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# BETWEEN AUTHORITY AND DOMINATION: TAMING THE MANAGERIAL PREROGATIVE

Alan Bogg,[†] and Cynthia Estlund[††]

Our starting question here is what is required, and what is possible, to protect the freedom and curb the potential for domination of workers within firms that are managed on behalf of owners of capital. We begin by highlighting two premises underlying that question. The first premise is normative, and concerns the goal of curbing employer domination of workers. The second premise concerns the context within which we pursue that goal—that is, a capitalist economy in which most workers are employed in private firms whose managers are chiefly accountable to those who supply capital and are regarded as the firms' owners. The core managerial function in that capitalist economy is the authoritative coordination of factors of production in pursuit of profits; that may require managerial tools of monitoring and surveillance, and recourse to coercive techniques (including discipline and dismissal) to ensure compliance. These two premises present us with a basic dilemma: can there be legitimate coercive authority over workers in capitalist workplaces without domination of workers? We hope to point to a resolution of this dilemma by the end of the article, partly through recourse to a concept of 'legitimate economic authority.' Or, if we cannot do so, that conclusion is also important to establish.

The rest of our Article is organized as follows: Part I elaborates our two starting premises—non-domination as a goal and capitalism as a context—along with a crucial distinction between *domination* and *subordination* on which much of our argument hinges. Part I also takes a preliminary look at three types of constraints on managerial authority that we think are required to curb domination within capitalist firms: adequate exit options, legal boundaries on managerial authority, and channels for individual and collective contestation of managerial authority. But the need for these constraints invites a logically prior question that we take up directly in Part II: Given the commitment we claim to non-domination, what can justify the coercive authority of managers, chosen by and accountable to capital, over workers?

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This brand of workplace authority seems to epitomize the sort of 'private government' that Elizabeth Anderson has powerfully critiqued. Drawing on work by Anderson, as well as Ronald Coase and Joseph Raz, we suggest that the case for recognizing a measure of legitimate authority in firm governance rests on societal interests in productive efficiency, authoritative coordination of labor and capital, and managerial expertise. Those considerations, drawn from outside republican theory, reflect the value individuals and societies legitimately place on a prosperous, dynamic, and innovative economy, including decent material standards of living and opportunities for meaningful work. The normative goal of non-domination is reflected less in the justification for managerial authority than in the insistence that it be appropriately curtailed to minimize the risk of domination. The resulting scope of *legitimate* economic authority is plainly more circumscribed than the existing *de facto* authority in firms, often known as the 'managerial prerogative,' established by private property and freedom of contract.[1]

In section III, using examples from existing work laws, we sketch out what the legal limits or boundaries on managerial authority should be. Those come in three varieties: (i) mandatory labor standards based upon a core of entitlements that cannot be denied for any reason; (ii) exclusion of discriminatory and retaliatory reasons for decisions that are outside category (i) but can have a significant adverse impact on workers; and (iii) a demand for affirmative justification—grounded in the reasons for which managerial authority is conceded—and independent external scrutiny for some decisions that threaten workers' essential interests and pose a particular risk of domination.

In the conclusion, we draw these arguments together. We think that the economic and social benefits of managerial authority within firms—including decent jobs that might not otherwise exist—can be secured with a tolerably low risk of domination. This requires us to dispense, however, with the old terminology of 'the managerial prerogative.' Instead, we would do better to think in terms of legitimate economic authority, to understand its underlying justifications, and to identify discrete domains where, to varying degrees, managerial authority should be limited. This would clarify the scope of authority claims and so tame the managerial prerogative in defense of workers' freedom from employer domination.

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1. On the distinction between legitimate and de facto authority, see JOSPEH RAZ, *Authority, Law, and Morality*, *in* ETHICS IN THE PUBLIC DOMAIN 210, 211–15 (Oxford Univ. Press 1995).

## I. FRAMING THE QUESTION OF THE LEGITIMACY OF MANAGERIAL AUTHORITY AND ITS LIMITS

Here we tee up our inquiry into the justification for managerial authority, both by establishing our starting premises and the tension between them and by previewing some strategies for taming managerial authority.

### *A. Why Freedom from Domination and Why Capitalism?*

Our first premise is grounded in neo-republican theory, which centers the goal of ensuring individuals' freedom from domination, both public and private. Reflecting our earlier work,[2] we position ourselves within perhaps the dominant strain of republicanism—a left-liberal variant associated with Philip Pettit.[3] We share Pettit's aspiration of ensuring individuals' "capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of uncontrolled interference over another."[4] According to Pettit's 'free-person heuristic,' or 'eyeball test': "people should securely enjoy resources and protections to the point where they . . . can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status, objective and subjective, of being equal in this regard with the best."[5] These evocative formulations might seem to imply a concern solely with one individual's domination of another; but Pettit is also concerned with domination of individuals by *organizations*, even if they cannot literally be faced 'eye to eye' (and even if they act through impersonal algorithms). The eyeball test is an imaginative device aimed at rendering the contours of civic equality more vivid and

2. Alan Bogg & Cynthia Estlund, *Democratic Contestation Rights for the Workplaces We Have* (unpublished paper) (on file with author); Alan Bogg & Cynthia Estlund, *The Right to Strike and Contestatory Citizenship*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., Cambridge Univ. Press 2018); Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, *in* VOICES AT WORK (Tonia Novitz & Alan Bogg eds., Oxford Univ. Press 2014)

3. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (Oxford Univ. Press 1997); PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY (Cambridge Univ. Press 2012).

4. REPUBLICANISM, *supra* note 5, at 5. We acknowledge some ambiguity, highlighted by Eric Tucker among others, in the sort of power over another that counts as domination. We think Pettit's formulation—'uncontrolled interference'—is better than either 'arbitrary' or 'unaccountable' (two terms that Elizabeth Anderson combines to describe 'private government'; *see infra* Section II.A). That is, we think domination can occur even if interference that is threatened is not 'arbitrary'; but that domination is not necessarily present whenever the interferer is not fully 'accountable,' electorally or otherwise, to those on the receiving end. Something more than rationality but less than full democratic accountability is required to legitimize authority over others. In a sense, this whole Article means to resolve that question, and to inject content into the notion of 'uncontrolled' (or, as we might prefer, unjustifiable) interference.

5. ON THE PEOPLE'S TERMS, *supra* note 5, at 84.

concrete.[6] For Pettit, freedom from domination, and the equal civic status it confers, requires the effective public resourcing and protection of 'basic liberties' in the relations between private citizens. These 'basic liberties' consist of those freedoms that are capable of being exercised and enjoyed equally by all citizens, such as "the freedom to think what you like" and "the freedom to travel within the society.".[7] But this equal status also requires constraints on individuals' and organizations' power to interfere in other individuals' lives.

The question for labor lawyers and scholars who hew to republican principles is whether and how it is possible to ensure individuals' freedom from domination in the context of subordinated capitalist work relations. We do not claim that freedom from domination is the only goal that should shape the law and institutions governing work relations. As we have already indicated, the positive justifications for legitimate authority in the workplace might come from outside the non-domination principle and be grounded in other goals and values. But we aim to reconcile other legitimate goals with the goal of non-domination if possible, and to minimize the risk of domination if conflict is unavoidable. In short, we take freedom from domination as a guiding but not exclusive principle for governing work relations.

There are several strains of contemporary republican thought, with divergent implications for work relations and workplace governance. All agree that there is a significant risk of employer domination at work, but they disagree about the nature of the problem of domination and therefore about its possible solutions. Some libertarian republicans view state regulatory power and collective entities like unions as more likely to compound than to counter the threat of domination from employers, and view competitive labor markets and the right and genuine ability to exit employment relationships as both necessary and sufficient to curb domination.[8] At the other end of the political spectrum, some radical neo-republicans regard employer subordination of workers under capitalism as inherently imbued with domination; for them, worker-ownership and full democratic control of firms is a necessary implication of demands for freedom from domination.[9] (That view is often

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6. The idea of looking into another person's eyes also renders vivid the potentially corrosive civic effects of impersonal algorithmic management. For example, the 'eyeball test' might provide support for a right to a human decision-maker for key disciplinary decisions. We are grateful to an anonymous referee for raising this point, and we will return to it in later work on these themes.

7. *Id.* at 103.

8. *See* ROBERT S TAYLOR, EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT (Oxford Univ. Press 2017).

9. *See e.g.,* ALEX GOUREVITCH, FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY (Cambridge Univ. Press 2014).

associated with a wider definition of 'domination' that includes not just 'dyadic' domination by individuals and organizations but also 'structural domination' stemming from the capitalist imperative to pursue profits. We have more to say on this question below.) We place ourselves between those poles, with Pettit as well as Elizabeth Anderson,[10] in seeking to identify conditions in which republican freedom might exist within capitalist firms and within some version of a capitalist market economy.

That brings us to our second premise: our acceptance of capitalism—specifically, a market economy in which most goods and services are produced by firms that are managed primarily on behalf of capital, and in which most workers are subject to the authority of managers who are chiefly accountable to capital. We undertake the challenge of attempting to curb domination *within* capitalist firms (as we'll call them), despite the limitations that imposes on our inquiry here and despite some decidedly problematic features of capitalism, for three reasons, all of which are concededly debatable yet not fully defended here:

*First*, we think capitalism in some form is here to stay. Working for bosses who are chiefly accountable to capital is a reality for most workers in these societies and is likely to be so for the foreseeable future. That fact alone makes it worthwhile—especially for us as legal scholars—to explore what can be done now by way of ensuring freedom from domination for those workers.

*Second*, we think the capitalist mode of production has staying power in part because it has proven to be quite successful, and more successful than any real existing alternative, at delivering the material prosperity that members of a society need and want from an economic system. We can imagine an alternative system, but we haven't seen one succeed in the modern era. There are good reasons to experiment with or even promote non-capitalist modes of production (such as worker-owned firms). Those innovations might eventually pave the way for a broader alternative to capitalism, but we appear to be a long way from that point.

*Third*, and crucially, capitalism is protean, and compatible with a wide range of socializing and humanizing constraints and institutions, including space for experimentation with non-capitalist modes of production. Capitalism's adaptability partly explains its staying power or resilience. There is undoubtedly a need to regulate capitalist firms in the interest of workers, consumers, and the natural environment; to reform firms' governance structures;

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10. *See* ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (Princeton Univ. Press 2017).

and to redistribute some of the fruits of capitalist production, including through taxation and public provision of public goods and the basic necessities of a decent life. We concede that, as Eric Tucker in his excellent contribution to this special issue emphasizes, the dynamics of capitalism itself may impel firms and managers to resist regulation, re-governance reforms, and redistribution, both politically and on the ground. But democratic societies have generated *varieties of capitalism*,[11] some of which have enabled most adults to enjoy decent work and a decent standard of living for themselves and their families. All in all, we set our sights on pursuing freedom as non-domination *within* capitalism, while recognizing that it is a steep uphill battle, rather than on replacing capitalism altogether.

The challenge we undertake here is linked to our position on the kind of domination we aim to minimize at work: Is it just the 'diadic' domination of individual workers by employers—both individual bosses and organizations? Or does it include the impersonal or structural domination that workers experience within capitalism by virtue of the imperative that bears down on their bosses to seek profits for the enrichment of capital (or shareholders) even to the detriment of other stakeholders including workers?[12] Structural domination can be softened—for example, by providing a basic level of economic security to workers who are dismissed or unable to secure a job, and by putting legal boundaries on the sorts of decisions, demands, and conditions employers can impose on workers in pursuit of profits (as we will discuss in some depth below). But we concede that impersonal or structural domination—including what Tucker calls 'economic subordination,' 'time subordination,' and 'workplace subordination'—is largely hardwired into capitalism and not entirely amenable to amelioration through law. To some extent, structural domination (if that is what we call it) is the price we, and especially workers, pay for the economic and other benefits of capitalism.

Given our acceptance of capitalism—based on its sheer staying power, its success in 'delivering the goods,' and its amenability to a range of humanizing and socializing reforms—we think that the priority for republican work law should be on personal or 'diadic' domination. This would also target the lingering residue of Master and Servant laws in the modern law of employment, where notions of status and servility may still be detected in the

11. *See generally* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (Peter A. Hall & David Soskice eds., 2001); DEBATING VARIETIES OF CAPITALISM (Bob Hancké, ed. 2009).

12. Eric Tucker, *A Tale of Two Orchestras*, 44 COMP. LAB. L. & POL'Y J. page 327 (2025). On the virtues of describing that form of domination as 'impersonal' versus 'structural,' see Matthew Dimick, *Marx and Domination: Issues for Labour Law*, *in* NEW FOUNDATIONS FOR LABOUR AND EMPLOYMENT LAW (Kevin Banks and Richard Chaykowski eds., forthcoming).

disciplinary powers of the modern enterprise. But it would not require the wholesale dismantling of capitalism, whatever that would mean.

So, the question we undertake here is whether and how our two premises—republican freedom as non-domination, thus defined, and private managerial authority over workers within capitalism—can be reconciled. Is it possible to ensure individuals' freedom from domination if they spend much of their lives working under the directive control of managers whom they did not elect and cannot replace? When workers sell their labor to a capitalist firm in exchange for a wage, they submit themselves to direction and oversight by, and subordination to, managers who are chiefly accountable to the firm's owners, not its workers.[13] The problem of subordinated employment is mitigated but not solved by workers' *consent* to that subordination. Insofar as they are free to quit their jobs, workers do consent in at least a minimal sense to the private authority and subordination that is inherent in the employment relationship. Now that counts for *something*. But the republican goal of freedom from domination cannot be achieved simply through what has been called "the moral magic of consent.".[14] On republican principles, consent to domination does not satisfy the 'eyeball test.' (That is one of the ways in which republicanism tends to diverge from mainstream liberalism.) If *subordination* to managerial authority necessarily equates to *domination*, we would have to abandon either our republican normative commitment to non-domination or our acceptance of managerial authority under capitalism.

Our view on this crucial point is that workers, in entering the employment relationship, do consent to a measure of *subordination* to managerial authority during working time for the duration of the employment; but they do not consent to employer *domination*. That is, they consent to the *legitimate economic authority* of managers to direct work and manage the workplace, but not to the arbitrary or uncontrolled exercise of authority of the sort that would amount to domination. That is not to say that strict hierarchy is the only viable way of organizing work; on the contrary, more fluid authority structures and more democratic ways of organizing work have sometimes proven successful within capitalist firms, often through collaboration between managers and institutionally-empowered workers. But we do not think it is either possible as a practical matter or necessary as a normative matter to dictate non-hierarchical management or eliminate subordination.

13. Workers might be subordinate to managers even in the case of worker-owned firms. Some measure of authority in the interests of coordination may be inescapable even in such firms. Whether democratic accountability of managers to workers as a group would preclude *domination* of workers is a harder question; but it might render unnecessary some of the constraints on managerial authority that we deem necessary in the case of capitalist firms. We hope to return to the question in future work.

14. *See* Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEG. THEORY 121 (1996).

Hierarchy, within limits explored here, is defensible even if it is not ideal. The source and scope of managers' legitimate authority over workers, and the appropriate limits on that authority, is the central preoccupation of this paper. In our view, a crucial task of the law of work is to regulate and delimit managerial authority over workers—by confining that authority and enabling workers to escape it, challenge it in a tribunal, or contest it more informally—so that subordination does not amount to domination; and to do so without suffocating the managerial discretion that firms and the economy as a whole need to thrive.

Given the tension between our two basic premises, the law of work on our view will involve balancing and compromise at the margin, and even some tradeoffs between seemingly incommensurable values. We are getting ahead of ourselves here, but we think it will prove impossible to wholly eliminate the risk of employer domination without stifling effective management and economic coordination, and stalling the engines of wealth-creation. But it might be possible, and should be good enough, to reduce the risk of domination to a tolerable level—a level at which workers and the society as a whole could reasonably accept that risk in exchange for the material and other benefits of managerial authority and productive organizations. Although it might seem troubling to allow this sort of tradeoff, consider the alternative: If any risk of employer domination is deemed categorically unacceptable, and if some such risk is unavoidable within capitalist workplaces, then we would be bound to jettison capitalism, whatever its economic and other benefits, in favor of some other system. (What would that be? Would it be reliably free from its own forms of state domination? How to get there from here? And what should we do for subordinated workers in the meantime?)

We do not think it makes sense to categorically foreclose any tradeoff of freedom-as-non-domination for other values associated with a decent life. Both societies with well-functioning democratic institutions and individuals within those societies should have latitude to accept some such tradeoff, within limits outlined here. At the same time, we must avoid sliding from accepting a 'tolerable' risk of domination in exchange for other values into an unappealing version of liberalism in which workplace conditions are deemed tolerable as long as workers 'consent' to them.[15] In short, we think the law should aim to reduce the risk and reality of employer domination as much as possible while preserving organizations' ability to function

15. That view has much in common with what we describe as the 'exit-is-enough' version of republican theory, by which adequate exit options for workers are sufficient to guard against employer domination at work. We critique that view below, *infra* Section II.A, and elsewhere. Bogg & Estlund, *supra* note 4.

effectively and productively. We will then have to judge whether the residual risk to republican freedom is outweighed by the economic and social gains of productive and decent employment that depend on private authority. The answer depends partly on whether subordinated workers get a fair share of those gains. But all we will say here about that distributional question is that we think the same constraints on private managerial authority that are necessary to check the risk of domination—including robust and adequately resourced exit options, regulatory boundaries on authority and a floor of core entitlements, and contestation rights—will *tend* to ensure that workers get a fair share of the gains from productive firms and a productive economy. These measures also perform a critical distributive role in allocating and constraining social and economic power within and beyond the firm.

### *B. A Preview of Strategies for Curbing Domination at Work*

Although policy makers have paid scant explicit attention to republican non-domination principles in the societies we know best, one can make sense of much of the existing law of work as aiming to counter employer domination within capitalist workplaces. That is not to say the existing law of work succeeds on that score. Far from it. Yet it is sensible, we think, to begin not with a blank slate but with what we observe in the world. Democratically governed capitalist societies all pursue three basic and mutually supportive strategies for combatting employer domination through the law of work: exit, voice, and boundaries on employer authority.

***Exit***: A right to exit or quit employment is essential to ensuring even nominal consent to subordination; and subordination to a boss's authority without ongoing consent—that is, without a right to quit—amounts to serious domination by itself. Accordingly, the freedom from forced labor, including the right to quit one's job, is now recognized as a fundamental human right.[16] Yet real exit options require more than a bare right to quit. The law should, and to some degree does, combat employer practices like collusion (such as no-poach agreements) and post-employment restraints (such as non-compete covenants) that make it harder for workers to quit and find another job. More ambitiously, public policies should enable workers to forego subordinated employment, to choose genuinely independent self-employment, or to support themselves while finding or preparing for a better job through access to universal basic income, benefits, training and education, and start-up

16. INT'L LAB. ORG., INTERNATIONAL LABOUR STANDARDS ON FORCED LABOUR (2016), https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_508317.pdf.

business loans.[17] States should also support the availability of more democratic forms of employment as an alternative to subordination within capitalist firms. The state might thus be required (as argued by Malleson[18]) "to foster and facilitate the expansion of democratic workplaces," such as worker coops. Although we reject the view that worker coops are the only defensible workplace form, making them a more accessible option would help to curb domination in capitalist firms.[19] Still, they are unlikely, even with some public support, to absorb more than a small fraction of the workforce.[20]

Exit rights and real alternatives to subordinated employment afford an indispensable check on employer domination. Indispensable but not sufficient.[21] That is so, first, because the dislocations of exit are often significant even when alternatives are readily available. Second, most of workers' alternatives to existing jobs will also be subordinated employment; so, unless workers are protected from domination on the job, the ability to quit might offer only a temporary respite. Third, many workers may prefer subordinated employment within capitalist firms because it provides security and opportunities for flourishing at work that may not otherwise be available, for example in precarious forms of self-employment. Yet we should not condemn those workers to private employer *domination*. Finally, exclusive reliance on the right to quit to constrain private domination neglects the social value of the solidaristic bonds that can flourish among workers who choose to stay put and push back on employer power through collective voice versus individual exit.[22]

***Voice***: A second basic strategy for combatting employer domination thus lies in support for workers' ability to contest employer authority. Labor movement aspirations for 'industrial democracy' have mostly shifted, at least since the early twentieth century, away from full-fledged democracy—including worker selection and control of managers—toward institutions of collective 'voice' and countervailing power. Those institutions have many goals, including enabling workers to participate in workplace governance,

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17. Robert S. Taylor, who has made the strongest case for the sufficiency of exit options in curbing domination, recognizes the need for supportive polices like these. *See* TAYLOR, *supra* note 10.

18. Tom Malleson, *Making the Case for Workplace Democracy: Exit and Voice as Mechanisms of Freedom in Social Life*, 45 POLITY 604, 605 (2013).

19. Labor-managed firms might, e.g., pay workers less in exchange for the benefits of workplace democracy (including perhaps a lower risk of domination). That might be a fair tradeoff for some workers to make, and for society to make more available; though it seems unlikely to be a popular tradeoff.

20. For a rigorous analysis of the empirical and theoretical literature on labor-managed firms and their relative rarity within market economies, see Gregory K. Dow, *The Theory of the Labor-Managed Firm: Past, Present, and Future*, 89 ANNALS OF PUBL. & COOP. ECON. 65 (2018).

21. *The Right to Strike and Contestatory Citizenship* , *supra* note 4.

22. *Id.*

both for its intrinsic value and as leverage in pursuit of better wages and working conditions. But those other goals are entirely compatible with the goal of curbing management domination. Indeed, we think the value of collective voice mechanisms in curbing management domination is an underappreciated virtue of institutions and reforms that are usually pursued under other banners such as 'industrial democracy' and participation in workplace governance. Historically, we also think that ameliorating the subordination of workers was at least as germane to some theorists of industrial democracy as was an intrinsic concern with civic participation and self-rule.[23] To advance republican freedom from domination, workers should have not only the right to walk away but also a right to stay and contest employer decisions and working conditions that are arguably unlawful as well as those that are lawful but contrary to workers' interests or preferences.

We contend for both individual and collective contestation rights (as elaborated elsewhere)[24]. Individuals should have the right to contest managerial decisions or working conditions free from reprisals. That can best be secured through job security protections that put the burden of justifying discharge (and perhaps other discipline) on the employer and that afford reasonable (not unlimited) latitude for employee contestation or dissent. The individual right to complain free from reprisals will not put much leverage behind those complaints (as *collective* contestation rights might do). But it is still important. First, an individual right to contest employer power is perhaps the most direct implication of Pettit's 'eyeball test': Can workers look their bosses in the eye and speak their minds without fear or undue deference? Second, some worker concerns are highly individualized, as in the case of harassment or the need for accommodations of family needs or disabilities. Third, individual contestation or dissent is often a necessary catalyst for collective contestation and part of what sustains it.

Individuals should also have a right to participate in mechanisms of meaningful collective contestation, which can provide a powerful way of holding managerial power at least partially accountable to those over whom it is exercised. In a companion paper, we examine the shape of existing collective contestation rights, and especially the shortcomings of the system of enterprise-based collective bargaining that prevails within the US, UK, and Canada.[25] The majority threshold for collective representation means that individuals—up to half the workers in any given workforce—will often be

23. For a classic example in this genre, see H.A. CLEGG, A NEW APPROACH TO INDUSTRIAL DEMOCRACY (Blackwell, 1960).

24. *See Democratic Contestation Rights for the Workplaces We Have*, *supra* note 4.

25. *Id.*

denied access to this traditional mechanism of collective contestation. It also means that even majorities of workers have to fight against what is often (at least in the US) intense employer opposition in order to prove their majority and gain a right to collective representation. But even if US labor law were reformed to better enable majorities to choose unionization, as it should be, we think the entitlement to collective representation should not be wholly hostage to majority sentiment. Those are among the reasons we support something like elected 'works councils,' with a much lower threshold showing of worker support, as a supplement to collective bargaining structures. We refer readers elsewhere for our further elaboration of these issues.

### *C. Boundaries on Employer Authority*

Existing law also combats employer domination by putting legal boundaries on the scope of employer authority—that is, by ruling out certain exercises of that authority. That includes minimum labor standards and prohibitions on employer discrimination and retaliation. We will return to these boundaries on employer authority. But first we need to take up the logically prior question of whether and why employer authority over and subordination of workers is justified in the first place, and what that implies about the boundaries the law should impose on employer authority.

## II. JUSTIFYING PRIVATE AUTHORITY WHILE AVOIDING DOMINATION

There is nothing novel in our grounding the justification for hierarchical authority within firms in its practical necessity. (The novelty lies in our attempt to reconcile that hierarchical authority with workers' freedom from domination.) Without managerial authority, it would be difficult at best to coordinate productive activities in the large and complex organisations that produce most goods and services in the modern post-industrial economy. Complex organizations deploying large and indivisible capital inputs gained dominance over independent artisanal-type production centuries ago in most sectors of the economy. Coase's path breaking work on why firms exist has garnered wide if sometimes grudging agreement: simply stated, firms in which some people are required to take orders from others are vastly more efficient than the conglomeration of individual one-to-one contracts that might otherwise be required to coordinate collective forms of production.[26] This would be true in worker-owned as well as capitalist firms.

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26. Ronald Coase, *The Nature of the Firm*, ECONOMICA 4 (1937). That still begs the question of why it is capital (instead of workers as a group) that 'hires' and ultimately controls the managers.

The basic 'theory of the firm' justifies a substantial measure of managerial authority over workers, but how much? And how much does it matter that managers are responsible chiefly to owners instead of workers? We'll say more about the latter soon. But we think it is plain that, in many liberal market economies, workplace subordination extends far beyond what would be strictly necessary to secure coordination, cooperation and productive efficiency. The actual degree of subordination of workers amounts to a state of republican unfreedom and domination in many firms and across different national labor markets. The US represents an extreme case, but it exemplifies a deregulatory pattern has become more prevalent across the world. How far should employer authority and subordination of workers extend?

### *A. The Problem of 'Private Government' and the Workplace-State Analogy*

The recent intervention of Elizabeth Anderson on 'private government' in labor markets has struck a real chord in both the law of work and political philosophy. According to Anderson, "most workers in the United States are governed by communist dictatorships in their work lives."[27] This is an arresting statement (even leaving aside the odd adjective 'communist'). For Anderson, it means that workers are routinely subject to their managers' exercise of arbitrary and unaccountable power. While these dictators may wear smart suits (or chic turtlenecks) and invoke the warm language of cooperation, the republican unfreedom of workers is stark. They are subject to the direction and control of managers not only in the performance of their work; they can be instructed what to wear or what to say or not say while at work and can be fired for refusing to undertake regular medical examinations and drug testing. Worse still, this dictatorship often extends beyond 'work lives.' In a regime of 'at will' employment, workers can be dismissed for civic, political, or sexual activities in their personal lives simply because the employer objects to it.

Given the economic necessity of waged employment for vast numbers of citizens, the language of dictatorship does not seem that far-fetched in 'at will' systems like the US. Anderson uses the idea of 'private government' to elucidate and critique this state of affairs. According to her, the workplace is a realm of 'private government.' The critical idea here is that of 'government': "government exists wherever some have the authority to issue orders to others, backed by sanctions, in one or more domains of life."[28] The modern tendency to view 'government' as synonymous with the state has no doubt

27. ANDERSON, *supra* note 12, at 39.
28. *Id.* at 42.

been encouraged by conventional understandings of the public/private divide: Government occurs in the public sphere, in the realm of the state, while the private sphere includes the realm of contract and the market. On this view, work relations, at least in the non-state sector of the economy, have little to do with 'government.' Anderson's argument ingeniously retrieves an older way of thinking about 'government' across a very broad range of relations and institutions: "parents (and governesses) exercise government over children, masters over apprentices, teachers over students, guardians over Indians, masters over slaves, husbands over wives."[29] For Anderson, what renders government 'private' is not that it takes place outside state institutions but that it involves the exercise of 'arbitrary, unaccountable power over those it governs.'[30] This penetrates to the heart of modern forms of bureaucratic organisation in liberal capitalist economies like the US, and it exposes the serious civic consequences of economic despotism.

Does it follow from Anderson's 'private government' thesis that we should give up on the very idea of legitimate economic authority? (Anderson does not seem to think so, but let us chart our own path to that answer.) We might conclude that it is simply not possible to accept authority relations in the workplace and republican freedom at work. 'Private government' is a civic stain, and it would be better for us to start again with radically reconceived work relations that are fully cooperative and non-hierarchical. But for us, as for Anderson, the problem with 'private government' at work is not government as such but rather its 'private' nature. And government is 'private,' and its authority presumptively illegitimate, where it is not accountable to those it governs and potentially arbitrary in its dictates. By contrast, government is 'public' and presumptively legitimate where it is embedded in institutions and norms that render that power accountable and non-arbitrary to those over whom it is wielded.[31]

In the case of the modern state, accountability and non-arbitrariness is secured by a mix of constitutional rights, access to independent courts, judicial review of public power, periodic elections of political representatives, civic culture, rule-of-law guarantees, and the separation of powers. The public nature of state power is therefore a contingent feature and is as fragile as the constitutional norms and culture that undergird it. By the same token, the power wielded by managers over subordinated workers in the workplace need not be 'private' power in Anderson's sense. We may have been lured into that way of thinking by regarding work relations as market relations (a

29. *Id.* at 43
30. *Id.* at 45.
31. *Id.* at 41–48.

premise that Anderson, following Marx, dismantles in the first part of her book[32]). In fact, the firm *displaces* the market mechanism by creating a managerial structure that vests broad authority in managers to reduce transaction costs and enable the efficient coordination of production. When workers enter the firm, they leave the market—even though their ability to exit back into that market constrains managers' power within the firm to some degree. What renders workplace government 'private' for Anderson is managers' unaccountable and arbitrary power over workers.

Yet this private dimension is a contingent and variable feature of workplace governance. The workplace hierarchy would cease to be 'private government' if managerial power were rendered adequately accountable and non-arbitrary (or, in terms we argue for here, justifiable) to subordinated workers. That might but need not entail democratic accountability to workers (or so we argue here). One finds significant variations in these matters across different political-economic models of capitalism, as captured in the 'varieties of capitalism' idea.[33] In some European labor law systems, for example, a combination of decent labor standards, robust protection of workers' fundamental rights, effective enforcement, sectoral collective bargaining, and strong enterprise-level works councils, has significantly countered 'private government.'

We will return below to the regulatory techniques that might transform private government into public government—that might, in the republican terms in which we state our thesis here, curb managerial *domination* of workers while allowing for legitimate economic authority). For now, let us recall that Anderson's broad definition of 'government' rejects the tight coupling of *state* power and government; 'public' government is that which is non-arbitrary and accountable, whether it governs a polity or a private firm. This allows for a kind of institutional isomorphism. State-level constitutional values and norms can to some degree be translated into workplace governance to render it more public and accountable to workers. The rich literature on workplace 'constitutionalism,' for example, borrows norms associated with political governance and applies them within the context of employer power.[34]

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32. *Id.* at 1–36.

33. *Supra* note 11.

34. In addition to ANDERSON, *supra* note 12, see, e.g., RUTH DUKES, THE LABOUR CONSTITUTION (Oxford Univ. Press 2018); SOPHIA Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT (Cambridge Univ. Press, 2014). Alan Bogg, *Labor Constitutionalism: Effective Judicial Protection as a Constitutional Principle in United Kingdom Labor Law*, 43 COMP. LAB. L. & POL. J. 45–71 (2023).

So, to return to Anderson's definition, there is 'government' "wherever some have the *authority* to issue orders to others, backed by sanctions, in one or more domains of life."[35] We think that this idea of 'authority' in Anderson's definition of government could help us to identify some limits of government, including workplace government. This is because the designation of a person or institution as an authority often implies at least the claim to legitimacy. An 'authority' is something distinct from brute force and the coercive threats of a gangster. It denotes a normative state of affairs. This is reflected in the characteristic authority language of *rights* and *obligations*. To say that an authority has a 'right to rule,' a right that is correlative to a 'duty to obey' on the part of those subject to the authority, invites a series of further questions on when those claims of authority are morally justified.[36] Where authority is morally justified and exercised for proper purposes, it is not arbitrary power; it is less vulnerable to the 'private government' critique. And where authority is amenable to robust democratic contestation by the subjects of authority, it is accountable power.

This brings us face to face, however, with one problem in the analogy between state authority in the polity and managerial authority at work: One central guarantee of state accountability to the citizens that is wholly missing in workplace governance is democratic election of the rulers by the 'citizens' they govern. The firm-state analogy usually assumes with little reflection that workers are analogous to the citizens of a polity. Yet to demand democratic election of managers by the worker-citizens would effectively put capitalism beyond the pale (a conclusion we resist).[37] Anderson, for her part, also rejects the notion that democratic electoral accountability is a necessary marker of 'public' workplace government.[38] But why? Why doesn't 'public' (and therefore legitimate) government in the workplace require democratic election of the governor-managers by the citizen-workers as it does within the polity? For Anderson, the answer appears to lie partly in the practical economic necessity of managerial authority in the interest of productive efficiency. That

35. ANDERSON, *supra* note 12, at 42 (emphasis added).

36. On this moralized account of authority, based on correlativity of right and obligation, we follow J. RAZ, THE MORALITY OF FREEDOM 23 (Oxford Univ. Press 1986).

