

Theorising Labour Law in a Changing World

Towards Inclusive Labour Law

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Introduction

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I. Introduction: The Paradox of Inclusion

In the twenty-first century, the world of work has undergone dramatic changes. How to respond to the increasingly obvious disjuncture between existing legal models and the realities of people's work lives, the global geographies of production and new modes of service delivery has stirred much critical reflection and debate in labour law scholarship. Over the last 20 years, the search for alternatives to traditional labour law models has involved various theoretical attempts to reconsider labour law's normative foundations, its purpose and scope, as well as its subjects, institutions, regulatory mechanisms and jurisdictions. These contributions have ranged from more restrained, sometimes defensive reassessments,¹ to bolder, more radical critiques and reconceptions,² or even calls to abandon

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¹ See, eg, G Davidov, 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) (arguing that the concept of employee, if properly used, can remain useful); A Goldin, 'Labour Subordination and the Subjective Weakening of Labour Law' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Oxford, Hart Publishing, 2006) (suggesting that we replace the concept of subordination with a broader notion of contractual inequality, also covering new forms of exercising power); M Freedland and N Kountouris, *The Legal Construction of Personal Work Relations* (Oxford, Oxford University Press, 2011) (revitalising the contract of employment through its reconceptualisation); ND Zatz, 'The Impossibility of Work Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2012) (advocating for a 'work law' that treats different forms of work differently).

² See, eg, R Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford, Oxford University Press, 2014) (urging that labour law should be reorientated around the values of redistribution and economic democracy); J Fudge, 'A New Vocabulary and Imaginary for Labour Law: Taking Legal Constitution, Gender, and Social Reproduction Seriously' in D Brodie, N Busby and R Zahn (eds), *The Future Regulation of Work: New Concepts, New Paradigms* (Basingstoke, Palgrave MacMillan, 2016) (making a conceptual contribution to expanding the scope of labour law so as to include unpaid care work); J Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulations,

labour law (as we know it) entirely.³ Spanning this diversity, however, is a general recognition that labour law's continued relevance depends on its capacity to become more inclusive, representative and broadly solidaristic.

Thus, *inclusion*, and how to achieve it in theory and practice, is a key theme and point of contention in contemporary labour law scholarship. An enduring question, though, is how and whether legal norms and institutions built around historically specific⁴ and deeply gendered (and racialised) ways of organising work (and society)⁵ can ever be satisfactorily adapted to accommodate evolving labour markets; and, even if they could be so adapted, how representative they would be, given the growing casualisation of work and its widespread informality in the world's lower income and developing economies.⁶

Even more problematically, the idea of inclusion is itself contested, and able to be co-opted for multiple and disparate political ends. For example, labour law's internal critique has coincided with longstanding neoliberal policy-led efforts to dismantle or re-regulate existing employment protection regimes,⁷ including on the basis of promoting 'inclusion'. Paradoxically, deregulation has often been advanced on the premise that employment protections for standard workers contribute to inefficiencies and rigidities in labour markets, not least because they reproduce labour market segmentation (that is, the insider/outsider divide) and,

and Decent Work' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2012) (broadening the scope of labour law by including tariff protection or state aid regulations); LF Vosko, 'Out of the Shadows? The Non-Binding Multilateral Framework on Migration (2006) and Prospects for Using International Labour Regulation to Force Global Labour Market Membership' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2012) (especially with a view to migrant labour, making a case for introducing a global labour market membership).

³ H Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law & Policy Journal* 585 (imagining a law of economic subordination and resistance encompassing all economic relations characterised by comparable asymmetries of wealth and power).

⁴ A Blackett, 'Emancipation in the Idea of Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2012).

⁵ J Fudge and R Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford, Hart Publishing, 2006); J Conaghan and K Rittich, *Labour Law, Work, and Family: Critical and Comparative Perspectives* (Oxford, Oxford University Press, 2005); J Fudge and E Grabham, 'Introduction: Gendering Labour Law' (2014) 4 *feminists@law*. While not a labour lawyer, LF Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford, Oxford University Press, 2009) proposed a particularly strong critique of legal norms based on the standard employment relationship, according to which the only way to address the exclusionary and gendered operation of those norms is to dissolve them.

⁶ J Fudge, S McChrystal and K Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford, Hart Publishing, 2012); D Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford, Hart Publishing, 2019) (forthcoming); S Marshall and C Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Cheltenham, Edward Elgar and ILO, 2016); S Routh and V Borghi (eds), *Workers and the Global Informal Economy: Interdisciplinary perspectives* (London, Routledge, 2016).

⁷ S Lee and D McCann (eds), *Regulating for Decent Work: New Directions in Labour Market Regulation* (London, Palgrave MacMillan, 2011).

as such, impede the pursuit of more inclusive, diverse, and equal labour markets.⁸ Advanced since the 1990s by the Organization for Economic Cooperation and Development (OECD) and the World Bank, and in Europe by the European Commission, this neoliberal version of inclusion has prioritised broader access to labour markets and paid work, without necessarily guaranteeing work quality or substantive equality to new labour market actors.⁹ Critiques of this policy show that it is not only rooted in a market-first logic, and undergirded by truncated conceptions of redistribution and equality, but also that methodological problems put into question its evidence base, not least by probing the assumed correlation between employment protection and labour market segmentation.¹⁰ Inclusion may also be used as a rationale and justification for coercive labour market reforms, designed to compel individuals to engage or re-engage with the labour market.¹¹ This is particularly apparent in social security reforms, where income support may be lowered or withheld entirely for a failure to engage with labour market processes,¹² ostensibly in a way that is in the individual recipient's 'best interests'.

