandelj, \textit{From Communists to Foreign Capitalists} (Princeton University Press, 2008).

\textsuperscript{60} Standing, above n 1, 269.

\textsuperscript{61} 433 US 119 (1977).
relationships, too. But it is absurd to think that the same system of regulating authority over work would apply across all these relationships.

The difficulty, then, is that when labour law intervenes in an economic relationship, even with regard to its economic terms, it necessarily also intervenes in the relationship’s noneconomic aspects. That conclusion is entirely of a piece with a perspective like Zelizer’s that sees economic action as not merely coinciding with or being ‘embedded in’ various relationships but as a means of establishing and expressing their distinctive characters.\(^{62}\) Therefore, the specific relational dynamics introduced by labour regulation will vary in their compatibility with different relationships that organize work.

2. Beyond economic organization

My argument suggests severe limits on the viability of any uniform system of work regulation. Different forms of work must be treated differently. Stated this way, my analysis has much in common with a number of recent attempts, introduced above, that grapple with the breadth of work that exists beyond employment, albeit largely within the labour market. There is much to be learned from these efforts, but I have misgivings.

Consider the method of subtraction, which recommends that work arrangements displaying a subset of employment’s features should be subject to a corresponding subset of labour law. Proceeding by subtraction provides no affirmative account of the varying ways in which work is incorporated into relationships, of what shifts among forms might \textit{add} as well as \textit{subtract}. The reason to vary regulation from the employment paradigm may derive from the presence of some additional relational component, one incompatible with a standard regulatory device. For instance, by subtraction one might think that volunteers lack economic dependence on employers (or the economic responsibilities characteristic of employees), and that this justifies exclusion from regulations augmenting the economic returns to work. That may be true, but, additionally, there may be specific virtues of voluntary work – including gift-like structure – that would be undermined by direct linkage to immediate economic returns.\(^{63}\) Or another: with regard to the subordination that arises from supervisory control, the method of subtraction might misapprehend the relevant comparison between conventional employment and prison labour. Plausibly, features of employment regulation designed to counter employee subordination are inappropriate to prison labour \textit{not} because there is less subordination to counteract but \textit{instead} because heightened subordination is appropriate to the relationship writ large.

Similar difficulties attend the more ambitious attempts to dislodge employment from the center of our maps of work. These efforts still appear thin when confronted with the \textit{types} of variation among work practices that one sees in nonmarket work. How do we account for the linkages between the labour process


and ‘non-economic’ practices: the infliction of punishment, the relief of poverty, the treatment of disease, the formation of character, the construction of intimacy, and so on? Closely related, how do we account for the coexistence of multiple forms of interaction between workers and the individuals and institutions who make use of their labour? How do we account for the specific ways in which people enter into and exit from work relationships: by receiving a criminal sentence, by qualifying for aid, by receiving a medical diagnosis, by establishing a kinship tie? How do we account for the specific place that work practices occupy within the larger canvas of a worker’s life: one component of daily and weekly time that complements and facilitates ‘personal’ time for family and consumption;64 one facet of existence within a totalizing institution; one closely linked to a life stage understood as transitional or aberrant?

If even quite expansive, flexible frameworks fail to capture the full range of productive practices, where do we go next? Having started down this trail, one might press on, expanding our models’ reach, adding new epicycles to capture variations in work, introducing yet more complexity. There certainly are good reasons to do so. Nonetheless, I have already suggested a basis for caution. It is not clear what makes this project hang together. Why is it that all practices involving ‘work’ belong in a single field, once we strip ‘work’ of all the baggage that ordinarily allows that simple word to stand in for a quite specific set of productive practices?

3. The futility of retreating to market boundaries

The preceding discussion invites a rebuttal: Stepping into the thicket of ‘work law’ is no end of trouble. We should stay out and settle for the good old law of market work. I demur for two distinct, though conceptually related, reasons. First, the embeddedness of work in specific social relationships irreducible to market transactions is omnipresent, even in relationships routinely characterized in market terms. Second, limiting labour law to the labour market assumes that ‘the labour market’ exists as a social phenomenon sufficiently well bounded that the application of labour law can track its perimeter. To the contrary, disputes over nonmarket work reveal that the boundaries of the market are themselves contestable, and one social mechanism for firming up these boundaries is the application (or not) of labour law itself. Under such circumstances, using the boundaries of the market to bound labour law is hopelessly circular.