37. Other forms of worker voice, like collective bargaining, are both compatible with managerial authority and in our view necessary to counter that authority. *See* Bogg & Estlund, *Democratic Contestation Rights for the Workplaces We Have*, *supra* note 4. Anderson's view of collective bargaining, expressed in a single paragraph of her book, appears consistent with ours. ANDERSON, *supra* note 12, at 69–70.

38. Indeed, she dismisses the option of "[w]orkplace democracy, in the form of worker-owned and -managed firms," in two sentences: "While much could be done to devise laws more accommodating of this structure, some of its costs may be difficult to surmount. In particular, the costs of negotiation among workers with asymmetrical interests (for example, due to possession of different skills) appear to be high." ANDERSON, *supra* note 12, at 69.

is, while she powerfully criticizes the imperative of *unfettered* managerial authority that she finds in the economists' Coasean model of the firm, Anderson is ultimately persuaded that a substantial measure of managerial authority over workers is justified by the productive advantages of hierarchical firms even if workers do not get to elect or fire their managers.[39] So are we. But there is more to say both on why electoral accountability is not required in the workplace (although it is in the polity) and on what alternative constraints on managerial power are required to render workplace government consistent with republican premises, or 'public' in Anderson's terms.

Democratic selection and accountability of top public officials is an essential and ultimate check on excessive or dictatorial authority in the polity. It is essential partly because of the virtual absence of another sort of ultimate check on excessive or dictatorial authority—that is, individuals' right and ability to exit the polity. It is not just that exit from the polity is highly burdensome; it is that the idea of exit as a check on political authority is at odds with the very idea of citizenship. By contrast, workers' inalienable right to exit the workplace, even if it is often burdensome, is foundational to the employment relationship. And it serves as an ultimate check on managers' authority at work. We have been emphatic here and elsewhere that exit is not a sufficient check on illegitimate workplace authority. But neither is electoral accountability a sufficient check on political authority. In both cases, despite one essential and ultimate (maybe primary) check on governmental authority—exit or elections, respectively—concerns about illegitimate authority and domination remain. Those concerns call for additional checks on authority—indeed, some quite similar sorts of checks: prohibition of discrimination, protection of fundamental rights, including rights of individual and collective contestation, and rule of law constraints including procedural and substantive 'due process' checks against some kinds of adverse decisions.

In both spheres, some decisions are subject to adjudication and third party (often judicial) review, because of their impact on individuals or disfavored groups. Other kinds of decisions are left to political or managerial authority, subject only to the ultimate check provided by democratic elections or exit rights respectively. In both spheres, in other words, we accept a range of discretionary judgement by managers; we accept that effective government could not go on, to the detriment of many stakeholders, if every decision with any impact on individual interests required affirmative justification subject to adjudicatory review. We will return to these institutional specifics. But the central question here remains: Why should we accept discretionary

39. *Id.* at 64–65.

managerial authority over workers? Can it be justified from within principles of republican 'freedom as non-domination'? Or is it just a practical economic necessity that must be constrained and countered in the interest of republican freedom and ultimately balanced against the risk of domination?

### *B. Can Managerial Authority Be Justified from Within Republic Theory?*

Again, parallel questions arise within the polity: Can government authority over citizens be justified from within republican (or liberal) accounts of the freedom and autonomy that citizens must enjoy, or is that authority merely a practical necessity in a complex society that must be accepted but adequately restrained in the interest of civic freedom and autonomy? A leading account of authority is provided by Joseph Raz, who defends a 'service conception' of authority.[40] Raz asks: when authorities issue binding directives to their subjects, can it ever be justified to surrender one's own judgement over such matters to the authority? Or, in so doing, are the subjects necessarily surrendering their autonomy? According to what Raz describes as the 'normal justification thesis': Where following the directive of the authority means that we are more likely to act in accordance with correct reasons and to thus better serve our own real interests, then we should do so.[41] The 'service' that authorities provide is a superior ability to assess the applicable reasons, to exercise practical judgement, and to make better decisions on behalf of their subjects.

On Raz's account, legitimate authorities improve the lives of those subject to their authority in two kinds of case. The first is where the authority has special technical or moral expertise. In relation to states, this includes "much of planning law, laws concerning safety at work, regulations regarding standards of manufactured goods . . . qualifications required for engaging in certain occupations."[42] The second is where the state is well-placed to provide an authoritative resolution of a collective coordination problem.[43] These coordination problems are pervasive in human communities, and states are often best-placed to solve them through the coercive enforcement of authoritative directives: "standards for the preservation of the environment, for the protection of scarce resources, for the raising of revenue through taxation to

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40. Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003 (2006).

41. *Id.* at 1014.

42. Joseph Raz, *The Obligation to Obey: Revision and Tradition*, *in* JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN 348 (Oxford Univ. Press 1995).

43. On law and coordination problems, see John M. Finnis, *Law as Coordination,* 2 RATIO JURIS 97 (1989).

finance public projects, welfare services."[44] Where state government is addressing itself to those legitimate tasks of public authority, the use of state power is less likely to be arbitrary in respect of those who benefit from greater expertise and valuable coordination, and more respectful of their autonomy insofar as it is oriented to the reasons that apply to their situation (if not necessarily their conscious preferences). In the terms we favor here, individuals' submission or subordination to state authority in those circumstances does not amount to domination.

If this argument works for states, might it also work for firms? There is no reason to think that the 'service conception' should be restricted to state authorities. In fact, our social world is marked and enriched by several sites of non-state authority—doctors and patients, lawyers and clients, schools and pupils, parents and children—that might be provisionally justified on the 'service conception' of authority. But a large stumbling block appears when we try to extend the argument to firms and workers. Doctors, lawyers, schools, parents, and indeed the state, essentially exist to serve their patients, clients, students, children and citizens respectively. That basic loyalty or duty is backed up by laws and institutions (such as fiduciary duties or, in the case of the state, elections). Private firms under capitalism do not exist to serve their workers.[45]

A number of functional analyses of managerial or employer authority within the firm—useful within their own terms—similarly encounter that stumbling block. Consider Mark Reiff's interesting reflections on why firms and hierarchy would emerge in a libertarian utopia. Reiff sketches a legitimate authority argument that we think could usefully be considered in parallel with Raz's 'normal justification' thesis:

> For what the firm does is provide a mechanism for taking full advantage of the division of labor, one of the great technological innovations of all time. Within the structure provided by the firm, some people can specialize in predicting wants, in deciding what is to be produced, and in acquiring and allocating the necessary factors of production; some people can specialize in familiarizing themselves with the logistical demands of managing labor and developing the interpersonal skills necessary to do so effectively . . . The

44. Raz, *supra* note 42.

45. By contrast, the 'service conception' of authority might more adequately justify managers' authority within worker-owned firms in that those managers are chosen by, and exist to serve, the worker-owners. Even then, if managers have authority to dismiss or lay off workers, parallel difficulties might arise. We are grateful to an anonymous referee for prompting us to think about authority in worker-owned firms.

> cooperation of each of these groups within the firm is what enables a business enterprise to be maximally productive.[46]

Similarly, Simon Deakin has identified overlapping functional characteristics of the concept of 'employer'—including coordination—which give rise to a kind of authority: "In an economic sense, the enterprise is defined by reference to an implied 'authority relation' which grants the employer a certain discretion to direct the factors of production, including labor, without the need for express recontracting."[47] Prassl's 'multi-functional' account of the employer also identifies core functions that justify the authority relation in the firm, in particular "managing the enterprise-internal market (coordination through control over all factors of production)" and "inception and termination of the contract of employment (this category includes all powers of the employer over the very existence of its relationship with the employee)."[48]

These functional considerations of expertise and coordination indicate ways in which firms might operate as legitimate authorities and exercise their power in non-arbitrary ways vis-à-vis their workers.[49] Despite apparent parallels with the 'service' conception, however, these considerations still do not bring the authority that managers exercise over workers completely under that normative umbrella. That is because those considerations fail to grapple with the problem of whose interests are served in case of conflicts. Certainly, skilled managers will often take workers' interests into account in making decisions; moreover, workers often benefit from skilled management—as long as they are members of the firm. But therein lies the rub. If we accept that managers have authority to dismiss workers or eliminate jobs, even through no fault of the workers' own, then it is difficult to accept the service conception as a comprehensive justification for managerial power. And we do mean to accept that kind of managerial authority (subject to certain constraints) as part and parcel of the 'creative destruction' that makes capitalism such a dynamic mode of production and engine of growth.

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46. MARK R. REIFF, IN THE NAME OF LIBERTY: THE ARGUMENT FOR UNIVERSAL UNIONIZATION 26 (Cambridge Univ. Press 2020).

47. Simon Deakin, *The Changing Concept of the "Employer,"* 30 LAB. L. INDUS. L.J. 72, 79 (2001).

48. JEREMIAS PRASSL, THE CONCEPT OF THE EMPLOYER 32 (Oxford Univ. Press 2015).

49. This relates to a debate within republican theory about the meaning of 'arbitrary' power. Some accounts, as in Philip Pettit's early work, suggest that power is arbitrary where it does not attend to the interests of those affected by it. Reiff proposes a thinner account such that power is non-arbitrary where it is exercised in accordance with the criteria appropriate to the decision. REIFF, *supra* note 48, at 91. We can see the attractions of this in the labor field. For example, we doubt that a dismissal for non-fault-based capability reasons could be described as 'arbitrary,' even though it cannot be said to be in the interests of the dismissed worker. But we do not think that a definitional reliance on 'criteria appropriate to the decision' reckons adequately with decisions that are primarily responsive and accountable to others rather than the subjects of the authority. It defines away the problem we are grappling with.

Managers do not stand as either fiduciaries or representatives of the firm's workers. Workers are among firms' stakeholders, but the law under capitalism (in all its existing varieties) effectively appoints the firm's *owners*, or suppliers of capital, as the primary stakeholders. Owners choose, direct, and potentially dismiss managers; and both law and the network of contracts that constitute managerial authority aim to ensure that managers are accountable primarily to the firm's owners. So, the question we must ask—given our dual embrace of capitalism as a mode of production and the central value of freedom from domination—is whether managerial authority over workers that is primarily driven by the pursuit of capital's interests, and is sometimes exercised against workers' interests, can nonetheless be justified if one is committed to republican freedom as non-domination. We think the justification cannot be grounded in the notion that firms exist to serve their workers' interests; it must come from elsewhere.

In seeking to justify managerial authority, we find ourselves falling back—like Anderson and others who would empower and protect workers without jettisoning capitalism altogether—on the productive efficiencies of hierarchical management and its contributions to societal prosperity. For-profit firms are obviously not the only way to produce essential goods and services. Within the varieties of capitalism, societies provide many 'public goods' and some indispensable survival goods (like health care and basic housing) through public provision, 'public options,'[50] or public funding, and through non-profit organizations. But private firms that are organized hierarchically and managed in pursuit of profits can and do generate most of the goods and services and most of the wealth and income that members of a society seek out of an economic system. Workers may benefit directly from skilful management of firms while employed within those firms. Otherwise, and crucially, they may benefit indirectly through overall economic vitality, including job opportunities elsewhere in the economy and tax revenues that support public goods and redistributive and regulatory institutions. Those indirect benefits are hard to squeeze into a 'service conception' of managerial authority (especially on behalf of workers who lose their jobs at the hands of skilled managers). The direct and indirect benefits of managerial authority under capitalism fit better under a broader rubric of 'legitimate economic authority.' Workers (and voters) might willingly and legitimately trade off some freedom (from subordination if not domination) in exchange for the mostly-economic gains from effective firm governance and a dynamic

50. *See* ANNE ALSTOTT & GANESH SITARAMAN, THE PUBLIC OPTION: HOW TO EXPAND FREEDOM, INCREASE OPPORTUNITY, AND PROMOTE EQUALITY (Harvard Univ. Press 2019).

economy. We might try to square the circle and express those gains in terms of freedom; but we think it is more honest to depict this as a trade-off between freedom and a package of other goods and gains.

As Anderson herself recognises, hierarchical managerial authority in private firms has achieved a level of productive cooperation, technological innovation, and economic prosperity in liberal market economies that is simply not possible to achieve through discussion and unanimity or through individually-negotiated agreements or contracts.[51] Nor does that appear possible—at least as far as history demonstrates—entirely through firms accountable either to workers collectively or to the state. All in all, we conclude that managerial authority over workers, subject always to the right of exit, is justified by the necessity of managerial authority in securing the broadly shared advantages of a productive and dynamic economy. Provided that those advantages are indeed broadly (though not necessarily equally) shared, that can justify workers' *subordination* to management but not their *domination*. There is no obvious reason, and no reason in our account so far, why managers' legitimate economic authority in the workplace should or must include the power of unjustified or unfettered control of the sort that amounts to domination. It does not necessitate or justify the nearly unchecked power wielded by firms over every facet of their workers' lives, as best exemplified in the 'at will' regime of US labor law.

### *C. Threshold Problem in Defining the Scope of Managerial Authority*

The threat of domination lies not in the existence but in the *scope of managerial discretion* conceded by the law of work under some varieties of capitalism. And while effective managerial authority does require discretion, it does not require unlimited discretion. Here again we land with Anderson: "[T]he theory of the firm, although it explains the necessity of hierarchy, neither explains nor justifies private government in the workplace. That the constitution of workplace government is both arbitrary and dictatorial is not dictated by efficiency or freedom of contract . . . ."[52] Managerial authority can be effective even though it is constrained in the interest of protecting workers' freedom from domination and abuse. Much turns, of course, on the nature and stringency of the constraints on managers' discretionary authority. That brings us to another knotty point.

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51. ANDERSON, *supra* note 12, at 52
52. *Id.* at 64.

Whenever a person or institution wields power, there is a risk that this power will be misused, abused, or exercised capriciously or unwisely. The law reports in the labor field are full to the brim of these abuses. Those abuses, or the potential for those abuses, might well add up to domination at work. One solution—a minimal discretion approach—might be to require managers to justify to the satisfaction of a neutral arbiter all decisions that affect workers' interests (if challenged)—that is, to demonstrate their utility or necessity in pursuing the efficiencies and such that justify managers' legitimate economic authority. An alternative approach might recognize (as Gardner does in relation to private property rights) "the net wisdom-yield of a wider system of assigning authority" rather than the case-by-case justification of specific exercises.[53] Applied to the workplace, the claim is that, overall, a system that accords a wider latitude for discretion, subject always to workers' ultimate right of exit, might achieve better outcomes than a system that is more restricted. Insisting upon a wise exercise of authority on every occasion, amenable to independent challenge in court or the like, would be intrusive and unwieldy; process costs alone would stifle effective management. On the latter 'wide discretion' view, some (even extensive) exposure to private domination may be an acceptable price to pay for a system that functions well in the round—that delivers the goods, services, incomes, innovations and whatever else we want out of an economic system.

We have some sympathy with the latter view. As suggested in the previous section, we think there should be some scope for both democratically governed societies and individuals to trade off some freedom from subordination in exchange for the economic benefits of managerial authority. But we think the better approach to managerial authority at work lies in between, or rather in a mix of, these two polar positions. Some decisions should have to be affirmatively justified based on the underlying rationale for managerial authority; others should be at least presumptively conceded to managerial discretion. (Still others should be ruled out altogether, as we will see.) We'll turn to specifics soon, but for now, it is worth laying down some principles that distinguish the two categories.

In identifying the first set of decisions, it is useful to recall Anderson's definition of 'government' again. It exists "wherever some have the authority to issue orders to others, *backed by sanctions*, in one or more domains of life."[54] Not all authorities resort to sanctions. We are not coerced to submit to the directives of our doctor or our lawyer. By contrast, the firm's

53. John Gardner, *Private Authority in Ripstein's* Private Wrongs, 14 JERUS. REV. OF LEG. STUD. 52, 57 (2016).

54. *Id.* (emphasis added)

coordinating function is supported by a structure of disciplinary surveillance and penalties, ranging from dismissal to demotion, suspension, fines, or warnings that might lead to future sanctions. Disciplinary codes and procedures might provide a privatised 'rule of law' in the workplace and may even ritualise the employer's disciplinary function through formalised hearings and opportunities for appeal. But at bottom these are systems of coercion. That sets firm authority over workers apart from most other instances of non-state authority. Moreover, the coercive nature of disciplinary sanctions, including dismissal, sets those particular managerial decisions apart from many others. Disciplinary sanctions and the threat of such sanctions pose the greatest threat of managerial domination of workers.

The wide discretion approach to such decisions is reflected in the pure version of employment-at-will, which backs up any employer demand or whim by the potential threat of dismissal for any reason or no reason at all without advance notice or recourse. (That principle prevailed in nineteenth century US law; but it has been softened—more than Anderson acknowledges—by the proliferation of wrongful discharge exceptions, as discussed below).[55] Even where the worker's contractual duty of obedience is restricted to lawful and reasonable instructions, as in English law,[56] this is a weak constraint where an employer can nonetheless terminate the contract at will—that is, for no good reason. In the absence of limits on the dismissal power, the employer effectively enjoys full control over any aspect of the worker's life (up to the point that the worker feels driven, and is able, to quit). This is because employer and worker are both aware that the contract can be terminated at the employer's whim. Besides state authority, no other type of authority comes close to this sweeping and intrusive control over citizens' lives. In our view (as in Anderson's), 'at will' employment embodies republican unfreedom at work.

The minimal discretion approach to such decisions, by contrast, would require employers to justify disciplinary decisions, or at least the most serious such decisions, based on something like 'just cause,' such as serious misconduct or poor performance. That approach is represented by 'unjust dismissal' laws, which prevail in nearly all developed market economies of the world. As we will underscore below, requiring fair reasons and procedures for a lawful dismissal probably constitutes the single most important way of securing freedom from domination in the workplace by limiting the arbitrary exercise of managerial power.[57]

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55. *See* Cynthia Estlund, *Rethinking Autocracy at Work—*, 131 HARV. L. REV. 795, 804–05 (2018).
56. *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698.
57. The classic work is HUGH COLLINS, JUSTICE IN DISMISSAL (Oxford Univ. Press 1992).

Existing labor law systems use a variety of techniques to define the appropriate limits of the 'managerial prerogative.' Many of these would be encompassed in Anderson's proposed typology of regulatory methods of exit, the rule of law, constitutional rights, and worker voice.[58] Her work exposes with great clarity that the fundamental starting-point for combatting domination at work must be protection from unjustified dismissal. The 'at will' regime represents a regulatory choice in the US system, and many other labor law models reject it. This comparative perspective on work relations, first, reinforces our own view that that managerial authority and non-domination can be reconciled—not on the basis of principles wholly internal to either construct but based on a careful balance between them. Second, that comparative perspective does helpfully point to ways in which this reconciliation or balance might be achieved through democratic decision and state regulation.

In the next section, we examine some variations in regulating and restricting managerial authority through work law. Legal regimes are sensitive to the specific type of managerial power that is being exercised. Where there are serious risks of coercive and personalized domination, for example in disciplinary dismissals, republican legal regulation would call for independent judicial or administrative review. Where those risks are attenuated—for example, in the case of strategic economic decisions leading to collective redundancies—there is a much wider zone of managerial prerogative. In these situations, accountability may be achieved by subjecting managerial authority to collective contestation by or consultation with workers.

## III. A GRADUATED APPROACH TO CONSTRAINING MANAGERIAL AUTHORITY THROUGH THE LAW OF WORK

So, our working premise is that managers have legitimate economic authority, including a range of discretionary authority, to manage workers and work in the interest of the enterprise as a whole within a market economy. The incentive structures of capitalist firms ensure that managers' understanding of the 'interest of the enterprise as a whole' is skewed heavily toward the interests of the firms' owners—that is, the residual equity claimants who supply capital and who ultimately hire and fire managers. The interests of other stakeholders enter managers' calculus mainly by way of contractual commitments (for example, to creditors or to unions representing workers) and the constraints of external law. External law includes governance reforms such as frameworks for codetermination and collective bargaining that give

58. *See* ANDERSON, *supra* note 12, at 65–66.

workers a voice *within* the firm. External law also includes outer boundaries or constraints on managerial authority in the interest of workers (as well as the interests of consumers, communities, and the natural environment).

Democratically-governed capitalist societies vary in how much they rely on direct regulation versus what we might call 'regovernance'—institutions of codetermination or collective bargaining—to protect workers' interests and combat domination; those variations are central to the 'varieties of capitalism' literature. But we will begin here—in part because of our own immersion in Anglo-American varieties of capitalism—with the direct regulation of work and employment, both as it is and as it ought to be in order to minimize the risk of employer domination of workers. That is, we put aside for now the effect of 'regovernance' institutions including collective bargaining and other rights of collective contestation at work.[59]

### *A. Three Types of Constraints on Managerial Authority*

The existing law of work in all democratically governed capitalist countries rules out some exercises of managerial authority, excluding them from the scope of managerial discretion and, by and large, from the 'freedom of contract.' These legal boundaries on managerial authority take three forms, including (1) prohibition of certain decisions or conditions altogether without regard to their justification or motive (or their disparate impact on particular groups); (2) prohibition of certain motives or reasons for managerial actions that are otherwise within the presumptive range of managerial authority; and (3) requirements of affirmative justification for some decisions. National labor laws vary in where they place different sorts of decisions, and our analysis offers a normative basis upon which to evaluate those judgements.

The first category includes minimum labor standards regarding wages, hours, scheduling, health and safety, and more. The second category includes laws against discrimination, harassment, and retaliation of various kinds. The third category is illustrated by the law of unjust dismissal (in most countries). As we explained above, dismissals present a particularly serious risk of domination; yet they cannot be ruled out entirely (for example, where workers steal, harass co-workers, or seriously and unjustifiably disrupt operations). In the US, dismissals are challengeable under the second category of laws based on unlawful discrimination or retaliation. But the rest of the democratic capitalist world requires affirmative justification by management based on

59. We recognize that much of what is done by government regulation in the Anglo-American countries is done in some Nordic countries by collective agreement. For our purposes what is important is the establishment of binding minimum standards by some legally-sanctioned mechanism.

legitimate and more or less compelling reasons, along with procedural rights such as notice of the allegation and a reasonable investigation/hearing.

We think that all managerial decisions that have a significant adverse impact on workers' basic needs and interests should be included in one of the three categories of boundary restraints sketched here. No managerial decision of that sort should be within the unfettered discretion of management. That is, even if such decisions conform to minimum labor standards (category 1), they should be subject at a minimum to legal review and potential reversal if they are motivated by discrimination or retaliation against workers based on protected characteristics or activities. That leaves a range of management decisions—those that do not have a significant impact on workers' basic needs and interests—outside of categories 1, 2, and 3. (Of course, questions may arise over what counts as a 'significant adverse impact' for these purposes; we will offer some thoughts about that in what follows.) Those decisions might be assigned to 'the managerial prerogative' without too much confusion; or they might be made subject to worker contestation or even mandatory consultation with workers. Either way, those policy choices would not be dictated by concerns about managerial domination of workers. Let us briefly examine the three categories.

*Absolute boundary restrictions on managerial authority*: Regulation of wages, working hours and scheduling, workplace hazards, and the like put a more or less *absolute* floor or lower boundary on labor conditions within a jurisdiction. Absolute, that is, in that no bad motive is required to challenge substandard conditions, and no business justification is admissible to defend them. Moreover, those lower boundaries are generally not waivable or derogable by workers either individually or collectively. Both managerial discretion and individual or collective bargaining with management must operate within those boundaries, or above the legal floor.

We think that some decisions that are now challengeable only if they are illegitimately motivated (category 2) ought to be flatly prohibited (category 1). We have in mind mainly the case of workplace bullying and harassment, which in the US is generally unlawful only if it is discriminatorily motivated, but that should be (and is in many countries) broadly prohibited and actionable.[60] (It does not make sense to ask whether such conduct must be justified (category 3); bullying and abuse are no more justifiable on legitimate managerial grounds than unsafe working conditions or subminimum wages.)

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60. *See* David C. Yamada, *The Phenomenon of 'Workplace Bullying' and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEORGETOWN L.J. 475 (2000). Alan Bogg & Mark R. Freedland, *'The Criminalization of Workplace Harassment and Abuse: An Over-Personalized Wrong?'*, *in* CRIMINALITY AT WORK (Bogg, Collins, Freedland & Herring eds., Oxford Univ. Press 2020) .

Bullying and abuse within the hard-to-escape workplace setting is a vivid example of personal domination, whatever its motive, that management should be charged with preventing and prohibiting.

Eric Tucker has highlighted the limited penetration of workplace regulations into that he, following Marx, calls 'the abode of production.' That is, with the crucial exception of occupational safety and health laws, managerial power over production itself—the power to define work tasks, to oversee the means and manner of their completion (including through constant surveillance), and to set standards of performance—is largely untouched by the law of work. Largely but not entirely. Insofar as all of those managerial powers over production are backed by the power of discipline, an unjust dismissal regime can open up managerial judgements of job performance to third-party review (albeit usually with a large measure of deference). Moreover, health and safety laws constitute no small exception to managerial power, and no small protection against employer domination, within the 'abode of production.' Those laws can and do sometimes impinge on managerial power over, for example, the pace of work; and they might be construed to reach any aspect of production that poses a significant risk to workers' physical or psychological well-being. We think that is about as far as boundary restrictions on managerial authority over the work itself ought to go, given the logic of 'legitimate economic authority.' (Note, too, that workers' contestation rights may extend further into the 'abode of production' through rights to protest or even strike against noxious but not-unlawful types or conditions of work, and to bargain collectively over them.)

The description so far might misleadingly imply that boundary restrictions on managerial authority are always simple, clear, and uniform. Some of these legal boundaries vary by sector, by size of the enterprise, or by geographical sub-jurisdiction. Other boundary restrictions may require judgement calls as they are rendered more determinate, as with prohibitions on harassment and abuse and even some safety violations. International labor law may supply a transnational floor on some working conditions; but at or above that level the floor set by national (and sometimes subnational) labor standards is subject to democratic and political judgements about what is possible and appropriate given economic and social conditions and has varied over time and across and within countries. These objective labor standards represent the core of what a given jurisdiction deems to be 'decent work,' a societal construct that is necessarily and appropriately subject to change and some variation, and generally to improvement over time.

Returning to our overall normative frame of non-domination, a society's collection of minimum labor standards, and the definition of decent work that

they embody, constitute outer boundaries on what workers can be required to accept at work, and thus on bosses' ability to impinge further on workers' basic interests as a condition of holding a job. That is one way the direct regulation of work constrains the nature and extent of workers' subordination and limits the risk of employer domination. Within this category, it will be particularly important to identify the 'minimum core obligations' of international labor law with which states must comply.[61] And that is about all we have to say about these objective labor standards, which (despite some complexities) are the simplest of the three categories of direct regulation of work.

*Constraining discretion: Between categories 2 and 3:* Those absolute lower boundaries on working conditions in category 1 leave untouched a wide zone of decision-making authority that is presumptively allocated to management. Some of those decisions impinge on some workers' vital interests, yet they cannot be categorically ruled out of bounds because they may serve the interests of the organization as a whole, including the welfare of other workers and other stakeholders. That includes discipline and discharge of workers; definition of job duties; location, relocation, or the opening or closing of operations; and the use of technology to replace or reshape job tasks. (Many such decisions are the subject of governance mechanisms like institutions of co-determination or collective bargaining; but for now, we are still bracketing those institutions to focus on direct regulatory restrictions.) As to each of those types of decisions, the law might adopt a rule of unconstrained managerial discretion, of discretion bounded by restrictions on retaliation and discrimination (category 2), or of more limited discretion only insofar as it can be affirmatively justified on the basis of legitimate organizational needs (category 3).

We think that, as to any decisions that can impinge on workers' vital interests, a rule of unconstrained discretion creates too great a risk of employer domination. At a minimum, allegations of discrimination or retaliation against workers in such decisions—that is, that they allegedly targeted workers because of protected traits or protected activities (like union organizing)[62]—ought to be subject to public (judicial or administrative) review and,

61. *See* JOHN TASIOULAS, MINIMUM CORE OBLIGATIONS: HUMAN RIGHTS IN THE HERE AND NOW (World Bank, 2017).

62. The scope of these protected activities deserves closer attention than we can give it here. But we think it follows from all we have said here that workers' off-duty, non-work-related activities and associations, as well as a range of contestatory activities (including union organizing, informal protest, and some work stoppages), ought to be protected from employer interference and reprisals.

if proven, some kind of sufficiently dissuasive remedy for affected workers.[63] That is the least that is required to combat employer domination of workers, and it does not impinge too much on managers' legitimate economic authority over the organization. By that we mean not only that managers' authority does not include discriminatory or retaliatory reasons for acting—it does not—but also that anti-discrimination and anti-retaliation laws can, we think, be administered in a way that does not indirectly or practically interfere too much with legitimate economic authority.

That final point is important as we move from abstract principles to institutional design: adjudication of boundary constraints like discrimination and retaliation entails both administrative costs and risks of error that can impinge on managers' ability to carry out legitimate (non-discriminatory and non-retaliatory) organizational aims. The easier it is for workers' challenges to prevail in case of uncertainty, and the costlier any resulting remedies and penalties, the more likely managers will be deterred and constrained from pursuing legitimate organizational ends. But the point cuts both ways: the harder it is to prosecute and prove claims of discrimination or retaliation and the weaker the remedies, the more likely it is that actual discrimination and retaliation will escape challenge. There is no perfect test or process for proving discrimination and retaliation that avoids significant administrative costs and that can ensure against both types of error—call them false positives and false negatives. The aim in these category 2 decisions should be to give enough but not too much deference to managerial judgements—enough to enable management to pursue its legitimate aims but not so much as to license discrimination and retaliation under cover of legitimate aims. The practical costs and burdens that attend enforcement of clearly justified restrictions on managerial decisions need to be considered in the design of enforcement institutions.

The point recurs for employer decisions in category 3—that is, decisions that require affirmative justification based on legitimate organizational needs—but in a form that shifts much of the risk of error and uncertainty to the employer. That, and the corresponding contraction of employer discretion, is precisely what is intended in imposing on the employer the 'burden of proof'—meant here in a non-technical sense—on certain decisions. If not for the significant administrative costs and risks of error that attend any public review of employer motive or justification, then it might seem that all employer decisions that could adversely affect workers should require

63. We include among discriminatory or retaliatory decisions those that have an unjustified disparate *impact* on protected groups or protected activities. That is, we do not mean to make proof of invidious motive a prerequisite to these legal restrictions on workplace decisions.

affirmative justification. After all, if managers' legitimate economic authority is defined by reference to what serves the legitimate interests of the organization, then it might seem axiomatic that the law should require just that sort of justification as to any decision that might adversely affect workers. Yet the cumulative burden of managers having to justify to a public body every such decision—every reprimand, change in job duties, or adoption of new workplace technology, for example—would undercut the reasonably efficient pursuit of the organization's mission and thus the interests of all stakeholders (including workers themselves) in the organization's success.

Our point here is that, given the costs and potential for error in public review of employer decisions, employers' legitimate economic authority to manage the organization should not necessarily be strictly limited to what the employer can prove to a public body is necessary to serve the organization's interests in a particular case; it has to include some buffer of discretion and deference for at least some decisions that may adversely affect workers. These practical institutional considerations should inform the line within the law of work between employer decisions in category 2 (presumptively legitimate unless proven discriminatory or retaliatory) and those in category 3 (illegitimate unless affirmatively justified). In our view, that means that category 3 should include decisions that satisfy two conditions: (i) the adverse impact on workers' economic interests is immediate and serious; and (ii) the decision involves a threat of personalized domination such as that presented by disciplinary action.

### *B. Drilling Down on Dismissals*

The clearest case for category 3 treatment is disciplinary dismissals, which indeed must be justified on something like a 'just cause' or 'good cause' standard in nearly all democratic capitalist societies. In the US, which consigns dismissals to category 2, workers are at too much risk of employer domination—of unlawful discrimination or retaliation that cannot be proven, of sheer arbitrariness or personal spite that falls outside the existing prohibitions of discrimination and retaliation, and of the leverage that employers or supervisors can exercise over workers by the explicit or implicit threat of unjustified discharge. That leverage may extend even to workers' off-duty private activities and associations to whatever extent workers need or want to retain their jobs. It is that allowance of serious unjustified interference with workers' needs and interests that, for Anderson, earns the label of 'private government.'

These prescriptions are reflected in the positive law of work across many national jurisdictions (outside the US) and are embodied in the ILO Convention on Termination of Employment, 1982 (No. 158). Articles 4 and 5 of that Convention provide:

> Article 4: The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.
>
> Article 5: The following, inter alia, shall not constitute valid reasons for termination:
>
> (a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;
>
> (b) seeking office as, or acting or having acted in the capacity of, a workers' representative;
>
> (c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
>
> (d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
>
> (e) absence from work during maternity leave.

Article 4 isolates permissible reasons for dismissal related to the productive needs of the enterprise; it puts at least individual disciplinary dismissals (including those based on misconduct or poor performance) into our category 3. This does not eliminate but sharply constrains the potential for domination through dismissal and threats of dismissal. Article 5 goes on to bar certain reasons—basically discriminatory or retaliatory reasons—from dismissal decision-making. Absent Article 4, that would suggest a category 2 approach to dismissals; but given Article 4's 'valid reason' standard, Article 5 effectively emphasizes that the reasons specified do not constitute 'valid reason' for dismissal. (Articles 7–9 of the Convention go on to provide for a 'rule of law' in termination decisions, including procedural guarantees such as an opportunity to challenge allegations prior to dismissal and a right to complain to an independent body.)