Regardless of (or, perhaps, precisely due to) the paradoxical way in which the notion of inclusion has been constructed in, and co-opted by, mainstream discourse, significant diversification of work arrangements has made the issue of inclusivity an urgent one for labour law. In addressing issues of exclusion and inclusion, many scholars are committed to finding solutions to labour law's arbitrary distinctions between standard and non-standard employment, and tackling its diminishing ability to protect workers within existing models. These interventions have, for instance, sought to rethink how work relations and parties are classified or identified,¹³ propose new legal categories,¹⁴ reflect on how employment contracts can be extended to cover the self-employed, or how labour law's purposes can be reconceived to extend its protective ambit.¹⁵

⁸ See, eg, J Rubery, *Re-regulating for Inclusive Labour Markets* (Conditions of Work and Employment Series No. 65, Geneva, International Labour Office, 2015); V De Stefano, 'A Tale of Oversimplification and Deregulation: The Mainstream Approach to Labour Market Segmentation and Recent Responses to the Crisis in European Countries' (2014) 43 *Industrial Law Journal* 253.

⁹ Rubery, *Re-regulating for Inclusive Labour Markets* (n 8) 2, referring to the OECD's 1994 *Jobs Study*, the World Bank's *Doing Business Index* and the European Commission's 2011 *Annual Growth Survey* (COM(2011) 11 final).

¹⁰ For comprehensive discussion and references to evaluations of these policies see Lee and McCann, 'Regulating for Decent Work' (n 7); Rubery, *Re-regulating for Inclusive Labour Markets* (n 8).

¹¹ H Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16.

¹² J Peck, *Workfare States* (New York, The Guildford Press, 2001); A Daguerre and D Etherington, 'Workfare in 21st century Britain: The Erosion of Rights to Social Assistance' (2014) ESRC Working Paper http://workfare.org.uk/images/uploads/docs/Workfare_in_21st_century_Britain-Final.pdf accessed 20 December 2018; J Millar and F Bennett, 'Universal Credit: Assumptions, Contradictions and Virtual Reality' (2017) 16 *Social Policy & Society* 169.

¹³ See, eg, J Prassl, *The Concept of the Employer* (Oxford, Oxford University Press, 2015).

¹⁴ See, eg, SD Harris and AB Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker"* (The Hamilton Project, Discussion Paper 10, 2015). In some European countries, in-between categories already exist, eg, Austria, Germany, and the UK.

¹⁵ G Davidov, *A Purposive Approach to Labour Law* (Oxford, Oxford University Press, 2016).

Other scholars, however, have argued that only a major reconceptualisation of labour law's scope to encompass different forms of work,¹⁶ such as unpaid care work¹⁷ or informal work,¹⁸ can make the law more inclusive and responsive to the realities of people's (work) lives. True inclusivity might require moving beyond employment to focus on social rights,¹⁹ adopting different models of regulation,²⁰ or considering ways in which labour law intersects with other regulatory fields²¹ to produce particular vulnerabilities and precariousness.²² These more radical approaches may be key to tackling enduring inequalities in accessing employment protection, particularly given the growing diversification of work.

The idea of inclusivity is therefore both a touchstone and point of contention for labour law scholarship. It offers at once a potential guide for the future of labour law reform, and a telling critique of the limits of labour regulation. This is made more complex, of course, by the inherent paradox in the notion of inclusion, and how it is deployed in public policy making. The notion or paradox of inclusion seems to be representative of the bind in which labour law now finds itself, especially in its efforts to develop an encompassing theory or answer to these various challenges.

II. Towards Inclusive Labour Law

This book's individual contributions originated as papers presented at a two-day workshop held at Maastricht University in the Netherlands in December 2016. The workshop aimed to feature critical, innovative, and interdisciplinary perspectives on labour law and work regulation, and to highlight the work of scholars at different career stages, featuring doctoral and emerging researchers alongside those who are already well established in their fields. As such, the premise of

¹⁶ Fudge, McChrystal and Sankaran, 'Challenging the Legal Boundaries of Work Regulation' (n 6).

¹⁷ J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptualizing Labour Law' in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, Oxford University Press, 2011); Fudge, 'A New Vocabulary and Imaginary for Labour Law' (n 2).

¹⁸ See, eg, S Routh, *Enhancing Capabilities through Labour Law: Informal Workers in India* (London, Routledge, 2014); Routh and Borghi, 'Workers and the Global Informal Economy' (n 6).

¹⁹ S Fredman, 'Women at Work: The Broken Promise of Flexicurity' (2004) 33 *Industrial Law Journal* 299; A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford, Oxford University Press, 2005).

