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Review of Philosophical Foundations of Labour Law, edited by Hugh Collins, Gillian Lester, and Virginia Mantouvalou

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BOOK REVIEW

Philosophical Foundations of Labour Law,
Hugh Collins, Gillian Lester, & Virginia Mantouvalou
(Oxford UP, 2019, 368 pp).

reviewed by Matthew Dimick†

I. PHILOSOPHICAL FOUNDATIONS FOR LABOR LAW

A specter is haunting labor law—the specter of Marx.

The expression is hackneyed, but it's is an irresistible choice for a review of this excellent collection of essays gathered together in the *Philosophical Foundations of Labour Law*, edited by Hugh Collins, Gillian Lester, and Virginia Mantouvalou. If the name of Karl Marx is not cited or invoked in every single chapter, his influence and concerns certainly pervade the entire volume. This creates both real tensions and real opportunities for activists and scholars seeking a deeper philosophical or normative grounding for labor law.

Opening the volume to preview its contents, it doesn't take long for some of these tensions to manifest. Harry Arthurs's foreword to the book gets right to them: the efforts of the "idealist tendency" to discover the "philosopher's stone" of labor law—its ultimate normative yardstick, whether that be "distributive justice," "non-exploitation," "dignity," "citizenship," or "social inclusion"—"have so far been in vain," he writes.[1] Channeling Marx's eleventh thesis on Feuerbach, the editors' themselves in the introduction concede the challenge: "The claim that it is a good time for philosophical contemplation is not to deny that ultimately the point of labour law is to do something."[2] Waxing philosophical about labor law, the criticism

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1. Harry Arthurs, *Foreward*, *in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW v (Hugh Collins, Gillian Lester & Virginia Mantouvalou eds., 2018) [hereinafter PHILOSOPHICAL FOUNDATIONS].

2. Hugh Collins et al., *Introduction: Does Labour Law Need Philosophical Foundations?*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 2.

goes, will at best do little to assist the cause of human emancipation and at worst divert attention away from that more worthy endeavor.

Perhaps the more serious danger is that a philosophy of labor law, while holding itself out as a tool to be used on behalf of the oppressed, may inadvertently serve to justify those very same social relations of oppression. Normative evaluation of labor law, the editors write, is "essential and inevitable."[3] "We need a normative account of labour law in order to assess its shortcomings and propose reforms. To assess the success of legal and civil society institutions, we need to consider against what this success is assessed. . . ."[4] But against what is the normative yardstick itself measured? As the editors acknowledge, following Ronald Dworkin (no Marxist he[5]), this is a particularly hazardous problem if the search for the normative measure of labor law must to some extent be found "in the existing labour laws and employment law."[6] Thus, Arthurs writes that for those who claim the "blood and muscle" narrative of labor law, "the ultimate riposte to power is not rights but countervailing power. Rights . . . do not revise power relations; at best, they ratify and legitimate them."[7]

Yet Marx himself wouldn't have poured his prodigious talents into his intellectually imposing life's work, *Capital*, if he didn't think philosophy, broadly understood, could change the world. To their credit, the authors and editors of *Philosophical Foundations* acknowledge these challenges and face them, head on. The result is a rich, varied, and comprehensive look at how various schools of political and normative philosophy can be put to work in the service of critique and reform of labor law. In this review essay, I want to focus on the theme of domination (broadly understood), get precise about its relation to Marx's economic and political concerns (above all, exploitation), show how a Marxian idea of domination can give interesting answers about important labor law topics, and suggest (but only suggest) that this idea could be a possible foundation for grounding labor law philosophically.

Domination and its cognate, subordination, long familiar to labor law scholars, surface throughout *Philosophical Foundations*. Let me first mark these appearances by giving the reader a brief overview of the volume's contents. Part I of the volume, entitled "Freedom, Dignity, and Human Rights," explores "whether justifications for labour law might be found in liberal values."[8] One way of placing domination, defined as arbitrary or uncontrolled interference, within liberal theory has been particularly influential the last few years. Underwritten by the work of political theorists

3. *Id.* at 3.
4. *Id.*
5. *See* Brian Leiter, *Marx, Law, Ideology, Legal Positivism*, 101 VA. L. REV. 1179, 1194–95 (2015).
6. Hugh Collins et al., *supra* note 2, at 16.
7. Arthurs, *supra* note 1, at vii.
8. Hugh Collins et al., *supra* note 2, at 21.

Philip Pettit, Frank Lovett, and others, this distinctive (small-r) "republican" view of domination (and its converse, freedom as nondomination) is given explicit application to labor law in the chapter by David Cabrelli and Rebecca Zahn, entitled "Civic Republican Political Theory and Labour Law." Hugh Collins also addresses republican domination in his chapter, "Is the Contract of Employment Illiberal?" Although Cabrelli and Zahn are enthusiastic about the prospect of using "civic republican non-domination ideology" to restore "worker-protective concerns ... to a central position" in economic and political decision-making,[9] Collins is notably less so. We will visit Collins's reservations later.

Part II of *Philosophical Foundations* is titled "Distributive Justice and Exploitation." Exploitation was of course a key concept for Marx, and "Analytical Marxists," like John Roemer, have been proponents of interpreting Marxian exploitation as a kind of distributive injustice, and indeed of later abandoning exploitation in favor of distributive injustice.[10] As these debates within Analytical Marxism attest, there is also a close connection between exploitation and domination, and we will return to this relationship later in this essay. As for the volume, the chapters in this part by Jonathan Wolff ("Structures of Exploitation"), Virginia Mantouvalou ("Legal Construction of Structures of Exploitation"), and Horacio Spector ("A Risk Theory of Exploitation") all explicitly and directly discuss the subject of exploitation. Subordination is also an explicit theme in Noah Zatz's chapter, "Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination," in which he challenges the division between anti-discrimination law and labor law that has been traditionally justified by giving them different normative bases.

Part III of the volume addresses themes in workplace democracy and self-determination. Of the two chapters in this part, domination (and freedom from it) are fundamental concepts in the one by Alan Bogg and Cynthia Estlund, "The Right to Strike and Contestatory Citizenship." Finally, Part IV of *Philosophical Foundations* addresses itself to social inclusion. The theme of social inclusion is applied to the case of women by Joanne Conaghan ("Gender and the Labour Law"), domestic workers by Einat Albin ("Social Inclusion for Labour Law: Meeting Particular Scales of Justice"), volunteer workers by Sabine Tsuruda ("Volunteer Work, Inclusivity, and Social Equality"), and migrant workers by Mark Freedland ("Reinforcing the Philosophical Foundations of Social Inclusion: The Isolated Worker in the Isolated State"). As the editors explain, "The theme of social inclusion is primarily concerned with distributive issues, though it concerns not so much the distribution of wealth as the distribution of other valuable interests

9. David Cabrelli & Rebecca Zahn, *Civic Republican Political Theory and Labour Law*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 121.