If disciplinary dismissal is the quintessential category 3 decision, we can imagine extending the category in three possible directions. The first would reach hiring and promotion decisions (or rather non-hiring and non-

promotion decisions). Such decisions are less likely to be used and perceived as a means of domination (though favoritism or conditional promises of hiring or promotion could back up unreasonable demands). In positive law, those decisions rarely need to be justified affirmatively or independently reviewed, even in more worker-protective labor law systems. Instead, the law (including US law) excludes certain reasons from the employer's discretionary judgement, including reasons or motives based on workers' identity, status, or protected activities. In other words, hiring and promotion decisions are placed in category 2, not category 3. We think this treatment of hiring and promotions appropriately focuses legal scrutiny on the worst potential abuses, while leaving adequate residual authority for managers to make these daily personnel decisions. That leaves workers free to demand greater constraints on these decisions—for example, a seniority system for promotions—through mechanisms of collective bargaining.

One could also extend category 3 treatment to either individual discipline short of dismissal (which could lead to dismissal), or terminations of employment that are not disciplinary but 'economic'—that is, that are not due to the employee's misconduct or poor performance but to reductions in force or relocation, reorganization, or technological transformation of operations. These two kinds of decisions might both warrant less exacting review than disciplinary dismissals, albeit for quite different reasons. Individual disciplinary decisions short of dismissal may warrant less exacting review because of their lesser impact on workers, as well as their greater frequency. It might not be worth it for workers, and too costly for employers, to hold relatively demanding good-cause hearings to include these lower-stakes and more frequent decisions. (When milder sanctions do eventually contribute to dismissal, however, they ought to be reviewable within the unjust dismissal process; that should induce employers to give some attention to fairness and even-handedness in those non-dismissal disciplinary decisions.)

As for what we might call impersonal or economically-based dismissals, the economic impact on workers is similar (though not identical) to individual dismissal, just multiplied by the number of workers affected. That might militate for category 3 review. But the stakes for employers and continuing member-stakeholders, including retained employees, are usually much greater. Such decisions thus seem less likely to be made arbitrarily or spitefully, more likely to trigger serious internal review, and more likely to involve complex calculations that might be harder for an outside decisionmaker to assess. Those factors might make public review both less necessary for workers and more burdensome to the organization.

Our normative frame of non-domination suggests another reason for less exacting review of these larger-scale economic decisions: Whereas managers' discretion over individual dismissals carries with it the potential to *threaten* dismissal, and thus to exert leverage over the targeted worker, it is harder to see that same risk in managers' power to terminate whole categories of jobs (as in collective redundancies or reorganization of operations). That power seems harder to throw around as leverage against workers, harder to deploy strategically to impose arbitrary or illegitimate conditions (like restrictions on private off-duty associations), and less likely to elicit a demeaning kind of deference from workers. To say of a collective layoff that 'it's not personal' might offer cold comfort to the employee who is left to scramble for another job; but it does tend to defuse the highly personal kind of domination that is enabled by the power of arbitrary individual dismissal.

This issue brings us back to the basic question about what kind of domination we are aiming to minimize: Is it only 'diadic' domination of individual workers by employers—both individual bosses and organizations—or also the impersonal or structural domination that workers experience by virtue of the imperatives of competition and accumulation that drive their bosses? If, as we have argued, 'structural domination' is the price we pay for the vitality and fruits of capitalism, then that suggests we should accept less exacting review of impersonal collective decisions that result in job losses than of individual disciplinary dismissals. That might call for either a lower standard of review, and greater deference to management, within a category 3 'good cause'-type review process; or it might call for putting these decisions within category 2, where the decision stands absent proof of a retaliatory or discriminatory motive. The latter, more deferential approach might be especially appropriate if the law affords channels of collective voice, such as consultation or collective bargaining, over such managerial decisions. We see something of this nature with collective redundancies consultation in the UK.[64] The employer is given a wide latitude in its economic-decision-making on collective redundancies, but affected employees have consultation rights. This provides a voice mechanism for collective contestation and an independent check on otherwise arbitrary and unaccountable economic authority.

### *C. A Brief Note on Collective Contestation and Consultation Rights*

We have explored elsewhere what we think those rights should entail at both the individual and collective levels. But one might ask how those

64. JOHN MCMULLEN, REDUNDANCY: LAW AND PRACTICE (Oxford Univ. Press 4th ed. 2021).

institutions relate to the regulatory limits on managerial authority explored here. First, we think that at least all managerial decisions or actions with a significant impact on workers—those that are covered by one or another of the three categories of constraints on managerial decisions—ought also to be subject to individual and collective contestation, including through institutions of mandatory consultation or codetermination. Workers acting through those institutions in turn might agree to some limits on the scope or extent or form of contestation. That is, workers acting through institutions of democratic engagement (even without the right to elect managers) should have the latitude to reign in and regulate contestatory activity to some degree in the interest of the enterprise as a whole. That might include, for example, barring strikes over matters covered by collective agreements during the term of such agreements or prescribing internal procedures for contesting management decisions, apart from any external review procedures.

Protecting workers' contestation of these already-regulated managerial decisions might seem duplicative. But we have already observed that external review procedures and enforcement mechanisms for minimum labor standards will often leave workers exposed to significant harms either during their pendency or when they fall short. Contestation rights afford a soft and partial backstop against the imperfections of regulatory processes, and an additional check on managerial domination of workers through unjustified interference. In particular, institutions of consultation or codetermination might put the right sort of restraints on collective redundancies that might not be effectively challengeable within category 2, but that might not be subject to the most rigorous justification requirements within category 3. That is apart from our arguments elsewhere that contestation rights are basic to workers' freedom from domination—not so basic as to admit of no constraints but basic enough to demand that constraints be backed by special justification and perhaps democratic bona fides.

What about management decisions that do not have a demonstrably significant impact on workers' vital interests—that are outside the three categories of restrictions—but that workers nonetheless care about? That might include decisions about products, product design, or production processes that affect the physical environment or workers elsewhere (outside the enterprise or even the jurisdiction), or decisions with political or foreign policy implications. We think jurisdictions could decide for themselves whether or not to allow or protect workers' contestation of and protests over these matters without, for the most part, implicating the risk of managerial domination of workers. (The prohibition of involuntary servitude should bar any constraints on the right to *quit*, including in protest of matters allocated wholly to

managerial discretion.) There might be other good reasons to protect such kinds of contestation; and workers might legitimately direct their political and collective power to protecting such activities. In supporting a contestatory civic culture, and vigilant citizenship, the republican state might provide affirmative support for such activities even though this is not concerned with domination at work.

## IV. CONCLUSION

The example of disciplinary sanctions illustrates some problems with the conventional concept of 'managerial prerogative,' which describes the constellation of rights and powers of the employer and its agents to direct the running of the enterprise, and which includes directing labor. The critical tradition in labor law has always been animated by these problems. Some legal scholars have called for the abolition of the managerial prerogative.[65] Others have asked if the contract of employment, with the managerial prerogative at its core, is a fundamentally illiberal institution.[66] Given our arguments in favor of legitimate economic authority, we think this is going too far. Authority in firms, even when it is exercised primarily in the interest of owners versus workers, provides the coordination and expertise necessary to secure a wide range of social and economic benefits for workers (among others) that could not otherwise be achieved. To that extent, authority can be justified in terms of the goods that could not be secured without it.

We do not want to be painted as apologists for the status quo in existing liberal capitalist economies, especially in 'employment at will' regimes. Liberal democracies with lightly regulated labor markets risk licensing a regime of widespread private domination, or what Anderson calls 'private governments,' in which coercive power is wielded by superiors over their subordinates without effective legal constraints or accountability. In many firms and some labor law systems, managers' legally sanctioned powers extend far beyond what could be justified by legitimate economic authority.

States determine the structures of private authority in labor markets through law and policy, both hammered out in the political sphere. There is a range of supporting arguments in favor of a measure of private authority, and we have drawn upon the work of (amongst others) Coase and Raz to begin that argument. Inevitably, even in well-designed institutions,

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65. Gali Racabi, *Abolish The Employer Prerogative, Unleash Work Law*, 79 BERK. J. EMP. & LAB. L. 79 (2022).

66. Hugh Collins, *Is the Employment Contract Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW (Oxford Univ. Press 2018).

individual decision-makers may be conceded more discretion than is strictly necessary. These powers may be used for good or for ill. There is a standing risk that those powers may be abused. This problem of abuse of power points to the distinctive contribution of neo-republican theory. It responds to the normative challenge of how to secure civic freedom in government, economy, and society. That said, we do not think that neo-republicanism itself can explain the nature of legitimate authority. We must look beyond the goal of freedom as non-domination to understand the nature of private workplace authority and how it might be legitimate, because this will often depend upon the realisation of goods other than non-domination. A normative theory of labor law is skewed if it overlooks either dimension—either social and economic justifications for authority or republican-inspired constraints on that authority. We must keep both elements in view.

Our arguments indicate two basic problems with the dominant 'managerial prerogative' concept for framing the employer's directive powers. The first is the very idea of a 'prerogative.' It suggests an exclusive privilege, prima facie immune from external review and oversight. This may be rooted in the patriarchal conception of the master's dominion over the household and its servants. It is a deeply troubling formulation from the perspective of republican freedom. The authority of the firm should be understood as authority conceded by the state. There is room for democratic debate about the scope of legitimate economic authority. Yet there should be agreement that its perimeter must always be defined and policed by the republican state, and always subject to democratic oversight. The second problem with the idea of *the* managerial prerogative is the image of a single and undifferentiated whole—a blank cheque for managerial authority that accentuates the problem of 'private government.' We would do better to disaggregate employer authority into specific areas related to legitimate employer functions—e.g. dismissal, access to employment, promotion, wages and reward, directions related to working time, directions related to work performance—which might call for different margins of discretion. These domains of authority must be considered in their own terms, by reference to the justifying arguments for legitimate economic authority, such as expertise or coordination. This would provide a better adjustment between legitimate economic authority and republican freedom at work. The path to reconciliation between republican citizenship and efficient and productive firms is no doubt fraught with great risks. In our view, there are far greater dangers to our politics by not attempting the journey at all.

# "LIFTING THE PRIVATE-LAW VEIL": EMPLOYER AUTHORITY AND THE "CONTRACTUAL-COATING" OF WORKER SUBORDINATION

Valerio De Stefano[†] and Nicola Kountouris[††]

ABSTRACT

Despite the notion of subordination in work relations, the subjection of workers to the managerial prerogatives of employers have received significant consideration and discourse since the outset of labor law. Critical examinations of the underlying foundations of such subordination and subjection in contemporary democracies founded on the rule of law remain scarce. This article wants to prompt a novel reflection on these issues, starting with a historical analysis of their origins and a renewed understanding of their legal background. It opens by discussing some outstanding issues concerning work subordination that are not adequately captured by the classic theory of the firm. It argues that the free nature of the individual negotiation of work arrangements at the dawn of industrialisation must be called into question from a legal perspective and highlights how disciplinary approaches to societies and work have materially shaped those arrangements. It then discusses the historical foundations of employer authority and worker subordination in what evolved into the modern contract of employment in various jurisdictions. It contends that, despite this, authority and subordination were "coated" in contractual and private-law guises to make them acceptable for the public discourse, their origins are rooted in public law and action, sometimes with overtly authoritarian aims. It then argues that acknowledging the public origins of employer powers should prompt an intensified scrutiny of employer choices beyond what courts are ready to do for managerial conduct that falls short of meeting standards for harassment, constructive dismissal or resignation for cause. It concludes by outlining potential avenues for future research

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on how the "personal work approach" may facilitate calling worker subordination in modern democratic societies into question.

## I. INTRODUCTION

Since the outset of labor law, the notion of subordination in work relations and the subjection of workers to the managerial prerogatives of employers have received significant consideration and discourse.[1] However, it is possible to argue that there is still a scarcity of critical examination regarding the underlying foundations of such subordination and subjection in contemporary democracies founded on the rule of law.[2] In this article, we would like to prompt a novel reflection on these issues, starting with a historical analysis of their origins and a renewed understanding of their legal background.

The discussions surrounding the governance of work in modern societies, as just said, have predominantly centred on limiting the exploitation and abuse of subordination and managerial prerogatives. While labor regulations have placed constraints on specific aspects of subordination, they have arguably proven to be insufficient in preventing such abuses from occurring. The limitations imposed by these laws can be seen as mere islands in a vast ocean of subordination.

The duty to obey the employer's orders, as long as they are not verging on the unlawful or otherwise violate public policy, is an implied term of the contract of employment in several jurisdictions, especially in common law ones. In other systems, particularly in the civil law tradition, the notion of subordination is so ingrained in the construction of employment contracts that it is considered an essential component of those contracts. In a country like Italy, for instance, the Civil Code even formally designates employees as "subordinate workers." The prevailing assumption that stems from these legal doctrines and institutions is that employers, or anyone vested with managerial powers by them, hold a unilateral authority to make decisions regarding the workplace unless the law or collective agreements impose specific limitations, or when codetermination systems are in place. This broad discretion over work organization and activities, which can significantly impact

1. The literature on this is extremely wide and it is impossible to offer a complete overview here. Some basic references include RUTH DUKES & WOLFGANG STREECK, DEMOCRACY AT WORK: CONTRACT, STATUS AND POST-INDUSTRIAL JUSTICE (2022); the works collected in ERNST FRAENKEL ET AL., LABORATORIO WEIMAR. CONFLITTI E DIRITTO DEL LAVORO NELLA GERMANIA PRENAZISTA (Gianni Arrigo & Gaetano Vardaro eds., 1982); ALAIN SUPIOT, CRITIQUE DU DROIT DU TRAVAIL (1st ed., 1994); the works collected in LUIGI MENGONI, IL CONTRATTO DI LAVORO (Mario Napoli ed., 2004); Hugh Collins, *Is the Contract of Employment Illiberal*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 48 (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018). *See also*, extensively, RUTH DUKES, THE LABOUR CONSTITUTION: THE ENDURING IDEA OF LABOUR LAW (2014).

2. Existing fundamental references on these subjects will be cited throughout the text.

employees' lives, remains generally unfettered unless exceptionally constrained for specific reasons and in specific ways. The same is also true of the right of employers to monitor and supervise their workforce, a right that is complemented by the disciplinary power of the employer, allowing for the imposition of private penalties such as summary termination of employment and, in many legal systems, even penalties short of dismissals such as demotion, fines, and suspension. In these systems, the ability to escalate disciplinary measures provides the employer with a graduated range of penalties, allowing them to punish recalcitrant or disobedient conduct without necessarily renouncing the working activity of an employee.

As just mentioned, labor lawyers have recognized the necessity of restricting the exercise of employer power to prevent abuses since the discipline's inception. However, even as this concern has persisted, the foundation[3] and justification of subordination in democratic societies remain insufficiently examined, especially from a comparative perspective.

The scarcity of such reflections outside the field of labor studies is also somehow puzzling if we consider how much subordination in employment appears to be at odds with the fundamental tenets of a democratic society and modern polities. The contrast between prevailing democratic values in the public sphere and the self-evidently anti-democratic subjugation suffered by workers employed by the capitalist enterprise, has often been explained by reference to contractarian theories, sometimes loosely associated with Ronald Coase's understanding of the "Firm" as a nexus of contracts, with the contract of employment essentially tasked with providing the power of direction.[4] In other words, it would typically be suggested that managerial authority lies in contract law, and that the very nature of the capitalist firm requires an acceptance of contractual subordination, in effect as an exception to the basic democratic and formal equality principles shaping liberal societies. This has often led to labor law reforms being justified as attempts to resolve this peculiar "exceptionalism" by ensuring that fundamental and constitutional principles can finally access the workplace.[5]

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3. Some prominent exceptions include SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET: INDUSTRIALIZATION, EMPLOYMENT, AND LEGAL EVOLUTION (1st ed. 2005), the chapters collected in THE MAKING OF LABOUR LAW IN EUROPE (Bob Hepple ed., 2d ed. 2010), and HARRY GLASBEEK, LAW AT WORK: THE COERCION AND CO-OPTION OF THE WORKING CLASS (2024).

4. "'It is the fact of direction which is the essence of the legal concept of employer and employee'." Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 404 (1937).

5. "'We will carry on this struggle until when the Constitution will have truly walked through the factory gates"' was, also reminded below, one of the mottos accompanying Parliamentary debates around the introduction of Italy's *Statuto dei Lavoratori* in 1970. *See* Franco Liso, *'Appunti per un Profilo di Gino Giugni Dagli Anni '50 allo Statuto dei Lavoratori*,' WP C.S.D.L.E. "MASSIMO D'ANTONA" IT 316, 331 (2016).

This article wants to prompt a renewed critical examination of employer authority based on the idea that this authority lies in public rather than private law. It will proceed as follows. Section II discusses some outstanding issues concerning work subordination that are not adequately captured by the classic theory of the firm, also on the basis of the reflections of political philosopher Elizabeth Anderson. Section III argues that the free nature of the individual negotiation of work arrangements at the dawn of industrialization must be called into question from a legal perspective and will highlight how disciplinary approaches to societies and work have materially shaped those arrangements. Section IV discusses the historical foundations of employer authority and worker subordination in what evolved into the modern contract of employment in various jurisdictions. It sheds light on the public and, sometimes, criminal law nature of these foundations and points out that employer powers are not vestiges of outmoded feudal legal doctrines; instead, they resulted from policy and court strategies and actions that tightened subordination at work throughout the eighteenth and, more widely, nineteenth centuries, sometimes openly at odds with emancipatory developments occurring in other facets of society. Employer authority and work subordination were "coated" in contractual and private-law guises to make them acceptable for the public discourse; however, their origins are rooted in public law and action, sometimes with overtly authoritarian aims. Section V, then, argues that acknowledging the public origins of employer powers should prompt an intensified scrutiny of employer choices beyond what courts are ready to do for managerial conduct that does not meet the standards of harassment or constructive dismissal and resignation for cause. Section VI concludes, by outlining future research about how the "personal work" approach may facilitate calling worker subordination in modern democratic societies into question.

## II. ELIZABETH ANDERSON AND WHAT THE THEORY OF THE FIRM NEGLECTS

In one of the few recent philosophical examinations of this subject matter, Elizabeth Anderson, an American philosopher, has indeed pointed out that before and during early industrialisation and the rise of modern factories, liberal thinkers such as John Locke, Adam Smith, and Thomas Paine had not envisioned a society in which the majority of people would be subject to contracts of employment based on subordination.[6]

6. ELIZABETH ANDERSON, *When the Market was "Left," in* PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 37 (2017).

Anderson discusses how the increased subjection of more significant swathes of the population to subordination via employment was connected to the need of business organizations to take advantage of economies of scale, which required their growth and the development of large bureaucratic structures. As Coase's Theory of the Firm highlights,[7] she recalls, vertical integration necessitates hierarchy in the coordination of labor and capital for a productive organization to function. Nonetheless, as Anderson and others observed,[8] the theory of the firm does not explain the extent to which the subordination of employees and business managerial prerogatives extends beyond what is necessary to coordinate individual work performances and integrate them into a business organization.

For instance, we recently observed[9] that even today, employees are expected to show a certain degree of deference to their employers and supervisors and can face discipline if they criticise them openly. Exceptionally, and even there within limits, they may enjoy some protections from the exercise of discipline, but only if their criticism is expressed in the performance of a protected activity, such as whistleblowing or a protected trade union activity.

Secondly, subordination extends far beyond the performance of work. In many legal systems, even when limitations on dismissal exist, employees can still face discipline for issues unrelated to their job performance. Employers can impose various forms of penalties on employees for actions outside of work performance, such as social media posts or conduct outside of the workplace.[10]

On the contrary, employers' actions that do not directly affect employees' working conditions cannot generally be sanctioned by employees, either individually or collectively, and most legal systems do not acknowledge the power of "private discipline" in the hands of employees for these actions.

Coase's theories regarding the organizational foundations of employer power and managerial prerogatives fail to account for how these powers and prerogatives pervade beyond their necessary role in coordinating work performance. As mentioned above, the exercise of managerial authority and the subjection of employees to the commands and directives of their supervisors and employers is widely accepted as a default component of employment relationships. This is evident in how lawmakers and courts treat it as such, with

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7. *See generally* COASE, *supra* note 4.

8. *See* Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795 (2018) (reviewing ANDERSON, *supra* note 6).

9. Nicola Countouris & Valerio De Stefano, '*The Future Concept of Work'*, *in* TRANSFORMATIVE IDEAS - ENSURING A JUST SHARE OF PROGRESS FOR ALL 93 (Kalina Arabadjieva et al. eds., 2023).

10. *See* Virginia Mantouvalou, '*I Lost My Job Over a Facebook Post – Was that Fair?' Discipline and Dismissal for Social Media Activity*, 35 INT'L J. OF COMPAR. LAB. L. AND INDUS. RELS. 101 (2019).

any limitations to these powers considered exceptions to the norm rather than the other way around, as discussed in Section V. Coase's account of hierarchy in firms also overlooks the fact that managerial prerogatives and employees' subordination are not simply products of economic development but are rooted in legal norms, as discussed in the next sections.

## III. "FREE" NEGOTIATIONS, THE DISCIPLINARY SOCIETY AND WORK ARRANGEMENTS

The Theory of the Firm is not alone in neglecting the legal and public origins of hierarchy and authority at work–this, arguably, is something which also risks being overlooked when rooting and justifying the subordination implied in employment relationships in the notion that workers freely consent to this subordination when entering into employment contracts.

As already discussed, the scope of employer managerial prerogatives and subordination often extends beyond work performance to encompass off-duty conduct. When it comes to work performance, moreover, an employer's power to give instructions to employees goes beyond the quality and quantity of their work tasks and includes aspects such as the location and timing of their performance. Employers also generally retain the right to alter employees' tasks and duties unilaterally or, in civil law terms, the "object" of the employment contract on a day-to-day basis as necessary, within the more or less broad limits of their job description.[11]

The current understanding of the powers and rights of employers in the realm of employment is commonly attributed to a combination of their status as property owners and parties to a contract whose essential feature is to give them command of their employees. This interpretation presumes that they possess property rights over the goods that constitute the work organization and, to a certain extent, albeit imprecisely, through employment contracts, to their employees' time. Arguably, however, this overreaching understanding of property rights and contractual obligations does not explain the extension and pervasiveness of hierarchy at work and fails to capture the complex nature of the employment relationship and its historical evolution.

In our opinion, to understand today's subordination in employment contracts, it is necessary to broaden our analysis and construction of employment law beyond the framework of property rights and private law and take fully

11. For a discussion, *see* ELENA GRAMANO, JUS VARIANDI: FONDAMENTO, DISCIPLINA E TUTELA COLLETTIVA DELLA PROFESSIONALITÀ (2023).

into account the historical, cultural, and economic context in which these laws have been shaped and developed.[12]

In this perspective, the first element that warrants critical re-examination is the notion of free work contract negotiation at the outset of modern work arrangements. This is not only because, as it is evident, in the absence of alternative economic resources, most workers, both before and after the Industrial Revolution, have not been truly free to enter into employment contracts or other work arrangements. Instead, in the vast majority of cases, this freedom, still today, is limited to choosing which employer to submit to or accept starvation. In this case, speaking about "free" negotiations requires accepting at face value the fundamental ideological premise that those who lack property and are capable of working should not receive income or resources from other communal supplies, another element that may warrant some scrutiny in democratic societies – the relationship between forms of basic income, the ability to exit, and the legitimacy of subordination in employment is, not by chance, a crucial focus of republican theory.[13]

The underlying and deeper issue, however, is that when modern work relationships were forming and eventually became the basis for the contemporary contracts of employment, workers did not even have the theoretical choice of starvation or living off makeshift means. Laws against begging and vagrancy were adopted throughout Europe, the United Kingdom and in many colonies, and in the South of the United States after the abolition of slavery, which often provided for confinement in workhouses, prisons, *Arbeitshäuser*, *dépôts de mendicité*, etc. and imposed forced labor on those who were capable of working but unable to support themselves through their means and did not accept work under a master or serve as apprentices (in some instances, even when employment opportunities were scarce).[14]

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12. Crucially, in contemporary times, the justification for managerial prerogatives concerning work performance and technical subordination in civil law systems is not directly rooted in property rights. Instead, they are grounded in contracts or, in some cases, in the integration of workers into the employer's organization (*Eingliederung in den Betrieb*). While some courts have recently used the term "time theft" to describe workers idling during working hours, the notion that an employment contract could confer employers with actual property rights over employees' "time" appears repugnant to modern legal and political thought as it implies the ownership of one of the most fundamental aspects of a person's life by another individual. For references and a discussion *see* Countouris & De Stefano, *supra* note 9.

13. *See* Estlund, *supra* note 8, at 815. *See also* Chetan Chetty, *Understanding the Claims About Labor Markets in Debates on 'Private Government'*, ECON. POL'Y INST. (Sept. 23, 2021), .

14. *See* among an extremely vast literature, Dirk Van Damme, *The Confinement of Beggars in Eighteenth-Century France: The Population of Some 'Hôpitaux généraux 'et 'Dépôts de Mendicité'*, 26 PAEDAGOGICA HISTORICA 99 (1990); AMIR PAZ-FUCHS, WELFARE TO WORK: CONDITIONAL RIGHTS IN SOCIAL POLICY 66–93 (2008); ANDRÉ GUESLIN, D'AILLEURS ET DE NULLE PART. MENDIANTS, VAGABONDS, CLOCHARDS, SDF EN FRANCE DEPUIS LE MOYEN ÂGE (2013). About the duty to work in Britain, *see also* DEAKIN AND WILKINSON, *supra* note 3, at 110–95.

In other words, the idea of a "free" contractual origin of the implied or essential terms of hierarchy and subordination, on which we still base our understandings of contracts of employment, leaves much to be desired if we examine how the various legal systems shaped the negotiation of those work arrangements that later evolved into those contracts.

Despite the repeal of legislation such as the Master and Servants Acts or the Black Codes (which disciplined the work of African Americans in the South of the United States before and after the Civil War), the abolition of workhouses, and the introduction of modern welfare systems (which, however, the more they adopt "workfare" approaches to assistance, the more risk reviving the marginalization of "deviants"),[15] the modern construction of employment contracts in legislation and case law are imbued with underlying assumptions derived from these legal sources that have not entirely disappeared even today.

Firstly, in both the European continent and the United Kingdom, including its colonies, a significant impetus driving legal reform and policy initiatives around labor was the notion of "civilising the barbarians"[16]—the working classes and the unemployed (but employable) poor needed stringent oversight, discipline, and education to inculcate a work ethic, mitigate their inherent idleness and preference for leisure over work (also associated with a backward bending labor supply curve), and curb tendencies toward disorderly behaviour.

In addition, those assumptions were also fundamentally shaped by notions pertaining to broader movements and ideals of governance that ultimately aimed at exerting control and discipline over the fundamental aspects of individuals' lives, particularly affecting the bodies and minds of people in the working classes.

The work of Michel Foucault has thoroughly illustrated how the transition to modernity was characterized by a pervasive governmental attitude towards discipline, aimed at transforming individuals into obedient bodies subject to regulation, supervision, and monitoring as if they were mere components of a productive machine. Institutions such as schools, prisons,

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15. *See generally* AMIR PAZ-FUCHS, *supra* note 14. *See also* ELIZABETH S. ANDERSON, HIJACKED: HOW NEOLIBERALISM TURNED THE WORK ETHIC AGAINST WORKERS AND HOW WORKERS CAN TAKE IT BACK 254 (2023).

16. *See* citations in JACQUES LE GOFF, DU SILENCE À LA PAROLE: UNE HISTOIRE DU DROIT DU TRAVAIL DES ANNÉES 1830 À NOS JOURS 47 (2019). For similar discourses in Britain (also concerning the other territories it ruled), *see* ANDERSON, *supra* note 15, at 97–99. For an in-depth discussion of how labor law, to date, still incorporates evident elements of distrust towards workers, *see* Valerio De Stefano et al., *Does Labour Law Trust Workers? Questioning Underlying Assumptions Behind Managerial Prerogatives*, INDUS. L. J. (2023).

hospitals, workhouses, barracks, and factories were integral to this "disciplined society."[17]

The origins of modern work-subordination developments also have grounds in this sweeping movement of rationalization that laid the basis for regulating the minutiae of life, movements and behaviour of individuals to direct them towards enhanced productivity. It can indeed be argued that this attitude underlies the very fabric of labor within the capitalist enterprise, where a mere loosely coordinated production is deemed insufficient; instead, the worker must perform tasks as instructed. Among other things, such a phenomenon could not have taken hold without the underlying premise that modern science and technology—in its meaning as "(the study and knowledge of) the practical, especially industrial, use of scientific discoveries"[18]—aim to control and dominate nature, in order to enhance the human condition.

This notion, which can be traced back to the works of Francis Bacon[19] and has its continental counterpart in the Cartesian dualism's distinction between *res cogitans* and *res extensa*, wherein the mind thinks and physical bodies can be ordered and directed by it, has significant and enduring consequences for workers and society as a whole. As Adorno and Horkheimer illustrate in their critical analysis of the practical implications of this mentality, human beings are also an integral component of the natural world, and they are thus not immune to the attempts of science, technology, and Reason to enhance comprehension of their nature and behaviour in pursuit of mastery over it.[20] The detailed regulation of the workforce, the exclusive control that entrepreneurs and masters claim over the organization of production and work, the continuing dismantling of crafts and trades, the unilateral exercise and mastery of technology, and the introduction of more complex machinery

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17. MICHEL FOUCAULT, HISTOIRE DE LA FOLIE À L'ÂGE CLASSIQUE (1972); MICHEL FOUCAULT, SURVEILLER ET PUNIR: NAISSANCE DE LA PRISON (1975).

18. *Technology*, Cambridge Dictionary (last visited May 13, 2024), https://dictionary.cambridge.org/dictionary/english/technology.

19. See the accounts in BENJAMIN FARRINGTON, FRANCIS BACON: PHILOSOPHER OF INDUSTRIAL SCIENCE (1951).

20. *See* MAX HORKHEIMER & THEODOR W. ADORNO, DIALECTIC OF ENLIGHTENMENT 2 (English ed., Gunzelin Schmid Noeri ed., 2002) ("'Although not a mathematician, Bacon well understood the scientific temper which was to come after him. The '"happy match"' between human understanding and the nature of things that he envisaged is a patriarchal one: the mind, conquering superstition, is to rule over disenchanted nature. Knowledge, which is power, knows no limits, either in its enslavement of creation or in its deference to worldly masters. Just as it serves all the purposes of the bourgeois economy both in factories and on the battlefield, it is at the disposal of entrepreneurs regardless of their origins. Kings control technology no more directly than do merchants: it is as democratic as the economic system with which it evolved. Technology is the essence of this knowledge. It aims to produce neither concepts nor images, nor the joy of understanding, but method, exploitation of the labor of others, capital. . . .What human beings seek to learn from nature is how to use it to dominate wholly both it and human beings. Nothing else counts.").'

connected to all of the above, have their underlying premise in the quest to control and dominate nature in pursuit of productivity.[21] It is thus not by chance that one of the most prominent and successful attempts in modern history to strip workers of their craft-based control over production, promoted by Frederick Taylor, went under the label "*Scientific* Management." This attitude towards "scientific" and technocratic control over workers was also innate but not exclusive to capitalist production—Taylorism's appeal to science and Reason made it palatable to production in Real socialist countries too. [22]

The "technological" premise of control over people also bestowed upon employers the notion that they must regulate both their organizational minutiae and their workers as if they were automatons: the employers and supervisors think, while the workers simply execute. It is thus entrepreneurs who, by adopting, controlling, and deploying technology, act as the "mind"; they exercise Reason, science and technology, while ordinary workers are the "body," the "res extensa" who carry out their directives. In this sense, one of the early Italian commentators of labor regulation offers a paradigmatic observation: "[a]nyone familiar with the situation in a large workshop will immediately realise that the entrepreneur regards the labour of a worker as an element of the production of his factory, no different from the machines, oil, coal and any other tools or raw materials required for production."[23] Despite coming from a scholar who was regarded as a conservative strawman even by his contemporaries, the essence of the assertion aligns closely with the examination of subordination both as a legal and technical concept, which would become an essential component of the employment contract in Italian law. This analysis was put forward, instead, by Ludovico Barassi, universally recognized as the "father" of Italian labor law. According to Barassi, subordination is the basis upon which workers become "a tool, and in a certain sense a passive tool, in that [they] lend [their] physical and intellectual capacities so that the other party can mould and direct them as it sees fit."[24]

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21. *See* Gaetano Vardaro, *Tecnica, Tecnologia e Ideologia Della Tecnica nel Diritto del Lavoro*, POLITICA DEL DIRITTO 75 (1986).

22. For a labor law discussion of Taylor's Scientific Management *see* KATHERINE V. W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE (2004). *See also* Raymond L. Hogler, *Employment at Will and Scientific Management: The Ideology of Workplace Control*, 3 HOFSTRA LAB. AND EMP. L. J. 27, (1985). For a recent discussion about Taylorism in socialist countries, *see* IFEOMA AJUNWA, THE QUANTIFIED WORKER, LAW AND TECHNOLOGY IN THE MODERN WORKPLACE (2023).

23. The quote (our translation) is from BIAGIO NICOTRA, IL CONTRATTO COLLETTIVO DI LAVORO 15 (1906) (cited by PAOLO PASSANITI, STORIA DEL DIRITTO DEL LAVORO. I. LA QUESTIONE DEL CONTRATTO DI LAVORO NELL'ITALIA LIBERALE (1865-1920)).

