

**Beyond Protection:  
An Informal Economy Perspective on  
Labour Law**

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August 2013

A thesis submitted to McGill University in partial  
fulfillment of the requirements of the degree of  
Master of Laws

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### **Abstract**

The large cohort of workers in the “informal economy” commonly described as lying “beyond the protection of labour law” represent a serious challenge (though not the only one) to the adequacy and legitimacy of labour law’s normative tools and legitimating narratives. Drawing on a critical review of recent work at the ILO and by WIEGO (an international research-advocacy network focused on women in the informal economy), the thesis tries to provide insight into the nature of that challenge. The heterogeneity of informal work calls for prudence to avoid still-popular folk images rooted in the Fordist-era organization of work in the global North. Capturing that diversity instead requires “socio-economic” approaches attentive to the particulars of the networks of production that workers participate in, and the complex interaction between working practices and state regulation. Ultimately, however, providing a platform for workers to pursue their capabilities requires labour law to go beyond “protection” as a structuring discourse and embrace a broader normative horizon.

### **Résumé**

Les travailleurs de l'«économie informelle» souvent décrit comme «au-delà de la protection du droit du travail» représentent un défi sérieux (mais pas le seul) qui menace la pertinence et la légitimité des instruments et discours normatifs du droit du travail. En utilisant une analyse critique des textes récents produits par l'OIT et par WIEGO (un réseau international de recherche et de plaidoyer centré sur les femmes dans l'économie informelle), cette thèse offre une perspective quant à la nature de ce défi. L'hétérogénéité du travail informel demande de la prudence, afin d'éviter de rester dans les images folkloriques ancrées dans l'ère du travail "Fordiste" des pays du Nord. La réponse à cette diversité exige plutôt un approche «socio-économique» non seulement attentifs aux particularités des réseaux de production dans lesquelles les travailleurs participent, mais aussi alerte aux interactions complexes entre les pratiques de travail concrètes et la réglementation de l'État. En fin de compte, cependant, afin de fournir aux travailleurs une plateforme leur permettre de poursuivre leurs «capabilités», il faudrait que le droit du travail cherche au-delà de la «protection» pour ses discours de structuration, en adoptant un horizon normatif plus large.

## **Acknowledgements**

Thanks are due to the mentors who not only inspired my interest in “international labour law” but who also allowed me to make it a field of practice: Brian Langille, Kerry Rittich, and Francis Maupain. This project also results from numerous conversations with students, professors and Sauvé Scholars at McGill University, and staff at the International Labour Organization. The finished product would not be what it is today, without the encouragement, patience, and sharp, thoughtful feedback I received from my supervisor, Adelle Blackett. Special thanks are due, for obvious reasons, to Jessica Bate. Funding support from the *Centre de recherche interuniversitaire sur la mondialisation et le travail* and the Labour Law and Development Research Laboratory is gratefully acknowledged. All errors are mine.

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## 1. Introduction: Informality and the Promise of Labour Law

*One day the snake was told "there are boubous for sale at the market."  
"How nice," the snake, supreme, replied, "for those with shoulders!"*<sup>1</sup>

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Something on the order 50% of the world's population work in "informal employment"<sup>2</sup> and therefore "without the protection of labour law," with, on average, lower incomes and greater poverty rates than the rest of the population.<sup>3</sup> Indeed, in many countries of the developing world, the percentage is much higher, estimated for example to be over 90% of India's workers.<sup>4</sup>

To lawyers and economists both, these workers are seen as "beyond the regulatory and protective reach of the state altogether;"<sup>5</sup> they "escape the gamut of regulations," including those aimed at protecting workers;<sup>6</sup> fail to come "within the practical reach of regulation;"<sup>7</sup> lie "outside the reach of different levels and

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<sup>1</sup> A proverb from the Sahel, quoted in Mamadou Diawara, "Mobilizing Local Knowledge" (2006) 27:2 Comp Lab L & Pol'y J 225.

<sup>2</sup> See International Labour Office, *Women and Men in the Informal Economy: A Statistical Picture* (Geneva: International Labour Office, Employment Sector, 2002) at 19 (as percentage of non-agricultural employment, informal employment constitutes 48% in North Africa, 72% in Sub-Saharan Africa, 51% in Latin America, 65% in Asia); Martha Alter Chen, "Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment" in Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, eds, *Linking the Formal and Informal Economy: Concepts and Policies* (Oxford: Oxford University Press, 2006) 75 at 82 (informal employment is one half to two thirds of non-agricultural employment in developing countries, and much higher portion of all employment); c.f. Marc Bacchetta et al, *Globalization and Informal Jobs in Developing Countries* (Geneva: International Labour Organization and World Trade Organization, 2009) at 26 (49.9% of global employment in "own account and contributing family workers"); *ibid* at 27 (as proportion of total employment, informal employment is 52.2% in Latin America, 78.2 in Asia, 55.7% in Africa).

<sup>3</sup> See e.g. Martha Alter Chen et al, *Progress of the World's Women 2005* (New York, NY: UNIFEM, 2005), ch 3.

<sup>4</sup> This may have to do with the complexities of India's particular regulatory response to informality. See below, note 57.

<sup>5</sup> Kerry Rittich, "Core Labor Rights and Labor Market Flexibility: Two Paths Entwined?" in Permanent Court of Arbitration, ed, *Labor Law beyond Borders: ADR and the Internationalization of Labor Dispute Settlement* (New York: Kluwer Law International, 2003) at 169. Compare Kerry Rittich, "Global Labour Policy as Social Policy" (2008) 14 Canadian Lab & Emp LJ 227 at 257 ("work...where, de facto or de jure, labour standards, collective bargaining law, and employment protections do not reach").

<sup>6</sup> Alvaro Santos, "Labor Flexibility, Legal Reform, and Economic Development" (2009) 50 Va J Int'l L 43 at 95.

<sup>7</sup> Kevin Banks, "Trade, Labor and International Governance: An Inquiry into the Potential Effectiveness of the New International Labor Law" (2011) 32 Berkeley J Emp & Lab L 45 at 51.

mechanisms of official governance,”<sup>8</sup> in some cases because their “fragmented workplace realities...have been moved out of the reach of national regimes of labor law protection.”<sup>9</sup>

Perhaps unsurprisingly, the situation has been characterised as one of the two key challenges facing labour law.<sup>10</sup>

The challenge posed by the informal economy, however, is not only regulatory, but first and foremost conceptual. Are workers “without the protection of labour law” simply because labour law is not being enforced, as a result of lack of capacity or otherwise? Perhaps their employers have broken ties with labour law because it imposes an “impossible burden.”<sup>11</sup> Are they “beyond” labour law’s protections simply because they are outside the regulatory ambit of labour laws? If their work falls outside labour law’s traditional regulatory frame, does that prevent it from being labour law’s problem, or should it trouble labour law’s frames of reference? Perhaps these workers actually lie “beyond” labour law’s normative horizon? Where does the problem lie—in the informal economy alone? in the developing world? or in labour law itself?

Here lies the paradox. For if it were true that the informal economy truly lay *beyond the reach* of labour law, then no matter the urgency of the hardships of those labouring there, they would not be, nor could be, labour law’s problem.<sup>12</sup> Indeed, some make exactly that argument.

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<sup>8</sup> Basudeb Guha-Khasnobis, Ravi Kanbur & Elinor Ostrom, “Beyond Formality and Informality” in Guha-Khasnobis, Kanbur & Ostrom, eds, *supra*, note 2, 1 at 4.

<sup>9</sup> Peer Zumbansen, “The Parallel Worlds of Corporate Governance and Labor Law” (2006) 13:1 *Indiana Journal of Global Legal Studies* 261 at 301–02.

<sup>10</sup> Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland, Or.: Hart, 2006) at 1.

<sup>11</sup> International Labour Organization, “Dilemma of the Informal Sector” in *Report of the Director General* (Geneva: ILO, 1991) Part I at 6.

<sup>12</sup> In its simplest version, this can be understood as a simple corollary of the idea that “ought implies can.”



## A. Theoretical Incongruities?

With apologies to Albert Hirschman, the arguments against saddling labour law with the responsibility for workers in the informal economy might be grouped together under the headings of irrelevance, perversity, and futility.<sup>13</sup>

The first obstacle standing in the way of integrating accounts of the informal work into labour law is a persistent, niggling suspicion—albeit seldom made explicit—that labour law provides a window on work with little meaningful intersection with the informal economy. For some scholars, insofar as labour law provides a platform holding individuals above the tumults of poverty, exploitation and powerlessness at work, that platform has traditionally extended only to “employees”—and a large portion of the informally employed are not employees at all; they “work for themselves.”<sup>14</sup> For many of the remaining workers, “informality” can be framed as a simple question of inadequate enforcement.<sup>15</sup> The conclusion is that informal work is either an elementary challenge,<sup>16</sup> or one irrelevant to labour law.

Others suggest that—inasmuch as these challenges are limited to the third world—the tools to address them are best sought in the “international development” project.<sup>17</sup> Some in the development community would even deploy the rhetoric of perversity, and argue that labour law is inimical to the development process, and therefore detrimental to the best strategy to raise living standards for informal

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<sup>13</sup> Compare Albert O Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1991).

<sup>14</sup> International Labour Organization, “Dilemma”, *supra* note 11 at 37–38.

<sup>15</sup> Guy Davidov, “Enforcement Problems in Informal Labor Markets: A View from Israel” (2005) 27:1 *Comp Lab L & Pol’y J* 3 (arguing, inter alia, that own-account workers in the informal economy are irrelevant to labour law, and that the problem for the remainder is simply a matter of fully enforcing existing law); see also Anne Trebilcock, “International Labour Standards and the Informal Economy” in Jean-Claude Javillier, Bernard Gernigon & George Politakis, eds, *Les normes internationales du travail, un patrimoine pour l’avenir: mélanges en l’honneur de Nicolas Valticos* (Geneva: International Labour Office, 2004) 585 at 592 (the failure to apply and effectively enforce international labour standards in the informal economy is simply “a failure of governance”); but see Anne Trebilcock, “Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law” in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 63 at 63 (suggesting that confronting informality may require looking at labour law through development frames).

<sup>16</sup> The claim is that informality is elementary, not because it presents no practical challenges for labour standards enforcement, but because it offers no novel analytical challenge.

<sup>17</sup> See Chapter 3, below.

workers.<sup>18</sup> There is a risk that the rush to extend protection to the informal sector would only reduce its capacity to provide work and income to vulnerable populations.<sup>19</sup>

A softer version of the argument, adopted by many labour law scholars, is that development is simply *prior* to labour law. In this narrative, those working in the informal economy represent that part of developing economies for which the frame of labour law is (as of yet) inappropriate; trying to use labour law before development has proceeded sufficiently would be futile. The capacity of labour law to meet the needs of workers is predicated either on gradual formalization *qua* industrialization,<sup>20</sup> or on an increased state regulatory capacity that comes only with economic growth.

These objections stand on shakier ground than they might have before labour law's current crisis,<sup>21</sup> a crisis triggered as "employment" crumbles as the unique foundation for the regulation of work. That crisis has spurred both scholars and practitioners into a search for new theoretical foundations<sup>22</sup> beyond the narrative of

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<sup>18</sup> See e.g. World Bank, *World Development Report 1995: Workers in an Integrating World* (New York NY: Oxford University Press for the World Bank, 1995) at 70–84 ("interventions" in labour markets can create good jobs for some at the expense for others, prevent workers from moving to more productive uses, and create market distortions); Norman V Loayza, Ana María Oviedo & Luis Servén, "The Impact of Regulation on Growth and Informality: Cross-Country Evidence" in Guha-Khasnobis, Kanbur & Ostrom, eds, *supra*, note 2, 121 (providing data showing negative correlation of labour regulation with growth); see generally Santos, *supra* note 6 at 47–48.

<sup>19</sup> International Labour Organization, "Dilemma", *supra* note 11 at 2.

<sup>20</sup> See, e.g. Banks, *supra* note 7 at 51 (justifying focus on formal sector alone on the basis that industrialization will gradually pull workers out of informality).

<sup>21</sup> Among the huge diversity of sources exploring this theme, see, e.g. Massimo D'Antona, "Labour Law at Century's End: An Identity Crisis?" in Joanne Conaghan, Richard Michael Fischl & Karl E Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (New York: Oxford University Press, 2004) 31; Kamala Sankaran, "Protecting the Worker in the Informal Economy: The Role of Labour Law" in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 205 ("The laws regulating and protecting people at work are in crisis."); Kerry Rittich ("Between Workers' Rights and Flexibility: Labor Law in an Uncertain World" [2010] 54:2 Saint Louis ULJ 565) traces this back at least as far as Paul Weiler's work (; *Governing the Workplace: The Future of Labor and Employment Law* [Cambridge, Mass.: Harvard University Press, 1990]) on "governing the workplace". Hugh Collins has traced the "crisis" label back to Lord Wedderburn, R. Lewis and J. Clark, eds, *Labour Law and Industrial Relations* (Oxford: Clarendon, 1983) 144 (labour law facing "a crisis in fundamental concepts").

<sup>22</sup> See especially the pieces collected in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (New York: Oxford University Press, 2011).

correcting for the subordination of the employee to their employer.<sup>23</sup> For many, if labour law is to contribute meaningfully to justice at work, it can no longer be seen as the law of the employment relationship<sup>24</sup> (indeed, a generation of feminist scholarship has aimed to illustrate just how much work this always left unregulated, i.e. regulated by other forces).<sup>25</sup>

The idea that labour standards are a luxury to be purchased by richer, less fragmented societies, on the other hand, is unsettled by the growing recognition that social rights can themselves play an instrumental role in moving toward development outcomes.<sup>26</sup> Still, as much as the mandate of “development” has expanded beyond growth and industrialization in recent years,<sup>27</sup> it remains obvious (to some) that the development frame remains better equipped to investigate the sources of productivity and growth than do labour law’s discourses.

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<sup>23</sup> The classic statement in the Anglo-American world is O Kahn-Freund, “A Note on Status and Contract in British Labour Law” (1967) 30 Mod L Rev 635 (imposed and implied terms of the contract of employment are justified by the employee’s relatively limited bargaining power); but see Harry Arthurs, “Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment” (2012) 34 Comp Lab L & Pol’y J 585 at 586 (labour law as an autonomous discipline came earlier in continental Europe).

<sup>24</sup> Harry Arthurs & Commission on the Review of Federal Labour Standards (Canada), *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: Commission on the Review of Federal Labour Standards, 2006); and see the three non-Canadian perspectives in the Comparative Labor Law & Policy Journal (introduced by “Fairness at Work: Three Perspectives on the Arthurs Report” [2008] 29:4 Comp Lab L & Pol’y J 475); Mark Freedland, “Application of Labour and Employment Law Beyond the Contract of Employment” (2007) 146:1-2 International Labour Review 3 (pointing to the contract of employment as only one of a “family” of personal work nexuses).

<sup>25</sup> See, e.g. Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (Oxford: Oxford University Press, 2010) (arguing, inter alia, that the “standard employment relationship” was always founded on a social contract that left a subordinated, excluded role for women and non-citizens); Adelle Blackett, “Emancipation in the Idea of Labour Law” in Davidov & Langille, eds, *Idea of Labour Law*, *supra*, note 22, 420 at 429–30 (touching on a substantial body of research tracing connections between the invisibility of care work inside the household and the working conditions of hired domestic workers); see generally Joanne Conaghan & Kerry Rittich, eds, *Labour Law, Work, and Family: Critical and Comparative Perspectives* (New York: Oxford University Press, 2005).

<sup>26</sup> Tonia Novitz & David Mangan, eds, *The Role of Labour Standards in Development: from Theory to Sustainable Practice?* (Oxford: Published for the British Academy by Oxford University Press, 2011) at 5. The idea that social rights may play an instrumental role in promoting growth has been a key part of recent development discussions. See generally Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

<sup>27</sup> Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 203.

But the deeper problem with the “development first” viewpoint flows from the same crisis that besets the irrelevance claim. For, if the crisis has opened the regulatory horizon of labour law, then the question need not be “what can labour law offer to informal workers?” but might be instead “what should labour law be, given the realities faced by informal workers?” Perhaps labour lawyers need to look at work through a different window.

## **B. Normative Overlap**

The crisis has put in question not only labour law’s regulatory frame, but also its normative assumptions. Proposals for renewal have pointed to labour market equality,<sup>28</sup> efficient production,<sup>29</sup> and the management of collective action problems in labour markets<sup>30</sup> as potential options for new foundations. This thesis however operates under the assumption that there is no need to abandon the normative ideal expressed in the ILO’s Constitution: the overarching commitment, under the banner of social justice, to pursue conditions where “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity...”<sup>31</sup>

The starting point for inquiry is the wide gap between that high expression of labour law’s purpose and the challenge Karin Mickelson places at the foundation of “Third World Approaches to International Law,” namely that “the basic reality of the international system remains...that 20 percent of the world’s population consumes

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<sup>28</sup> Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (New York: Oxford University Press, 2005).

<sup>29</sup> Brian Langille, “Labour Law’s Back Pages” in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 15.

<sup>30</sup> Alan Hyde, “What is Labour Law?” in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 37.

<sup>31</sup> *Constitution of the International Labour Organization, Part XIII of the Treaty of Peace between the Allied Power and Associated Powers Germany*, Versailles, 28 June 1919, UKTS 1919 No 4 (entry into force: 10 April 1920) [*ILO Constitution*], Annex (Declaration of Philadelphia). See Brian Langille, “What is International Labour Law For?” (2009) 3:1 *Law & Ethics of Human Rights* Article 3 (*international* labour law, at least, should be based not in “justice against markets” but in the idea of social justice).

80 percent of its resources; that approximately one-fifth of the world's population lives in conditions of absolute poverty.”<sup>32</sup>

Lest there be any doubt, such poverty and inequality remain, in even more ways than they are in the industrialized countries, problems connected to *work*.<sup>33</sup>

What is less clear is that the nature of those connections to work is the same as those that drove labour law's narratives throughout the 20th century. Thus, while informality in no way puts in question the commitment to social justice, it does raise questions about the nature of the most relevant threats to social justice. Indeed, part of what marks “informality” as preferable to other discourses focusing on those excluded from the benefits of both development *and* labour law (such as, for example, discussions of the “working poor”), is precisely its casting of the problem as a matter of imperfect fit between existing regulatory frames and the on-the-ground realities of work.

### **C. From a “Labour Law Perspective” to an “Informal Economy Perspective”**

The ILO's relationship to labour law, both as domestic legislation and as international jurisprudence, is of course complex, but there are three reasons it deserves attention in an exploration of the nature of the challenge that informality presents to labour law. The first, though least salient, is that the “informality” discourse was more or less a product of ILO efforts to bring attention to the developing world's working poor in the 1970s.<sup>34</sup>

The second, as given some exploration in the conclusion, is that informality is an issue with meaningful transnational dimensions.

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<sup>32</sup> Karin Mickelson, “Rhetoric and Rage: Third World Voices in International Legal Discourse” (1997) 16 *Wis Int'l LJ* 353 at 418.

<sup>33</sup> Nomaan Majid, “The Working Poor in Developing Countries” (2001) 140:3 *International Labour Review* 271 (in absence of minimum income guarantee, higher unemployment is actually likely to be associated with *lower* poverty rates, because poverty is associated with work); Gary S Fields, *A Guide to Multisector Labor Market Models* (Washington DC, 2004) at 1; see also Martha Alter Chen, Joann Vanek & Marilyn Carr, *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Handbook for Policy-Makers and Other Stakeholders* (London: Commonwealth Secretariat and International Development Research Centre, 2004) at 9.

<sup>34</sup> See below, Chapter 2.

Finally, the ILO has been a key actor in efforts over the last twenty years to build what might be called a “labour law perspective” on the informal economy. The attention of the international labour movement was focused on the informal economy by the 1991 discussion of the Director General’s (DG) report at the ILC.<sup>35</sup> Spurred on by the DG’s focus on more comprehensive and detailed data collection,<sup>36</sup> and aided significantly by research and analysis by the International Labour Office (the “Office”), the International Conference of Labour Statisticians (ICLS) crafted definitions that literally made informal workers “count” for the first time. Following discussions in 2001, the International Labour Conference<sup>37</sup> (ILC) passed a set of *Conclusions on Decent Work and the Informal Economy*.<sup>38</sup> The Office has also published numerous reports on the application of labour standards in the informal economy.<sup>39</sup>

Much of the work produced by the Office and its officials have used the metaphor of “extending” labour law,<sup>40</sup> explored ways in which international labour standards already apply to informal workers,<sup>41</sup> and insisted on the applicability of fundamental rights at work to the informal economy.<sup>42</sup> Here, the “labour law perspective on informality” focuses on how to fit informal work under the protection of labour law’s umbrella.

The next three chapters use labour law differently. The normative commitments remain central, but with a focus shifted to the particular connections that informal work has to poverty, risk and subordination. As for labour law’s specific rules,

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<sup>35</sup> International Labour Organization, “Dilemma”, *supra* note 11; see Martha Alter Chen, “Rethinking the Informal Economy: From Enterprise Characteristics to Employment Relations” in Neema Kudva & Lourdes Benería, eds, *Rethinking Informalization: Poverty, Precarious Jobs and Social Protection* (Cornell University Open Access Library, 2005) 28 at 30.

<sup>36</sup> International Labour Organization, “Dilemma”, *supra* note 11 at 20–21.

<sup>37</sup> The ILO’s tripartite ILC is the highest decision-making body at the ILO, and its “legislative” organ.

<sup>38</sup> International Labour Organization, *Conclusions Concerning Decent Work and the Informal Economy*, International Labour Conference, 90th Session (Geneva: International Labour Office, 2002).

<sup>39</sup> Charlotta Schlyter, *International Labour Standards and the Informal Sector: Developments and Dilemmas*, Working Paper on the Informal Economy 2002/3 (International Labour Organization, 2002); International Labour Office, *Extending the Scope of Application of Labour Laws to the Informal Economy* (Geneva: International Labour Organization, 2010).

<sup>40</sup> International Labour Office, *Extending Scope*, *supra* note 39.

<sup>41</sup> Trebilcock, “Labour Standards”, *supra* note 15 at 589–90.

<sup>42</sup> *Ibid* at 590; International Labour Organization, “Dilemma”, *supra* note 11 at 39–41.

nothing is taken for granted. In the analysis, current and proposed regulatory frameworks play an important a role, not always because they are most appropriate, but also because they can serve as useful foil or analogy to illustrate a promising approach. Retained, as well, is a set of lessons that have been important in crafting labour law's narratives: the gap between law on the books and law in action; the necessity of taking into account workplace-level norms and not only state rules; the constitutive, and not only regulatory, power of law; and the usefulness of defining relationships functionally. My goal is nothing so ambitious (or foolhardy) as crafting a totalizing "labour law frame" for the regulation of work. Rather, I intend to contribute to ongoing analysis that highlights useful questions for labour lawyers to ask as they attempt to transcend the "beyond the reach" model of informality.<sup>43</sup>

To that end, Chapter 2 begins with a general introduction to the contentious debates that have characterized discussion of and research on "the informal economy." To orient the reader, it provides a rough sketch of the classes and categories of work that have been captured by the two classifications of the informal economy crafted under ILO auspices at the ICLS. Tracing the historical origins of those definitions, the chapter examines and critiques three ways of trying to bring order to that diversity: minimal consensus, synthesis and segmentation. In addition to providing an orientation, however, the chapter reveals the shortcomings, lacunae and tensions in the application of the "employment-based approach" to informal work which lies at the heart of the ICLS definitions.

Chapter 3 argues for a move away from attempts to craft a regulatory frame by comprehensively categorizing types of informal work, and toward a regulatory classification organized around the forms of subordination that characterize what Mark Freedland would call the "work nexus" associated with particular types of informal work. Drawing on work by Ravi Kanbur, it then points to the need to pay

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<sup>43</sup> I have taken particular inspiration from scholarship produced by the Labour Law and Development Research Network, and the work of Rose-Marie Belle Antoine, Tzehainesh Teklè and Adelle Blackett.

attention not only to the appropriateness of the regulatory frame, but to the quality of fit between on-the-ground practices and overall regulatory technique.

Chapter 4 starts with an unravelling of the connected threads of thought weaved into labour law's traditional "protective" functions: exploitation, risk, and discrimination. By digging more deeply into the livelihood challenges of informal workers, it proceeds toward two conclusions. The first is that, even under an idealized scaffold of "ramified subordination" suggested in chapter 3, the protection concept provides inadequate leverage for informal workers to achieve the "justice against markets" that ultimately colours labour law's traditional narratives. In particular, it points to forms of "market subordination"—poverty or exclusion—that contradict the social justice ideal, while remaining inaccessible to labour law's traditional protections. Second, the chapter shows that such market subordination is not limited to informal work, thus pointing to the need to craft policy solutions that transcend the formal-informal divide. Indeed, in concluding with an endorsement of a "decent work" approach to informality, overall stress is placed on the need to forgo regulatory strategies rooted in the nature and boundaries of "informality" itself, in favour of specificity about the relationships—between economic actors, but also between those actors and official institutions—that constitute and contribute to the subordination *and* exclusion underlying poverty and powerlessness for both "informal" *and* formal workers.

The analyses in chapters two to four draw heavily from a critical reading of research and advocacy documents produced and published by WIEGO.<sup>44</sup> Two factors make WIEGO's work a particularly fertile site for analysis. As explained in chapter 3, WIEGO worked closely with the ILO as it developed its own "informal economy" framework, and helped to craft the influential "employment-based approach" that has focused recent informality discussions on the situation of workers rather than the organization of production. On the other hand, through its on-the-ground research and advocacy, the organization has also played an active role in cataloguing

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<sup>44</sup> WIEGO ("Women in Informal Employment Globalizing and Organizing") is a "global action-research-policy network" focused on women working in the informal economy.



the “buzzing, blooming confusion” of informal work, without the burden of institutional ties to existing international labour standards. As a result, their analysis can often be read against itself, as it simultaneously provides support and advocacy for synthesis-, segmentation- and protection-based approaches, while offering case-studies on particular groups of workers, and important statistical data demonstrating the weakness of those approaches.

The conclusions in chapter 5 summarize the two key findings of chapters three and four: first, that the relationships of production found in the informal economy require particular, innovative conceptual frames and careful, responsive regulation, and second, that intervening in ongoing relationships of production may be an inadequate tool to address social justice for workers in the global south. It then addresses some broader questions that might be considered in attempts to construct a constituting narrative for labour law, one that takes into account the particular market dynamics and working realities of developing countries. It finishes with optimism about labour law’s usefulness in addressing the normative challenges of informal work, but insists that it will require uncomfortable questions, broader perspectives and a willingness to take on new challenges.