²⁰ See, eg, Zatz, 'The Impossibility of Work Law' (n 1); D Brodie, N Busby and R Zahn (eds), *The Future Regulation of Work: New Concepts, New Paradigms* (London, Palgrave MacMillan, 2016).

²¹ A Bogg, C Costello, A Davies and J Prassl, 'Introduction: Exploring Autonomy' in A Bogg, C Costello, A Davies and J Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 18.

²² C Costello, 'Migrants and Forced Labour: A Labour Law Response' in A Bogg, C Costello, A Davies and J Prassl (eds), *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015). The editors of *The Autonomy of Labour Law* agree that labour law should look at other legal disciplines, however, the key issue they highlight is the need to develop filtering criteria to assess whether a particular borrowing or influx from other legal domains is apt to fulfil or undermine labour law's aims and functions: Bogg, Costello, Davies and Prassl, 'Introduction' (n 21) 18.

inclusivity was both the organising idea for the workshop itself, and one of the key crosscutting themes that emerged over the course of our discussions.²³

Building on this theme, this collection seeks to contribute to the ongoing debates in labour law scholarship by providing a diverse set of ideas and insights on what a more inclusive labour law theory might be. To be clear, the collection does not put forward a singular, coherent vision, nor do all contributions speak to the idea of inclusion directly. Instead, as emerges in the coming pages, inclusive labour law, as we see it, is a multifaceted umbrella concept, and an approach to scholarship, that is characterised by a number of shared commitments. An inclusive labour law theory is diverse and multiple, reflecting the complexity of the globalised world we live in. As a regulatory field, inclusive labour law eschews exclusions by remaining open to a multiplicity of regulatory approaches, which are capable of addressing different problems, rather than seeking one-size-fits-all solutions. While it pays homage to some of labour law's traditional values and goals, and is informed by established scholarship and legal history, inclusive labour law is self-reflective and not laden by nostalgia in thinking about contemporary conditions or future possibilities.²⁴ As a scholarly discipline, it embraces diverse conceptual framings, methodological approaches, and scholarly voices. It seeks to engage in a dialogue with other disciplines and across generations of scholars. Finally, as a political project, it is emancipatory and democratic, and seeks to bolster sociality and solidarity between differently situated workers. Inclusive labour law rejects co-optation by economic rationalities and political agendas that seek to weaken protections and fragment solidarity under the guise of inclusivity.

III. Themes and Structure

The individual contributions in this collection are arranged across three parts. Part A considers work regulation in the context of a shifting socio-economic order; Part B reviews the role of collective institutions; and Part C seeks to develop and extend theories already present in labour law scholarship. These thematic sections broadly align with what we identify above as features of inclusive labour law; namely, rejection of economism, commitment to sociality and solidarity, and openness to a multiplicity of regulatory and conceptual tools. These themes are focal points for the book's organisation, and also traverse the collection, being

²³ While the contributions in this volume are largely European-centred and engage with developed countries, other papers at the workshop had a more global scope, also pertaining to Australia, South Korea and South Africa. These contributions have been published together as a special issue of the *International Journal of Comparative Labour Law and Industrial Relations*, entitled 'Scrutinizing the Standardized Worker: International and Comparative Perspectives' (2018) 34, 345–96.

²⁴ In this sense, we accept Bob Hepple's urging to reject nostalgia in a search for alternatives, and instead let the 'close analysis of the present and an understanding of the past' guide these efforts: B Hepple, 'The Future of Labour Law' (1995) 24 *Industrial Law Journal* 303, 305.

echoed in many of its contributions. We examine these shared themes in more detail before turning to a description of the book's three parts and the individual chapters that comprise them.

First, the critique of a regulatory approach or strategy where economic logics are privileged over social, usually non-quantifiable, values, is most clearly articulated by the contributions in Part A.²⁵ That said, the need to prioritise qualitative and normative principles such as democracy, social justice and dignity in our efforts to address the challenges facing labour law is evident in many of the book's other contributions. Taking a long-term historical perspective, the present moment may be exceptional in the extent to which neoliberal market rationality has usurped the justificatory authority of all other competing normative values (Knecht). Echoing the neoliberal capture of the notion of inclusion we noted earlier, regulatory approaches such as reflexive law have also been appropriated by neoliberal governance agendas, and now need to be re-evaluated (Blackham). When considering ways to counteract the resulting 'normative erosion' of labour law, we should not underestimate the role of the courts in challenging so-called 'emergency measures' induced under the guise of economic and financial crises (Rodgers) or refining legal doctrines to transform labour law from within (Pietrogianni). At the same time, challenging neoliberal and deregulatory ideas and strategies might require the introduction of new conceptual and justificatory tools (Eleveld) or the facilitation of horizontal means for organising production, to address the imbalance of power embedded in the employment relationship (Iossa). While trade unions seem to have adapted to the 'economic rationales of efficiency and productivity', they must become credible again in their representation function if they are to regain their role in shaping social consensus and relations (Vergis). Economism can also be rejected from the point of view of those who are excluded from the scope of labour law, as in the case of unpaid care workers, whose work – though societally indispensable – is often not seen as 'market' work and as such remains grossly undervalued (Zbyszewska and Routh).