24. LUDOVICO BARASSI, IL CONTRATTO DI LAVORO NEL DIRITTO POSITIVO ITALIANO 29 (2nd ed. 1915-1917) (our translation).

Compelling workers to accept to become this malleable was neither a simple nor a quick process. It required a far-reaching governance of the workforce, which has its basis in the disciplinary trends described above. The concentration of workers in factories and workshops was a crucial means to this end, as it allowed, and to some extent even served initially, as a means of enabling surveillance and enforcing strict production standards.[25]

The early stages of factory discipline were marked by meticulous regulation of working spaces and times.[26] For instance, Richard Biernacki recalls that, in British factories, "the yard served . . . as a connector for human traffic." In fact, "surveillance of the central yard could give an overview of important traffic at a glance," so that "directors occasionally incorporated large lookouts or jutting bay windows into their mills offices." "These impressive windows"—he explains—"did not face away from the factory perimeter for an enjoyable view, but looked instead toward the interior mill yard." In sum, "the strategy was to position the management complex so that it could receive vendors and customers from without but also scan the interned labourers within."[27] While Biernacki highlights significant architectural distinctions between the structures in question and the precise specifications of the Benthamite Panopticon, the concept of persistent observation enabled by the building's design is remarkably similar to the Panopticon. As Foucault recalls, this notion of construction-enabled unceasing surveillance constituted a fundamental technological feature of the disciplinary society and served as a paradigm for developing institutions such as hospitals, prisons, schools, and workplaces. Indeed, according to Stanziani, Foucault even underestimates the innate connection between Bentham's ideation of the Panopticon and work discipline specifically.[28]

As mentioned, thus, the concentration of people in single workshops at the outset of industrialization is not simply linked to mechanization and crucially also arose from the need for surveillance. The scientific and technological quest to control nature to achieve domination over it and its disciplinary

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25. *See* Simon Deakin, *The Duty to Work: A Comparison of the Common Law and Civil Law Systems from the Eighteenth to the Twentieth Centuries*, *in* LABOUR, COERCION, AND ECONOMIC GROWTH IN EURASIA, 17TH-20TH CENTURIES 40 (Alessandro Stanziani ed., 2013). In particular: "The historical evidence suggests that the disciplinary mechanism of the [Master and Servant] Acts were widely used as instruments of economic regulation during a period when modern managerial techniques had yet to develop." *Id.* at 42.

26. Beyond the work of BIERNACKI, *infra* note 27, *see* Edward P. Thompson, *Time, Work-Discipline, and Industrial Capitalism*, 38 PAST & PRESENT 56 (1967); LE GOFF, *supra* note 16, at 36.

27. RICHARD BIERNACKI, THE FABRICATION OF LABOR. GERMANY AND BRITAIN, 1640–1914, 132–34 (1995).

28. ALESSANDRO STANZIANI, LE METAMORFOSI DEL LAVORO COATTO: UNA STORIA GLOBALE, XVIII-XIX SECOLO 29 (Italian ed., 2022).

arm to direct humans towards the same ends were not compatible with a loose and dispersed work organization.[29]

Firstly, the nascent capitalist production pattern implied an abundance of goods and stocks whose conservation could not be dispersed across far-flung and uncontrollable workplaces. Moreover, the imperative that workers, increasingly conceived as mere components in the mechanism of production, be closely directed demanded the abandonment of the homework labor system, as it did not allow for the detailed and intensified supervision and monitoring of labor required by the notion that technology and control over production should lie in the hands of management.

In civil law terms, this all finds expression, first and foremost, in the notion of labor as a commodity that workers lease to entrepreneurs through rental agreements (l*ouage de services* or *locatio operarum*). Here, the worker surrenders their labor as if it were a shapeless and inert substance that will then be moulded and shaped by the entrepreneur to render it functional for their productive organization—a notion perfectly epitomised in the quote from Barassi cited above. In common law systems, the open-ended duty of obedience of a servant towards their master that came to characterise the contract of service provided the legal channel for this.[30] Through these notions, workers could functionally become cogs within a larger mechanism over which they had no practical control nor any legal entitlement to co-regulate.

## IV. "CONTRACTUAL COATING": THE "PUBLIC" ORIGINS OF EMPLOYER AUTHORITY AND WORK SUBORDINATION

### *Britain*

As already mentioned, despite managerial prerogatives in common law systems and the legal notion and construction of subordination in civil law ones being now construed as pertaining to private law concepts such as property and contract, their origins are deeply rooted in a long-standing tradition of legislative actions and juridical concepts that went well beyond any meaningful understanding of private law. For instance, the Master and Servants laws, which were enacted in Britain in the eighteenth and nineteenth centuries, laid the foundation for the current open-ended duty of obedience to the

29. Stephen Marglin*, What Do Bosses Do?: The Origins and Functions of Hierarchy in Capitalist Production*, 6 REV. RADICAL POL. ECON. 60 (1974) discusses the centrality of work discipline at the outset of the Industrial Revolution. The famous response by David S. Landes, *What Do Bosses Really Do?*, 46 J. ECON. HIST. 585 (1986) does not refute the importance of discipline. For a detailed discussion of the scientific and 'technological' features of employer powers *see* Vardaro, *supra* note 21.

30. *See* Deakin, *supra* note 25, at 42. *See generally* BIERNACKI, *supra* note 27, at 93.

employer, which is now an implied term of the contract of employment at common law.[31] In Germany, instead, the concept of *Treupflicht*, which represents a personal-bond duty of loyalty of employees to their employers inspired by feudal notions, is at the core of the historical origins of subordination in modern employment relationships. These historical antecedents reveal that the powers and rights of employers in labor law are rooted in much more complex and nuanced origins than simple property rights or contracts – in fact, these antecedents transcend private law as a whole, rooted as they are in legislations and legal concepts that often belonged to the realm of criminal and public law.

After tracing the evolution of the contract of employment, and its antecedents based on the service models and hierarchical understandings of the polity, throughout the eighteenth, nineteenth and first half of the twentieth century, Simon Deakin and Frank Wilkinson explain: "the survival of the service model and its assimilation into the modern contract of employment account for many of the doctrinal tensions of contemporary labour law." This survival is evident in the courts' insistence that "the employment relationship, notwithstanding its consensual character, continues to confer to the employer an essentially extracontractual power to give orders within certain limits, a power which cannot be easily reconciled with a contractual logic."[32]

In a similar vein, Collins and Mantouvalou accurately observe that "[w]hilst the common law's conception of the contract of employment was inspired by ideas of freedom of contract and individual liberty, the paradox was evident that the conditions under which many worked were oppressive, exploitative, and exhibited considerable domination by the master over the servant. The common law seemed to proclaim the liberty of the individual but then simultaneously endorse legal norms that justified subordination and exploitation."[33] The two authors also remark that "the Master and Servant Acts continued to apply criminal sanctions against disobedient workmen under a contract of service until 1875," and that "[e]mployers could effectively coerce performance of contracts of employment during much of the nineteenth century, either by threats of prosecution for heavy fines or orders for damages, or magistrates' orders to perform the contract or face incarceration."[34]

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31. For an extensive discussion, *see* DEAKIN & WILKINSON, *supra* note 3, at ch. 2; Glasbeek, *supra* note 3. *See also* the chapters collected in MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955 (Douglas Hay & Paul Craven eds., 2004).

32. DEAKIN & WILKINSON, *supra* note 3, at 103.

33. Hugh Collins and Virginia Mantouvalou, *'Human Rights and the Contract of Employment'*, *in* THE CONTRACT OF EMPLOYMENT 193 (2016).

34. *Id.* at 194.

Importantly, Deakin and Wilkinson also make clear how "the open-ended duty of obedience is, today, characterised as an implied contract [of employment] term." However, they point out, "the juridical origin of the duty of obedience does not lie in contract. It is to be found instead in the master-servant model which *reached its height in the nineteenth century*."[35] This observation by Deakin and Wilkinson is crucial. They demonstrate that "while it emerged out of the framework of the Elizabethan Statute of Artificers' the master and servant legislation of the eighteenth and nineteenth centuries 'was not an attempt to maintain in place a pre-industrial model of household employment.'" On the contrary, "it aimed to impose a more rigorous system of work discipline upon the growing number of labourers, artisans and outworkers employed in manufacturing, as well as maintaining control of the agricultural labour market."[36]

In other words, the master and servant model was not a vestige of feudal times;[37] the subordination it imposed on working people was an innovation to bolster and support employer powers and work discipline in the wake of industrialization.

### *The United States*

Britain was not an exception. During the nineteenth century, other countries saw a tightening of work subordination and discipline at the hands of legislatures, courts or scholarly writings. In the United States, for instance, at the beginning of the century, the narrative of subordination was generally rejected by white workers, something which also permeated the public debate.[38] However, as noted by Tomlins, the same was not true for "legal discourse" and its "social consequences." He points out how "at a time when popular discourse treated linguistic claims to vested status and authority in the employment relationship as highly controversial, legal discourse did not."[39] For "working white Americans," the "legal culture of work" emerging from the colonial period did not imply a "generic legal regime of authority

35. DEAKIN & WILKINSON, *supra* note 3, at 61–62 (emphasis added).

36. *Id.* at 62.

37. This idea was expressed, among others, by ALAN FOX, BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS (1974). In contrast, Deakin, *supra* note 25, at 42–43, reaffirms: "the master-servant model was not a hang-over from the corporative regime of the Statute of Artificers; on the contrary, the core disciplinary powers of employers and of the courts were enacted in legislation passed in the century from around 1750 as Parliament responded to the interests of the new employer class." *See also* Eric Tucker and Judy Fudge*, Class Crimes: Master and Servant Laws and Factories Acts in Industrializing Britain and (Ontario) Canada*, *in* CRIMINALITY AT WORK 456, 459 (Alan Bogg et al. eds., 2020).

38. *See* Christopher L. Tomlins, *Early British America, 1585-1830: Freedom Bound*, *in* MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562-1955, *supra* note 31, at 117, 150.

39. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 225 (1993).

and subordination" in work relations—in other words, there existed no unified "servant" status that attached automatically to people who worked for others.[40] Instead, "adult hired labor (work for wages) . . . appears to have been considered a relation distinct in important respects, both social and legal, from servitude."[41] Nonetheless, starting from the early nineteenth century, the situation changed as the higher courts and legal scholars imported notions, languages and concepts from the British master and servant legislation and embedded them in the general structure of the employment relationship.[42] American courts, in fact, started resorting to "master/servant discourse to construe the generality of employment relationships," something which "involved them in engineering an extensive doctrinal migration of vested authority beyond the more specific kinds of social relations that the law concerning "masters" and "servants" had described in the colonies."[43]

Crucially, according to Tomlins,

> The carryover of the magisterial claim to authority meant that the nineteenth-century employment relationship failed in vital respects to comport with the "liberal illusion" of formal legal equality. Rather than facilitating the development of employment in the early Republic as a transaction between juridical equals, courts and treatise writers' resort to master/servant doctrine instead helped establish employment as a legally asymmetrical relationship in which the parties coexisted under conditions of structured inequality. On some occasions courts can be found denying this inequality; on others . . . they affirmed it as both natural and necessary—essential, indeed, to the proper functioning of the relation. Sometimes they can be found attempting to do both simultaneously.[44]

Tomlins, therefore, notes for the United States something similar to what Deakin and Wilkinson observed for eighteenth and nineteenth century Britain – rather than representing a "survival of older forms," "employment law in the nineteenth century must be considered in large part a new-minted discourse." In the American case, this discourse was "the product of an extension

40. Tomlins, *supra* note 38, at 150.
41. TOMLINS, *supra* note 39, at 229–30.
42. Tomlins, *supra* note 38, at 151.
43. TOMLINS, *supra* note 39, at 226. *But see* John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 LAW AND HIST. REV. 627 (2000).
44. TOMLINS, *supra* note 39, at 227.

> of master/servant concepts to encompass a circle of work relationships previously outside the master/ servant ambit."[45]

An essential distinction between the British master and servant legislation and the case-law imposed work discipline in the United States was the lack of criminal sanctions for breach of contract and the ensuing extensive penal prosecution of workers occurring in Britain and its colonies. For that matter, however, "there is little evidence that [criminal] restraints had ever been applied in America to other than bound servants" even before the American Revolution.[46] Nonetheless, Tomlins outlines how the American courts found an adequate substitute for criminal provisions by enforcing strict subordination at work and penalizing workers who left their employment before the agreed term. Initially, lower courts allowed departing employees to recover wages on a plea of *quantum meruit* for the time they had spent working for an employer—even if they quit early—allowing employers only to recover actual losses originating from the early departure. "Almost unanimously during the first half of the century," though, "courts of record hearing cases on appeal disallowed lower court recoveries, holding that an employment contract was an entire contract, and therefore that no obligation to pay wages existed until the employee had completed the agreed term."[47] The upper courts pretended that this approach was in continuity with tradition when it once again represented an innovation. Moreover, the courts began to establish that not only workers who left their employment prematurely but also those who did not faithfully execute their duties would forfeit their entire wages—"failure to perform according to an employer's 'lawful and reasonable commands' . . . warranted immediate dismissal without wages and without compensation."[48] It was only much later, once work discipline and employer authority had been firmly established through these doctrines, that "employment at will" became prevalent (and provided additional support for employer authority and managerial prerogatives).[49] Despite hierarchical relationships and the legal elements of servitude, albeit "contractualized," being repugnant to public discourse and the sensitivities of workers in the early Republic, and also contrasting with the legal practices concerning adult white laborers before and after the Revolution, they were thus introduced from the top down by courts and jurists, and cloaked in artificial contractual rhetoric.

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45. *Id.* at 228–29.
46. *Id.* at 277.
47. *Id.* at 273–74.
48. *Id.* at 279.
49. *See generally* Hogler, *supra* note 22. *See also* Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. EMP. & LAB. L. 79 (2022).

*France*

The contrast between the unilateral authority of employers and workplace subordination with the public sentiment and legal practices of a society just liberated from the *Ancien Régime* and imbued with egalitarian values is also clearly visible in France. Here, too, the higher courts spearheaded an authoritarian turn in labor relations. Alain Cottereau has contrasted the hierarchical work relations and criminalization of worker breach of contract under the Master and Servant legislation in Britain with the situation in France immediately after the French Revolution.[50] The Revolution entailed the emancipation of most workers and the abolition, for many of them, of the criminal sanctions that accompanied the breach of work discipline as well as the abandonment of one's work during the *Ancien Régime*. Contrary to some classic scholarly accounts, even the *livret ouvrier* was mostly deprived of its disciplinary character.[51] Thus, during the first half of the nineteenth century, only domestic servants and those assimilated to them ("*journaliers"*), including many agricultural laborers, were deemed subject to the open-ended authority of their employers—an authority supported by police disciplinary legislation and fines.[52] The vast majority of industrial workers, known as *ouvriers* (or "workmen"), were not subjected to the same level of subordination, and employers could not impose regulations on them without their explicit consent.[53] This idea was underpinned by the common belief that dismantling the Ancien Régime entailed eradicating all forms of domination, including those in the workplace. It was not until the 1860s that the higher courts in France recognised that industrial and factory workers were also bound to subordination to their employers, a bond initially reserved for domestic servants and a select few other workers. From the 1860s, instead, "the judicial hierarchy . . . launched an initiative to have it considered that," every time workers entered into a contract of employment, they "thereby undertook to obey the employer's orders." In turn, "doctrine soon accepted the idea that

50. Alain Cottereau, *Industrial Tribunals and the Establishment of a Kind of Common Law of Labour in Nineteenth-Century France*, *in* PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES IN BRITAIN, FRANCE, GERMANY, AND THE UNITED STATES 203 (Willibald Steinmetz ed., 2000).

51. Importantly, the *livret*, however, maintained significant "public order" functions. *See* LE GOFF, *supra* note 16, at 59.

52. *See* STANZIANI, *supra* note 28, at 117.

53. *See* for references to other civil law countries, De Stefano et al., *supra* note 16. Importantly, Alain Cottereau, *Sens du Juste et Usages du Droit du Travail: Une Évolution Contrastée Entre la France et la Grande Bretagne au XIXe siècle*, 33 REVUE D'HISTOIRE DU XIXE SIÈCLE 114 (2006) notes: "'Statistically, *journaliers* accounted for around 10% of industrial workers at the end of the Second Empire, and should not be confused with the much broader English category of '"unskilled"' workers"' (our translation).

when the worker entered into a contract of employment, this was an undertaking 'of industrial service.'" An equivalence was established between "industrial-service hiring" and the new expression "labor contract" (*contrat de travail*).[54]

The industrial subordination embedded into *contrats de travail* since the second half of the nineteenth century, thus, lays in a stark repudiation of the emancipatory repercussions of the French Revolution on work arrangements. By endorsing the employer's ability to issue workplace regulations (*règlements d'atelier*) to unilaterally establish binding rules supported by heavy fines and other sanctions, the French upper courts prompted "the establishment of employers as private judges."[55] Despite the efforts of these courts to cover their rulings and workplace regulations behind a "contractual coating," the new industrial order sanctioned by the courts was profoundly asymmetrical and hardly reconcilable with the formal equality of contractual parties before the law. Nor were employers' new unilateral disciplinary powers confined to monitoring the correct executions of work tasks. The *Cassation*'s ruling that marked the beginning of this new course quashed an industrial tribunal decision that, based on an article of the Civil Code, had reduced a hefty penalty (half a month's salary) imposed on a worker for wearing clogs on the shop floor. According to the Court, the tribunal could not reduce the penalty because the worker could not even have been deemed to have partially fulfilled her contractual obligations since she broke workplace discipline.[56] Workplace regulations introduced "automatic presumptions of fault, with automatic penalties, to the detriment of workers alone. No more discussions during the performance of work. Penalties fell within the employer's remit, and appealing to the industrial tribunal became a kind of second-instance appeal, after an initial automated employer's judgement." In this way, "a new, asymmetrical hierarchy of remedies [was] being established." In the workplace, therefore, "the employer [became] the sole judge of the industrial order," and the upper courts severely restricted the ability of industrial tribunals to review the employer's decisions.[57] Importantly, moreover, "alongside workplace regulations," as recalled by Stanziani "a set of legal measures (*livret ouvriers*, laws against begging, forms of servile dependency, etc.) attempt to regulate mobility and work arrangements in response to a concern for [the] internal organisation [of society], competition and public order."[58]

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54. Cottereau, *supra* note 53, at 220.

55. Alain Cottereau, *Justice et Injustice Ordinaire Sur les Lieux de Travail D'après les Audiences Prud'homales (1806-1866)*, 141 LE MOUVEMENT SOCIAL 25, 55 (1987) (our translation).

56. Cour de cassation, Feb. 14, 1866, Bull. civ., No. 34 (Fr.).

57. Cottereau, *supra* note 55, at 58 (our translation).

58. STANZIANI, *supra* note 28, at 136.

*Italy*

In Italy, too, workplace regulations were the main vehicle of subordination in the second half of the nineteenth century. It has been observed that regulations "were not born from thin air, they were not just the outcome of a legal vacuum that left room for internal micro-regulations." Instead, they were "both an affirmation of the entrepreneur's ability to make [themselves] a legislator of the organisation of life inside the factory and instruments for applying national laws in the workshops." They were in clear continuity with the guild system, characterized as it was by "the overlapping and identification between economic power and jurisdictional power" and could be seen as a novel instantiation of "the re-proposition in the productive sphere of the ancient plurality of sources of law of the modern age, whereby the producer held legal sovereignty inside the workshop."[59] In Italy, as in France,[60] employers "were indeed empowered in the exercise of their authority by 'an intense legal rhetoric that portrayed them as ethically superior and therefore worthy of trust.'"[61]

Here, it is also helpful to refer again to the words of Ludovico Barassi, who provided the most prominent and influential early systematization of employer powers into a contractual shape in Italy. In his words, the contract of employment

implies a unilateral affirmation of the will of the creditor of the work [i.e., the employer], a seigneurial and imperative affirmation . . . which does not need to meet on its way an actual consent of the worker, because he has already committed himself in the contract to submit to those commands unquestionably.[62]

The keyword here is *seigneurial*, as it manifestly relates to a system of notions and values that bears little relation to modern private and contract law, notwithstanding any contractual form that one may identify as a source of employers' prerogatives. The words of a XIX-century French conservative student, who denounced "the resurgence of feudalism in a more despotic and even more odious form" in the new powers vested in *chefs d'etablissement*

59. STEFANO GALLO & FABRIZIO LORETO, STORIA DEL LAVORO NELL'ITALIA CONTEMPORANEA 60–61 (2023).

60. According to Maria Luisa Pesante, *Lavoro Servile e Lavoro Salariato in Prospettiva Storica*, *in* LA LIBERTÀ DEL LAVORO. STORIA, DIRITTO, SOCIETÀ 75, 101 (Laura Cerasi ed., 2016), the hierarchy and domination at work in nineteenth-century France was legitimized on the basis of an 'anthropological difference' between the risk-taker employers and workers (our translation).

61. GALLO & LORETO, *supra* note 59, at 60 (citing GERMANO MAIFREDA, LA DISCIPLINA DEL LAVORO: OPERAI, MACCHINE E FABBRICHE NELLA STORIA ITALIANA 34 (2007)) (our translation).

62. BARASSI, *supra* note 24, at 698 (our translation).

through workplace regulations[63] sound perhaps more realistic than the efforts to reconcile these unilateral sources of rules and sanctions with genuine contractual notions. As distant as the idea of managerial prerogatives simply stemming from consent and contract may have seemed to their initial proponents, these juridical approaches resonate more with the German feudal notions of *Treupflicht* ("duty to loyalty") and *Herrenrecht* ("right of the master," but, more correctly, "right of the seigneur")—which according to Otto von Gierke were the foundations of worker subordination in German Law[64]—than their proponents would have cared to admit.

In Italy, even if the higher courts and the industrial tribunals had read them through contractual lenses, unilateral workplace regulations remained a doctrinal conundrum for a long time. During the work of an official *Commissione per la riforma del contratto di lavoro*, initiated in 1901, the commissioners extensively discussed the nature, scope, and limits of these regulations. Ludovico Barassi, also a member of the *Commissione*, notwithstanding his strenuous scholarly commitment to construe worker technical subordination as a contractual form, proposed that employers submit workplace regulations to a public authority before introducing or amending them. The other Commissioners did not second this proposal and opted to endorse the fiction that workplace regulations were contractual in nature and presumed to be accepted by employees in various ways.[65]

Industrial tribunals[66] sometimes intervened to contain the most evident employer abuses of workplace regulations, but employees were never treated on equal footing with employers when it came to their application. As observed by Paolo Passaniti, "while the operational innocence of the master [was] presumed, the worker [remained] a subject whose conduct, albeit with a certain benevolent façade, must be evaluated according to the strict terms of the efficiency of performance in the execution of the employment relationship." Accordingly, "a worker who spends (or would like to spend) a considerable part of their life in the same factory must be educated in some way: disciplinary sanctions become the disciplinary tool to educate the entire occupational group,"[67] something clearly at odds with a purely contractual construction of individual work arrangements.

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63. LOUIS REYBAUD, ÉTUDES SUR LE RÉGIME DES MANUFACTURES 12 (1859) (cited by LE GOFF, *supra* note 16, at 50–51) (our translation).

64. Otto von Gierke, *Die Wurzeln des Dienstvertrages*, *in* FESTSCHRIFT FÜR HEINRICH BRUNNER 37, 56 (1914).

65. PASSANITI, *supra* note 23, at 210.

66. We use the term "Industrial Tribunals" for both the French *Conseil de prud'Hommes* and the Italian *Collegi dei Probiviri*, although the functions of these bodies were not exactly identical.

67. PASSANITI, *supra* note 23, at 387.

The authority of employers to issue unilateral regulations binding clerical workers was formally sanctioned by legislation in 1925, during Fascism, thereby finalizing the reform process started with the *Commissione* in 1901.[68] Meanwhile, the Italian world of work had changed dramatically. During the First World War, special laws subjected many factory workers to a militarised discipline to bolster the war effort. "Fines for breaches of regulations became more frequent and substantial; punishments could extend to dismissal and, in more severe instances, imprisonment. For men, the most ominous threat was the withdrawal of the release from military service and deployment to the front lines."[69] After the War ended, one of the crucial elements of the industrial struggle in factories was work discipline, with the most militant worker groups and collectives demanding voice and agency over the organization of work.[70] Quashing these initiatives and claims was a central promise and result delivered by the Fascist regime to employers, both in factories and agriculture. The regime fostered and gave employers the legal means to enforce a militarized, hierarchical, and authoritarian work discipline.[71] Some of the most important employers even hired former military police officers to direct and carry out internal security and surveillance of both work and off-duty behaviour of workers. This practice persisted well after the regime's fall and was accompanied by overt or covert personnel filing, demotions and the creation of punitive departments for members of particular trade unions or opposition political parties.[72] From the legal standpoint, all this was underpinned by the labor chapter of the new Civil Code adopted by the regime in 1942. Nowadays, the Code still includes: an article providing that the entrepreneur "is the head [*capo*] of the firm and [their] collaborators depend hierarchically on [them]" (art. 2086); one providing that workers "must exercise the diligence required by the nature of the work to be performed, by the interests of the enterprise, *and by the higher interest of national production*," and that they "must abide by the provisions for the performance of the work and for discipline as given by the employer and his collaborators on whom [they] may be

68. Regio decreto legge 13 novembre 1924, n.1825, G.U. 22 novembre 1924, n.273 (It.). Disposizioni relative al contratto d'impiego privato, convertito nella legge 18 marzo 1926, n. 562, art. 3, G.U. 3 march 1926, n.102 (It.).

69. GALLO & LORETO, *supra* note 59, at 129 (our translation).

70. *See* CLARA E. MATTEI, THE CAPITAL ORDER: HOW ECONOMISTS INVENTED AUSTERITY AND PAVED THE WAY TO FASCISM 21–100 (2022); *see also* Paolo Spriano, L'ORDINE NUOVO E I CONSIGLI DI FABBRICA. CON UNA SCELTA DI TESTI DALL'ORDINE NUOVO (1919-1920) (1973).

71. For a recent discussion of labor under Fascism, *see* GALLO & LORETO, *supra* note 59, at 153–211.

72. *See* Bruno Settis, *Produttori, Sabotatori, Sorveglianti. I "Tribunali di Fabbrica" Nella Fiat del 1953*, 282 ITALIA CONTEMPORANEA 114 (2016).

hierarchically dependent" (art 2104); one providing for an extensive duty to loyalty towards the employer (art. 2105); one providing that proportionate disciplinary sanctions can ensue a violation of these latter articles (art. 2106).

These provisions clearly imbued the employment relationship with authoritarian and public-law elements. Work discipline was fully granted by the law and delegated to employers, who had to steer enterprises in view (also) of national interests. After the regime fell, these articles were "salvaged" by academic scholarship, which anyway embarked on a genuine quest to purge them of their public-law components and ground work discipline and subordination in contractual terms. The part of article 2104 about national interest was deemed to be abrogated, and the rest was read through private-law lenses.[73] While this re-contractualization was a breath of fresh air considering the abuse that the Fascist regime had made of public law, it also came with profound and long-lasting consequences. Hierarchy and discipline were given a contractual foundation and guise, but they were still predominantly based on articles 2104 and 2105, whose authoritarian components were hard to remove; moreover, the "privatization" of subordination also came at the expense of any meaningful court interference on the exercise of employer prerogatives.[74] Courts had to refrain from questioning the merit of an employer unilateral decision unless they were explicitly authorized by the law. This meant that, until when some significant legislative protection was enacted in the late 1960s and 1970s, some essential Constitutional protections of individual and collective rights and freedom remained a dead letter inside workplaces, while, to date, courts do not question the reasons for employers' unilateral decisions unless this is expressly required by law.[75]

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73. *See*, among the most prominent works, FRANCESCO SANTORO PASSARELLI, NOZIONI DI DIRITTO DEL LAVORO (1946); GIUSEPPE FEDERICO MANCINI, IL RECESSO UNILATERALE E I RAPPORTI DI LAVORO. VOL. I - INDIVIDUAZIONE DELLA FATTISPECIE. IL RECESSO ORDINARIO (1962); MATTIA PERSIANI, CONTRATTO DI LAVORO E ORGANIZZAZIONE (1966); MENGONI, *supra* note 1. *See generally* Gustavo Minervini, *Contro la "Funzionalizzazione" Dell'Impresa Privata*, RIVISTA DI DIRITTO CIVILE 618 (1958).

74. For a critical discussion, *see* Adalberto Perulli, *Il Controllo Giudiziale dei Poteri Dell'Imprenditore tra Evoluzione Legislativa e Diritto Vivente*, 34 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 83 (2015); Adalberto Perulli, *Razionalità e Proporzionalità nel Diritto del Lavoro*, GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 1 (2005).

75. Antonio Loffredo, *Dal Diritto del Lavoro Delle Origini a Quello Moderno e Ritorno*, *in* LA LIBERTÀ DEL LAVORO. STORIA, DIRITTO, SOCIETÀ, *supra* note 62, at 107, 116 (criticizing this "one-sided and slanted use of private law") (our translation).

## V. "LIFTING THE PRIVATE-LAW VEIL": STATE ACTION, EMPLOYER POWER AND DUE PROCESS

On the basis of our analysis so far, we suggest that by persistently viewing the notion of labor law as simply a component of private law and solely attributing it to contract and property, we are prone to misperception. As discussed below, among other things this private-law perspective implies that, inevitably, courts, scholars, and even lawmakers should largely defer to the discretion of employers as they hold the authority to make decisions concerning their property and acquire a right to direct and discipline their workforce through a valid contract that employees freely sign.

In our opinion, however, what we discussed in the previous sections requires that we conduct further examination and critical evaluation of these claims. The legal evolution leading to the modern contract of employment in the various jurisdictions we have surveyed above allows one to question the belief that employer powers originate in private law, property or free contracts. As we have seen, for a considerable amount of time during the early stages of industrialization, the negotiation of individual work arrangements was surrounded by penal and public legislation that criminalized vagrants and the able-bodied poor who refused to submit to work, often on pain of internment in workhouses or other institutions. Many workers were not *free* to work or starve, whatever freedom may lie in this choice—they could only opt between work under a master or various forms of compulsory labor.

Once they entered into a work arrangement, they would then walk into a series of duties and obligations materially shaped by statutes or case law that sanctioned the unilateral authority of employers, often permeated by public functions and policy (e.g., maintaining public order, educating and policing the working classes, sustaining the war effort, fostering national production, etc.). Through legislation, case law, or both, the State delegated substantial powers to employers. These powers were not remnants of feudalism; they resulted from modern disciplinary policies. In the various jurisdictions above, for a considerable amount of time and well after feudalism and colonial rule otherwise fell, public bodies, in various forms, tightened work discipline and bolstered unilateral employer authority. This authority is, we argue, public in nature and variously disguised in contractual and private forms.

We must emphasise at this point that we do not aim to glorify or revive any remnants of public law inherent in the employment contract, especially in civil law countries, where those public elements are sometimes gloomily intertwined with authoritarian regimes. On the contrary, we wish to distance ourselves from those experiences.

However, we wish to acknowledge and bring to light that the powers granted to employers in modern labor law do not neatly fit within the conventional notions and frameworks of contract and property law. Instead, as said, these powers possess public origins and functions, and they often also emerged in response to the need to control and police certain segments of the population that were perceived as potential threats to public safety or other State objectives. Despite this, these public origins and elements of work subordination embedded in labor laws have somewhat artificially become entrenched in our understanding of concepts such as contract and property. In doing so, we often use such constructs to shield and justify relationships of subordination that are inherently public in nature. It is worth stressing that some forms of labor that, while less prevalent, remain entirely acceptable in modern-day labor markets are more visibly characterized by a strong public law underpinning of the contractual element of subordination. For example, the work of migrant workers (particularly if undocumented or subject to very restrictive visa requirements) or that of prison laborers, where public law intervention shapes what some scholars do not hesitate to define as "state-mediated structures of exploitation."[76] But while in respect of these particular forms of work public law exerts an obvious role in shaping the subjugation of workers – with contract law offering at best a thin veneer of bilaterality and mutual agreement – its less visible influence on more mainstream forms of employment remains, we argue, particularly relevant.

In tracing the historical development of labor regulation, it is also impossible to assert that hierarchy and subordination in work arrangements have been progressively reduced since the start of industrialization, in line with the progress towards more democratic and less authoritarian forms of polities. Subordination and autocratic rule at work have sometimes followed a very different path from political liberties; sometimes—as in the cases of France and the United States—this path was significantly at odds with the public discourse and the people's sensitivities shaped by revolutionary and egalitarian ideas. In our opinion, this should prompt a more rigorous analysis and critical questioning of work subordination in democratic societies. This analysis should not just aim at mitigating the abuses of managerial prerogatives and employer powers, something already long-rooted and elaborate in labor law scholarship. Instead, we posit that the foundations and justifications of employers' unilateral authorities should be called into question and possibly examined through different lenses and with partially different criteria.

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76. VIRGINIA MANTOUVALOU, STRUCTURAL INJUSTICES AND WORKERS' RIGHTS 11 (2023).