## 2. Into the Thicket

Debates over the nature of informality—and how to respond to it—have a tangled history. Since the terminology was first applied in the early 1970s, the “informal economy” has been the subject of intense study and attention, none of which unfortunately has ended the conceptual confusion, trenchant disagreements, and sometimes contradictory empirical findings regarding the people, enterprises, and activities collected under the “informality” banner. Even the label itself has been in flux: Keith Hart, an anthropologist attributed with first applying the “informal” label,<sup>45</sup> was primarily concerned not with the boundaries of an “informal sector,” but with being analytically specific about “informal income opportunities.”<sup>46</sup> Nonetheless, his use of the “informal sector” terminology was determinative,<sup>47</sup> and that language became the primary reference point for many years thereafter.<sup>48</sup> A recent strand of policy and research has deployed what is intended to be a broader term—the “informal economy”—to stress the common intermingling in practice of “formal” and “informal” activities, the continuum of practices between formal and informal, and the heterogeneity of informal practices. For some however, “the informal economy” still evokes an image of two separate spheres of economic

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<sup>45</sup> The standard account attributes the delimitation of the informal sector to a presentation by Hart in 1971, subsequently published in 1973 (Keith Hart, “Informal Income Opportunities and Urban Employment in Ghana” [1973] 11:1 *The Journal of Modern African Studies* 61); and to an ILO report on Kenya, published in 1972 (International Labour Organization, *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya* [Geneva: ILO, 1972]). But see Paul E Bangasser, *The ILO and the Informal Sector: An Institutional History*, Employment papers 2000/9 (Geneva: International Labour Office, 2000) (many of the heterodox findings regarding the informal economy came from Kenyan development professionals and academics, not from the international professionals who had been hired to lead the ILO’s in-depth employment study).

<sup>46</sup> Indeed, the idea of treating informal and formal work as “sectors” was floated as one possible way of understanding the reality of the former. See Hart, “Informal Income Opportunities”, *supra* note 45.

<sup>47</sup> See *ibid* at 85.

<sup>48</sup> This was the language used by the ILO, from the Kenya report to the 1991 ILC discussion (International Labour Organization, “Dilemma”, *supra* note 11); it is still in vogue in many circles. See Guillermo E Perry et al, *Informality: Exit and Exclusion* (Washington, D.C.: World Bank, 2007).

activity.<sup>49</sup> For that reason, many have resorted to speaking instead simply of “informality”<sup>50</sup> or the “informalization”<sup>51</sup> of particular economic practices.

At the core of debates regarding the causes of informality, the scale of the “problem,” and the most effective responses are deeper disagreements about what factors can be used, individually or in combination, to identify a certain practice as either “formal” or “informal” (or at least, as more or less “informal”). Factors that have been treated as relevant include precarious work,<sup>52</sup> the flexibility of work relations,<sup>53</sup> lack of official registration with tax and administrative authorities,<sup>54</sup> and noncompliance with particular regulatory requirements (especially with state-

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<sup>49</sup> Trebilcock, “Labour Standards”, *supra* note 15 at 64–65.

<sup>50</sup> See, e.g. Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8.

<sup>51</sup> For a recent endorsement of the “informalization” approach, see Elizabeth Hill, *Worker Identity, Agency and Economic Development: Women’s Empowerment in the Indian Informal Economy* (New York: Routledge, 2010); she attributes this approach primarily to the work of Alejandro Portes and, in particular to Alejandro Portes, Manuel Castells & Lauren A Benton, eds, *The Informal Economy: Studies in Advanced and Less Developed Countries* (Baltimore, Md: Johns Hopkins University Press, 1989).

<sup>52</sup> See Hill, *supra* note 51 at 21–22 who, following a diachronic review of the literature, suggests the existence of an “emerging consensus” that “...it is the precarious nature of work, and the socio-economic vulnerability attached to work which is neither recognised, regulated or protected that sets informal workers apart.” On the idea of “precarious work” see e.g. Judy Fudge & Rosemary Owens, eds, *Precarious Work, Women and the New Economy: the Challenge to Legal Norms* (Oxford: Hart Pub., 2006). While there are important overlaps between the dimensions of precarious work identified in this literature—degree of uncertainty regarding continued availability of work, lack of control over the conditions of work, degree of regulatory protection and adequacy of income level—and the concerns about social justice in the informal economy raised here, the foundation of the precarious work literature in the labour markets of developed Northern countries has aligned this research with the “employment-based approach” critiqued below.

<sup>53</sup> While alluding to an old version of “informality” associated with small, family enterprise, Guy Standing identifies informalization in the developing world with the creation of “jobs” without regular wages, without benefits, and without employment protection. Indeed, he essentially treats informalization as synonymous with what he calls “flexibilization”—the trend toward casual, part-time, temporary and subcontracted labour and work which does not benefit from statutory labor laws. Guy Standing, “Global Feminization Through Flexible Labor: A Theme Revisited” (1999) 27:3 *World Development* 583 at 585, 587. For arguments connecting the discourse of “labour market flexibility” with an increasing role for market forces in labour regulation, see Guy Standing, *Global Labour Flexibility: Seeking Distributive Justice* (New York: St. Martin’s Press, 1999); see also Kerry Rittich, “Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work” in Fudge & Owens, eds, *supra*, note 52, 31; Rittich, “Two Paths”, *supra* note 5; and Emily Grabham, “Doing Things with Time: Flexibility, Adaptability, and Elasticity in UK Equality Cases” (2011) 26:3 *CJLS* 485; but see Santos, *supra* note 6 (pointing to the multiple agendas which can be connected to labour market flexibility).

<sup>54</sup> See the discussion of the Indian case, below note 57

promulgated labour laws).<sup>55</sup> Some confusion has likely been caused by assumptions about the inherent correlation between such factors,<sup>56</sup> but the challenges have also been exacerbated by the obvious difficulty of measuring phenomena which are, according to at least some definitions, outside the ambit of official enumeration. In some cases, conceptual coherence has been hindered as easily-measured factors have displaced the qualities originally thought to be most relevant, not only for descriptive purposes but in policy formulation, as well.<sup>57</sup>

It is tempting to imagine resolving such inconsistencies by unravelling the “true nature” of the informal economy. That task would require a longer philosophical detour than is necessary here—even assuming it were possible: given the scale and diversity of situations it has been used to describe, trying to give a comprehensive description of the informal economy is like trying to describe “the economy.”

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<sup>55</sup> These are particularly relevant in what Martha Chen has described as “legalist” and “voluntarist” approaches to informality. See Martha Alter Chen, *The Informal Economy: Definitions, Theories and Policies*, WIEGO Working Paper No 1 (Cambridge, MA: WIEGO, 2012) at 4–6.

<sup>56</sup> In Hart’s seminal paper (“Informal Income Opportunities”, *supra* note 45 at 68), the division between the informal and formal sectors turned simultaneously on the rationalization of work—whether workers are hired on a predictable or permanent basis with predictable remuneration—and on the amenability of enterprises to enumeration. In Hart’s estimation, these two factors are highly correlated, because bureaucratization of the firm leads both to rationalization of work and to ease of official measurement. Later research has demonstrated a more complicated reality.

<sup>57</sup> For example, the Indian government has long divided economic activities into an “organised” and “unorganised” sector. In this usage, “organised” is primarily a matter of enumeration rather than organization—on one side of the dividing line lies the (theoretically) audited public sector, organisations which make their accounts publicly available, and all registered manufacturing firms; on the other, unregistered manufacturing and, as an unstated residual, other types of economic activity. The question of registration is complicated by the *Factories Act 1948*, 1948, India [*Factories Act 1948*], which defines factories as—and therefore limits mandatory registration to—enterprises where or ten or more persons work regularly (more if no electricity is used); and by the *Collection of Statistics Act 1953*, 1953, India [*Collection of Statistics Act 1953*], which limits regular data collection to factories so defined, but also to other types of economic activities. See National Sample Survey Office (India), *Non-agricultural Enterprises in the Informal Sector in India 1999 – 2000* (New Delhi: Government of India, Ministry of Statistics and Program Implementation, 2000) at 2. In this way, “unorganised” officially became a matter of firm size. No doubt, there is some correlation in other countries between firm size and other factors which might be thought to correspond to “informality”—including a degree of worker insecurity or compliance with regulatory rules. Yet in the Indian case, the question of measurement is inextricably bound up with state policy, especially given that the *Factories Act* not only exempts such small manufacturing firms from registration, but also from the great majority of labour protections, rendering the “evasion” of labour laws a moot question.

Philosophical questions aside, how the boundary of “the economy” is defined in practice has significant normative salience.<sup>58</sup> As put by Anne Trebilcock, a long-time official at the International Labour Office, “what is measured matters.”<sup>59</sup> If it were true, as lamented by the editors of an important recent collection, that “formal and informal are better thought of as metaphors that conjure up a mental picture of whatever the user has in mind at that particular time...”<sup>60</sup> it would be impossible to even see the thicket clearly, let alone find a way out.

Fortunately, this degree of cynicism is unwarranted. Three remarks can help prevent the search from chasing after false leads.

The first is that points of relative consensus underlying the ongoing controversy *have* allowed the creation of definitions for certain statistical purposes, detailed in the next section. What the record of their origins show,<sup>61</sup> moreover, is that they were intended as much to redefine the boundaries of work (and production) for policy purposes as to delimit a concept of informality for statistical purposes.

The second point is that while it can make certain realities “count,” measurement is not what ultimately matters. Measurement may be instrumental in comprehending the scale of social problems, but it is not always essential in understanding the nature of those problems. A bright, clear line setting the informal off from other parts of the economy<sup>62</sup> may be useful in measuring connections between informality and poverty, or its links to inequality, or its correlation with growth, but understanding those links requires close, contextual analysis of actual, possibly diverse social phenomena.

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<sup>58</sup> For example, does care work count as part of “the economy” and in particular, unremunerated care work? What about unremunerated work more generally? What are the implications for different sections of the population of measuring economic improvements or changes using these boundaries? See generally Marilyn Waring, *If Women Counted: A New Feminist Economics* (San Francisco: Harper and Row, 1988). These issues are touched on briefly below, in Chapter 3, Section C.i.

<sup>59</sup> Trebilcock, “Development Approaches”, *supra* note 15 at 72.

<sup>60</sup> Guha-Khasnabis, Kanbur & Ostrom, *supra* note 8 at 3.

<sup>61</sup> See below, section C.i.

<sup>62</sup> Unfortunately, in most uses, the formal and the informal do not provide a comprehensive partition of work or the economy as a whole. See Alice Sindzingre, “The Relevance of the Concepts of Formality and Informality: A Theoretical Appraisal” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2 58 at 63 (criminal activities and reproductive work are each generally excluded from both “formal” and “informal” categories).

The third idea is that what gets seen, ultimately, is a function not only of what gets looked *at*,<sup>63</sup> but also of what one is looking *for*—and the latter in turn is often a reflection of the interests of those asking the questions.<sup>64</sup> Though classifications can bring sense and order to the “great blooming, buzzing confusion” of human activity, they are not scientific and determinate, but contingent and purposive.<sup>65</sup>

Using this collection of ideas as guiding cues, the remainder of the chapter traces three prospective paths out of the thicket and toward a way of understanding informality that is comprehensible and relevant for the achievement of labour law’s normative ends. The first, limited to consensus ideas, is shown to lead to a framework that is too vague for useful legal analysis; a second, that tries to craft a synthetic approach, is rejected as too specific to capture the diversity of informal work; a third, organized precisely around that diversity, is shown paradoxically to borrow too heavily from labour law’s existing normative frames.

What can be concluded from these analyses is already hinted at in the guiding principles: a search for the sharp boundaries of the informal might distract from the underlying task.<sup>66</sup> There is no denying the significance of distinguishing previously concealed, disguised or overlooked social realities. The value of doing so, however, does not depend on whether those realities are labelled as “informal.” Moreover, since what reveals those realities is a reframing—one inevitably dependent on

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<sup>63</sup> See discussion below, notes 375-77 and accompanying text, regarding the limited conclusions that can be drawn about informality based on survey data limited to men in urban centres.

<sup>64</sup> Trebilcock, “Labour Standards”, *supra* note 15 at 585 (statisticians, economists and legal experts have all proposed definitions of informality based on their professional perspective); Sindzingre, *supra* note 62 at 63 (pointing to institutional differences at ILO, World Bank and IMF driving different measurement projects); Carol Lee Bacchi, *Women, Policy, and Politics: The Construction of Policy Problems* (Thousand Oaks, Calif.: Sage, 1999) (policy proposals inherently rely on a representation of the underlying problem). Note that “interests” as used here can both mean either “desired ends” or “what an agent is curious about”, and while the latter is often a reflection of the former, I only mean to bring attention to the link between the nature of the curiosity and the nature of the data one is able to collect.

<sup>65</sup> “Legal Classification: Persons-Things-Actions and Beyond” in Eric H Reiter, *Towards a Reintegration of the Human Being in Law* (Master’s Thesis, McGill University, 2003) [unpublished], ch 1 at 1 quoting William James, *The Principles of Psychology* (Cambridge, MA: Harvard University Press, 1981), vol 1 at 462.

<sup>66</sup> Trebilcock, “Labour Standards”, *supra* note 15 at 585 (“The definitional discourse risks losing sight of the essential question: how can people, whether their work is designated ‘formal’ or ‘informal’, be both empowered and protected?”).

normative assumptions—it is important not to wait to bring the labour lawyer’s tools to the table until after the frame has already been built. The development of a perspective based in a more direct conversation between labour law’s normative concerns and on-the-ground realities begins in the next chapter.

### **A. Seeking Minimal Consensus**

Some easy paths seem to lead out of the thicket. One way—what might be called the “minimal consensus” route—is to keep track solely of those building blocks used in *all* accounts of informal economic activities. If no single mental picture corresponds to the “right” version of the informal economy, certainly some use can be made of relying only on those elements which appear in (almost) every approach.

#### **i. Work and Production in the Developing World**

This route quickly leads to some near-to universal, often implicit aspects of the informality literature.

Perhaps most obvious across the shifts in focus from survival activities<sup>67</sup> to small-scale production,<sup>68</sup> to the role of informality in local and global production chains,<sup>69</sup> is that the literature using “informality” as an operating frame has not only been oriented around economic questions in general, but addressed issues of *work* and the *organisation of production* in particular. This perspective has remained stable, despite the ILO’s tendency to focus on employment dimensions and more recently on working conditions<sup>70</sup> and a greater interest from other quarters on its overall role in national productivity.<sup>71</sup> Keeping hold of this common thread is important,

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<sup>67</sup> Hart, “Informal Income Opportunities”, *supra* note 45.

<sup>68</sup> William F Maloney, *The Structure of Labor Markets in Developing Countries: Time Series Evidence on Competing Views*, World Bank Policy Research Working Paper 1940 (Washington DC: World Bank, Policy Research Dissemination Centre, 1994).

<sup>69</sup> Francie Lund & Jillian Nicholson, eds, *Chains of Production, Ladders of Protection: Social Protection for Workers in the Informal Economy* (Durban, South Africa: School of Development Studies, University of Natal, 2003); Marilyn Carr, ed, *Chains of Fortune: Linking Women Producers and Workers with Global Markets* (London: Commonwealth Secretariat, 2004).

<sup>70</sup> For an overview of the ILO’s engagement, see Bangasser, *supra* note 45. As explored below, in the 1970s the ILO viewed informality primarily through a development lens, not as a matter of protection at work.

<sup>71</sup> For a recent attempt at synthesis, see Bacchetta et al, *supra* note 2. It is interesting to note (see Hill, *supra* note 51 at 13–16) that the research which first addressed development questions through the

because it turns out that the discourse of informality has been used to address matters reaching far beyond these core subjects.<sup>72</sup> Indeed, consideration of even a single collection of studies reveals, in addition to a partial continuation of these trends,<sup>73</sup> a much broader field of situations for which the contrast between “official and unofficial”/“organised and unorganised”/“formal and informal” provide a useful framework of economic analysis.<sup>74</sup> Leaving economic questions entirely, the formal/informal dichotomy is applied in the same collection to understand the contribution made by non-state (i.e. informal) institutions in the success and failure of post-conflict governance.<sup>75</sup>

Also submerged slightly below the surface of the debate is the fact that the main subject of concern has been work and production in developing economies and the global South. It was not until the end of the 1980s that the looming existence of an

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lens of informality was done by the ILO, while World Bank research was first to address the interaction between informality and labour law protection.

<sup>72</sup> See e.g. Rittich, “Second Generation”, *supra* note 27 at 224–25 (pointing to the increasing attention paid to non-legal, “informal” norms in the modern development agenda).

<sup>73</sup> See Roever (Sally Roever, “Enforcement and Compliance in Lima’s Street Markets: The Origins and Consequences of Policy Incoherence Towards Informal Traders” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 246) who returns to a classic subject of analysis, street traders in Lima; Frederik Söderbaum (“Blocking Human Potential: How Formal Policies Block the Informal Economy in the Maputo Corridor” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 163) who provides a closer look at how migration controls contribute to ongoing informalization; Loayza, Oviedo & Servén, *supra* note 18 who trace how the impact of regulatory frameworks on national growth is mediated by informality.

<sup>74</sup> See, e.g. Krister Andersson & Diego Pacheco, “Turning to Forestry for a Way Out of Poverty: Is Formalizing Property Rights Enough?” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 195 (investigating the interaction between legal title over land and customary institutions in sub-Saharan Africa); Basudeb Guha-Khasnabis & Rajeev Ahuja, “Microinsurance for the Informal Economy Workers in India” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 179 (exploring upsides and downsides of using “formal” and “informal” micro-insurance to reduce workplace risks); Robert Lensink, Mark McGillivray & Pham Thi Thu Trà, “Financial Liberalization in Vietnam: Impact on Loans from Informal, Formal, and Semi-Formal Providers” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 145 (examining the prevalence of household borrowing and lending through “formal” and “informal” channels). A narrow focus on the role of informal working relations might miss a great deal which is relevant from the perspective of social justice outcomes. For example, Lensink, McGillivray & Pham found that greater than 50% of household borrowing in Vietnam was through informal channels—though this number includes intra-family lending.

<sup>75</sup> Amos Sawyer, “Social Capital, Survival Strategies, and Their Potential for Post-Conflict Governance in Liberia” in Guha-Khasnabis, Kanbur & Ostrom, eds, *supra*, note 2, 230. All of this is to say nothing about a parallel literature attempting to tackle social analysis through the lens of the divide between “explicit v. implicit”/“mandatory v. voluntary”/“specific v. general” norms. See, e.g. Barbara A Misztal, *Informality: Social Theory and Contemporary Practice* (New York: Routledge, 2000).



“informal economy” in the developed industrialized economies of the global North began to become a question of serious concern.<sup>76</sup> Indeed, the earliest literature was premised on the idea that particular differences between developed and developing economies was precisely what led to the persistence and existence of informality,<sup>77</sup> and most of the literature still takes for granted a focus on the developing world.

**ii. Outlining the Informal: The ICLS Definitions**

The “minimal consensus” route is intended to lead to working definitions that attract little controversy, remain moderately consistent across contexts and avoid conceptual conflation. These three features—lack of controversy, disaggregation and stability—make such definitions particularly suited to statistical applications. The characteristics noted in the last section meet two of these criteria but, partially as a result of referencing both the organization of work and the organization of production, they lack the necessary conceptual coherence necessary to provide a workable benchmark for enumeration—or analysis.

Two resolutions on the subject passed by the International Convention of Labour Statisticians in 1993 (the “1993 Resolution”<sup>78</sup>) and 2003 (the “2003 Guidelines”<sup>79</sup>) therefore sought to refine the consensus, creating a statistical framework that would, at the very least, support further data collection regarding the correlation between informality and other economic factors.<sup>80</sup> Doing so, however, required

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<sup>76</sup> Saskia Sassen, “Informal Economy: Between New Developments and Old Regulations” (1993) 103 Yale LJ 2289 at 2289.

<sup>77</sup> W Arthur Lewis, “Economic Development with Unlimited Supplies of Labour” (1954) 22:2 The Manchester School 139.

<sup>78</sup> International Labour Organization, “Resolution Concerning Statistics of Employment in the Informal Sector” in *Fifteenth International Conference of Labour Statistics, Report of the Conference* (Geneva: International Labour Office, 1993).

<sup>79</sup> International Labour Organization, “Guidelines Concerning a Statistical Definition of Informal Employment” in *Seventeenth International Conference of Labour Statistics, Report of the Conference* (Geneva: International Labour Office, 2003) 12.

<sup>80</sup> The goal of the 1993 Resolution was to “contribute to the improvement of labour statistics and national accounts as an information base for macroeconomic analysis, planning, policy formulation and evaluation, to the integration of the informal sector into the development process and to its institutionalisation. It should provide quantitative information on the contribution of the informal sector to various aspects of economic and social development, including employment creation, production, income generation, human capital formation and the mobilisation of financial resources.” (International Labour Organization, “1993 Resolution”, *supra* note 78, s 1).

creating two distinct but (nearly) compatible definitions, one focusing on production, the other on work.

**a. From the Informal Sector...**

In the first of these texts, an operational definition of the “informal sector” was adopted, referring to a portion of low-organization production units, or—using terminology borrowed from the UN’s System of National Accounts (SNA)<sup>81</sup>—of “unincorporated enterprises owned by households.”<sup>82</sup> This choice left many important controversies unresolved. Whether informality has something to do with registration or non-registration of the business,<sup>83</sup> with “firm” size,<sup>84</sup> or with non-compliance with legislation<sup>85</sup> (and which regulatory frameworks might be relevant in dividing the formal from the informal<sup>86</sup>)—these questions were all left to national discretion and the preferences of those using the standard. As per the SNA, the resulting definitions turned primarily on the lack of a formal legal separation between the revenue streams of a business and its owner(s), and on the absence of

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<sup>81</sup> The SNA is a global compendium of guidelines on the collection of economic statistics compiled and approved by a coalition of international institutions. See Inter-Secretariat Working Group on National Accounts, *System of National Accounts* (Brussels/Luxembourg; New York; Paris; Washington DC: Published jointly by Commission of the European Communities, International Monetary Fund, Organisation for Economic Co-operation and Development, United Nations and World Bank, 1993); see also European Commission et al, *System of National Accounts 2008*, ST/ESA/STAT/SER.F/2/Rev.5 (New York: Published jointly by Commission of the European Communities, International Monetary Fund, Organisation for Economic Co-operation and Development, United Nations and World Bank, 2009) at 471–482 (providing guidelines on “informal aspects of the economy” including reference to 2003 definitions of informal employment).

<sup>82</sup> International Labour Organization, “1993 Resolution”, *supra* note 78, s 6(1)–6(2).

<sup>83</sup> Thus, one can find (*ibid*, s 8(2)) that “[f]or operational purposes, informal own-account enterprises may comprise, depending on national circumstances, either all own-account enterprises or only those which are not registered under specific forms of national legislation.” Similar language appears under s 9(2).

<sup>84</sup> The 1993 Resolution (*ibid* at 9) provides a long list of factors relating to the “number of employees” which might or might not be relevant in this determination: region, industry, country, whether the work is ongoing or seasonal, whether work takes place at more than one “establishment.”

<sup>85</sup> The resolution (*ibid*, s 5(2)) also suggests that informal activities be differentiated from the “underground economy” because “[a]ctivities performed by production units of the informal sector are not necessarily performed with the deliberate intention of evading the payment of taxes or social security contributions, or infringing labour or other legislations or administrative provisions.” (emphasis added) Yet this leaves open the possibility, of course, that informal activities may have something important to do with intentional and unintentional non-compliance.

<sup>86</sup> If it is relevant, then non-registration may be measured “under factories or commercial acts, tax or social security laws, professional groups’ regulatory acts, or similar acts, laws, or regulations established by national legislative bodies.” (*ibid*, ss 8(3), 9(6)).

any formal record-keeping for “the business” proper,<sup>87</sup> while potentially limiting the “informal sector” further by reference to a wide ranging set of additional factors.<sup>88</sup>

**b. ...to the Informal Economy**

When the ICLS returned to questions of informality in 2003, it was primarily in response to critiques of a top-down focus on the informality of *production units*, to the detriment of a full picture of those facing informal *working conditions*.<sup>89</sup> The 2003 Guidelines therefore aimed at creating a definition of “informal employment” that included, but was not exhausted by, the “employment in the informal sector” referenced in the 1993 Resolution.<sup>90</sup> The resulting, expanded category eventually pointed to nine possible forms of informal employment, including:<sup>91</sup>

- members of informal producers’ cooperatives—which were not covered by the 1993 Definition of “informal sector enterprises”;
- those producing goods for the exclusive use of their own household (i.e. subsistence activities), contra the limitation to commercial production and services used in the 1993 definition of the informal sector<sup>92</sup>;
- paid domestic workers (if their job was informal)—a category that also fit poorly with the prior focus on *commercial* production by, and not for, the household;
- most importantly for some observers, the category of “employees holding informal jobs in formal sector enterprises,” a possibility excluded from the 1993 definitions—and explored in more depth below.

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<sup>87</sup> *Ibid*, s 7: “According to the United Nations System of National Accounts (Rev.4), household enterprises (or, equivalently, unincorporated enterprises owned by households) are distinguished from corporations and quasi-corporations on the basis of the legal organisation of the units and the type of accounts kept for them.”

<sup>88</sup> Two sections (*ibid*, ss 8(1), 9(1)) limit informal enterprises to those which meet a list of “conceptual” characteristics listed in ss 5(1) and 5(2), including commercial purpose, low levels of factor separation, casual and unstructured labour relations, and the individualization of financial risk—which are, for the most part, all referred to in language of discretion (“may”; “mostly”; “typically”). Other boundary issues left to discretion included the possible exclusion of all work in the agricultural sector (*ibid*, s 20).

<sup>89</sup> Chen, *Theories and Policies*, *supra* note 55 at 7.

<sup>90</sup> International Labour Organization, “2003 ICLS Guidelines”, *supra* note 79.

<sup>91</sup> See the definition of informal employment in *ibid*, para 3.2.

<sup>92</sup> Compare International Labour Organization, “1993 Resolution”, *supra* note 78, para 14.

