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Philosophical Foundations of Labour Law

Edited by
HUGH COLLINS
GILLIAN LESTER
VIRGINIA MANTOUVALOU

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Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination

Noah D Zatz

What is a discussion of anti-discrimination law doing in a collection about labour law? An odd question, perhaps. True, prohibitions on employment discrimination were not among the initial waves of worker protections concerning organising, striking and collective bargaining, wages and hours, workplace injury, social security, and so forth. Today, though, the question seems odd because employment discrimination provisions are now commonplace and well integrated into the practice and teaching of labour law.[1] Nonetheless, there is an awkward conceptual fit between the fields, at least as they commonly are understood.

The standard 'constituting narrative' of labour law[2]—one that predates the rise of anti-discrimination law—is a story of partial decommodification. Markets characterised by an 'inequality of bargaining power'[3] must be restrained to vindicate the principle that 'the labor of a human being is not a commodity'.[4] The recent ferment in labour law theory largely has continued to anchor the field in market labour specifically, even when looking beyond employment relationships to broader concepts of labour market regulation.[5]

At first glance, employment discrimination law fits poorly within labour law's constituting narrative. Instead, its practical legal development and theorisation both have emerged largely as specific, though centrally important, applications of general purpose or multi-sector anti-discrimination principles.[6] More substantively, insofar as employment discrimination law has its own constituting narrative, it cuts in just the opposite direction as labour law's. Discrimination occurs when, infected by bias, employers fail to fully commodify workers by treating them strictly as factors of production. Instead, such employers get distracted by workers' unrelated human particularities, disrespecting them as market actors. By excising bias, employment discrimination law purifies market dynamics, not counteracts them. Of course, this conception centred on 'direct discrimination' (or, in the US, 'disparate treatment'[7]) is itself contested, but typically not in ways more integrated with labour law.[8]

My contention here is that as labour law and anti-discrimination law theorists scrutinise and attempt to stabilise our fields' foundations, it is fruitful to consider explicitly how compatible those foundations are, and what insights might be shared. In particular, discrimination casts a different light on whether labour law is concerned exclusively and constitutively with market-specific dysfunctions. In debates over labour law's scope,[9] feminist theorists in particular have urged that going 'beyond employment'[10] means attending not only to the wide varieties and determinants of work *in labour markets* but also to work performed *outside* them.[11] Employment discrimination law, however, reminds us that even in labour law's core institutional setting of conventional employment, economists' market concepts provide neither a complete description of how work is organised nor a complete diagnosis of how it may go awry.[12]

In this way, workplaces conventionally located *inside* 'the labour market' raise problems for labour law that are not captured by its constituting narrative.[13] These problems may operate along altogether different dimensions than labour–capital conflict.[14] More challenging still, labour–capital conflict cannot itself be understood exclusively in market terms. Instead, that quintessential object of labour law may also be constituted by the social practices and power relations of, inter alia, white supremacy, as the literature on 'racial capitalism' insists.[15]

This chapter explores these themes through the lens of bilateralism, the location within the employer–employee relationship (or its variants) of the wrongs the law seeks to prevent or remedy. Both fields' conventional constituting narratives are strongly bilateral, but in the different ways already noted. Critical perspectives on both bilateralisms tend to press towards more structural analysis. But with different structures in each case—white supremacy, patriarchy, etc on the one hand, capitalist labour markets on the other—this structural turn seems to further diminish the common ground.

Focusing on anti-discrimination theory, I offer a heterodox conception of the structural problem that helps return anti-discrimination law to the familiar ground of bilateral work relationships, albeit with a new understanding of the crucial injury at issue. The simple

[1] Orly Lobel, 'The Four Pillars of Work Law' (2006) 104 Michigan Law Review 1539.

[2] Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011).

[3] Paul Davies and Mark Freedland, *Otto Kahn-Freund's Labour and the Law* (3d edn, Stevens & Sons 1983); Mark Barenberg, 'Workers: The Past and Future of Labor Law Scholarship' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (OUP 2003).

[4] Clayton Act of 1914, codified at 15 USC § 17; Declaration Concerning the Aims and Purposes of the International Labour Organisation (Declaration of Philadelphia), § I(a) (1944).

[5] Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press 2006); Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP 2005); Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); David Weil, *The Fissured Workplace* (Harvard University Press 2014).

[6] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015); Stephen M Rich, 'One Law of Race?' (2014) 100 Iowa Law Review 201.

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[7] For varied assertions of disparate treatment's primacy, see *Ricci v DeStefano*, 557 US 557, 577 (2009) ('Disparate-treatment cases present "the most easily understood type of discrimination. . . ."') (quoting *Teamsters v United States*, 431 US 324, 335, fn 15 (1977)); Tristin K Green, 'A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong' (2007) 60 Vanderbilt Law Review 849.

[8] But see SR Bagenstos, 'Employment Law and Social Equality' (2013) 112 Michigan Law Review 225; Noah D Zatz, 'The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?' (2009) 2009 University of Chicago Legal Forum 1.

[9] Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart 2006).

[10] Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001).

[11] Adelle Blackett, 'Emancipation in the Idea of Labour Law' in Davidov and Langille (n 2) 430; and in the same volume, J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' and Noah D Zatz, 'The Impossibility of Work Law'.

[12] Chris Tilly and Charles Tilly, *Work Under Capitalism* (Westview Press 1998).

[13] Noah D Zatz, 'Does Work Law Have a Future If the Labor Market Does Not?' (2016) 91 Chicago-Kent Law Review 1081.

[14] Guy Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in Davidov and Langille (n 2). Again, feminist legal theory has provided an important template by analysing labour law in terms of the politics of a 'family wage', situating workers in gendered relation not only to their employers but to their 'dependants' and the state. Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (OUP 2001).

[15] Cedric J Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Zed Press 1983); Michael C Dawson, 'Hidden in Plain Sight: A Note on Legitimation Crises and the Racial Order' (2016) 3 Critical Historical Studies 143.

idea, drawn from liberal egalitarian philosophical thought, is that institutions allocating opportunities for work and income ought to be structured to avoid distribution on morally arbitrary bases.[16] Such bases include race, sex, and other grounds traditionally protected by anti-discrimination law.[17] This conception places direct and indirect discrimination on a common foundation without relying on a structural analysis of group hierarchy that is divorced from specific bilateral relationships.[18] The harms inflicted on one worker by one employer ideally are addressed at that level because structural remedies fall short when they treat workers as fungible.

By seamlessly crossing the direct/indirect distinction, this conception acquires the distinguishing feature of neither systematically embracing nor systematically rejecting market ordering. Instead, it offers an analysis of *both* how markets can go astray and how they can advance justice, as can non-market relationships.

1. The Traditional Approaches: United by Bilateralism, Divided by Markets

Employment discrimination law, like labour law generally, obviously regulates employment. But so what? Is it like the proverbial 'law of the horse'?[19] Theft, assault, fraud, and breach of contract might all occur between employers and employees, but the fact that a lawyer accustomed to representing employees might handle all these claims would not imply any coherent structure or rationale. And yet it is generally thought that labour law is more than an iterated doctrinal coincidence but rather is a meaningful *field*. At this level of a field's constituting narrative, the most familiar accounts set employment discrimination law and labour law at loggerheads. They are united in employment but divided by the role of markets.