Before we sketch these criteria, a caveat is in order. Of course, work subordination and employer authority are not the same in our contemporary societies as they were decades ago. Labor regulation has come a long way to limit the scope and intensity of managerial prerogatives through legislation introducing rights and entitlement for workers and, above all, by strengthening workers' abilities to oppose jointly autocratic rule at work. Collective bargaining, action and voice indeed became the privileged fora and tools to restore and enforce equality at work in many societies. In Britain, this occurred through collective *laissez-faire*.[77] Industrial democracy is also a tenet of the Wagner Model in the United States and Canada, where the Supreme Court has openly acknowledged that "[t]he right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers."[78] Bolstering collective rights to preserve individual liberties at the workplace was also the lynchpin of the 1970 *Statuto dei Lavoratori* in Italy. The main axiological thrust behind the *Statuto* was "making the Constitution walk into workplaces"[79] and, importantly, stripping employer powers of their most authoritarian elements while still sanctioning the existence of these powers.[80] An innovative element of the *Statuto*, however, was the protection of individual workers' rights as a means to underpin collective rights – in this sense, a landmark *Statuto* provision materially strengthened remedies against unfair (not only discriminatory or retaliatory) dismissals. Protecting collective bargaining and action and bolstering individual rights, including the right not to have one's contract of employment terminated without a valid reason, has been a common feature of labor regulation throughout many European countries and beyond. This has undeniably contributed to containing employer powers and authority at work. There are, however, some crucial observations to make.

Firstly, collective bargaining has never involved the entire workforce, even in countries with strong sectoral bargaining, let alone in single-employer-bargaining-based systems. Many workers, and often the most vulnerable groups of workers, sometimes remained excluded from the most meaningful collective protection (small and medium enterprise workers in Southern Europe are a prominent example).

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77. DEAKIN & WILKINSON, *supra* note 3, at 83.

78. *Health Services and Support—Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391 (Can.).

79. *See* GINO GIUGNI, LA MEMORIA DI UN RIFORMISTA (Andrea Ricciardi ed., 2007).

80. Some of the powers that are acknowledged under the *Statuto*, albeit with limitations, include searching workers and their belongings and hiring private eyes or using cameras and ITCs to detect illegal conduct from workers (notably, however, covert or tech-enabled monitoring cannot generally be carried out for productivity reasons).

Moreover, relying on collective bargaining to limit employer powers makes this limitation contingent on other trade unions' priorities and strategies. Danielle Linhart, for instance, has observed that,

During the "*Trente Glorieuses*," there was little opposition to the Taylorist organisation of work in France. The trade unions, for the most part, questioned neither the conditions nor the content of work. They concentrated their struggles and demands on wage increases and bonuses where working conditions deteriorated because of that organisation of work. . . . We were thus in a paradoxical situation where the most vigorous trade union battles were fuelling and reinforcing the Taylorist model. Indeed, unions did not seek to interfere in the organisation of work and concentrated on demands for higher wages and bonuses.[81]

Arguably, prioritizing achieving economic gains over limiting employer authority and managerial prerogatives can be seen as a common attitude of trade unions across industrialized countries after World War II, with the very notable exception of bargaining over "just cause" or other limits to the authority of employers to terminate employment relationships in countries whose legal systems do not generally require valid reasons to issue a dismissal.

Finally, when collective bargaining and union coverage started to decline in various countries, collective restraints on employer powers inevitably shrunk. In addition, even systems that had made more extensive recourse to legislation to uphold individual rights and liberties at the workplace began retrenching on these protections by allowing growing segments of the workforce to be hired through temporary contracts or sham self-employment schemes[82] and significantly weakening remedies against unfair dismissal. All this has arguably resulted in a material re-expansion of employer authority, with very few effective counterbalances. A prominent example of this amplified authority is, for instance, the increasing adoption of invasive electronic and algorithmic monitoring and disciplining systems that impose strict control and surveillance on work and off-work activities of people and have, so far, not met effective resistance from lawmakers and trade unions.[83]

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81. DANIÈLE LINHART, L'INSOUTENABLE SUBORDINATION DES SALARIÉS (2021).

82. For a discussion about temporary contract, human rights and managerial prerogatives, *see* Valerio De Stefano, *Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, 46 INDUS. L. J. 185 (2017).

83. *See*, however, the articles collected in REGULATING AI AT WORK: LABOUR RELATIONS, AUTOMATION, AND ALGORITHMIC MANAGEMENT, 29 TRANSFER: EUR. REV. LAB. AND RSCH. (Valerio De Stefano and Virginia Doellgast eds., 2023). *See also* ANTONIO ALOISI & VALERIO DE STEFANO, YOUR BOSS IS AN ALGORITHM: ARTIFICIAL INTELLIGENCE, PLATFORM WORK AND LABOUR (2022).

Of course, we consider strengthening forms of collective resistance against employer authority and bolstering workers' rights concerning specific entrepreneurial decisions such as dismissals to be a desirable path; however, this alone is not sufficient. Too many workers in today's world of work would remain inadequately protected by these safeguards. Instead, we believe that alongside these strategies, there needs to be a critical reassessment of employer powers and their limits under the law. This reassessment should be rooted in the acknowledgement that despite the contractual guise assumed by these powers due to over a century of interpretative layering in case law and scholarship, their origins and foundation lie in public and criminal law as well as in disciplinary approaches to work and perceptions of working people by courts and policymakers that are incompatible with modern democratic societies.

Calling into question the entirely contractual and private nature of employer powers—or, we may say, "lifting the private law veil"—should entail a thorough revision of legislative court approaches that assert judges and public authorities cannot intervene in the substance of entrepreneurial decisions over their workforce as they represent expressions of their economic liberties and property rights. As mentioned above, this attitude is widely prevalent in Italy, but it is also deeply entrenched in common law jurisdictions, beyond the most evident example of the United States, even when important notions of mutual trust and confidence or duties to act in good faith were established by courts. For the United Kingdom, for instance, Deakin and Wilkinson argued that courts "are not prepared to countenance the application of the notion of mutual trust and confidence to the employer's power to dismiss, where that would have the effect of putting in place a common law jurisdiction governing termination of employment which would largely parallel that created by statute." These approaches reflect "vestiges of a hierarchical conception of employment which entered the common law via the disciplinary labour legislation of an earlier period, and which is now barely able to resist the application of modern contractual logic."[84]

Nor does the duty of cooperation offer a solid ground to limit employer authority, mainly because express contract terms can restrict the parties' obligations under this duty. The editors of *Deakin and Morris* observe that this can "make it difficult to rely on the duty of co-operation as a general guarantor of employee protection: its content is not fixed, but will differ from one case to the next depending on how the express terms are framed."[85]

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84. DEAKIN & WILKINSON, *supra* note 3, at 104.

85. ZOE ADAMS ET. AL., DEAKIN AND MORRIS' LABOUR LAW 3.78 (7th ed. 2021). For a broader discussion *see* De Stefano et al., *supra* note 16.

In Canada, Tucker observes that there have been "developments in the common law that provide workers with some protection against abusive workplace management. Workers who experience abuse have the option of claiming they have been constructively dismissed and claiming wrongful dismissal damages and potentially aggravated and punitive damages. They may also claim damages for intentional infliction of mental suffering." However, he notices that if the mistreatment falls short of the standard for constructive dismissal or they prefer, or cannot avoid, "to keep their job rather than to quit for cause, they are unlikely to claim damages" because courts "have been unwilling to impose a general duty to act fairly throughout the employment relation" since they do not want to interfere with employer decisions concerning how the workplace is run. He also notes that while, in 2014, "the Supreme Court of Canada recognised good faith as a central organising principle of contract law and announced a duty of honest performance," this has not led courts to intervene more decisively in questioning unilateral employer decisions.[86]

## VI. CONCLUSIONS

To conclude, we believe that acknowledging and problematizing the public and statutory origins of employer powers and worker subordination may persuade and encourage courts to overcome their reluctance to scrutinise the substance of managerial decisions lest they interfere with private autonomy and action. "Lifting the private-law veil," on the basis of this acknowledgement, should prompt the examination of these decisions firstly on the basis of due process and according to accountability criteria that cannot be confined to (allegedly) enhanced efficiency or shareholder value alone. Recognition of the public-law foundations of the employer's authority should also lead to more stringent application protection of workers' human rights[87] and, more generally, constitutional rights when, as it is the case in Canada, they require state action to be activated.

We note that whenever it is recognised that certain managerial prerogatives are the result of public law or public policy decisions—including, as we shall see, public policy omissions—courts are more likely to reject some of the more pernicious effects of private law doctrines, and make good use of

86. Eric Tucker, *Something Old, Something New, Something Borrowed, and A Lot That's Blue: Political Economy Reflections on Contemporary Worker Subordination and Law*, in this Special Issue (forthcoming 2024).

87. *See Il Controllo Giudiziale dei Poteri Dell'Imprenditore tra Evoluzione Legislativa e Diritto Vivente*, *supra* note 74.

worker protective fundamental rights doctrines. An apt example is a 2023 judgment of the Court of Justice of the EU,[88] where the Court did not accept that the principles of "freedom of contract" and to choose with whom to do business with, could be relied upon by a Polish state employer to refuse to contract with a worker on grounds of his sexual orientation, even though domestic law specifically omitted this particular ground from the ones it had otherwise duly transposed when implementing EU Directive 2000/78.[89] The Court had been duly alerted by the Opinion of the Advocate General, that the omission of this ground by the Polish authorities was neither accidental nor justifiable as, overall, "the Polish legislature does not understand the freedom to discriminate as necessary to guarantee freedom of contract in a democratic society."[90]

Managerial decisions with significant implications for workers should also be assessed in terms of necessity and proportionality, as generally demanded for public action in a democratic society. This entails the possibility of scrutinizing managerial choices that may not necessarily meet the standards for constructive dismissal or resignation for cause or may not constitute harassment behaviours already prohibited by courts or legislation. In our view, for example, two areas where proportionality tests could apply even when they do not meet the standard of constructive dismissal are the unilateral implementation of "back to office" mandates or electronic monitoring of workers.

Lastly, we would like to conclude this article with some sketches of our future research. We have advanced on multiple occasions and in various contexts the concept of "personal work" to redefine the scope of labor protection. The "personal work approach" would imply extending labor and employment protection to all those performing work in a predominantly personal capacity, regardless of their employment status.[91] We have, in fact, extensively argued how the binary divide between employment and self-employment is increasingly inadequate in effectively safeguarding workers in the contemporary world of work.

We also believe that the notion of "personal work" could facilitate the questioning of subordination in civil law systems and the submission to

88. Case C-356/21, J.K. v. TP S.A., ECLI:EU:C:2023:9 (Jan. 12, 2023).

89. Council Directive 2000/78/EC, art. 13, 2000 O.J. (L303) (establishing a general framework for equal treatment in employment and occupation).

90. Case C-356/21, J.K. v. TP S.A., ECLI:EU:C:2022:653, ¶ 111 (Sept. 8, 2022).

91. *See*, among others, NICOLA COUNTOURIS & VALERIO DE STEFANO, NEW TRADE UNION STRATEGIES FOR NEW FORMS OF EMPLOYMENT (2019); Nicola Countouris & Valerio De Stefano, *supra* note 9. *See also* MARK R. FREEDLAND & NICOLA KOUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2011).

stringent employer powers in common law countries as fundamental criteria for accessing labor protection.

We posit that, as long as these elements remain the main gateway to protection, their questioning will likely never be complete. On the contrary, workers' subjection to stricter forms of control and subordination has been at the core of some prominent businesses' attempts to evade labor standards in recent years—most notably in platform work. Accordingly, where there was even a modicum of autonomy on the part of workers, such as the ability to decide on their work schedules, these protections should have been denied despite businesses wielding other significant disciplinary powers. This approach reflects the baseless idea that workers deserve access to protections only when there is maximum possible compression of their freedom. Labor legislation, whose purpose has also traditionally been to constrain managerial powers, would instead thus be applied only to the most extreme forms of subordination. In our opinion, the risk that workers may reject not only these extreme forms but also the protection that would only accompany them is not negligible.

Arguably, the concept of "personal work," by allowing to dispense with considering subordination and managerial powers as the main criteria for applying labor protection, would also help defuse this dangerous paradox.

# NOTHING, YET EVERYTHING NEW UNDER THE SUN: SUBORDINATION, AUTHORITY, AND TRANSFORMATIONS OF THE ORGANIZATION WORK IN A LABOR LAW PERSPECTIVE

Elena Gramano

## INTRODUCTION

There has long been debate about the crisis of subordination as a suitable legal category for identifying those who are recipients of the protections inherent in labor law. Very generally speaking, and without any intention of encompassing the specific features of the single notions of subordination (or of worker) adopted under different jurisdictions, subordination in many civil law systems is the essential legal construct of the contract of employment. More specifically, as a legal category, subordination is employed in order to identify and thus select those who fall within the scope of application of labor law. It usually and mainly relies, in most jurisdictions, on the hierarchical authority exercised by the employer over the worker. In other words, workers are protected under labor law in so far as they are subordinate to an employer.

The crisis of subordination as the legal gateway to accessing labor and social protections is said to have occurred for several reasons, all ultimately traceable to a basic observation: those who are not recipients of the protections of labor law, and thus those who are not subordinate workers, include individuals who live or survive solely based on their personal labor and are in situations of weakness and vulnerability in their contractual relationship with their counterpart, not unlike that of a typical subordinate worker.[1]

Subordination would, therefore, constitute an obsolete, anachronistic category, completely unsuitable for responding to the needs of labor protection today, in the face of the profound transformations in labor markets but especially of labor organizations, from the gig economy to so-called post-Fordistic or liquid or horizontal enterprises.

1. The literature on this topic is extensive. For some essential readings, *see* Brian Langille, *Labor Law's Theory of Justice*, *in* THE IDEA OF LABOR LAW, 101–19 (Guy Davidov & Brian Langille eds., 2011); Adalberto Perulli, *Social Justice and Reform of Capitalism*, *in* SOCIAL JUSTICE AND THE WORLD OF WORK 23–34 (Brian Langille & Anne Trebilcock eds., 2023).

In light of this debate, this paper intends to support two main theses on subordination.

First, the paper aims to construct a critique of the thesis of the radical unsuitability of subordination for the constitution of a legal category that underpins labor law and its protections. Such a critique is grounded on the observation that subordinate labor constitutes a specific social phenomenon, characterized by the existence of a relationship of authority between the subject who provides labor (i.e. the employee) and the employer. The power dynamic specific of the relationship between a subordinate employee and the employer depends on a number of factors, including the integration of the employee in an organization of the employer, who maintains a full control of the organization. The subsequent subjection of the employee to a number of manifestations of the employer's authority makes subordinate labor worthy of a specific legal response that is the one that traditionally has been provided by labor law by means of the legal notion of subordination, as a gateway to accessing certain protections and rights.

Such a statement, that will be further assessed in the forthcoming paragraphs, does not contrast nor it excludes *per se* the adoption of policy measures meant to address the social vulnerabilities of self-employed workers, or, more generally speaking, those workers who do not fall within the legal notion of subordination, which might vary from system to system. In contrast, this article aims to claim that different social phenomena need different legal responses and that the introduction of protective or supportive measures for non-subordinate workers does not need to go along with the negation of subordination as a legal category that affords some specific protections.

Furthermore, in its second part, that we might define *pars construens*, this article aims to support the thesis that an adjusted and renewed notion of subordination that shall look at the new ways of manifestations of the employer's authority in a working relationship might well cover relations that would not fall under a more traditional notion of subordination, but that are indeed characterized by specific power dynamics between the parties.

In this respect, the paper intends to suggest a new key to interpreting and applying the traditional concept of subordination: that is, a renewed understanding of the concept of authority to which the subordinate worker is subject, and thus of the juridical relevance of the manifestations of that authority and of its transformations in new labor organizations.

Indeed, the final goal of the present paper is to offer a reflection on the legal issues related to new forms of the employer's interference, i.e., their *power and authority* in the worker's sphere of activity and in the

organizational context in which the activity is carried out, as well as a reflection on the effects of new forms of the employer's authority on the general notion of subordination.[2]

More specifically, this paper aims to reconsider the legal acknowledgment and relevance of the *authority* in the employment relationship in order to suggest a necessary conceptual shift from a notion of authority that depends exclusively on the existence of a *directive power*, to a broader notion of authority that relies on the existence of an *organizational power*.

In this sense, as it will be further illustrated below, the organizational power shall be intended as the employer's prerogative to organize and command the organizational context in which the working activity is conducted, which can be perfectly compatible with the worker's autonomous organization and performance of her personal working activity, without making her relationship with the employer any less subordinate.

Such a shift in the notion of authority that traditionally, under most jurisdictions, stays at the very core of the legal notion of subordination, determines a consequent enlargement of the notion of subordination itself, without putting into question its actual persistency, its own juridical identity, and the need to provide for a specific legal discipline of subordinate labor.

## THE ORIGINAL RULE OF SUBORDINATION AND ITS LIMITS

The topic of subordination and the legal criteria for its ascertainment before courts are certainly not new and have been addressed by many scholars repeatedly in the past decades and under different legal systems.

Since at least the 1980s, the reflection on the notion of subordination has been complemented by a vivid debate on the crisis of the notion subordination itself.[3]

The debate about the crisis of subordination is grounded on a more general crisis of labor law (here used to include employment law as well).

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2. Gali Racabi, *Abolish the Employer Prerogative, Unleash Work Law*, 43 BERKELEY J. OF EMP. & LAB. L. 79, 79–138 (2022).

3. As Guy Davidov wrote in the opening of his well-known monograph, "The ingredients of a crisis are arguably an inherent part of labor law." GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 1 (2018). The author also suggests that the main reasons of the crisis of labor law shall be found "in the mismatch between goals and means." *Id.* at 2. *See* Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1, 1–35 (2014); Massimo D'Antona, *Labor Law at the Century's End: an Identity Crisis?*, *in* LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES AND POSSIBILITIES 30, 31–49 (Joanne Conaghan, Richard Michael Fischl, & Karl Klare eds., 2000); *see generally* ALAIN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE (2001).

Indeed, since the last decade of the last century, economics has progressively gained capacity to influence the choices of lawmakers regarding the regulation of labor-related social phenomena. Compelled by the need to respond to the social impact produced by the acceleration of global competition, lawmakers have found in some policy lines formulated by the emerging neo-classical economic theory the "scientific" justification for enacting reforms that have profoundly affected the *aquis* in the area of social and labor rights. The outcome has been a rebalancing of interests that has marked the erosion of traditional workers' protections in favor of greater spaces of freedom for business and for their economic interests.

The progressive erosion of traditional protections for workers has driven a more expanded instance for protecting also those who, although not legally classifiable as subordinate employees, nevertheless survive only by their own labor and find themselves in situations of weakness and vulnerability in the market and in their relationships with the client or the recipient of their services.

Labor law and subordination, as the gateway to its protections, would thus have failed in their ultimate purpose of protecting those who work to live and of rebalancing the subjective legal positions of the parties between capital and labor.

Indeed, without debating the long-acquired observation that subordination, intended as a social phenomenon, also results from the economic dependence of workers on employsers and therefore that the economic dependence is paramount to the power relation and imbalance, scholars have started to question the *raison d'être* of the *legal* notion of subordination as formalized in statutory laws and/or applied by courts.

The acknowledgment of the problem of the lack of protection for vulnerable but nonetheless non-subordinate workers has prompted a number of proposals by scholarship and has also prompted, in different systems and in different ways, some reformatory interventions by lawmakers and some profound updates through case law in the interpretation and application of labor law and its legal categories.[4]

Without claiming to be exhaustive, we can identify four main renewal movements that are profoundly different from each other but united by the same demand to extend labor law protections beyond the typical boundaries of the traditional legal notion of subordination.

First, there are those who have suggested redefining and thus broadening the notion of subordination, and thus of the general and abstract legal

4. *See infra* notes 5–11 and accompanying text.

category, which would remain, in this perspective, the key to accessing protections. Extending the notion of subordination also allows its addressees to be broadened and to include some or many of those in the gray zone between genuine self-employment and subordination without altering the basic dichotomy between the one and the other.[5]

A second proposal, endorsed in several jurisdictions, such as the United Kingdom, Germany, Austria, Spain, and, for a certain period of time, Italy, to name some examples, advocates holding firm to the notion of subordination but introducing, in addition to it, new categories located somewhere between subordinate employment and self-employment status.[6]

In a great many jurisdictions, and in particular in all the member states of the European Union, as under European Union law as well, the distinction between the notions of "subordinate worker" and "self-employed worker" remains essential for identifying those who enjoy the protections provided by labor law. Yet some jurisdictions have long introduced legal disciplines that target workers who do not fall within the definition of an employee. They have become recipients of certain regulations to meet their need for social protection.[7] Some jurisdictions—such as Spain or Germany—have seen economic dependence on the principal fit to be used as a criterion for recognizing these third category parameters.[8] Others, including the Italian legal system, have instead traditionally valued parameters exclusively linked to the functional connection between the work performance and the principal's business organization; technical–legal parameters anchored exclusively to dynamics that are all internal to the contractual relationship between the parties.[9] Ultimately, albeit with different regulatory techniques, some national legislatures have, thus, modulated or extended protections beyond the boundaries of

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5. Brian Langille, *A Question of Balance in The Legal Construction of Personal Work Relations*, 7 JERUSALEM REV. LEGAL STUD. 99, 99–111 (2013); Antoine Jeammaud, *Il Diritto del Lavoro alla Prova del Cambiamento*, LAVORO E DIRITTO 339, 339–70 (1997); Mark Freedland, *The Segmentation of Workers' Rights and the Legal Analysis of Personal Work Relations: Redefining a Problem*, 36 COMPAR. LAB. L. AND POL'Y J. 241, 241–56 (2015); DAVID WEIL, THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT (2014).

6. Adalberto Perulli, *Un Jobs Act per il Lavoro Autonomo: Verso una Nuova Disciplina della Dipendenza Economica?*, DIRITTO DELLE RELAZIONI INDUSTRIALI 109, 109–39 (2015).

7. For a comparative legal analysis, *see* Robert Rebhahn, *Der Arbeitnehmerbegriff in Vergleichender Perspektive*, 62 RECHT DER ARBEIT 154, 154–74 (2009); Pierluigi Digennaro, *Subordinazione o Dipendenza? Uno Studio Sulla Linea di Demarcazione tra Lavoro Subordinato e Lavoro Autonomo in sei Sistemi Giuridici Europei*, 6 LABOUR & L. ISSUES 1, 1–47 (2020).

8. Adalberto Perulli, *Subordinate, Autonomous and Economically Dependent Work: A Comparative Analysis of Selected European Countries*, *in* THE EMPLOYMENT RELATIONSHIP: A COMPARATIVE OVERVIEW 137, 137–86 (G. Casale ed., 2011).

9. Elena Gramano, *Arbeitnehmer. . .hnliche personen e collaboratori coordinati e continuativi: ai confini della subordinazione. Un confronto tra le tecniche di tutela in Italia e Germania*, 4 ARGOMENTI DI DIRITTO DEL LAVORO 895, 895–914 (2021).

subordination, responding to specific needs and attempting to bridge, at least in part, the gap that otherwise separates the self-employed from subordinate workers. Specific protection is thus reserved for these categories, different from that intended for subordinate workers and reduced in comparison with the full protection for the subordinate worker.

A third approach has proposed that the protection proper to subordination should be used according to the goals the system aims to pursue, even those beyond the ones typically associated with the classical notion of subordination, by means of open-ended standards (in this sense, see Davidov's Purposive approach, according to which protection is applied where "needed," regardless of the defining limits of the category).[10]

Finally, the most radical thesis suggests totally overcoming the very category of subordination, and thus the extension of protections to anyone who renders a service by means of their own personal work.[11]

## THE END OF SUBORDINATION: A CRITIQUE

The latter thesis is subject of attention in this paper. Whilst other responses to the need for the protection of non-subordinate workers do not question the cornerstone of the system, subordination, and indeed, reaffirm its centrality as a parameter of access and even as a benchmark for measuring protections, the fourth thesis referred to above certainly stands out as the most radical, as it suggests eliminating the very legal category of subordinate work as a gateway to access social protection, in order to provide for protection to all kind of personal work. It marks a sharp break with the entire framework of labor law that we have known so far and that has characterized labor law since its inception. In fact, scholars who support this thesis propose to

10. DAVIDOV, *supra* note 3.

11. MARK FREEDLAND, THE PERSONAL EMPLOYMENT CONTRACT (2003); MARK FREEDLAND & NICOLA COUNTOURIS, THE LEGAL CONSTRUCTION OF PERSONAL WORK RELATIONS (2012); Nicola Countouris, Valerio De Stefano, & Mark Freedland, *Testing the "Personal Work" Relation: New Trade Union Strategies for New Forms of Employment*, 10 EUROPEAN LAB. L.J. 175, 175–78 (2019); Marcello Pedrazzoli, *Dai Lavori Autonomi ai Lavori Subordinati*, *in* IMPRESA E NUOVI MODI DI ORGANIZZAZIONE DEL LAVORO, ATTI DELLE GIORNATE DI STUDIO DI DIRITTO DEL LAVORO, SALERNO, 22–23 MAGGIO 1998, 95–103 (Giuffrè ed., 1999).
In some cases, the radical critique of subordination as a technical means of access to protection moves, indeed, from pre-legal reasons that cast doubt on the persistent relevance of the ideal type of the subordinate worker that had inspired the legislators of the last century in the construction of a labor law endowed with its own autonomous identity with respect to the common law of contracts. In this respect, *see* Adalberto Perulli, *The Notion of 'Employee' in Need of Redefinition* (The Annual Conference of the European Centre of Expertise (ECE), Working Paper, 2017); Adalberto Perulli, *A New Category within European Union Law: Personal Work*, 15 EUROPEAN LAB. L.J. 184–210 (2024); ADALBERTO PERULLI & TIZIANO TREU, "IN TUTTE LE SUE FORME E APPLICAZIONI. PER UN NUOVO STATUTO DEL LAVORO (Giappichelli ed., 2022).

overcome the dichotomy between subordinate employment and self-employment that has characterized twentieth century labor law, but which in some ways continues to permeate even the most recent regulatory interventions on this matter.[12] This thesis has found different variations, also in the arguments in its support.[13] However, all of these variations to some extents are united by a basic stance, namely the idea of conditioning the legal access to social protections not to the worker's subjection to the employer's authority but instead to the provision of personal work.

As a consequence, what is critiqued is the very distinguishing feature of labor law in its reference case: subordination as the sole means to access social protection, and therefore as a special and typified power relationship between capital and labor, distinct from other forms of working relations and, in particular, to self-employment.

In fact, the recognition of subordinate labor protections has historically been embedded and explained in a necessitated logic of exchange between protection, on the one hand, and subjection to the employer's authority, on the other hand. Subtracting, therefore, the recognition of the protection from this logic would extend the protection to any person who works personally (i.e. without relying on the work of other workers) and would represent a step that, in fact, has never found full expression, at least in European systems. In other words, in the described perspective, labor should be protected as long as it is personally provided by a human being, without the need to be further classified as subordinate to an employer's authority.

While the rationale behind this thesis (or rather, theses) is certainly agreeable (that is the acknowledgement that human labor shall always be protected, irrespective of its modalities of performance or the context of the relationship in which it is provided), several critical remarks can be made regarding this thesis from a strictly technical viewpoint.

First, on the systematic level, it can be observed that the removal of the legal notion of subordination does not result in the category being overcome *tout court* but in fact ends up suggesting the replacement of the current abstract and general category of subordination with a new one, that of personal labor. This argument relates to the method of construction of the law and its rules, and it concerns the persistent need, despite the complexity of reality, to identify in general and abstract legal categories the instrument for defining the recipients of a certain discipline. Thus, for example, the shift from the

12. As mentioned above, several jurisdictions have indeed extended, in whole or in part, the scope of application of the protections typical of subordinate labor to new or different categories of workers but have ended up confirming the differences between self-employment and subordination.

13. *See supra* note 11.

category of subordination, as occurring when a worker is subject to the employer's authority, to the category personal work, still introduces a general and abstract category, thus capable of identifying a perimeter between included and excluded subjects.[14]

Second, a possible risk of the extension of protections to personal labor in all its forms and applications feared by some is that of flattening the protections out and thus reducing them for everyone, since not all labor relations are sustainable in terms of economic balance on the terms that the system provides for subordinate employment. Indeed, this second objection is rooted in an observation that is not, or is not necessarily, true. If it is true that the universal extension of protections to all who work could generate the side effect of diminishing levels of protection, this effect would not be a logical consequence of the premise but would at most represent a precise choice of the policy makers in balancing opposing interests when regulating labor.

In my opinion, a different objection could be moved to these theses: while advocating for the extension of the protection provided by labor law beyond the perimeter of subordinate work, the theses ultimately calls for the radical rejection of subordination as a category and therefore as a means to select subjects who deserve a specific protection. The overcome of the category of subordination, for the purpose to protect any kind of personal labor, brings to the logical and inevitable consequence that subordination shall be denied as a legal construction.

It is on this exact point that these theses can be criticized in light of an absorbing argument that pertains to the persistent actuality, and indeed, ontological existence, as a social and therefore also legal phenomenon, of subordination in our societies. Subordination, as a social phenomenon and by virtue of its own identity, requires and necessitates a specific normative response that takes into account the peculiar needs of those who work *subordinately to someone else's authority*.

## DOES SUBORDINATION STILL EXIST?

The purpose of subordination has been, and still is, to identify the recipients of the protections that labor law offers by drawing the perimeter of the application of that legal discipline, which serves to rebalance the asymmetry

14. Some authors support the thesis that even genuinely self-employed workers work for others and thus seem to point to "personal work for the benefit of others" as the ultimate criterion to which to anchor the recognition of protections. ADALBERTO PERULLI & TIZIANO TREU, "IN TUTTE LE SUE FORME E APPLICAZIONI. PER UN NUOVO STATUTO DEL LAVORO (Giappichelli ed., 2022). Others refer only to personal work, thus with no or little organization. FREEDLAND, *supra* note 11; FREEDLAND & COUNTOURIS, *supra* note 11.

in contractual power between the parties, by providing specific protections for the party who works for someone else under an employment relationship.[15]

In this respect, it is undoubtedly true that it is the scholarship's duty to critically assess the suitability of the current dogmatic construction of subordination to identify and thus select who is protected by labor laws and who is not; we might and we shall therefore critically assess the possible loss of resilience of the legal concept of subordination not so much as a logical criterion for distinguishing between subordinate and non-subordinate (i.e. self-employed) work, but as a discriminating criterion between *protected* and *unprotected* labor.

However, the question just described constitutes a logically different passage from the (logically preliminary) issue on the persistence of subordination as a *legal category*, which might or shall not be the sole one any longer, but that still identifies and cover a specific social phenomenon that requires an equally specific normative response.

Indeed, a basic observation might be missing from the debate: subordinate labor has its own precise identity, which makes it deserving of specific legal protection in the system, different, additional, and separate from the protections that the system wants to provide or has already provided for non-subordinate forms of personal labor.

The distinction between subordinate labor and non-subordinate labor is conceptually radical[16]: the varied field of non-subordinate labor lacks a suitable element for the aggregating function that on the other side of the bench is fulfilled by the worker's subjection to the employer's authority, which, in addition to the problem of correcting market dynamics, poses a specific problem in terms of protecting workers *against the power of the employer*.

Indeed, in most legal systems, labor law was born *per differentiam*: labor law came into being because an apparatus of rules was needed to distinguish the employment contract from other contracts. This was an apparatus of rules that broke away from contract law in order to capture the specificity

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15. Massimo D'Antona, *La subordinazione e oltre. Una Teoria Giuridica per il Lavoro che Cambia*, *in* LAVORO SUBORDINATO E D'INTORNI, IL MULINO 43–50 (Mario Pedrazzoli ed., 1989), who suggested to observe the concept of subordination not only as the technical means to identify the perimeters of the subjects covered by labor law, i.e., its personal scope of application, but also as the foundation of the conceptual autonomy of labor law and as the foundation of the subsequent distinction between workers protected under labor law and service providers exposed to pure market dynamics, in so far as they are covered by the sole contract law. This perspective is challenged by a different scholarship: SIMON DEAKIN & FRANK WILKINSON, THE LAW OF THE LABOUR MARKET 41–105 (Paul Davies, Keith Ewing, & Mark Freedland eds., 2005).

