

# FRAGMENTING WORK AND FRAGMENTING ORGANIZATIONS: THE CONTRACT OF EMPLOYMENT AND THE SCOPE OF LABOUR REGULATION<sup>©</sup>

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This article diagnoses the conceptual and normative crisis of the scope of labour protection as resulting from conceiving of employment as a personal and bilateral contract between an employee and a unitary employer that is characterized by the employee's subordination. It argues that the related fragmentation of organizations and fragmentation of work reveals the extent of the problem with this legal conceptualization of employment. The article offers an approach to reconceptualizing the scope of labour protection that is based on an understanding of personal work arrangements and enterprises as activities. It justifies this approach in terms of the goals of labour regulation—responding to market failure, protecting human rights, strengthening social solidarity, and promoting countervailing power.

Cet article pose un diagnostic de la crise conceptuelle et normative de l'étendue de la protection de la main d'œuvre, en affirmant qu'elle découle du fait de concevoir l'emploi comme un contrat personnel et bilatéral entre un employé et un employeur unitaire, contrat qui se caractérise par la subordination de l'employé. L'article avance que la fragmentation connexe des organisations, et la fragmentation du travail, révèlent l'ampleur du problème que pose cette conceptualisation juridique de l'emploi. L'article offre une méthode permettant de reconceptualiser l'étendue de la protection de la main d'œuvre, fondée sur le fait de percevoir les aménagements relatifs au travail personnel et les entreprises comme des activités. L'article justifie cette méthode sur le plan des buts de la réglementation du travail—répondre à la défaillance du marché, protéger les droits de la personne, renforcer la solidarité sociale, et promouvoir le pouvoir compensateur.

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The changes in employment relations and organizations since the 1980s have led to what is widely recognized as a conceptual crisis in the broad area of employment and labour law.<sup>1</sup> Policies promoting the deregulation of labour markets have combined with new technologies to transform the standard employment relationship that was established in the period of reconstruction following World War II. Growth of flexible forms of work, emphasis on entrepreneurship, widespread vertical disintegration, and the rise of network enterprises have undermined the legal concepts of the “employee” and “employer”—concepts that have traditionally been used to determine the scope of labour protection and of social insurance. Increasingly, the contract of employment is being challenged as the best method for determining the boundary between the discrete realms of labour protection and commercial transaction.<sup>2</sup>

This conceptual crisis has a long legacy, but it was only in the mid-1990s that it began to attract a great deal of attention, generating a plethora of scholarly articles, studies, and recommendations over the next decade. Most of this work has focussed on the distinction that determines the scope of labour law: the distinction between employment, understood as subordinated or dependent labour, and independent contracting, which is equated with entrepreneurship and freedom of contract. However, the crisis is much broader, and it occurs on two fronts: identifying employees and identifying their employer. This second problem, which involves attributing responsibility for the costs and risks of utilizing labour, has received much less attention—with the exception of triangular relationships involving temporary agencies that supply only labour to enterprises—within the English-speaking world.

While these problems were always latent in the field of employment and labour law, their resolution has recently become much more critical given the changes in the way services and production are organized, and the

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<sup>1</sup> Paul Davies & Mark Freedland, “Changing Perspectives on the Employment Relationship in British Labour Law” in Catherine Barnard, Simon Deakin and Gillian S. Morris, eds., *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (Portland and Oregon: Hart, 2004) 129 at 156-8.

<sup>2</sup> Bob Hepple, “Restructuring Employment Rights” (1986) 15 Indus.L.J. 69; Sandra Fedman, “Women at Work: The Broken Promise of Flexicurity” (2004) 33 Indus.L.J. 299.

way labour is contracted and deployed. This problem will not be solved either by devising better tests to distinguish between subordinated labour and independent contracting, or by developing the concept of dependent contractor or worker. The problem of defining the scope of employment protection will not be solved by developing better tests to identify which entity is the “real” employer in situations where multiple parties are involved. New tests cannot solve the problem because it is much deeper; it deals with conceptualizing employment as a personal and bilateral contract between two unitary and bounded entities.

To substantiate this claim, I will draw on a series of articles and reports I have written (either singly or with co-authors) that have examined the scope of employment from the supply and demand sides. My goal is to draw together the strands of this research in order to develop a different approach to determining the scope of labour protection. This article is conceptual and normative, and proceeds in three parts. The first briefly looks at the processes that have led to the fragmentation of work, and its purpose is to link the two sides of the problem—the fragmentation of employment and the vertical disintegration of employing enterprises—by focussing on the changing organizational form of enterprises. The second part focuses on the conventional legal framework that is used to conceptualize the employment relationship: a bilateral contract of personal service characterized either by subordination or by dependence. First, I examine the problem of distinguishing employees from independent contractors, and I then turn to the related problem of identifying the employer for the purposes of labour protection. The third part addresses the question of how to resolve the problem of determining the scope of employment. I begin by identifying the goals of or reasons for regulating work arrangements, and then look at some general approaches to addressing the supply and demand sides of the determination of the scope of labour protection. In the penultimate section, I develop a matrix for ascribing employment-related responsibilities in complex, multilateral work arrangements. To conclude, I address the legitimacy of expanding labour law beyond the contract of employment.

## I. CHANGING ORGANIZATIONS AND FRAGMENTING WORK

The standard employment relationship is conceptualized as involving a bounded relationship: a contract between a single employer and an employee. However, changing organizational forms have reshaped it. Groundbreaking work by Hugh Collins on the vertical disintegration of firms and the breakdown of internal labour markets has shown how individuals

who had once been treated as employees could easily be transformed into independent contractors, outside the scope of labour protection.<sup>3</sup> In a companion article, Collins also raised what he called the “capital boundary problem.”<sup>4</sup> He identified a growing reliance on relational contracting and cooperation between firms at the expense of organizing activities within firms, and noted that many of these complex economic enterprises function as quasi-firms. According to Collins, the problem is that “where the work is organised through numerous separate legal entities rather than a single firm, the limits of legal responsibility set by reference to the boundaries of capital units establish the conditions for potential injustice.”<sup>5</sup> This is because the firm is free to organize its activities as it sees fit, either through vertical integration within one corporate entity or via external contracting, and can adopt a form that enables it to avoid, or minimize, its exposure to judgement for statutory employment-related obligations like pay equity, health and safety, and severance pay.

Paul Davies, Simon Deakin, and Mark Freedland have taken up this approach of looking at both sides of the employment relationship.<sup>6</sup> Although initially their work dealt with the question of how to identify those workers in need of employment protection, they, like Collins, turned to the question of ascribing responsibility for employment-related costs, duties, and risks in multilateral employment relationships where more than one employing entity was involved. Recently, together with Davies and alone, Freedland has begun to look at the relationship between the two aspects of the problem of determining the scope of employment, which he sees as springing from a single source: the conception of the employment relationship as a personal and bilateral contract, which also involves conceiving of the employer as a unitary entity.

In a recent essay, Davies and Freedland draw upon work by Linda Dickens that makes the connection between the growth of flexible and atypical forms of employment and the rise of “networked, boundaryless (sometimes virtual) organizations.”<sup>7</sup> Dickens also makes a distinction

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

<sup>4</sup> Hugh Collins, “Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration” (1990) 53 Modern Law Review 731.

<sup>5</sup> *Ibid.* at 736.

<sup>6</sup> Simon Deakin, “The Changing Concept of ‘Employer’ in Labour Law” (2001) 30(1) Indust.L.J.72; Simon Deakin, “‘Enterprise Risk’: The Juridical Nature of the Firm Revisited” (2003) 32(2) Indust. L. J. 97; Davies & Freedland, *supra* note 1.