(a) Bilateralism in traditional labour law: the market bargain

Labour law is the law of work under capitalism, understood a specific way. As Guy Davidov has recently observed, the attribution of 'inequality of bargaining power' to employment relationships has been and remains 'by far the most widely accepted' account of labour law.[20] Precisely what that means and why it requires correction gets elaborated in various ways, but the consistent theme—even among those who eschew 'the bargaining power' terminology—is that the problems labour law addresses are specific to and emergent from market-based allocation of labour. Thus, the essence of labour law is that it constitutes 'restraints on',[21] 'regulation of',[22] or 'interventions in'[23] labour markets. These are grounded in rejection of the laissez-faire 'assumption that market forces are ordinarily adequate to

[16] Seana V Shiffrin, 'Egalitarianism, Choice-Sensitivity, and Acccommodation' in R Jay Wallace et al (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (OUP 2004); Sophia Moreau, 'What Is Discrimination?' (2010) 38 Philosophy & Public Affairs 143; Noah D Zatz, 'Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent' (2009) 109 Columbia Law Review 1357.

[17] Khaitan (n 6).

[18] Noah D Zatz, 'Disparate Impact and the Unity of Equality Law' (2017) 97 Boston University Law Review 1355.

[19] Frank H Easterbrook, 'Cyberspace and the Law of the Horse' [1996] University of Chicago Legal Forum 207.

[20] Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) 52.

[21] Katherine VW Stone and Harry Arthurs, *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage Foundation 2013) 4.

[22] Samuel Estreicher and Gillian Lester, *Employment Law* (Thomson/Foundation Press 2008) 1.

[23] Marion G Crain, Pauline T Kim, and Michael L Selmi, *Work Law: Cases and Materials* (LexisNexis 2011) ix.

deal with problems that arise in employment contexts'.[24] Market actors making deals in rational pursuit of their economic self-interest are what generates the need for intervention, whether in the name of efficiency (to correct 'market failures'), distributive justice, or other values. This conception 'is so entrenched in the way we think about labour law that it is difficult to conceive of an alternative view'.[25]

Although developed with respect to the employment relationship specifically, this bilateral conception of the problematic market bargain can readily be extended to forms of market work that either fall outside employment or can be captured only by expansive conceptions of that category. Fidelity to the traditional goals of labour law may require reaching beyond its traditional scope, not only with regard to the precise scope of the bilateral market relationship but even to more complex variants that may take 'triangular' shape and beyond, but which nonetheless retain the relevant functional features of employment.[26] Thus, even accounts of labour law that disclaim reliance on the particular labour process features of employment nonetheless most often rely on a more general conception of the inadequacy of market ordering.[27] In this vein, labour law remains fundamentally tethered to a project of market regulation focused on the participants in market bargains over work.

(b) Bilateralism in anti-discrimination law: the distortion of market value

Employment discrimination's constituting narrative arguably is more fraught, at least among scholars, though not so in US courts and much lay understanding.[28] 'Bias' plays a role roughly like that of 'inequality of bargaining power', the ill that must be corrected, even as it may be understood more or less expansively.[29] Rather than being endemic to the market form, however, employer bias is understood as an intrusion on it: the vestiges of illiberal commitments to race and gender hierarchy, the eruptions of anti-democratic passions poorly controlled, or the distortions of undisciplined irrationality. The problem is failure to act according to market principles, not the failure of market behaviour to deliver what matters most. Thus, 'anti-discrimination laws can help labor markets function more competitively'.[30]

This concept of discrimination as an intrusion upon markets—and thus anti-discrimination law as demanding a restoration—is closely linked to its lack of specificity to the employment arena. Unlike labour law, employment discrimination law typically is understood as the workplace application of more general anti-discrimination principles.[31] Thus, the Civil Rights Act of 1964 contains the centrepiece of US employment discrimination law in Title VII; the other titles address discrimination in voting, education, public accommodations, government facilities, and public expenditures—but not other types of employment regulation.

In this transcontextual vein, what is consistent is the nature of discrimination's disruption, the distortion by bias of spherically appropriate organising principles, whatever they are. We understand discrimination in government services as readily as in labour markets

[24] Estreicher and Lester (n 22) 1.

[25] Davidov (n 25) 21.

[26] Judy Fudge, 'The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection' in Davidov and Langille (n 9).

[27] Alan Hyde, 'What Is Labour Law?' in Davidov and Langille (n 9).

[28] Khaitan (n 6).

[29] Stephen M Rich, 'Against Prejudice' (2011) 80 George Washington Law Review 1.

[30] Estreicher and Lester (n 22) 192.

[31] George Rutherglen, *Employment Discrimination Law: Visions of Equality in Theory and Doctrine* (West Academic 2016) 14; Supiot (n 10) 144.

because their two quite different organising principles may be undermined by the common threat of bias. No generalised account of discrimination would ever conceive of it in terms of 'market failure', whether broadly or narrowly construed.

To the contrary, when the setting is labour markets, the narrative of external threat positions employment discrimination law as *enforcing* market rationality, not restraining it. As Mark Kelman put it in an influential article, the core employment discrimination principle is that market actors 'are duty-bound to treat those putative plaintiffs with whom they deal … no worse than they treat others who are equivalent sources of money.… A worker is essentially just her embodied net marginal product …'[32] In *Hazen Paper Co v Biggins*,[33] the US Supreme Court identified the 'essence of age discrimination' as the reliance on 'inaccurate and stigmatizing stereotype[s]', such as the notion that 'productivity and competence decline with old age'; under the law, however, an employer 'cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly'. The leading sexual harassment opinion, *Burlington Industries v Ellerth*,[34] expressed a similar view when assessing an employer's legal responsibility for one of its supervisory employees' sexual harassment of a subordinate. The Court saw the difficulty with standard agency analysis as the fact that '[t]he harassing supervisor often acts for personal motives, motives unrelated and even antithetical to the objectives of the employer'. In short, the law commands that employers be good capitalists, focused on worker productivity and their own bottom line, not distracted by social categorisation, hierarchy, and extrinsic motives.