Taken uncritically, the ICLS definitions provide an effective illustration of the value and the shortcomings of trying to pin down a minimal consensus. As an effort to make the informal economy “count,” the standardization efforts were highly successful. Not only did the definitions from the 1993 Resolution make their way directly into the System of National Accounts, but the 2003 Guidelines also formed the basis for the first-ever cross-national statistics on the scale of the informal economy and informal employment.<sup>93</sup> Though finding consensus required differentiating work-related from production-related dimensions of informal economic processes, dividing the informal concept also allowed the consolidation of “informal economy” as an umbrella term, in accordance with the *Conclusions on Decent Work and the Informal Economy* passed by the International Labour Conference the previous summer.<sup>94</sup>

As for downsides, the 1993 definitions especially were rather vague and largely discretionary—meaning the comparability of the statistics based on those definitions is somewhat limited. Oddly, however, the 2003 Guidelines left in place whatever vagueness was demanded by compatibility with the earlier definition of the “informal sector,” while providing a surprisingly detailed typology of the working situations covered by “informal employment.”

The expected downside of a relatively stable, uncontroversial measure of informality would be a degree of analytic vagueness; as will be seen below, however, the actuality was that the search to imbue the definitions with some policy relevance may have led to an imperfect fit between analytical categories and on-the-ground realities.

## **B. The Perils of Synthesis**

A second way of trying to escape from the thicket is to leave aside (or take for granted) the conceptual dimensions universally shared across the literature and instead attend precisely to those factors that differentiate the approaches. How various authors have modelled formality and informality, the issues they have

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<sup>93</sup> International Labour Office, *Statistical Picture*, *supra* note 2.

<sup>94</sup> International Labour Organization, *Informal Economy Conclusions*, *supra* note 38.

treated as most relevant, the relationships they have highlighted and, in particular, the kinds of questions they have asked—each can help build an understanding of informality both as policy construct and social practice. Something important about practices in and characteristics of the informal economy can be gleaned from each perspective, even if none of them is treated as capturing the “true” picture.<sup>95</sup>

There are two variations on this stratagem. The first is the attempt to provide a universal, totalizing synthesis of perspectives on informality—to simply cut through the thicket. The history of the literature is littered with failed attempts at offering a “final word” on the informal economy, each crafted by sifting through scholarship to date on the lookout for key insights and theoretical blind spots, reasonable premises and empirical shortcomings. In each case, the outcome has been a kind of Frankenstein’s monster, sewing together what are taken to be the best bits from prior work, and throwing away the rest. This goes beyond “characterizing” the informal economy by collecting together features and factors that have been treated as relevant, to actually providing a picture that ignores certain issues, prioritizes among the remainder and takes sides in any important disagreements.

The immediate advantage of such solutions, of course, is that they “walk and talk,” in the sense of providing a uniform and operable framework for policy-making, regulation—and law. Yet, to stretch the metaphor, they might also be accused of being a bit clumsy and imperfect, committing potentially harmful errors as they make their way in the world. William Maloney’s work provides a case in point here. His central claim is that “as a first approximation we should think of the informal sector as the unregulated, developing country analogue of the voluntary entrepreneurial small firm sector found in advanced countries.”<sup>96</sup> The critiques in Chapter 4 put in serious question how helpful this picture is, even as a “first

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<sup>95</sup> Compare Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, translated by David Pears & B. F McGuinness (New York: Routledge, 2001), para 6.342 (“The possibility of describing a picture [composed of abstract shapes] with a grid of a given form tells us nothing about the picture...But what does characterize the picture is that it can be described completely by a particular grid with a particular size of mesh. Similarly the possibility of describing the world by means of Newtonian mechanics tells us nothing about the world: but what does tell us something about it is the precise way in which it is possible to describe it by these means”).

<sup>96</sup> William F Maloney, “Informality Revisited” (2004) 32:7 World Development 1159 at 1159.

approximation.”<sup>97</sup> Yet the problem is not only with Maloney’s particular model. One of the key lessons of the literature—clear even in the short review of the ICLS definitions above—is that conditions of work and production in the informal sector are themselves heterogeneous. The challenge of addressing informality is not only the conceptual diversity reflected in the literature, but also the diversity of practices captured under the single “informal economy” banner.<sup>98</sup> The problem is relying on *any* one model to try to capture that diversity.

### C. The Sirens of “Segmentation”

The other offshoot, one that tries to capture and address that diversity, pursues analysis based in a “segmentation” of the informal economy.<sup>99</sup> Though the idea of a labour market divided between formal and informal job opportunities was implicit in the idea of an “informal sector” from the very beginning, research in the 1980s began to suggest that the informal sector should also, itself, be seen as segmented. There were a variety of attempts to pursue this strategy. Based on work by Victor Tokman, Gary Fields divided the informal sector into two categories—an “easy-entry informal sector” composed of those who could not find work in the formal economy, and an “upper-tier informal sector” including those who chose to exit the formal sector to set up their own small businesses.<sup>100</sup> Other research explored the possibility that increasing or stagnating levels of informality might be driven by firms deciding to outsource homeworkers and casual subcontractors, thereby depriving them of access to social benefits to which they were otherwise entitled.<sup>101</sup> Such research culminated in the view, traced in the work of Lourdes Benería, that the informal economy might best be viewed as composed of two aspects:

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<sup>97</sup> See below, Chapter 4.C.

<sup>98</sup> In fact, this heterogeneity has led some to argue in favour of abandoning the concept altogether. See e.g. Lisa Peattie, “An Idea in Good Currency and How it Grew: The Informal Sector” (1987) 15:7 *World Development* 851.

<sup>99</sup> Chen, Vanek & Carr, *supra* note 33 at 23–24.

<sup>100</sup> Gary S Fields, “Labour Market Modelling and the Urban Informal Sector: Theory and Evidence” in David J Turnham, Bernard Salomé & Antoine Schwartz, eds, *The Informal Sector Revisited* (Paris: Organisation for Economic Co-operation and Development, 1990) 49 at 50.

<sup>101</sup> Portes, Castells, & Benton, *supra* note 51; and especially Lourdes Benería, “Subcontracting and Employment Dynamics in Mexico City” in Portes, Castells & Benton, eds, *The Informal Economy*, *supra*, note 51, 173.

“[p]roductive activities that used to be performed in core firms” and “subsistent activities generated by the inability...to absorb the unemployed and underemployed.”<sup>102</sup>

**i. The Employment-Based Approach**

Perhaps the most influential segmented model was developed by Martha Chen and the WIEGO network.<sup>103</sup> WIEGO’s analytical segmentation was part and parcel with the organization’s advocacy for (what they called) an “employment-based” approach to the informal economy. At the core of that approach was a concern that multiple forms of work were rendered invisible by their lack of conceptual fit with either “regular” formal-sector employment or the definitions of employment in the informal sector laid out in the 1993 Resolution.<sup>104</sup> Strictly speaking, many of these workers—homeworkers (or “industrial outworkers,” domestic workers, and other casual, temporary workers hired by formal firms<sup>105</sup>)—might have already had a place in the enterprise-based model of the “informal sector:” they could be categorised as *owners* of “informal own-account enterprises.”<sup>106</sup> To the degree that the goal was simply to ensure that these workers were captured in statistical measures (and therefore addressed in policy-making), determining whether individual workers “operated as a fully dependent wage worker or as a truly

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<sup>102</sup> See Lourdes Benería, “Introduction” in Kudva & Benería, eds, *supra*, note 35, 6 at 6.

<sup>103</sup> See especially Martha Alter Chen, Renana Jhabvala & Frances Lund, *Supporting Workers in the Informal Economy: A Policy Framework*, Paper prepared for ILO Taskforce on the Informal Economy (Women in Informal Employment Globalizing and Organizing, 2001). Also published as Martha Alter Chen, Renana Jhabvala & Frances Lund, *Supporting Workers in the Informal Economy: A Policy Framework*, Working Paper on the Informal Economy 2002/2 (Geneva: International Labour Office, 2002).

<sup>104</sup> Martha Alter Chen, Renana Jhabvala & Frances Lund, *Supporting Workers in the Informal Economy: A Policy Framework*, Working Paper on the Informal Economy 2002/2 (Geneva: International Labour Office, 2002) at 4 (agricultural workers, domestic workers and semi-independent workers a poor fit with 1993 definitions); Martha Alter Chen, Jennefer Sebstad & Lesley O’Connell, “Counting the Invisible Workforce: The Case of Homebased Workers” (1999) 27:3 *World Development* 603.

<sup>105</sup> Including not only outworkers, but agricultural workers and domestic workers whose inclusion had previously been left to country-level discretion. Marilyn Carr & Martha Alter Chen, *Globalization and the Informal Economy: How Global Trade and Investment Impact on the Working Poor*, Working Paper on the Informal Economy 2002/1 (Geneva: International Labour Office, 2002) at 4.

<sup>106</sup> International Labour Organization, “1993 Resolution”, *supra* note 78, para 18.2 (outworkers only employed in informal sector if they are employees of informal enterprises or can be considered owners themselves of informal enterprises).

independent entrepreneur”<sup>107</sup> was unnecessary: a clarification that these workers should be counted as own-account workers, and therefore falling in the informal sector, would have been sufficient.<sup>108</sup>

Even were this response to suffice for statistical purposes, for WIEGO and those pushing the employment-based definition, it would not do for policy purposes.<sup>109</sup> Like the Office, WIEGO was clearly inclined to endorse an employment-based approach because it allowed statistical definitions that not only captured “everyone” facing informal working conditions, but that were also blunt about who should be held accountable.<sup>110</sup> To ensure the inclusion of a significant cohort<sup>111</sup> of atypical workers who were a poor fit with the 1993 Resolution, the employment-based approach would deploy a conceptual framework that pulled in anyone who worked without the “protection of labour laws”<sup>112</sup> i.e. without “minimum wage, assured work or benefits.”<sup>113</sup>

Or not exactly. The problem with this frame is that most owners of formal firms—even those decidedly in the formal sector—also lack these protections; they do not benefit from minimum wage laws, they seldom have access to national health and pension benefit schemes, and they usually lack any assurance of continuing work.

WIEGO thus divided the informal economy on the basis of *employment status*, with wage-workers on one side and non-wage-workers on the other.<sup>114</sup> On the one-hand,

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<sup>107</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 8.

<sup>108</sup> In fact, for the purposes of making these workers “count,” such a clarification was not even necessary. Paragraph 18 of the 1993 Resolution already urged collection of data on outworkers/homeworkers, *regardless* of whether they could be considered as employed in the “informal sector.” As elaborated below, section B.ii, it is not clear whether including them in the “informal” category was the ideal strategy.

<sup>109</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 8, n 7.

<sup>110</sup> International Labour Office, *Decent Work and the Informal Economy*, International Labour Conference, 90th Session Report VI (Geneva: ILO, 2002) at 124–25.

<sup>111</sup> Using the framework eventually adopted in the 2003 Guidelines, ILO staff estimated that “informal employees of formal firms” included close to 15% of all workers in “informal employment” in Mexico. *Ibid* at 128.

<sup>112</sup> Chen, Sebstad & O’Connell, *supra* note 104 at 609, n 6 (“some observers” in favour of casting homeworkers as informal because of their exclusion from labour laws).

<sup>113</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 8; Carr & Chen, *supra* note 105 at 4.

<sup>114</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 7; Chen, Vanek & Carr, *supra* note 33 at 21–22.



the waged/self-employed dichotomy worked to stabilize a worker-focused picture of the informal economy. On the waged employment side, informality would be defined in terms of jobs without the protections traditionally associated with wage work; on the non-waged side, it would be limited to the owners of firms (and their contributing family workers) already defined as informal in the 1993 Resolution, thereby preventing the category of informal work from expanding so as to cover *all* non-employee workers. In this sense, the dichotomy was also indispensable to the definition of informal employment in the 2003 Guidelines. Indeed, though Ralf Hussmanns has claimed<sup>115</sup> that the conceptual framework for the Guidelines<sup>116</sup> lay in an earlier project to define informal employment via a cross-classification of 1993 Resolution's sectoral definitions with the International Classification of Status in Employment (ICSE),<sup>117</sup> the reality was somewhat the opposite: despite *prima facie* reliance on the ICSE's five-part scheme (own-account workers, employers, employees, unpaid family workers, members of cooperatives), the primary value of "status in employment" to the Guidelines was in providing a recognizable, established inflection point between paid employees—for which the "protection"-based definition would apply—and everyone else, for which the sectoral definitions would remain in place.<sup>118</sup>

For the purposes of gathering statistics based on more-or-less consensus definitions, the resulting categories do effectively outline the extent of the informal

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<sup>115</sup> Ralf Hussmanns, *Informal Sector and Informal Employment: Elements of a Conceptual Framework* (New Delhi, 2001) at 2.

<sup>116</sup> The 2003 Guidelines include a diagrammatic "Conceptual Framework" which, as published, does not correspond to the definitions in the text (see International Labour Organization, "2003 ICLS Guidelines", *supra* note 79 at 15). The chart seems to have been incorrectly copied from the version provided in International Labour Office, *Report VI*, *supra* note 110 at 123–124, whose categories do correspond to the definitions provided in the Guidelines. The Office paper in turn makes clear that the framework was produced by Hussmanns. See *ibid* at 121, n 2.

<sup>117</sup> The ICSE (or ICSE-93) is elaborated in International Labour Organization, "Resolution concerning International Classification of Status in Employment" in *Fifteenth International Conference of Labour Statistics, Report of the Conference* (Geneva: International Labour Office, 1993) 65.

<sup>118</sup> See *ibid*, para 5. The one exception to this framework was subsistence workers who, as noted above, had been explicitly excluded from the sector-based approach of the 1993 Resolution. On subsistence workers as a problematic case, see below, notes 127–137 and associated text. The coherence of this dichotomy also depended on an interpretive clarification identifying domestic workers as "employees." See International Labour Organization, "2003 ICLS Guidelines", *supra* note 79, s 2.

economy. It is a crude map, drawn in a shaky outline, that shifts slightly based on who is holding the pen, but one which captures essentially all the territory claimed by those interested in informality.<sup>119</sup>

Yet WIEGO's reliance on the employee-employer dichotomy went further, also making it a cipher for the internal structure of the informal economy *qua* informal labour market. The result was a picture of informal employment broken down into multiple tiers or "segments": the informal "self-employed," broken down into informal employers, informal own-account operators, and unpaid family workers; and those in informal "wage employment," split into employees of informal enterprises, other informal wage workers (e.g. casuals in formal enterprises), and industrial outworkers/homeworkers.<sup>120</sup>

This was not, like the 2003 Guidelines, simply a typology of different forms that could be taken on by informal working relationships, but one allotted central analytical significance. For one, WIEGO took it for granted both before and after the passage of the Guidelines that the difference between (dependent) wage workers and the (independent) self-employed should be the *summa divisio* of policy formulation.<sup>121</sup> Their larger point however was that informal employment is "segmented" by status in employment,<sup>122</sup> in the sense not only that lower segments are disadvantaged in comparison to upper segments,<sup>123</sup> but also in the sense that structural barriers (particularly important for women) make it harder to move to

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<sup>119</sup> In fact, many might claim that it captures too much.

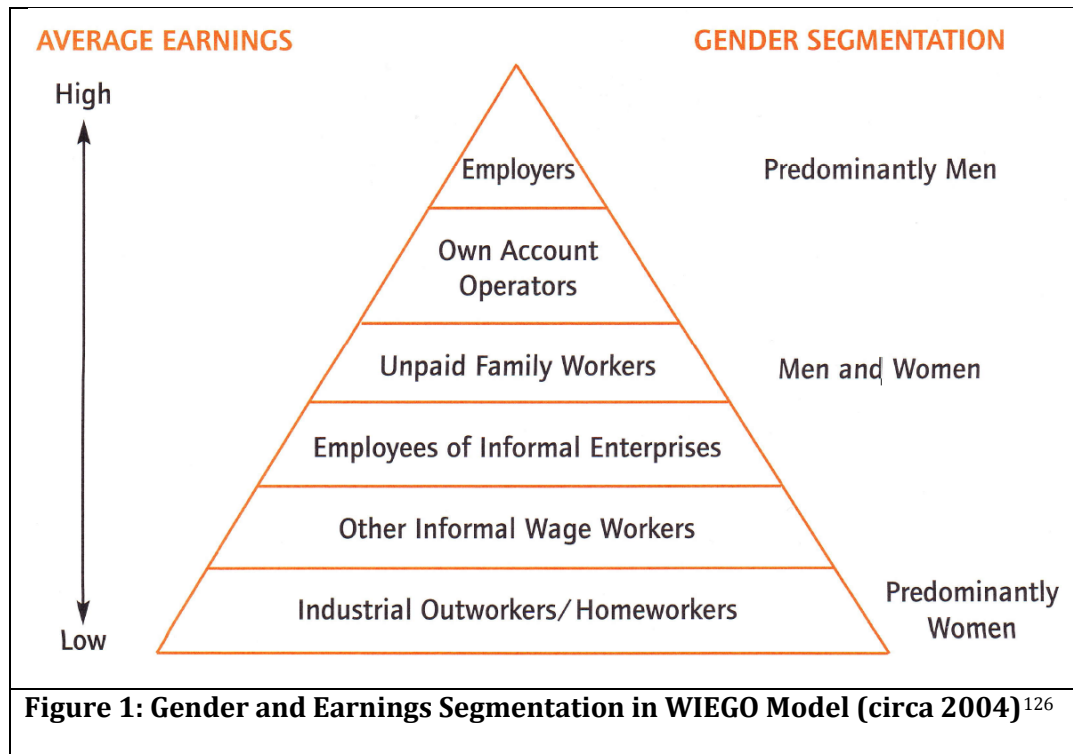
<sup>120</sup> Chen, Vanek & Carr, *supra* note 33 at 23–24; see also Chen, *Theories and Policies*, *supra* note 55 at 9.

<sup>121</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 8; *ibid* at 22 (policies can target informal self-employed, informal wage workers or all informal workers); Carr & Chen, *supra* note 105 at 18; Chen, "From Enterprises to Employment", *supra* note 35 at 38–39; Chen, "Informal Linkages", *supra* note 2 at 31–32; Martha Alter Chen, "Informality and Social Protection: Theories and Realities" (2008) 39:2 IDS Bulletin 18 at 19–20; Chen, *Theories and Policies*, *supra* note 55 at 7–8; Carr & Chen, *supra* note 105 at 4, 7–8 (dividing into three high-level groups: employers, self-employed, wage employees).

<sup>122</sup> Chen, *Theories and Policies*, *supra* note 55 at 4.

<sup>123</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 15–16; Chen, Vanek & Carr, *supra* note 33 at 40–45; Chen et al, *supra* note 3 at 45–53; Chen, "From Enterprises to Employment", *supra* note 35 at 41; Chen, "Informal Linkages", *supra* note 2 at 78.

higher segments.<sup>124</sup> This justified the pyramid figure used to order those segments in multiple WIEGO publications (see Figure 1 below): it effectively illustrated the decreasing average incomes, increasing poverty risk and growing women’s share as one moved from top to bottom.<sup>125</sup>



Unfortunately, the particular divisions deployed in their scheme are an odd—even clumsy—choice for dealing with the informal economy. Perhaps the most telling gap in the scheme is its awkward fit with the realities faced by workers who rely primarily on non-market income. Though data is sparse on what portion of global production is contributed by those working in subsistence agriculture,<sup>127</sup> available

<sup>124</sup> Chen, “Informality and Social Protection”, *supra* note 121 at 20–21.

<sup>125</sup> See Chen, Vanek & Carr, *supra* note 33 at 39–41 (first appearance of pyramid, tiered by earnings and gender share); Chen et al, *supra* note 3 at 54 (pyramids tiered by earnings and gender share, and by poverty risk); Chen, “Informality and Social Protection”, *supra* note 121 at 21; Chen, “Informal Linkages”, *supra* note 2 at 79 (earnings and gender share); Chen, “From Enterprises to Employment”, *supra* note 35 at 31–33; compare Carr & Chen, *supra* note 105 at 2–3 (claim made about earnings and gender share; no pyramid); Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 15–16 (poverty risk and income tied to segment; no pyramid).

<sup>126</sup> Image reproduced directly from Chen, Vanek & Carr, *supra* note 33 at 40.

<sup>127</sup> Subsistence activities might also include hunting, fishing, and pastoral activities. Indeed, since the 1993 revision, all production of goods for household consumption has been included in “economic

evidence indicates that it constitutes an important (if not the only) source of income for a sizeable portion of workers and households in the global South.<sup>128</sup> One clear advantage of the worker-focused frame in the 2003 Guidelines is that it reverses the explicit exclusion of subsistence work from the 1993 definition of the informal sector,<sup>129</sup> while taking care to clearly differentiate the category from the market-based work it is mixed with in the ICSE.<sup>130</sup> It has nonetheless remained relatively invisible in subsequent analyses based on WIEGO's segmentation—in some cases mentioned only in a footnote;<sup>131</sup> in other cases receiving no mention at all<sup>132</sup>—making it hard to know whether the group has been subsumed under the category of “own-account workers,” or simply excluded entirely.<sup>133</sup> Now, the inclusion of non-market work and subsistence workers within the informal economy is a contentious point, and somewhat at odds with the conceptual origins of the informal sector.<sup>134</sup> Nor can WIEGO be blamed for basing their analyses on the incomplete data that are available.<sup>135</sup> Yet there is something troubling about the invisibility of these workers (or even their wholesale exclusion) in a conceptual framework explicitly intended to

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activity” for the purposes of production and employment statistics in the SNA. See generally Inter-Secretariat Working Group on National Accounts, *supra* note 81 at 146–53.

<sup>128</sup> World Bank, *World Development Report 2008: Agriculture for Development* (Washington DC: The World Bank, 2007) at 75–79.

<sup>129</sup> International Labour Organization, “2003 ICLS Guidelines”, *supra* note 79, para 5(iii); compare International Labour Organization, “1993 Resolution”, *supra* note 78, para 14.

<sup>130</sup> It is given its own category (cell 9). See International Labour Organization, “2003 ICLS Guidelines”, *supra* note 79; and especially the correct version in International Labour Office, *Report VI*, *supra* note 110 at 123; compare International Labour Organization, “ICSE-93”, *supra* note 117 (production for own consumption defined as part of “profits” for the “self-employed”).

<sup>131</sup> See e.g. Chen, *Theories and Policies*, *supra* note 55 at 7, n 3; Chen et al, *supra* note 3 at 39, n 3.

<sup>132</sup> Chen, “Informal Linkages”, *supra* note 2; Chen, “Informality and Social Protection”, *supra* note 121; Chen, Vanek & Carr, *supra* note 33, ch 2.

<sup>133</sup> Even in the more granular and particularized collection of policy solutions enumerated in a WIEGO “policy handbook,” not a single case study deals with the challenges of subsistence production. Chen, Vanek & Carr, *supra* note 33, ch 4.

<sup>134</sup> See e.g. International Labour Office, *Statistics of Employment in the Informal Sector*, Fifteenth International Conference of Labour Statisticians, Report III (Geneva: ILO, 1993), paras 104–106 (“producers for own final use” not a good fit with informal sector because gathering data technically difficult and, tautologically, because they are not market-focused).

<sup>135</sup> In line with discretionary provisions in the 1993 Guidelines (International Labour Organization, “1993 Resolution”, *supra* note 78, para 16), many countries choose to collect data on the informal economy that exclude agricultural work entirely, therefore excluding most production for own consumption, as well. International Labour Office, *Statistical Picture*, *supra* note 2 at 17–19.

capture all “productive”<sup>136</sup> work that fell outside the protections traditionally provided by labour law.<sup>137</sup>

## ii. Towards a Graduated Model?

The submersion of subsistence work, however, can also be understood as just one example of a larger problem of sidelining important differences among those within the “self-employed” and “wage employment” group.

As an illustration, consider whether the group of workers that motivated the employment-based approach—homeworkers and other subcontractors—are best served by relying so heavily on the divide between employees and the self-employed. It is not *prima facie* obvious that this type of precarious work is even best included in the “informal” category at all.<sup>138</sup> Undoubtedly, the goal of ensuring that all “true” employees receive the protections and benefits thereby entailed is a familiar strategy,<sup>139</sup> tied to an idea as old as labour law itself, that security and prosperity at work should be guaranteed through the employment relationship.<sup>140</sup> Over the last twenty years however, many labour scholars have worked to develop conceptual frames and regulatory approaches capable of re-internalizing the costs and risks of work externalized onto workers by firms in the formal sector—without

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<sup>136</sup> For a discussion of the implications and controversy connected to the exclusion of services for household consumption from the definition of “productive economic activities” see below, notes 223-27 and associated text.

<sup>137</sup> After all, Chen (“From Enterprises to Employment”, *supra* note 35 at 76) points to the inclusion of agricultural workers as a particular strength of the 2003 Guidelines.

<sup>138</sup> Compare the treatment of domestic workers in the 2003 Guidelines. Though a large portion of the world’s domestic workers are subject to forms of insecurity and risks not faced by the traditional industrial workforce, the Guidelines rejected the approach advocated by WIEGO to include all domestic workers in the “informal wage worker” category, in favour of an approach that carefully limited informality to domestic workers who were, in fact, not subject to labour law protections. International Labour Organization, “2003 ICLS Guidelines”, *supra* note 79, para 3(2)(v); compare Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 7.

<sup>139</sup> See e.g. *Recommendation (no 198) concerning the Employment Relationship*, International Labour Convention, 95th Session, 15 June 2006 [*Employment Recommendation*], s 4(b) (pointing to the need prevent “disguised employment”); Adrián Goldin, “Labour Subordination and the Subjective Weakening of Labour Law” in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 109.

<sup>140</sup> Note that this idea, like labour law, is not very old at all. See Simon Deakin, “The Comparative Evolution of the Employment Relationship” in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 89 (the particular form of the employment relationship in the United Kingdom as differentiated from earlier categories of regulating work are tied to the particular rise of industrialization and the welfare state); *ibid* at 89, n2 (providing a list of comparative American and European sources).

relying on the discourse of “informality.”<sup>141</sup> Some of the most influential among that scholarship has argued that the binary frame of employees and self-employed should be abandoned in favour of a more graduated set of categories between totally subordinate and totally independent.<sup>142</sup>

Given that WIEGO’s tiered model draws on these perspectives, there is a hint of unfairness in applying the critique of the self-employed/wage employment dichotomy too strongly to their research and advocacy (no matter the strength of the critique itself).<sup>143</sup> Their model, after all, has six segments, not only two.