Secondly, this commitment is supplemented by a shared understanding that developing a more inclusive approach to labour law requires us (and labour market actors) to recast and reimagine solidarity, so as to ensure its relevance to the changing world of work. Solidarity is better seen as a bond that extends beyond occupational or class-based allegiances to encompass relations with and between differently situated workers,²⁶ and perhaps even those excluded from the

²⁵ See also, eg, Dukes, *The Labour Constitution* (n 2); K Rittich, 'Making Natural Markets: Flexibility as Labour Market Truth' (2014) 65 *Northern Ireland Legal Quarterly* 323. In a European context see, eg, C Crouch, 'Entrenching neo-liberalism: the current agenda of European social policy' in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (Cambridge, Cambridge University Press, 2013); D Ashiagbor, *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford, Oxford University Press, 2005). Offering a gendered critique: Fudge and Owens, *Precarious Work, Women, and the New Economy* (n 5).

²⁶ Supiot, *Beyond Employment* (n 19).

scope of work regulation. As the contributions in Part B make apparent, this has implications for collective forms of organisation and resistance, with a more inclusive approach potentially also being a source of renewal for traditional labour law institutions and collective actors (Zahn). That said, some situations might require the establishment of new types of collective actors and activism, especially where existing ones, even if transformed, might not be suitable (Dias-Abey). Other contributions also address solidarity that extends to relations between workers and those who are, by contemporary labour law, seen as non-workers (Zbyszewska and Routh). By stressing the need to elevate non-market logics or principles, including those operating in the civic sphere (Knecht), re-embed the economy in society through solidaristic structures and collective voice (Vergis), make work organisation more horizontal (Iossa), and rebalance power relations at work (Inversi), the chapters reiterate the importance and potential of collective action in transforming new work arrangements and structures.

Thirdly, and as the book's contributions make apparent, adopting a one-size-fits-all approach is inadequate, be it in relation to collective representation, regulatory tools, or theoretical perspectives. Instead, different strategies, values and principles are needed to steer a shift away from the current overreliance on neoliberal ideologies. Multiplicity is therefore a third theme that runs through all chapters; that is, the idea that diverse work and national circumstances require multiple tools and types of regulation, actors, disciplinary approaches and methods, as well as a grounding in normative values and goals, to design a decent and socially just labour market in which diverse groups of workers can participate. Multiplicity acknowledges and seeks to accommodate diversity in: the different forms of work and workers captured by the scope of labour law (Zbyszewska and Routh); the economic organisation of work (Iossa); regulatory instruments (Inversi, Blackham); legal institutions (Rodgers, Pietrogiovanni); and ways of representing the diverse workforce (Vergis, Zahn, Dias-Abey). With this diversity in mind as a guiding principle, we can, in the long-term, envision and create a more inclusive labour law.

These three themes are further developed across the three parts of the volume, as we detail below.

A. Part A: Work Regulation and the Socio-Economic Order

The notion of crisis has provided a critical entry point into theoretical debates on labour law over the last two decades. In this first set of contributions, the crisis – both that which afflicts labour law itself (as a regulatory model and academic discipline), and that pertaining to transformation in the socio-economic conditions within which this law is embedded – serves as the basis for reflections on labour law's constitutive operations and its possible futures. In keeping with the book's theme of conceptual and methodological multiplicity, the contributions in this Part shed light on this subject using distinctive lenses, ranging from historical

and economic sociology to doctrinal approaches. Underpinning all three contributions, however, is a critique of economic and market rationality or, rather, its disproportionate privileging over social concerns, which has permeated broader policy discourse, unsettling (and increasingly influencing) labour law's justificatory and technical apparatus.

To start, Robert Knegt's chapter positions labour law's current adaptation problems and search for new normative and institutional paradigms against a historical account of centuries-long (crises and) transformations in European labour relations. His aim is to expose the dynamics of normative ordering in labour relations, so as to inform future institutional design and dispel a number of common assumptions that constrain labour law's imagination. While adopting a historical methodology, conceptually Knegt draws on economic sociology,²⁷ which posits an interdependent or co-constitutive relation between societal spheres (including the 'already embedded market'), that is nonetheless dynamic, negotiated, and subject to change. Normative orders of labour relations, as an aspect of broader social relations and life, undergo similar processes of negotiation, institutionalisation, and change. Knegt illustrates this with examples dating back to Europe's medieval period, to show how successive models of industrial relations emerged, crystalised, and eventually gave way to others; in each case, their precise institutional design an outcome of negotiated settlement between co-existing and often competing 'orders of worth', or justifications for action, associated with particular societal spheres or domains. What is exceptional about the present moment, Knegt urges, is that neoliberal market rationality has usurped the justificatory authority over orders pertaining to 'civic' or 'domestic' spheres, with the effect of shaping social life, including labour relations, around the values of the market and the individual, entrepreneurial self. Breaking the grip of this logic in designing future models of labour relations will require more inspiration than simply clutching onto the industrial and Fordist-era past, the conditions and societal compromises of which no longer hold. While Europe's institutional history provides a rich repertoire of ideas, the labour relations and legal regimes of the future must reflect new societal compromises.