This conception of disparate treatment elegantly facilitates an alliance between two quite different legal theoretical stances. On the one hand, it appeals to a tort-like conception of discrimination as blameworthy conduct that gives rise to a demand for corrective justice within a bilateral relationship. The act of discrimination is understood as a 'personal wrong'[35] that reflects the discriminating employer's disrespect for the worker or, more generally, failure to give adequate weight to her interests. Tristin Green insists on the distinctive character of disparate treatment as an 'intrinsically morally wrong act' that reflects a 'view that members of that [discriminated against] group are of less moral worth'.[36] This 'perpetrator perspective'[37] 'approach[es] the question of what makes discrimination wrongful by examining discrimination as an expression of various types of preferences',[38] thereby treating discrimination as an improperly motivated act. On the other hand, because economic decision-making based on these wrongful preferences marks a deviation from market rationality, suppressing discrimination also means instructing employers to 'ignore race' and 'focus solely on criteria related to productivity'.[39]

This opposition between discrimination and productivity can extend even into the more controversial claim of 'disparate impact' (indirect discrimination). When the US Supreme Court endorsed such claims in *Griggs v Duke Power Co*,[40] it retained market-perfecting rhetoric even while it dispensed with the perpetrator perspective. To determine which policies with a disparate impact must be stricken and which may be retained, the Court

[32] Mark Kelman, 'Market Discrimination and Groups' (2001) 53 Stanford Law Review 833, 834.
[33] 507 US 604 (1993). [34] 524 US 742 (1998). [35] Moreau (n 16). [36] Green (n 7) 874.
[37] Alan David Freeman, 'Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine' (1978) 62 Minnesota Law Review 1049.
[38] Larry Alexander, 'What Makes Wrongful Discrimination Wrong?: Biases, Preferences, Stereotypes, and Proxies' (1993) 141 University of Pennsylvania Law Review 149, 153.
[39] Stewart J Schwab and Stephen L Willborn, 'Reasonable Accommodation of Workplace Disabilities' (2003) 44 William and Mary Law Review 1197, 1199.
[40] 401 US 424 (1971).

characterised the law as requiring the 'removal of artificial, arbitrary, and unnecessary barriers to employment' in order to make 'qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant'. On this view, employment discrimination law continues to require nothing more than merit-based productivity considerations, not costly deviations from a market baseline.[41] This, too, keeps the focus on individual employer decision-making.

2. Away from Bilateralism: Property Distribution and Racial Caste

This section considers how important critiques of the constituting narratives discussed earlier only push employment discrimination and labour law further apart, away from shared bilateralism but no closer to common substantive underpinnings.

(a) Labour law: the roots of bargaining power outside the employment relationship

A basic problem with labour law's bilateralism is that focusing on the unequal employer–employee bargain obscures how inequality originates in the social relations that structure entrance into and potential exit from such bargains. The emphasis on *unequal* bargaining power suggests that so long as we get the power right, employment bargains would be unproblematic in principle. This, however, necessarily abandons the notion that markets in human labour pose a *particular* problem above and beyond those afflicting markets in general.[42]

The distinctive problem of *labour* markets lies in labour's status as a 'fictive commodity',[43] 'a human activity which goes with life itself, which in its turn is not produced for sale but for entirely different reasons, nor can that activity be detached from the rest of life'.[44] The irony, then, is that labour law's narrow focus on the employment relationship bargained in the market neglects precisely the 'rest of life' that the Polanyian perspective declares is inevitably 'embedded' in labour markets.

A version of this insight animated Sinzheimer's path-breaking work. As Ruth Dukes reconstructs, 'the source of [workers'] subordination lay with the employer's ownership of the means of production'.[45] This is a question of the posture in which workers approach the wage bargain and what they face if they exit it. The injunction to 'work or starve' gains its force not simply from the market character of work but from its interaction with markets in food and with workers' propertylessness, where food comes only from money and money comes only from wages.

In this way, labour law's constituting narrative risks reproducing the problem it aspires to solve: the way in which 'this domination of the worker by "Property" was obscured by the notion of freedom of contract, which posited free agreements between legal persons, each the bearer of legal rights and legal capacity'.[46] Labour law rejects the sanctity of contract, but

[41] Schwab and Willborn (n 39); JH Verkerke, 'Disaggregating Antidiscrimination and Accommodation' (2003) 44 William and Mary Law Review 1385.
[42] Paul C Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Harvard University Press 1990) 21.
[43] Fudge (n 11).
[44] Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press 2001) 75.
[45] Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law' in Davidov and Langille (n 2) 59.
[46] ibid.

its bilateralism focuses on reconstructing the deal—most obviously in the aspiration for collective rather than individualised bargaining. It does not directly address the property relations that necessitate the employment contract's reconstruction. This is one sense in which labour law constitutes and validates labour markets, not just restrains them.[47] Thus, it profoundly misses the point to focus simply on bilateral bargaining and the resulting employment relationships, not on the political economic structures that shape bargaining power.

These observations comport with certain efforts in labour law theory to move away from bilateralism. These suggest that 'labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes',[48] including tax, trade, education, industrial policy, and so forth.[49] Similarly, Freedland and Kountouris's innovative notion of the 'personal work profile' incorporates not only a worker's present relationship to a particular (putative) employer but also her simultaneous work or work-related states (including both disability and family care work) and her work trajectory over time (including unemployment and retirement).[50]

This expansion beyond bilateralism, however, runs some risk of hollowing out labour law's core.[51] These developments generally are understood to be *expansive* in nature, as *additions* to the scope of labour law that come with a richer understanding of its goals and the means necessary to achieve them. Nonetheless, by attributing inequality *within* employment to the power relations created *outside* it, the question arises whether redressing the latter may seem to obviate the need to muck around with the former.

This hollowing-out dynamic is evident in attempts to impose a division of policy labour between market-perfecting regulation, on the one hand, and redistributive tax-and-transfer policy, on the other.[52] Although these sometimes arise as bad-faith arguments by those seeking labour market deregulation without any genuine interest in redistribution, even sincere proponents of ambitious distributive schemes sometimes count labour market liberalization among their benefits.[53] This implication lurks in the observation that a universal basic income or other aggressive forms of decommodification—in the sense of access to resources outside the wage bargain—would enhance workers' bargaining power in the labour market.[54] If insufficient bargaining power is labour law's *raison d'être*, then more decommodification through social welfare policy would seem to justify less decommodification through traditional labour law.

(b) Employment discrimination: from the perpetrator to the caste structure

In employment discrimination law, too, the narrow focus on bilateral employment relationships has come under attack for bracketing structural context and accepting a market

[47] Deakin and Wilkinson (n 5); Noah D Zatz, 'Working at the Boundaries of Markets' (2008) 61 Vanderbilt Law Review 857.
[48] Harry Arthurs, 'Labour Law After Labour' in Davidov and Langille (n 2) 27.
[49] John Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work' in Davidov and Langille (n 2).
[50] Freedland and Kountouris (n 5).
[51] Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-Used) Legal Concept' in Davidov and Langille (n 9).
[52] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Davidov and Langille (n 2); Daniel Shaviro, 'The Minimum Wage, the Earned Income Credit and Optimal Subsidy Policy' (1997) 64 University of Chicago Law Review 405.
[53] Anne L Alstott, 'Work vs Freedom: A Liberal Challenge to Employment Subsidies' (1999) 108 Yale Law Journal 967.
[54] Erik O Wright, 'Basic Income, Stakeholder Grants, and Class Analysis' (2004) 32 Politics Society 79.

baseline. For instance, Neil Gotanda's classic critique of colour-blindness ideology characterises the fetish of disparate treatment as an ideology of 'unconnectedness' that treats race as an individual attribute and racism as 'irrational personal prejudices' against people with a racial attribute. This excludes any 'understanding that race has institutional or structural dimensions beyond the formal racial classification'.[55]