16. Luigi Mengoni, *Il Contratto di Lavoro nel Secolo XX*, *in* IL DIRITTO DEL LAVORO ALLA SVOLTA DEL SECOLO 3–22 (Giuffrè ed., 2002).

of a relationship that is characterized by two essential elements: the direct involvement of the person who works, hence the strictly personal nature of the working activity, and indeed the authority exercised over her by the employer, who employs such an authority to transform the working activity into an economic utility through the business organization.[17]

It is for these reasons and on the basis of this axiological status that the fundamental categories of labor law—starting with subordination—were created, thus distinguishing themselves from the general law of contracts.[18]

The very idea of subordination as a condition of access to labor law arose in response to the spread of modern enterprise and the functionalization of labor to it. Subordination is work that is destined to be transformed into value to the extent that it responds to a complex organization of people and means whose ownership, responsibility and control rest solely with the employer. And it is indeed true, and the scholarship has long pointed this out, that subordination has been and still is functional to the capitalistic system, and it is not by chance that it has found in the enterprise its best terrain of expression: with subordination and the regulation of the employment relationship, the authority of the employer is limited but at the same time recognized, and it finds citizenship in the legal system.[19]

Subordinate labor law arose because modern enterprise presupposes the division of labor and the relationship of subordination to the entrepreneur who is responsible for organizing the work. As Chandler reminds us, the modern enterprise was born at the end of the Second Industrial Revolution because it became clear that, with a network of service providers (or self-employed workers) coordinated by a merchant (the façonists of the putting-out system), the increasing technological complexity could not be addressed. The enterprise overcomes the limitations of the network of autonomous individuals through the two organizational mechanisms of the specialization of complex work, which is divided so that it can be completed, and the authority

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17. Hugh Collins, Gillian L. Lester, & Virginia Mantouvalou, *Does Labour Law Need Philosophical Foundations?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 1–30 (Hugh Collins, Gillian L. Lester, & Virginia Mantouvalou eds., 2018); D. M. Betty, *Labour is not a Commodity*, *in* STUDIES IN CONTRACT LAW, 314–55 (Barry J. Reiter & John Swan eds., 1980); Alan Hyde, *What is Labor Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW. GOALS AND MEANS IN THE REGULATION OF WORK 35 (Guy Davidov & Brian Langille eds., 2006). See the critical observations of Judy Fudge, *Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law*, *in* THE IDEA OF LABOUR LAW 120–36 (Guy Davidov & Brian Langille eds., 2011).

18. Harry W. Arthurs, *Labour Law after Labour*, in COMPARATIVE RESEARCH IN LAW & POLITICAL ECONOMY 13– 29 (2011).

19. As an example, it is no coincidence that the Italian Civil Code does not contain a general definition of subordination, preferring to precisely identify the subordinate worker as one who is obligated through remuneration to collaborate in the enterprise, performing intellectual or manual labor in the employ and under the direction of the entrepreneur.

relationship, which allows coordination and monitoring of the results of the divided work.

It was precisely from the observation of the material substratum of modern enterprise that the lawmaker identified the instance of subordinate labor in which the worker is subject by contract to the authority of the employer. Subordinate labor is thus the main instrument, even today, through which those who do business can organize and bring back *ad unum* the results of others' labor, ultimately in order to produce a product or service to be sold in the market. This is not only for reasons related to transaction costs, according to the Coase theory,[20] but also because, in complex organizations, there is no alternative, given that work is necessarily parceled out and must therefore be organized in order to bring the results of the activities of individuals back to an aggregate value that goes far beyond the mere sum of the individual performances of workers.[21]

In this context, it should not be ignored that, in the last quarter century, a strand of thought has developed that has tried to question the foundations of modern business, starting with denying the hierarchical structure of its organization. As has been observed,[22] a hazardous transposition of reflections on liquid modernity[23] suggested to some that the modernity of the organization has passed from the concept of fluidity or instability of the organization, which would, today, be without boundaries and without hierarchy[24]

In the face of these assertions and, therefore, the possible objection that sees in today's enterprises flat, hierarchy-free, liquid organizations, in which workers end up eventually owning and being responsible for parts of the organization and no longer subject to managerial power, it can be answered that, indeed, even in cognitive, liquid, post-Fordist enterprises, there is an

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20. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–44 (1960).

21. Hugh Collins, *Market Power, Bureaucratic Power, and the Contract of Employment*, 15 INDUS. L.J., 1, 1–15 (1986); Orsola Razzolini, *The Need to Go Beyond the Contract: Economic and Bureaucratic Dependence in Personal Work Relations*, 31 COMPAR. LAB. L. AND POL'Y J. 263–304 (2010).

22. Rossella Cappetta, *Organizzazioni Multi-Responsabili e Multi-Monitorate per Trasformazioni serie*, *in* BUSINESS NEXT, 105–34 (Andrea Beltratti & Alessia Bezzecchi eds., 2018).

23. ZYGMUNT BAUMAN, LIQUID MODERNITY (2000), read in the Italian translation MODERNITÀ LIQUIDA (2nd ed. 2011), according to whom what differentiates modernity from any historical form of human organization is the compulsive and obsessive, continuous, irrepressible, always incomplete modernization, irrepressible and unquenchable thirst for creative destruction.

24. RON ASHKENAS, DAVE ULRICH, TODD JICK, & STEVE KERR, THE BOUNDARYLESS ORGANIZATION (2015); Georg Schreyogg & Jörg Sydow*, Organizing for Fluidity? Dilemmas of New Organizational Forms*, 21 ORG. SCI. 1251, 1251–62 (2010); WILLIAM H. DAVIDOW & MICHAEL S. MALONE, THE VIRTUAL CORPORATION: STRUCTURING AND REVITALIZING THE CORPORATION FOR THE 21ST CENTURY (1992).

From a labor law perspective, *see* Luca Nogler, *Contratto di Lavoro e Organizzazione al Tempo del Post-Fordismo*, 4–5 ARGOMENTI DI DIRITTO DEL LAVORO 884, 884–902 (2014); Riccardo Del Punta, *Modelli Organizzativi D'Impresa e Diritto del Lavoro*, 3 SOCIOLOGIA DEL DIRITTO 113, 113–21 (2011).

organization: there is someone who owns and controls the organization, and so there is authority and someone who exercises it.[25]

From this perspective, the thesis that argues for the need for the radical overcoming of subordination suffers from a fundamental flaw: subordinate labor still exists; it is still an observed and observable mass social phenomenon that consists of labor subjected to the authority of others.

Even in the most advanced and sophisticated organizations, authority has not disappeared; rather, it has changed modes of manifestation, although not always and not everywhere. Therefore, the change pertains to the mode of manifestation of the employer's authority and not to its persistence as a social phenomenon that requires a specific normative response. And, indeed, where there is authority, workers need specific protection to counterbalance that authority *inside* the contractual relationship. It is not a mere protection of the working person but a specific protection of the working person being subject to the authority of others established by means of a contract.

## SUBORDINATION AND NEW FORMS OF LABOR ORGANIZATION

The above statements need clarification. Self-evidently, those who argue for the need to radically reject the category of subordination do not claim that the employer's authority has ceased to exist in liquid or horizontal enterprises, but often, in contrast, argue that the power of the principal, in a non-subordinate working relationship, is as intrusive as that of the employer, resulting, for example, in the economic dependence of the non-subordinate worker on the principal.[26]

Considering this, and for the purpose of the thesis we are trying to support, it is necessary to clarify the specific nature of the authority that identifies subordinate labor, and then to investigate how and why the manner of exercise of the typical employer's authority might have changed, and eventually how these changes affect the notion of subordination, in an apparently circular, but indeed logical reasoning.

Despite the relevant differences among legal systems, the fact that one party, namely the employer, is entitled to exercise authority over the other party, the employee, is in most jurisdictions at the core of the concept of subordination. Such authority is regulated and thus limited differently from system to system, but it can go as far as to give orders and directives on how the

25. Alain Supiot, *Les Nouveaux Visages de la Subordination*, DROIT SOCIAL, 131–45 (2000).

26. Judy Fudge, *The Legal Boundaries of the Employer, Precarious Workers and Labor Protection*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW. GOALS AND MEANS IN THE REGULATION OF WORK 295, 295–315 (Guy Davidov & Brian Langille eds., 2006).

working obligation shall be fulfilled, which is the very core of the employer's prerogative; to change the content of the employee's obligations (known in civil law systems as *jus variandi*); to monitor and control to some extent the employee's working activity; and to sanction the employee when the orders and directives have not been punctually respected.

The typical authority of the employer is the power she derives from being the owner or rather the controller of the organization for which the work performance is intended. It is, therefore, a power that is expressed and expands, at least in potential, to every aspect of the work performance and the organizational context that is functional to production.

Traditionally, ascertaining the existence of the employer's authority goes through establishing the circumstance whereby the worker has assumed the obligation to be subject to the employer's directive power, even if the power is not exercised in concrete terms or is exercised in a manner or through manifestations other than directive power in the strict sense.

The manifestations of the *exercise* of the typical employer's authority have changed as the organization of labor has changed. We might consider two examples to support this observation: remote work and platform work.

Traditionally, labor law has largely (not exclusively, but still largely) dealt with the need for protection of employees who work inside a certain workplace, usually the employer's premises. Consequently, the notion of subordination was built on an organization of work that was characterized by one aspect: work was performed physically within the employer's premises, inside a place that belonged to the employer, and that, without any legislative or collective intervention, would have been entirely subject to the power and control and management of the employer,[27] who was indeed the owner of the place and the master of the servant.[28] Progressively, workers conquered space and physical and moral protection in the workplace by securing their liberty, freedom, and dignity from the hands of the employer. The employment relationship and the workplace ended up inseparable, even in the vision of complete protection of the weaker party of the contract.[29]

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27. Otto Kahn-Freund, *Servants and Independent Contractors*, 14, MODERN L. REV. 504, 504–09 (1951).

28. DEAKIN & WILKINSON, *supra* note 15, at 41–105. More in general on the topic: Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW, 48–67 (Hugh Collins, Gillian Lester, & Virginia Mantouvalou eds., 2018); Valerio De Stefano, Ilda Durri, Charalampos Stylogiannis, & Mathias Wouters, *Does Labour Law Trust Workers? Questioning Underlying Assumptions Behind Managerial Prerogatives*, 53 INDUS. L.J. 206, 206–38 (2024).

29. In the Italian legal system, for example, this binomial is welded with the Statute of Workers of 1970 (Law No. 300 of 1970), where the contract of employment and the workplace identify the person who works: the employee is the person who works in a certain workplace, and the legal protections pass through the events of the workplace. This is clear if we read, for example, the first title of the statute

This binomial was somehow, for the first time, broken with the technological evolution of the means of work, the tertiarization of the economy and, in the end, the rise of remote working.

Remote working is work without a place and, as a legal phenomenon, it has substantially extracted from the notion of subordination the dimension of the workplace. This novelty became increasingly important with the Covid pandemic[30] and, more generally, with the major use of technology, and it has challenged an essential paradigm of labor protection: that is, the co-essentiality of the protection of the working person through her protection in the workplace, and in particular through her protection against the possible intrusions and interferences of the employer, ultimately against the exercise of the employer's authority in the workplace and on the employee's person.

Such a transformation of the organization of work—from work performed in a physical space to work performed in any space or in a non-space—places us in the need to understand whether and how the axes of protection that have settled over the decades on this assumption, which is the material *substratum* to which the labor law discipline applies, might have changed; it cannot leave us indifferent to an overall rethinking of the very sense of labor law protections while observing the changing of the work organization when work can be fully performed outside a workplace.

Scholars have largely addressed the phenomenon demonstrating that power dynamics are in place even when working activities are performed remotely and are even exacerbated by taking advantage of the blurriness of the line that separates personal life and working time when the working activity is conducted in a non-pre-determined location.[31]

Another relevant example of the transformation of the organization of work and, therefore, of the manifestation of the employer's powers in new organizational contexts, is given by the business model adopted by the platform economy, which ensures that a mass of workers is available to provide a service (i.e., a personal working activity) while not being formally bound by any set working time or even any formal obligation to work. The business model of platforms works on the basis of two fundamental mechanisms that

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(entitled on freedom and dignity of employees), which protects workers from the employer's interference with their person at work.

30. David Mangan, Elena Gramano, & Miriam Kullmann, *An Unprecedented Social Solidarity Stress Test*, 11 EUROPEAN LAB. L.J. 247, 247–75 (2020).

31. Antonio Aloisi & Valerio De Stefano, *Essential Jobs, Remote Work and Digital Surveillance: Addressing the COVID-19 Pandemic Panopticon*, 161 INT'L LAB. REV. 289, 289–314 (2022); Antonio Aloisi & Elena Gramano, *Artificial Intelligence Is Watching You at Work. Digital Surveillance, Employee Monitoring, and Regulatory Issues in the EU Context*, 41 COMPAR. LAB. L. AND POL'Y J. 95, 95–121 (2019).

have been deeply analyzed and discussed by scholars and case law, and that I briefly refer to for the sole purpose of addressing the change in the exercise of traditional employers' prerogatives in new organizations, among which we can consider platform work or the gig economy as an example.[32] On the one hand, the platform addresses a vast pool of potential users through immediate connection tools (apps, websites, etc.), allowing easy access to a certain service. On the other hand, the platform undertakes contractual relationships with a large number of workers whose working relationship is often classified as self-employment.

Without going into further detail on this phenomenon and its legal implications, one of the questions it raises is whether we are simply observing situations of economic dependence of a solo self-employed person toward the platform, or something different. We might ask ourselves, from a labor law perspective, whether such a business model, and the organization of work it relies on, pushes for an extension of the traditional reasoning on the employer's authority to these new forms of work organizations, which ultimately drive the worker to provide her working activity in a certain way at a certain time, as if she has been bound by orders, despite not being formally bound by any, but just by being part of a broad organization in which her working activity is included and that indirectly dictates the ways in which the work will be performed.

Moreover, in general, the profound changes undergone by enterprises in their internal organization and assets, the massive use of technologies (including algorithms), and the remotization of work might have altered the traditional manifestation of authority but have not limited or eroded the traditional prerogatives of the employer in managing the workforce.

Remote work and platform work might serve as examples or rather benchmarks for rethinking the approach to understanding the traditional power dynamics of the working relationship to include and detect atypical or

32. The literature on this topic is extremely vast. As essential doctrinal references see at least: Miriam Cherry & Antonio Aloisi, *"Dependent Contractors" in the Gig Economy: A Comparative Approach*, 66 AM. U. L. REV. 635, 635–89 (2017); JEREMIAS ADAMS-PRASSL, HUMANS AS A SERVICE: THE PROMISE AND PERILS OF WORK IN THE GIG ECONOMY (2018); Valerio De Stefano, *The Rise of The Just-In-Time-Workforce: On-Demand Work, Crowdwork, and Labor Protection in the "Gig-Economy"*, 37 COMPAR. LAB. L. AND POL'Y J. 471, 471–504 (2016). Please allow a reference to Elena Gramano, *Digitalization and Work: Challenges from the Platform-Economy*, 15 CONTEMP. SOC. SCI. 476, 476–88 (2019). More specifically, on the exercise of the employer's prerogatives in platform work, *see* Valerio De Stefano, *'Negotiating the Algorithm': Automation, Artificial Intelligence and Labour Protection*, 41 COMPAR. LAB. L. AND POL'Y J. 15, 15–46 (2019); Valerio De Stefano, *"Masters and Servers": Collective Labour Rights and Private Government in the Contemporary World of Work*, 36 INT'L J. COMP. LAB. L. AND INDUS. RELS. 425, 425–44 (2020); Antonio Aloisi, *Regulating Algorithmic Management at Work in the European Union: Data Protection, Non-Discrimination and Collective Rights*, 40 INT'L J. COMP. LAB. L. AND INDUS. RELS. 37, 37–70 (2024).

new forms of authority in the employment relationship and, consequently, in the legal notion of subordination.

## WORK TRANSFORMATION AND THE RESILIENCE OF SUBORDINATION: NEW FORMS OF AUTHORITY AND TRADITIONAL YET UNREPLACEABLE FORMS OF COUNTERPOWER

It is now necessary to bring order to the reasoning presented so far to clarify the final thesis that is intended to be argued here.

First, to achieve the goal of protecting those who are in need of protection (the tautology is deliberate) in a contractual relationship involving personal labor, it is not necessary to overcome subordination *tout court* as a legal and dogmatic category intended to identify the recipients of the protections proper to labor law. The protection of genuinely non-subordinate workers can be pursued through different *ad hoc* instruments (e.g., the legal protection of self-employment,[33] the legal protection of economically dependent but self-employed workers, and so on[34]).

Second, we need to note that, despite new technologies and new ways of organizing work, from the gig economy to remote work to liquid and horizontal enterprises, subordinate work still exists as a social phenomenon because there are workers who work in someone else's organization and, therefore, by definition are subject to someone else's authority.

If we take this perspective and seriously consider the transformation of work as a phenomenon to be observed and explained, if it is true that labor law conforms to the ideal type of work in an external organization, and if it is true that any work can be self-employed or subordinate, and therefore that the classification of the relationship does not depend on the content but on the organization of the work performed, then it is necessary to observe how the organization itself is transformed and therefore how the manifestation of

33. Luca Ratti, *2020/2030 Self-Employment Matters. The EU's Response to the Lack of Social Protection for Independent Workers*, 3 EUROPEAN EMP. L. CASES 164, 164–67 (2020); Veronica Papa, *The New Working (Poor) Class. Self-Employment and In-work Poverty in the EU: A Supranational Regulatory Strategy*, 14 ITALIAN LAB. L. E-JOURNAL 41, 41–58 (2021); Chiara Garbuio, *The Autonomous Workers and the Needed Responses of Social Protection Systems to Overcome Transitions*, 14 ITALIAN LAB. L. E-JOURNAL 1, 1–16 (2021). Please allow a reference to Elena Gramano, *Self-Employment in the EU and Italian Legal Systems: Recent Trends and Missed Steps*, 38 INT'L J. COMP. LAB. L. AND INDUS. RELS. 453, 453–72 (2022).

34. Felicia Rosioru, *Legal Acknowledgement of the Category of Economically Dependent Workers*, 5 EUROPEAN LAB. L.J. 279, 279–305 (2014).

the authority is transformed; the authority is transformed in its manifestations but does not cease to exist.[35]

We observe and study organizational change so that we are able to ascertain the existence of that authority in new ways it is exercised, to grasp its manifestations, even when it is difficult to do so, even when the authority escapes, even when it does not take the form of directives or orders given directly to the worker.

Jurisprudence has always employed the typological method or multifactor tests in ascertaining the existence of a subordinate employment relationship. These methods imply that, for the purpose of ascertaining subordination, it is not strictly necessary to verify that the employer issues specific directives on how the work is to be carried out, but it is sufficient that she decides on everything else (for example, where, and when, with whom the working activity shall be performed); that is, she decides on organizational matters that surround the working activity, which the employee may also perform independently, without this constituting a contradiction with the subordinate nature of the employment relationship. The typological method as the multifactor tests used by case law are nothing more than a method to ascertain the existence of organizational power, and thus distinguish it from the directive power.

That said, the key point that allows us to affirm that subordination still exists, and therefore needs specific protection, even in new organizations where hierarchy seems rarefied and managerial authority is not formally exercised, is the shift from the notion of directive power to that of organizational power as the *legal parameter for ascertaining subordination*.

If we were to draw a conceptual distinction between the employer's directive power and organizational power, such as to identify their content and scope of exercise, we could say that the former affects the content of work performance, while the latter affects the organization within which that performance takes place. More precisely, directive power consists of the employer's authority to determine the manner of the worker's performance, its intrinsic performance, and its concrete content; organizational power, on the other hand, has regard to the context within which the work performance is intended to take place and, specifically, represents the authority to conform the structural structure of the enterprise, the organization of the stages of production and their coordination. In this sense, while the exercise of directive power has regard to the worker as an *actor* to be directed in production, the

35. Frank Hendrickx, *Regulating New Ways of Working: From the New 'Wow' to the New 'How,'* 9 EUROPEAN LAB. L.J. 192, 195–205 (2018); Paul Schoukens & Alberto Barrio, *The Changing Concept of Work: When does Typical Work Become Atypical?*, 8 EUROPEAN LAB. L.J. 306, 306–32 (2017).

exercise of organizational power has regard to the *scenic context* in which the actor operates, as well as to the construction of the plot that the actor, by playing her part, helps to enact.

This conceptual shift acknowledges the changes in organizations whereby the manifestation of authority might be less intrusive in the sphere of performance of the employee than in the past. It helps detects authority even when it is not directed at working activities, but at the organizational context in which the activities are supposed to be performed.

Furthermore, and most importantly, it serves the purpose of allowing us to affirm that, for the worker to be classified as subordinate, it is sufficient to verify that workers are subject to organizational power. This is because, in the new labor organizations, authority no longer affects the sole object of the worker's obligation and thus the work performance in the strict sense but is often limited to affecting the organization in which the performance is embedded. This is because the exercise of directive power in the strict sense is no longer or not always necessary for the purpose of organizing subordinate work and its performance. Subordination is also embodied in the sole organizational power, which is the power of the employer, the owner and controller of the organization, manifested outside the strict object of the work performance and thus the contractual obligation. This is not only in systems such as Italy, where a norm has provided for this case (Article 2, Legislative Decree No. 81 of 2015),[36] or in Germany, where the integration of the working activity into the employer's organization has always been used, among others, as a parameter for ascertaining subordination (as stated above, this is also referred to as the typological method for ascertaining subordination),[37] but more generally (or even universally) because of the recognition that work has

36. In Italy, the debate on Article 2, Legislative Decree No. 81 of 2015 is extremely vivacious and still ongoing. For some references to the internal debate, Giuseppe Ferraro, *Collaborazioni Organizzate dal Committente*, 1 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 53, 53 (2016); Marco Marazza, *Collaborazioni Organizzate e Subordinazione: Il Problema del Limite (Qualitativo) di Intensificazione del Potere di Istruzione*, 6 ARGOMENTI DI DIRITTO DEL LAVORO 1170, 1170 (2016); Adalberto Perulli, *Le Collaborazioni Organizzate dal Committente*, *in* TIPOLGIE CONTRATTUALI E DISCIPLINA DELLE MANSIONI. DECRETO LEGISLATIVO 15 GIUGNO 2015, N. 81, 279 (L. Fiorillo, A. Perulli eds., 2015); Orsola Razzolini, *La Nuova Disciplina delle Collaborazioni Organizzate dal Committente. Prime Considerazioni*, *in* COMMENTARIO BREVE ALLA RIFORMA "JOBS ACT" 560 (G. Zilio Grandi, M. Biasi eds., 2016); Mariella Magnani, *Autonomia, Subordinazione, Coordinazione nel d. lgs. n. 81/2015*, WP C.S.D.L.E. "MASSIMO D'ANTONA".IT – 294/2016; Silvia Ciucciovino, *Le «Collaborazioni Organizzate dal Committente» nel Confine tra Autonomia e Subordinazione*, 3 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 321, 321–43 (2016). For an analysis of the reform in English, *see* Maurizio Del Conte & Elena Gramano, *Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors under the Italian Legal System*, 39 COMPAR. LAB. L. AND POL'Y J. 579, 579–605 (2018).

37. Bernd Waas, *The Legal Definition of the Employment Relationship*, 1 EUROPEAN LAB. L.J. 45, 45–57 (2010); Claudia Schubert, *Crowdworker, Arbeitnehmer, Arbeitnehmer. . .hnliche Person Oder Selbst. . .ndiger*, 4 RECHT DER ARBEIT 248, 248–53 (2020).

changed, the organization of the work has changed, and therefore the way in which the employer's authority is exercised has also changed.

The employer may no longer need to issue precise directives on the content and manner of work performance. Today's employees work according to cycles and objectives or remotely without schedules. Nonetheless, they remain an integral part of an organization that is at the full disposal of the employer alone and thus they remain fully subordinate.

For this reason, there is no contradiction between autonomy in working performance and subordination in the employer's organization.

Indeed, the recognition of the legal relevance of organizational power alone as the distinguishing and thus identifying element of subordination is not the same as stating that hetero-organized work performance is completely autonomous because the authority that is exercised over the organization in which the work performance is embedded, inevitably influences the performance itself and the manner in which it is carried out.

Today's employees are not more autonomous than in the past. It is necessary, on the contrary, to note that we have moved from a traditional notion subordination anchored to a historicized ideal type of worker, to a subordination that remains itself in complex organizations, even where authority does not go as far as to determine the concrete content of working activity.

We are not dealing with a new attenuated subordination but rather with a remodeled subordination, which does not betray the essential elements of subordination which is the authority relationship between worker and employer. The distinguishing feature of subordination is not something less or different than the employer's authority but an evolution of it that, while remaining perfectly consistent with its identity, acts in a different way, but not to a lesser degree.

Authority does not fade but is articulated in a way that is different in its manifestations but not qualitatively or quantitatively inferior.

The manifestations of authority change; the ways in which power is expressed change but this does not make organized labor any less subordinate.

This is the logical and therefore legal step that the organizational transformations of labor require us to make: to take note that organizational transformations do not make the employer's power disappear, but they alter and transform its manifestations.

The organizations change, but subordination remains.

Subordinate work is not surmountable because it has its own identity and dimension, which the legal system is obliged to continue to recognize as a typical social phenomenon through subordination (understood as a factual matter).

In the face of the transformations of labor, the legal system, and in particular case law, shall react by updating the instruments for ascertaining subordination, and by enlarging the same area, the perimeter of subordination, without losing its core identity, which lies in worker's subjection to the organizational authority of others.

This updating takes place exactly in the shift from directive power to organizational power and thus in the operation of conceptual separation between the space of the work performance, which is the object of the employee's obligation, and the space over which the employer's power is extruded, which no longer has, or rather not only has as its object, the working activity, or not necessarily the working activity, but has as its object the organization in which it is embedded and without which it would lose its *raison d'être*.

## FINAL REMARKS

Ultimately, the concept of subordination has shown extraordinary resilience to the transformation of work by continuing to express the fundamental traits of the labor relationship in the enterprise.

Such resilience plays a role not only at the individual level but also at the collective level. The persistent centrality of the relationship of subordination and its specific legal regulation recalls the need for collective representation of the interests of workers who share that contractual condition of subjection to the employer's organizational power. Since its origins, the constituency of unions has been subordinate workers. Consequently, union action was born for and has been focused on subordinate work, with the purpose and result of improving the living and working conditions of subordinate workers through an articulated system of collective bargaining with their employer counterparts. In other words, the trade union phenomenon has been substantiated by the representation of two categories of subjects identifiable through their typical bargaining relationships: employers and workers subordinate to them.

Naturally, as the organization of work and, therefore, the *quomodo* of subordination transformed, so did collective bargaining and the instruments of collective representation. The law, grasping the evolution, gradually assigned to the collective agreement the role of specifying and drawing up boundaries to the employer–entrepreneur's organizational power, all the way to the formation of a genuine inter-union order capable of governing labor

relations on a large scale.[38] It is no accident that industrial democracy has been spoken of as a form of governance of subordinate labor in enterprise.[39]

The crisis of subordination and the associated decline of the role of trade unions have pushed the legal debate—and with it, in some cases, the lawmakers themselves—to explore new means of protection, even to the point of embracing instances of universalistic protection, with the ambition of guaranteeing the protection of the working person in all forms and expressions, thus overcoming the traditional and narrower scope of the person who performs her activity under the authority of the employer.[40]

Such a perspective, evidently, is not without effects on the labor protection system in its basic structure and, in particular, on its sources of production, starting with the industrial relations system.

In conclusion, such a radical paradigm shift presupposes a move away from (and perhaps the abandonment of) the assumption that has always held labor law and industrial relations together, entailing a redefinition of the protected good itself: no longer the work organized by the employer but, generically, the welfare of the working person. In essence, the sole lawmaker would be trusted with the task of reconstructing, on the basis of a different axiological premise, the corpus of labor protections in a nonspecific and universalistic key, which would inevitably tend to be confused with the fundamental rights of the person.

Are we ready for this quantum leap?

38. GIUGNI GIUGNI, INTRODUZIONE ALLO STUDIO DELL'AUTONOMIA COLLETTIVA (1960).

39. MARCELLO PEDRAZZOLI, DEMOCRAZIA INDUSTRIALE E SUBORDINAZIONE. POTERI E FATTISPECIE NEL SISTEMA GIURIDICO DEL LAVORO (1985).

# POLITICAL ECONOMIC REFLECTIONS ON WORKER SUBORDINATION AND THE LAW IN CONTEMPORARY CAPITALISM: SOMETHING OLD, SOMETHING NEW AND A LOT THAT'S BLUE

Eric Tucker†

## INTRODUCTION

Debates over worker subordination are central to discussions of the efficacy of protective labor and employment law, whose central mission in a capitalist political economy, after all, is to reduce but not eliminate subordination. When protective labor and employment law seems to be fulfilling its mission discussions of worker subordination, but the topic becomes more urgent as the efficacy of the law declines. Not surprisingly, as labor law's efficacy has been declining over the past several decades,[1] we are in the midst of a revival of debates over worker subordination, the premise of this special issue. While many seek to revive the classic mission of labor and employment law, ameliorating the worst excesses of subordination, while leaving in place labor's structural dependency on capital,[2] the goal of this article is to revisit and elaborate a marxist political economy perspective to demonstrate that workers' structural subordination to capital is deepening and that this limits the possibility of achieving much of the reformist agenda.[3]

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1. For similar assessments, see Gali Racabi, *Private Ordering Churn*; Brian Langille &Anne Trebilcock, *Introduction: A Framework for Thinking about the Framework of Social Justice*, *in* LANGILLE &TREBILCOCK, EDS., SOCIAL JUSTICE AND THE WORLD OF WORK 1–8 (Oxford: Hart Publishing, 2023), and the sources cited therein.

2. For example, see Alan Bogg & Cynthia Estlund, *Between Authority and Domination: Taming the Managerial Prerogative*; Guy Davidov, *Subordination vs Domination: Exploring the Differences*, 33(3) INT'L J. LAB. L. & IND. REL. 365–90 (2017).

3. For similar efforts, see ZOE ADAMS, LABOUR AND THE WAGE (Oxford: Oxford University Press, 2020) and *A Structural Approach to Labour Law*, 46 CAMBRIDGE J. ECON. 447–63 (2022); BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK (Cambridge, MA: MIT Press, 2023; Matthew Dimick, *Marx and Domination: Issues for Labour Law* (forthcoming paper for New Foundations conference, delivered in Toronto, June 2022).

The article begins with a brief reiteration of the classic marxist perspective on the structural subordination of workers to capital, including a discussion of the meaning of subordination and its relation to domination. The article then turns to argue that a full understanding of subordination in contemporary capitalism requires us to recognize that wage labor is not now, and never has been, the exclusive mode of subordination. In particular, it argues that unfree labor and self-employment not only remain as alternate modes of capitalist subordination but that their significance has grown in some contexts. That said, the primary focus of the remainder of the article is on worker subordination through wage labor, still the predominant form of subordination in advanced capitalist countries. The article seeks to deepen our understanding of contemporary subordination by identifying and exploring three of its crucial dimensions: economic subordination; time subordination; and workplace subordination. I argue that each of these dimensions of subordination is structural, in the sense that they are a condition of the existence of capitalism, but that the degree of subordination is variable and the object of ongoing struggles. That said, I offer evidence supporting the view that in Canada and most other advanced capitalist countries subordination in each of these dimensions has been deepening over the past 50 years.[4] The final section of the article makes two arguments about the limits of protective employment law. First it argues that the structures of capitalism not only generate subordination in the first instance but also provide capital with significant advantages in limiting the protective employment laws' efficacy. Second, it argues that, with the possible exception of occupational health and safety (OHS) regulation, the deeper one descends into the abode of production, the less likely protective labor law is to follow. While there are no easy ways of overcoming that structural subordination, a progressive reform agenda must centre that subordination and think about how labor laws might contribute to a transformative project.

## WORKER SUBORDINATION: A STRUCTURAL FEATURE OF CAPITALISM

Any discussion of worker subordination must begin with some definitional clarity of what is meant by subordination. A minimal definition is that subordination exists in circumstances where a class or person exercises power over another person or class. A central tenet of Marxism is that worker subordination is a structural feature of capitalism, which is to say that it derives from the inner logic of capitalism itself. Capitalism in its broadest sense

4. I acknowledge but bracket for the purposes of this paper the ways in which subordination is gendered and racialized and shaped by legacies and practices of imperialism and settler-colonialism.

can be defined as a system in which production and exchange are undertaken with the aim of making a profit. But what underlies it are certain social relations that can usefully be divided into vertical relations between the immediate producers and the capitalists and horizontal relations between the producers and capitalists themselves.[5]

Beginning with vertical relations between immediate producers (workers) and capitalists, social relations are founded on an underlying property distribution (forcibly brought into existence) in which a relatively small class of capitalists own the means of production while a large class of workers who are dependent on the sale of their labor power to a capitalist in order to secure access the means of social reproduction. This produces a structural dependency of workers on capital itself that is independent of and indeed precedes any particular exchange. Marx characterized the situation as one in which "In reality, the laborer belongs to capital before he has sold himself to capital"[6] since labor power is effectively rendered economically useless for most outside the mediation of capital.[7] While it is true that capitalists depend on labor inputs, as Adam Smith noted, "the necessity is not so immediate."[8] The result is an asymmetrical structural dependence of labor on capital.

Of course, an asymmetrical dependency alone does not necessarily produce subordination since the superior party may choose not to take advantage of its position. But that is not all there is, which brings us to the horizontal relations between capitalists.[9] A defining feature of capitalism is that capitalists enter into economic relations with the purpose of boundlessly expanding their capital. However, assuming competitive markets, the ways in which profits can be secured is limited. In the sphere of markets and circulation, the immanent tendency is toward an exchange of equivalents based on uniform market prices for all participants. Capital can neither dictate the cost of inputs (including labor inputs) nor the price of outputs. It is in the sphere of production, not circulation, where capitalists seek to expand their capital by extracting and appropriating surplus value from the labor they have purchased. Product or technological or organizational innovation can provide temporary shelter from competition, but over time competitive pressure will require other units of capital to catch up or go out of business. Therefore, absent

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5. *See generally* SØREN MAU, MUTE COMPULSION: A MARXIST THEORY OF THE ECONOMIC POWER OF CAPITAL (Verso, 2023).