<sup>7</sup> Paul Davies & Mark Freedland, “The Complexities of the Employing Enterprise” in Guy Davidov and Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford and Portland: Hart,

between these two trends in order to contrast the profound differences in the quality of different types of non-standard work; Davies and Freedland, on the other hand, use her “dual categorization of change in the nature of employment” to develop a “more ambitious cross-cutting theme, which is the growing multi-agency organization of personal work relations.”<sup>8</sup> It is this insight that I want to develop, and I will do so by drawing upon an edited collection called *Fragmented Work: Blurring Organizational Boundaries and Disordering Hierarchies*.<sup>9</sup>

In this collection, Damian Grimshaw, Mick Marchington, Jill Rubery, and Hugh Wilmott argue for the need to go beyond “this polarization of the ‘employment’ and ‘organization’ dimensions of work” in order to provide an integrated analysis that appreciates the interaction of the two dimensions.<sup>10</sup> They note the importance of remembering “that the boundaries of an ‘organization’ are in many respects defined by the extent of the internalized employment relationship.”<sup>11</sup> The main theoretical argument they make is for “an expanded and more complex matrix of inter-organizational relations that re-inserts the employment relationship into the study of organizations.”<sup>12</sup> Focussing on the relationship between changing organizational forms and changing employment relations allows them to capture the twin dimensions of flexibility or, in other words, the supply and demand sides of the employment relationship. They present the significance of organizational form for the employment relationship diagrammatically, which I have adapted by using terminology that is more familiar in Canada.

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2006) 273; Linda Dickens, “Problems of Fit: Changing Employment and Labour Regulation” (2004) 42(4) *British Journal of Industrial Relations* 595.

<sup>8</sup> Davies & Freedland, *supra* note 7 at 286

<sup>9</sup> Mick Marchington, Damian Grimshaw, Jill Rubery, & Hugh Willmott, eds., *Fragmenting Work: Blurring Organizational Boundaries and Disordering Hierarchies* (Oxford: Oxford U.P., 2005).

<sup>10</sup> Damian Grimshaw, Mick Marchington, Jill Rubery, and Hugh Wilmott, “Introduction: Fragmenting Work Across Organizational Boundaries,” in Marchington, Grimshaw, Rubery and Willmott, *supra* note 9 at 10.

<sup>11</sup> *Ibid.* In fact, this is precisely what Coase does in his theory of the firm, see Judy Fudge, “La segmentation verticale et l’externalisation de l’emploi: Le Droit commun, la corporation, et COASE” (2006) Bulletin de droit compare et de la sécurité sociale 85.

<sup>12</sup> *Ibid.* at 16.

The x-axis depicts the variations in internal labour markets and the standard employment contract, whereas the y-axis represents the extent to which the employment contract is under the influence of a single employing organization or is subject to control or influence by multiple employing entities. The standard employment contract that is typical of the large firm with an internal labour market is situated where the two axes meet. Self-employment is the farthest away from that point—diagonally across from it—since it is regarded as the opposite of employment. Most research has focussed on where to draw the line between employees and non-employees along the x-axis, and the concern is with flexible forms of employment, such as part-time, casual, temporary, and dependent workers. However, as Grimshaw *et al.* note, although there has been much less attention to this dimension, variations in employment relationships also occur along the y-axis.

Although employment is treated as a bounded relationship between an employee and an employer, which is identified as a single firm, the boundaries of the firm have proven to be quite porous, “making it difficult to know where the firm ends and where the market or another firm begins.”<sup>13</sup> There has been a growing reliance on relational contracting and cooperation between firms at the expense of organizing activities within firms. Many of these complex economic organizations function as quasi-firms. Emerging organizational forms, such as networks, have combined with older, pre-Fordist, organizational forms—especially subcontracting and employment agencies—to blur the traditional boundary of the firm. Grimshaw *et al.* suggest that “it is more plausible to regard ‘market’, ‘hierarchy’, and ‘network’ as concepts that have proven valuable in differentiating elements or dimensions of organizing practices within and between organizations, rather than as alternative designs of economic organization.”<sup>14</sup>

The fragmentation of the enterprise as an organization and the decline of hierarchy in the organization of internal labour markets have led to more complex employment relationships that do not fit with the conception of employment as a bilateral and personal contract.<sup>15</sup> There are a wide range of situations involving, for example, employment agencies, franchising, subcontracting, and labour-only contracting, in which the different functions involved in employing labour have been distributed among a number of different entities. Interconnected corporate groups rival the vertically integrated firm as a method of organizing services and production, and integrated chains of production and distribution have long been the preferred method of organizing enterprises in certain sectors. Joint ventures, partnerships, and situations involving the purchase and operation of an enterprise by a separate legal entity also complicate the organizational landscape.

The changes in how enterprises are organized have resulted in a transformation in, and polarization of, employment relations. At the high end of the spectrum are the knowledge workers, who are associated with the rise of the “new economy” and networked organizations.<sup>16</sup> These workers

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<sup>13</sup> Walter W. Powell, “The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise” in Paul DiMaggio (ed.), *The Twenty-First-Century Firm: Changing Economic Organization in International Perspective* (Princeton, NJ: Princeton University Press) 33 at 58.

<sup>14</sup> Grimshaw, Marchington, Rubery, & Willmott, *supra* note 10 at 16.

<sup>15</sup> Judy Fudge, “The Legal Boundaries of the Employer, Precarious Workers, and Labour Protection” in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006) at 295.

<sup>16</sup> Dickens, *supra* note 7; 2004; Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press 2004); Alan Hyde,

function as entrepreneurs in the boundary-less enterprise, building their own networks, which—when linked with their property in knowledge—can invert the relations of power and subordination that have traditionally structured employment. Although they fall outside the standard employment relationship, these workers are not typically considered to be in need of labour protection.<sup>17</sup>

At the other end of the spectrum are “precarious” or vulnerable workers who are associated with the informal economy and subcontracted labour.<sup>18</sup> These workers are poorly paid and employed in atypical and unstable jobs, which more often than not fall outside the scope of collective representation or legal regulation. Initially identified with household labour in small, family enterprises in developing countries, informal employment has grown across the world as firms pursue flexible forms of labour, such as casual labour, contract labour, outsourcing, home-working, and other forms of subcontracting that offer the prospect of minimizing fixed non-wage costs.

The structure of enterprises determines not only what form the employment relationship takes, but also which entity in a common enterprise bears the responsibility for employing labour and the attendant employment-related obligations. The blurring of organizational boundaries affects whether a worker falls within the scope of labour protection and which entity bears the responsibility for legal obligations owed to employees in different legal contexts. Moreover, the organizational form that an enterprise takes impacts profoundly upon equity in employment conditions.<sup>19</sup>

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*Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (Armonk, NY: M.E. Sharpe, 2003).

<sup>17</sup> However, in a labour market in which knowledge workers are oversupplied, they too are easily transformed into contingent workers who may well be in need of labour protections, see John Purcell, Kate Purcell & Stephanie Tailby, “Temporary Work Agencies: Here Today, Gone Tomorrow?” (2004) 42 *Brit. J. Ind. Rel.* 705.

<sup>18</sup> Judy Fudge & Rosemary Owens, “Precarious Work, Women and the New Economy: The Challenge to Legal Norms” in Judy Fudge & Rosemary Owens, eds., *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart, 2006) at 7-9.

<sup>19</sup> Hugh Collins, “Multi-segmented Workforces, Comparative Fairness, and the Capital Boundary Obstacle” in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006); Jill Earnshaw, Jill Rubery & Fang Lee Cooke, *Who is the Employer?* (London: Institute of Employment Rights, 2002) at 2.

## II. THE SHORTCOMINGS OF THE CONVENTIONAL LEGAL FRAMEWORK

The law conceptualizes employment as a bilateral personal contract that is marked by subordination, which presents two problems. First, it assumes that there is a conceptual and normative salience to the distinction between employees and independent contractors for the purpose of determining the scope of employment and labour protection. Second, it anthropomorphizes or personalizes the employer by assuming that the employer is a unitary entity.<sup>20</sup> These two problems are linked, and combined they create insurmountable problems for determining the scope of employment.

### A. *Employees and Independent Contractors: The (In)significance of Subordination*

Historically, in both civil and common law systems, the key to distinguishing employment contracts from other contracts for the use of labour was the subordination of the worker.<sup>21</sup> However, this emphasis upon subordination in the common law jurisdictions owes more to master and servant law than it does to contract. Moreover, the recent growth in self-employment indicates that subordination is not very helpful in distinguishing between employment and independent contracting.