10. *See, e.g.*, John E. Roemer, *Should Marxists be Interested in Exploitation?*, 14 PHIL. & PUB. AFF. 30 (1985).

including the distribution of good jobs."[11] These chapter contributions as well as the editor's definition may lead one to conclude that the topic of social inclusion is at the furthest remove from concerns of domination. But this would be a hasty conclusion. As Noah Zatz's chapter demonstrates (already mentioned from Part II), distributive justice frameworks can obscure the subordination that is an inherent part of concerns regulated by, for instance, employment discrimination law, which would otherwise be labeled as a form of social inclusion.

Domination therefore runs throughout the breadth and depth of *Philosophical Foundations*, even though, under some of its (i.e., republican) definitions, it does not garner the assent of all labor law scholars, and even though, in some instances (i.e., social inclusion), its potential remains submerged. The remainder of this essay will argue for a more explicit role for domination in labor law philosophy by exploring alternative definitions.

II. DOMINATION

Perhaps the most currently influential concept of domination comes from the (small-r) republicans, who understand freedom as not being subject to the arbitrary or uncontrolled power of another. Domination is then the obverse of this condition. Philip Pettit, for example, defines domination as uncontrolled—or, arbitrary—interference: "Arbitrary interference ... is interference practised in accordance with the *arbitrium*, or 'will,' of another. It is precisely what I describe here as uncontrolled interference: that is, interference that is exercised at the will or discretion of the interferer; interference that is uncontrolled by the person on the receiving end."[12] Canonical examples of domination include the way the master exercises authority over his slave, or the discretionary power a monarch holds over her subjects.

Elizabeth Anderson, in her widely discussed analysis of the workplace, *Private Government*, also adopts a republican notion of freedom: "If you have republican freedom, no one is dominating you—you are subject to no one's arbitrary, unaccountable will."[13] For Anderson, it seems, the workplace

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11. Hugh Collins et al., *supra* note 2, at 27.

12. PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 58 (2012). Freedom as non-domination is a distinctive idea of freedom. The popular, non-republican idea of freedom, by contrast, is the idea of being free from another's interference. For the republican, however, the absence of interference is neither necessary nor sufficient for freedom. On the one hand, a "kind" master need not interfere with his slave at all. It is only necessary that the master have the *ability* to interfere in an arbitrary way. On the other hand, simple interference, by itself, will not necessarily make a person unfree in the republican sense. The law "interferes" with our choices and plans all of the time; but such interference is justified, and not liberty depriving, if the laws are adopted under the correct set of procedures (e.g., democratic, deliberative, due process, etc.).

13. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) 45–46 (2017). Elsewhere, Anderson writes, "An unfree person is anyone subject to another's dominion: someone who must obey another's arbitrary orders, whose liberty is enjoyed only at the pleasure of a master, who can take it away without notice, justification, process, or

is the *characteristic* site of domination. What could be more arbitrary than employers firing employees for off-duty conduct under the at-will employment rule, which permits terminations for good reason, bad reason, or no reason at all? This intuition no doubt is why the concept of domination has piqued the interest of labor law scholars.

But is Anderson right? Does domination in this republican sense accurately characterize the employer's authority over an employee? Perhaps not. For instance, in his chapter for *Philosophical Foundations* Hugh Collins argues that "the power of employers is in an important sense the very antithesis of a prerogative [i.e., royal, arbitrary] power, because subordination in employment is a relation of authority created by rules, and those rules necessarily set some limits on the scope of managerial discretion."[14] (Collins is here primarily referring to the rules of contract, but see more on this below). Therefore, because freedom is defined in the republican tradition as independence from arbitrary power, "exponents of the republican theory of freedom and domination make a mistake when they equate managerial discretion with the kind of arbitrary powers claimed as royal prerogatives."[15]

Collins's skepticism about workplace domination has some serious force. Beyond the rules of contract formation, modern employment law is characterized by a "substantial" [16] array of workplace rules and protections. In her review of Anderson's book, *Private Government*, Cynthia Estlund writes that Anderson's characterization of employers' powers of termination "seriously understates the formal legal constraints on employer power."[17] "[A] fair description of the current U.S. regime of workplace governance," Estlund explains, "includes not just 'a few exceptions' to dictatorial employer control, but a veritable litany of exceptions."[18] This body of law, Estlund continues, "has transformed the internal governance structures of large firms" as they seek to avoid "unionization, litigation, and regulatory scrutiny." It should be added that to maximize profits large firms especially have substantial *economic* incentives to *rationalize* (i.e., make non-arbitrary) the workplace, independently of concerns about litigation or regulation, just so that they can routinize and make predictable the work of a vast range of subordinate supervisors and rank-and-file employees.

We can take this further, and ask whether domination, *as defined in the republican sense*, exists in the market at all. In fact, republicans frequently

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appeal." Elizabeth Anderson, *Equality and Freedom in the Workplace: Recovering Republican Insights*, 31 SOC. PHIL. & POL'Y 48, 52 (2015).

14. Hugh Collins, *Is the Contract of Employment Illiberal?*, *in* PHILOSOPHICAL FOUNDATIONS, supra note 1, at 56.

15. *Id.* at 60.

16. Cynthia Estlund, *Rethinking Autocracy at Work*, 131 HARV. L. REV. 795, 802 (2018) (book review).

17. *Id.* at 803.

18. *Id.* at 806.

construe the perfectly competitive market not as a source of domination but as an ideal mechanism to counteract it. Pettit explains: "[I]in a well-functioning labor market ... , no one would depend on any particular master and so no one would be at the mercy of a master: he or she could move on to employment elsewhere in the event of suffering arbitrary interference."[19] In this view, "the market, much like the rule of law, promises to disperse power through a quasi-natural, anonymous order such that no individual or corporate agent will have the capacity to invade another's freedom."[20] As Pettit's quote indicates, republicans do not go so far as libertarians in their embrace of the market. Republicans recognize that, to the extent that the market is imperfect or delivers large extremes of wealth or income inequality, the potential for domination exists. The existence of that domination, in turn, justifies regulatory intervention. Nevertheless, the market remains not something to transcend or overcome, but a "regulative ideal"[21] which the law and regulation should strive to perfect.

Given these considerations, it is easy to see why labor law scholars have also not been uniformly enthusiastic about the arrival of republican political theory to their shores. Of course, these rules and actions do tend to make the employer's authority non-arbitrary. But if, for example, all the employer needs to do to justify its action is provide due process and a just cause for termination, that seems an inadequate basis for what labor law actually does, let alone what it should do.[22] Not only do market relationships constrain the arbitrary authority of otherwise powerful market actors, but even where the employment relationship is regulated, and therefore not arbitrary, this does not seem to address the residual subordination that workers face. Republican freedom therefore seems an inadequate basis for motivating, defending, or advancing labor law.