A large body of critical scholarship demonstrates that the conventional constituting narrative fails as a description of core employment discrimination doctrine. Most obviously, well-established prohibitions on indirect discrimination (both disparate impact and non-accommodation) explicitly break from the bias model and consistently require employers to deviate from what profit-maximising employment practices would counsel.[56] Of course, this is precisely the basis on which many have questioned—or attempted to sharply limit—those claims as deviations from core anti-discrimination principles. In particular, a large literature has grown up attempting to distinguish market-perfecting 'anti-discrimination' (paradigmatically the disparate treatment prohibition) from redistributive 'accommodation' (paradigmatically affirmative action and reasonable accommodation mandates), with disparate impact liability allocated to one side or another depending on whether market rationality is a sufficient defence.[57]

This attempted division between market correction and redistribution is confounded by the inability of even relatively uncontroversial doctrines—such as the prohibitions of disparate treatment and sexual harassment—to be explained adequately from a market-perfecting perpetrator perspective.[58] As discussed further below, disparate treatment liability attaches even when specific employment decisions based on protected status are economically rational.[59] Similarly, it attaches even when the challenges of effective monitoring and management make it more costly to prevent, detect, or remedy discrimination than to accept some level of managerial error as a cost of doing business.[60] The dominant view among courts and scholars working in this vein is that these doctrines show anti-discrimination to be better understood as an effort to dismantle caste-like relationships of structural subordination among groups.[61]

This turn to structural subordination typically is tied to an explicit incorporation of distributive justice aims.[62] Understood in this way—as an effort to override rather than perfect market distributions—employment discrimination law starts to look much more at home within labour law. That said, it generally does so without incorporating a critique of capital–labour wage bargaining and labour discipline as the specific source of how markets go astray. In this way, such structural accounts of employment discrimination by private employers remain continuous with those offered for government conduct in other domains.

The incorporation of market-overriding distributive aims triggers for employment discrimination law a new difficulty that parallels those for labour law. Distributive rationales

[55] Neil Gotanda, 'A Critique of "Our Constitution Is Color-Blind"' (1991) 44 Stanford Law Review 1, 43.
[56] Christine Jolls, 'Antidiscrimination and Accommodation' (2001) 115 Harvard Law Review 642; Samuel R Bagenstos, '"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights' (2003) 89 Virginia Law Review 825.
[57] Kelman (n 32); Schwab and Willborn (n 39); Verkerke (n 41); Samuel Issacharoff and Justin A Nelson, 'Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?' (2001) 79 North Carolina Law Review 307; Green (n 7).
[58] Bagenstos (n 56); Jolls (n 56); Zatz (n 16). [59] Bagenstos (n 56).
[60] Owen M Fiss, 'A Theory of Fair Employment Laws' (1971) 38 University of Chicago Law Review 235; JH Verkerke, 'Notice Liability in Employment Discrimination Law' (1995) 81 Virginia Law Review 273; Amy L Wax, 'Discrimination as Accident' (1999) 74 Indiana Law Journal 1129.
[61] Bagenstos (n 56); Jolls (n 56); Cheryl I Harris, 'Whiteness as Property' (1993) 106 Harvard Law Review 1709; Cass R Sunstein, 'Three Civil Rights Fallacies' (1991) 79 California Law Review 751; Khaitan (n 6).
[62] Harris (n 61); Bagenstos (n 56).

risk becoming unmoored from the bilateral employer–employee relationship. Insofar as individual employment relationships matter merely as reflections of and increments in the broader structural patterns of ultimate importance, it becomes an open question whether retail intervention in those relationships is the best way to shift the structural patterns; were that so, employers could appropriately be held responsible for implementing such redistribution.[63]

Rather than a bilateral focus on employers' discrimination against their employees, shifting the balance of employment opportunities to overcome stratification by race and sex (and so on) may require massive shifts in education, training, job creation, and even macroeconomic growth.[64] Moreover, because these market-overriding discrimination claims are 'best conceived of as zero-sum, distributive claims to a finite pot of redistributed social resources', they must 'compet[e] not only with the demands of others who seek accommodation (or the wishes of putative defendants) but with all claimants on state resources'.[65] Even if what is at stake is the distribution of *jobs*, not merely the income conventionally linked to jobs, this may best be addressed through active labour market policies quite different from duties between employers and their own current employees or applicants.

A useful thought-experiment once was proposed by David Strauss. He embraced the standard distributive conception offered against a focus on retail bias, a conception in which the ultimate goal is 'justice between racial groups'.[66] On that view, individual litigation is an error-prone, misdirected waste of resources. Instead, 'employment discrimination laws should be designed to give employers incentives to hire and promote members of minority groups in proportion to their representation in the relevant population'. Under such an approach, 'an employer can make whatever employment decisions it wishes within the minority employee population, so long as it maintains the required ratios'.[67] In other words, the employer owes no duty to any individual employee. Its duty is to maintain an aggregate pattern.

This aggregative approach could readily be generalised. Once one moves above the level of individual workers, it is difficult to see why even the individual employer remains a relevant unit of analysis. Consider two firms, one with an under-representation of a group and the other with the equal and opposite over-representation. On Strauss's model, both would be in violation, but the violation would be cured if the firms merged. Vice versa, a compliant firm could produce two non-compliant firms by spinning off a division. From the perspective of inter-group justice, there is no less reason to allow trade-offs across firms than to allow trade-offs across divisions within a firm. There might plausibly be reasons to care about patterns that exist within integrated labour markets at subnational scale, and about patterns at the levels of specific occupations, but neither of these would respect firm boundaries.

Abstracting from those subtleties, one quickly gets to a system of tradable inequality permits, a hybrid of Derrick Bell's fable of the 'Racial Preferences Licensing Act'[68] and systems of tradable emissions permits. A firm that deviates from racial parity may do so perfectly legally so long as it purchases a permit from another firm with offsetting demographics. If the goal is to increase aggregate African American employment, then by all means, let us

[63] John Gardner, 'Discrimination as Injustice' (1996) 16 Oxford Journal of Legal Studies 353.
[64] Cass R Sunstein, 'The Anticaste Principle' (1994) 92 Michigan Law Review 2410, 2450.
[65] Kelman (n 32) 852.
[66] David A Strauss, 'The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards' (1991) 79 Georgetown Law Journal 1619, 1620.
[67] ibid.
[68] Derrick A Bell, *Faces at the Bottom of the Well: The Permanence of Racism* (Basic Books 1992).

get the most bang for the buck. Firms that are particularly good at minority hiring will do even more of it thanks to the financial incentives, and their increases will more than offset the decreases at firms where resistance is more entrenched.

As we have seen, labour law's and employment discrimination law's characteristic focus on bilateral work relationships both can readily be seen as epiphenomenal distractions from the broader structural forces that produce particular instances of inequality. The nature of those structural forces, however, tends to diverge along familiar lines of class versus race, etc.

There are opportunities to bridge that divide by drawing on, for instance, the critical literature on racial capitalism.[69] Bargaining in the shadow of property distribution is just one example of a broader point about the socially and legally determined stakes of unemployment. Southern states in the US taught a master class in this point during Jim Crow, utilising a range of practices that reduced the ability of African Americans to switch employers or exit the labour market. These practices often took the form of criminal prohibitions—on vagrancy, on quitting work, on changing employers—and criminal punishments, from convict leasing to parole, many of which have analogues today.[70] Similarly, employment-based visas in contemporary 'guestworker' programmes, as well as employers' capacity to trigger immigration enforcement against unauthorised workers, link unemployment to the state violence of deportation.[71] Thus, the political structures that shape 'economic' bargaining power include racialised structures of property distribution, criminal prosecution and punishment, impunity for private violence, and so on.