What their model retains, however, is the idea of a spectrum,<sup>144</sup> stretching from employees at one end to employers at the other, laid along a *single dimension* that combines degree of economic risk with degree of subordination or authority.<sup>145</sup> These are also the factors used in the ICSE to differentiate employees from the self-employed, and employers from own-account workers.<sup>146</sup> In WIEGO’s hands, the

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<sup>141</sup> See especially Hugh Collins, “Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws” (1990) 10:3 Oxford J Legal Studies 353.

<sup>142</sup> See especially Arthurs & Commission on the Review of Federal Labour Standards (Canada), *supra* note 24; see also the chapters on “subordination, parasubordination and self-employment” collected in Giuseppe Casale, ed, *The Employment Relationship: A Comparative Overview* (Portland, Or., Geneva: Hart, International Labour Organization, 2011), chs 3–5.

<sup>143</sup> Indeed, many of their publications directly critique labour law’s traditional reliance on that dichotomy. Chen, Sebstad & O’Connell, *supra* note 104 at 607; Chen, “From Enterprises to Employment”, *supra* note 35 at 38.

<sup>144</sup> Chen, Sebstad & O’Connell, *supra* note 104 at 607 (“workers fall along a continuum of possible labor relationships”).

<sup>145</sup> A comparable point can be attributed to Hugh Collins (“Vertical Disintegration”, *supra* note 141). His key point was that tests for the presence of an employment relationship in UK labour law included aspects of both bureaucratic control, and allocation of profit or loss away from the worker. In addressing changes to the most prevalent forms of work, he argued that courts should be careful about differentiating between these two dimensions. In the result, he endorsed a regulatory model still based on a one-dimensional indicator of “employee-ness,” measured by an inverse of the combined distance along these two axes away from an employee ideal. For more extensive elaboration of risk and subordination aspects of employment, see below, Chapter 4.A.

<sup>146</sup> International Labour Organization, “ICSE-93”, *supra* note 117, paras 5–7. The particular ideas of risk and subordination in the ICSE were actually late additions. The ICSE grew out of early work aimed at the creation of comparable international statistics on employment and unemployment; the classifications were provided to ensure that the entirety of the working population was counted (and that no one was inadvertently counted as unemployed), regardless of their “industrial status.” As such, the four categories originally used (workers for public or private employers, employers, persons who work for their own account without employees, and unpaid family workers) appeared without definitions. (See *Resolution concerning Statistics of Employment, Unemployment and the Labour Force, Montreal, ICLS, Sixth Session 12 August 1947 in The Sixth International Conference of Labour Statisticians* (International Labour Office: Geneva, 1948) and especially *ibid* at para 10). By

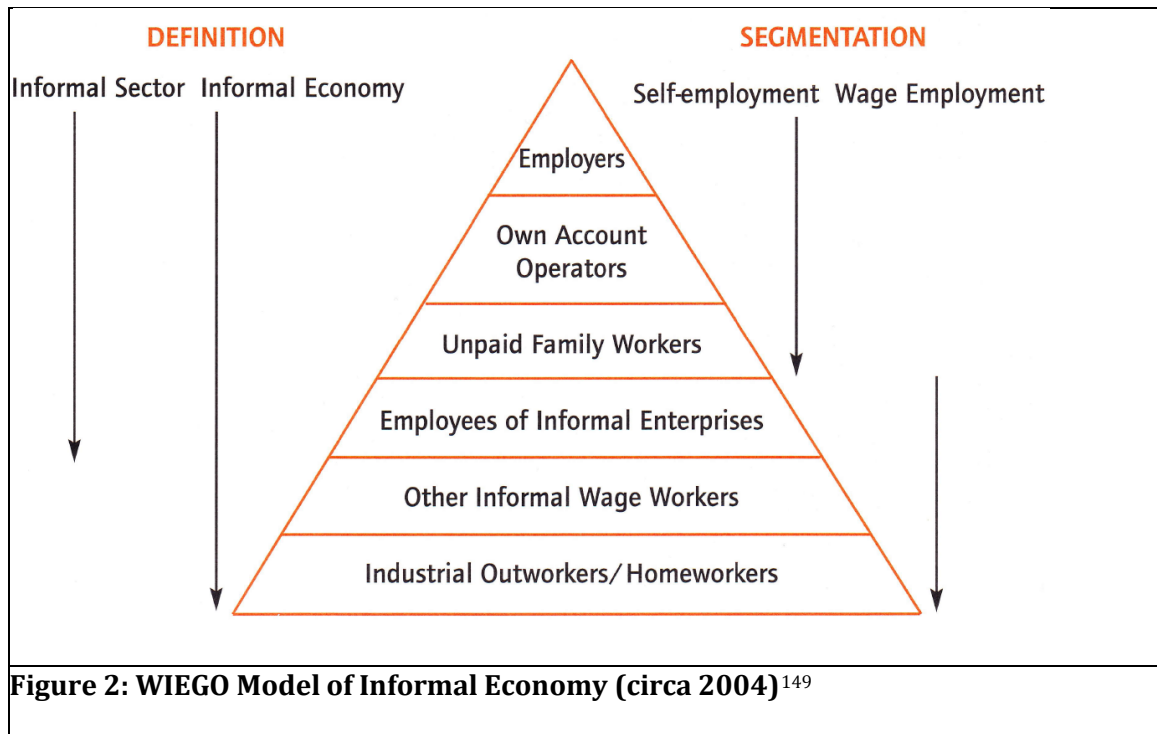
ICSE categories are amended to capture the “full” variation in this dimension: if the meaning of “risk” inherent in the ICSE definitions is relaxed,<sup>147</sup> then the resulting six segments can not only be grouped into the high-level “self-employment”/“wage employment” binary (see Figure 2), but also ordered within these categories from the most employer-like (own-account workers do not have authority over others, but they are not subordinate to others either) to the most employee-like (industrial outworkers and casuals face *more* risk than other employees).<sup>148</sup> In this way, the conceptual ordering by authority/risk derived from the employer-employee spectrum can be lined up with an economic ordering by income and poverty (compare Figure 1 above).

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1949, however, measuring population by industrial status had become a goal in its own right (see “Resolution concerning an International Standard Classification according to Industrial Status,” adopted on 8 October 1949, in *The Seventh International Conference of Labour Statisticians* (International Labour Office: Geneva, 1951) Though the ICLS was unable to agree on a formal resolution, it expressed its consent and willingness in 1957 to add a fifth category, members of “co-operative production units.” In the meantime, the UN Population Commission had come up with definitions of the original four categories. What was lacking, however, was any clear agreement on what exactly the “classification according to status” was actually classifying, so that the preparatory Office report could not only suggest a separate category for military personnel, but propose a subclassification based on mode of remuneration. (See Report of the “Committee on the International Classification According to Status,” in *The Ninth International Conference of Labour Statisticians* (International Labour Office: Geneva, 1957) 28 and *ibid* at 29, 31) The five categories were nonetheless adopted and put into use as the International Classification of Status in Employment by the United Nations Statistical Commission in 1958. It was not until 1993 that the ICLS returned to the ICSE. While the ICSE-93 retained the five basic groupings (it now being made explicit that there was, or at least might be, a residual group of workers “not classifiable by status”) (para 4), the revised definitions now made reference to an explicit conceptual framework intended to differentiate statuses on the basis of the *type of contract* governing each individual’s relationship with other groups and people (para 2). Though such contracts were theoretically governed by multiple factors—the type of risks faced, the nature of the authority exercised over others and the strength of attachment to the job—the groups were defined primarily by reference to the distinction between paid employment and self-employment (para 5).

<sup>147</sup> In Anglo-American labour law (see e.g. Collins, “Vertical Disintegration”, *supra* note 141), “risk” is relevant in establishing the employee/non-employee divide in the sense that employees, unlike entrepreneurs, are not exposed to the risks *and rewards* of variations in their efficiency. The lack of exposure to this form of revenue uncertainty is also the sole indispensable factor in the ICSE’s definition of wage employment (see International Labour Organization, “ICSE-93”, *supra* note 117, para 6). In WIEGO’s hands, however, this is reversed: employees face economic “risk” as a result of their subordination, and casual workers and industrial outworkers need to be differentiated, because they face even more revenue risk and are in a sense more dependent than “regular” employees of even informal enterprises: Chen, *Theories and Policies*, *supra* note 55 at 8–9.

<sup>148</sup> Chen, *Theories and Policies*, *supra* note 55 at 8.



Beyond its conceptual tensions (dealt with in section iii), and its potential lacunae (including the subsistence workers discussed above), the strongest case against the validity of the model comes from empirical data—much of it collected under WIEGO auspices. First, though it is only implicit in the model, research released in 2005 shows that any inferences drawn from the pyramid shape about population distribution across segments are likely to get it backwards; “self-employment” actually constitutes a majority of all informal employment: 70 per cent in sub-Saharan Africa, 62 per cent in North Africa, 60 per cent in Latin America, and 59 per cent in Asia.<sup>150</sup> More telling, however, was data based on six pilot studies released in 2005, showing that own-account workers were actually worse off, in terms of income and poverty risk, than many informal employees.<sup>151</sup> That data forced a revision of the model and abandonment of reliance on the employer-employee spectrum (see figure 3). Finally, WIEGO’s research increasingly revealed significant

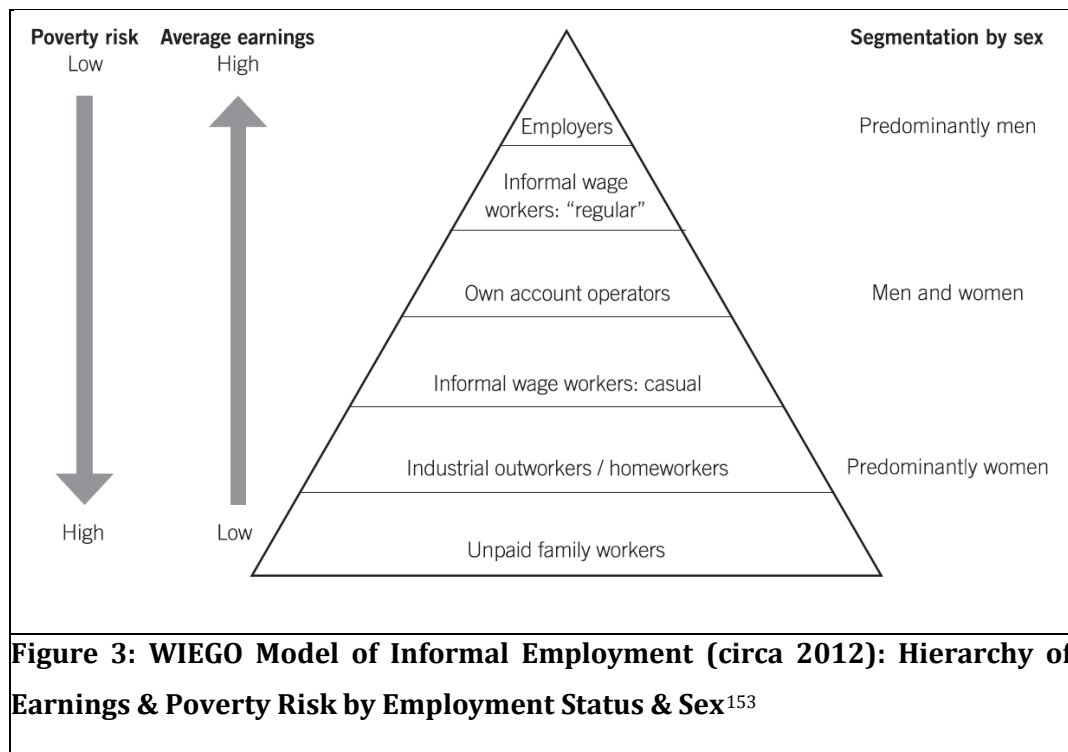
<sup>149</sup> Taken from Chen, Vanek & Carr, *supra* note 33 at 24.

<sup>150</sup> International Labour Office, *Statistical Picture*, *supra* note 2 at 20 (Martha Chen and Joann Vanek were both key consultants on this study).

<sup>151</sup> Chen et al, *supra* note 3 at 43–53.



income and poverty variation within each segment, which should have put a question mark over the entire linear, one-dimensional model.<sup>152</sup>



### iii. The Hazards of Labour Law's "Folk Images"

The aim of the above analysis is decidedly not to warn labour lawyers away from WIEGO's research. WIEGO has consistently emphasised that explanations of the "cause" of informality need to be limited to at most particular groups of informal workers, and has insisted on analysis contextualized against the relationships workers have with each other, formal firms, official regulations and informal institutions.<sup>154</sup> In fact, much of WIEGO's analysis and advocacy has taken the broad, multi-dimensional approach endorsed in the final chapter.

The critiques above are instead intended as a vivid illustration of the threat of using familiar categories to understand unfamiliar cases, a lesson stretching back to Keith

<sup>152</sup> Chen, "Informal Linkages", *supra* note 2 at 77–78.

<sup>153</sup> Taken from Chen, *Theories and Policies*, *supra* note 55 at 9. Compare Chen et al, *supra* note 3 at 54.

<sup>154</sup> Chen, Vanek & Carr, *supra* note 33 at 19; Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 9–15.

Hart's seminal paper on the informal sector.<sup>155</sup> Hart's key concern in developing the informality concept was that useful analysis and policy-making in the informal sector would be "impeded by the unthinking transfer of western categories to the economic and social structures of African cities."<sup>156</sup> In particular, he suggested that attempts to apply the categories of unemployed, employed, and non-active would fail to capture a realistic image of work and income for those in the global South,<sup>157</sup> with "unemployment" in particular likely to be deployed "with its attendant Western folk images of Tyneside or New York in the 1930s, of dole queues and Keynesian solutions."<sup>158</sup>

No doubt, such warnings anticipate the dangers of trying to understand the informal economy by drawing on an analogy with the "high-tech pioneers" of California's Silicon Valley.<sup>159</sup> Given the sizeable cohort of workers with dependent or semi-dependent relationships to formal, and often international, trade networks who are nonetheless invisible in economic measurements (and policy-making) in the global south, WIEGO's strong reaction to that model is unsurprising.<sup>160</sup> Yet using quasi-dependent homeworkers as a foil may have made it easy to split the difference, allowing that some situations might fit the narrative of informal workers as the "plucky entrepreneurs" of the global south<sup>161</sup> while insisting that others look more like employment as per the Fordist social contract.<sup>162</sup> In other word, it allowed analyses to simply double down in their reliance on Western folk images.

Especially inasmuch as it was tied to a model that reproduced a traditional, hierarchical picture of class structure and income divisions, there was an obvious

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<sup>155</sup> Hart, "Informal Income Opportunities", *supra* note 45.

<sup>156</sup> *Ibid* at 61.

<sup>157</sup> *Ibid* at 62.

<sup>158</sup> *Ibid* at 82.

<sup>159</sup> See Maloney, "Informality Revisited", *supra* note 96 at 1167.

<sup>160</sup> See Chen et al, *supra* note 3 at 59; Chen, "Informality and Social Protection", *supra* note 121 at 21–22.

<sup>161</sup> Hernando de Soto, *The Other Path: The Invisible Revolution in the Third World*, translated by June Abbott, 1st ed (New York: Harper & Row, 1989).

<sup>162</sup> See e.g. Chen, Vanek & Carr, *supra* note 33 at 16; Chen et al, *supra* note 3 at 71; compare Chen, "Informal Linkages", *supra* note 2 at 83–89 (discussing three "schools" of thought for understanding aspects of the informal economy, but focusing on legalist and structuralist perspectives).

temptation for those steeped in the key opposition of 20<sup>th</sup> century labour relations—that between employers and their workers—to read informal work as “just like formal work,” though of course with both informal employers and informal employees worse off than their counterparts. At times WIEGO itself seems to have yielded to that temptation, even while advocating for more complex, contextual thinking.<sup>163</sup> The larger issue, however, is the perpetuation of this “first approximation” beyond WIEGO’s analyses, and reinforcement of a traditional division of regulatory labour between (albeit better enforced, more inclusive) labour standards and (albeit less onerous, more accessible) business rights.<sup>164</sup>

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<sup>163</sup> See Chen, Vanek & Carr, *supra* note 33 at 21–24; Chen et al, *supra* note 3 at 38–39; Chen, “Informal Linkages”, *supra* note 2 at 77–78; Chen, “Informality and Social Protection”, *supra* note 121 at 19–20; Chen, *Theories and Policies*, *supra* note 55 at 7–8 (emphasizing the importance, and in some cases the centrality, of “status in employment” not only for gathering statistics but for purposes of “analysis and policymaking”).

<sup>164</sup> Compare Chen, “Informality and Social Protection”, *supra* note 121 at 18 (“What the working poor lack, *more fundamentally*, is labour rights (if they are wage workers), business rights (if they are self-employed)...” (emphasis added)).

### 3. From Segmentation to Classification?

*To the isolated, isolation seems an indubitable certainty; they are bewitched on pain of losing their existence, not to perceive how mediated their isolation is.*<sup>165</sup>

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These critiques of the employment-based approach hardly open a clear path to understanding how the heterogeneity of the informal economy should be comprehended. Might the informal economy be segmented in some another way?

As alluded to above, however, “segmentation” has two different valences in the study of labour markets: simple partition into component sections; and hierarchical division, with more and less advantaged tiers. As for the latter, closer consideration of hierarchies and relative advantage will have to wait until the next chapter. The idea of a labour market divided into separate components, on the other hand, offers itself as an easy, direct corollary of the heterogeneity of informal work. If it is simply a matter of one set of divisions working imperfectly, the right question is manifestly “how *should* the informal economy be split up?”

Before rushing to answer, however, it is important to think about *what* is being classified and *why* they need to be differentiated. Doing so helps to reveal the limits of imagining the informal economy as an amalgam whose elements will become straightforwardly governable if only it is carved up in the right way.

#### A. Constitutive Relationships and Regulating Categories

Despite language indicative of differentiation between individuals, the 2003 Guidelines classify relationships and not people. This choice is borrowed from the quite explicit subject matter of the ICSE, which classifies jobs (not job-holders) by “the type of...contract...with other persons or organizations,” i.e. by the relationships structuring the work in question.<sup>166</sup>

WIEGO adopts a broader version of this approach, suggesting that informal work should be differentiated by the links workers have both with formal firms and with

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<sup>165</sup> Theodor W Adorno, *Negative Dialectics*, translated by E.B. Ashton (New York: Continuum, 1987) at 312.

<sup>166</sup> International Labour Organization, “ICSE-93”, *supra* note 117, para 2.

formal regulations—though the power of this insight is obscured by its subordination in WIEGO’s work to classification in terms of status in employment.<sup>167</sup> Still, the relational approach is vital to their classification. After all, industrial outworkers<sup>168</sup> do not have some relation to formal firms independent of their status as industrial outworkers; rather, that status is defined precisely by their relation to formal firms.

While it may sometimes be obscured, this relational approach has traditionally been the core of labour law’s worldview as well: employees are defined not by something inherent or internal to them as individuals, but by the details of their relationship with some other organization or individual.

As for the “whys,” the rush to classify informal work has been informed by multiple motivations.

The “conceptual framework” for the 2003 Guidelines<sup>169</sup> classifies not only all kinds of informal work, but provides a (near-) comprehensive classification of *all* working relationships.<sup>170</sup> As stated above, the goals underlying that project included making certain work (more) visible *as* work, thereby promoting its enumeration in official statistics *on* work, and thus, it was hoped, making it relevant in the formulation of policy *about* work. From this perspective, the ICLS classification was aimed at expanding the scope of the regulatory gaze.

At right angles to this aspect of the project were concerns about regulatory fit. WIEGO’s work on homeworkers argued not only that they were too often excluded from economic aggregates, but that they needed particularized policy solutions and particularized laws, as well.<sup>171</sup> Though this work did not result in the inclusion of a

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<sup>167</sup> Chen, Vanek & Carr, *supra* note 33 at 16–21; Chen, “Informal Linkages”, *supra* note 2 at 83–90; Chen, *Theories and Policies*, *supra* note 55 at 12–14.

<sup>168</sup> (that is, to the degree industrial outworkers are included in informal employment: see above, notes 138–142 and associated text)

<sup>169</sup> See above, note 111.

<sup>170</sup> But see Sindzingre, *supra* note 62 at 63 (ICLS definitions exclude both criminal enterprise and all of the unpaid reproductive work usually understood to occur “within the family”).

<sup>171</sup> Chen, Sebstad & O’Connell, *supra* note 104 at 607–08.

separate category for homeworkers in the 2003 Guidelines,<sup>172</sup> other advocacy did lead to increased detail, cutting out subsistence workers and paid domestic workers from categories of informal work that could have otherwise included them.<sup>173</sup> From this perspective, the 2003 Guidelines were aimed at increasing the *specificity* of regulation.

Finally, the 2003 Guidelines had to provide categories amenable to enumeration, meaning that they had to be *disjoint* and *determinate*: each job had to fall into its own unique, identifiable slot. Everything in its right place, and a right place for everything.

In combination, these three goals required the Guidelines to be *taxonomical*; to provide an exhaustive, consistent, mutually exclusive, rationally organized typology. Though its contents differed slightly, WIEGO's six-part typology seemed to have the same purposes in mind.

Despite the enthusiasm that law is often accused of having for such universal taxonomies,<sup>174</sup> they are surprisingly rare in the legal field, and this is because in the real world, the underlying rationales often weigh against one another.

Labour law has never been concerned with providing, nor even relied on, a comprehensive taxonomy of working relationships.<sup>175</sup> Traditionally, its method has instead been to identify and draw a boundary around only *one* kind of working relationship.<sup>176</sup> Workers were not divided by labour law into employees and non-

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<sup>172</sup> Similar advocacy did, however, result in the separation of paid domestic work and (productive) subsistence work as separate categories.

<sup>173</sup> In particular, both groups could have been classified as informal own-account workers according to the 1993 Definitions.

<sup>174</sup> Reiter, *supra* note 65 at 2–3.

<sup>175</sup> Compare Dzodzi Tsikata, "Toward a Decent Work Regime for Informal Employment in Ghana: Some Preliminary Considerations" (2011) 32:2 Comp Lab L & Pol'y J 311 at 338–39 (a comprehensive classification of all work arrangements is precisely what is needed to address informality).

<sup>176</sup> Indeed, if we are to trust the classics of modern Western jurisprudence, this might be understood as the archetypical question of modern adjudication: not "what is it?" but "is it or isn't it?" See H L A Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harvard Law Review 593 at 607–08 (prohibition against "vehicles in park" requires determining whether or not a given thing is a "vehicle"); Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harvard Law Review 630 at 662–63 (interpretation of "vehicle" only meaningful in context of

employees because there are fundamentally “two types” of working relationships, but because one kind was seen to require a *sui generis* form of regulation.<sup>177</sup> In no way did the relevant categories have to be comprehensive; only the subset of relationships that were relevant from a regulatory perspective had to be identified. Neither has labour law been too enamoured of consistency, either. Much of the conflict and struggle in labour law over the last twenty years has resulted from the active, continual redefinition of the boundaries of the employee category—*au fur et à mesure* with the shifting shape of regulatory need.<sup>178</sup> And of course, the idea that categories need to be mutually exclusive is anathema to the overlapping categories that typify slightly different but related areas of the regulation of work.<sup>179</sup> Even “employee” can be used differently depending on the regulatory frame.<sup>180</sup>

This contrast suggests that the project of classifying, amassing and generalizing about the category of “informal work” might actually be counterproductive. In fact, if the goal is to comprehend the specific forms of regulation required by particular kinds of working relationships, then the outer boundaries of informal work may be just as moot as the boundaries of “work” have traditionally been to labour law. It is instead the nature of the relationships that matter, not whether they are “actually” informal or not, especially because the “informal” definition has often been used to imagine, but also reproduce, a regulatory free-for-all.<sup>181</sup>

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legislative function); see generally Pierre Schlag, “No Vehicles in the Park” (1999) 23 Seattle U L Rev 381 (interpretation of “vehicle” depends on how “law” itself is understood).

<sup>177</sup> For elaboration, see chapter 4.

<sup>178</sup> See generally, Mark Freedland, “From the Contract of Employment to the Personal Work Nexus” (2006) 35:1 Industrial Law Journal 1 at 8–9.

<sup>179</sup> So see e.g. *ibid* at 4 (recent creation of broader “worker” category in UK minimum wage and working time regulations); contra Hart, “Positivism and the Separation of Law and Morals”, *supra* note 176 (arguing that legal concepts have a “core of meaning” independent of regulatory context).

<sup>180</sup> “Teach the children a game” is unlikely to be an invitation to teach them blackjack. Accord Ludwig Wittgenstein, *Philosophical Investigations*, 3d ed, translated by G.E.M. Anscombe (Oxford: Basil Blackwell, 1986) at 33. This point is due to Brian Langille.

<sup>181</sup> Santos, *supra* note 6 at 94–96 (employer-employee relations in Mexican informal economy a “free for all”); compare Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8 at 4–5 (“informal” has often been associated with unstructured, disorganized practice).

## B. Forms of Subordination, Forms of Protection

Perhaps unsurprisingly, recent labour law scholarship is rife with projects that move away from the fight over the boundary of “employee” and toward strategies that meaningfully orient analysis around a diversity of regulatory needs.<sup>182</sup> For example, a key proposal in the well-known “Supiot report” was the creation of overlapping circles of social rights, with the broadest set attaching to employment, a slightly narrower group applying to all remunerated work, some applying to *all* work, and a minimal set of rights applying to all citizens.<sup>183</sup> However, while this proposed scheme is organized around regulatory need rather taxonomical schema, its similarity to the graduated models critiqued above suggests it might not be the best fit with the diverse challenges of informal work.

Mark Freedland’s proposed reorganization of European labour law provides a more promising starting point.<sup>184</sup> He gives lucid expression to an essential insight that working relationships vary not only along a single spectrum running from the “contract of employment” to “contracts for services,” but along multiple dimensions.<sup>185</sup> Using a method he describes as empirical (“socio-economic” rather than “legal”),<sup>186</sup> he discerns a broad family of working relationships lying in a multi-dimensional space,<sup>187</sup> one that of necessity leaves behind the analogy of a solar system with “the contract of employment” at its centre.<sup>188</sup> Given they are based in a comparative examination of European experiences, Freedland’s categories are unlikely to be the right ones to think about informal employment.<sup>189</sup> Nonetheless,

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<sup>182</sup> Compare Arthurs & Commission on the Review of Federal Labour Standards (Canada), *supra* note 24.

<sup>183</sup> Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (New York: Oxford University Press, 2001).