If republican domination is inadequate, perhaps we can rescue it by giving domination a Kantian cast. This appears to be Collins's approach when he deploys the term "subordination" and applies the norm of equal respect to the workplace. Collins explains that "the structure of practical authority [found in the workplace] confers in practice asymmetrical authority and responsibilities, which in turn construct different levels of esteem."[23] From this follows "an inherent conflict between the institution of the contract of employment and the value of equal respect with regard to differences in social status or esteem."[24] Collins continues, "Managers assume not only a

19. Philip Pettit, *Freedom in the Market*, 5 POL., PHIL., & ECON. 131, 142 (2006).

20. Steven Klein, *Fictitious Freedom: A Polanyian Critique of the Republican Revival*, 61 AM. J. POL. SCI. 852, 854 (2017).

21. ROBERT S. TAYLOR, EXIT LEFT: MARKETS AND MOBILITY IN REPUBLICAN THOUGHT 63 (2017).

22. This is essentially the point of Guy Davidov, *Subordination vs Domination: Exploring the Differences*, 33 INT'L J. COMP. LAB. L. & INDUS. REL. 365, 377–78 (2017).

23. Collins, *supra* note 14, at 62.

24. *Id.*

power to coordinate production, but also a right to deference from subordinate staff. . . . Managers often assume that their superior position entitles them to criticise other staff in abusive, harassing, and demeaning ways."[25] Echoing similar Kantian tones, others have said that "[d]omination, in its most general form, is subordination offensive to equality of status" and, more precisely, as "constituted by disrespectful (that is, degrading, or demeaning, or humiliating) power-overing."[26]

Yet this Kantian, equal-respect revision of domination also has its challenges. Though not responding to Collins directly, Horacio Spector, in his *Philosophical Foundations* chapter, asks, "Can moral intuitions help to establish a *conceptual* connection? This is doubtful."[27] Spector continues: "I believe that a respectful exploiter is not a conceptual impossibility. Though domination can obviously include a subjective dimension (for instance, humiliation), there can be exploitation without any particular expressive attitude on the part of the exploiter."[28] In the context, we can substitute "domination" for wherever Spector writes "exploitation," without any loss of generality. The point I take away from this is, again, not that domination is never arbitrary nor disrespectful. The kinds of hierarchies of esteem in the workplace that Collins describes are all too real, and perhaps even more pervasive than the impositions of arbitrary authority that republican theorists like to highlight. Nevertheless, the point is that it might still be possible for non-arbitrary and respectful relations of domination to exist.

I will now turn to a third approach to domination, due to Nicholas Vrousalis.[29] Vrousalis approaches domination from a Marxian perspective in terms of *power-dependent* reasons for action. We would acknowledge that a doctor has power over her patient, a teacher over a student, and a coach over an athlete. Vrousalis calls these "power-facts." In the normal course of things—when "things go well," as Vrousalis says—the motivations of the patient to take the medicine, the student to study, or the athlete to go the distance do not reflect these power-facts, i.e., the dispositions of the doctor, teach, or coach in virtue of their power. That is, the patient acts to get healthy, the student to get smarter, and the athlete to get stronger, not because of the power of the doctor, teacher, or coach. This is different in the case of the power of the master over the slave, of the highwayman over the rambler, or of the husband over the wife in the patriarchal family. Why?

The answer is that in the latter set of cases (slaves, ramblers, wives), the dominated person's normative reasons to do what the proposer proposes

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25. *Id.* at 61.

26. Nicholas Vrousalis, *Exploitation, Vulnerability, and Social Domination*, 41 PHIL. & PUB. AFF. 131, 139 (2013).

27. Horacio Spector, *A Risk Theory of Exploitation*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 212.

28. *Id.*

29. *See* Nicholas Vrousalis, *How Exploiters Dominate*, REV. SOC. ECON. (2019).

constitutively track considerations that are dependent on the power-facts. That is, the dominated person (let's call them B) has no reason to do what slaveowners, highwaymen and husbands propose, independently of what *they* want B to do, are interested that B does, or are disposed that B does. Moreover, all three proposers are, by existential necessity, out to get B to *take these power-facts as her reasons*. Contrast doctors, teachers and coaches: when things are going well, their relationship to patients, students, athletes helps the latter track normative requirements independent of the former. So, when things are going well, the proposer's power merely facilitates action *for* the power-independent consideration; the proposer empowers the proposee's recognition of, and reaction to, that consideration. More succinctly: the nondominator's power is *self-effacing* in favor of power-independent, objective values; the dominator's is not.[30]

The important point to note in our context is that domination, under this definition, requires neither *arbitrariness* nor *disrespect*. For example, the propertyless cook must work for the cookshop-owning capitalist, or starve. The owner's property rights over the cookshop confer a power upon him over the cook. That power-fact, and the threats of termination and offers of wage increases (for example), gives the cook power-dependent reasons for action—as opposed to the power-independent reasons for cooking, such as nutrition, the quality of the food, or simply the intrinsic joy of cooking. None of the power-dependent reasons are arbitrary, and they won't be if the cookshop owner is a good, profit-maximizing capitalist. Of course, they *could be* arbitrary and disrespectful. The owner might give the cook a raise because he wants to sleep with her, or threaten to fire her for the same reason; or he could threaten to fire her because she doesn't like her race, or doesn't think women should work for their own wages. Those would certainly be cases of domination. But they are not necessary for domination to occur.

Notice also that we have been using an example of domination in the labor market. The fact that a worker can leave employment and work for another capitalist does not remove the fact of domination. The availability of the worker's exit option may constrain, "control," or limit the arbitrariness of the employer's domination, but domination remains because Vrousalis's definition does not depend on these republican requirements. Instead, domination obtains in the labor market for structural reasons. Not only does the capitalist own the cookshop and the worker own nothing but her ability to work, but the institution of private property, along with capitalism's reproductive dynamics, ensures that this distribution of productive assets—or, in Marx's terminology, means of production—is a structural feature of capitalist society: although anyone is formally free to purchase and own means of production, nevertheless it is an extra-legal fact that they are owned only by a class of the population, the capitalists. The distribution of the means

30. *Id.* at 8.

of production between owners and nonowners means that capitalism systematically confronts workers with a choice between no work (and therefore starvation) and dominated work. Hence, not only is the employment relationship one of domination, but it is also one of structural domination.[31]