Picking up the theme of labour law in the clutches of neoliberal market rationality, Lisa Rodgers's contribution addresses labour law's more recent transformations, brought about by the post-2008 economic crisis reforms adopted across the European Union (EU). Rodgers adopts a 'state of exception' conceptual lens, drawing on Giorgio Agamben, to examine the mechanics and logics of crisis governance and, within them, the double-edged operation of law and the role of legal actors. Applying this lens to labour law, Rodgers shows how

²⁷ For other examples of how an economic sociology approach has been developed and used in socio-legal scholarship, including in relation to work and labour, see two special issues by Diamond Ashiagbor, Prabha Kotiswaran and Amanda Perry-Kessaris: *Towards an Economic Sociology of Law* in the *Journal of Law and Society* (2013) and *Continuing Towards an Economic Sociology of Law* in the *Northern Ireland Legal Quarterly* (2014).

invocation of a ‘state of emergency’ associated with the crisis enabled adoption at the EU-level of a series of rapid and wide reaching macroeconomic and fiscal governance reforms, often through technocratic means, extension of the executive power, and with involvement of democratically unaccountable institutions, such as the European Central Bank. Contra their exceptional (ie, of temporary need) justifications, Rodgers argues these reforms have had permanent and transformative consequences for labour law; they have also been consistent with existing policy preferences seeking to align labour law with economic and employer-focused requirements of flexibility and efficiency. At the same time, as she illustrates by reference to several national court rulings concerning the implementation of reform measures, the resulting normative erosion of labour rights has not been uncontested. These rulings, in Rodgers’s view, demonstrate that when bolstered by civil society and the mobilisation of social movements, law and legal actors (including the judiciary) can still play an important role in challenging re-regulatory measures that aim to downgrade employment rights.

Conviction in law and legal actors’ transformative possibilities also informs Vincenzo Pietrogiovanni’s contribution. As he shows, the crisis of labour law partly derives from its inability to respond to contemporary conditions of work, especially the growth in insecurity and precarity associated with technology-enabled forms of work organisation, and the blurring of the boundaries of the workplace. In particular, Pietrogiovanni notes, the realities of crowd-work or platform-assisted work are not captured by mainstream concepts of autonomy and subordination, as invoked in judicial decisions about employment status (as opposed to self-employment) (see also Iossa, Part C). The solution, he suggests, is to reconceptualise subordination, and he proposes to do so by drawing on the concept of subordination as ‘double alienness’, as developed in Italian jurisprudence. As Pietrogiovanni explains, the Italian Constitutional Court has used the concept of double alienness to capture a situation wherein one party provides a service, but another party effectively owns both the service product itself and the means by which the service delivery is organised. With reference to fractal work, specifically car ride services provided through the Uber platform, he shows that this concept could be useful in extending protection to workers who are deemed autonomous, but in fact operate in the “grey zone” ... where traditional indices of subordination coexist with typical elements of autonomy’. Ultimately, then, although he highlights labour law’s limitations and exclusionary operation, Pietrogiovanni is interested in the possibilities offered by existing legal doctrine to transform labour law from within. In a similar vein to Rodgers, he demonstrates the important role of the courts in interpreting and developing labour law protections for new forms of work.

Notwithstanding their differences of emphasis and approach, as Nicole Busby notes in her commentary, the key point of convergence between the three contributions in Part A, and with Busby’s own comment, is the pointed critique of the prioritisation of economic concerns as labour law’s primary antecedents and justification for its existence. While labour law’s role in the constitution of socio-economic orders is certainly not new (Knecht and Rodgers), its privileging

of economic logics and objectives reflects and reproduces the broader hegemony of market rationality as a key organising principle of contemporary social life. To harness law's constitutive power for socially progressive ends, labour lawyers must elevate other concerns and rationalities that have historically animated labour law, not least those of democracy and social justice. As Busby urges, labour law's emancipation from the market must involve the broadening of its scope, so that its reinvention also produces instruments or regulatory approaches that promote inclusion and justice. While this should be guided by our past, Busby maintains, in agreement with Knecht, that we have to be mindful of contemporary conditions to develop rules that ultimately respond to and reflect day-to-day human practices. Being open to a multiplicity and plurality of approaches, supporting collective mobilisation of workers and civil society, and embedding labour law in wider socio-economic strategies, rather than making the law subservient to the latter, are some proposals Busby invokes as steps forward.

B. Part B: Revitalising the Role of Collective Representation

The contributions in this Part take up the theme of collective mobilisation and solidarity. As they exemplify, the challenges that collectivism and collective representation face relate, in part, to the shrinking base for these forms of workplace regulation. As all three contributions and the two commentaries make clear, traditional collective institutions have often neglected to address and include in their policies and strategies marginalised workers, particularly women and racialised workers. As such, trade or labour unions have missed out on opportunities to engage with groups of workers that could stimulate their renewal. The question these contributions pose is whether there is any role left for traditional and conventional trade unions (Zahn); and, if so, what that role ought to be (Vergis); or, if not, whether new institutions can provide a solution (Dias-Abey).