a. Social specificity within ‘the market’

The claim that work always is embedded in specific social relationships and institutions is not limited to ‘nonmarket’ work and workers. Market work is not a purely economic practice, devoid of other social characteristics, in contrast to nonmarket work which is work-plus-sociality. I mean this in a stronger sense than

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the standard realist points about how markets are creatures of politics and law that dictate certain forms of security in person and property, define and enforce contracts, and so on. Beyond that lie specific socialities of market interactions.65 There is an official public rhetoric of virtue and shame that not merely justifies but glorifies the hard bargain and marks those who walk away with less as suckers or fools. There is a hierarchy of legitimate ends that makes a virtue out of acquisitiveness and an embarrassment out of sentiment or solidarity. And of course there are the people thought best suited for markets, well-endowed with means–ends rationality, nicely ranked ordinal preferences, and no squeamishness about commensurability. This is no criticism of markets, merely insistence that they are social institutions among others, and that indeed this follows necessarily once we see the economic as a characteristic of the social, not an alternative to it.

Consider the labour law status of unauthorized migrants. The US Supreme Court recently limited their remedies if fired for union organizing.66 The arguments for restriction were analogous to those against labour law coverage for prison labour and other ‘non-market’ work; this was so notwithstanding that the workplace in question was a paradigmatic factory where the other workers would have been treated as market employees without any hesitation. The court downplayed the economic relationship between employee and employer and gave precedence to matters of immigration policy, emphasizing the worker’s possibly criminal conduct. Consistent with the highly racialized history of treating unauthorized workers, especially those from Mexico, as both a second-class labour force and a criminal menace, the social status of the workers appears to be driving the scope of employment protections.67 As Catherine Fiske and Michael Wishnie have argued, the case turned on its framing as an ‘immigration’ rather than ‘labour’ case, reproducing the familiar separate spheres structure even when analyzing an institution ostensibly within ‘the market.’

Such cases invite the kind of universalizing response that motivates ‘work law.’ Exclusions from employee status could be construed as deviations from the idealized, asocial market. In ‘hostile worlds’ fashion, these noneconomic considerations are sand in the gears. ‘Workers are workers, and immigration enforcement should be a separate matter,’ the argument goes.

The ‘workers are workers’ formulation of unauthorized workers’ rights asserts an egalitarian claim as between citizen and migrant workers. But is it really grounded in the mere fact of work? I am skeptical. Far more likely, it cloaks in the language of the asocial market – in which all workers are fungible factors of production – a substantive egalitarian view about labour mobility and migration. Surely it is no coincidence that organizations structured around immigrant workers’ rights find themselves drawn constantly to ‘nonlabour’ issues ranging from access to drivers’ licenses to regularization of immigration status. It is difficult to see how one can

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maintain that immigrants’ rights are a labour issue yet immigration status is irrelevant to labour law.

None of this should be the least bit surprising given the robust tradition of framing labour rights in terms of access to full citizenship. In this tradition, labour law is not merely a species of market regulation, a full sibling of consumer protection, housing law, and so on. Instead, the founding intuition traces to the old rallying cry that labour is not a commodity. But if the imperative for and content of labour law derive not simply from tweaking the market qua market but also from workers’ claims to community membership, then there is no avoiding the question whether particular workers are appropriate claimants to that membership. That question admits to many answers – including that ‘work’ itself provides the basis for inclusion. Some of these answers will put the migrant and formal citizen on equal footing, but not because the question of immigration status is irrelevant from the outset.

More generally, the historical record in the United States strongly supports the view that labour rights always have been intertwined with broader views of workers’ place in society. To take just one example, the exclusion of women workers, especially women of color, from labour protections has never been a matter simply of the market/nonmarket divide. Instead, even among employment relationships, important exclusions hark back to the gendered work/family split. Many US statutes limit protection for domestic workers and personal care attendants, seemingly in part because this work is associated with the family domain. This ‘nonmarket’ character exists in synergy with the race and gender composition of the occupation, making these workers poor claimants to the mantle of ‘free labour.’