Through most of the nineteenth century, the continued operation of master and servant statutes in Anglo-Saxon common law jurisdictions emphasized the hierarchical and status dimension of employment, and provided the context for most decision making about its scope.<sup>22</sup> No clear distinction between employees and independent contractors emerged, either at common law or, for that matter, within statutory master and servant regimes. Although the decriminalization of master and servant law in the last quarter of the nineteenth century and the growing importance of vicarious

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<sup>20</sup> Mark R. Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003).

<sup>21</sup> Simon Deakin, "The Comparative Evolution of the Employment Relationship" in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford and Portland: Hart, 2006) 89; Adalberto Perulli, *Economically dependent / quasi-subordinate (parasubordinate) employment: legal, social and economic aspects* (Brussels: European Commission, 2002), online: <[http://ec.europa.eu/employment\\_social/labour\\_law/docs/parasubordination\\_report\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/docs/parasubordination_report_en.pdf)>.

<sup>22</sup> The historical discussion draws upon Judy Fudge, Eric Tucker & Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers* (Report for the Law Commission of Canada, October 2002); Judy Fudge, Eric Ticker and Leah Vosko, "Changing Boundaries in Employment: Developing A New Platform for Labour Law" (2003) 10 C.L.E.L.J. 329 at 361.

liability created a space for the conceptual triumph of contractualism, and the development of a “pure” and unambiguous test for distinguishing between employees and independent contractors, a clear distinction between employees and independent contractors still did not emerge. Labour markets never enjoyed a *laissez-faire* period. By the time master and servant laws were being repealed, other regulatory legislation was being enacted and decisions had to be made about the scope of its operation. In England, for example, Deakin argues that social legislation of the late nineteenth century continued to rely on status-based distinctions between different classes of workers.<sup>23</sup> It was only in the early twentieth century that the legislation began to use the concept of the contract of service as a way to define the class of people covered, and this practice required courts to distinguish between different types of contracts. To differentiate between contracts of service and contracts for services, courts adopted the control test. However, instead of resorting to a well-established common law test, Deakin claims that judges introduced a doctrinal innovation that enabled them to restrict the application of social legislation that they found repugnant.<sup>24</sup> The effect was to exclude low-status casual and seasonal workers on the one hand and high status professionals on the other, thus emphasizing older status-based distinctions. Deakin argues that a more unitary conception of employment only became firmly rooted in the *National Insurance Act 1946*, which established two principal classes of contributors: employees under a contract of service and persons employed on their own account.<sup>25</sup> Under this new scheme, courts found the control test to be inappropriate and began to develop other approaches, including the “integration” and “business reality” tests. These tests were better suited to employment relationships in the large vertically integrated firms that grew after World War II, and which funded the social insurance scheme.<sup>26</sup>

There was, however, nothing inevitable about the contractualization of employment. As Deakin explains, the employment contract was constructed in response to a set of contingent economic and social circumstances that combined in the period of reconstruction after World War

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<sup>23</sup> Simon Deakin, “The Contract of Employment: A Study in Legal Evolution” (2001) 11 Hist. Stud. Indus. Rel. 1.

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

<sup>25</sup> Simon Deakin, “The Evolution of the Contract of Employment, 1900-1950: The Influence of the Welfare State” in Neal Whiteside & Robert Salais, eds., *Governance, Industry and Labour Markets in Britain and France: The Modernising State in the Mid-Twentieth century* (London: Routledge, 1998) 212 at 214-5.

<sup>26</sup> Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford: Oxford University Press, 2005) at 308.

II. These circumstances—the rise of the welfare state, the growth of industrial-based unions, and the proliferation of large vertically integrated firms—began to unravel in the 1980s, “thereby endangering the very project of democratic emancipation that it introduced.”<sup>27</sup>

Since the 1980s, there has been a partial renaissance in self-employment. However, rather than unconditionally celebrating it as evidence of the vitality of entrepreneurship, the Organization for Economic Cooperation and Development raised concerns about the quality (working conditions, training, security, and income) and status (whether it was a form of disguised employment) of much of the new self-employment.<sup>28</sup> These concerns were particularly relevant to Canada, where there was a large growth in self-employment through the 1980s and 1990s. Although it has dropped somewhat since then, by 2002 self-employment reached 16 per cent of all employment.<sup>29</sup>

The self-employed do not make up a homogenous category; they range from the high-income professional who employs others to the child-care provider who works out of her home and employs no one. Sociologists now recognize a continuum of self-employment that differs in terms of the quality of and rewards from the work, and the chances of economic security and success. The range of self-employed covers employees who are falsely labelled as self-employed, franchisees, skilled crafts people, independent professionals, and owners of incorporated businesses who employ many workers. At best, some types of self-employment provide autonomy which allow people to realize their potential and align rewards with efforts; at worst, self-employed workers are marginalized and fall outside the scope of labour protection and social insurance.

One crucial distinction among the self-employed turns on whether they hire other employees. Self-employed people can be employers, who employ other workers, or they can be own-account, which means that they do not hire anyone else. In 2000, 65.4 per cent of the self-employed were own-account, and it is in this type of self-employment that women and members of visible minorities are more likely to be found. The two

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<sup>27</sup> Simon Deakin, “The Evolution of the Employment Relationship” in Peter Auer Bernard Gazier, eds., *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers: Proceedings of the France/ILO Symposium, Lyon 2002* (London: International Institute for Labour Studies, 2002) 191 at 195-6.

<sup>28</sup> OECD, “Partial Renaissance of Self-Employment,” OECD Employment Outlook (Paris: OECD, 2000) at 187.

<sup>29</sup> This discussion of the data is drawn from Fudge, Tucker, & Vosko, *supra* note 22; Judy Fudge, “Legal Protection for Self-Employed Workers” 3 *Just Labour* 36; Cynthia Cranford, *et al.*, *Self-Employed Workers Organize: Law, Policy, and Unions* (Montreal: McGill-Queens Press, 2005).

categories of employment exhibit profound differences in income; on average, self-employed employers earned two and a half times more than the own-account self-employed did in 1999. The own-account self-employed also earn less on average than employees do. Generally, the self-employed are less likely to have access to benefits than employees, although access to benefits depends upon the type of self-employment, with self-employed employers enjoying greater coverage than the own-account self-employed. Moreover, in 2000, 30 per cent of the own-account self-employed worked in client locations or locations supplied by clients, and 37 per cent of all of the self-employed received support from their clients. In 2000, 15 per cent of the total number of self-employed (18 per cent of own account self-employed) reported that their last employer was one of their clients, of whom 51 per cent obtained more than half of their annual revenue from work done for their last employer. The day-to-day business operations of many self-employed mirror those of many of those who are employees.

As employment relationships have changed with the growth of market-mediated work arrangements and networks of firms, the simple dichotomy between subordination and autonomy is not an effective way of determining entitlement to labour protection under the law. Moreover, once we turn to the demand side of the employment relationship, it is evident that relying on subordination and autonomy to determine the boundary of employment protection is conceptually flawed.

#### B. *Beyond a Unitary Analysis of the Employer*

In their examination of employment relationships that involve multiple employers, Jill Rubery, Jill Earnshaw, and Mick Marchington remark that a “scrutiny of the legal framework [in the UK] surrounding the employment relationship and of relevant case law demonstrates that the traditional focus on regulation within the confines of a single organization remains largely untouched.”<sup>30</sup> They also question whether an organizational entity can make a psychological contract with an employee because, as they note, “[a]n organization is neither a person nor a social entity (as opposed to a legal entity as party to the legal employment contract) and should not be anthropomorphized or indeed reified as a coherent, unified agent.”<sup>31</sup> Nevertheless, as Freedland explains, employment law does precisely this; it

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<sup>30</sup> Jill Rubery, Jill Earnshaw, & Mick Marchington, “Blurring the Boundaries to the Employment Relationship: From Single to Multi-employer Relationships” in Marchington, Grimshaw, Rubery & Willmott, *supra* note 9 at 73 [Rubery].