Fotis Vergis considers the contemporary role of collective institutions by going back to the conceptual roots of the idea of labour protection, including the mechanisms developed to ensure labour's safeguarding from coercion and abuse of power. Drawing on both Marxist and liberal theory, and examining the political history that gave rise to collective labour institutions, Vergis explores their role as a catalyst for market democratisation, something he sees as a prerequisite for a functional liberal democracy. Like Knecht (Part A), Vergis also puts forward a social constructivist conception of the market (and economy) as embedded in particular social structures, institutions and norms, with the choice of the latter being ultimately a negotiated and political one. As Vergis notes, historically, collective labour institutions have played a key role in embedding the economy or the market through their regulatory and solidaristic functions. Labour unions' current representational crisis, he claims, stems partly from their acquiescence to a purely economic role, and the concessions and accommodations unions have made around economic rationales of efficiency and productivity. Despite this critique,

Vergis maintains that collective labour institutions are still uniquely positioned to re-embed the market in its new social context. To do so, however, they have to act beyond their current market regulation shackles, and re-embrace their solidaristic and regulatory functions, alongside the pursuit of individual dignity and freedom for their members. Unions also have to re-engage in identity building, albeit on terms that correspond with contemporary realities and diversity among workers, so that they can again partake meaningfully in shaping the (new) socio-political consensus.

Picking up on the need to rebuild collective identities in a manner that is more inclusive and representative, Rebecca Zahn's contribution engages with the historical experiences of trade unions in organising and protecting atypical workers. Her starting point is that while expanding their representational reach among non-standard workers (ie, women workers in the gig economy) could be an important source of trade union renewal, in practice, unions are still perceived as representing the quintessential white, working-class blue-collar man, who was the model for the once prevalent standard employment relationship.²⁸ In reflecting on why traditional trade unions have had only limited success in shifting this presumption, Zahn considers how they tend to prioritise their functions, which, as classified by Keith Ewing, include functions of service, representation, regulation, government and public administration. She observes that unions will have to rethink not only which functions they prioritise, but also what these functions entail, if they are to be more successful in reaching women workers, those in the gig economy, and other non-standard workers. The historic prioritisation of regulation²⁹ over service functions, she notes, reflects organised labour's gendered understanding of the labour market. Moreover, while the service function has typically focused on legal advice at work or discounts for holiday insurance, these matters are less relevant for female workers who struggle to manage work and care or who do not know how many hours they will work week to week, making their income highly precarious. Thus, if traditional trade unions are to respond effectively to the rise in non-standard work, Zahn argues they ought to actively show their willingness to adapt to the realities of this work and the needs of people who perform it.

Continuing and developing the theme of adaptation, Manoj Dias-Abey explores the emergence of alternative collective representation in the United States (US) by so-called worker centres. Despite not being protected by labour regulations, these organisations have grown in prominence and impact, including due to their focus on serving and organising those workers left out from the New Deal, namely African-Americans and other racialised workers. As Dias-Abey demonstrates through his study of the Coalition of Immokalee Workers (CIW), alternative forms of collective organisation can be more effective than traditional

²⁸ See, eg, J Conaghan, 'Labour Law and Feminist Method' (2017) 33 *International Journal of Comparative Labour Law & Industrial Relations* 93; Vosko, *Managing the Margins* (n 5).

²⁹ That is, bargaining on behalf of workers to regulate work through collective bargaining.

models, not least because they may be open to a broader and more creative range of strategies. In the case of the CIW, activists went beyond the labour law paradigm which long marginalised migrant farm workers, instead deploying strategies pertaining to different regulatory and discursive ‘fields’ and devising a private regulatory system, the Fair Food Program. As Dias-Abey shows, by enlisting large fast food chains and supermarkets that purchase Floridian tomatoes to sign up to the Fair Food Program, the CIW managed to put pressure on growers in fast food/supermarket supply chains to comply with a series of labour standards the Program stipulates, ultimately improving the conditions of work on farms. Even if it primarily pertains to a private regulatory mechanism – a code of conduct – rather than formal legal reform, the CIW case affirms that law (albeit broadly construed) remains an important and effective instrument, thereby echoing other contributions’ views of law as having enduring strategic utility. At the same time, Dias-Abey remains cautious, pointing out law’s frequent limitations and, drawing on the example of immigration law, its problematic operations. Notwithstanding these reservations, his study invites us to think about law and legal strategies pertaining to work more broadly, and to more seriously consider how, when combined with political engagement, law can be used to benefit those traditionally left out of regulatory protection.

Ultimately, what all the chapters in this Part show is that a necessary requirement for strengthening collective institutions is reimagining the role or functions such institutions could or should play. They also show that a multiplicity of different approaches can be adopted to that end, though the kind of institutional set-up and regulatory and strategic tools needed will depend on the political and socio-economic context. The comments by Tonia Novitz and Nicola Smit also pick up on this theme of multiplicity and need for context specific adaptation. Novitz acknowledges the concerns raised by Zahn, but emphasises that, at least to some extent, we should aim to preserve the more traditional functions of trade unions, while simultaneously ‘developing a multiplicity of tools to achieve further objectives that address the intricacies and dynamics of our twenty-first-century labour markets’. Among others, she notes that international and cross-border regulation (ie, international labour standards in combination with rules on trade) should provide additional methods of strengthening the role of collective institutions. Smit is more cautious about the role and scope of international labour and social labour protection. The latter, she notes, tends to focus on the formal sector, ignoring the complexity of informality, which is the reality in many low income and developing countries. She particularly questions whether the tripartite structure promoted by the International Labour Organization (ILO) is of use in countries where informal markets dominate and trade unions are marginalised. When considering the potential future role for collective actors in the non-standard work context, Smit suggests that a mix ‘between social, enterprise and network bargaining and persuasive influence has become relevant’. She adds that it might be necessary to establish ‘new hybrid models of collectivism’ – issues to which Zahn and Dias-Abey speak – which are able to involve more non-traditional players and

could also cover ‘subjects other than traditional terms and conditions of employment and social benefits.’ As many workers do not enjoy decent work, existing regulatory and collective models are in need of review.