Capitalism is not the only form of structural domination. Patriarchy, for example, is also a form of structural domination whose reproduction depends, in part, on restricting access to undominated options to women's life choices. The same can be said about white supremacy. A final aspect of structural domination worth mentioning is that, while it presupposes collective power, it does not require any joint agency or shared intentions. Vrousalis explains, "The *intentions* of capitalists are irrelevant here. The kindly capitalist, who gives away all her profits to charity, is still disposed, on pain of competitive disadvantage, to extract as much labour as she can from her workers ... In her structurally-conferred disposition, she is no different from Henry F. Potter."[32] The fact that intentions are not necessary for domination also explains why all men, regardless of their individual attitudes toward women, benefit from patriarchy and all whites, regardless of their individual attitudes towards Blacks or other groups of different races, benefit from white supremacy.[33]

III. DOMINATION AND EXPLOITATION

Is domination related to exploitation? Exploitation and domination are often depicted as separate normative concerns, with exploitation relegated to a matter of distributive justice. The organization of *Philosophical Foundations* itself subscribes to this framework, where Part II is entitled "Distributive Justice and Exploitation." And in particular, it is not unknown for Marxists—for example, the Analytical Marxists—to have made a concerted effort not only to interpret exploitation as a matter of distributive

31. Davidov, *supra* note 22, at 385, makes the persuasive argument that "it is important to maintain the distinction between structural dependency [i.e., the fact that workers must sell their labor power in order to survive because they do not own means of production] and dependency on a specific employer, given that these are two separate vulnerabilities (even if one leads to another)." However, that very last statement, "even if one leads to another," should give pause to placing too much weight on that distinction. For Marx, this is what makes capitalism the quintessentially modern form of domination: a worker is not dependent on her employer in the same way as a slave or a serf is, because the worker is legally free to end the employment relationship at any time. Yet it is precisely that structural dependency, as Davidov calls, it, that makes that legal freedom more formal than substantive.

32. Vrousalis, *supra* note 29, at 15 n. 25.

33. One could ask whether men or whites are under the same competitive constraints that capitalists are. Although a full answer is impossible in this footnote, I would say, "Yes," at least partly. Competition in the labor market induces advantaged whites to move to neighborhoods with "better schools" to improve their children's future prospects in the labor market. Regardless of the white family's attitudes toward race, the choice reproduces segregation and white supremacy. Similarly, because of labor market competition, a husband may be compelled to take a higher paying job with less family-time flexibility, which constrains the choices of his wife.

justice, but to clearly separate domination and exploitation as discrete moral wrongs.

However, there is a problem with interpreting exploitation in a distributive sense. In this case, the most relevant sense of distribution refers to the aggregate distribution of material goods, assets, and resources. There are actually several problems, but, as befits us here, taking a distributive approach to exploitation in fact undercuts the goal of using the concept as a philosophical foundation for labor law. In his chapter for *Philosophical Foundations*, Noah Zatz describes how certain approaches to employment discrimination lead to odd, "distributive" solutions. For instance, if the employer owes no duty to any individual employee, but only to maintaining "aggregate patterns" of racial hiring, "one quickly gets to [an absurd] system of tradable inequality permits," which would allow a "firm that deviates from racial parity" to do so "perfectly legally so long as it purchases a permit from another firm with offsetting demographics."[34] Very much the same objection can be made when the distributive motive is already more transparent, as in labor law's objective of reducing inequality of bargaining power between employers and workers. What use are labor unions and collective bargaining when the government can simply use the tax-and-transfer system to reduce income inequality, with its much better capacity for precisely targeting the problem at hand?[35] As Zatz writes, "If insufficient bargaining power is labour law's *raison d'être*, then more decommodification through social welfare policy would seem to justify less decommodification through traditional labour law."[36] If redistributive motives are the rationale for labor law, then labor law's philosophical foundations would appear to be weak indeed.

Nevertheless, we can bring exploitation back into the philosophical foundations of labor law if we understand it, not in distributive terms, but as a special type of domination. Against the distributive justice view, Vrousalis says that exploitation is domination for self-enrichment: "exploitation is a dividend of servitude—a benefit the powerful extract by converting the vulnerable into their servants."[37] He attributes to Marx and endorses the theory of unequal exchange of labor, a specific form of market-based exploitation. "On this definition, A exploits B only if B unilaterally serves A,

34. Noah D. Zatz, *Discrimination and Labour Law: Locating the Market in Maldistribution and Subordination*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 164.

35. This is the standard objection that law-and-economics scholars make about distributive justification for legal rules generally. *See* ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 7–8 (6th ed. 2016), https://scholarship.law.berkeley.edu/books/2.

36. Zatz, *supra* note 34, at 162.

37. Vrousalis, *supra* note 29, at 1.

or, equivalently, A extracts unreciprocated labour flow from B, where A and B may be individuals, groups, or classes."[38]

But there are well-known arguments for dissolving the link between exploitation and domination, which potentially block the attempt to use exploitation as a philosophical guidepost, via domination, for labor law. Most famously, John Roemer has argued that domination is neither necessary nor sufficient for exploitation to occur.[39] One could have exploitation, for example, without employer control of the workplace. Roemer subscribes to Paul Samuelson's well-known declaration: "Remember that in a perfectly competitive market it really doesn't matter who hires whom: so have labor hire 'capital' . . . ."[40] What is crucial for exploitation, Roemer argued, is the "differential ownership of productive assets," that is, the *unequal distribution* of productive assets. For Roemer, exploitation arises when some own the means of production and others do not, not when there is domination in the workplace. As we will shortly see, Roemer thinks of domination in a narrower sense than we have used it thus far.

Roemer even argued that neither credit nor labor markets were necessary for exploitation. Consider the following example, which Roemer calls *Friday and Robinson*:

> There are two producers, Friday and Robinson. Friday is capital-poor, and Robinson is capital-rich. If they do not trade, Robinson will work eight hours and Friday will work sixteen so that each can satisfy his needs. (Assuming they are both rational, the fact that they decide to trade shows that they both benefit from trading.) They only trade in final goods, and there are no labor or credit markets. In equilibrium under free trade, Friday works twelve hours, Robinson works four, and both attain subsistence.[41]

In this example, there is exchange of neither labor nor capital, yet exploitation still obtains through the exchange of the products of labor. Because exploitation depends only on the distribution of productive assets, Roemer's metric for determining whether exploitation exists is to compare the outcome with a given distribution of assets to one where each person owns a per capita

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38. *Id.* at 3. As several of the contributions to *Philosophical Foundations* assert, Marx's basis for this theory of exploitation, the "labor theory of value," remains controversial. *See, e.g.*, Jonathan Wolff, *Structures of Exploitation*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 175 (writing that "relatively few people think that the Marxist account [of exploitation] is sound."); Spector, *supra* note 27, at 205 (writing that "Marxian approaches to exploitation are no longer plausible."). However, more recent research on Marx's value theory has produced a number, maybe even a surfeit, of solutions to the alleged deficiencies of Marx's theory of value and exploitation. For an overview of these various solutions, see Simon Mohun & Robert Veneziani, *Value, Price, and Exploitation: The Logic of the Transformation Problem*, 31 J. ECON. SURV. 1387 (2017).