Analyses of this form, promising as they are, remain at a structural level that risks divorce from the bilateral bread-and-butter of both employment discrimination and labour law. So rather than develop these points further, I turn to the possibilities for linking broad distributive concerns to the workings of individual employer–employee relationships.

3. Back to Bilateralism: The Injured Worker, Not the Perpetrator Employer

Is there a route back down from these heights to regulation of employment relationships? And might employment discrimination law and labour law both follow a similar route? One possible answer is that forging such a path depends on sidelining the distributive concerns that propelled the structural turn discussed earlier. Labour law certainly offers resources to do so via its concern for workplace subordination, but it is less obvious what that might mean for employment discrimination law, if not reversion to a perpetrator perspective.

[69] Robinson (n 15); Dawson (n 15).
[70] Angela Y Davis, 'From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System' in Bill E Lawson and Frank M Kirkland (eds), *Frederick Douglass: A Critical Reader* (Blackwell 1999); Robin DG Kelley, *Hammer and Hoe: Alabama Communists During the Great Depression* (25th anniversary edn, University of North Carolina Press 2015 [1990]); Risa L Goluboff, *The Lost Promise of Civil Rights* (Harvard University Press 2007); Douglas A Blackmon, *Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II* (Anchor Books 2009); Sarah Haley, *No Mercy Here: Gender, Punishment, and the Making of Jim Crow Modernity* (University of North Carolina Press 2016); Angela Y Davis, 'From the Convict Lease System to the Super-Max Prison' in Joy James (ed), *States of Confinement: Policing, Detention, and Prisons* (St Martin's Press 2000); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (CUP 1998); Noah D Zatz, 'A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond' (2016) 39 Seattle Law Review 927.
[71] Maria L Ontiveros, 'Immigrant Workers and the Thirteenth Amendment' in Alexander Tsesis (ed), *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (Columbia University Press 2010); Kathleen Kim, 'Beyond Coercon' (2015) 62 UCLA Law Review 1558.

Resisting that route, this section sketches how a return to bilateralism in employment discrimination law can proceed via a reconceptualisation of its distributive project.[72]

(a) Individual injury in indirect discrimination

How might employment discrimination law overcome the tension between a conventional, bilateral theory that is rather shallow in its ambition and a more structural competitor that either abandons bilateralism or remains wedded to it arbitrarily, even dysfunctionally? A useful entry point is the Achilles heel of the perpetrator perspective, its inability to account for the bar on so-called 'rational discrimination'.

Rational discrimination occurs when an employer motivated purely by conventional market money-making goals will make decisions based on applicants' or employees' race, sex, or other protected status.[73] When life expectancy is difficult to predict but correlates with sex, employers might use employees' sex as an actuarial factor in pension policy. When customers prefer to be served, or prefer not to be, by workers of a particular race, then employers might use employees' race as a proxy for expected customer satisfaction. And so on. Although such employers act for precisely the sorts of profit-maximising reasons ordinarily legitimated in the labour market, US courts consistently prohibit rational discrimination as a form of disparate treatment.[74]

Although one can generate a variety of plausible market-failure rationalisations for the prohibition on rational disparate treatment,[75] the most direct and powerful failing shifts from the perpetrator to the victim perspective. Whether the employer is boiling over with animus or coolly assessing her as 'embodied net marginal product',[76] either way the result is the same: the worker loses a job because of her sex, race, etc.[77]

This very simple idea—that the injury at the heart of employment discrimination law is to suffer workplace harm because of one's protected status, what I call 'status causation'[78]—coheres with the strong emphasis on causation in disparate treatment claims. Notably, it has no fixed relationship to market rationality, even in the disparate treatment context. Some forms of disparate treatment arise as deviations from market rationality and would be corrected by adherence to it. Others arise as manifestations of market rationality and would be corrected by specific deviations from it.

The real power of a status causation framework comes from its ability to connect disparate treatment to the other forms of liability that seem to veer away from bilateralism and into general distributive concerns. Consider the relationship between the prohibition of disparate treatment and the mandate of reasonable accommodation.[79] The quintessential non-accommodation case involves a worker who loses a job without the employer taking his disability into account. Instead, the employer applied some 'neutral' rule: to work here, you must use this tool proficiently. The worker could not use the tool; that is all the employer needed to know. But one reason *why* the worker could not use the tool was because of his disability (as well as how the tool was designed). The worker could not use the tool because of his disability. The worker could not get the job because he could not use the tool.

[72] For another effort to address the same problem, see Tarunabh Khaitan's excellent recent book (n 6) ch 6.
[73] Bagenstos (n 56); Stewart Schwab, 'Is Statistical Discrimination Efficient?' (1986) 76 American Economic Review 228.
[74] *City of LA Department of Water & Power v Manhart*, 435 US 702 (1978); *UAW v Johnson Controls, Inc*, 499 US 187 (1991); *Ferrill v Parker Grp*, 168 F3d 468 (11th Cir 1999).
[75] Schwab (n 73); Bagenstos (n 56). [76] Kelman (n 32) 835.
[77] Owen M Fiss, 'A Theory of Fair Employment Laws' (1971) 38 University of Chicago Law Review 235.
[78] Zatz (n 18). [79] Zatz (n 16); Zatz (n 18).

Therefore, the worker did not get the job because of his disability: status causation. That the employer cared only about his tool use, not his disability, is as cold a comfort here as it is in the case of rational disparate treatment.

Again, the relationship to market rationality is indeterminate in theory. The employer might insist on proficiency with the tool because it is the most cost-effective one available, in which case an accommodation will require a costly deviation from market rationality. But maybe the employer insists to favour his lazy nephew who is idiosyncratically good at using this tool (or owns the company that produces them), and the employer wants to subsidise his kin rather than maximise profits. Now a little market discipline might improve matters for equality.

(b) Bilateralism and the rejection of fungibility among workers

The connection between status causation and bilateralism is illustrated by analysis of disparate impact liability, seemingly the most structurally oriented aspect of employment discrimination law. In *Griggs*,[80] the employer required high school graduation as a hiring credential in circumstances where this credential was distributed unequally by race. Thus, racial disparity in employment was produced by racial disparity in education, itself produced by pervasive discrimination in the educational sphere at that time.

Under these circumstances, there were African American job applicants who were denied a job for lack of a degree and lacked a degree because of their race. Absent a racist education system, they would have gotten the degree and gotten the job. In this regard, they are like the quintessential non-accommodation plaintiff—harmed by a policy that does not take status into account and yet one that imposes harm on some individuals because of their protected status.

In the disparate impact setting, however, such victims cannot be identified individually. In contrast, the paradigmatic non-accommodation case determines that the plaintiff cannot use the tool because her particular impairment interacts with tool use in a known way. In *Griggs*, however, not all African American non-graduates were non-graduates because of their race. True, 88% of blacks did not graduate, but neither did 66% of whites. Equalising the rates requires shifting 22% of blacks from non-graduate to graduate status, but that is only one-quarter of all black non-graduates. Furthermore, the pool of non-graduates cannot feasibly be sorted into those whose non-graduation is and is not attributable to their race.