C. Part C: Advancing Theoretical Models to Respond to the Contemporary World of Work

While canvassing a wide array of theoretical approaches, from reflexive law (Blackham), to regulatory space (Inversi), to anarchist theory (Iossa), to the republican theory of non-domination (Elefeld), to feminist theory (Zbyszewska and Routh), the chapters in this Part are united in recognising both the limits and potential of different theories for reconceiving labour law and labour regulation for the contemporary world of work.

The chapters by Cristina Inversi and Alysia Blackham engage with the regulatory function(s) of labour law. Inversi uses the concept of ‘regulatory space’ to capture the multiplicity of regulatory levels, dimensions, instruments and actors that already coexist and interact in the context of labour relations. This perspective decentres mandated legal norms, which it treats as only one among various dimensions of regulation, with the others being generated through negotiation (between employers and workers) and unilateralism (imposition of rules through managerial prerogative). At the same time, law’s capacity to produce hierarchies renders it crucial for facilitating both self-regulation and particular interactions between other regulatory dimensions. As Inversi points out, it is not only what law does, but also what it does not do that matters. Law’s limits and inconsistencies shape spaces for other regulatory dimensions and differently situated actors. As Inversi shows, drawing on the case of working time in the United Kingdom (UK), the benefit of this pluralist approach is that it better captures the dynamism and complexity of regulatory change.

While the approach that Inversi adopts highlights reflexivity and self-regulation as integral elements of the regulatory space, Blackham more specifically addresses the theory of reflexive law, highlighting that, at least for equality law in the UK, this theory does not work in practice as would be predicted. In contrast to Inversi’s contribution, Blackham’s chapter highlights reflexive (labour) law’s ‘exclusivity’. While reflexive law – in theory – is fundamentally inclusive, drawing on regulation at multiple levels and encouraging self-regulation by local actors, this is not borne out in practice. As Blackham’s chapter shows, it ‘appears difficult to translate systems theory and reflexive law into practical regulatory interventions’, especially where mechanisms are lacking to ‘moderate the power of organisations and public bodies’. What this chapter shows, then, is that ideas and theories are fundamentally beholden to their implementation, and are therefore also dependent on political will and political values. Reflexive law in particular has the potential to be captured by neoliberal actors to (further) deregulate existing labour protections. Blackham

concludes by canvassing some emerging developments in critical systems theory, which may offer a path to develop reflexive law as a useful tool that escapes its current limitations.

Anja Eleveld's contribution builds on these ideas to consider how labour law and work regulation might be defended from the incursions of neoliberal policy. Eleveld suggests that the answer might lie in the application of the republican theory of non-domination as an interpretative tool to contest deregulatory ideas and strategies. In doing so, she reflects on and joins recent labour law engagements with republicanism.³⁰ Unlike most, however, Eleveld is not interested in republican theory as a source of new philosophical or normative foundations for labour law. Rather, she endorses a 'post-foundationalist' approach, with the objective of ascertaining whether republican theory is helpful from a justificatory perspective. Eleveld considers whether conceptions of domination, the power on which it rests, and its particular theory of justice and equality provide a more convincing language with which to defend labour law than other alternatives that labour lawyers have considered, such as the capabilities approach and theories of vulnerability and subordination. Eleveld finds republican theory more suited to the task, as the theory is inherently relational rather than individualistic (a fault she finds in the capabilities approach, for example). Moreover, Eleveld shows, drawing on Philip Pettit's work, that the objections that republican theory makes to the exercise of 'arbitrary power' – especially in so far as it has consequences for personal freedom, including the ability to enjoy free choice and make future plans – are more likely to effectively contest neoliberal rationales (which, after all, profess to maximise individual freedoms). Thus, defending against the erosion of labour law on the basis that its insufficiency might lead to domination and the exercise of arbitrary power by employers is an argumentative strategy that neoliberal policy might find harder to counter.