39. *See* Roemer, *supra* note 10, at 33.

40. Paul A. Samuelson, *Wages and Interest: A Modern Dissection of Marxian Economic Models*, 47 AM. ECON. REV. 884, 894 (1957).

41. JOHN E. ROEMER, EGALITARIAN PERSPECTIVES: ESSAYS IN PHILOSOPHICAL ECONOMICS 52–53 (1996), *quoted in* Vrousalis, *supra* note 26, at 153.

share of those assets. Thus, under the given distribution of assets, Robinson needs to work only four hours rather than eight hours to achieve the same level of subsistence through this exchange and Friday works less after the exchange, too. However—and critically—Robinson works less and Friday works more than if they each enjoyed their per capita share of productive resources. Under Roemer's test, Friday exploits Robinson purely through exchanging the products of their labor. For Roemer, this example is further proof that exploitation can exist without domination.

The problem with Roemer's concept of domination is that it is limited to *market power*, and not concerned with economic power more broadly.[42] For Roemer, power over another only exists in *imperfectly* competitive markets. According to Roemer, imperfect competition implies that "one agent has *power over* another which he would not have in a fully developed, perfectly competitive market economy."[43] This is completely consistent with the way that economists think about power, where imperfect competition allows agents to be price makers rather than price takers.

However, the case of Friday and Robinson easily satisfies Vrousalis's definition of exploitation as a dividend of domination. It is the existence of Robinson's wealth, which, in Roemer's own language, he "is able to use . . . as leverage,"[44] that allows him to extract a net benefit from Friday. Thus, Robinson's wealth confers power on him over Friday. Furthermore, Friday's reasons for working are not independent of these power facts. In the Friday and Robinson example, the unequal ownership of the means of production creates structural conditions for Friday to choose dominated, and exploited, work. For these reasons, exploitation, economic power, and domination are completely compatible with *perfectly* competitive markets and the absence of market power.[45]

We can conclude from this analysis that there is a deep, intrinsic link between exploitation and domination, and that a normative concern with exploitation, via domination, can possibly help motivate a philosophical grounding for labor law. To reiterate, the link between exploitation and domination is necessary. Without it, exploitation simply becomes another form of distributive injustice. And, as Noah Zatz showed in his contribution, a distributive justice framework tends to undercut our normative claims for labor and employment law.[46]

Now that we have provided some justification for the domination-based account of exploitation, I want to compare this account with the various analyses of exploitation found in *Philosophical Foundations*. To begin with Jonathan Wolff's chapter, Wolff's primary concern is trying to solve the

42. *See* Vrousalis, *supra* note 26, at 155.
43. ROEMER, *supra* note 41, at 74, *quoted in* Vrousalis, *supra* note 26, at 155.
44. ROEMER, *supra* note 41, at 52, *quoted in* Vrousalis, *supra* note 26, at 153.
45. *See* Vrousalis, *supra* note 26, at 153.
46. Zatz, *supra* notes 32–34 and accompanying text.

puzzle of why somebody would voluntarily choose to enter into an exploitative relationship.[47] Why is the only thing worse than being exploited, in Joan Robinson's phrase, not being exploited at all?[48] His ultimate conclusion is that "exploitation is a compound relationship in which an individual's vulnerable circumstances are used by another individual in order to achieve a benefit for the exploiter in violation of fairness or flourishing norms."[49] Throughout, the chapter is animated by the distinction between the justice or fairness of the background or baseline conditions in which people interact, and the moral propriety of those interactions themselves. Wolff's argument is that diagnosing exploitation involves giving attention to both of those "two normative variables."[50]

However, in light of the domination-centered view of exploitation, this view is too indebted to the distributive and fairness concerns that, as we have seen, are already problematic. In this case, another reason for that conclusion is that the fairness view is too lenient to "predatory, but prudent, proposers."[51] Suppose that Grasshopper has been irresponsible. Instead of accumulating provisions for the winter, she failed to do so, and is now starring at an empty cupboard. Ant comes along and, noticing Grasshopper's predicament, offers her a sweatshop contract to work for him for $1 per day. Although Grasshopper must work in miserable conditions, it is better than starvation; if accepted, the exchange would make both better off. However, Ant is also in a position to offer modest shelter to Grasshopper without any cost whatsoever. This option would leave Ant no worse off than doing nothing, and although the help would be modest, Grasshopper would prefer modest help to sweatshop labor conditions.

In the Ant and Grasshopper example, the baseline conditions are fair and cleanly generated: Grasshopper's bare cupboards are entirely her fault.[52] On that condition, therefore, the sweatshop contract would also be entirely fair. Offering shelter would also be fair, but the fairness view has no way of discriminating between any of Ant's options. Ant could do nothing, offer a sweatshop contract, or offer shelter—any of those choices are acceptable under the fairness view. However, under the idea of exploitation as domination for self-enrichment, Ant preys on Grasshopper's predicament in order to secure a material benefit by offering the sweatshop contract when he

47. Wolff, *supra* note 38, at 175.

48. "[T]he misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all." JOAN ROBINSON, ECONOMIC PHILOSOPHY 45 (1962).

49. Wolff, *supra* note 38, at 187.

50. *Id.* By distinguishing baseline conditions and choices individuals make in reference to that baseline, I take Wolff to be working with a "luck egalitarian" view of distributive justice. This interpretation would be consistent with Wolff's reliance on Dworkin, Roemer, and Steiner, who are all (types of) luck egalitarians.

51. Vrousalis, *supra* note 29, at 23.

52. Under a different principle of distributive justice—say, Rawl's Difference Principle rather than luck egalitarianism—Grasshopper might still be entitled to some level of subsistence from, say, the government.

could have helped Grasshopper without cost and without so preying. Thus, Ant uses power facts to convert Grasshopper into his servant. In that respect, the fairness view is too lenient, allowing cases of exploitation to pass through its moral filter.