<sup>184</sup> Freedland, “Personal Work Nexus”, *supra* note 178 (introducing a proposed reorganization of employment law around a family of “personal work contracts” of which employment is only one, each located in the context of a “personal work nexus”).

<sup>185</sup> *Ibid* at 7–10.

<sup>186</sup> Freedland, “Application Beyond Contract”, *supra* note 24 at 5–6.

<sup>187</sup> Freedland, “Personal Work Nexus”, *supra* note 178 at 7, 12.

<sup>188</sup> *Ibid* at 12–13.

<sup>189</sup> C.f. Freedland, “Application Beyond Contract”, *supra* note 24 (proposing a preliminary “family” that includes standard employees; public officials; liberal professions; entrepreneurial workers, including freelancers and consultants; marginal workers, including casuals and volunteers; and trainees and apprentices).



using a similar “empirical,” “socio-economic” approach could reap comparable advantages in a confrontation with the regulatory challenges of informal work. First, he suggests that his type of analysis would make it easier to extend a collection of protections tied exclusively to the employment relationship (or at least, correlated with distance from the employment ideal) to more diverse contexts. On the other hand, he suggests his typology offers a framework for regulatory analysis that is able to cleave more closely to the specificities of real-world working relationships.<sup>190</sup> By paying closer attention to both convergences and divergences between different working relationships, such legal analysis might be more responsive to regulatory needs, and thereby offer more efficient regulation.<sup>191</sup>

His approach reveals some conflicting tendencies. Over the years, his research has proceeded from the inside out, from early work on the contract of employment,<sup>192</sup> through the personal work contract,<sup>193</sup> to the whole class of “contracts personally to execute any work or labour.”<sup>194</sup> As he pushes outward, he has become disillusioned with the picture of employment law as “an oasis of social justice regulation in a desert of neo-liberal *laissez faire* for contracts in general,” gradually finding a number of resonances between employment law and the multiple areas of regulation offering “protection” from contractual unfairness more generally.<sup>195</sup> Yet the resulting focus on contracts conflicts with his introduction of the “personal work *nexus*” as a way to manage the failures of a single, bilateral, personal contract as an effective metaphor for the full, complex relational content of many actual working relationships.<sup>196</sup>

Recent work by Harry Arthurs is also instructive. Rooted in a *gedankenexperiment* about alternate labour law histories, Arthurs has tentatively explored what might have been gained, and what might yet be won, were labour law embedded in a

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<sup>190</sup> Freedland, “Personal Work Nexus”, *supra* note 178 at 19–20.

<sup>191</sup> *Ibid* at 18.

<sup>192</sup> Mark Freedland, *The Contract of Employment* (Oxford: Clarendon Press, 1976).

<sup>193</sup> Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003).

<sup>194</sup> See Freedland, “Personal Work Nexus”, *supra* note 178 at 3–5.

<sup>195</sup> *Ibid* at 24.

<sup>196</sup> *Ibid* at 14–16.

framework, not of correcting potentially unfair contracts *per se*, but of specifically providing protection to economically subordinated groups—not just employees (and their ilk), but tenants, consumers, and small business owners as well.<sup>197</sup>

Combining Arthurs' focus on subordination with Freedland's idea of a "personal work nexus" falling in a multi-dimensional space of working relationships, offers a tantalizing alternative method for the creation of regulatory categories for the informal economy. It shares with the employment-based approach the admirable intent of identifying those in need of social protection, yet it does not rush to answer the complementary questions of what forms of protection are appropriate, who "deserves" that protection, or who should be held accountable for that protection.

By rooting the analysis in careful attention to the forms that "subordination at work" can take, and the dimensions along which that subordination can vary,<sup>198</sup> it provides an option that, at the very least, outperforms the employment-based approach in capturing the regulatory challenges of the groups included in the 2003 Guidelines.

For example, consider how it might deal with the group of informal employers. One flaw in WIEGO's "pyramid" model is that it sets up an unfortunate normative emphasis: despite being largely motivated by the contrasts in opportunities, risks and social outcomes marking off informal from formal employment,<sup>199</sup> the reproduction of the waged/self-employed divide emphasized differences in income and poverty risk only among informal workers.<sup>200</sup> In a strong version, the pyramid implied that employers in the informal economy, by reason of having employees, are not themselves in need of "protection." Realizing that subordination is not one-dimensional helps unsettle a conclusion that does not even hold everywhere in the

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<sup>197</sup> Arthurs, "Subordination and Resistance", *supra* note 23.

<sup>198</sup> Including, as in Freedland's analysis, the identity of the counterparties to the relationship. See Freedland, "Personal Work Nexus", *supra* note 178 at 10–11.

<sup>199</sup> WIEGO's own data show that even the best-remunerated category of workers in the informal economy on average still face greater poverty risk than formal-sector employees. See Chen et al, *supra* note 3 at 54–55.

<sup>200</sup> *Contra* International Labour Organization, *Informal Economy Conclusions*, *supra* note 38, para 4 (setting out divide between wage workers and own-account workers, but stressing that both are "insecure and vulnerable").

formal economies of the industrialized North<sup>201</sup>—and creates a space for conclusions that WIEGO has made in their own research.<sup>202</sup>

Setting aside the requirement for a “contract for work or labour” also hints at a more responsive framework for the subsistence workers discussed above, especially given the reality that many such workers have a subordinate relationship with landlords or local authorities that simply cannot be squeezed into the box of a “contract for work or labour” at all.<sup>203</sup> Surprisingly, support for this approach can already be found in the non-operative provisions of the ICSE.<sup>204</sup> Especially in light of the preparatory discussions, these provisions suggest an alternate history of “status in employment” for which seating definitions of the informal economy in a “cross-classification” with the informal sector may have made much more sense.<sup>205</sup>

### C. Networks of Subordination?

Read slightly askance from his own intentions, Freedland’s suggestion to look beyond the single, bilateral contract can be used to much more radically unsettle the horizon of analysis implicit in both the ICSE definitions and Arthurs’ focus on individual relations of subordination.

Freedland notes that working relationships often include a *complex* of relationships, both contractual and non-contractual, between multiple actors. In the British context, this may mean that an employment relationship also includes, for example, trust-based pension entitlements. More relevant in what follows, however, is his

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<sup>201</sup> See e.g. *Construction Lien Act*, RSO 1990, c 1 [*Construction Lien Act*] (subcontractors involved in construction projects are subject to a statutory trust to ensure they are paid before other parties, even though they may themselves be employers or subcontract some of the work they undertake).

<sup>202</sup> Chen, Vanek & Carr, *supra* note 33 at 104 (the self-employed may be dominated by a counter-party who is not an employer).

<sup>203</sup> This requires even greater relaxing of Freedland’s suggestion to embrace a typology that includes relationships not framed as payment for work or labour at all.

<sup>204</sup> See International Labour Organization, “ICSE-93”, *supra* note 117, para 14 (enumerating *inter alia* groups of workers for which the five categories were an imperfect fit); especially *ibid*, para 14(q) (discussion of forms of subordination faced by share-croppers, despite falling outside the frame of “employment”).

<sup>205</sup> See above, notes 115-17 and associated text.

point that in an age of temporary work agencies and triangular employment, there may simply be *many* relevant contracts to take into account.<sup>206</sup>

Especially in their research on homeworkers, WIEGO has occasionally tried to wrestle with these same complexities in terms of “identifying the employer”<sup>207</sup>—a bilateral frame that Freedland warned might simply reproduce the problem, rather than solving it.<sup>208</sup> Yet situations where work is mediated by a labour contractor have also acted as a bridge to more far-ranging explorations for sources of workplace subordination that lie beyond “the workplace.”

In some cases, they express this in terms of adding a “system of production” or “sector” analysis to status in employment considerations.<sup>209</sup> In the most developed of these analyses, “system of production” is broken down into three ideal types: thus, while some production might best be viewed through the *market ideal*—as a series of distinct, individual transactions (where it is always the “dominant counterparty” who controls the transaction)—some transactions are best grouped by *sub-sectors* (in which a dominant member of a “network” of firms may also strongly influence conditions of exchange with customers and suppliers) and as production organised through *value chains*.<sup>210</sup>

Relying on metaphors of a cable composed of sub-sector strands<sup>211</sup> a continuum of economic relations,<sup>212</sup> or links on a chain,<sup>213</sup> the engagement with value-chain

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<sup>206</sup> Freedland, “Personal Work Nexus”, *supra* note 178 at 14–18.

<sup>207</sup> Chen, Vanek & Carr, *supra* note 33 at 105–06.

<sup>208</sup> Freedland, “Personal Work Nexus”, *supra* note 178 at 9–10, 15–18; Freedland, “Application Beyond Contract”, *supra* note 24 at 7–8. See also Mark Freedland and Paul Davies, “Employers, Workers and the Autonomy of Labour Law” in Hugh Collins, Paul L. Davies and R.W. Rideout, eds, *Legal Regulation of the Employment Relation* (London: Kluwer, 2000).

<sup>209</sup> Carr & Chen, *supra* note 105 at 8–14 (structure of production, and changes to structure differs by “subsector”); Chen, Vanek & Carr, *supra* note 33 at 101–12 (three dimensions matter: status in employment, place of work, and systems of production); Chen et al, *supra* note 3 at 61–62 (discussion of system of production in three-dimensional approach); Chen, *Theories and Policies*, *supra* note 55 at 12; compare Frances Lund & Smita Srinivas, *Learning from Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (Geneva: International Labour Organization, 2000) (four dimensions, including sector structure, employment status, family circumstance and regulatory environment); see also Chen, “Informality and Social Protection”, *supra* note 121 at 22 (referencing “system of production” dimension).

<sup>210</sup> Chen, Vanek & Carr, *supra* note 33 at 107–08; Chen, *Theories and Policies*, *supra* note 55 at 12.

<sup>211</sup> Lund & Srinivas, *supra* note 209 at 11.

analysis,<sup>214</sup> allows the exploration of two related claims. The first is that much of the work that takes place within the confines of the traditional “informal sector” is connected to broader networks of production, which often cross national boundaries; that “control” over the production process is therefore distributed; and that conditions of work are therefore also shaped by decisions made by an interconnected “chain of actors,” not only by an individual employer or single counter-party.<sup>215</sup> In short, many workers are connected to networks of productive institutions, and the location in that network structures their particular vulnerabilities, capacity to improve their conditions, and access to social protection.<sup>216</sup>

The converse of this idea is that “responsibility” for workplace conditions, in an ethical sense or even as a matter of legal liability, should be distributed back up these chains.<sup>217</sup> In the simplest version, the question becomes “...which unit in the chain should be held accountable for the rights and benefits of workers down the chain?”<sup>218</sup> While this still comes close to reproducing the bilateral perspective on subordination and responsibility warned against by Freedland (i.e. one which asks “which actor” rather than “which actors”), the larger exploration nonetheless lays open the broader point that sites of power, and therefore the sources of subordination, are dispersed across multiple actors.

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<sup>212</sup> Lund & Nicholson, *supra* note 69 at 15.

<sup>213</sup> Lund & Nicholson, *supra* note 69.

<sup>214</sup> See especially Terence Hopkins & Immanuel Wallerstein, “Commodity Chains in the World-Economy Prior to 1800” (1986) 10:1 *Review* 157 (first appearance of “commodity chain” analysis); Gary Gereffi & Miguel Korzeniewicz, eds, *Commodity Chains and Global Capitalism* (Westport Conn.: Greenwood Press, 1994) (exploring theoretical frame of “commodity chains”); Bruce Kogut, “Designing Global Strategies: Comparative and Competitive Value-Added Chains” (1985) 26:4 *Sloan Management Review* 15 (early inquiry into firm-level use of “value-chain analysis”); Gary Gereffi, John Humphrey & Timothy Besley, “The Governance of Global Value Chains” (2005) 12:1 *Review of International Political Economy* 78 (broader theoretical synthesis using “global value chain” terminology); see e.g. Olivier Cattaneo, Gary Gereffi & Cornelia Staritz, eds, *Global Value Chains in a Postcrisis World* (World Bank, 2010).

<sup>215</sup> See generally Lund & Nicholson, *supra* note 69, especially at 18-20; see also Chen, Vanek & Carr, *supra* note 33 at 108-12; Lund & Srinivas, *supra* note 209 at 10-13, 31-33.

<sup>216</sup> Lund & Srinivas, *supra* note 209 at 12.

<sup>217</sup> Lund & Nicholson, *supra* note 69 at 19-20, 48-50, 54, 106.

<sup>218</sup> Chen, Vanek & Carr, *supra* note 33 at 105-06.

If the obvious risk with opening the horizon of analysis in this way is entering into a bottomless inquiry, labour law scholars have developed numerous strategies and doctrines to focus the scope of analysis and pinpoint potential nodes of responsibility in broad, diffuse production networks.<sup>219</sup> Difficulties aside, this work has highlighted potential normative advantages of thinking about responsibility for working conditions in terms of chains of power and responsibility rather than subordination—or segmentation—alone.

#### **i. Family Work**

Thinking beyond a “work nexus” located at the site of labour exchange<sup>220</sup> also offers a framework for confronting the problematic case of “unpaid” family workers, but using that frame pulls in conflicting directions.

On the one hand, shifting the frame of analysis toward forms of subordination in relations of production renders the reality of unpaid family work much more intelligible than it is under a frame that casts work and production solely in terms of firms, their employees, and the self-employed.<sup>221</sup> Despite the ICLS definitions, it has remained difficult to convince countries to take on the burden of attempting to count (and calculate) the economic contribution made by unpaid family workers.<sup>222</sup> Nonetheless, it is clear that a large portion of informal “firms” derive part of their income from “unpaid” work done by family members.<sup>223</sup>

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<sup>219</sup> See e.g. Banks, *supra* note 7; D J Doorey, “Who made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation” (2005) 43:4 Osgoode Hall LJ 353.

<sup>220</sup> Freedland points to “trainees” or apprentices as a group that requires particular treatment. Freedland, “Application Beyond Contract”, *supra* note 24 at 6, 13–14. Though he does not mention the possibility, the rise of the unpaid intern in North America especially points to the possibility of forms of labour “exchange” where work is attached not to monetary remuneration, but to the educational opportunity involved in that work. For a groundbreaking US case on the issue, see *Glatt v. Fox Searchlight Pictures*, 11 Civ 6784 (WHP) (SD NY 2013).

<sup>221</sup> See Tsikata, *supra* note 175 at 339–40 (stressing the need to account for labor relations in household-based production).

<sup>222</sup> See International Labour Office, *Statistical Picture*, *supra* note 2 (despite being based on the 2003 Guidelines, does not include work by contributing family workers as a separate category).

<sup>223</sup> See *ibid* at 54 (citing data showing between 11% and 50% of street food vendors in 9 global cities including contribution from unpaid women family members); Chen et al, *supra* note 3 at 45 (Egyptian data showing 85% of women’s informal agricultural work in “unpaid family” category) .

There is no doubt that some portion of unpaid family workers are, in reality, in relationships of subordination to the titular head or “formal” owner of a family business, and the framework provides a starting point to think through the contribution that intra-family power dynamics may make to distributive outcomes.<sup>224</sup> Under the realities of homework, there is also a problematic blurring of productive, market-based activities and domestic care responsibilities that needs to be carefully considered.<sup>225</sup>

On the other hand, once attention is shifted to unpaid family work, it becomes difficult to maintain the stability of a frame focused on relations of production alone. While all productive work is theoretically included within the “production boundary” that delimits economic from non-economic work in the SNA, it has nonetheless been a consistent challenge to collect and account for contributions which are not organized through a separate exchange relation. The result has been a perennial under-counting of women’s contributions to both subsistence activities and family businesses. The larger issue, however, remains the wholesale exclusion of “subsistence services”—i.e. unpaid care work, the majority of it done by women—from even the conceptual frame of “economic activity”, and especially from aggregates about work.<sup>226</sup> A similar dynamic historically framed labour law’s narratives, with reproductive work conceptually excluded from the account of commoditization, and the market “rigidly demarcated from reproductive household labour.”<sup>227</sup>

Once notice is taken of the ways in which assumed and actual distributions of *reproductive* responsibilities operate as background realities in constructing

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<sup>224</sup> See Tzehainesh Teklè, “Labour Law and Worker Protection in the South: An Evolving Tension Between Models and Reality” in Tzehainesh Teklè, ed, *Labour Law and Worker Protection in Developing Countries* (Portland, Or: Hart Publishing, 2010) 3 at 13–15 (work performed by family members has often been placed outside the attention of labour regulation by its treatment as a “private” matter).

<sup>225</sup> Lund & Srinivas, *supra* note 209 at 4.

<sup>226</sup> Chen et al, *supra* note 3 at 23–24.

<sup>227</sup> Blackett, “Emancipation”, *supra* note 25 at 421, 429–31.

relations of *production*<sup>228</sup> the boundaries of the “production relationship” are unsettled as well.

On the one hand, this opens the door to heterodox, if not necessarily novel, forms of “protection.”<sup>229</sup> But ultimately, it raises distributive questions which seem unanswerable from within the frame of the “work nexus” and the perspective of labour exchange. Those questions, however, will also have to be momentarily set aside.

#### **D. The Silent Partner of (State) Law**

The thrust of these engagements is that devising effective normative responses to informal work turns on correctly capturing the networks of subordination faced by (possibly overlapping) groups of workers and, as per Freedland’s analysis, using those perspectives to craft regulatory frames which account for the particular combination of factors present in particular contexts. Missing from this account however are questions that have been central to discussions of informality—those touching on what developed-world jurists have generally cast in terms of non-compliance or evasion.<sup>230</sup> To some degree, the perspectives above proceed without sufficient inquiry into the concept of regulatory “effectiveness,” or the context in which regulation operates.

Ravi Kanbur has drilled down on this aspect of informality and come up with a typology of possible regulatory gaps: beyond the usual case of a rule working as intended, he suggests that economic behaviour can be typified by non-compliance with an applicable rule, non-relevance of a rule, and non-applicability of a rule.<sup>231</sup> Unfortunately, Kanbur’s typology is jumbled, conceptually mixing the rules a regulation uses to structure behaviour, rules about its scope of application, and the

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<sup>228</sup> See e.g. Chen, Vanek & Carr, *supra* note 33 at 101–02 (homework preferable to many women particularly because of their child-care responsibilities).

<sup>229</sup> Lund & Nicholson, *supra* note 69 at 112 (urging consideration of social insurance for childcare and housing).

<sup>230</sup> See the collected articles in issue 103:8 Yale Law Journal, especially Richard A Epstein, “The Moral and Practical Dilemmas of an Underground Economy” (1994) 103:8 The Yale Law Journal 2157.

<sup>231</sup> Ravi Kanbur, *Conceptualising Informality: Regulation and Enforcement*, IZA Discussion Paper DP 4186 (Bonn: Institute for the Study of Labor, 2009).



regulation's underlying public policy purpose. This jumbling is easily demonstrated by its conflation of gaps detailed in Freedland's work. Freedland identifies two kinds of regulatory gaps, breaks or lacunae. The first is the exclusion of certain groups from regulatory protections contrary to the public policy purposes of those protections. On the other hand, certain groups of workers might be included in regulatory frameworks that are a poor fit with the kinds of protections those workers actually need.<sup>232</sup> Is one of these gaps a matter of irrelevant rules? Are both of them? Is one or the other a matter of inapplicable rules?

If the optimistic assumption is made that a set of appropriate—"relevant"—protections might be uniquely identified to address the forms of subordination faced by any group of workers, at least six possibilities appear: compliance with an applicable, relevant regulatory framework; or non-compliance with an applicable, relevant rule; compliance, or non-compliance, with an applicable but irrelevant rule; and finally, a relevant set of regulations (real or hypothetical) may not be applicable to a particular set of workers.<sup>233</sup>

Such a typology allows an unpacking, and potential challenge, to the common framing of practices in the informal economy as "outside the reach of different levels and mechanisms of official governance."<sup>234</sup>

Even informal activities corresponding to three cases which can be discerned in Freedland's framework queer the "beyond the reach" image. In Freedland's sanguine narrative, the shortcomings of European labour law are primarily conceptual, in the sense that labour law scholars have developed inadequate frames, and juridical, in the sense that jurists have relied on these frames—excluding some from the application of relevant rules, applying not-quite-relevant rules to others,

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<sup>232</sup> Freedland, "Personal Work Nexus", *supra* note 178 at 20.

<sup>233</sup> Three binary variables would imply eight combinations. In the last of the cases listed here however, the question of compliance is moot (reducing the total by one case); as for irrelevant, inapplicable rules, neither compliance nor non-compliance is possible (removing two). The total is brought up to six by hypothetical regulations, which are obviously not applied, and are only worth considering in cases of hypothetical compliance and hypothetical relevance.

<sup>234</sup> Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8 at 4.

and failing entirely to respond to the forms of subordination faced by others (the inapplicability of a hypothetically relevant rule).

None of these cases seem to correspond to activities actually being beyond the reach of regulation, though the first of them comes closest. As in the case of India, one way that informality can arise is from explicit exceptions and exemptions carved out of existing regulatory orders, either by firm size, or by sector.<sup>235</sup> This type of situation, which has most commonly spurred calls for the extension of labour standards (including in WIEGO's work),<sup>236</sup> could perhaps be viewed as being outside, if not actually beyond, regulatory reach.<sup>237</sup>

The case of homeworkers, on the other hand, seems to fall into an awkward space among the inapplicability of one set of rules, the application of another set of not-quite-relevant rules, and the absence of rules responding to their particular form of subordination.<sup>238</sup> Here, it is much harder to think of the problem in terms of the reach or extent of regulation. This is why, over the years, numerous authors have moved from speaking in terms of regulatory reach, toward analysis more engaged with regulatory fit instead. Research applying alternate frame have applied discourses of unfamiliar modes of organization,<sup>239</sup> of imperfect interaction with the

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<sup>235</sup> See above, note 57. The developing world is hardly alone in excluding workers in certain sectors from labour law protections. For consideration of the constitutionality of the exclusion of agricultural workers from collective bargaining protection in one Canadian jurisdiction, see *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 SCR 3 (Supreme Court of Canada).

<sup>236</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 35–37 (core rights and other basic rights should be extended to all workers; the “real challenge” is enforcement); Chen, Vanek & Carr, *supra* note 33 at 139–151 (supportively detailing efforts to extend labour standards to informal workers, including in India); compare International Labour Office, *Extending Scope*, *supra* note 39.

<sup>237</sup> Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8 at 4.

<sup>238</sup> See e.g. *Convention (no 177) concerning Home Work*, 20 June 1996, Geneva, International Labour Conference, Eighty-Third session [*Home Work Convention*] (recalling that “standards of general application concerning working conditions are applicable to homeworkers” but noting “the particular conditions characterizing home work make it desirable to improve the application of [standards] to homeworkers, and to supplement them by standards which take into account the special characteristics of home work”).

<sup>239</sup> Madhura Swaminathan, *Understanding the “Informal Sector”: A Survey*, WIDER Working Papers WP 95 (1991) at 1, quoted in Martha Chen, Jennefer Sebstad & Lesley O’Connell, “Counting the Invisible Workforce: The Case of Homebased Workers” (1999) 27:3 World Development 603.

net of official governance<sup>240</sup> and, from Keith Hart, of “invisibility to the bureaucratic gaze.”<sup>241</sup>

The frame of regulatory fit, however, retains some of the same awkwardness entailed by thinking about “reach.” If Freedland’s overarching model were sufficient, the particularities of “informality” would fade into a more global regulatory challenge: insofar as the reality of subordination is hidden by a skewed perspective, all that would be needed is a parallax view, a shift in the bureaucratic gaze. Without claiming that solving this version of the problem is easy, it at least creates a general way of characterizing the challenges applicable to both more and less industrialized, both richer and poorer countries. Unfortunately, the extension of Kanbur’s typology developed above clearly shows Freedland’s account to be insufficient. Simply put, regulatory problems are not limited to conceptual tangles. Laws are not self-executing. This is the old law-and-society lesson that, if one wants to understand the impact of legal rules, one must look not only at law on the books but at law in action as well.<sup>242</sup> Beyond the case of formally exempted workers and those whose forms of subordination are overlooked by existing regulation are a whole host of situations where the forms of subordination are familiar, or at least well-captured, where existing regulatory frames furthermore do seem to apply—and where the relevant protections are nonetheless unavailable. In these situations, the image of failed reach may again become relevant, not because of the formal scope of a regulation, but because in practice it only has a direct impact on some portion of workers. In these situations, what is needed is not so much a change in the conceptual frame, but either improvements in or amendments to methods of enforcement and administration.<sup>243</sup>

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<sup>240</sup> Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8 at 4–6.

<sup>241</sup> Hart in Guha-Khasnobis at 22

<sup>242</sup> See e.g. Marc Galanter, “Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change” (1974) 9:1 Law and Soc Rev 95; see Santos, *supra* note 6 at 67, 84–88, 94–97 (application of this insight to “informality”).

<sup>243</sup> So see e.g. David Weil, “A Strategic Approach to Labour Inspection” (2008) 147:4 International Labour Review 349 (beyond more resources, labour inspectorates need more strategic approach to inspection); Michael J Piore & Andrew Schrank, “Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World” (2008) 147:1 International Labour Review 1 (promises of a “Latin

There are numerous points that can be made here regarding what is what is hidden beneath the reference to practices being “beyond protection,” both by confusing conceptual lacunae with other shortcomings of governance,<sup>244</sup> and by mischaracterizing inappropriate frames as absent ones.

What even a full application of Kanbur’s extended typology misses, however, is that law not only intervenes in social relations *ex post*, but contributes actively to those relations *ex ante*. Laws are not only regulative, in terms of forcing actors to behave one way or the other, but also facilitative<sup>245</sup> (“reducing transaction costs” by making interactions legible and building trust) and constitutive (acting in the background to construct the rights, powers and identity of the actors).<sup>246</sup> There are easier and more complicated versions of this argument. For one, it has long been suspected that vertical disintegration not only creates realities falling outside the old frame of labour law, but that the absence of employment protections for the types of working relationships created is precisely what leads some firms to employ labour in these ways.<sup>247</sup> Some of the contracting-out documented in WIEGO’s global value chain research is hard to understand except through this frame.<sup>248</sup> The converse of this point is that changing the structure or scope of regulation may lead to changes in the organization of activities,<sup>249</sup> and in many cases produce perverse outcomes that actually increase levels of subordination.<sup>250</sup> Yet one of WIEGO’s most recent

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model” of labour inspection tailored to firm exigencies); compare Janice Fine & Jennifer Gordon, “Strengthening Labor Standards Enforcement Through Partnerships with Workers’ Organizations” (2010) 38:4 Politics and Society 552 (every violation of workplace laws in US could be addressed by changing the “logic” of detection and enforcement). See especially John Braithwaite, “Responsive Regulation and Developing Economies” (2006) 34:5 World Development 884 (responsive regulation may be particularly useful for developing economies with “capacity deficits”).