<sup>31</sup> *Ibid.* at 77-78.

treats the complex organization that in most cases is the employer as if it was the same as the human master.

The source of this conceptual confusion is, once again, master and servant law. According to Freedland, employment's master and servant roots shape its characterization as a personal and bilateral contract. While this characterization fits with situations where a human employer personally directs an employee, it bears little resemblance to situations where the employee is employed in a large bureaucratic network, subject to many sources of direction and authority, and where the employee's contract is with a corporation instead of a human being. This conceptual framework has remained intact, despite the change in employment relations and enterprises, because "the legal corporate person, the incorporated company," has been treated "as the direct equivalent of the individual human employer or master."<sup>32</sup> The complex multilateral relationship between people within a work organization is thus equated with a simple bilateral relationship between two individuals.

Viewing the firm as a unitary and bounded entity, and the employment relationship as a personal and bilateral contract, distorts what goes on when workers are employed. Freedland identifies four functions that make up the idea of employing workers or being an employer, and he complicates the analysis by demonstrating that the different functions related to employing labour "may be exercised together by or within a single employing entity, or they may be exercised separately by different employing entities."<sup>33</sup>

However, despite the weak conceptual and empirical foundation for the unitary notion of the employer, it continues to exercise a profound influence, largely for ideological reasons,<sup>34</sup> over how responsibility for employment-related obligations is ascribed. This presents a problem from two perspectives: one which looks at the internal structures or hierarchies within a single employing enterprise; and one which looks at the relationship between multiple entities engaged in a common enterprise.

Davies and Freeland recently have focussed on the internal dimension of a single organization, and they make the obvious—although often ignored—point that organizations can only manage labour by employing managers. In most cases, there is no such thing as "the

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<sup>32</sup> Freedland, *supra* note 20 at 37.

<sup>33</sup> These functions are: 1) engaging workers and terminating employment; 2) remunerating and providing them with other benefits; 3) managing the employment relationship and the process of work; and 4) using workers' services in the process of production or service provision. *Ibid.* at 40.

<sup>34</sup> Davies & Freedland, *supra* note 7 at 276.

employer"; rather, in most enterprises a number of people exercise managerial functions. Thus, many people in an enterprise have dual functions—as workers and as employers—who manage others. Even chief executives at the apex of an organization are characterized as employees, although it is clear that they are not in any way subordinate to an employer. The abstract legal category of the employer, inevitably, is embodied within human beings.

Moreover, with the increased emphasis on the entrepreneurial nature of employment, a great many people in employing enterprises are in an intermediate position between the traditional parties to the employment relation—the employer and the employee. Thus, Davies and Freedland argue, even within a single employing enterprise, that employment relations are multilateral rather than simply bilateral. The consequences of this analysis on the scope of employment protection are profound, and Davies and Freedland deserve to be quoted at length on this point. According to them, there is

a level of employment relations within the enterprise which cannot satisfactorily be characterized in terms of simple subordination and dependency. This thereby erodes, at a deep and subtle level, not just the simple bipolar antithesis between “the employer” and “the worker”, but also, and no less momentously, the simple binary distinction between employees and independent contractors. All of this tends to de-legitimate the use of that distinction as a basis for drawing the boundaries of employment rights.<sup>35</sup>

Furthermore, from the external perspective, which focuses on multiple entities engaged in a common enterprise, the conventional legal approach is problematic.<sup>36</sup> This is because the legal starting point for attributing employment-related responsibility is to search for a contract with *the employer* as the basis for ascribing employment-related obligations. Only the employer with whom the employee has a contract is liable for employment-related obligations and risks. The legal conception of the employment relationship as a personal and bilateral contract allows (and, perhaps, invites) firms to shift the risks associated with employing labour.

In sum, the fragmentation of work and the changing form of organizations have revealed the problem at the heart of determining the scope of employment: conceptualizing employment as a bilateral contract between two unitary entities that is marked by subordination of one of the parties to the other. At the same time, the notion of legal subordination—having to follow the order of a superior—is giving way to workers setting their own achievement targets; in commercial law, “legal independence is

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<sup>35</sup> *Ibid.* at 283

<sup>36</sup> Fudge, *supra* note 15.

being weakened to make business subject to the collective disciplines of production or distribution networks.”<sup>37</sup>

### III. BEYOND THE EMPLOYMENT CONTRACT

#### A. *The Goals of Regulating Work Arrangements*

What is lacking is a conceptual and legal structure to capture the wide range of work arrangements that result from the related processes of fragmenting work and changing organizations. However, before evaluating different approaches and developing specific techniques, it is first necessary to consider the justifications for regulating employment, as the justifications offered will influence both the approach to, and the techniques of, regulation. Instead of canvassing the wide range of justifications offered for employment regulation, I will focus on two broad approaches to regulation. Hugh Collins and Alan Hyde, who focus on market failure as the primary reason for regulating employment or work arrangements, provide the first. Tony Prosser’s pluralistic account of regulation provides the second, which rejects market failure as the threshold reason for employing techniques other than the private law of property, contract, and tort to regulate social and economic fields. Although these approaches differ in their starting points, the extent to which they overlap is significant. This is because Collins and Hyde share a robust view of what constitutes a labour market failure, and, thus, their approach tends to justify a great deal of regulation that has traditionally been justified on distributive grounds. Similarly, Prosser’s rationale for regulation, which emphasizes solidarity as a legitimate and important goal, also has important implications for making markets more efficient. However, despite the fact that the two approaches converge in justifying a wide range of regulation, the difference in establishing the threshold goals is important both for the content and the form of regulation.

Situating his analysis within regulation theory, Collins identifies two general sorts of reasons or justifications that typically are offered for regulating employment relations: efficiency concerns pertaining to market failure, and welfare concerns relating to distribution.<sup>38</sup> He argues that

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<sup>37</sup> Alain Supiot, “Introductory Remarks: Between Market and Regulation: New Social Regulation for Life Long Security” in Peter Auer & Bernard Gazier, eds., *The Future of Work, Employment and Social Protection: The Dynamics of Change and the Protection of Workers: Proceedings of the France/ILO Symposium, Lyon 2002* (London: International Institute for Labour Studies, 2002) 149 at 153.

<sup>38</sup> Hugh Collins, “Justifications and Techniques of Legal Regulation of the Employment Relation” in Hugh Collins, Paul Davies, & Roger Rideout, eds., *Legal Regulation of the Employment Relation* (London: Kluwer International, 2000) 3. Collins has also discussed another basis for regulating

distributive justifications have not had much influence in regulation theory, either because they are conceptually ill-conceived or because they create a range of problems that do more harm than good. Although he does not explicitly refer to regulation theory, Hyde offers “a revised definition of labour and employment law that locates its distinctiveness in its techniques of overcoming collective action problems that will produce sub-optimum contracts in markets that do not permit the formation of organizations and other similar collective devices.”<sup>39</sup> This approach to regulation regards market allocation (that is, the private law rules of contract, property, and tort) as the preferred mechanism for regulation unless a market failure can be established.

Both Collins and Hyde identify a range of failures that characterize the labour market and, therefore, justify regulating employment or, even more broadly in Hyde’s case, personal work arrangements: (1) information asymmetry; (2) inelasticity in labour supply; (3) collective action problems; (4) overcoming low trust, opportunism, and sub-optimum investment in human capital; (5) high transaction costs; and (6) externalities.<sup>40</sup> Regulation that addresses these market failures and promotes efficiency includes laws permitting workers to form organizations and bargain as a group, the creation of consultative institutions, minimum terms of employment (such as minimum wage), restrictions on child labour, ground rules for collective conflict, default terms for employment contracts (such as minimum notice provisions and implied duties), health and safety rules, and notice requirements in the case of economic dismissals.<sup>41</sup>

Collins and Hyde also agree that inequality of bargaining power does not provide a distinctive or persuasive justification for regulating employment because it is conceptually vague and empirically under inclusive. However, Hyde claims that the inelasticity of labour supply does capture what *is* distinctive of personal service arrangements: the fact that labour cannot be stored (most workers must sell their labour power in order

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employment see Hugh Collins, “Regulating the Employment Relation for Competitiveness” (2001) 30 Indus. L.J. 17.