It is not clear whether Wolff would agree that the Ant and Grasshopper example is a case of exploitation. Wolff writes that when the background conditions are themselves morally tainted, the charge of exploitation is "easy to sustain."[53] But when those conditions are morally clean, "exploitation is still possible."[54] In the latter case, however, it becomes "very hard to supply a definitive account of exploitation."[55] However, the more fundamental point is that reasoning from baseline fairness conditions may be the wrong way to think about exploitation. Marx certainly thought that the origin of capitalism, in its phase of "primitive accumulation," was morally unclean.[56] But I do not think it is quite correct to say that that Marx "does not consider the theoretical question of whether we should have the same attitude to capitalist exploitation if it really were the case that capitalist power structures had 'morally clean' origins."[57] On the one hand, as Wolff is aware, Marx famously says that capitalist exchange *is* fair, independent of its origin.[58] On the other hand, the problem is that *fairness* is the wrong way to ask about Marx's attitudes to capitalist exploitation. The fairness view delivers false negatives when it comes to abuses of power that result in domination and exploitation, as the Ant and Grasshopper example demonstrates. This, and the way that the fairness view trivializes exploitation,[59] leads us to the conclusion that, instead of taking Wolff's two-stage (background conditions and interactions) approach to exploitation, we should proceed directly on a domination-centered account of exploitation. On that account, capitalism is condemnable, with or without morally clean origins.

In her chapter, Virginia Mantouvalou focuses her account of exploitation on workers made particularly vulnerable by intended or unintended state action.[60] There is no indication that she confines her sense of exploitation to these particular cases. Rather, her objective is to place

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53. Wolff, *supra* note 38, at 187.

54. *Id.*

55. *Id.*

56. KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 873–940 (Ben Fowkes trans., Penguin Books 1976) (1867).

57. Wolff, *supra* note 38, at 183.

58. According to Marx, although "the value which [the use of labor power] during one day creates[] is double what the capitalist pays for that use, this circumstance is, without doubt, a piece of good luck for the buyer, but by no means an injury to the seller." MARX, *supra* note 56, at 301. I do not wish to reopen the interminable debate over "Marx and justice," but only point out that distinguishing the "fairness as justice" view from the domination view may be one way to reconcile Marx's seemingly contradictory statements.

59. *See* Vrousalis, *supra* note 29, at 24–25.

60. Virginia Mantouvalou, *Legal Construction of Structures of Exploitation*, *in* PHILOSOPHICAL FOUNDATIONS, *supra* note 1, at 188.

"special attention" on cases of "structural vulnerability . . . created not by the free market, but by the legal system itself."[61] Nevertheless, her emphasis on vulnerability indicates a notion that is often considered to be essential to exploitation in a more general setting. It is often thought that vulnerability is a key component of exploitation; for example, that exploitation is the instrumentalization, the taking-advantage of, another person's vulnerability.[62]

However, vulnerability is not sufficient for exploitation to occur. Unlike the fairness view, which generates false negatives, the vulnerability approach can generate false positives. If vulnerability was sufficient for exploitation, then the physician that treats the cancer patient and charges a modest, even better than fair, price would count as exploitation.[63] The patient's cancer makes her vulnerable to the physician, who materially benefits from that vulnerability. Thus, vulnerability by itself gives us the wrong answers about exploitation. Mantouvalou's examples certainly are cases of exploitation, but that exploitation inheres in the power-dependent reasons for action that employers have over workers, not only in their vulnerability. Put another way, vulnerability that created relationships of power would certainly count as instances of domination and, where material benefits are extracted, exploitation. The point is not to challenge Mantouvalou's conclusions, but to demonstrate the limitations of the vulnerability account of exploitation.

In his chapter, Horacio Spector takes yet another approach to exploitation.[64] Spector considers, and finds unsatisfactory, several different theories of exploitation—the Marxist "exploitation as misappropriation of objective value"; the neoclassical "exploitation as unequal bargaining power"; and the philosophical "exploitation as advantageous utilization of the vulnerable." As an alternative, Spector advances a risk theory of exploitation. Laborers cannot diversify their "human capital" in the same way that capitalists can diversify their financial capital. Given these risks, workers might rationally choose or accept lower paying jobs with less risk over jobs with more risk but higher expected returns. Employers, Spector argues, can exploit this fact to extract a risk surplus from workers. This is, of course, a much narrower form of exploitation than that advanced by Marx, but it nevertheless identifies a possible source of rent extraction.

However, not only is Spector's approach to exploitation potentially too narrow, but the rents may actually flow in the opposite direction. To explain, Spector's model includes no behavioral response to employee's risk preferences on the part of the employer. If employees rationally choose to take lower-paying jobs with less risk over higher-paying jobs with more risk,

61. *Id.* at 190.

62. *Id.* at 189. Wolff, *supra* note 38, at 181–83, also discusses the idea of exploitation as "exploiting a vulnerability."

63. Vrousalis, *supra* note 29, at 19–21.

64. Spector, *supra* note 27, at 205.

the best response of high-risk, high-wage employers is to offer higher wages—a risk premium. Otherwise, high-risk, high-wage employers will be left with empty job vacancies. This will especially be the case if high-risk jobs also have a high value of output—a fair inference based on Spector's model because he assumes that high-risk jobs are also more highly paid. This is the standard result in a search-frictions and job-matching model, for example, as developed by Acemoglu and Shimer.[65] It does not follow that the risk asymmetry between employers and workers will necessarily redound to the employer's benefit. It may, instead, redound to the employee's benefit. Of course, on a broader, Marxian theory of exploitation, even workers enjoying a risk premium will still be exploited. All of this is again to suggest that we need a concept of exploitation that goes beyond the framework of the market.

IV. DOMINATION: LESSONS FOR LABOR LAW

We turn now to the next question: can Marxian concepts of domination and exploitation serve as a philosophical foundation for labor law? Given Marx's approach to these concepts, we run into an immediate problem. If, for Marx, all workers are exploited,[66] does not labor law, or at least the employment contract, simply facilitate exploitation? On that view, there can be no legitimate normative ground for labor law.

That conclusion is too negative, in my view. It is correct to say that, because all workers are exploited, society should abolish waged labor and place productive assets in public hands under democratic control. Yet that does not mean that the fight to *reduce or ameliorate* exploitation and domination, short of this objective, is without normative value. Domination and exploitation are not dichotomous states of being; society can take measures to mitigate domination and exploitation, if it is not prepared to or capable of abolishing them altogether. And even if the abolition of domination or exploitation is the ultimate goal, this does not prevent those committed to that aim from joining with those who seek to only ameliorate these oppressive conditions.[67] Therefore insofar as labor law can be a tool in

65. *See* Daron Acemoglu & Robert Shimer, *Efficient Unemployment Insurance*, 107 J. POL. ECON. 893 (1999).

66. In point of fact, it is only under a "first approximation" of Marx's analysis that *all* workers are exploited. Some workers, because of special skills or position within the workplace, may in fact be dominators and/or exploiters. For example, the CEO of a highly profitable company is, in legal terms, an employee, but (1) exploits other workers, because he is compensated many times over the amount he adds in value to production; and (2) dominates other workers, because of the workplace authority conferred upon him. For a more extended discussion of these kinds of issues, see ERIK OLIN WRIGHT, CLASSES (1985).