<sup>244</sup> Trebilcock, “Labour Standards”, *supra* note 15 at 588–89.

<sup>245</sup> See Lon L Fuller, “Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction” 1975 BYU L Rev 89.

<sup>246</sup> An excellent illustration of the “constitutive” role of law in American labour regulation is provided in Mark Barenberg, “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation” (1993) 106:7 Harv L Rev 1379.

<sup>247</sup> Collins, “Vertical Disintegration”, *supra* note 141 at 355–56.

<sup>248</sup> See Lund & Nicholson, *supra* note 69 at 75–77, 89–91.

<sup>249</sup> Guha-Khasnobis, Kanbur & Ostrom, *supra* note 8 at 6.

<sup>250</sup> See e.g. Kimberley Ann Elliott & Richard B Freeman, *Can Labor Standards Improve Under Globalization?* (Washington, D.C: Institute for International Economics, 2003) at 12, 112–13 (debate

publications draws on Kanbur's typology to make a slightly different point, which is that beyond changes in law or change in behaviour, the interplay between regulations and actor incentives can leave some activities not only unprotected by some particular regulatory frame, but with minimal access to *any* state institutions.<sup>251</sup>

While this provides another sense in which informal activities may be thought to be "beyond protection," the label remains misleading even in this clearest case. The reality captured is not one where workers are uninfluenced by state regulation, but quite the contrary: it is particular legal frames, particular strategies of enforcement and administration, and particular policy and spending priorities on the part of the state<sup>252</sup> which perpetuate and constitute these activities as outside regulation. This is the meaning intended by the epigraph opening this chapter: even where it seems absent, the law remains a silent partner.

Thus, confronting subordination in its diversity requires reflective, even reflexive approaches to law and regulation.<sup>253</sup> For the time being, the administrative, jurisprudential, and pragmatic challenges of developing such a reflexive approach to law in the countries of the global south are set aside. For, as explored in the next chapter, the possibility that state policy might constitute certain relations as practically outside the presumed benefits of certain regulatory regimes leaves open a potentially wide rift between the typical content of labour law and normative challenges at work which are not, it turns out, limited to the informal economy.

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about harms to children and their families from banning child labor, including "forcing them into prostitution").

<sup>251</sup> Chen, *Theories and Policies*, *supra* note 55 at 9–11.

<sup>252</sup> See Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 21–22 (policy stances toward informal activities can be dismissive, punitive, supportive); compare Chen, Vanek & Carr, *supra* note 33 at 173–74 (policy perspectives include informality as nuisance to be *eliminated*, vulnerable group to be *assisted*, source of growth and unemployment to be *unleashed*).

<sup>253</sup> Teklè, *supra* note 224 at 10–11; on aspects of reflexive law see Gunther Teubner, "Juridification: Concepts, Aspects, Limits, Solutions" in *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust, and Social Welfare Law* (New York: De Gruyter, 1987) 3.

## 4. Beyond Protection

*The normative core of labour law must surely entail more than worker protection.*<sup>254</sup>

Imagine for a moment a world in which appropriate, relevant rules had been crafted for every kind of working relationship; that those rules took account of the particular context in which everyone worked, including the complex networks of subordination in which they found themselves; that those rules were enforced through innovative, responsive regulatory methods that took into account both state capacity and the particular capacities of those regulated. This ideal seems to be the aspiration of what has come so far. Insofar as informal workers are “unregulated and unprotected,”<sup>255</sup> this would seem to eliminate informality and its problems in one fell swoop.

Closer inspection, however, reveals this account as underdetermined, a scaffold without the walls provided by an idea of what such “protections” would actually *do*.

What this chapter tries to show is that if the usual meanings of protection were used to fill in the architectural frame provided by the “ramified subordination” perspective detailed in the last chapter, the result would still leave a gaping hole in the normative horizon labour law has traditionally claimed for itself. It suggests that, while the gaps may be filled in differently, doing so requires both uprooting the relational account of the previous chapter from even a broadly-conceived version of Freedland’s “work nexus,” and uncoupling the analysis from informality as a distinct, stable category.

### A. Faces of Labour Law’s Protection

In WIEGO’s work, the idea of protection has multiple valences, but these meanings might be divided as a first cut into protections against *exploitation* and protection against *risk*. Both are well-known in labour law, but as the more familiar (and less complex), it is useful to start with the former.

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<sup>254</sup> Blackett, “Emancipation”, *supra* note 25 at 431.

<sup>255</sup> Lund & Nicholson, *supra* note 69 at 15.

**i. Protection from Exploitation**

Why protect the subordinate? Though the usual accounts are by now gospel to labour lawyers, it is worth rehearsing them, especially insofar as what sometimes appears as a single, coherent narrative actually combines multiple stories.

In labour law's most well-known justifying discourse, subordination has at times been deployed somewhat loosely. The terminology is variously used in contrast with the greater *transactional* power of an employer, to address unequal *bureaucratic* power in the production process, or in reference to an imbalance of overall *market* power.<sup>256</sup>

For many, what Brian Langille calls the "constituting narrative" of labour law cannot be recounted without drawing on Kahn-Freund's famous dictum that labour law acts as "a countervailing force to counteract the inequality of bargaining power....inherent in the employment relationship."<sup>257</sup> Such protections are intended to allow the subordinate party to "structure countervailing power,"<sup>258</sup> or even to "resist or limit (this form of) subordination."<sup>259</sup>

Efforts to rehabilitate the employment relationship over the last twenty-five years, however, have pointed out that this account combines or even conflates multiple issues. Hugh Collins has pointed out that while the employment contract may be shaped by inequality of bargaining power, that the ongoing integration into a bureaucratic organization entails subjection to bureaucratic power and control, even in contexts where the bargaining parties are relatively equal.<sup>260</sup> Indeed, as

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<sup>256</sup> These three meanings of subordination are often combined. See e.g. Arthurs, "Subordination and Resistance", *supra* note 23 ("subordinate" actors might include welfare recipients, tenants, small business owners).

<sup>257</sup> P L Davies & M R Freedland, *Kahn-Freund's Labour and the law*, 3d ed (London: Stevens, 1983) at 8. See Langille, "What Is ILL For?", *supra* note 31 at 54; Bob Hepple, "Four Approaches to the Modernisation of Individual Employment Rights" in Roger Blanpain & Manfred Weiss, eds, *Changing Industrial Relations & Modernisation of Labour Law: Liber Amicorum in Honour of Professor Marco Biagi* (The Hague; New York: Kluwer Law International, 2003) 181 at 182.

<sup>258</sup> Arthurs, "Subordination and Resistance", *supra* note 23 at 596.

<sup>259</sup> *Ibid* at 8.

<sup>260</sup> Hugh Collins, "Market Power, Bureaucratic Power, and the Contract of Employment" (1986) 15:1 *Industrial Law Journal* 1; see also Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002) 52:4 *UTLJ* 357 at 378-79 (bureaucratic organization subjects work to centralized decision-making); Orsola Razzolini, "Need to Go Beyond

traced by both Guy Davidov and Orsola Razzolini, subjection to bureaucratic control and direction has been the primary factor used by both European and North American courts in determining whether employment protections should be applied to a working relationship.<sup>261</sup>

As for this latter form of “bureaucratic” subordination or subjection to control, labour law’s protections have tried to react to the possibility of super-ordinate actors not acting “decently,”<sup>262</sup> or to ensure “respect” for workers<sup>263</sup> and especially for their basic rights.<sup>264</sup> Where workers are integrated into an organization, there is an intrinsic, moral sense that they should have the benefit of reasonable rules and reasonable decisions, i.e. that such control should not be misused.<sup>265</sup> Put differently, integration into a dictatorial, hierarchical setting creates a “democratic deficit” for those who are the subject of, but not the authors of, key decisions.<sup>266</sup> In this account, employees need protection from employers because the latter threaten to become *unreasonable* or *unscrupulous* authority figures.

As for countering inequality of bargaining power at the creation of the employment relation, the primary justification has been primarily instrumental. As Mundlak describes it, the goal of this “brokerage of power...between labour and capital” is not only to set the parties on equal footing, but rather to pursue a fair distribution of income from production.<sup>267</sup>

Langille claims that there is no coherent idea of inequality of bargaining power internal to economic theory,<sup>268</sup> and that accounts based on a brokerage of power

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the Contract: Economic and Bureaucratic Dependence in Personal Work Relations, The” (2009) 31 Comp Lab L & Pol’y J 267 at 280–82. Compare Giuseppe Casale, “The Employment Relationship: A General Introduction” in Casale, ed, *supra*, note 142, 1 at 3 (listing three dimensions of control or hierarchical power, including directional power, control power, disciplinary power).

<sup>261</sup> Davidov, “Three Axes”, *supra* note 260 at 365–71; Razzolini, *supra* note 260 at 269–272.

<sup>262</sup> Arthurs, “Subordination and Resistance”, *supra* note 23 at 592.

<sup>263</sup> Langille, “What Is ILL For?”, *supra* note 31 at 54.

<sup>264</sup> *Ibid* at 53.

<sup>265</sup> Collins, “Market Power”, *supra* note 260 at 10–11.

<sup>266</sup> Davidov, “Three Axes”, *supra* note 260 at 379–81.

<sup>267</sup> Guy Mundlak, “The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers” in Davidov & Langille, eds, *Idea of Labour Law*, *supra*, note 22, 315 at 316.

<sup>268</sup> Langille, “What Is ILL For?”, *supra* note 31 at 54.



inevitably transform labor standards into a tax on otherwise-efficient market activity in the name of making society fairer, or more equal.<sup>269</sup> Strictly speaking, arguments about efficient allocation of rents from production might actually be used to justify the power-redistributing intervention.<sup>270</sup> Either way, whether the problem is solved by increasing the power of workers in the bargaining process, or by setting limits on the bargain that can be negotiated,<sup>271</sup> protection is offered in this account to change the bargain that would arise in the absence of these protections, and replacing it with one that gives the worker their fair share of the returns on production.<sup>272</sup>

Thus, the *economic* harm being protected against in the meaning of subordination is exploitation, the possibility of the more powerful parties in (networked) relations of production taking more than their fair share.<sup>273</sup>

It is necessary to drill down in these arguments a bit further, however. Rooted in attempts to understand, rehabilitate and extend the employment relationship, discussions of “dependence” or “economic subordination” of workers have actually combined two arguments, one about the relative power of the parties in the negotiation of the terms of work (used to justify regulation of the employment relationship) and the other about the relative power of market actors more generally (used to defend the employment model of work regulation itself).

The first step requires establishing market inequality between workers and employers. Employers are held to have access to greater resources than workers, and to therefore face a lower marginal cost of choosing not to contract.<sup>274</sup> Workers

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<sup>269</sup> *Ibid* at 56.

<sup>270</sup> Christopher L Erickson & Daniel J B Mitchell, “Monopsony as a Metaphor for the Emerging Post-Union Labour Market” (2007) 146:3/4 *International Labour Review* 163; Bruce E Kaufman, “Labor’s Inequality of Bargaining Power: Myth or Reality?” (1991) 12:2 *Journal of Labor Research* 151.

<sup>271</sup> Langille, “What Is ILL For?”, *supra* note 31 at 54–55.

<sup>272</sup> See Preamble, International Labour Organization, *Declaration on Fundamental Principles and Rights at Work* (International Labour Conference, 86th Session, 1998) (“guarantee of fundamental principles and rights at work...enables the persons concerned to claim...their fair share of the wealth which they have helped to generate”).

<sup>273</sup> Compare Kaufman, *supra* note 270 at 153–54 (if exploitation means a wage below marginal product of labour, then a wage can be unfair, even inefficient, without being “exploitative”).

<sup>274</sup> Collins, “Market Power”, *supra* note 260 at 1.

are more *vulnerable* than other market actors,<sup>275</sup> not least because they have to earn an income to subsist.<sup>276</sup> Employers may also enjoy formal or de facto status as monopsony purchasers of labour.<sup>277</sup>

Of course, this offers less than the broader account of “market subordination” explored below. It does on the other hand capture how market inequality appears in labour law’s traditional narratives. To the degree that labour law is concerned with making society fairer, or more *equal*,<sup>278</sup> or with justice against markets,<sup>279</sup> it is these market realities which are to be counterbalanced.

It seems easy enough to move to the second step, of transferring this market inequality into transactional inequality in the establishment of a contract for work or labour. Additional factors may become salient—information asymmetries about the labour market, for example<sup>280</sup>—but overall, what makes workers “market subordinate” are the same factors that decrease their ability to avoid an exploitative working relationship.

What needs to be absolutely stressed, however, is the logical fallacy of assuming the contrapositive: just because market inequality is the source of transactional inequality, it does not logically follow that regulating against transactional subordination can overcome market subordination.

Discussions of the employment relationship or its justifications have seldom stated such an assumption explicitly; without keeping the two issues separate, it would be hard to do so. Nonetheless, discussions of “dependency” in particular show that the claim is implicit in discussions of the regulation of employment and the policing of the divide between employee and non-employee workers. For the term is used on the one hand to refer to an individual’s reliance on income from a particular source

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<sup>275</sup> Davidov, “Three Axes”, *supra* note 260 at 375; Arthurs, “Subordination and Resistance”, *supra* note 23 at 592.

<sup>276</sup> Davidov, “Three Axes”, *supra* note 260 at 385; Mundlak, *supra* note 267 at 318, quoting Clause Offe.

<sup>277</sup> Razzolini, *supra* note 260 at 279–80; Kaufman, *supra* note 270 at 153–54.

<sup>278</sup> Langille, “What Is ILL For?”, *supra* note 31 at 56.

<sup>279</sup> *Ibid* at 55.

<sup>280</sup> Razzolini, *supra* note 260 at 279–80.

(their employer),<sup>281</sup> and on the other to their general position of “vulnerability” as market actors who need to work to earn a living.<sup>282</sup>

## **ii. Protection from Risk**

Risk appears in two somewhat contradictory guises in labour market regulation.

First and foremost, risk is the villain in the narrative that justifies what both WIEGO and the ILO refer to as social protection,<sup>283</sup> or social security.<sup>284</sup> As typified by the framework set out in the ILO’s Convention 102,<sup>285</sup> the social security schemes consolidated in the post-WWII period were designed to address common, but not always predictable interruptions (“contingencies”)—illness, disability, maternity, child rearing, and old age—that would either cut into the ability of households to earn an income,<sup>286</sup> or create exceptional cost burdens.<sup>287</sup>

Beyond these contingencies, however, risk is inherent in market-based economies—and also, albeit in different orientations, outside them. Income interruptions and income volatility more generally arise not only from life events affecting individuals and their families, but from the unpredictable trajectories of prices for both inputs and outputs that exist in anything but the most sterilized of theoretical market

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<sup>281</sup> Davidov, “Three Axes”, *supra* note 260 at 389–92; Razzolini, *supra* note 260 at 278–79; Collins, “Vertical Disintegration”, *supra* note 141 at 354.

<sup>282</sup> Razzolini, *supra* note 260 at 269.

<sup>283</sup> International Labour Organization, “Decent Work” in *Report of the Director General* (Geneva: ILO, 1999) Part I. Somewhat problematically, as consolidated under ILO auspices, “social protection” also included “labour protection” i.e. the assurance of decent conditions of work when it comes to wages, working time and health and safety.

<sup>284</sup> Both ILO and WIEGO documents often use the two terms interchangeably. See, e.g. International Labour Office, *Social Security: Issues, Challenges and Prospects* (Geneva, 2001); Chen, “Informality and Social Protection”, *supra* note 121; but see Lund & Srinivas, *supra* note 209 (“social protection” as umbrella term including social assistance, disaster relief and social security). Part of the problem may flow from the fact that “social security” is used to refer to both a normative ends for individuals and, as in the case of the United States, the group of institutions and systems set up to achieve those ends. The difference between “social insurance” and “social security” is addressed more directly in the next section.

<sup>285</sup> *Convention (no 102) concerning Minimum Standards of Social Security*, 28 June 1952, Geneva, International Labour Conference, 35th Session [*Convention 102*].

<sup>286</sup> It was threats to household income, and not only individual income-earning capacity, that were targeted. See *ibid* at arts 59–62. See Simon Deakin & Mark Freedland, “Updating International Labor Standards in the Area of Social Security: A Framework for Analysis” (2006) 27:2 Comp Lab L & Pol’y J 151 at 157 (in Convention 102, social wage was tied to the model of a single-breadwinner family).

<sup>287</sup> *Convention 102*, *supra* note 285, pt II (benefits to be paid for costs of medical care), *ibid*, pt VII (benefit to be paid for maintenance of children).

models. Of course, these volatilities can imply both ups and downs, and in the long term, returns from even risky income sources are at least moderately predictable.<sup>288</sup> Unfortunately, real people cannot eat the possibility of a future windfall and, as Keynes said, in the long term we are all dead.

In this context, some accounts of employment cast it as a form of risk exchange: the security and stability of a wage income are offered in return for subordination (hierarchical control).<sup>289</sup> For the employer, the wage bargain limited variability in the quality of inputs,<sup>290</sup> reduced transaction costs associated with complex tasks,<sup>291</sup> and allowed dynamic response to volatile market demand by identifying and locking in trustworthy counterparties.<sup>292</sup> For employees, what this meant, first and foremost, was relatively reduced exposure to high income volatility and especially to periods without income at all (“unavailability of work”).<sup>293</sup>

This latter idea of risk—in reality an amalgam of all the risks of market production external to an individual’s capacity to work—became an important factor in delimiting employees from “independent contractors.” In fact, it was central in the ICSE’s division between the two: wage employees are defined, first and foremost, by the indirect connection between their (predictable) wages and the actual (more

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<sup>288</sup> In a review of the literature on livelihood risks, Chen and Dunn usefully point out that risk can be defined either by reference to the variance in outcome or by the probability of a negative outcome. Martha Alter Chen & Elizabeth Dunn, *Household Economic Portfolios*, AIMS Paper (Washington, D.C.: Management Services International, 1996) at 19. The former idea is the one prevalent in finance circles, and its importation into considerations of threats to livelihoods can easily lead to confusion: see e.g. Davidov, “Three Axes”, *supra* note 260 at 390–91 (noting piece rate workers face greater risk, without averting to their “chance of profit” where they are able to produce more efficiently).

<sup>289</sup> Collins, “Vertical Disintegration”, *supra* note 141 at 362–63; Langille, “What Is ILL For?”, *supra* note 31 at 57.

<sup>290</sup> Collins, “Vertical Disintegration”, *supra* note 141 at 353, 358–59 (vertical integration allows firm to manage risks of production; employment relationship matured alongside vertical integration).

<sup>291</sup> *Ibid* at 364.

<sup>292</sup> Herbert A Simon, “A Formal Theory of the Employment Relationship” (1951) 19:3 *Econometrica* 293.

<sup>293</sup> Collins, “Vertical Disintegration”, *supra* note 141 at 362. Of course, it was recognized that employers ultimately had a limited capacity to absorb the cost of low-demand periods. Given that this protective function of the employment relationship could only go so far, insurance schemes were also created to manage income interruptions resulting from job loss, a contingency covered by the framework provided in Convention 102. *Convention 102*, *supra* note 285.

unpredictable) returns from their work; the self-employed, on the other hand, bear the full brunt of risk-connected loss *and* the full benefit of risk-related reward.<sup>294</sup>

Guy Davidov has argued that employees actually face greater risk than non-employees because, unlike independent contractors, they are unable to insure against production risks by diversifying their income sources.<sup>295</sup> It is true, to a point, that there is a risk involved for employees in “investing” in firm-specific skills.<sup>296</sup> How these factors balance out is a hard question. Yet the assumption, at least, of the Convention 102 model, was that professionals and small-business owners would be the ones exposed to greater risk—especially since the employment relationship meant it became designated as the “natural” platform to deliver insurance against the common contingencies<sup>297</sup>—but that this was acceptable primarily because they were “capable of taking care of themselves.”<sup>298</sup>

### iii. Equality

Before turning to WIEGO’s application of (and departure from) the protective themes outlined in the last two sections, it is worth taking note of a set of ideas that lies at an oblique angle with the capital-labour conflict. As expressed by Guy Mundlak, labour law has always entailed not only a function distributing power, income and risk between workers and their employers, but a function distributing income opportunities among workers themselves, as well.<sup>299</sup>

On the one hand, Mundlak’s argument simply takes the old saw of realist legal theory, that market institutions inevitably shape not only aggregate production but also the distribution from that production,<sup>300</sup> and applies it as between the subjects of concern to labour law, namely those who have to work to make their living. At

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<sup>294</sup> International Labour Organization, “ICSE-93”, *supra* note 117, paras 6–7.

<sup>295</sup> Davidov, “Three Axes”, *supra* note 260 at 392–93.

<sup>296</sup> *Ibid* at 389–90.

<sup>297</sup> Langille, “What Is ILL For?”, *supra* note 31 at 58.

<sup>298</sup> Supiot, *Beyond Employment*, *supra* note 183 at 152.

<sup>299</sup> Mundlak, *supra* note 267; see also Colleen Sheppard, “Mapping Anti-Discrimination Law onto Inequality at Work: Expanding the Meaning of Equality in International Labour Law” (2012) 151:1-2 *International Labour Review* 1 at 2–3 (labour law has often excluded concerns of marginalized workers).

<sup>300</sup> See e.g. Robert L Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38:3 *Political Science Quarterly* 470.

first glance, it seems odd that he would even have to stress this point. The reality that workers might have differential income opportunities seems explicit in the corpus of most industrialized-country labour codes, in the form of non-discrimination standards that attempt to overcome systemic disadvantage faced by certain groups of workers.<sup>301</sup> Yet, he suggests, such worker-distributive functions have often been marked and discussed as derivative of the worker-capital conflict, aimed at preventing exploitation by eliminating the opportunity to leverage between groups of insider and outsider workers.<sup>302</sup>

Without delving into a full elaboration of these ideas, it is worth touching on the awkward overlap between the goal of fairly distributing income (and income opportunities) among workers, and the discourse of “protection.” It may be true that the goal of labour market equality began its life framed as a matter of “protection” against discrimination.<sup>303</sup> Yet there have also been clear-cut cases where measures designed to protect particular groups of workers have explicitly conflicted with the goal of “equality at work.”<sup>304</sup> More generally, there is doubt about how much systemic inequalities can be overcome by regulating individual relationships.<sup>305</sup>

### **B. Informality as “Vulnerability”**

Attempts made by WIEGO-affiliated scholars to extend protective functions beyond the formal setting have revealed important practical concerns that would have to be overcome. More fundamentally, however, WIEGO attempts to apply these concepts has forced them to bring up normative concerns that slot imperfectly into any of the “protective” frames listed above. To put the problem succinctly, there are important tensions both internal to and in the interaction between the “risk management” and

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<sup>301</sup> That is, labour law should have a role not only in ensuring workers can claim their fair share, but that they can do so “on the basis of equality of opportunity” (as in the International Labour Organization, “1998 Declaration”, *supra* note 272, preamble). See e.g. *Convention (no 111) concerning Discrimination in Respect of Employment and Occupation*, 25 June 1958, Geneva, International Labour Conference, 42nd Session [*Convention 111*]. See generally Sheppard, *supra* note 299.

<sup>302</sup> Mundlak, *supra* note 267 at 322–23. Michal Kalecki (“Political Aspects of Full Employment” [1943] 14:4 *The Political Quarterly* 322 ) provides the converse argument, that trade-offs between workers are derivative of efforts by capital to prevent full employment.

<sup>303</sup> Sheppard, *supra* note 299 at 4–6.

<sup>304</sup> See e.g. *ibid* at 5–6.

<sup>305</sup> *Ibid* at 12–13.

“exploitation-prevention” functions, and engagement with the issues raised by WIEGO shows that reconciling those tensions using the strategies relied on by labour law during the 20<sup>th</sup> century proves impossible once account is made of common features of work in the global south.

**i. Exploitation through Risk?**

Recall that at the root of the employment-based approach to informality was a desire both to capture workers who “lacked the protection of labour law,” and to identify those who should be held accountable for those (unprotected) working conditions.<sup>306</sup> Some of WIEGO’s work has been quite explicit in its claims that working conditions result from exploitation by more powerful actors in networks of production.<sup>307</sup> Without speaking to the logistical or cognitive burden of actually implementing decisions about the kind of institutions, in what contexts of power imbalance, would be necessary or appropriate to reach “fair bargains” between individual workers and the networks of production in which they find themselves, it is at least conceivable that this narrative about counteracting relational power to prevent exploitation might be generalized to the much broader set of subordinate relations identified above.

Despite reference to “labour benefit” analysis, however, WIEGO has focused primarily on how relationships of production distribute rights and entitlements (as implied by the “lacking protection” frame), not on how they distribute returns from that production.<sup>308</sup> Even where the language of exploitation has been explicitly deployed, the concern has not been on the allocation of benefits *per se*, but instead on the distribution of both the risks connected to that production and the costs of mitigating that risk.<sup>309</sup> Both in the study of homeworkers and industrial outworkers, and in the broader unravelling of global value chains, the key claim could be read as

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<sup>306</sup> See Chapter 3.B

<sup>307</sup> Chen, Jhabvala & Lund, *Policy Framework*, *supra* note 103 at 9–11; Chen, “Informality and Social Protection”, *supra* note 121 at 23–24; Chen, *Theories and Policies*, *supra* note 55 at 11.

<sup>308</sup> Lund & Nicholson, *supra* note 69 at 16.

<sup>309</sup> Chen, “Informality and Social Protection”, *supra* note 121 at 23–24; Chen, Vanek & Carr, *supra* note 33 at 111.

a matter of dominant players having outsourced and downloaded risk without fairly compensating workers for doing so.

In fact, orienting the characterization of worker needs around the theme of risk (and “vulnerability”) rather than exploitation has been a strong trend in WIEGO analysis—and perhaps with good reason. Within the context of large or even global production networks, the idea that exploitation would work *via* downloaded risk, unfairly compensated has undeniable potency.