<sup>39</sup> Alan Hyde, “What is Labour Law?” in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford and Portland: Hart, 2006) at 38.

<sup>40</sup> *Ibid.* at 54-7; Collins, *supra* note 38 at 7-11. Collins characterizes externalities as a distributive issue because they are not directly related to market failures and result from the fact that private property rights do not consider all relevant interests during trading. However, externalities could also be seen as an instance of market failure.

<sup>41</sup> For Collins, based in the UK, tort law governs collective bargaining, whereas for Hyde, the National Labour Relations Act governs industrial conflict.

to survive) and the fact that workers do not control the supply of labour.<sup>42</sup> Not only does this distinctive characteristic provide for a wide range of different types of regulation in order to remedy market failure, it captures a much broader range of work arrangements than employment contracts.

Is there room for values that cannot be translated into market enhancing, or for welfare economics goals, in the market failure justification for employment regulation? According to Collins and Hyde, the problem with goals such as distributive justice is that they are politically contentious; employers will likely resist their imposition, and governments have limited scope for imposing values and goals that people do not accept. Collins allows for a significant degree of overlap in the different justifications for regulation, and he points out the important example of the distribution of power in employment contracts, in which the presence of “excessive or unconstrained managerial discretion in employment contracts can be challenged on both distributive and market failure grounds.”<sup>43</sup> However, he notes that the different, albeit overlapping, justifications might lead to significant differences in the design of the regulation. Hyde accepts that some labour law norms, especially those relating to health and safety, should be understood as basic human rights, which, in effect, trump market efficiency concerns.

By contrast, Prosser wants to move away from the premise that the market is the best technique of regulation, and that those advocating regulation for reasons other than market failure bear the burden of justification. He suggests that there are additional rationales that justify regulation, and he develops the idea of social solidarity as one such justification. He argues that “regulation must be based upon a variety of different values which are appropriate to the context in question, and that there is no overarching first choice logic that can form the basis for regulatory decisions.”<sup>44</sup> Prosser emphasizes the necessity of weighing

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<sup>42</sup> Some economists argue that market failure is a defining feature of labour markets since human beings are not produced for the labour market and they conclude that the neo-classical model is fundamentally flawed as a model for explaining the labour market, see, for example, Antonella Picchio, *Social Reproduction: The Political Economy of the Labour Market* (Cambridge: Cambridge University Press, 1992).

<sup>43</sup> Collins, *supra* note 38 at 16.

<sup>44</sup> Tony Prosser, “Regulation and Social Solidarity” (2006) 33 J.L. & Soc'y 364 at 385. The default preference for market regulation, according to Prosser, is based on the mistaken conception of other social goals as essentially arbitrary. Here he contrasts “thin” proceduralism, which is characterized by the exogenous formation of preferences, which are then aggregated through the electoral system, with “thick” proceduralism, which is based on deliberative democracy. Thick proceduralism would allow for ethical and moral discourse and debate, and not only technical discussions concerned with meeting efficiency goals.

competing values, and claims that this should be done through a democratic deliberative process, rather than simply by fiat of the commitment to welfare economics.

Prosser identifies two roles for regulation based on social solidarity, which would include a range of social and economic rights.<sup>45</sup> The first is that regulation provides the essential social underpinnings of mutual trust and expectations that are necessary for markets to function. This approach reverses the assumptions underlying the critique of regulation. Rather than seeing it as an external constraint on markets, regulation is a necessary source for those conditions that markets require for their operation.<sup>46</sup> The second role of regulation for social solidarity is to prevent the socially fragmenting effect of markets. This is an important corrective to the market failure approach because it does not relegate regulation to a second best that is called into play when markets fail.

Notably absent from Collins and Hyde's list of labour regulation's objectives is a prohibition against race and sex discrimination. Although it is possible to justify legislation prohibiting discrimination against women in employment as market enhancing,<sup>47</sup> the very translation of a human right approach into a market failure approach for regulation should raise suspicions that the market failure approach is neither as technical nor as neutral as its advocates suggest. Labour regulation protecting and promoting freedom of association and collective bargaining can be justified in terms of protecting human rights, promoting social solidarity, and remedying market failure. It has also been criticized, and successfully so in the wake of the political triumph of neo-liberalism and the dominance of neo-classical economics in the mid-1980s, as contributing to market failure.<sup>48</sup> Subordinating regulation designed to achieve other social values to the threshold of market failure is risky in the context of the market for human labour. Remedyng market failure and promoting efficiency is an important goal in regulating employment and work arrangements. It is also important to be aware of, and to pay attention to, the host of negative consequences that regulation can provoke. But market failure should not become either the exclusive or primary reason for regulating work arrangements. Human rights

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<sup>45</sup> *Ibid.* at 382.

<sup>46</sup> For a similar analysis of social rights as market creating and perfecting see Deakin & Wilkinson, *supra* note 26 at 290-303.

<sup>47</sup> See Simon Deakin's commentary on Richard Epstein in Richard Epstein, *Equal Opportunity or More Opportunities? The Good Thing About Discrimination* (London: Institute for the Study of Civil Society, 2002).

<sup>48</sup> Richard Epstein, *Equal Opportunity or More Opportunities? The Good Thing About Discrimination* (London: Institute for the Study of Civil Society, 2002).

and social solidarity are also important goals that labour regulation should protect and promote.

Moreover, the market failure approach to regulation assumes that changing employment relations and organizational forms are the result of the rational pursuit of more efficient and/or effective organizations. However, in their case studies of organizational and employment change, Grimshaw *et al.* found “substantial evidence of fragmentation as an outcome of complex, institutionally anchored, political processes of negotiation over the form of organizations and employment relationships.”<sup>49</sup> They also found that power, understood both collectively and individually as the command of greater resources and access to more options, influenced the distribution of risk. Their case studies highlight the centrality of power relations in the establishment and operation of inter-organizational linkages both at the level of firms, and between firms and workers.

From the perspective of developing regulatory approaches for fragmented work and organizations, one of Grimshaw *et al.*’s most important findings is that “[p]ressures towards fragmentation and the shifting of risk have concentrated powers away from centralized locations where there are opportunities to establish effective institutions of countervailing power.”<sup>50</sup> If countervailing power is to be reinstitutionalized, it is necessary to redraw the legal boundaries of employment and labour regulation.

#### B. *Approaches to Regulating Work Arrangements*

##### 1. The Supply Side

There are two general approaches to the problem of determining the scope of employment on the supply side. The first approach is represented by the recommendation adopted by the International Labour Organization (ILO)<sup>51</sup> in 2006 and a series of articles by Guy Davidov. The ILO suggests the

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<sup>49</sup> Damian Grimshaw, Mick Marchington, Jill Rubery, & Hugh Willmott, “Conclusion: Redrawing Boundaries, Reflecting on Practice and Policy” in *supra* note 9 at 261 [Grimshaw].

<sup>50</sup> *Ibid.* at 273 (citation omitted).

<sup>51</sup> International Labour Conference, Fifth Item on the Agenda: The Employment Relationship, Provisional Record, Ninety-fifth Session, Geneva, 2006, Recommendation 198. A recent report by the Federal Labour Standards Review goes further than ILO Recommendation 198 by proposing to extend labour standards to some autonomous workers and requiring employers to give all workers written notification of their employment. The failure to provide such notification would result in the worker being categorized as an employee. In addition to calling for further study of temporary employment agencies, the Commission recommended that federally regulated firms that used employees supplied by a

need to develop better criteria for dealing with disguised and ambiguous employment relationships. Davidov goes further: in addition to advocating a purposive approach to determining the scope of employment,<sup>52</sup> he advocates extending labour protection to dependent workers.<sup>53</sup> He also addresses the problem of triangular employment relationships,<sup>54</sup> an issue that was raised by the ILO, and then ultimately dropped at the 2006 conference.<sup>55</sup> However, like that of the ILO, Davidov's approach is essentially rehabilitative. He accepts the characterization of employment as a personal and bilateral relationship; defends the continuing conceptual and normative salience of the contract of employment as determining the scope of labour protection; attempts to shore up the boundary between dependent labour and independent contracting to determine the scope of employment protection; and seeks to determine the "real" employer in triangular relationships. The other approach, advocated by Freedland<sup>56</sup> and Hyde,<sup>57</sup> among others, involves a radical rethinking of a status quo which anchors labour protection to the existence of a personal and bilateral contract.