6. Karl Marx, *Capital, Vol. 1*, 577 (International Publishers, 1967 [1867]).

7. Mau, *supra* note 5, at 265.

8. ADAM SMITH, THE WEALTH OF NATIONS, Vol. 1, ch. 8, 99 (U. Chi. Press, 1977 ed.).

9. Horizontal relations also exist between workers that may exacerbate their vulnerability to subordination when they are in competition, but which may also be a source of power when workers act in combination.

coordination among capitalists, there is constant pressure to reduce unit labor costs by extracting more value from the labor power they have purchased. Because individual capitalists are subject to the logic of capital, they do not have the option of not producing for profit or relenting from the extraction of surplus value from labor. The interaction between these horizontal relations and the vertical asymmetrical dependency of labor on capital produces worker subordination as a structural feature of capitalism.[10]

While the worker subordination is immanent feature of capitalism, arising out of its core logic, as I argue, subordination manifests itself through multiple modes and in several dimensions. Moreover, and its depth varies, shaped by technology, class power and law, among other influences. The article returns in its last section to a discussion of the role of protective and disciplinary labor and employment law in ameliorating manifestations of worker subordination.

This brings me to the definition of domination as developed in republican theory and applied to labor. Without getting into an extended discussion, I turn to two distillations that both draw on the work of Philip Pettit.[11] Davidov defines domination essentially as being subject to arbitrary power[12] while Bogg and Estlund, focus more on the conditions that must be present for non-domination in employment. Specifically, they point to three: 1) the existence of minimum labor standards regarding such matters as wages and hours; 2) prohibitions on managerial authority to discriminate or retaliate; and 3) a requirement that employers be able to affirmatively justify certain decisions.[13] In either account, the underlying reason for distinguishing between subordination and domination is to justify worker subordination within limits, while accepting the structural subordination of workers under capitalism.

Both approaches fail to recognize the salience of structural subordination. If the focus is exclusively on the elimination of arbitrary power, then all rational decisions made in the name of profit maximization are justified and are do exercises of unacceptable domination, regardless of the devastating impact those decisions may have on workers and their communities. Normatively and empirically, this is pretty thin gruel. Bogg and Estlund's more elaborate conditions for non-domination promise much thicker protection, but as

10. For a similar account derived from labor republicanism rather than Marxism, see Alex Gourevitch, *Labor Republicanism and the Transformation of Work*, 41:4 POL. THEORY 591–617 (2013).

11. PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT (OUP 1997).

12. Davidov, *supra* note 2, at 374.

13. *See generally* Bogg & Estlund, *supra* note 2.

I will argue in the final section of the article, they fail to recognize the impediments posed by workers' structural subordination to their realization.

## MODES OF CAPITALIST SUBORDINATION

The principal mode of subordination in contemporary capitalism is through the wage relation. As Marx famously described it, worker and employer meet as juridical equals in the labor market, the 'very Eden of the innate rights of man…[where] alone rule Freedom, Equality, Property and Bentham," where the worker sells her capacity to work to an employer wishing to buy it. The transaction being complete, they enter into "the hidden abode of production . . .where we shall see, not only how capital produces, but how capital is produced. We shall at last force the secret of profit-making."[14] It is in this space where worker subordination is enacted, where the capitalist having purchased the commodity of labor power now puts it to use with the goal of extracting from it more value than its cost.

Wage labor, however, is not the only capitalist mode of subordination, a fact of both historical and contemporary significance. As David McNally argues, "What is critical to capitalism is that individual units of capital reproduce themselves by appropriating surplus value through the production of commodities – and essential tasks related to that production – in the contexts of market competition."[15] While wage labor is the predominate mode or relation of production in contemporary capitalism, it is not the only mode of commodity production and surplus value extraction. Here we briefly discuss two others, unfree labor and self-employment.

## UNFREE LABOR

Including unfree or coerced labor as a mode of capitalist subordination poses some theoretical difficulties for a Marxist framework that distinguishes the capitalist mode of production from slavery and feudalism in part on the basis that surplus labor in those regimes was extracted through the threat of violence and the exercise of the personal rule of the master or lord over their slaves or serfs. In contrast, under capitalism, it is the separation of workers from access to the means of production that generates impersonal economic compulsion to enter into employment that is only available on condition that

14. Marx, *supra* note 6, at ch. 6.

15. DAVID MCNALLY, BLOOD AND MONEY 157 (Chicago: Haymarket, 2020). See also John Clegg, *A Theory of Capitalist Slavery*, 33(1) J. HIST. SOC. 74–98 (2020), for a discussion of the meanings of capitalism and an argument for why slavery was capitalist in some contexts.

the employer is able to extract more value from labor than its cost.[16] While this is a crucial insight for understanding the capitalist mode of production in its essential form, its historical manifestations are more complex and varied, a point that has been made by many others.[17] While it would be difficult to imagine that a regime of universal slavery or serfdom could be capitalist, the existence of unfree labor within a capitalist mode of production is not only theoretically possible, but empirically accurate.

There are various forms of unfree or coerced labor, its purest expression is chattel slavery in the western hemisphere. Slave plantations in the Caribbean and the American south were engaged in the production of commodities such as cotton and sugar to be sold for profit in value chains integrated into and indeed essential for the expansion of industrial capitalism. Moreover, labor was indeed a commodity, although not separated from the enslaved person, who was fully owned by the enslaver, but bought and sold in slave markets. As well, plantation owners became very adept at extracting value from the human commodities they owned, not only by subordinating the enslaved persons' time to their needs through the lengthening of the working day but also by their real subsumption through changes to the labor process to extract more value per unit of labor input. The seeds of Taylorism can be found in the ways overseers studied the labor process to determine how much work enslaved people were physically capable of performing, although the liberal use of whipping to extract that effort was not permissible to discipline wage labor. Slave labor, contrary to some claims, was not unproductive and doomed to end when faced with competition from more productive free labor, but rather was becoming more productive under the brutal conditions of subordination imposed by capitalist masters.[18] While their labor was expropriated rather than exploited, that goes to the point there are different modes of capitalist subordination, rather than being an argument that slavery is inconsistent with capitalism.[19]

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16. Mau, *supra* note 5, at 140–41, 156.

17. For example, see IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH 27 CENTURY (Academic Press, 1974) ("Free labor is indeed a defining feature of capitalism, but not free labor throughout the productive enterprises. Free labor is the form of labor control used for skilled work in core countries whereas coerced labor is used for less skilled work in the peripheral areas.").

18. EDWARD E. BAPTIST, THE HALF HAS NEVER BEEN TOLD: SLAVERY AND THE MAKING OF AMERICAN CAPITALISM 111–44 (New York: Basic Books, 2014).

19. The distinction between exploitation and expropriation is developed by Nancy Fraser, F*rom Exploitation to Expropriation: Historic Geographies of Racialized Capitalism*, 94(1) ECON. GEOGRAPHY 1–17 (2018).

While chattel slavery is perhaps most closely associated with so-called "primitive accumulation,"[20] unfree labor continues to be a capitalist mode of subordination intertwined in various and changing ways with wage labor, and both are used in the boundless pursuit of profit, albeit the former primarily in the abodes of production most hidden from our view and performed disproportionately by racialized populations.[21] As Sylvia Fraser argues, "there are structural reasons for capital's ongoing recourse to expropriation." Expropriation raises profits by lowering the cost of production both by reducing the cost of labor inputs directly by substituting unfree for free labor and indirectly by reducing the cost of free labor by making available for consumption cheaper commodities produced by expropriated labor.[22]

A recent ILO report on forced labor and forced marriage estimated that in 2021, 27.6 million people work in situations of forced labor on any given day, its prevalence increasing slightly since 2016. Eighty-six percent of forced labor is imposed in the private economy, the five largest sectors being services (excluding domestic work), manufacturing, construction, agriculture (excluding fishing) and domestic work. Moreover, unfree labor is extremely lucrative. According to a recent ILO study, the total gains from forced labor have risen dramatically over the last decade, estimated to reach $236 billion US in 2024. Not only is the mass of illegal profits increasing, but so too is amount extracted per victim.[23] Systematic withholding of wages with the threat of losing accrued earnings is the most common form of coercion.[24]

The latter point indicates that the boundaries between free and unfree labor cannot be sharply drawn.[25] Indeed, Nancy Fraser argues that under financialized capitalism, there is a new entwinement of exploitable free workers and expropriable unfree workers.[26] This difficulty has led many scholars

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20. Marx, *supra* note 6, at ch. 31 ("[C]apital comes dripping from head to foot, from every pore, with blood and dirt." On the significance of slavery for industrial capitalism); see MAXINE BERG & PAT HUDSON, SLAVERY, CAPITALISM AND THE INDUSTRIAL REVOLUTION (London: Wiley 2023).

21. For example, see NANCY FRASER, CANNIBAL CAPITALISM ch. 2 (NY: Verso, 2022); Sébastian Rioux, Genevieve LeBaron, & Peter Verovšek, *Capitalism and unfree labor: A review of Marxist perspectives on modern slavery* 27:3 REV. INT'L POL. ECON. 709–31 (2020); AZIZ CHOUDRY & ADRIAN SMITH, *Unfree Labour*? STRUGGLES OF MIGRANT AND IMMIGRANT WORKERS IN CANADA (Oakland, CA: PM Press, 2016).

22. Fraser, *supra* note 19, at 5.

23. ILO, *Profits and Poverty: The Economics of Forced Labour* (Apr. 2024), https://www.ilo.org/global/topics/forced-labour/publications/WCMS_918034/lang—en/index.htm.

24. ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriages* (Sept. 2022), https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipec/documents/publication/wcms_854733.pdf.

25. For a nuanced discussion of the varieties of unfree labor and the difficulty of drawing boundaries between free and unfree labor, see Sidney W. Mintz, *Was the Plantation Slave a Proletarian?*, 2:1 Rev. 81–98 (1978) (Fernand Braudel Center).

26. Fraser, Fraser, *supra* note 21, at 47.

to view labor freedom and unfreedom as a continuum. However, as Judy Fudge has argued, the idea of a continuum is too blunt and a more nuanced account is needed that considers mechanisms of labor control, the social spaces in which control occurs and commodification, among others.[27] This requires more detailed studies of the processes of worker subordination in modes of unfree labor.

## SELF-EMPLOYMENT

Self-employment is another mode of subordination that merits mention, especially given recent controversies over the status of platform workers. It too poses some theoretical challenges to the marxist model of the capitalist mode of production in which workers lack direct access to a means of production and thus are compelled to sell their labor to a capitalist willing to hire them. To the extent that workers have the option of becoming self-employed and producing for themselves, their dependency on capital and the dull compulsion of economic necessity is lessened. While a mode of production in which all workers had the option of producing for themselves rather than selling their labor could hardly be characterized as capitalist, that is not the world we live in. While actual existing capitalist modes of production can and do incorporate forms of self-employment, they remain capitalist provided that wage labor remains the dominant relation of production.

Estimations of self-employment vary from country to country and over time. For example, in Canada, in 2022 it was estimated that about 13% of the labor force was self-employed, a figure that has been relatively stable since a growth in the 1990s.[28] Countries in the Global North generally have similar rates of self-employment, while rates in the Global South tend to be much higher.[29]

That leaves open the question, however, of whether or when self-employment is a mode a capitalist subordination. Here we need to recognize that self-employment is a diverse phenomenon. To the extent that self-employed

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27. Judy Fudge, *(Re)Conceptualizing Unfree Labour*: *Local Labour Control Regimes and Constraints of Workers' Freedoms*, 10:2 GLOB. LAB. J. 108–22 (2019). For a analytic scheme that helps illuminate the multitudinous forms of coerced labor, see MARCEL VAN DER LINDEN, THE WORLD WIDE WEB OF WORK ch. 6 (London: UCL Press, 2023).

28. *Employment by class of worker, annual (x 1,000)*, STAT. CANADA (Jan 1, 2024), https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=1410002701.

29. See for example, Self-employed, total (% of total employment, WORLD BANK (Feb. 7, 2024), https://data.worldbank.org/indicator/SL.EMP.SELF.ZS?view=map. The current official US estimate of about 7% likely only captures about half of the total. *See* KATHERINE G. ABRAHAM ET AL., THE INDEPENDENT CONTRACTOR WORKFORCE: NEW EVIDENCE ON ITS SIZE AND COMPOSITION AND WAYS TO IMPROVE ITS MEASUREMENT IN HOUSEHOLD SURVEYS (NBER Working Paper No. 30997, Mar. 2023).

workers truly operate their own businesses, provide their own capital and hire their own workers, we are in the sphere of commerce where each party more or less freely seeks only their own advantage and may, within loose legal limits, exercise whatever market advantages they enjoy to realize value from the products or services they produce and sell, or to appropriate value from the businesses with whom they contract. One business may exploit its market position to squeeze another business, but the resulting 'subordination' occurs in a horizontal relation between businesses in the sphere of circulation, not in the vertical relations between classes that exist in the abode of production.

That said, it must also be recognized that the horizonal commercial arrangements between capitalist firms may pressure subordinated businesses to extract more value from within *their* abode of production, including by violating their employees' labor rights or exploiting their own and family-members' labor. The phenomenon has been well documented in some areas of business including David Weil's work on fissured workplaces.[30]

More generally, there has been a growth in rentier capitalism, characterized by the economic domination of asset owners who extract value from businesses without becoming employers.[31] In some cases, subordinated businesses and so-called independent contractors may be at such a disadvantage that they seek and obtain associational rights or other means of protection against undue advantage taking. For example, franchisees in Ontario enjoy a protected right to form associations and at times fishers and farmers in Canada have been given a collective voice in product marketing schemes designed to keep more of the value they produce in their pockets.[32]

However, these associational or other rights are typically created outside the field of protective employment law and thus perhaps correspond to the boundary between the horizontal exploitation that takes place between businesses within capitalism and the horizontal subordination between classes that characterizes capitalist modes of exploitation.

While these are useful theoretical heuristics, empirically there is a continuum between independent self-employed (particular self-employment employers with their own businesses), own-account self-employed who do not

30. DAVID WEIL, THE FISSURED WORKPLACE (Cambridge, MA: Harvard University Press, 2014).

31. BRETT CHRISTOPHERS, RENTIER CAPITALISM: WHO OWNS THE ECONOMY AND WHO PAYS FOR IT (London: Verso, 2020); Brett Christophers, *Class, Assets and Work in Rentier Capitalism*, HIST. MATERIALISM 3–28 (2021); Herman Schwartz, *Intellectual Property, Technorents and the Labour Share of Production*, 26:3-4 COMPETITION & CHANGE 415–35 (2022).

32. Eric Tucker, *Competition and Labour Law in Canada: The Contestable Margins of Legal Toleration*, *in* SANJUKTA PAUL, SHAE MCCRYSTAL, & EWAN MCGAUGHEY, THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 127–40 (Cambridge: Cambridge University Press, 2022). For a dated but interesting comparison of collective bargaining by workers and by farmers, see D.R. Campbell, *Collective Bargaining in Ontario Agriculture and Industry*, 6:1 CANADIAN J. AGRIC. ECONS. 44–52 (1958).

hire worker, and employees. As a result, clear distinctions between horizontal business subordination within capitalism and vertical capitalist class subordination are often fuzzy. The issue is particularly acute at the boundary between own-account self-employer and employees, which is also the boundary that is most heavily populated. For example, in Canada only a little more of a quarter of the 13 percent of the workforce classified as self-employed, are (or about 3 percent of the workforce) are self-employed employers. The remaining 87 percent of the self-employed do not hire workers and are in essence selling their own labor. The issue of distinguishing these so-called self-employed workers from employees has attracted enormous attention beginning with the breakdown of the standard employment relation in the 1980s and more recently with the rise of platform mediated work. Hirers claim that the worker is outside the firm and, if there is subordination, it occurs in the context of a commercial relationship conducted in the sphere of circulation, where labor rights do not run. However, these claims are often exaggerated or simply bogus misclassifications of employees. For example, in 2019, the OECD reported that while the between 2010 and 2015 the incidence of self-employment has remained stable, dependent and false self-employment increased.[33]

To address the blurriness of the distinction and to avoid unduly limiting the scope of protective labor and employment laws, some jurisdictions have adopted in-between classifications that are fully or partially protected. For example, in Canada, the gray space between employment and truly independent self-employment is covered by dependent contractor provisions that extend collective bargaining rights to a workers who cannot bring themselves within the legal definition of an employee but "who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."[34] The "worker" category in UK law performs a similar function in regard to employment standards, but does not confer workers with the full set of rights enjoyed by employees.[35]

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33. OECD, *Employment Outlook 2019: The Future of Work* 60–62(Paris: OECD, 2019). For a variety of reasons, including the blurriness of boundaries, estimating the scale of true self-employment is challenging. A recent US study concluded that current methods in the significantly under-estimates the size of the self-employed workforce in the US by fifty percent. ABRAHAM ET AL., *supra* note 29.

34. *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A., § 1.

35. CYNTHIA CRANFORD, JUDY FUDGE, ERIC TUCKER, & LEAH VOSKO, SELF-EMPLOYED WORKERS ORGANIZE (Montreal: McGill-Queen's University Press, 2005); *Alan Bogg, Square Pegs in Round Holes?*

The larger point, however, is that there are multiple modes of subordination with capitalism whose boundaries are often indistinct and co-exist simultaneously. In a full accounting we would need to examine more closely particular modes of subordination, the dimensions of subordination in each, and how these modes operate together in a particular setting.[36] This is necessary in order to better understand pathways for effective resistance and regulation, since it is no longer the case that existing repertoires of resistance or protective labor laws are adequate in a world in which multiple forms of subordination operate simultaneously.

Dimensions of Subordination within Wage Labor and their Trajectory

We turn then to the dimensions of subordination within wage labor, which remains the predominant mode of capitalist subordination, at least in the global north. The focus here is on three dimensions of subordination: economic subordination, time subordination and workplace subordination, which while interlinked can fruitfully be analyzed separately.

### ECONOMIC SUBORDINATION

By economic subordination we mean a situation in which workers' economic interests are secondary to those of capital. Workers' economic subordination is not a function of market imperfections or transitory bargaining inequality (although it may be exacerbated or alleviated by them) but a structural feature of capitalism as discussed above.[37] Another way to make the point that workers' economic subordination is a structural is to ask for whose economic benefit do capitalist enterprises operate? The answer is obvious. While of course workers benefit economically from being employed, the enterprise will only continue, and workers will only remain employed for as long as it is in the economic interest of the employers – that is for as long as they are producing and extracting surplus value. Capital will only remain invested as long as it sees an opportunity to profit and expand, immediately or in the near future. When that is no longer the case, employers will seek to

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*Collective Bargaining and the Self-Employed*, 42(2) COMPAR. LAB. L. & POL'Y J. 409 (2021). See also the other articles on collective bargaining for self-employed workers in that issue.

36. For an excellent study of the dynamics of subordination and agency in the context of self-employed online platform workers, see Alex J. Wood & Vili Lehdonvirta, *Antagonism Beyond Employment How the 'Subordinated Agency' of Labour Platforms Generates Conflict in the Remote Gig Economy*, 19:4 SOCIO-ECON. REV. 1369–96 (2021).

37. Davidov, *supra* note 2, at Labor365–89, refers to economic subordination as structural dependency.

reduce their workers' compensation,[38] lay them off or terminate them in due course.

Of course, there is scope for bargaining over the degree of workers' economic subordination, and conflict between labor and capital over the wage, including benefits, is recurring. Economic subordination, like other dimensions of subordination, is variable and depends on a variety of factors that determine the bargaining power of the parties, but it is difficult to envision a scenario in which the economic interests of employees will not be subordinated to the capital's structural imperative to extract surplus value from the workers they hire.

There are many ways to measure the extent of labor's economic subordination, including labor's share of national income and the relation between wage growth and productivity growth. A 2015 study by the ILO and OECD the labor share in G20 economies provides a snapshot of both.[39] It found that while labor shares were stable for several decades prior to 1980, since then there has been a secular decline in labor's share regardless of the measure used. For example, the average contraction of labor's share of private sector income was 0.24 percent a year between the early 1990s and 2007, with a particularly sharp drop in Canada. By historical standards, the labor share in the US in 2009 was lower than it has been since the turn of the twentieth century, while in the UK and France it had dropped to its lowest level since World War II.[40]

The ILO/OECD report also considers the evolution of the relationship between productivity and wage growth. While real wage growth in G20 economies kept pace with productivity growth in the post-WWII era, that has not been the case since the early 2000s when wage growth began to flatten while productivity growth continued to increase. Moreover, the gap between median real wages and productivity growth is increasing more rapidly than the gap between average real wages and productivity growth, a reflection of

38. Economists have found that for a variety of reasons, wages are sticky so employers tend to pursue alternative strategies that may including layoffs. For a recent study, see STEVEN J. DAVIS & PAWEL M. KROLIKOWSKI, STICKY WAGES ON THE LAYOFF MARGIN (Working Paper No. 23-12. Federal Reserve Bank of Cleveland), https://doi.org/10.26509/frbc-wp-202312.

39. ILO & OECD, *The Labour Share in G20 Economies* (Report Prepared for the G20 Employment Working Group, Antalya, Turkey, 26-27 Feb. 2015). Also, see OECD, *supra* note 33, at 66–72.

40. Also, see MARTA GUERRIERO, THE LABOR SHARE OF INCOME AROUND THE WORLD: EVIDENCE FROM A PANEL DATASET (ADBI Working Paper 920. Tokyo: Asian Development Bank Institute, February 2019) (finding the labor share across 151 economies in both the global north and south has generally declined over time, especially in the last three decades.).

growing wage inequality and signalling that the declining share of productivity growth going to low-wage labor is particularly severe.[41]

Indeed, a 2022 report by the World Inequality Lab finds that in-country income inequality rose between 1820 and 1910, then sharply declined between 1910 and 1980 and rose again between 1980 and 2020.[42] Specifically with regard to Canada, the Report finds income inequality has been rising significantly since 1980. In 1980 the bottom 50 percent captured almost 20 percent of national income compared to 15.6 percent in 2020. The drop in the US was sharper, from about 19 percent to 13.3 percent.[43]

Economists debate the cause of labor's declining share and the growing gap between productivity growth and wage increases, but at least some significant part of it can be understood in relation to economic subordination. This would include the decline in workers' bargaining power associated with shrinking union density, more decentralized bargaining, reduced access to unemployment benefits, increased global competition from low wage countries with large labor forces, corporate concentration and monopsony, and a shift from investment in technological innovation to workplace surveillance. Moreover, these developments are not simply the result of market forces but are significantly driven by the concentration of economic and political power that is deployed to push governments to adopt policies that increase inequality. All of these factors undermine the willingness and ability of workers to resist employer demands to take more of the income generated from within the abode of production.[44]

## TIME SUBORDINATION

A second dimension of subordination is with respect to time, by which we mean the extent to which workers' time is subordinated to the needs of capital. In a deservedly famous essay, E.P. Thompson explored the

41. Aaron Benanav, *Automation and the Future of Work-1*, 119 NEW LEFT REV. (2019), https://new-leftreview-org.ezproxy.library.yorku.ca/issues/ii119/articles/aaron-benanav-automation-and-the-future-of-work-1.

42. Chancel, L., Piketty, T., Saez, E., Zucman, G. et al., *World Inequality Report 2022*, WORLD INEQUALITY LAB WIR2022.WID.WORLD, at 56, https://wir2022.wid.world/www-site/uploads/2022/03/0098-21_WIL_RIM_RAPPORT_A4.pdf.

43. *Id.*, at 187, 229.

44. ILO & OECD, *supra* note 39; Gene Grossman & Ezra Oberfield, *The Elusive Explanation for the Declining Labor Share* (2022) (paper prepared for the Annual Review of Economics); U.S. DEP'T TREASURY, *The State of Labor Market Competition* (Mar. 2022), https://home.treasury.gov/system/files/136/State-of-Labor-Market-Competition-2022.pdf; JOHN PETERS, JOBS WITH INEQUALITY: FINANCIALIZATION, POST-DEMOCRACY, AND LABOUR MARKET DEREGULATION IN CANADA (Toronto: University of Toronto Press, 2022); Philippe Askenazy, *Worker Surveillance Capital, Labour Share and Productivity* (IZA Institute of Labor Economics, Discussion Paper Series, IZA DP No. 13950, 2020), https://docs.iza.org/dp13950.pdf.

subordination workers' time from pre-capitalist patterns of work, more attuned to natural cycles and workers' own decisions about when to work, to the discipline of the clock under industrial capitalism.[45] Not only did factory production require 'regular' working hours, but the length of the working day was extended to the edge of human limits and beyond, it being the principal mode of extracting surplus value in the first industrial revolution, The length of the working day however is not the only dimension of time subordination. The scheduling of hours, including both when workers will have to provide service and certainty about whether they will be required to provide service and on what schedule are also important dimensions of time subordination, dimensions that arguably have become even more important in recent decades, as has the need of workers to adjust their work schedules in response to the routine unpredictability of everyday life.[46]

As with other dimensions, time subordination is also a structural feature of capitalism, in the sense that, apart from perhaps a few elite occupations, we cannot imagine a capitalist regime of production in which workers decide when to work according to their needs rather than the needs of their employers. Also, as is the case with economic subordination, time subordination is a recurring terrain of conflict. Struggles over working time were central to early working-class resistance and eventually compelled "the passing of a law, an all-powerful social barrier that shall prevent the very workers from selling, by voluntary contract with capital, themselves and their families into slavery and death."[47] Even after early victories to limit the length of the working day for women and children employed in factories, workers continued the struggle to reduce the length of the working day and working week, as well as to provide for regular schedules. Their partial achievement was a major accomplishment of unions in the post-WWII era, which was extended to some non-union workers through employment standards legislation.

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45. E.P. Thompson, *Time, Work-Discipline and Industrial Capitalism*, 38 PAST & PRESENT 56–97 (1967). *See also* Bryan D. Palmer, *The Time of Our Lives: Reflections on Work and Capitalist Temporality*, *in* LEO PANITCH AND GREGORY ALBO, BEYOND DIGITAL CAPITALISM: NEW WAYS OF LIVING 14–49 (New York: Monthly Review Press, 2020); CHRISTOPH HERMANN, CAPITALISM AND THE POLITICAL ECONOMY OF WORK TIME (London: Routledge, 2014).

46. There is another dimension of time subordination, closely related to economic subordination, not addressed here and that is the phenomenon of wage theft, which is also time theft since it is a way of appropriating workers' time without paying for it. For a recent and particularly useful framing of the issue, see Cole, M., Stuart, M., Hardy, K., & Spencer, D., *Wage Theft and the Struggle over the Working Day in Hospitality Work: A Typology of Unpaid Labour Time*, WORK, EMP. & SOC'Y, https://doi-org.ezproxy.library.yorku.ca/10.1177/09500170221111719.

47. Marx, *supra* note 6, at ch. 10. According to Alain Supiot, limiting working time was 'the founding act of labor law' (trans.). Alain Supiot, *Temps de travail: pour in concordance des temps*, 12 DROIT SOC. 947, 947 (1995).

What is current state of workers' time subordination? While Keynes famously predicted that by 2030 the rise of productivity would reduce working hours to as little as 15 hours a week, the reality of the twenty-first century has been far different.[48] Rather, the decline in average weekly working hours that characterized the period between 1870 and 1939 and then from 1950 to about 1980, flattened afterwards so that across the OECD median weekly working time remained relatively stable between 1995 to 2019 at about 40 hours, despite productivity increases.[49] A decline in working hours, however, is not a positive development if workers are unable to maintain their standard of living on fewer hours – and most workers are not. Rather, as Aaron Benanav argues, we are witnessing a shift to the phenomenon of mass under-employment in which increasing numbers of workers are pushed out of full-time standard employment into insecure employment that is not only low-waged and lacking in benefits, but also is often part-time, temporary or, as in much of the Global South, informal.[50] This constitutes a variation on an old form of time subordination, one in which workers' need for more working time in order to survive exceeds and therefore is subordinated to capital's flagging demand for it.[51]

That said, we should not imagine that the problem of long working hours has disappeared, at least for some workers. Low-wage workers, even those with full-time permanent jobs, may need to work long hours to earn a living wage and thus need to work multiple jobs, a growing trend particularly among women in Canada, the U.S. and Europe.[52] The situation for low-wage workers with part-time or insecure jobs is even worse. The opportunity to supplement incomes is one of the attractions of Uber and other labor platforms. In other cases, particularly for those whose labor is immaterial, the

48. JOHN MAYNARD KEYNES, ESSAYS IN PERSUASION 321–32, at 329 (London: Palgrave, 2010).

49. OECD, *supra* note 33, at ch. 5; Charlie Giattino, Esteban Ortiz-Ospina, & Max Roser, *Working Hours* (2020), https://ourworldindata.org/working-hours.

50. Aaron Benanav, *Automation and the Future of Work-2*, 120 NEW LEFT REV. (2019), https://new-leftreview-org.ezproxy.library.yorku.ca/issues/ii120/articles/aaron-benanav-automation-and-the-future-of-work-2; In 2018, researchers estimated that 61percent of the global employed population earned their living in the informal economy, ranging from 18 percent in the developed world to 90 percent in the developing world. FORENCE BONNET, JOANN VANEK, & MARTHA CHEN, WOMEN AND MEN IN THE INFORMAL ECONOMY: A STATISTICAL BRIEF (Manchester, UK, WIEGO, 2019).

51. ILO, *World Employment and Social Outlook: Trends 2020* 26–34 (Geneva: ILO, 2020), reported that globally labor underutilization is pronounced and greatly exceeds unemployment.

52. *Multiple Jobholders, 1976 to 2021*, STATS. CANADA, https://www150.statcan.gc.ca/n1/pub/14-28-0001/2020001/article/00011-eng.htm (Last Visited 25 July, 2023); Keith A. Bailey & James R. Spitzer, *A New Measure of Multiple Jobholding in the U.S. Economy* (U.S. Census Bureau, Center for Economic Studies, CES 20-26, 2020), https://www2.census.gov/ces/wp/2020/CES-WP-20-26.pdf (accessed 25 July 2023); Wietke Conen & Paul de Beer, *When two (or more) do not equal one: an analysis of the changing nature of multiple and single jobholding in Europe*, 27:2 TRANSFER: EUROPEAN REV. LAB. & RSRCH. 165–80 (2021).

boundaries between working and non-working time have eroded to such an extent that legislation is being enacted to create a right to disconnect from work.[53]

Perhaps an even more pressing time subordination issue for our era is not the average length of the working day but the inability of workers to exercise a modicum of control over their hours of work and their work schedules. We do not seem to have quantitative data that allows us to identify trends in work schedule flexibility over time, but there are indications that worker time subordination of this kind has increased as employers rebelled against the standardization of working time that was a key feature of the post-WWII settlement in an effort to secure greater temporal flexibility for themselves. Employer-centred numerical and scheduling flexibilization of work takes many forms. Zero hours contracts or being an on-call worker is perhaps the most extreme form of time subordination in that workers are expected to be available when the employer requires them but without a reciprocal commitment to provide work. In other cases, workers may have a more or less secure commitment to be provided with a defined number of hours a week but receive limited advance notice of their scheduled hours. Workers also experience time subordination when they are liable to be sent home before the end of their shift if the employer decides they are no longer needed or are unable to adjust their work schedule in response to the routine unpredictability of everyday life.[54]

One of the most appealing features of some forms of platform mediated work, such as Uber, is that it purports to provide workers with the freedom to choose when to work and thus reduces their time subordination. However, in reality those choices are more constrained than they first appear. Apart from the necessity to find more work, in location-based platform work such as food delivery and transportation services, workers may be free to go on the app when they choose, but that does not guarantee they will find work there. Rather, they must be on the app when there is client demand for their services, which of course is higher during certain hours. Cloud-based workers may not face the same constraints, since client demand is less likely to be

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53. Loïc Lerouge & Francisco Trujillo Pons, *Contribution to the study on the 'right to disconnect' from work. Are France and Spain examples for other countries and EU Law*, 13:3 EUROPEAN LAB. L. J. 450–65 (2022). Ontario, Canada recently enacted a very weak version that requires employers with 25 or more employees to have a written policy, but without stipulating any minimum content. *Employment Standards Act*, 21.1.1 – 21.1.2.