The larger gap in the salience of the exploitation narrative however, is implicit, but glossed over<sup>310</sup> in WIEGO’s attempts to integrate a “system of production” variable into their analyses of informal work. While some workers may have a spot in long value chains, a large number of them may be best characterized as involved in “point transactions” (where there may still be a dominant counterparty), and possibly in subsectors where a dominant player strongly influences overall conditions.<sup>311</sup>

The careful reader will note that these latter cases overlap uneasily with the accounts of “subordination” from the last section—and not at all with the “bureaucratic integration” narrative. Before a rehabilitation of the “exploitation” narrative can be attempted, however, it is worth exploring WIEGO’s much broader inquiry into informality, risk and social protection.

## **ii. (Un)common Contingencies**

Though some of WIEGO’s work falls into the trap of discussing the problem of informality and social security simply as a matter of “gaps in coverage,” almost colouring legal integration into a social security system as an end rather than a means,<sup>312</sup> foundational work by Francie Lund and Smita Srinivas has framed the general challenge of social protection (for formal and informal workers) as one of effective risk management.<sup>313</sup> This perspective recasts the question of coverage in

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<sup>310</sup> See Chen et al, *supra* note 3 at 61–62; Lund & Nicholson, *supra* note 69 (considering only long value chains).

<sup>311</sup> Chen, Vanek & Carr, *supra* note 33 at 107–08; Chen, *Theories and Policies*, *supra* note 55 at 12.

<sup>312</sup> Lund & Srinivas, *supra* note 209 at 2, 13 (problem cast as a matter of “getting access to measures of provision”); Chen, “Informality and Social Protection”, *supra* note 121 at 24–26.

<sup>313</sup> Lund & Srinivas, *supra* note 209, ch 4.



more fundamental terms, as a matter of the capacity of households and individuals to prevent, mitigate and cope with potential threats to their livelihoods (taking the form of either income reductions or exceptional costs).<sup>314</sup>

Within this broad frame, one point repeatedly made by WIEGO researchers is that (many of) the “common contingencies” are just as likely, if not more likely, to strike informal workers, no matter their status in employment.<sup>315</sup> Beyond those contingencies, however Lund and Srinivas are far from alone in arguing for social security systems more attuned to the most common contingencies facing workers in particular countries and contexts.<sup>316</sup> They point out, for example, that for the most vulnerable workers, the most salient “exceptional” costs may extend beyond those addressed by Convention 102 (health care and child-rearing), to include funeral costs,<sup>317</sup> or celebrations related to births or weddings.<sup>318</sup>

Their analysis also reveals design problems that transcend misidentification of the most relevant contingencies. In fact, the nature of threats to worker livelihoods they identify put in question the overarching model of managing risk to individual earning capacity, by drawing attention to sources of loss and volatility tied not to personal circumstance but to broader factors like flood, drought, blight—or seasonality of work.<sup>319</sup>

The existence of livelihood threats that impact on entire communities and industries is incompatible with the individual- or household-based model of Convention 102 (it also strains against the reliance on integrating community-level schemes

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<sup>314</sup> *Ibid* at 54.

<sup>315</sup> *Ibid* at 44; R Filali Meknassi, “Extending Social Security in the Developing Countries: Between Universal Entitlement and the Selectiveness of International Standards” (2005) 27 Comp Lab L & Pol’y J 207 at 214–15 (small workplaces increase chance of workplace injury).

<sup>316</sup> Compare Diawara, *supra* note 1 (crafting effective social security regimes requires attention to motivations, existing institutions and resources, and most relevant threats to livelihoods).

<sup>317</sup> See e.g. *ibid* (cultural centrality and high cost of lavish funerals in much of South and Central Africa).

<sup>318</sup> Lund & Srinivas, *supra* note 209 at 44.

<sup>319</sup> *Ibid* at 47.

emphasized in recent ILO strategy documents<sup>320</sup>). While such threats have traditionally been managed through public relief schemes, that is not the end of the inquiry into their relevance. The larger problem is that these factors seem to bleed into the category of “market risk” identified in the first section. Seasonality, for example, can affect communities, but it is also inherent in the production process in many agricultural settings.<sup>321</sup> Moreover, for many workers, the impact of a disaster is not incapacity to work, but loss of assets, which may affect earning capacity while influencing neither an individual’s capacity to work, nor the availability of work.<sup>322</sup> Even more broadly, a key “risk” identified in surveys of informal workers is the precariousness of individual income sources, and the challenge of finding dependable employment.<sup>323</sup>

Finally, WIEGO’s work showed that effective social security systems are also troubled by a mirror image of the unpredictable income problem: despite those who argue strongly for maintaining and expanding contributory social protection schemes,<sup>324</sup> for many workers in the informal economy, low income makes it difficult to save to address contingencies, or to participate in contributory schemes.<sup>325</sup>

### **iii. Social Security and “Protection from Want”**

Together, these ideas push against framing social protection as “coverage against contingency.”<sup>326</sup>

The problem may lie in the ambiguous origins of “social security” as a broadly-supported normative project in the post-WWII order. Where it appears in the

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<sup>320</sup> Diawara, *supra* note 1 at 225–26 (ILO aims to “expand social security” by expanding the scope of extant systems, attempting to link public systems to community-based measures, and supporting decentralized measures).

<sup>321</sup> Lund & Srinivas, *supra* note 209 at 17. 46.

<sup>322</sup> *Ibid* at 44.

<sup>323</sup> Lund & Nicholson, *supra* note 69 at 40, 112.

<sup>324</sup> Alain Supiot, “The Outlines of a Framework Agreement on the Extension of Social Protection” (2005) 27 Comp Lab L & Pol’y J 273 at 276–80 (treating workers with “dignity” requires expectation of reciprocity—and thus of worker contribution—in social protection schemes).

<sup>325</sup> Lund & Nicholson, *supra* note 69 at 16; see also Meknassi, *supra* note 315 at 210–11; and see especially Maloney, “Informality Revisited”, *supra* note 96 at 1165–66 (many workers in informal sector may feel state social security schemes are an unaffordable, or even inefficient, luxury).

<sup>326</sup> Contra Lund & Srinivas, *supra* note 209 at 31.

Universal Declaration of Human Rights (UDHR), for example, the guarantee is given little elaboration,<sup>327</sup> though it is supplemented by separate articles guaranteeing the right to “an adequate standard of living” that includes food, clothing, housing, and medical care; and to “security” against an enumerated list of threats to a person’s livelihood that are “beyond his [or her] control.”<sup>328</sup> This broad expression goes beyond the meaning intended by the phrase’s appearance in the Declaration of Philadelphia, which was limited to a guarantee of the bare necessities of life in all circumstances.<sup>329</sup> The “risk” targeted by social security measures thus takes on a double aspect<sup>330</sup>: on the one hand, it stands for the possibility of destitution, of families becoming unable to produce or purchase the necessities of life, while on the other, it references the more general and less severe threat of events that disrupt a family’s “livelihood,” i.e. their ability to *earn* an income.<sup>331</sup>

Emmanuel Reynaud has suggested that Convention 102<sup>332</sup> was intended to give the promise of social security in the UDHR and the Declaration of Philadelphia the force of international law.<sup>333</sup> Though Convention 102 was the centrepiece of the ILO approach to social security in the post-WWII period,<sup>334</sup> it only got half-way there; much in line with the *Income Security Recommendation* passed by the ILC in the wake of the Atlantic Charter eight years earlier, Convention 102 provided a framework for countries to “relieve want” and “prevent destitution” but only insofar

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<sup>327</sup> *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948)art 22.

<sup>328</sup> *Ibid*, art 25.1.

<sup>329</sup> Emmanuel Reynaud, “Social Security for All: Global Trends and Challenges” (2005) 27 Comp Lab L & Pol’y J 123 at 140.

<sup>330</sup> Unhelpfully, the discourse of “risk” is sometimes used to refer to the probability or likelihood of events or outcomes, and in some cases refers directly to unwelcome events or to the loss associated with those events.

<sup>331</sup> Compare K P Kannan, *Social Security, Poverty Reduction and Development: Arguments for Enlarging the Concept and Coverage of Social Security in a Globalizing World*, ESS Paper 21 (Geneva: International Labour Office, 2004) (pointing to “basic social security” to meet deficiency and “contingent social security” to meet adversity).

<sup>332</sup> *Convention 102*, *supra* note 285.

<sup>333</sup> Reynaud, *supra* note 329 at 141.

<sup>334</sup> Deakin & Freedland, *supra* note 286 at 151.

as it could be done by restoring income lost as a result of inability to work or loss of pre-existing work.<sup>335</sup>

Deakin and Freedland hint at the nature of the gap when they describe Convention 102 as taking a “social insurance” approach to social security, but they have in mind a narrower point. Their claim is that the approach to social security supported by Convention 102 is one that guards against the risks faced by households dependent on a wage.<sup>336</sup> To a point, they are correct. The narrow, exceptional case<sup>337</sup> available to any country “whose economy and medical facilities are insufficiently developed”<sup>338</sup> makes clear that the touchstone of the Convention’s framework was the male, full-time employee in a medium-to-large size industrial setting, supporting a wife and family (i.e. the “Fordist” ideal).<sup>339</sup> Nonetheless, the provisions outlining the target populations for most of the Convention’s enumerated benefits do allow for a broader scope of application, one that includes classes of residents beyond employees.<sup>340</sup> Moreover, many of the covered contingencies speak only of a household’s loss of earnings, without specifying the original source of those earnings.<sup>341</sup>

The more general version of Deakin and Freedland’s point is nonetheless correct: to understand Convention 102 as aimed at “social security” in the larger sense of preventing destitution, or of overcoming want, it has to be assumed that everyone already has an (above-poverty) income to lose. It is only according to this interpretation of “employment,” not as a matter of wage earning *per se*, but as matter of reliable, non poverty-level income more generally, that it can be said that the social insurance approach only makes sense against a background assumption

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<sup>335</sup> *Recommendation (no 67) concerning Income Security*, ILO, 12 May 1944, Philadelphia, International Labour Conference, 26th Session [*Income Security Recommendation*], art 1.

<sup>336</sup> Deakin & Freedland, *supra* note 286 at 152–53.

<sup>337</sup> *Convention 102*, *supra* note 285, art 9(d).

<sup>338</sup> *Ibid*, art 3.1.

<sup>339</sup> Supiot, “Outline”, *supra* note 324 at 273–74.

<sup>340</sup> See e.g. *Convention 102*, *supra* note 285, art 9(b).

<sup>341</sup> *Ibid*, arts 14, 26, 32(b)-(d), 47, 54, 60.

that the larger aim of social security will be guaranteed through a policy of full employment, broadly understood.<sup>342</sup>

#### **iv. Beyond the Work Nexus**

Even a fully-funded, public-financed social insurance scheme—say, one designed to address the most salient “income shocks” for particular groups of workers—would thus leave a host of workers in developing countries subject to the key income risk; not those arising from personal contingencies, but simply from the vagaries of a fickle market, more competitive than ever under the pressures of globalization.

If the “exploitation through risk” narrative described the central dynamic in the constitution of informality, then addressing that broader, more fundamental source of vulnerability would be congruent with the “ramified subordination” framework and the strategy of redistributing risk, costs and returns more equitably among the participants in production networks. Unfortunately, bringing attention back to the under-emphasized members of the “system of production” typology mentioned above<sup>343</sup> makes clear that it does not.

Far from it. In fact, 60% (or more) of informal workers are at least nominally in the broad self-employed category, including a large number of (sometimes counted, sometimes uncounted) unpaid family workers,<sup>344</sup> and therefore best understood as engaged either in “true” market transactions, in a series of what Chen calls “point transactions,” or in a sub-sector where similarly-situated firms nonetheless dominate overall conditions.

Assume, for the sake of argument, that some of the collected data fail to effectively draw boundaries according to the 2003 Guidelines, and that some of these self-employed workers are in fact tied into larger production networks.<sup>345</sup> Indeed,

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<sup>342</sup> Reynaud, *supra* note 329 at 143; see also Meknassi, *supra* note 315 at 209–10.

<sup>343</sup> See above, notes 209–10 and associated text.

<sup>344</sup> Chen relies on data based (loosely) on ICLS definitions, estimating that, as a portion of informal employment, “self-employment” constitutes 70 per cent in sub-Saharan Africa, 62 per cent in North Africa, 60 per cent in Latin America, and 59 per cent in Asia. Chen, “Informal Linkages”, *supra* note 2 at 82–83.

<sup>345</sup> The latter of these claims is clearly documented. See Maloney, “Informality Revisited”, *supra* note 96 at 1169 (up to 20% of small informal proprietors in urban Mexico “associated” with larger firms).

assume that fully half of “self-employed” workers are in fact being exploited (via, *inter alia*, downloaded risk) by other participants in their production networks, who according to the “ramified subordination” model have at least some responsibility for mitigating, managing and mediating market risk.

Putting the elements of this optimistic hypothetical together still leaves approximately 30% of the world’s informal workers, approximately 15% of the world’s working population, “protected” from common contingencies, but without access to a reliable income sufficient to keep them out of poverty. Unable to find sufficiently powerful, sufficiently flush, (and in the ideal, sufficiently regulated) networks to work within, this 15%—half a billion people being a conservative estimate—would be forced to search for income from whatever sources they can cobble together, in the hopes of finding opportunities that are at least moderately predictable, using local, family and community institutions as the sole source of income smoothing.

According to the traditional labour law narratives discussed above, this leaves this between 15% and 40% of the world’s workers grouped together with “the self-employed independent entrepreneur [who] foregoes security in return for the chance of profit...”<sup>346</sup> Indeed, extended to its reasonable limits, the normative underpinnings of labour law laid out in section A cast these workers as without the *need* of labour law’s protection. After all, these workers have “chosen” to forgo the subordination that would entitle them to the risk protection derivative of an employment contract; and, lacking a relationship of subordination, they do not need institutional protection to counterbalance power within the systems of production in which they are engaged, either. In fact, WIEGO has carefully documented that a key risk management strategies pursued by such workers is also one attributed to the self-employed of the global North:<sup>347</sup> diversification of income sources.<sup>348</sup>

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<sup>346</sup> Langille, “What Is ILL For?”, *supra* note 31 at 57.

<sup>347</sup> As noted by Davidov at the end of section A.ii above.

<sup>348</sup> See Chen & Dunn, *supra* note 288 at 21–22, 28; Lund & Srinivas, *supra* note 209 at 34, 54, 111; but see Lund & Nicholson, *supra* note 69 at 51–52 (capacity of many households to diversify incomes is weak).

To those interested in social justice, this may seem deeply dissatisfying,—and so it should. Not only does it place a large cohort of vulnerable workers with those that the social insurance model imagined as capable of taking care of themselves,<sup>349</sup> but it also groups the young man working at his uncle’s street stall together with the German telecom CEO, because each is tied into a “network of subordination.”

The relevant questions here are how to differentiate these groups and, especially when it comes to the “self-employed,” what role labour law can meaningfully play, given that these workers not only *lack* labour law’s protections, but are quite outside the traditional scope of those protections.

The first, perhaps obvious answer to the former question is poverty. Though WIEGO has relied heavily on protection for the purposes of defining informality, reducing poverty has been at the crux of much their analysis.<sup>350</sup>

Perhaps counter-intuitively, however, addressing poverty has seldom been the remit of labour law.<sup>351</sup> It is true that the broader ambition of social security has been understood to require not only social insurance, but social assistance—direct government transfers to the poorest citizens.<sup>352</sup> Recent efforts to rehabilitate social security have argued that rethinking social security systems requires consideration of both functions.<sup>353</sup> But to the degree that poverty is understood in terms of low income and few assets, and as long as the solution is framed in terms of direct transfers to the poor, there actually seems to be little room for labour law.

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<sup>349</sup> Supiot, *Beyond Employment*, *supra* note 183 at 152 (in addition to dependents, the wealthy, professionals, small business owners excluded from social insurance because they could take care of themselves).

<sup>350</sup> See e.g. Chen, Vanek & Carr, *supra* note 33; Chen et al, *supra* note 3.

<sup>351</sup> Lucy Williams, “Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution” in Conaghan, Fischl & Klare, eds., *supra*, note 21, 93 (welfare law and labour law have developed separately).

<sup>352</sup> Lund & Srinivas, *supra* note 209 at 5, 15–18; see also Williams, *supra* note 351 at 93; Deakin & Freedland, *supra* note 286 at 153 (social assistance tied to need rather than entitlement).

<sup>353</sup> See especially Kannan, *supra* note 331; see also Reynaud, *supra* note 329; Adrián Goldin, “Extending Social Security Coverage: The Normative Route” (2006) 27:2 Comp Lab L & Pol’y J 257 at 265 (both endorsing Kannan’s approach); compare Reynaud, *supra* note 329 (World Bank’s advice during 1984-2004 based on two functions for social security: income smoothing and poverty reduction).

There is one conceivable way out of this dilemma: to push further against the limits of the “ramified subordination” model, and to try to pack everyone—every street-trader, every subsistence farmer who occasionally brings eggs to market, every garbage picker—into some “network of production and exchange.” At its limit, however, trying to use this model to overcome worker poverty falls into *reductio ad absurdum*. Casting every market transaction as an appropriate site for rebalancing in favour of the weaker party simply leaves open too broad an analytical window. Which other transactions would be most relevant in such exchanges? What assets of the parties? When would apparently equal parties nonetheless require regulation because of other parties they each deal with?

On the other hand, there is no *prima facie* reason to believe that a set of universal methods to redistribute risk and income in every exchange would actually overcome the market subordination of some actors. Ultimately, if labour law remains “a drama played out on the stage of contract law,”<sup>354</sup> or more generally, one addressing particular participants in a particular “work nexus,” it may have to accept limited power to truly achieve “justice against markets.” The poorest workers do not lack protection from any particular counter-party to their transactions, or even from “income shocks,” but from the market itself.

It is precisely this problem underlying Rose-Marie Belle Antoine’s full frontal assault on maintaining a contractual foundation of labour law, in order to use it to address the problems of social justice for workers in the developing world. As she puts it, labour law’s normative challenges derive from the broader socio-economic context,<sup>355</sup> and one suggestion she therefore puts forward is to borrow ideas of proximity and foreseeability from tort law.<sup>356</sup> Here, however, it is worth returning to Guy Mundlak’s point about the distribution of benefits from labour markets. What he adverts to is the distinct possibility that market winners and market losers may

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<sup>354</sup> Langille, “What Is ILL For?”, *supra* note 31 at 55.

<sup>355</sup> Rose-Marie Belle Antoine, “Rethinking Labor Law in the New Commonwealth Caribbean Economy: A Framework for Change” (2011) 32:2 Comp Lab L & Pol’y J 343 at 343.

<sup>356</sup> *Ibid* at 350.



not be neighbours at all. In fact, they are likely to be, under the traditional frame of private law, strangers.<sup>357</sup>

### C. Informality as Exclusion

Mundlak's arguments, however, can also be read in the opposite direction. It is not only that labour law benefits some workers more than others, but that it plays a role in actually distributing income-earning opportunities among workers. WIEGO's analyses have once again raised related issues. Lund and Srivinas, for example, point to a number of "risks" for informal workers that cannot properly be understood as risks at all, including unequal access to production technologies, differential impact of regulations, different economies of scale, and discriminatory gender norms.<sup>358</sup> In line with the organization's focus, Chen and others have stressed over and over the way in which explicit norms can mean that men and women have different earning opportunities.<sup>359</sup> In an investigation into relations between poverty, work and trade, Chen, Vanek and Carr have stressed that economic reforms are translated through unequal access to resources, assets and power, varied impacts of changes to prices, taxing and spending, and national production strategies, uneven integration into goods, credits, land and labour markets, and differentiated capacity to meet shocks associated with economic reforms.<sup>360</sup> And, as discussed above, the systems of production perspective pointed to the possibility that market structure and prices may be dominated by large players.

In combination, these factors suggest an additional way to differentiate the "self-employed" in the informal economy from the professionals and small business owners of the global North, beyond the presence of poverty *qua* low income. Such workers can in fact be explicitly depicted as having *not* chosen to work under these conditions. Especially in combination with the broader perspective on the potential

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<sup>357</sup> Compare Collins, "Market Power", *supra* note 260 at 14 (reality of power imbalances in the labour market sits ill at ease with idea of private law limited to protection from harm).

<sup>358</sup> Lund & Srinivas, *supra* note 209 at 49–50.

<sup>359</sup> Chen et al, *supra* note 3, ch 3; Chen, Vanek & Carr, *supra* note 33 at 40–45, 60, 90–91; Chen, "Informal Linkages", *supra* note 2 at 77–78; Reanna Jhabvala & Shalini Sinha, "Social Protection for Women Workers in the Informal Economy" (2005) 27 Comp Lab L & Pol'y J 167 at 170.

<sup>360</sup> Chen, Vanek & Carr, *supra* note 33 at 74.

contribution of state policy at the end of the previous chapter, it may be as Chen has emphasized that in addition to exploitation, workers in the informal economy are also “vulnerable” because of exclusion.<sup>361</sup>

There is an extreme version of this argument. Mundlak notes that attention to labour law’s distributional impact among workers has a long legacy among critics of (non-market) forms of labor regulation<sup>362</sup>—though Mundlak himself is quick to point out that there is no *a priori* reason to believe either that any particular group of workers might be better off under a pure “free market” system governed solely by contract, or that the distribution which would result from such a system would be normatively superior.<sup>363</sup>

Nonetheless, without totally abandoning the importance of regulatory fit, it is important to think through the ways in which the formality-informality dichotomy might also be viewed through the lens of advantaged workers who have access to labour law and other beneficial market institutions, and disadvantaged informal workers who lack such access. In other words, freed from attempted integration with “status in employment,” the perspective of exclusion calls for a reconsideration of the role of segmentation in differentiating formal from informal work.

#### **i. Segmentation Revisited**

Because the neoclassical market frame is his starting point, William Maloney’s work provides a particularly enlightening set of results about the role that exclusion plays in constituting informality. Indeed, if there is one undeniable advantage in Maloney’s synthesis, it lies in the challenge he believed it posed to the relevance of subordination and protection in informal employment.

Whether caused by union monopoly power, employment standards, or institutional decisions made by rational firms,<sup>364</sup> the basic premise of labour market

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<sup>361</sup> Chen, *Theories and Policies*, *supra* note 55 at 10–11; Chen, “Informality and Social Protection”, *supra* note 121 at 23.

<sup>362</sup> Loayza, Oviedo & Servén, *supra* note 18.

<sup>363</sup> Mundlak, *supra* note 267 at 324.

<sup>364</sup> See Fields, “Theory and Evidence”, *supra* note 100 at 51–52 (providing a summary of the reasons often used to explain segmentation). Mazumdar and Stiglitz (“The Urban Informal Sector” [1976] 4:8

segmentation is the idea that “different wages must be paid in different sectors to comparable workers.”<sup>365</sup> Siding with critics of this view,<sup>366</sup> Maloney’s argument started with the position that the presence of segmentation should instead be measured with reference to constraints on worker choice. In particular, if there were “segmentation” between formal and informal sector jobs, it would have to mean that there were workers who would rather be in “protected” formal-sector jobs who did not have access to those jobs. In his view, wage dispersion was actually irrelevant, not only because it was too hard to find truly “comparable” workers, but because fair comparisons would have to take into account all the differences between jobs, not only wage differentials.<sup>367</sup>

Maloney’s studies have found little evidence that informal sector workers are being kept out of formal sector jobs that they qualified for. Segmentation would imply “queuing” for formal sector jobs—meaning low rates of formal sector turnover, a unidirectional flow from the informal to the formal sector, and a positive correlation between participation in the formal economy and age. Maloney’s interpretation of his evidence was that movements between “sectors” instead primarily reflected worker preference.<sup>368</sup> His data showed little evidence of queuing, and surveys of workers who had moved from a formal job to informal self-employment found a

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World Development 655; “Alternative Theories of Wage Determination and Unemployment in LDC’s: The Labor Turnover Model” [1974] 88:2 Quarterly Journal of Economics 194) focused here on the idea that it could be efficient for firms to pay higher-than market wages to some workers.

<sup>365</sup> Fields, “Guide”, *supra* note 33 at 6.

<sup>366</sup> See e.g. Mark R Rosenzweig, “Labor Markets in Low-Income Countries” in Hollis Chenery & TN Srinivasan, eds, *Handbook of Development Economics* (Elsevier, 1988) 713.

<sup>367</sup> Thus, the lack of benefits in self-employment would require higher wages, but formal sector workers would need to be compensated for taxes not paid in the informal sector. A formal workplace might be cleaner and safer, but self-employment might provide greater flexibility and the pride of being one’s own boss. Income uncertainty connected to self-employment would imply a risk premium. See Maloney, “Informality Revisited”, *supra* note 96; “Does Informality Imply Segmentation in Urban Labor Markets? Evidence from Sectoral Transitions in Mexico” (1999) 13:2 World Bank Economic Review 275 at 284, 287. Rosenzweig, *supra* note 366 at 756 (“Do [these differentials] suggest barriers to mobility – non-competing groups – or do they merely reflect compensatory differentials, rewards for unmeasured skills or compensation for unmeasured differences in the disutility of the workplace?”).

<sup>368</sup> Maloney, “Informality and Segmentation”, *supra* note 367 at 290–92.

large portion who had left their previous job because they thought that they would be better off.<sup>369</sup>

Maloney did not deny the poor fit such work had with the state's regulatory institutions. He nonetheless argued that such informality was "incidental."<sup>370</sup> While those legal institutions implied a different distribution of costs and benefits between formal and informal operation, the sum total of costs and benefits did not in his view make working in the informal sector *disadvantageous*. Whether jobs were good or bad did not, by this account, depend on formality.

There are, to preface conclusions regarding his analysis, numerous critiques that can be levelled against Maloney's assumptions and his conclusions. First, he depends on the idea of compliance with formal regulatory regimes being substantially less than compulsory, if not "voluntary." His picture is one in which firms choose, almost cafeteria-style, the particular institutions they feel they will benefit from.<sup>371</sup> He applies this picture of "cobbling together" the highest-value collection of institutions to individual workers as well, with much of his work trying to point to the inefficiencies of existing labour institutions for many, if not most, workers in his study sites—and certainly for those who choose "self-employment."<sup>372</sup> This points to a second critique, which is the incompatibility of workers choosing what social protections to take advantage of at the same time as the small firms they work for being free to make this choice. Third, most of his analysis is limited to Latin America,<sup>373</sup> which has urbanization rates more than

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<sup>369</sup> 59% of men interviewed in Mexico gave these reasons. Similar data from Brazil and a single province in Argentina showed that 62% and 80% of self-employed men, respectively, who "did not want" a formal job. Maloney, "Informality Revisited", *supra* note 96 at 1160, 1162.