The distinctive function of disparate impact liability is, in my view, to use statistical evidence to identify the presence of this harm within a larger pool even when individual victims cannot reliably be identified.[81] Changing the policy, however, will prevent future victimisation.

How does this relate to bilateralism? The crucial point is that the requisite injury occurs at the level of individuals, not groups, even though its existence only can be made visible by looking for patterns in groups—aggregations of individuals. From this perspective, two individuals are not rendered fungible simply because their employment makes the same incremental contribution to their group's aggregate employment level.

Recall Strauss's proposal: employers should focus on their 'bottom line' while remaining free to draw intra-group distinctions. That dictum contradicts the most theoretically perplexing disparate impact decision of the US Supreme Court, *Connecticut v Teal*.[82] *Teal* began

[80] See n 40. [81] Zatz (n 18). [82] 457 US 440 (1982).

with a fairly typical challenge to the standardised test used to determine which applicants for promotion were eligible; the test disproportionately screened out African American applicants. As among those eligible based on test results, however, the employer hired African Americans at a higher rate. This ad hoc affirmative action resulted in a 'bottom line' in which promotions were racially proportionate to the original (pre-testing) applicant pool. The employer argued that this bottom-line parity insulated it from disparate impact liability. If proportional distribution of promotions by race was the goal, then the employer's approach fulfilled it.[83]

The Supreme Court rejected this 'bottom line defense' in a notoriously confusing opinion.[84] My analysis, however, makes sense of it. The problem with the test was that some test-takers failed it because of their race. These individuals lost promotional opportunities because of their race. They suffered status causation. That injury was personal to those individuals. It could not be cured or offset by awarding promotions to other African Americans.

Although in *Teal* this analysis operates at the level of the promotional process, the same logic applies at the level of the firm and at the level of the labour market as a whole. Structural changes to increase aggregate black employment are not simple substitutes, let alone more efficient ones, for firm-level changes that alter outcomes for the particular individuals who suffer racial harm.

The notion that employment discrimination law aims to minimise status causation is readily understandable within conventional—though of course contested—streams of liberal egalitarian thought.[85] In particular, it appears to be a simple application of what is known as 'responsibility-tracking' or, from its critics, 'luck' egalitarianism.[86] Resources subject to principles of just distribution should be allocated according to features of individuals, including their actions, for which they are responsible and 'should not be influenced by morally arbitrary factors'.[87] Race, gender, and other typical statuses protected by employment discrimination are obvious candidates to be among the morally arbitrary factors that should not drive resource distribution.

The reason why this conception of distributive justice is compatible with, and even demands, some degree of bilateralism is that the ultimate matter of concern is the processes that drive outcomes for individuals.[88] This proceduralism is why this school of thought is sometimes referred to as a 'left-libertarian' approach. This egalitarianism is leftist because it views property and contract as political choices about how to structure human relationships, and thus subject to design constraints that advance underlying goals of human freedom and equality.[89] There is no a priori commitment to the security of private property or the freedom to contract, though in fact in some form these may be quite important.[90] But it is libertarian insofar as it aspires to protect individuals' ability to order their affairs in

[83] Cases like *Teal* create a serious difficulty for Khaitan's effort to harmonise the group and individual levels of his analysis into an account of discrimination law as having dual purposes that are systematically aligned (n 6) ch 6.

[84] Richard T Ford, 'Civil Rights 2.0: Encouraging Innovation to Tackle Silicon Valley's Diversity Deficit' (2015) 11 Stanford Journal of Civil Rights & Civil Liberties 155.

[85] Zatz (n 16).

[86] Daniel Markovits, 'Luck Egalitarianism and Political Solidarity' (2008) 9 Theoretical Inquiries in Law 271; Elizabeth S Anderson, 'What Is the Point of Equality?' (1999) 109 Ethics 287.

[87] Shiffrin (n 16) 273.

[88] For another account of anti-discrimination law grounded in individual harm, see Joseph Fishkin, *Bottlenecks: A New Theory of Equal Opportunity* (OUP 2014).

[89] Gerald A Cohen, 'Back to Socialist Basics' (1994) 1/207 New Left Review 3.

[90] Philippe Van Parijs, *Real Freedom for All* (OUP 1995); Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002).

pursuit of their own conception of the good life, which in turn requires significant responsibility for the outcomes of those pursuits.

The upshot of this proceduralism is that aggregate—or in Nozick's terms, 'patterned'[91] — outcomes do not supply the ultimate criteria for whether justice is being achieved, though they may be relevant indicators, as in disparate impact theory. And yet standard accounts of the distributive goals of both labour law and employment discrimination law generally take group outcomes as providing the relevant benchmark. That is why they both are subject to the standard objection that it would be more direct, fair, and efficient to focus on structural policies, especially via tax-and-transfer, that achieve those aggregate benchmarks rather than piecemeal attention to particular employment relationships.[92]

If it is the aggregate outcome that matters, then individual members of that aggregate are fungible—it does not matter *which* workers are unemployed versus employed or make this wage rather than that, so long as workers overall are doing well enough. That kind of fungibility ignores intra-group difference. This includes both intra-group difference with respect to those choices for which individuals are responsible and also intra-group difference with respect to subjection to unjust practices. Employment discrimination law consistently rejects this kind of fungibility, not only in the relatively controversial case of the 'bottom-line defense' discussed earlier, but pervasively.[93] The simple, consistent point is that if one worker loses a job because of her race, the remedy must go to that worker, not to another worker who shares the same protected status.

(c) Revisiting labour law's distributive function

Does this account of employment discrimination law have any significance for labour law more generally? It might. Labour law, after all, has long sounded in the correction of economic inequality, namely that emergent from inequality of bargaining power in labour markets. Superficially, these seem to be different forms of equality: labour law's runs between workers and employers, employment discrimination's from worker to worker. But if we think of bilateral employment relationships as part of the economic structure of society—even the 'basic structure' that Rawls argued is the proper object of justice—each field is simply one component in the broader institutional design project of advancing the freedom and equality of all citizens.[94]

If the problem of inequality of bargaining power emerges from problems in the distribution of resources, including not only productive capital but also many of the determinants of individual capabilities, then labour law's problem linking structural inequality to bilateralism is not so different in kind from employment discrimination law's problem. That is especially clear where the law forbids 'rational' employer action, something characteristic of labour law generally and of the swathes of employment discrimination law that motivate alternatives to the perpetrator perspective.

When an employer pays what the market will bear to a worker economically dependent on employment and relatively low skilled, that employer is doing something similar to paying African American workers less because of the consequences of racial inequality in education, criminal justice, and so forth. Indeed, I have suggested elsewhere[95] that this area

[91] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 2013 [1974]).

[92] Zatz (n 8).

[93] Zatz (n 18). Eg courts allow 'sex plus' discrimination claims by women in female-dominated job categories where the employer strongly favours (relative to all men) women with a particular additional characteristic (like being unmarried) while barring women (but not men) who lack that characteristic.

[94] John Gardner, 'Liberals and Unlawful Discrimination' (1994) 9 Oxford Journal of Legal Studies 1.