This dynamic played out recently when the Supreme Court upheld a broadly exclusionary interpretation of the US wage and hour law as applied to home health workers. The US Department of Labor’s justification of that exclusion reeked of a stratified conception of citizenship, one linked, moreover, to ambiguities in the relationship between labour protections and the family wage system. Excluding home health aides from overtime protections purportedly addressed the ‘special problems of working fathers and mothers who need a person to care for an elderly invalid in their home.’ Here, the gendered association of home care with nonwork follows the task even when market hiring substitutes for family caregiving and does so to enable market work by both adults in a prototypical middle-class household. The paradigmatic citizen in need of protection shifts from the worker to the employer, refigured as the ‘working family’ who ordinarily would be the protagonist of arguments favouring employment protections.

Now consider another example with a more complex political valence, one less easily explained away as a deviation from the ideal of egalitarianism among workers

workers. California recently restructured publicly funded home health care to make home health aides public employees entitled to union representation. The campaign to do so relied on an alliance between organized labour and groups representing ‘consumers,’ namely senior citizens and people with disabilities. One point of tension involved the standard union contract provision requiring just cause for termination. The consumer groups were adamantly opposed, in part because of their specific conception of ‘independent living’ in which home health aides enabled consumers to achieve a level of personal and bodily autonomy taken for granted by the nondisabled. To require a process of justification, and to place consumers in the position of either forfeiting assistance or receiving it from someone not of their choosing, struck them as deeply corrosive of the independent living concept. The union allies gave way on this most basic of contract terms.71

Now, my point is not that giving up just-cause protection was the correct result. More modestly, I insist that even if one generally thinks of a just-cause termination rule as a basic protection, the home health context presents a serious question with which to grapple. That question does not arise because home health aides are less in need of job security than other employees. Instead, it arises because of a tension between job security provisions and arguably valuable features of the specific relationship that home health assistance helps bring into being, and the particular way that relationship interacts with the social project of civil rights for people with disabilities. Perhaps that tension should be resolved in favour of just-cause protections, but if so, it should be on reasoning more supple than ‘workers are workers.’72

These last several examples point toward a broader claim. Not only does the method of subtraction fail to account for the affirmative value of the specific relationships of which work may be a part, but it risks obscuring the relational specificity of standard employment,73 not merely its exceptions. The easiest way to see this is to consider the paradigmatic protagonist of labour law, the member of ‘free labour.’ This worker is not simply someone seeking to make a buck. Instead, ‘free labour’ links the receipt of wage payments to a broader, and specific, form of life involving the maintenance of an independent household (for which one seeks a ‘family wage’) that engages in market consumption.74 Employment, in other words, is not just about making money, it is about ‘earning a living,’ and living a certain kind of life.

In this regard, we might build on but broaden Freedland and Kountouris’ concept of the ‘personal work profile,’ which compiles over time one person’s various forms of work and work-relative states like unemployment.75 They rightly emphasize how analysis of one work arrangement might draw meaning from its

75 Freedland and Kountouris, this volume.
linkage to another, as when concern about overwork requires considering whether a worker holds multiple jobs. But analogous points apply to linkages between work and consumption patterns, family structure, immigration status, income level, health, incarceration, and so on.

b. Identifying market boundaries

The social character of market work suggests a more general problem with confining labour law to one side of the market/nonmarket boundary. We now have jettisoned both the idea that the economic resides exclusively in the market and that the social resides exclusively outside it. Once neither the presence of the economic nor the absence of the social distinguish market activity, how are we to identify it?

My contention is that law, including labour law, is partly constitutive of our designation of a practice as inside or outside the labour market. Legal and other practices institutionalize market/nonmarket boundaries, where that institutionalization is the result of contestatory ‘boundary work’76 or ‘relational work’77 by social actors, not simply reading off a preexisting map. Having argued this at length elsewhere,78 I will add another somewhat speculative example here.

With respect to work by unauthorized migrants in the United States, two current trends are criminalization of work without proper documentation79 and intensification of monitoring and identification regimes that reveal unauthorized status to employers.80 Conceivably, these trends could largely eliminate the present-day phenomenon of unauthorized migrants regularly working side-by-side with authorized workers and, more generally, force work arrangements involving unauthorized migrants deep into the informal sector. How would we classify the resulting furtive exchanges of work and money? I suspect they decreasingly would be recognized as market employment and increasingly articulated as crime – not illegal employment, but instead not employment at all. That, after all, would be consistent with how prostitution and drug dealing are seen, notwithstanding ample basis for understanding them in market terms.81

D. Conclusion: channeling as a possible way forward

Labour law scholars are stuck with a dilemma. We must confront the diversity of work. Consistency and equality demand it, at least insofar as there is something

77 Zelizer, above n 19.
81 ‘Sex Work/Sex Act’, above n 78; P Bourgois, In Search of Respect (Cambridge University Press, 1995); and SA Venkatesh and SD Levitt, ‘Are We a Family or a Business?’ (2000) 29 Theory & Society 427.
special about productive action, and so do the practical problems generated by substitution among forms of work. Yet we are ill-equipped for this confrontation without a way to account for the relational specificity of work. Our best tools were designed to grapple with market work, but this specificity makes them both intrinsically self-limiting and vulnerable to the slipperiness of market boundaries.