67. "The Communists fight for the attainment of the immediate aims, for the enforcement of the momentary interests of the working class; but in the movement of the present, they also represent and take care of the future of that movement." KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO 87 (Phil Gasper ed., Haymarket Books 2005) (1848).

these struggles, it is not without normative significance. We will come back to this issue in the conclusion.[68]

The crucial question is whether Marxian ideas of domination and exploitation can give distinctive answers about how to reform or advance labor law. While it is impossible to answer that question with any degree of satisfaction in the boundaries of this review, this final section will make a modest attempt to apply these ideas to the case of employment protection rules. This is an illuminating choice, I submit, because different theories of domination give different answers about the prudence of such rules.

What does a domination approach to labor law say about employment protection rules? If you begin with a republican conception of domination, rules limiting the employer's power of termination are a no-brainer. Consider that in the United States, the default term of employment is at-will: either the employer or the employee may terminate the relationship for good reason, bad reason, or no reason at all. The rule is "mutual," but given the employee's dependency, this formal "equality" works very differently in practice, of course. What could be more arbitrary than to give an employer the power to terminate a worker's employment without any reason whatsoever? This fact makes a rule requiring the employer to demonstrate just cause before termination the perfect republican response to the at-will rule. Procedural requirements—notice and an opportunity to be heard—also normally accompany such rules, so just-cause encompasses both substantive and procedural dimensions. The employer's termination can no longer be arbitrary: the employer must demonstrate valid *reasons* for the termination. Again, an ideal antidote to republican domination.[69]

Not only is a just-cause termination rule easily justified in terms of limiting arbitrary authority, but it is "narrowly tailored" in a way appropriate to republican thinking because, on Pettit's account, there is nothing intrinsically problematic about the market. Instead, just cause regulates the *personal* aspect between employer-employee relationships. Doubly so since, as observed earlier, a "good" profit-maximizing capitalist will want to limit the arbitrary power of those subordinates who are superordinate to the rank-and-file employee. Just cause cleanses the market of just those imperfections that republicans find objectionable, addressing those less impersonal—less bureaucratic, less rationalized—employers who allow their personal feelings to interfere with their personnel decisions.

However, just-cause limitations, and employment protection rules more generally, have some significant drawbacks for other—impersonal, structural—forms of domination. Let me get to that point, step by step. The first step is noticing that a common feature for countries with high levels of employment protection is a substantial increase in the *duration* of

68. *See infra* text accompanying notes 84–86.

69. Davidov, *supra* note 22, at 377–79, comes to similar conclusions.

unemployment. Take the case of Portugal in the 2000s (prior to the financial crisis at least).[70] The unemployment rate was virtually identical to that of the United States—and lower than other countries, such as France or Spain—suffering from the dreaded, but arguably misdiagnosed "Eurosclerosis." However, the surprising, "hidden" difference is that the average time spent unemployed in Portugal was *three* times that of the United States' unemployment duration spell.[71]

Economists Olivier Blanchard and Pedro Portugal link these longer unemployment spells in Portugal with stronger employment protection laws.[72] The argument is that stronger employment protection reduces the flow rate of employees into unemployment. This makes sense, insofar as stronger employment protection rules reduce the number of separations—either terminations or lay-offs. At the same time, however, a smaller flow rate *into* unemployment will also necessarily reduce the flow rate *out* of unemployment. Put another way, if fewer jobs open up through firm-worker separations, that means there will be fewer opportunities to be hired back into employment.

For our purposes, the main consequence of these lower flow rates and longer unemployment spells is that they contribute to segmentation, informal as well as formal, between labor market "insiders" and "outsiders."[73] Although employment protection rules influence the distribution of rights, powers, and resources between capital and labor, they also influence the distribution of rights, powers, and resources among workers themselves, which Guy Mundlak calls the "third function" of labor law.[74] This works by allowing employers to be more "choosy" in who they hire. If at any given moment there are a certain number of job-seeking workers,[75] then employers can be more selective in hiring; when there are fewer job openings at any given moment, workers have less choice and employers have more. This selectivity augments the advantages certain workers have, say, in terms of age, experience, or skill. Hence, the labor market segments between these privileged insiders and less privileged outsiders. This process does not require the formal segmentation that happens through explicit "two-tier"

70. *See* Olivier Blanchard & Pedro Portugal, *What Hides behind an Unemployment Rate: Comparing Portuguese and U.S. Labor Markets*, 91 AM. ECON. REV. 187 (2001).

71. *Id.* at 187.

72. *Id.* at 196.

73. On the role of employment protection rules in the development of *formal* labor-market "dualization," see PATRICK EMMENEGGER, THE POWER TO DISMISS: TRADE UNIONS AND THE REGULATION OF JOB SECURITY IN WESTERN EUROPE 195–275 (2014).

74. Guy Mundlak, *The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers*, *in* THE IDEA OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2011).

75. Or if the same proportion of workers are seeking jobs, e.g., the US and Portugal with the same unemployment rate.

labor market reforms as occurred in Western Europe in the 1980s and 1990s, although such reforms may certainly exacerbate it.

Next, these insider-outsider dynamics have, at best, enormously ambiguous effects for workers' domination. Certainly, in the republican sense, and referring strictly to the personal employer-employee relationship, the employer's arbitrary authority to terminate the worker is restrained or even eliminated. But in the structural sense of domination, the domination of capital over labor may in fact increase.[76] For one, segmented labor markets weaken the collective, structural power of workers vis-à-vis capital. For another, longer job tenures with specific employers lead worker incumbents to identify their interests more strongly with those of the firm than with other workers. Employment protection rules may limit the arbitrary power of employers, but all of these factors help employers get workers to accept the employer's power-dependent reasons as their reasons for action.

These insider-outsider dynamics would be bad enough, but they are also fertile ground for segmenting the labor market along lines of race, gender, and other invidious forms of discrimination. Common wisdom among labor and employment law scholars has it that anti-discrimination would be strengthened by the presence of just-cause rules.[77] Employers, the argument goes, would be less able to terminate discriminatorily women or people of color if they always needed to demonstrate a good reason for the termination. However, Julie C. Suk has made a persuasive case against this assumption in her comparison of French and American labor markets.[78]

Suk argues that in France, between the 1970s to 2000s, racial inequality in access to employment worsened even though employee job security legislation improved. This was not a coincidence. Suk writes that an "employer knowing how costly it will be to fire a full-time employee is less likely to hire candidates whom they consider risky hires. This leads to both 'rational' and racially biased failures to hire racial minorities."[79] Because just cause shuts down the ability to make arbitrary terminations, employment discrimination "migrates," in Suk's words, to the hiring stage. And because employment protection rules enable employers to be more selective in their

76. Ironically, employment protection rules may also undercut republican freedom. As Blanchard and Portugal observe, not only rates of layoffs or dismissals, but also voluntary quits are lower in Portugal than in the US. *See* Blanchard & Portugal, *supra* note 70, at 195. Thus, the lower rate of job openings may prevent workers who want to leave from quitting their jobs, which weakens the "exit option" that market republicans prize. It is also worth pointing out that Marx would also find occupational immobility itself to be morally disagreeable. For an extended treatment of this point, see James Furner, *Marx's Sketch of Communist Society in* The German Ideology *and the Problems of Occupational Confinement and Occupational Identity*, 37 PHIL. & SOC. CRITICISM 189 (2011).

77. Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 75, 75 n. 5 and sources cited therein (2007).

78. *Id.* at 75–77.

79. *Id.* at 97.

hiring decisions[80], this both compounds merit-based failures to hire racially-subordinate groups and allows employers to indulge their discriminatory "tastes." Employment protection rules therefore aggravate other forms of domination, hierarchies based on race and national origin in the French case. With more analysis, we could extend this mechanism to patriarchy as well.

Perhaps one could argue that the security benefits of employment protection rules outweigh these unintended drawbacks. But just cause is not the only way to provide for security in the labor market. For example, Scandinavian countries were a laggard in employment protection legislation, Sweden in particular preferring in the earlier post-war period the "safety of wings" to the "safety of the snail shell."[81] A number of other employment security measures could be considered: (1) well-designed workforce training programs to enhance skills and employment opportunity; (2) publicly-provided employment referral services; (3) "solidaristic" wage policies that compress the distribution of earnings income, enacted via either collective bargaining or taxation, so that reemployment is not accompanied by a significant wage loss compared to previous employment; (4) higher net-replacement rates for unemployment insurance, which reduce the difference between a previous job's wages and unemployment benefits received; (5) a combination minimum-wage and wage-subsidy policy which could both increase employment and raise lower-wage incomes; and (6) a government job guarantee which would reduce unemployment and raise wages at the bottom end of the wage distribution. Each of these policies is subject to various levels of "political feasibility," but surely, in our neoliberal times, strengthening employment protection rules does not prevail on that argument alone.

None of these employment security alternatives *directly* limit an employer's formally arbitrary powers of dismissal. All far short of freeing workers entirely from capitalist exploitation and domination. However, some of these (i.e., (1) to (3)) *indirectly* challenge republican domination by bolstering the market-based, "exit option" for workers. And the remaining measures (i.e., (4) to (6)) also indirectly contest *republican* domination while also critically weakening the main *structural, impersonal* source of capitalist domination: the threat of unemployment and the "freedom" to starve.[82] By

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80. Relying on her central case, France, Suk identifies high unemployment as the main mechanism permitting greater employer selectivity in hiring. *Id.* This is true, but perhaps the more general mechanism is slower flows into and out of unemployment. Even when you have similar-sized unemployment rates (e.g., the United States and Portugal), employers will still have greater selectivity when employees face fewer job openings.

81. PETER A. SWENSON, CAPITALISTS AGAINST MARKETS: THE MAKING OF LABOR MARKETS AND WELFARE STATES IN THE UNITED STATES AND SWEDEN 275 (2002) (explaining the origin of Sweden's active labor market policy).

82. Just as just cause is the ideal answer to republican domination in the workplace, one could believe that universal basic income would be the ideal antidote for structural domination in the labor market. Unfortunately, UBI reinforces the sharp division under capitalism between (paid) work and leisure, and does not equitably solve for the ubiquity of drudgery. *See* Aaron Benanav, *Automation and the Future of*

improving workers' exit options and bargaining power *as a class*, we can also hope that these measures would reduce other forms of domination, a question that should be addressed in future analysis. We can also be more ambitious and think beyond the boundaries of employment security and toward the strengthening of publicly-provided, decommodified goods like healthcare, housing, and education, as well as public forms of productive-asset ownership.[83]

In summary, the republican idea of domination is too narrow. It centers only on the personal, dyadic relationship between employee and employer, and neglects the structural forms of dependency and domination that underly this relationship. Consequently, its policy prescriptions are likewise too narrowly conceived. While employment protection rules may limit the employer's arbitrary powers of dismissal, they may unintentionally strengthen employer' structural domination by making workers more dependent on their jobs, segmenting the labor market, and weakening labor's collective capacity to resist. Employment protection rules may also exacerbate other forms of domination based on race and gender. In contrast, focusing on the structural dimension of workplace domination brings into view alternative forms of employment security that can mitigate both impersonal and personal forms of domination. This, I submit, demonstrates the value of a Marxian approach to labor law.

V. CONCLUSION

The editors and contributors to *Philosophical Foundations of Labour Law* have put together a wonderful volume of essays that encourage us to think about how to advance and reform labor law on more normatively explicit grounds. The variety of perspectives on offer is impressive. Both Karl Marx and domination are persistent themes throughout the volume, in both more and less obvious ways. This review essay has explored a more explicit Marxian concept of domination, extended it to address the related idea of exploitation, and briefly applied it to the area of employment security regulations.

Whether these Marxist ideas of domination and exploitation can serve as a philosophical foundation for labor law remains to be seen. We can return to the problem raised earlier.[84] Labor law always *presupposes* a relationship that constitutively depends on domination and exploitation. If that's the case, how can a Marxist approach to domination and exploitation ever normatively ground labor law? The answer given earlier is that, short of abolishing wage

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Work—2, 120 NEW LEFT REV. 117, 135–42 (2019). *See also* Matthew Dimick, *Better Than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473 (2017).

83. It is important to indicate the decommodified nature of these public goods, to indicate that they are not merely distributive in philosophical intent or effect.

84. *See supra* text accompanying notes 67–68.

labor altogether, labor law can still be harnessed to the effort to reduce or ameliorate exploitation and domination. But perhaps we should also embrace the contradiction this answer represents. Recall Harry Arthurs's remarks cited in the introduction: there is a danger that normative approaches to labor law do "... not revise power relations; at best, they ratify and legitimate them."[85] To avoid this, maybe we want normative concepts that justify the struggle to improve workers lives here and now, but that leave us uncomfortable; that, instead of seeking *only* to justify existing relations, are permanently critical. Marx and Engels expressed a similar idea in *The German Ideology*: "Communism is for us not a *state of affairs* which is to be established, an *ideal* to which reality [will] have to adjust itself. We call communism the *real* movement which abolishes the present state of things."[86] A philosophical foundation to labor law should clarify what we want it to do, but should also not allow us to rest on our laurels.

85. *See supra* note 7 and accompanying text.

86. KARL MARX & FRIEDRICH ENGELS, THE GERMAN IDEOLOGY 56-57 (C.J. Arthur ed., Int'l Publishers Co. trans., 1970).