The rehabilitative approach adopted by the ILO is understandable given the nature of its objectives, which was to achieve tripartite agreement on a specific recommendation. While there are pragmatic reasons for this approach,<sup>58</sup> it does not deal with the deeply rooted conceptual and normative limitations presented by the personal and bilateral contract of employment that distinguishes it from other contracts for the performance of work by

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temporary agency should be jointly and severally liable for the payment of wages and benefits. Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21st Century* (Human Resources and Skills Development Canada: Gatineau, 2006) Chapters 4 & 10.

<sup>52</sup> Guy Davidov, "The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection" (2002) 52 U.T.L.J. 357.

<sup>53</sup> Guy Davidov, "Who is a Worker" (2005) 34 Indus. L.J. 57.

<sup>54</sup> Guy Davidov, "Joint Employer Status in Triangular Employment Relationships" (2004) 42(4) Brit. J. Ind. Rel. 727.

<sup>55</sup> For a brief discussion of the history of this recommendation see Judy Fudge, "Self-Employment, Women, and Precarious Work: The Scope of Labour Protection" in Judy Fudge & Rosemary Owens, eds., *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Oxford: Hart, 2006) 201, 204-9. For an insider's perspective see Enrique Marín, "The Employment Relationship: The Issue at the International Level," in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford and Portland: Hart, 2006) at 340. In the Conference Report on the proposed recommendation, it is clear that the employers' group adamantly opposed any extension to the scope of employment, see International Labour Conference, *supra* note 51.

<sup>56</sup> Mark Freedland, "From the Contract of Employment to the Personal Work Nexus" (2006) 35 Indus. L.J. 1.

<sup>57</sup> Hyde, *supra* note 39.

<sup>58</sup> Paul Benjamin, "Beyond the Boundaries: Prospects for Expanding Labour Market Protection in South Africa" in Guy Davidov and Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford and Portland: Hart, 2006) at 190.

vulnerable employees. Thus, it is ill-equipped to deal with the larger problem of fragmenting organizations and work.

Davidov offers the most sophisticated attempt to provide a conceptual and normative justification of the rehabilitative approach. He conceptualizes employment along three axes in order to characterize workers in need of protection. Despite the new vocabulary that he uses to identify the three dimensions of what makes employees especially vulnerable and thus deserving of employment and labour protection (democratic deficits and psychological and economic dependence), these dimensions correspond to the old tests (control, integration, and business reality respectively) that have been used by the courts to determine employee status.<sup>59</sup> These dimensions also suffer from the same problems as the old tests: a lack of precision that is conceptual, as well as operational, in nature. Inequality of bargaining power, which Davidov interprets as a market failure and translates into the terminology of democratic deficits and psychological and economic dependence,<sup>60</sup> simply does not have the conceptual muscle to distinguish employment from a range of other personal work arrangements that he argues ought to be excluded from the scope of labour protection.<sup>61</sup> He asserts, rather than demonstrates, that independent contractors are capable of achieving contracts with employers (now clients) that are socially acceptable and able to self-insure against risks, and assumes that employees are not.<sup>62</sup> The fundamental problem with Davidov's analysis is that he reifies the

<sup>59</sup> Although Davidov claims that democratic deficits is a better characterization of employment than subordination, *supra* note 52 at 377-88, he goes on to claim that control is the concept central to understanding the organizational aspect of employment relationships, *ibid.* at 381). In a later essay he translates inequality of bargaining power into labour market failures, Guy Davidov, "The Report of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though Over-used) Legal Concept" in Guy Davidov & Brian Langille, eds., *Boundaries and Frontiers of Labour Law* (Oxford and Portland: Hart, 2006) at 138-43.

<sup>60</sup> *Ibid.* at 138. Davidov does not address Hyde's argument that labour market failures should expand the scope of labour protection beyond employment or Hyde's point that the problem of using proxies such as subordination or economic dependency to identify market failure is that, more often than not, they will simply be used to reinforce old judicial practices, see Hyde, *supra* note 39 at 60, n. 45.

<sup>61</sup> A large range of commercial transactions, such as franchising arrangements and networks involving a range of commercial entities, are also characterized by democratic deficits, and some employment relationships, especially those of high-ranking corporate executives, entrepreneurial knowledge workers, and law professors are not characterized by such deficits. See the work cited at *supra* note 16 for examples of employment relationships that are not characterized by democratic deficits.

<sup>62</sup> Davidov, *supra* note 52 at 359. For those who are familiar with the common law of employment, the paradox is that employees who are least in need of legal protection (high ranking managers and executives) enjoy the most protection, and employees who are most in need of it (cleaners and catering staff), receive the least protection. For a similar observation, see Mark Freedland, "Rethinking the Personal Work Contract" (2005) 58 *Current Legal Problems* 517 at 537 and Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001) at 13.

notion of a bilateral contract for personal service, distinguished by subordination as the justification for employment and labour protection. Rather than engaging in a serious scrutiny of the notion, he then uses it as the prototype against which to assess competing claims.

This approach explains the modesty of Davidov's proposals, but his anxiety towards re-conceptualizing the scope of labour law beyond employment—arguing that it will have unacceptable consequences—explains his commitment to a view of employment as a personal and bilateral contract.<sup>63</sup> According to Davidov, replacing employment with contracts for the performance of work will mean

either that general contract law will be applied to employment contracts, or that independent contractors who sell their labour power to numerous clients (e.g. plumbers) will be treated like the employees of each of their clients. Both options are clearly unacceptable. As long as there is some difference, in real life, between employees and independent contractors – a difference with significance for the purpose of providing workers' protection – this difference must be recognized in legal regulation or employees will end up losing their basic rights.<sup>64</sup>

He identifies two salient differences between employees and independent contractors: (1) whereas independent contractors can, employees cannot protect themselves in the market; and (2) unlike an independent contractor, employees have an employer “who can and should take care of their well-being.”<sup>65</sup> However, as the preceding discussion demonstrates, these differences do not correspond to the “reality” of a growing number of work arrangements in which self-employed workers are extremely vulnerable and many employees cannot find a corresponding employer. Davidov is prepared to accept both conceptual incoherence and the fact that, according to his own criteria, employment is under- and over-inclusive as a mechanism for protecting vulnerable workers, in order to maintain the legitimacy of labour law as a regulatory mechanism that is distinct from commercial law. Moreover, because he is wedded to the prototype of employment as a personal and bilateral contract he cannot deal with the demand side of the problem of the scope of employment—that is, multiple entities engaged in a common enterprise. In the case of temporary agency work, his solution to the problem of the triangular nature of the relationship is to identify *the* employer who exercises control over the agency worker. Only when that endeavour fails (as it inevitably will in the

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<sup>63</sup> See also Freedland, *supra* note 56 at 28-9.

<sup>64</sup> Davidov, *supra* note 59 at 147.