Redrawing the line between protected and unprotected work is not the only way to relieve pressure on the boundaries of labour law. Another is what I call ‘channeling,’ borrowed from related usages in contract and family law. My earlier discussion of labour law’s constitutive role implies that law channels productive activity into specific institutional forms and away from others. It shapes how work gets done, not just the legal implications that follow.

Channeling may act to suppress alternative work forms or to force greater differentiation from employment, as the identification and criminalization of unauthorized workers suggests. Responding to boundary pressure from displacement, one important channeling technique is to limit the substitutability among workers, including by limiting substitutability among their work products. In this fashion, rather than either including or distinguishing work at the margins of employment, channeling increases the difference between them.

The channeling mechanism with the most explicit relationship to substitution is an anti-displacement policy. Such policies permit nonstandard work relationships on condition that the workers do not displace conventional employees. For instance, current US welfare law bars ‘workfare’ programmes from using participants to fill vacancies created by another employee’s ‘layoff from the same or any substantially equivalent job’ or by any termination designed to allow substitution of a workfare worker.82 Similarly, certain prison labour programmes must ‘not result in displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality . . . significantly impair existing contracts,’ or result in ‘the inappropriate transfer of private sector job functions to inmates.’83

Another channeling mechanism prevents direct competition with conventional employment. For instance, there are broad prohibitions on the sale of inmate-produced goods, both in private commerce and as part of federal contracts.84 Even when exceptions apply, priority often is given to producing goods and services with no alternative domestic source, thereby focusing any displacement on foreign workers.85 Workfare programmes traditionally have barred placements with for-profit firms that might substitute workfare workers for regular employees.86 And employer participation in guestworker programmes is conditioned (in theory) on the unavailability of a domestic workforce.

83 64 CFR §§ 17,000, 17,010 (2009).
84 18 USC § 1761 (2006); 41 USC § 35(c) (2006).
On their face, these channeling mechanisms are meant to shepherd work toward conventional (domestic) labour markets. Work that might otherwise have been assigned to inmates or welfare recipients instead gets directed to regular employees. But channeling rarely suppresses competing forms of work entirely. Instead, it marginalizes them and helps cast them as occurring outside the market, perhaps as something other than work at all.

In these ways, channeling rules overtly address and clarify the relationship between different forms of work. Rather than simply defining the scope of employment or prescribing separate rules for prison labour, channeling allocates between these fields both work itself and legal authority over it. For this reason, not only is channeling interesting and important in its own right, but it also offers a concrete place to begin formulating a legal analysis that grapples with the full range of work.

Notably, notwithstanding labour law scholars’ limited attention to channeling between institutional domains, similar issues arise in two familiar regulatory contexts: international trade and immigration. Both feature efforts to police the boundaries of the domestic labour market, with major themes of steering work toward citizens and minor ones of concern for the labour conditions of workers abroad and migrants within. This unabashed, though often fraught, linkage between work and citizenship resonates with theories of labour regulation grounded in notions of social solidarity, not merely recalibrating unequal bargaining power.

Likewise, the scope and content of citizenship presents the most difficult questions lurking beneath the dilemma I have outlined here. Is the combination of attaching labour protections to a subset of work and channeling work into that form an illegitimate form of privilege or, instead, perhaps in addition, the necessary foundation for egalitarian citizenship? The answers may well depend on who has access to that privileged zone and what the costs are of migrating into it.

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87 Channeling also occurs along the control dimension, for instance by pressuring organizations to hire workers as employees rather than independent contractors. SL Cummings and SA Boucher, ‘Mobilizing Local Government law for Low-Wage Workers’ [2009] U Chi Legal F 187, 201, or even by creating new institutions that can serve as employers, ‘Homecare Worker Organizing in California’, above n 71.

88 Howe, this volume.