[95] Zatz (n 8).

of convergence—where both labour law and employment discrimination law focus primarily on altering market-driven outcomes against the backdrop of unjust distribution of bargaining power—makes new sense of the relationship between accommodation requirements in discrimination law and wage regulation in labour law; that includes their shared puzzle of bilateralism. The same might be true of important conditions of employment that are not monetised for workers but, for employers, are fungible with wage costs. Occupational safety and health, working hours, and family and medical leave may be candidates.

Insofar as the underlying problem is fair distribution, however, there is no reason to limit either labour law or employment discrimination law to market-driven injustice. It is an observation basic to labour law, institutional economics, and the sociology of work that employment within firms is managed by hierarchy, not markets. Bosses (or teams, or software) exercise ongoing power over subordinates. And from a management perspective, this exercise of discretionary power entails agency costs, creating opportunities for supervisory power to diverge from market rationality at the level of the firm. Employment discrimination law adds the insight that this problem of discretion also operates with regard to hiring into the firm.

If these 'non-market' dynamics within firms systematically produce results that deviate from just distributions, then it makes perfect sense for law to seek to suppress those dynamics. If people of colour lose job opportunities because of their race, that problem is not fundamentally different when that injustice arises from market-driven bargaining versus exercises of supervisory discretion that deviate from firm-level interests. To the firm, these may merely be agency and error costs that must be accepted because the cure is more expensive than the disease, but from a regulatory perspective, they are a problem of a higher order.

An important question is whether any of labour law, discrimination aside, can be understood as confronting distributive questions of this sort. To be sure, the exercise of supervisory discretion, and its limitation by just-cause dismissal, seniority-based pay and promotion, and so on, are classic subjects of both direct regulation and collective bargaining. But insofar as such discretion (when unconstrained) is exercised essentially randomly—rather than in ways that are socially patterned and predictable—the problem of its regulatory control may look more like the firm's own internal problem, and thus a weaker candidate for intervention. That certainly is consistent with the US model of only selective deviation from at-will employment. But it may well be that some of the problems of inter-worker distribution that Guy Mundlak has identified as labour law's hidden 'third dimension' have a distributive character analogous to those familiar in employment discrimination; that may be especially likely when they are negotiated by unions that use non-market (hierarchical or democratic) means to choose among inter-worker distributions that are equally costly to the employer on net.[96]

4. Revisiting Subordination after Decentring the Market

The preceding discussion focused on economically distributive projects within labour law and employment discrimination law. But the resulting stance in relation to markets—that they neither systematically create nor systematically correct either field's problems—might have broader application, including to labour law's prong focused on workplace subordination. This suggestion coheres with arguments, different as they are in particulars, from

[96] Mundlak (n 14).

Blackett[97] and Langille that '"inequality of bargaining power" has cramped our thinking about labour law and has held us hostage to a thin normative ideal'.[98]

Langille calls for articulating the upsides of markets, a search for 'something positive' that explains why 'more equal labor markets, and their outcomes, are a good thing'.[99] Doing so creates room for 'a theory which explains why market activity and economic growth are desirable in the first place'.[100] If labour law has something positive to say about (appropriately constructed and regulated) labour markets, then labour law must also have something critical to say about (at least some) *non-market* forms of work—or at least about some ways in which work within 'labour markets' may *deviate* from idealised market ordering. In other words, not all decommodification is created equal; some forms constitute no improvement, or even a deterioration, in the circumstances of work that are labour law's core concern.[101] That, recall, is employment discrimination law's home turf.

This suggestion resonates with some aspects of the inequality of bargaining power concept. Although it is amenable to the structural interpretation discussed earlier, another strand operates at some remove from the problem of market power—and the terms of the bargain struck—but instead emphasises the *fictive* character of the commodity bargained over.[102] That is, labour law's problem arises from the fact that the human embeddedness of labour requires that its transfer occurs via ongoing social relations. That is why labour law is at its apex when work is organised by command-and-control within the firm (even if entry into that control is by bargain) rather than by arms-length bargains for a discrete product.[103]

If, however, this fictive character means that labour law addresses problems that arise when employment *deviates* from stylised market ordering, then it becomes quite peculiar to see those problems as deriving *exclusively* from work relationships constructed through labour markets. The fact that labour markets *can* and *do* systematically produce subordination cannot bear the inference that *only* labour markets can produce such subordination at work.

At this juncture, Blackett's analysis complements Langille's by highlighting how labour law must look beyond the confines of conventional labour markets and include slavery and forced labour within its ambit. To focus on, and to theorise from, labour markets alone is—and has been—to condemn labour law to silence or befuddlement about slavery and forced labour,[104] the most abhorrent—and thoroughly racialised—means of organising human activity into economic production. How bizarre! Thus, 'labour market regulation alone as the core idea of labour law offers a dangerously thin conceptual starting point'.[105]

Slavery and forced labour present particularly *extreme* versions of labour law's core concerns with subordination, not outliers relative to the core problems of labour markets. Chattel slavery in particular represents the ultimate institution of dehumanisation,[106] one that 'solves' the problem of labour's human embeddedness by denying the humanity of those whose bodies labour. Moreover, there are ample continuities not only in labour management techniques[107] but even in nominal legal protections[108] between unfree and free labour regimes.

[97] Blackett (n 11). [98] Langille (n 2) 110. [99] ibid. [100] ibid. [101] Zatz (n 13).
[102] Fudge (n 11).
[103] Stephen Nayak-Young, 'Revising the Roles of Master and Servant: A Theory of Work Law' (2014) 17 University of Pennsylvania Journal of Business Law 1223.
[104] Blackett (n 11). [105] ibid. [106] Dukes (n 45).
[107] Edward Baptist, *The Half Has Never Been Told: Slavery and the Making of American Capitalism* (Basic Books 2014).
[108] Blackett (n 11) 425.

Consider the relationship between labour law and prohibitions on slavery, involuntary servitude, and forced labour. Surely these constitute labour law's *foundation*, not an entirely separate topic.[109] As such, they illustrate the point that market ordering can further labour law's purposes relative to certain non-market forms.[110] That is the central insight of *Pollock v Williams*, the high-water mark of involuntary servitude jurisprudence in the US: 'When the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work.'[111] The corollary of this fundamental right to quit—and thereby to bargain over staying—is the right to strike's centrality within labour law.[112]

Forced labour may seem distant from labour law's contemporary concerns, but less so as one considers both slavery's incorporation into capitalist development and its projection towards the present through colonial relationships[113] and forms of neoslavery like those of the US institutions of convict leasing and the chain gang,[114] as well as prison labour.[115] Moreover, physical coercion by both private and state actors persists in matters of trafficking and deportation[116] and in emergent practices that criminalise unemployment, especially among low-income communities of colour subject to non-custodial forms of criminal justice supervision and coercive debt collection.[117]

Forced labour represents merely an example of a more general claim to decentre market work within labour law theory. That more general point extends to care work within families, which generations of feminist scholars have argued—seemingly with little impact on labour law theory generally—can (and historically does) exhibit the exploitation, subordination, and dependency that labour law attacks in labour markets.[118] Not coincidentally, all these practices are pervasively structured by and constitutive of the race and gender stratification central to discrimination law.