Countering neoliberal ideology by taking advantage of the conditions and opportunities it has brought about is a thread taken up by Andrea Iossa's contribution. Iossa argues that traditional labour law has, alongside its protective function, also institutionalised and perpetrated subordination (that is, a form of labour exploitation). At the same time, neoliberal ideology, notwithstanding all its harms, has also effectively diminished the importance of both the employer and the state as traditional expressions of authority. This context, Iossa suggests, invites us to consider how anti-authoritarian, anarchist theories might be usefully applied to

³⁰ A Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse?' (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 391; K Breen, 'Non-Domination, Workplace Republicanism, and the Justification of Worker Voice and Control' (2017) 33 *International Journal of Comparative Labour Law & Industrial Relations* 419; D Cabrelli and R Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 *International Journal of Comparative Labour Law & Industrial Relations* 339; G Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 *International Journal of Comparative Labour Law & Industrial Relations* 365.

rethink labour regulation. Specifically, Iossa proposes a horizontal organisation of production, as an alternative to subordinate and hierarchical relations inherent in the bilateral employment relationship. A horizontal organisation of work would enable the redistribution of earnings among workers, challenging the idea that workers must work for the employer's benefit and profit. Referring to successful examples of workers' cooperatives, Iossa therefore shows that there is an alternative to capitalist undertakings as a form of economic organisation. What he makes clear is that the current labour law model, which favours capitalist economic ordering of work (relations), is not fit for the contemporary socio-economic reality, as it only serves a few and excludes workers from most of the benefits of production. A horizontal economic production or work organisation would allow us to focus on workers' dignity, and therefore would give the reinvented labour law a human touch. In this way, Iossa's contribution speaks to the inclusion of workers in a more dignified work organisation, focusing on the quality rather than the quantity of work and production.

As discussed above, 'inclusion' in the labour market can become coercive. This risks undermining individual autonomy and the value placed on other social goods. The conversation between Ania Zbyszewska and Supriya Routh illustrates this idea in their critique of the implicit (or unintentional) productivism underlying labour law as a discipline and regulatory field. Engaging with feminist scholarship, Zbyszewska and Routh probe the extent to which critical contributions to labour law debates have managed to challenge productivism, and question the extent to which a 'productivism' lens should be used to expand labour law's scope. Zbyszewska emphasises labour law's exclusionary scope, derived from its focus on productive work, which has particular implications for the family/work divide and the exclusion of unpaid household and care labour from labour law's remit. To counteract that productivist lens, feminist political economists have stressed the need to consider the role and place of social reproduction, which is needed to uphold the productive workforce. Reconceiving labour law's subjects and domains thus requires addressing the interdependence of production and social reproduction. However, Routh questions whether feminist labour law scholars have not reproduced a productive bias in justifying the contributions made by homework and care work (as non-market activities). Rather than seeking recognition of home and care work by the market, Routh uses the notion of 'public good' to argue that a justification must be found outside the market for care work. Yet, as Zbyszewska argues, promoting such a justification poses a danger in – again – not recognising home and care work as something of value and, more importantly, possibly opens the door to coercive obligations to provide such work because it is in the public interest. Zbyszewska and Routh's contribution therefore neatly illustrates the tensions inherent in labour market inclusion and exclusion, and the potential interplay between the market and other social goods, such as care.

The final contribution in this Part comes from Ralf Rogowski, who recalls Ton Wilthagen's two-decade old proposal for advancing labour law theory, and uses it as a framing device for his comment. As Rogowski reminds us, the elements

of this proposal to make labour law fit for contemporary conditions included: multidisciplinary; attentiveness to the relations between labour law, employment relations, labour markets and the state; deconstruction of neoliberal economism and its normative assumptions; inclusion of the policy dimension; and development of a theoretical frame for labour law based on the notion of reflexivity. While Rogowski's comment is refracted through his own interest in reflexive law – a theoretical approach to which he has greatly contributed – the fact that each chapter in this last section tackles at least one of the elements Wilthagen identified attests to the need for a multiplicity of tools and approaches for inclusive labour law theory. Moreover, Rogowski's comment picks up on the broader concern that traverses this volume, namely challenging the link between work regulation and neoliberal policy, be it through revitalisation of collective action (Part B), or the search for alternative logics to those that prioritise markets and emphasise production as a key aspect of social life (Parts A, B and C). Rogowski's comment also helpfully identifies ways in which this agenda can be advanced, via areas for future research and scholarship. He particularly emphasises the global nature of labour law, and reiterates the need to consider global conditions in research and scholarship.

IV. Conclusion

This volume advances the conversation about how we might develop a more inclusive labour law theory. Rather than proposing a singular vision, and while acknowledging the contestable nature of 'inclusiveness', we propose the notion of inclusivity as an overarching umbrella concept and an approach to scholarship.

To that end, this book showcases the diverse ways in which labour lawyers and our colleagues in adjacent disciplines theorise possibilities for labour law's future development. Within this diversity, the contributions are united by a number of joint commitments. The three overarching features of inclusivity that we have highlighted here are: a rejection of economism that seeks to weaken protections and fragment solidarity under the guise of inclusivity; a commitment to sociality and solidarity between differently situated workers; and openness to a multiplicity of regulatory, methodological and conceptual tools and approaches, as well as to scholarly voices across generations and jurisdictional boundaries.

As the contributions highlight, these commitments are not necessarily novel. Rather than being beholden to history, however, the vision of inclusive labour law that emerges here is conceptually and normatively informed by and grounded in the past, but also unafraid of change, so long as this change advances the values of democratic participation, social justice, and protection of a broader range of work activities and the people who perform them. This collection, then, offers a roadmap and a rallying call for a future of inclusive labour law scholarship.