<sup>65</sup> *Ibid.*

case of truly temporary placements) does he recommend making the agency and the client firm jointly responsible for employment-related obligations.<sup>66</sup>

The legitimacy of regulating work arrangements using the values and techniques traditionally associated with labour law is very important, and I will address this issue in the conclusion. At this point, however, it is important to note that several scholars (myself included) have argued for the need both to move away from conceptualizing employment as a personal bilateral contract characterized by subordination, and to expand the scope of labour protection beyond employment. Hyde develops the idea that labour law should respond to collective action problems that create labour market failures. The question of whether particular groups of workers should obtain such legally recognized collective bargaining rights would depend upon whether or not it is in the public interest.<sup>67</sup>

Freedland has also jettisoned the contract of employment as the conceptual core of labour law, adopting in its stead the wider, and more diverse, notion of personal work contracts. They can be analyzed across five dimensions: (1) the workers; (2) the employing enterprise; (3) duration and continuity; (4) personality; and (5) purpose or motivation. The prevailing conception locates the contract of employment at the centre of an expanding ring of concentric circles of personal service contracts that stop at independent contractors. This is contrasted with his conception of the domain of personal work contracts as an openly constructed sphere with a permeable outer boundary enclosing personal work contracts, which move

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<sup>66</sup> The problem with Davidov's analysis of temporary agency work is that he only focuses on the relations between the employing firms and the workers as a basis for ascribing liability rather than on the relationship between the firms that are engaged in a common enterprise and how this the inter-firm relationships influence the attribution of employment-related obligations. His narrow focus on the relationship between the firm and the employee is attributable to his attempt to analogize work arrangements to a personal and bilateral relationship that is marked by the employer's control over an employee. Moreover, Davidov's claims (*supra* note 54 at 734) about the status of temporary agency workers under employment standards legislation and the interpretation of the related employer provisions under that legislation do not reflect the situation in Ontario, the most populous jurisdiction in Canada. Even workers who have been placed with a client firm for several years are considered to be the employees of the agency and under the Ontario *Employment Standards Act* adjudicators continue to insist on control in terms of ownership as a relevant factoring finding distinct entities to be related employers. For a discussion of the difference in the definition and interpretation of the related employer provisions in collective bargaining and employment standards legislation in Ontario see Judy Fudge & Kate Zavitz, "Vertical Disintegration and Related Employers: Attributing Employment-Related Obligations in Ontario" (2006) 13 C.L.E.L.J. forthcoming.

<sup>67</sup> Hyde, *supra* note 39 at 60. See also Cranford *et al.*, *supra* note 29 for a similar recommendation and a discussion of different ways of providing collective bargaining rights for self-employed workers.

freely through the sphere along the five dimensions.<sup>68</sup> Moreover, he offers the idea of “the personal work nexus,” which is intended to deal with the non-contractuality, complexity or multilateralism, and the presence of incidental arrangements that cannot be captured within the personal work contract, in order to provide “an even larger explanatory matrix for the legal construction of those personal work relationships.”<sup>69</sup>

Freedland’s conception of a personal nexus holds a great deal of promise for analyzing complex organizations and fragmenting employment. The five dimensions of personal work contracts that he identifies have the potential to provide a basis for determining the scope of different elements of labour law, such as hours of work rules or health and safety standards and rights, in relation to different types of work arrangements. Moreover, his conception of a personal work nexus provides the opportunity to develop a more comprehensive basis for attributing employment-related obligations to multilateral employing enterprises.<sup>70</sup>

## 2. The Demand Side

There is a lack of fit between the traditional binary and personal conception of the employment contract where the employer is conceived of as a unitary entity, and the range of complex ways labour is employed in enterprises—often composed of several entities. More importantly, the insistence on privity and separate legal corporate personality as a basis for liability creates a number of normative and distributive problems. Although employees have little say about how enterprises are organised and employment relations are structured and, thus, little input into how risks are distributed amongst entities engaged in a common enterprise, they bear the consequences of how those risks are distributed. Grimshaw *et al.* note that in the United Kingdom, “[b]y default, if not by design, the legal and policy framework often...prevents ready identification of agents who are

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<sup>68</sup> For an approach that favours concentric and weakening circles of labour protection radiating away from the contract of employment, which is distinguished by subordination, see Supiot, *supra* note 62 at 55.

<sup>69</sup> Freedland, *supra* note 56 at 17.

<sup>70</sup> Together with Eric Tucker and Leah Vosko, I advocated that, in principle, labour law should be extended to all workers who sell their capacity to work. We argued that the onus should be on those seeking to exclude workers from labour protection, and that this onus could be met by identifying features of either the work arrangement or the specific regulation that warrant the exclusion. Our recommendations are similar to Freedland’s in that they are based on a multi-dimensional approach to identifying work arrangements, are sensitive to different fields of labour law, and recognized the importance of the demand side in determining the scope of labour protection. Fudge, Tucker & Vosko, *supra* note 22.

responsible, and thus frustrates the process of bringing them to account.”<sup>71</sup> As I have detailed elsewhere, in Canada the current legal basis for ascribing employment-related obligations operates as an incentive to firms to externalize their responsibility for employing labour.<sup>72</sup> For these reasons, there is a need to go beyond contract and the corporate form, and adopt a relational and functional approach to ascribing employment-related responsibilities in situations involving multilateral work arrangements in employing enterprises.

Much of the conceptual difficulty in ascribing responsibility for obligations related to employing labour in complex, multilateral organizations can be dissipated by separating out three dimensions of the problem. First, the legal concept of “employer” serves different functions in labour law. Second, enterprises that employ labour can be made up of a wide variety of different types of arrangements with different degrees of autonomy and control. Third, there are different subfields, with different goals, within the broad area of labour law. It is useful to elaborate on each of these dimensions in turn and then to describe how they inter-relate.

Deakin has developed a functional approach to identify the employer in order to form a unifying set of underlying principles that can lend coherence to the task of attaching the liabilities relating to employing labour to a particular entity or group of entities.<sup>73</sup> The different functions serve as criteria for identifying which entity or entities should bear employment-related responsibilities. The first function is that of managing or coordinating the productive process. According to Deakin, “on this basis, the scope of employer liability would be determined by reference to the presence of managerial control” and this is what the “control” or “subordination” test of employee status seeks to identify.<sup>74</sup> The employer also functions, through the taxation and social insurance systems, as a mechanism for absorbing and spreading certain economic and social risks, such as those of unemployment, interruption of income, and work-related injury or disease. The “integration” and “economic reality” tests are used to determine the scope of employment protection for these purposes. The employer’s third function is to serve as a space within which the principle of equal treatment or comparative fairness must be observed.

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<sup>71</sup> Grimshaw, *supra* note 49 at 273

<sup>72</sup> Fudge, *supra* note 15.

<sup>73</sup> Simon Deakin, “The Changing Concept of ‘Employer’ in Labour Law” (2001) 30(1) *Indust.L.J.* at 79.

<sup>74</sup> *Ibid.*

The benefit of this functional approach to identify the employer is that it takes us beyond a simple contractual approach to ascribing employment-related obligations and recognizes that the employer cannot simply be reduced to the corporation with which the employee has a contract. There are several examples, such as the concept of related, associated, and common employers in the common law and employment statutes—legislation that preserves an employee’s status and employment continuity through the sale of a business. Also, the idea of enterprise risk is used as the basis for delineating the scope of vicarious liability, in which the law recognizes a broader basis for ascribing employment-related obligations than a simple bilateral contract.<sup>75</sup> The common feature of the legal devices that broaden the scope of employment-related obligations beyond the personal and bilateral contract is that they use the idea of enterprise as the basis for ascribing responsibility.

Deakin equivocates in using the term “employer” and the term “enterprise” to identify the different functions that the concept “employer” captures in labour law.<sup>76</sup> The reason for this slippage is the historical congruence between the “employer” and “enterprise” in the post-World War II period when the large vertically integrated firm was the hegemonic form of organizing production and services, and the basis for standardizing the employment relationship and delivering employment protection and social insurance.<sup>77</sup> But, as Deakin notes, while these two terms may be congruent—and they were in fact congruent when enterprise took the organizational form of the vertically integrated firm—they are not equivalent: “The legal meaning of the employer is not synonymous with the sociological or economic idea of the ‘enterprise’ or ‘organization’, nor with the workplace, that is, the physical site on which work is carried out.”<sup>78</sup> The enterprise is an economic unity that brings together physical, technical, and human resources oriented towards the achievement of a productive goal, whether the production of goods or services.<sup>79</sup>

The problem with using the term employer to capture the idea of the enterprise is that the organizational unity of the firm, which was the basis for identifying the employer as an entity with the enterprise as an activity, has

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<sup>75</sup> Fudge, *supra* note 15; Fudge & Zavitz, *supra* note 66; Simon Deakin, “‘Enterprise Risk’: The Juridical Nature of the Firm Revisited” (2003) 32(2) *Indust. L. J.* 97.