Even efforts to incorporate non-market work and thereby expand labour law's scope often remain curiously tethered to labour law's traditional emphasis on market ordering. The validation of non-market work relies upon linking it to the market. Thus, in a tradition tracing back at least to Engels, feminists have theorised familial care work as a practice of reproductive labour.[119] What is reproduced, however, is the capacity to work in labour

[109] cf Deakin and Wilkinson (n 5).

[110] Lea S VanderVelde, 'The Labor Vision of the Thirteenth Amendment' (1989) 138 University of Pennsylvania Law Review 437.

[111] 322 US 4, 18 (1944). This passage also vividly illustrates the interaction between interpersonal subordination and economic dependency.

[112] James G Pope, 'Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude"' (2010) 119 Yale Law Journal 1474.

[113] Blackett (n 11).

[114] Haley (n 70); Davis, 'From the Prison of Slavery to the Slavery of Prison (n 70).

[115] Noah D Zatz, 'Prison Labor and the Paradox of Paid Nonmarket Work' in Nina Bandelj (ed), *Economic Sociology of Work* (Emerald Press 2009); CF Fenwick, 'Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law' (2005) 27 Human Rights Quarterly 249.

[116] Kim (n 71). [117] Zatz (n 70).

[118] Michelle Barrett and Mary McIntosh, 'The "Family Wage": Some Problems for Socialists and Feminists' (1980) 11 Capital & Class 51; N Folbre, 'Exploitation Comes Home: A Critique of the Marxian Theory of Family Labour' (1982) 6 Cambridge Journal of Economics 317; Nancy Fraser and Linda Gordon, 'A Genealogy of Dependency: Tracing a Keyword of the US Welfare State' (1994) 19 Signs 309; Dorothy E Roberts, 'The Value of Black Mothers' Work' (1994) 26 Connecticut Law Review; Katharine Silbaugh, 'Turning Labor into Love: Housework and the Law' (1996) 91 Northwestern University Law Review 1; Anne L Alstott, *No Exit: What Parents Owe Their Children and What Society Owes Parents* (OUP 2004); Blackett (n 11); Fudge (n 11).

[119] Folbre (n 118); Rayna Rapp, 'Family and Class in Contemporary America: Notes Toward an Understanding of Ideology' in Barrie Thorne and Marilyn Yalom (eds), *Rethinking the Family: Some Feminist Questions* (Longman 1982); Ann Ferguson, *Blood at the Root* (Pandora Press 1989).

markets. Similar patterns are endemic to analyses of coerced labour as integral to, even constitutive of, raced and gendered capitalism.

Focusing on the porous border between market and non-market work, as I have often done myself,[120] risks tethering analysis of the latter to the former. Much as Fudge, for instance, pushes beyond a 'labour market regulation' framework to insist rightly that labour law include 'the problems of incorporating labour into the market and the reproduction of labour',[121] the labour market remains the touchstone for a field that includes 'all of the regulatory dilemmas that any attempt to govern the labour market must confront'.[122] Freedland and Kountouris likewise tether their move beyond bilateralism and into 'personal work relations' to a labour market nexus, for instance when they justify their inclusion of unpaid volunteers by virtue of 'their significance to the functioning of labour markets'.[123] Blackett goes further by rejecting labour market regulation as labour law's core, yet she retains a more general market nexus by invoking a framework of 'resistance to the *commoditization* of the factor of production that is labour'.[124]

Rather than pursuing this problem of labour *outside* the market, I have tried to reverse course, turn inward, and reconsider whether it is the market character of market work that underlies the labour law project. In other words, we might return to the Polanyian insight not only that markets are but one form of economic organisation but also that what we call 'markets'—and in particular labour markets—always fail to achieve the 'self-regulating' character that liberal thought attributes to them, that markets in labour are never just that.[125]

5. Conclusion

Focusing on matters of distribution, I have suggested how a particular liberal conception can make sense of employment discrimination law in ways that account for the broader structural context that shapes employment while continuing to bring that account to ground in the experiences of individual workers within particular employment relationships. That bridging, in conjunction with a capacious account of how markets may either produce or counteract injustice, suggests opportunities for placing employment discrimination law and labour law on a shared footing. Doing so, however, will require further attention to the aspects of labour law that emphasise interpersonal subordination, which likewise may be enriched by a more contingent relationship to the market.

This domain of subordination also may be where labour law has the most to offer employment discrimination law. The most obvious application is to the law of harassment. In this domain, employment discrimination scholars rightly have shown the distributive significance of hostile work environments, how they may influence occupational segregation, job success, and advancement in ways that are functionally equivalent to more direct control over hiring, firing, pay, and promotion.[126] Yet there always has been a competing

[120] Zatz (n 115). [121] Fudge (n 11) 136. [122] ibid.

[123] Freedland and Kountouris (n 5) 356.

[124] Blackett (n 11) 421. To be clear, I do not mean to deny that commoditisation is implicated by Blackett's examples, nor that this commoditisation is part of the dynamic that produces the need for emancipatory resistance, just to suggest that this relationship to markets is a contingent rather than essential one. Any specific examples will raise difficult questions about how to give content to notions of production and labour without either using market society as a baseline or incorporating all human activity with social significance. Zatz (n 11); Noah D Zatz and Eileen Boris, 'Seeing Work, Envisioning Citizenship' (2014) 18 Employee Rights and Employment Policy Journal 95.

[125] Tilly and Tilly (n 12).

[126] Vicki Schultz, 'Reconceptualizing Sexual Harassment' (1998) 107 Yale Law Journal 1683.

analysis grounded in dignitary affront,[127] one that remains important for a worker who bears it without economic consequence.[128] This non-economic aspect, moreover, is not unique to harassment. Instead, it is continuous with the long-standing set of concerns around self-respect, dignity, and stigmatisation that accompany more tangible forms of discrimination.[129] This, too, is clarified by returning to slavery as a touchstone for both labour law and anti-discrimination law, one that speaks to labour not only as a site of economic expropriation but also a site of interpersonal violence, one that both reflects and reproduces 'the ontological distinction between superior and inferior humans … codified as race.'[130]

One virtue of labour law's traditional 'inequality of bargaining power' notion was its effort to integrate matters of economic inequality and day-to-day subordination at work. Although analytically separating these clearly has its benefits,[131] this discussion also suggests some of what may be lost, whether the paradigm case is enslavement or a wage bargain. Any effort to analyse these in an integrated fashion will be aided by approaching them as both labour law problems and discrimination problems, and as both inextricable from yet irreducible to the problems of markets under racial capitalism.

[127] Anita Bernstein, 'Treating Sexual Harassment with Respect' (1997) 111 Harvard Law Review 445.
[128] *Harris v Forklift Sys*, 510 US 17 (1993).
[129] Kenneth L Karst, 'Foreword: Equal Citizenship Under the Fourteenth Amendment' (1977) 91 Harvard Law Review 1; T Shelby, *We Who Are Dark: The Philosophical Foundations of Black Solidarity* (Harvard University Press 2005).
[130] Dawson (n 15) 147.
[131] Davidov (n 20).