54. ALEX J. WOOD, DESPOTISM ON DEMAND ch. 3–4 (Ithaca, NY: Cornell University Press, 2020); Michelle O'Sullivan et al., *Zero Hours and On-call Work in Anglo-Saxon Countries* (Singapore: Springer, 2019); Vivien Shalla, *Shifting Temporalities: Economic Restructuring and the Politics of Working Time*, in VIVIAN SHALLA & WALLACE CLEMENT, WORK IN TUMULTUOUS TIMES 227–61 (Montreal: McGill-Queen's University Press, 2007).

concentrated during certain hours, especially when the client base is global, but the tasks themselves are time limited and cloud workers spend large amounts of unremunerated time seeking work and have aptly been described as "'wage hunters and gathers' continually searching for bits and pieces of work."[55]

The negative consequences of these forms of work without employer time commitments are well documented and constitute an important dimension of deepening worker subordination, particularly for the most vulnerable.[56] These include increased difficulty juggling caregiving responsibilities and heightened levels of personal insecurity. Moreover, flexible scheduling is central to a new regime of labor discipline that Woods characterizes as "flexible despotism".[57]

Not surprisingly, the distribution of flexibility varies. According to a recent OECD survey, worker-centred flexibility is more commonly available to highly paid employees with higher education, while lower paid workers without higher education are most likely to be subordinated to their employers' time demands.[58] And finally, one cannot possibly ignore the gendered dimension of time subordination in a context in which women still bear primary responsibility for caregiving.[59]

## WORKPLACE SUBORDINATION

Workplace subordination is the third dimension and is also a structural feature of capitalism. It arises from the necessity of treating labor power as a commodity and then assigning to the employer the power to convert that commodity into a use value, that is to put the wage laborer to work for the

55. PHIL JONES, WORK WITHOUT THE WORKER: LABOUR IN THE AGE OF PLATFORM CAPITALISM 29 (London: Verso, 2021).

56. For a small sample, see Keith A. Bender & Ioannis Theodossiou, *The Unintended Consequences of Flexicurity: The Health Consequences of Flexible Employment*, 64:4 REV. INCOME & WEALTH 777–99, at 797 (2018) ("it is shown that the longer the amount of time spent in flexible employment contracts increases the odds of falling into ill health for a variety of heath conditions"); WAYNE LEWCHUCK, MARLEA CLARKE, & ALICE DE WOLFF, WORKING WITHOUT COMMITMENTS (Kingston: McGill-Queen's UP 2011); LONNIE GOLDEN, IRREGULAR WORK SCHEDULING AND ITS CONSEQUENCES (Economic Policy Institute, Issue Briefing Paper 394, 2015); Michael Quinlan, Claire Mayhew, & Philip Bohle, *The Global Expansion of Precarious Employment, Work Disorganisation and Occupational Health: A Review of Recent Research*, 31 INT'L J. HEALTH SERVS 335–414 (2001); DAN CLAWSON & NAOMI GERSTEL, UNEQUAL TIME: GENDER, CLASS AND FAMILY IN EMPLOYMENT SCHEDULES (New York: Russell Sage Foundation, 2014).

57. Woods, *supra* note 54.

58. OECD, *supra* note 33.

59. Nancy Fraser, *Contradictions of Capital and Care*, 100 NEW LEFT REV. 99 (2016); Judy Fudge, *Working-Time Regimes, Flexibility, and Work-Life Balance: Gender Equality and Families*, *in* CATHERINE KRULL & JUSTYNA SEMPRUCH, DEMYSTIFYING THE FAMILY/WORK CONFLICT: CHALLENGES AND POSSIBILITIES 170–93 (Vancouver: UBC Press, 2011).

employer's benefit. Therefore, the worker must subsume their personal needs, desires and ambitions to their employers' demands when they conflict. Harry Glasbeek eloquently captures this reality:

Employers are given potential power to *force* their workers to use their capacities to suit the employers' desires…[a]nd liberal law that self-consciously claims to support the inherent equality of all human being beings, deliberately and paradoxically gives employers an astonishing amount of help to reduce human traits to objects, to equipment to be disposed of as it suits them.[60]

While we might conceptualize the worker's duty to obey as one that is externally imposed by law (we will return to the role of law), it is of course the essence of the bargain. The employer has purchased the capacity of the employee to work and so must have the authority to determine, within very broad limits, how the work will be performed, its pace etc. That the employment relation is at its core one of subordination is hardly a radical observation. As Otto Kahn Freund famously remarked, employment "in its inception it is an act of submission, in its operation it is a condition of subordination."[61]

What then of the trajectory of workplace subordination? Unlike economic and time subordination that at least partially take place at the level of exchange, and thus are measurable by labor economists, most workplace subordination takes place behind closed doors in the abode of production making it harder to observe or quantify and making comparisons over time and place more difficult. However, there is a large literature that has studied capitalist workplace regimes as they have changed over time that suggests worker subordination is deepening in the twenty-first century.

Roughly speaking, we can identify three previous work regimes. The first, craft control, was one in which skilled workers exercised considerable control over production through organization and a partial monopoly of skill. Craft control and a rejection of employee servility, however, were always limited to a small and diminishing minority of the male workforce.[62] The majority labored under a despotic workplace regime, where the foreman's rule was near absolute. As law limited the length of the working day,

60. HARRY GLASBEEK, CAPITALISM: A CRIME STORY 41 (Toronto: Between the Lines, 2018).

61. OTTO KAHN FREUND, LABOUR and the Law 8. Also, see CANADIAN INDUSTRIAL RELATIONS: THE REPORT OF THE TASK FORCE ON LABOUR RELATIONS para. 291 (Ottawa: Privy Council Office 1968) ("The collective bargaining process becomes a means of legitimizing and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship.").

62. The Knights of Labor were perhaps the purest expression of trade union's culture and practice of control. For the history of the Knights in Ontario, Canada, see GREGORY S. KEALEY, & BRYAN D. PALMER, 'DREAMING OF WHAT MIGHT BE': THE KNIGHTS OF LABOR IN ONTARIO, 1880–1900 (Cambridge: University of Cambridge Press, 1982).

employers focused more on real subsumption of labor to their command, resulting in work intensification through managerial and technological innovations. This regime achieved its highest expression during the second industrial revolution in F.W. Taylor's scientific management, and its use of time-motion studies, minute division of labor and mechanization, with the ultimate goal of depriving workers, and particularly the remaining rump of craft workers, of their ability to control any aspect of the labor process.[63] Skilled workers fiercely resisted this assault on their historic prerogatives and, as they perceived it, their masculinity, but despite a deep craft culture and strong organization, they could not stop the real subsumption of their labor to capital.[64]

The era after World War II until the 1970s is often characterized as a hegemonic regime, at least in those areas of the economy where industrial unions were successfully established and negotiated collective agreements that instituted seniority regimes and placed formal limits on the arbitrary exercise of disciplinary power backed up by a grievance procedure. Employers sometimes faced shopfloor rebellions or sabotage when the intensification of work or the exercise of disciplinary power exceed workers' tolerances, although these actions were relatively sporadic and time limited.[65] As well, waves of occupational health and safety struggles succeeded in the enactment of laws that aimed to limit the exercise of managerial prerogative when it (excessively) endangered the lives and health of workers.[66] However, beyond these limits, unions and labor regulation largely ceded managerial control over the labor process, permitting Fordist production regimes characterized by the assembly line, task fragmentation and monotonous work routines and so could do little to limit the introduction of new technologies and managerial strategies during the life of the collective agreement.[67] The principle benefit for unionized workers was that they shared in the productivity gains.

While capital's relentless drive for economic and workplace subordination was partially blunted by an institutionalized hegemonic regime in some core sectors, it resumed in the last decades of the twentieth century as capital

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63. FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (1911) (New York: W.W. Norton, 1967).

64. DAVID MONTGOMERY, THE FALL OF THE HOUSE OF LABOR (Boston: Cambridge UP, 1989); RICHARD EDWARDS, CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY (New York: Basic Books, 1979).

65. Peter S. McInnis, *'Hothead Troubles': Sixties-Era Wildcat Strikes in Canada*, *in* DOMINQUE CLÉMENT, GREGORY S. KEALEY, & LARA CAMPBELL, DEBATING DISSENT: CANADA AND THE SIXTIES 155–72 (Toronto: University of Toronto Press, 2012).

66. Eric Tucker, *Re-Mapping Worker Citizenship in Contemporary Occupational Health and Safety Regimes*, 37 INT'L J. HEALTH SERVS. 145–70 (2007).

67. HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL (New York: Monthly Review Press, 1974).

rebelled against its strictures on surplus value production and extraction through attacks on collective bargaining, mobilization of technology and the globalization of production.[68]

The erosion of union density and collective bargaining coverage is well documented. A recent survey concluded that union density has fallen over the last decades in most countries and regions, although the rate of decline and the density rate varies considerably.[69] Looking just at Canada, the unionization rate in the public sector has grown from about 70 percent in 1997 to 74 percent in 2021, but over the same period, private sector unionization dropped from about 19 percent to about 14 percent.[70] The trend is even worse in the United States where the overall union membership rate in 2021 was about 10 percent (6 percent in the private sector) compared to about 20 percent in 1983.[71] As already noted, declining unionization contributes to economic subordination, but it also reduces the ability of workers to regulate hours of work, exercise voice in the workplace, resist work intensification and generally limit workplace subordination.

Technological and organizational innovation was also directed to labor intensification and heightened managerial control. Weakened industrial unions were unable to resist the imposition of post-Fordist regimes that squeezed workers even harder than they had been under Fordism. Lean production, the team concept, kaizen (continuous improvement), assembly line speed-ups intensified work in the industrial setting and, where possible, spread to the service sector.[72] In their wake, repetitive strain injuries and psychological stress emerged as major new OHS issues, ones that the regulatory regime was ill-equipped to address.[73]

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68. Matthew Cole, Hugo Radice, & Charles Umney, *The Political Economy of Datafication and Work: A New Digital Taylorism?*, *in* Leo Pantich & Greg Albo, Beyond Digital Capitalism: New Ways of Living 78, at 89 (London: Merlin Press, 2021) ("Within the workplace, capital's drive for control over production was indeed universal, but the actual evolution of both technology and organization was always shaped by a much broader constellation of factors….").

69. CLAUS SCHNABLE, UNION MEMBERSHIP AND COLLECTIVE BARGAINING: TRENDS AND DETERMINANTS (IZA DP No. 13465, July 2020).

70. *Quality of Employment in Canada, Trade Union Density Rate, 1997 to 2021,* STATS. CANADA, https://www150.statcan.gc.ca/n1/pub/14-28-0001/2020001/article/00016-eng.htm.

71. *Bureau of Labor Statistics, US Department of Labor, Union Members – 2021*, U.S. DEP'T LAB. (Jan. 20, 2022), https://www.bls.gov/news.release/pdf/union2.pdf.

72. Alain Lipietz, *The Fortunes and Misfortunes of Post-Fordism*, *in* ROBERT ALBRITTON, ET AL., PHASES OF CAPITALIST DEVELOPMENT 1736 (New York: Palgrave 2001); Askenazy, *supra* note 44.

73. Andrew Hopkins, T*he Social Recognition of Repetitive Strain Injuries: An Australian/American Comparison*, 30:3 SOC. SCI. & MED. 365–72 (1990); Robert A. Karasek, *Job Demands, Job Decision Latitude and Mental Strain: Implications for Job Redesign*, 24 ADMIN. SCI. Q. 285–308 (1979) (introducing the Job Demands-Control Model, whose major innovation was recognizing the importance of job decision latitude as a determinant of occupational stress).

Depending on how you count them, we have moved to the third or fourth industrial revolutions, made possible by exponential increases in computing power, that allow for the massive collection and analysis of data, including information gathered from intensive surveillance, linked to advances in artificial intelligence and algorithmic controls. These technological advances, however, do not occur in a vacuum but rather are put in the service of capital accumulation, with the goal of further subordinating labor to its needs, in a process aptly described as digital Taylorism.[74]

The impact of these developments on work has been thoroughly explored, including in two recent books, *Your Boss is an Algorithm*, by Antonio Aloisi and Valerio De Stefano, and *Data and Democracy at Work: Advanced Information Technologies, Labor Law and the New Working Class* by Brishen Rogers.[75] Aloisi and De Stefano find:

Mounting evidence reveals a widespread trend toward workforce homogenisation and, in turn, deskilling, which can be considered enabling factors in introducing automated decision-making systems. This causes a process of simultaneous regimentation, parcellisation and uniformization of work, compounded by the risk of individual harm….[W]orkers are increasingly forced to comply with standardised rules in unchangeable environments.[76]

In a similar vein, Rogers concludes:

Digital Taylorism reflects a clear underlying logic: Companies are using their legal operational powers over data to automate some tasks, to reorganize production accordingly, and to supervise workers much more intensely. By doing so, companies can both enhance productivity and ensure that workers cannot capture a significant share of profits.[77]

Another researcher, Robert Ovetz, has described the new regime as "algorithmic despotism":

Today, algorithms have become what I call "Taylor's digital stopwatch." They are always on and never miss any details. Algorithmic management makes many jobs extremely tedious, repetitive, and stress inducing…. This results in high rates of turnover, injury, and mental anguish as

74. Cole et al., *supra* note 68. *See also* ROGERS, *supra* note 2, at ch. 3, p.1.

75. ANTONIO ALOISI & VALERIO DE STEFANO, YOUR BOSS IS AN ALGORITHM (Oxford: Hart Publishing 2022); BRISHEN ROGERS, DATA AND DEMOCRACY AT WORK (Cambridge, MA: MIT Press, 2023). *See also* ALESSANDRO DELFANITI, THE WAREHOUSE: WORKERS AND ROBOTS AT *Amazon* (London: Pluto Press, 2021).

76. ALOISI & DE STEFANO, *supra* note 75, at 68.

77. ROGERS, *supra* note 2, at ch. 3.

workers literally burn out from the microscopic, tyrannical surveillance and control of their every movement….[78]

In short, there is ample evidence that workplace subordination is deepening, as is economic and time subordination, and while workers in many places are resisting these developments, whether through informal gamification or more formal collective bargaining or political action for now the trajectory is unchanged.

## PROTECTIVE LABOR LAW AND THE DIMENSIONS OF SUBORDINATION

To this point, little has been said about the role of protective labor law in mediating workers' subordination, although clearly it has played such a role. My goal here is not to describe its role and evolution at a high level of abstraction. Rather, I want to make two related arguments. The first, arising out of the conclusion that empirically workplace subordination is deepening, is that labor law's ameliorative mission of reducing workplace subordination within capitalism faces recurring regulatory dilemmas arising from the logic of capitalism that limit is efficacy. This is an argument that challenges the view that capitalism can be tamed to make structural subordination acceptable. The second is that the deeper we descend into the abode of production the less likely protective labor law will follow.

Before turning to these claims, it is helpful to first set out what most agree is the mission of protective labor law, which is to ameliorate worker subordination within capitalism, not to challenge the structures that produce subordination in the first place. For example, both Bogg and Estlund ("We concede that impersonal or structural domination [that workers experience within capitalism] is largely hardwired into capitalism and have focused our attention on [diadic domination of individual workers by employers]", and Davidov ("we should focus on the vulnerabilities that are *internal* to the relationship…rather than background facts that led to these relations") make this abundantly clear.[79]

My first argument, then, which is only sketched out here, is that the project of protective labor law so conceived concedes too much by accepting the background condition of capitalism as the unchallenged terrain on which it must operate. In earlier work, I argued that labor law is beset by recurring regulatory dilemmas in the sense that its disciplinary and protective dimensions are generally in conflict: workers' interests in reducing their

78. Robert Ovetz, *Taylor's Digital Stopwatch*, DOLLARS & SENSE (Sept./Oct. 2022), Online https://dollarsandsense.org/archives/2022/0922ovetz.html.

79. Bogg & Estlund, *supra* note 2; Davidov, *supra* note 2, at 374.

subordination run into and are contrary to employers' interests in advancing labor law's disciplinary function and by leaving undisturbed the structures that allow the extraction of surplus value through mute economic compulsion.[80] However, the resolution of recurring regulatory dilemmas is not somehow independent of capitalist class relations so that labor law can equally be bent toward a more disciplinary or more protective direction depending on transitory differences in political or bargaining power, or swayed by the more attractive normative theory. While law generally is shaped and limited by the structures of capitalism, so that it reliably reproduces the essentials of capitalist legality that produce the workers' structural subordination, labor law in particular tends over time to sustain and prioritize employers' ability to extract and appropriate surplus and limit protection accordingly. Of course, this is not to say that protective labor law is not partially shaped by (or cannot partially shape) shifting balances in political or economic power or changing ideological or cultural norms. Rather, it is that terrain on which conflicts over labor law play out tilts in favour of and is ultimately limited by capitalist class relations.

Zoe Adams' has developed a complementary analysis. Following Pashukanis, she argues that law is embedded within capitalism's constitutive practices and relations in the sense that capitalist legality is a condition of the existence of capitalism. As such, the law will reliably reproduce its core features foundational to capitalism, including those intrinsic to market practices. To be consistent with the assumptions embedded in market practices, including the abstract idea of formal legal equality and freedom, the law must appear to be external to the market itself, requiring a degree of relative autonomy to sustain that belief. However, the precise form and expression of that autonomy is an historical question.[81]

By way of illustration, labor law institutionalizes workers' subordination at the point of production by implying a duty to obey into every employment contract and providing employers with the means to enforce it, whether by the use of criminal sanctions up until the 1870s in England and Canada, or now by the power of the sack.[82] On the other hand, workers have resisted the exercise of arbitrary disciplinary power with varying degrees of success.

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80. Eric Tucker, *Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?*, 39:2 INDUS. L.J. 99–138 (2010).

81. Zoe Adams, *supra* note 3. Also, see Nate Holdren & Eric Tucker, *Marxist Theories of Law Past and Present: A Meditation Occasioned by the 25th Anniversary of Law, Labor and Ideology*, 45:4 L. & SOC. INQUIRY 1142–169 (2020).

82. Laws v. London Chronicle (Indicator Newspaper) Ltd…, [1959] All E.R. 285 (C.A); Eric Tucker & Judy Fudge, *Class Crimes: Master and Servant and Factories Acts in Industrializing Britain and (Ontario) Canada*, *in* ALAN BOGG ET AL., CRIMINALITY AT WORK BOGG (Oxford, 2020; online ed., Oxford Academic, 23 Apr. 2020), https://doi.org/10.1093/oso/9780198836995.001.0001 (last visited July 28, 2023).

Unionized workers were the most successful. Just cause provisions in collective agreements limit the exercise of arbitrary managerial authority and allow arbitrators to moderate penalties. While it undoubtedly provides unionized workers with meaningful job protection and a modicum of fair treatment, it also subjects them to an effective disciplinary regime that draws on concepts derived from criminal punishment that speak of worker violations of the collective agreements as "offences," inquires as to whether or not "offences" were "premeditated" and asks whether "progressive discipline" has been applied, ensuring that legitimately exercised management authority to discipline is effective and undiminished.[83]

Where protective labor and employment law limit the extraction and appropriation of surplus value, employers tend to view the law as a barrier to be overcome if and when the opportunity arises. That may involve weakening the laws themselves, undermining their enforcement, or changing work arrangements or their geographic location to escape those limits. The attack post-war collective bargaining regimes provides ample evidence of these phenomena.[84] Thus, not only is labor and employment law enacted and reenacted against a structure that underwrites worker subordination in the first instance, but that structure also advantages employers in shaping law and using it to legally entrench their structural power.

Against that background, my second argument, that protective labor law is least likely to follow workers into the depths of the abode of production. There are theoretical reasons why that would be so, beginning with the distinction Marx drew between the realm of exchange, where workers sell their labor power, and the abode of production, where employers produce and extract surplus value. While market exchange is private, in principle both employers and employees are subject to market forces, which limits the range of agreements.[85] Capital can use its bargaining strength to appropriate more of the surplus that is available to be distributed and some will resist efforts to

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83. Wm. Scott & Co., [1977] 1 C.L.R.B.R. 1 (P.C. Weiler), at pp. 5–6 quoted in DONALD J.M. BROWN & DAVID BEATTY, CANADIAN LABOUR ARBITRATION § 7.67 (Thompson Reuters 5th ed., 2019). Harry Glasbeek first drew attention to the use of this language and its implications in H.J. Glasbeek, *The Utility of Model Building – Collins' Capitalist Discipline and Corporatist Law*, 13:1 INDUS. L.J. 133–52, 144 (1984).

84. The literature on each of these strategies is massive. See for example, BRYAN EVANS ET AL., FROM CONSENT TO COERCION: THE CONTINUING ASSAULT ON TRADE UNION FREEDOMS (Toronto: University of Toronto Press 4th ed., 2023); STEVE TOMBS, SOCIAL PROTECTION AFTER THE CRISIS: REGULATION WITHOUT ENFORCEMENT (Bristol: Policy Press, 2016); JASON FOSTER, GIGS, HUSTLES AND TEMPS (Toronto: Lorimer 2023); Chris Arup, *"Labour Law Liberalisation and Regulatory Arbitrage*, 33:3 AUSTRALIAN J. LABORLAB. L. 183–208 (2020).

85. I say in principle, because in practice employers often enjoy monopsony power over workers so that labor markets do not function according to competitive models. Alan Manning, *Monopsony in Labor Markets: A Review*, 74:1 ILR REV. 3–26 (2021).

limit its take through exchange. However, surplus value is not produced at the level of exchange, but in the abode of production and so it can be predicted that capital is likely to even more ferociously resist laws that limit the production of surplus value in the first place.

There is also ample evidence to support this hypothesis. Bracketing OHS for the moment, if we look at the history of modern protective labor law, it starts with limits at the level of exchange, most notably the length of the working day, but leaves untouched what employers can demand of workers during the hours available to them. Indeed, historians point to the restrictions on the length of the working day as an incentive for capital to transform the labor process to bring about the real subsumption of labor to capital and the intensification of work. Law was not an impediment to the deepening of workplace subordination that followed.

It was nearly one-hundred years later before minimum wage laws were first enacted, initially applicable exclusively to women, but again they set a floor for market exchanges and did not directly limit what went on in the abode of production. However, like hours of work laws, they spurred employers to extract more value out of the labor power they purchased. Similarly, the post-WWII expansion of employment standards to include paid vacations and public holidays, termination and severance entitlements, leaves of absence, or even eating periods provided regulations on the terms of the exchange, but posed no restrictions on the intensity of work during the time available to the employer.

While statutory collective bargaining regimes in varying degrees facilitated access to unionization and collective bargaining, the resulting agreements were the product of negotiation. Some scholars, speaking from the perspective of legal pluralism, characterized the collective agreement as the foundation of industrial citizenship that brought law into the workplace.[86] But as we have already noted, while that regime clearly ameliorated economic and time subordination, and placed limits on the exercise of arbitrary managerial authority, it largely conceded management control over the production process, indicating that the closer unions came to the abode of production the more difficult it was to bring industrial citizenship with them.

Occupational health and safety regulation is arguably the exception to this pattern. Laws requiring employers to take reasonable precautions for the health and safety of workers were first enacted in the nineteenth century, overriding the common law view that health and safety conditions should be

86. H.W. Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CANADIAN BAR REV. 786 (1967).

regulated through notionally voluntary exchanges in the labor market. These laws clearly extended into the abode of production and prohibited employers from producing surplus value in ways that came to be recognized as posing serious dangers to workers' lives and health.

Employer opposition to the enactment of health and safety laws is well documented and often blunted their reach.[87] But perhaps even more significant were the barriers to effective enforcement. For example, OHS laws typically required employers to take such measures as are reasonably practicable. When interpreting these provisions, Ontario factory inspectors accepted difficult economic conditions as a reason for failing to correct hazardous conditions identified on previous inspections. More generally, employers were rarely penalized even when violations resulted in worker injuries or even fatalities. By the early twentieth century doubt about the efficacy of OHS law ran so deep that work-related injuries and diseases came to viewed as the inevitable consequence of industrial production, leading to a shift in focus from prevention to compensation.[88]

In the late twentieth century, a new generation of workers rebelled against the failure of OHS regulation to reach into the abode of production to provide protection against hazardous working conditions. Workers recognized their health and safety had become more a matter of market exchange than effective regulation. Under the slogan, "Our health is not for sale," OHS activists pressed for new laws limiting their exposure to hazardous conditions in the abode of production and for worker participation rights, including a right to be informed about hazards in the workplace, a right to collective representation on joint health and safety committees and a right to refuse unsafe work. Employers fiercely resisted these rights, and in particular objected to the right to refuse, which challenged the foundation of workplace subordination, the duty to obey and to giving joint committees of any decision-making power. Nevertheless, for a time, workers made some progress in bringing OHS law into the abode of production.[89]

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87. For example, see DONALD W. ROGERS, MAKING CAPITALISM SAFE: WORK SAFETY AND HEALTH REGULATION IN AMERICA, 1880-1940 (Urbana: University of Illinois Press, 2009); ERIC TUCKER, ADMINISTERING DANGER IN THE WORKPLACE: THE LAW AND POLITICS OF OCCUPATIONAL HEALTH AND SAFETY REGULATION IN ONTARIO, 1850-1914 (Toronto: University of Toronto Press, 1990); BL HUTCHINS AND A HARRISON, A HISTORY OF FACTORY LEGISLATION (Abington: Routledge 3rd ed., reprinted, 2013).

88. Tucker, *supra* note 87; I.M. RUBINOW, SOCIAL INSURANCE 55 (New York: Henry Holt and Company, 1913) ("[I]ndustrial accidents are not accidents at all, but normal results of modern industry….").

89. Robert Storey & Eric Tucker, *All that is Solid Melts into Air: Worker Participation in Health and Safety Regulation in Ontario, 1970-2000*, *in* VERNON MOGENSEN, WORKER SAFETY UNDER SIEGE: LABOR CAPITAL AND THE POLITICS OF WORKPLACE SAFETY IN A DEREGULATED WORLD 157–86 (Armonk, NY: Sharpe ed., 2005); Alan Hall, et al., *Identifying knowledge activism in worker health and safety representation: A cluster analysis*, AM. J. IND. MED. (2016).

However, the efficacy of the reformed OHS regime has been difficult to sustain. Despite legal protection against retaliation, work refusals have become less common. As workers experienced greater precarity, including in unionized workplaces, workers became less willing to directly challenge employer orders. Joint health and safety committees have also shifted from being sites where worker representatives acted as protagonists of an autonomous worker perspective to ones where representatives are more likely to be transmitters of management OHS policy.[90] In short, even when workers lives and health are at risk, effective regulation of the abode of production has proven to be exceedingly difficult.

The two strands of my argument, that protective labor law is enacted and enforced against unfavourable structural conditions and that protective labor laws are least likely to follow workers into the abode of production, come together when we analyze recent developments in the law of Ontario regarding workplace harassment and abusive treatment.

Workplace harassment is not a new phenomenon. The first female inspector of factories in Ontario reported on sexual harassment in the late nineteenth century.[91] However, the first set of laws protecting workers against harassment were not enacted until the 1960s, beginning with the prohibition on harassment based on gender and other enumerated grounds in the Ontario *Human Rights Code*.[92] These are, of course, vitally important protections that restrict arbitrary exercises of workplace power that have a marginal relation to the production of surplus value. Cutting more deeply to the bone of managerial prerogatives are protections against workplace harassment generally. The OHSA was amended to provide such protection in 2009 and strengthened in 2016.[93] However, the law is crafted to minimize its impact on the exercise of management powers aimed at improving productivity. The law specifies that "reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment."[94] The Ontario Labor Relations Board has interpreted this section to mean that "workplace harassment provisions do not normally apply to the conduct of a manager that falls within his or her normal work function, even if in the course of carrying out that function a worker suffers

90. David Walters, *Representing Workers on Safety and Health: The Current Challenge?*, *in* PETER SHELDON ET AL., EDS. THE REGULATION AND MANAGEMENT OF WORKPLACE HEALTH AND SAFETY (New York: Routledge, 2021), 123–140; ALAN HALL, THE SUBJECTIVITIES AND POLITICS OF OCCUPATIONAL RISK (London: Routledge, 2021).

91. Tucker, *supra* note 87, at 166.

92. R.S.O. 1990, c. H.19.

93. S.O. 2009, c. 23; S.O. 2016, c. 2, Sched. 4. The law also addresses workplace violence.

94. OHSA, §§ 1(1) and 1(4).

unpleasant consequences."[95] Workers who experience mental stress injuries are not eligible for workers' compensation if that stress is "caused by decisions or actions of the worker's employer relating to the workers' employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate employment."[96]

Notably, the Act does not require employers to provide a harassment free workplace, but rather to have a written policy with respect to workplace harassment, to post it in the workplace and to review it at least annually. In addition, the employer must have a program to implement the policy that is to be developed in consultation with the joint health and safety committee or a health and safety representative. The program must include reporting procedures, set out how incidents will be investigated, etc. Finally, the employer must ensure that an investigation is conducted into complaints "that is appropriate in the circumstances" and that the worker who allegedly experienced the harassment and the alleged harasser are informed in writing of the results.[97]

The focus on requiring employers to have policies and procedures indicates that regulation remains largely at the level of exchange rather than reaching into the abode of production itself. A study of found that, despite giving employers considerable leeway to design workplace harassment policies and programs, regulators were issuing a large number of compliance orders but hardly ever penalizing employers for their non-compliance.[98]

Closely associated with harassment is the issue of abusive workplace management. Workers who experience abuse have the option of claiming it amounts to a constructive dismissal entitling them to claim wrongful dismissal damages, potentially including aggravated and punitive damages. They may also claim damages for intentional infliction of mental suffering.[99] However, the courts reserve this protection only for clear cases of abuse, most commonly in the manner of dismissal, and are unwilling to impose a general duty on employers to act fairly throughout the employment relation, notwithstanding that Supreme Court of Canada has recognized good faith as a central organizing principle of contract law.[100] The reason is clear: the court does not want to descend too deeply into the abode of production:

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95. Amodeo v. Craiglee Nursing Home Limited, 2012 CanLII 53919 (ON LRB), at para. 12.
96. Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sched. A, § 13(5).
97. OHSA, §§ 32.0.1, 32.0.6, and 32.0.7.
98. Erin Sorbat, *Just Going Through the Motions? Regulating Personal Harassment under Ontario's Occupational Health and Safety Act*, 24 CANADIAN LAB. & EMP. L. J. 31, 100 (2022).
99. For example, see Boucher v. Walmart Canada, 2014 ONCA 419.
100. Bhasin v. Hrynew, 2014 SCC 71; Claire Mumme, *Bhasin v. Hrynew: A New Era for Good Faith in Canadian Employment Law, or Just Tinkering at the Margins*, 32 INT'L J. COMPAR. L. 117 (2016);

> [M]uch disagreement can be anticipated as to whether criticism is "constructive", whether work performance is "poor", and whether the tone of the former was appropriate to the latter. The existence of the tort would require the resolution of such disputes. The court is often called upon to review the work performance of employees and the content and manner of their supervision in dismissal cases. It is unnecessary and undesirable to expand the court's involvement in such questions. It is unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal. It is undesirable because it would be a considerable intrusion by the courts into the workplace, it has a real potential to constrain efforts to achieve increased efficiencies, and the postulated duty of care is so general and broad it could apply indeterminably.[101]

We could multiply the examples of recent workplace laws that not only do not descend into the abode of production, but that also lightly regulate the terms and conditions of the exchange, preferring instead to require employers to be transparent about the terms of exchange on offer. These include the *Digital Platform Workers' Act*, which opens up the black box of algorithmic management, and two amendments to the *Employment Standards Act* that require employers to have policies regarding the right to disconnect and electronic monitoring, without any prescriptive elements.[102]

In sum, the burden of my argument is not that protective labor law never provides meaningful protection or follows workers into the abode of production but rather that legal protections generally are difficult while the capitalist structures of subordination remain untouched and that penetrating the abode of production is even harder because it is the space where surplus value is produced and thus most jealously guarded by employers.

## CONCLUSION

Capitalism matters more than many care to admit.[103] Protective labor laws aim to create barriers that limit workers' subordination, but they do not address the underlying structure that makes subordination possible, indeed, inevitable. While laws sometimes create barriers, capital's limitless drive to

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101. Piresferreira v. Ayotte, [2010] ONCA 384, at para. 62.

102. *Digital Platform Workers' Rights Act*, S.O. 2022, c. 7 (despite being enacted in 20222, this act is not in force at the time of writing in 2024); S.O. 2021, c. 35, Sched. 2 (disconnecting from work); S.O. 2022, c. 7 Sched. 2, § 4, (electronic monitoring).

103. For an extended critique of liberal egalitarianism and its failure to appreciate the contradiction between satisfying its normative demands and the structural requirements of continued capitalist reproduction, see TONY SMITH, BEYOND LIBERAL EGALITARIANISM (Chicago: Haymarket Books, 2018).

expand leads it to dismantle or push beyond those barriers when they significantly limit the extraction and appropriation of surplus value and when capital has the power to do so. Workers movements arise to resist their subordination and have been partially successful from time to time, securing protective legislation and collectively bargained limits. These forces produce labor law's recurring regulatory dilemmas.[104] However, in the last decades of the twentieth century and continuing into the first decades of the twenty-first, workers have lost ground organizationally and politically, resulting in the deepening of workers' subordination in each of the three dimensions examined. The imbalance has become so great that the Supreme Court of Canada has officially recognized it and made it foundational to its legal analysis of the employment relation.[105] We now are seeing signs of another wave of worker organizing and political campaigning that has resulted in the enactment of some new protective laws. But the gains so far have been minimal, especially when workers seek to bring protective labor law into the abode of production.

While labor law as such cannot be the primary vehicle for undermining capitalism, "we need to think about…how we might expose the structural limits to the changes for which we ourselves advocate, and the particular way in which these limits are perpetuated through, and manifest in, law."[106] We might also propose changes that would better meet those challenges and contribute to strengthening anti-capitalist movements and ideologies. At the very least, we can begin by naming the system that generates subordination, rejecting claims that protective labor and employment laws are capable of taming it on a sustained basis, and ceasing to devise arguments justifying it as if they were. Other worlds are possible and "once in a lifetime the longed-for tidal wave of justice can rise up and hope and history rhyme"[107], even though for now the ripples of resistance have yet to turn the rising tide of worker subordination.

104. Tucker, *supra* note 80.

105. Wallace v. United Grain Growers Ltd., [1997] 3 SCR 701; Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27.

106. Adams, *supra* note 3, at 461.

107. Seamus Heaney, *The Cure at Troy*, *in* 100 POEMS 100 (London: Faber, 2018).