<sup>370</sup> *Ibid* at 1175.

<sup>371</sup> *Ibid* at 1168. See also Alec R Levenson & William F Maloney, *The Informal Sector, Firm Dynamics, and Institutional Participation*, Policy Research Working Paper 1988 (Washington DC: World Bank, 1998).

<sup>372</sup> Maloney, "Informality Revisited", *supra* note 96 at 1165–67.

<sup>373</sup> But see Paolo Falco et al, *Heterogeneity in Subjective Wellbeing: An Application to Occupational Allocation in Africa*, Policy Research Working Paper 6244 (Washington DC: World Bank, 2012) (very robust details of subjective well-being reported across sectors in Ghana) .

double the average for the global south.<sup>374</sup> In fact, his key data were taken from interviews with men with a high-school education or less, in large cities in Mexico;<sup>375</sup> a troubling focus not only because his own data reveal very different responses to key questions among the women he surveyed<sup>376</sup> but especially because global data seems to suggest that women, not men, are over-represented in informal employment.<sup>377</sup> Fourth, his account told only part of the story: even his definition of “voluntary” covered at most 70% of the self-employed in his sample, and even less during economic downturns.<sup>378</sup> Finally, his dismissal of the importance of informal “employees,” on the basis that they may have unreported earnings connected to the fact that many of them are employed by relatives<sup>379</sup> gels uncomfortably with his own data showing informal wage employment to be more prevalent among young workers, the majority of whom *would* like a formal job.<sup>380</sup>

#### **D. Poverty, Capabilities and “Market Subordination”**

There is a paradoxical aspect to Maloney’s findings. The critiques levelled against his conclusions underline the point made in chapter two about the inevitable inadequacy of trying to assimilate the working realities of the informal economy to a single model. Because they limit the breadth of the regulatory model he constructs, those critiques also put in question the particular policy proposals he puts forward.

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<sup>374</sup> Alejandro Portes & Richard Schauffler, “Competing Perspectives on the Latin American Informal Sector” (1993) 19:1 Population and Development Review 33 at 34–35.

<sup>375</sup> Maloney, “Informality and Segmentation”, *supra* note 367 at 278.

<sup>376</sup> Compared to the 64% of men who provided the same answer, only 22% of women said they had left a formal job because it improved their standard of living. In addition 46% of the women said they had left formal employment *because they got married* (Maloney, “Informality Revisited”, *supra* note 96 at 1160, 1162). Maloney suggests that such responses reflect the possibility that “women may more easily balance *their* productive (market) and reproductive (homecare) roles if they work for themselves than if they are employees.” (*ibid* at 1162, emphasis added). The implicit acceptance of the distribution of unpaid labour, and the implicit rejection of the idea that (formal) labour markets have a role in overcoming this inequity, are particularly disconcerting aspects of this analysis from a perspective rooted in equality at work and social justice more generally.

<sup>377</sup> Chen, Vanek & Carr, *supra* note 33 at 28 (citing data that women compose 60% of informal employment in the world, and also pointing to the great diversity in the relative presence of men and women in the “self-employed” and “wage employed” subsectors).

<sup>378</sup> Maloney, “Informality Revisited”, *supra* note 96 at 1162; see also *ibid* at 1169 (up to 20% of informal firms associated with larger firms).

<sup>379</sup> Maloney, “Informality Revisited”, *supra* note 96 at 1164, 1169–69.

<sup>380</sup> *Ibid* at 1169. See also Levenson & Maloney, *supra* note 371.

Nonetheless, these critiques cannot prevent his findings from unsettling the simple image of informal work as the disadvantaged portion of a segmented labour market. For a majority of workers in the sites he studied, exclusion was simply not the determining factor in the constitution of their informality. If workers can move freely in and out of the informal sector or, in his usage, “small firm sector,”<sup>381</sup> informality becomes “the optimal decision given their preferences, the constraints they face...and the level of formal sector labor productivity in the country.”<sup>382</sup>

The key to the paradox lies in the second clause of this conclusion, in the “constraints” faced by workers. In the end, Maloney cannot be understood to have been claiming that workers’ income opportunities are all equal, but only that their income opportunities are not governed by their status in employment broadly conceived.<sup>383</sup>

For Maloney, the key factor in determining income opportunities was human capital.<sup>384</sup> A more general way of summarizing his findings is that, in a context of weak and inappropriate regulation, where educational opportunities are rationed and few, and where small firms end up on the losing end of network externalities<sup>385</sup> with limited access to capital and credit, being a formal or informal sector worker may make little difference to an individual’s overall living standards.

Thus, while undermining a picture of strict segmentation between formal and informal opportunities, Maloney’s data simultaneously reinforce the idea that

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<sup>381</sup> Maloney, “Informality Revisited”, *supra* note 96 at 1159.

<sup>382</sup> *Ibid* at 1160. Focusing on “voluntariness” in the context of these caveats seems to lead inevitably to a conflation of a workers’ “preference” with their “ability” to find work in a particular type of job under particular conditions (see Mariano Bosch & William F Maloney, “Comparative Analysis of Labor Market Dynamics using Markov Processes: An Application to Informality” [2010] 17:4 Labour Economics 621 at 622).

<sup>383</sup> That is, their income opportunities were not governed by their status as formal or informal, or as self-employed or employees.

<sup>384</sup> Maloney, “Informality Revisited”, *supra* note 96 at 1173. Maloney here also relied on data that showed self-employment not as an “entry” occupation but as one “chosen” mostly by older, established workers, dependent on their ability to access education that would allow the formation of human capital, but also on accumulated savings in the face of low access to credit (*ibid* at 1160–61).

<sup>385</sup> Maloney alludes to firm size being determined not only by capital accumulation, available skill sets, and a proprietor’s “entrepreneurial ability” but also by “how well-placed his/her firm is.” Maloney, “Informality Revisited”, *supra* note 96 at 1167.

informality interacts with unequal access market opportunities. In other words, informality becomes a possible, but not necessary, result of worker choice under conditions of reduced access to earning, earning-improvement and risk-mitigation opportunities. In fact, this was one of Maloney's conclusions as well: it may be that informal employment is associated with poverty, but "[w]hat is more difficult to claim is that their poverty is a result of their job, and not the other way around."<sup>386</sup>

Immediately after insisting that informality—the lack of government protection—might be thought of as an incident of poverty, Maloney suggests that the choice these workers make to take on “unprotected” jobs implies a need to revisit the “optimal mechanisms for protecting families against the inevitable income and other types of shocks that are part of life.”<sup>387</sup> Indeed, he spends much of the rest of his best-known paper laying out reasons *other than their poverty* why informal workers face greater risk. Yet his data make clear that their poverty, understood as reduced opportunity rather than simply low income, is precisely what makes them different.

In the end, poverty and exclusion are both imperfect ways of discussing this reality. In many settings, exclusion is no doubt a part of the puzzle: market opportunities are in fact gendered, racialized, or otherwise segregated in ways that reduce income, investment, education, and risk-mitigation opportunities for particular groups.<sup>388</sup> The discussion of family work above, however, shows that the way in which markets regulate the distribution of care responsibilities can also shape the income opportunities that women have access to, stretching at least pedestrian meanings of “exclusion.”<sup>389</sup>

On the other hand, mundane definitions of poverty do not capture the situation very well either. It is not solely that some portion of the population has lower incomes or fewer fiscal assets. Their situation is also marked by heightened exposure to risk,

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<sup>386</sup> *Ibid* at 1164.

<sup>387</sup> *Ibid* at 1165.

<sup>388</sup> See e.g. Sankaran, *supra* note 21 at 252–259.

<sup>389</sup> See also Kerry Rittich, “The Properties of Gender Equality” in Philip Alston & Mary Robinson, eds, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford and New York: Oxford University Press, 2005) 87 (women’s access to land will be structured not only by formal exclusions, but by real-world dynamics of implementing particular property models).

and reduced capacity to manage that risk. Moreover, it is as much social as it is personal.

The complex social dimension of worker inequality thus connects the discussions of informality which have come so far to perspectives that have moved toward the normative core of the development discourse: discourses of empowerment, livelihoods and capabilities.<sup>390</sup> It requires attention not only to individual capabilities, but to what Sen calls the *conversion factors* constituting the distribution of capabilities, at the confluence of an individual's personal characteristics, aspects of their environment (including existing infrastructure) and, most importantly for our purposes, social factors (including institutions and in particular, norms, laws and political institutions).<sup>391</sup>

In other words, the problem has to be understood as a matter of overcoming forms of unfreedom.<sup>392</sup>

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<sup>390</sup> Trebilcock, "Development Approaches", *supra* note 15.

<sup>391</sup> Deakin in Alston at 56; Deakin and Wilkinson at 290-91

<sup>392</sup> Blackett, "Emancipation", *supra* note 25.



## 5. Conclusion: Informality and Social Justice

There is a temptation to conclude by asking “what stands in the way of social justice for informal workers?” Putting the question this way loses sight of one of the signposts offered in chapter two as a potential marker for ways out of the thicket: not to be distracted too much by “informality” itself.

First of all, the reality of informality in the global south is not only a concern to those interested in social justice. The perspective that seeks to empower, support and improve the lives of those working in informal conditions is just one among many perspectives on the “buzzing, blooming confusion” that marks the urban streets of the global south, its slums and its small farms. Perspectives casting the goal in terms of eliminating the mess, chasing down illegal practices, or supporting informal entrepreneurship are each just as viable, and the policies each view entails are sure to be more than occasionally incompatible.<sup>393</sup>

However, it is possible to lose the thread even from within the bounds of a commitment to social justice. Though much of WIEGO’s research and advocacy has perpetuated a view of informality bounded by the employment-based approach or, more generally, by a frame of “workers lacking protection,” the foundation of their work in the experiences of workers in the informal economy has perhaps inevitably informed a much broader view. The resulting perspectives, often drawn from the organizing strategies of these workers as well, have been usefully categorized according to the ILO’s four-part Decent Work agenda.<sup>394</sup> Taking the four pillars of “decent work” identified by the ILO’s Director General in 1999<sup>395</sup> and relabeling them as concerns about rights, income opportunities, protection, and voice, the result has been a perspective that explicitly exceeds the normative horizon of

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<sup>393</sup> Chen, “Informal Linkages”, *supra* note 2 at 90.

<sup>394</sup> International Labour Organization, “Decent Work”, *supra* note 283; see also Francis Maupain, *L’OIT à l’épreuve de la mondialisation financière: peut-on réguler sans contraindre?* (Geneva: International Labour Organisation (International Institute for Labour Studies), 2011) at 60–63; and especially Marieke Louis, *L’organisation internationale du travail et le travail décent: Un agenda social pour le multilatéralisme* (Paris: Harmattan, 2011).

<sup>395</sup> International Labour Organization, “Decent Work”, *supra* note 283 at 13–44.

protection.<sup>396</sup> Though the majority of research conducted by Chen and her collaborators does not rest on top of those four pillars, it has consistently returned to this broad, “comprehensive” approach to overcoming informality’s normative challenges.<sup>397</sup>

Unfortunately, searching for ways to overcome “informality’s normative challenges” may produce pieces of the wrong puzzle. As tempting as it may be to “address informality,” or to address the concerns associated with informal activities,<sup>398</sup> doing so is simply not the same thing as addressing the social justice concerns of informal workers. Informality, thought of solely in terms of poor regulatory fit, is also home to market practices that result from the avoidance of regulatory costs by actors who might be thought capable of “affording” them—though admittedly the line is blurry. On the other hand, to speak, as is often done, of the “working poor of the informal economy”<sup>399</sup> not only limits consideration to one portion of disadvantaged workers, but encourages analysis of the risks, barriers and poverty they face in terms in terms of their informality alone.

In other words, informality is not the sole manifestation of market subordination at work, nor is informality solely a manifestation of market subordination at work. More importantly, what the consideration of Maloney’s findings in chapter four should have driven home is that there is no clear dividing line between formal and informal manifestations of market subordination; workers may move between the two. So policies are likely to affect workers in both categories.<sup>400</sup>

Thus, if the goal is truly to pursue social justice, then the question cannot be phrased in terms of informal workers alone. It might be better to ask instead what kind of challenges to labour law are revealed by an engagement with informality.

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<sup>396</sup> Chen, Vanek & Carr, *supra* note 33, ch 4.

<sup>397</sup> Chen, *Theories and Policies*, *supra* note 55 at 17–19; Chen et al, *supra* note 3, ch 6.

<sup>398</sup> Chen, *Theories and Policies*, *supra* note 55 at 17.

<sup>399</sup> Chen et al, *supra* note 3 at 15.

<sup>400</sup> Indeed, workers not only move between and combine formal and formal income opportunities, but “production, distribution and employment relations tend to fall at some point on a continuum between pure ‘formal’ relations...and pure ‘informal’ relations.” Chen, Vanek & Carr, *supra* note 33 at 22–23.

### A. Fairness, Protection and “Justice Against Markets”

The first lesson that can be drawn from the last three chapters is the need for labour law to hold separate, and attempt to reconcile, two functions it has historically assimilated: the idea of empowering workers in markets<sup>401</sup> and the idea of promoting fairness within particular relationships of production.

The idea that workers in the informal economy are “vulnerable,” or that they are “dependent,” makes it easy to rush to protect them. Unfortunately, at one extreme, meaningful “protection” for subordinate workers can be combined with legal sanction of even the most severe forms of unfreedom and indignity.<sup>402</sup> At the other limit, even at the height of effectiveness, the regulation of the internal details of certain kinds of relationships comes up against the limits of law’s power to help overcome deprivation, insecurity and powerlessness in a market society.

Focusing with Mundlak on the differential opportunities that labour markets offer to different groups of workers risks missing the larger point, which is that market dominance and market subordination need not play out through direct transactions to have distributive impacts. This is an old point. Though the outcomes of the monetarist revolution of the neoliberal era shows remarkable affinities with those he predicted, one need not accept Michal Kalecki’s explanation of its result—that the enemies of full employment brought it down with an explicit intent of disempowering workers<sup>403</sup>—to believe the converse, that economic power and security for workers turn as much on employment rates as they do on the internal regulation of the employment relationship. Indeed, this insight is just as implicit in the neoclassical *critique* of labour market regulations as in Kalecki’s Keynesianism.<sup>404</sup>

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<sup>401</sup> Trebilcock, “Development Approaches”, *supra* note 15 at 66 (the aim of labour law remains the empowerment of those who have to work to make their living).

<sup>402</sup> Blackett, “Emancipation”, *supra* note 25 at 425–27 (French “Codes noir” guaranteed slaves rest days, provision of sustenance, and care during illness and infirmity).

<sup>403</sup> Kalecki, *supra* note 302 at 325–326.

<sup>404</sup> Weiler, *supra* note 21 at 18 (in neoliberal account of employment relationship, there is no governance gap as per labour law’s traditional narrative, because relationship is disciplined by external labour market); see also Paul Benjamin, “Beyond The Boundaries: Prospects for Expanding

### i. Social Justice for Whom?

Yet especially in the absence of full employment, and especially in countries where the idea has never had the meaning it did in the heydays of embedded liberalism, labour law has no choice but tackle Mundlak's concerns head-on. Labour law today may still have to grapple with redistribution in the workplace (to address conflicts between empowered capital and subordinate labour), but as usefully elaborated by Roberto Filho, the field is *also* challenged to distribute opportunities to expand human capital, lest inequalities expand between qualified and non-qualified workers;<sup>405</sup> *and* to promote social inclusion in general and equal access to professional opportunities in particular (to avoid the perpetuation of "insiders" and "outsiders");<sup>406</sup> *and*, most in line with Kalecki's warning (and especially to the degree that diminishing labour demand is a real trend<sup>407</sup>), to think through what role it might play in the broad set of policies influencing both the creation and distribution of work.<sup>408</sup>

### B. Transactional Diversity

It is surely such concerns which led Deakin and Wilkinson to argue in favour of shifting labour law's regulatory frame away from the worker, and toward a "law of the labour market."<sup>409</sup> When it comes to the working realities of the global South,

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Labour Market Regulation in South Africa" in Davidov & Langille, eds, *Boundaries & Frontiers*, *supra*, note 10, 181 at 185 (unemployment has been a "handmaiden" of flexibility *qua* reduced worker power).

<sup>405</sup> Compare Harry Arthurs, "Labour Law After Labour" in Davidov & Langille, eds, *Idea of Labour Law*, *supra*, note 22, 13 at 24–26; see generally Deakin & Wilkinson, *supra* note 28.

<sup>406</sup> Compare Mundlak, *supra* note 267 (labour law not only determines sources of norms governing work in general and distribution of power between capital and labour, but also implicitly distributes opportunities among workers).

<sup>407</sup> The issue has generated a great deal of heat, especially in recent American debates, most notably in Marxist analysis, but also from more liberal sources. See e.g. Peter Frase, "Robots and Liberalism", (12 December 2012), online: *Jacobin* <<http://jacobinmag.com/2012/12/robots-and-liberalism/>>; compare Paul Krugman, "Sympathy for the Luddites", *The New York Times* (13 June 2013), online: <<http://www.nytimes.com/2013/06/14/opinion/krugman-sympathy-for-the-luddites.html>>. What the evidence actually seems to reveal under current conditions of economic integration is at least a medium-term convulsion, with relative demand for skilled and unskilled labour moving in opposite directions. Adelle Blackett, "Trade Liberalization, Labour Law and Development: A Contextualization" in Teklè, ed, *supra*, note 224, 93 at 100–01.

<sup>408</sup> See R F Filho, "Celebrating Twenty-five Years and Speculating Over the Future from a Brazilian Perspective" (2005) 25:1 Comp Lab L & Pol'y J 21.

<sup>409</sup> Deakin & Wilkinson, *supra* note 28.

however, the structure of the solutions they propose are triply flawed. They are inappropriate, first of all, because they are not based in the diversity of subordination and relations of production that take place in developing countries, nor the specific working contexts of those countries. Like Freedland's insights, however, it might be imagined that Deakin and Wilkinson's solutions and analyses could be shifted, using "empirical" "socio-economic" analysis to better match the risks of exploitation and income loss that are faced by these groups of workers.

Even with these amendments, however, the solution they propose would fall short if it remained organized around the idea of work being bought and sold in a labour market, and the relevant opportunities to be distributed as opportunities for the sale, purchase and improvement of labour. To rearticulate this point, when it comes to determining a worker's income, their future income, and the risks to that income, the details of their direct relationship with other actors and the effectiveness of state law intended to mediate those relations is not enough. Rather, income, risks and opportunities are also influenced by realities that lie far *outside* that relationship. Some of those opportunities are no doubt familiar to labour law—finding a different employer, a different part of the country to work in, a form of work that is organized differently, or opportunities to improve skills.<sup>410</sup> But applying the ideas summarized by Filho in a context of wide-spread informality requires much broader inquiry, including consideration both of the role labour law does and should play in distributing opportunities, and of barriers to opportunities that are much less familiar, like those determining capital investment, access to land—or labour mobility across borders.

### **C. The Wider Horizon**

This last idea points to a third flaw with speaking of "*the* labour market" namely its reliance on the conceit of a labour market a uniform, bounded social practice. Even were states more economically bounded, scholars like Adelle Blackett have explored how much oppression at work has historically taken place and continues to take

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<sup>410</sup> Compare *Ibid.*

place “outside” the labour market, and in particular, at the edges of the labour market—and particularly at national boundaries.<sup>411</sup>

The engagement with informality therefore calls for an even broader expansion of labour law’s regulatory horizon.<sup>412</sup> Arthurs has argued that attempts to reconstruct “labour law after labour” must take into account how fiscal, monetary, trade, immigration and education policies also shape labour markets—as much, and usually more, than regulation of the individual working relationship.<sup>413</sup> In countries where informality continues to be relevant, that may require revision of traditional economic and institutional assumptions (such as, for example, the interaction between macroeconomic policy and labour market outcomes).<sup>414</sup> It must also, beyond simply trying to *regulate* existing forms of subordination, also engage with how it should interact with customary norms and practices that, while serving important social protection functions, might simultaneously perpetuate gendered, racialized and otherwise discriminatory access to labour market opportunities, property and voice.<sup>415</sup>

However, both in the engagement with global value chains and in its consideration of the ways in which the organization of work mediates the interaction between globalization and poverty,<sup>416</sup> WIEGO has pointed to the importance played by international actors, international institutions, and international relationships in constituting, contributing to and addressing poverty in the global south.<sup>417</sup> It is not only that the idea of a unitary employer at the centre of labour law is challenged at once by the externalization of risk, the disintegration of production and the distribution of managerial control, sometimes across borders.<sup>418</sup> It is also that

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<sup>411</sup> Blackett, “Emancipation”, *supra* note 25.

<sup>412</sup> Antoine, *supra* note 355 at 352.

<sup>413</sup> Arthurs, “Labour Law After Labour”, *supra* note 405 at 15, 18; see also *ibid* at 27 (in one possible future, these questions would be made explicit aspects of labour law).

<sup>414</sup> James Heintz, “Revisiting Labour Markets: Implications for Macroeconomics and Social Protection” (2008) 39:2 IDS bulletin 11.

<sup>415</sup> Teklè, *supra* note 224 at 39–40; Lund & Srinivas, *supra* note 209 at 11–12.

<sup>416</sup> Chen, Vanek & Carr, *supra* note 33, ch 3.

<sup>417</sup> Lund & Srinivas, *supra* note 209 at 38–41.

<sup>418</sup> Antoine, *supra* note 355 at 349–50.

understanding and responding to the opportunities, risks and capabilities of workers in the developing world has to be informed by the particular histories of developing countries, including racial inequities which are the legacy of colonialism, and continuing inequities between developed and developing countries.<sup>419</sup>

In other words, what is needed is a developmental approach to labour law.<sup>420</sup> This demand must be parsed carefully, however. Beyond debates about whether labour standards might contribute positively or negatively to growth,<sup>421</sup> engagement with the diverse and agendas of the development project might help craft a labour law that is fundamentally informed by the challenges of development.

The end of chapter four already suggested the normative shift this might entail, but the turn to development should not be misunderstood as one tied only to overcoming poverty in the third world. The question of a “right to development”<sup>422</sup> aside, the development project had beginnings aimed, if not at correcting past wrongs in the international order, then at least at contributing to its just future. As much as the economic regime brought into being in the late 1940s was an attempt to minimize the risks of global economic integration for the industrialized countries, it was also the product of a compromise struck between the industrialized countries and those that felt themselves to have been disadvantaged by the prior regime.<sup>423</sup> Embedded liberalism may have been the condition of possibility for labour law’s successes in the global North,<sup>424</sup> but in what it included and excluded from

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<sup>419</sup> *Ibid* at 343.

<sup>420</sup> Trebilcock, “Development Approaches”, *supra* note 15; Tsikata, *supra* note 175 at 334–8; Antoine, *supra* note 355 at 368.

<sup>421</sup> See especially Janine Berg & David Kucera, eds, *In Defence of Labour Market Institutions: Cultivating Justice in the Developing World* (Palgrave Macmillan, 2008).

<sup>422</sup> On a fruitful contextualization and critique of the “right to development” discourse, see Mickelson, *supra* note 32 at 374–386.

<sup>423</sup> Blackett, “Contextualization”, *supra* note 407 at 94–97. See especially Eric Helleiner, “Reinterpreting Bretton Woods: International Development and the Neglected Origins of Embedded Liberalism” (2006) 37:5 *Development and Change* 943 (arguing that the conventional narrative of the origins of embedded liberalism in the goal of providing a buffer for developed welfare states of the global North neglects its roots in providing a supportive framework for “developmentalist” priorities in the global south as well).

<sup>424</sup> But only, quite significantly, with the wealth that they had accumulated in some significant part as through resource extraction and labour commodification in the colonized countries. Blackett, “Contextualization”, *supra* note 407 at 94.

regulation,<sup>425</sup> it also provided the conditions for continued poverty in much of the global South. The development project was at least in part intended as an attempt to overcome that gap.<sup>426</sup> The question is how the concerns arising from that project can be integrated into legal conceptualizations of work and production<sup>427</sup> in a way that is sensitive to the global South's traditionally subordinate economic position. That implies a multi-level<sup>428</sup> approach that spreads, as Mickelson points out, across the field of international law.<sup>429</sup>

In the 1990s, labour law embraced an engagement with trade law which—with the passage of the 1998 Declaration<sup>430</sup>—may have been successful in circumscribing the discipline's doctrines.<sup>431</sup> Though the result of those efforts remains a trade-integrated global economic system which still co-exists with some of the worst violations of human freedom,<sup>432</sup> the project demonstrates that there need be few limits to the regulatory ambitions labour law sets itself. Vindicating the universalist, internationalist aspirations of the ILO Constitution, however, will first require labour lawyers to move beyond protection, and give the labour market's "other others" a more central location in their analysis.<sup>433</sup>

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<sup>425</sup> As Ruggie points out ("International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" [1982] 36:2 *International Organization* 379 at 396) one of the matters of particular interest to developing countries—the regulation of global commodity markets—was not included in the GATT. It was, on the other hand, included in the Havana Charter which was to establish the ITO; the developing countries were significantly better represented at the latter. See Blackett, "Contextualization", *supra* note 407 at 95–96; Gerald M Meier, "The Formative Period" in Gerald M Meier & Dudley Seers, eds, *Pioneers in Development* (New York: Published for the World Bank by Oxford University Press, 1984) 3 at 9–10.

<sup>426</sup> Despite Helleiner's insights (*supra*, note 3), Bretton Woods decidedly did *not* put development on the agenda. This was not only a matter of the failure of the ILO, but of the priorities of its key players. Keynes saw the presence of developing countries as a hindrance to the successful outcome of the meeting, characterising their presence as contributing to a "monkey-house." Meier, *supra* note 425 at 9–10 quoting Donald Moggridge, ed, *The Collected Writings of John Maynard Keynes* (London: Macmillan and Cambridge University Press, 1980), vol. 26, at 42.

<sup>427</sup> Antoine, *supra* note 355 at 344.

<sup>428</sup> Tsikata, *supra* note 175 at 334.

<sup>429</sup> Mickelson, *supra* note 32.

<sup>430</sup> International Labour Organization, "1998 Declaration", *supra* note 272.

<sup>431</sup> For an optimistic, nuanced analysis of the regulatory possibilities offered by the interaction between fundamental rights and WTO law, see Maupain, *supra* note 394 at 166–198.

<sup>432</sup> Blackett, "Emancipation", *supra* note 25 at 427.

<sup>433</sup> *Ibid* at 428.







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