<sup>76</sup> Deakin *supra* note 73 at 72.

<sup>77</sup> Guylaine Vallée, “What is Corporate Social Responsibility?: The Case of Canada” (2005) 47 *Managerial Law* 20.

<sup>78</sup> Deakin, *supra* note 73 at 73.

<sup>79</sup> Vallée, *supra* note 77; Deakin *supra* note 75 at 98.

broken down. Although the three functions were united within the large vertically integrated firms that prevailed from 1945 to the early 1980s, there was no necessary unity between the coordination, risk absorption, and equity functions of an enterprise as an activity and the organizational form that an enterprise takes.<sup>80</sup> Grimshaw *et al.* demonstrate that the activities of an enterprise can be coordinated and integrated in a variety of firms through an amalgam of market, hierarchy, and network. The coordination and management of labour can be diversified across several different firms engaged in a common enterprise, and the risks associated with employing labour can be shifted from one firm to another with important consequences for the workers who are employed in the enterprise. Labour law needs to develop techniques to deal with controlled autonomy as well as the transfer of risk that occurs once the enterprise as an activity loses its organizational unity.<sup>81</sup> By conceptualizing the enterprise as an activity rather than an organization, it is possible to capture enterprises that are organized via hierarchy, market, and network.

The second dimension that is important in ascribing responsibility for employment-related obligations is the type of arrangement that is used by an enterprise to employ labour. Both the relationship between the firms engaged in an enterprise and between the firms and the workers whose labour they employ are features of this dimension. These arrangements can be classified into three different types of situations. Focusing on the managerial or coordinating function, Davies and Freedland identify two situations.<sup>82</sup> There is also a third situation, one in which the risk-absorption function of the enterprise is paramount.<sup>83</sup>

The first situation arises when separate legal entities comprise a coherent managerial unit under common control—conventionally understood as ownership. The paradigmatic example is the corporate group, which in labour law is known as associated and related employers. The second is where managerial power has been diversified across two or more legal units that are clearly not under common ownership and control. Typical examples include the use of temporary agency workers and labour-only contracting, as well as some franchising situations. Some forms of network organizations and joint ventures also fall into this category. There is also a

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<sup>80</sup> Vallée makes this important distinction, *supra* note 77, and Freedland, *supra* note 62 at 541-2 also refers to it. In Quebec, the Labour Court initially interpreted the successor rights legislation as covering the enterprise as an activity, see Fudge, *supra* note 15 at 309.

<sup>81</sup> Marie-Laure Morin, “Labour Law and New Forms of Corporate Organization” (2005) 144 *Int’l Lab. Rev.* 5.

<sup>82</sup> Davies & Freedland, *supra* note 1.

<sup>83</sup> Fudge & Zavitz, *supra* note 66.

third category involving outsourcing situations, such as some instances of franchising and contracting out, in which there is a high degree of integration between different entities but where the management of labour is not distributed between them. In situations involving supply chains, for example, although the contractor provides a product rather than a service to the retailer, the contractors are so closely integrated into the retailer's operation that the retailer effectively sets the terms and conditions of employment for the contractors' employees by imposing the constraints within which the contractor must operate. The retailers' control over resources and the range of available options gives them great power over contractors and allows them to shift risks on to the contractors, who in turn shift them on to employees or self-employed workers.

The final dimension relates to the different reasons for, or goals of, regulating labour. Labour law can be broken into three broad subfields corresponding to different goals or values that the regulation seeks to achieve.<sup>84</sup> The first subfield pertains to economic governance—minimum labour standards and collective bargaining. This general type of labour regulation serves two purposes: to correct for market failures and to promote solidarity. The second broad subfield comprises social justice and includes occupational health and safety and human rights legislation. Its goal is to promote and protect human rights. Social insurance and revenue laws, such as workers compensation, unemployment insurance, public pensions, and tax, constitute the third subfield of labour regulation, and the goals of this regulatory subfield are also to correct for market failure and to promote social solidarity.

The different functions that the concept of employer is designed to fulfil provide different justifications for ascribing responsibility for employment-related obligations. There are two principles for ascribing responsibility for employment-related obligations to an enterprise. The first is the most commonly accepted, and it has to do with managerial control and coordination: the entity that exercises control should be responsible for the risks and liabilities created. The second moves beyond a fault-based model of responsibility to capture the idea of enterprise responsibility based on the commitment to risk absorption and spreading inherent in the concept of social solidarity.<sup>85</sup> The idea is that enterprises should share the risks inherent

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<sup>84</sup> Fudge, Tucker & Vosko, *supra* note 22. As we note, some types of legislation, such as collective bargaining law, can be characterized as either social justice or economic governance. However, we argue that the typology we have provided captures the salient differences between different types of regulation in relation to the key purposes they are designed to achieve in the Canadian (and US) context.

<sup>85</sup> Vallée, *supra* note 77.

in socially useful activity, and it is based on an analysis of the risks created by the enterprise's activities.<sup>86</sup>

The matrix for ascribing employment-related responsibility that I have described can be depicted schematically as a simple chart. The cells on the left side contain the dimensions of, and mechanisms for, ascribing employment-related responsibility, and the cells along the top refer to the varieties of organizational forms for engaging in enterprises. The central idea is to base responsibility for employment-related obligations on the enterprise as a coordinated and integrated activity.<sup>87</sup> The next step is to identify the different functions that the enterprise plays within labour law, the different ways that enterprises can be organized, and the different subfields of labour law. In developing techniques for regulation, it is important to consider the goals regulation is designed to achieve and to select techniques that have resonance within the legal system. Joint and several liability, for example, is an accepted method in tort law for ascribing responsibility to separate entities engaged in a common enterprise. Moreover, before the rise and proliferation of the vertically integrated firm, joint and several liability was a common labour law technique for ascribing employment-related responsibilities to organizations involved in a common enterprise.<sup>88</sup>

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<sup>86</sup> As Vallée, *supra* note 77 and Deakin, *supra* note 75 at 113 point out, the risk absorption and spreading basis for ascribing responsibility is part of the wider interest in "corporate social responsibility" which is concerned about the responsibility of enterprises for the social risks associated with their activities.

<sup>87</sup> Freedland, *supra* note 62, makes reference to the importance of looking to continental Europe to see how this concept is legally institutionalized and Vallée, *supra* note 77, provides a helpful overview of how this concept is understood in Quebec.

<sup>88</sup> G. de N. Clark, "Industrial Law and the Labour-Only Sub-Contract" (1967) 30 Mod. L. Rev. 6 at 22-24. Eric Tucker recounts the long history – which dates to the mid-1880s – in common law countries of judges limiting shareholder and director liability for unpaid wages in the face of remedial legislation: see Eric Tucker, "Recurring Dilemmas: The History of Shareholder and Director Liability for Workers Wages in Canada," L.H.R. [forthcoming, 2007]. For a modern example of the use of joint and several liability to enforce labour standards see David Weil, "Public Enforcement / Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage" (2005) 58 Indus. & Lab. Rel. Rev. 238.

Having identified the matrix of dimensions and principles involved in ascribing responsibility for employment-related obligations, it is now possible to evaluate a variety of different approaches that have been offered. Marie-Laure Morin summarizes three types of approaches identified by Gunther Teubner and designed to respond to the changing form of

organizations and fragmented work.<sup>89</sup> The first is to seek out fraud; the second is to piece together the constituent parts of the enterprise; and the third is to examine the contractual or financial relationships between firms in order to retrace the chain of responsibility. I shall analyze each approach using the matrix that I have developed for ascribing employment-related responsibilities in multilateral enterprises.

The first approach is to seek out fraud and identify the real employer. It continues to conceptualize the employment relationship in personal and bilateral terms and invokes the concept of control to determine which among the possible entities is the “real” employer. However, it is ambiguous as to whether control refers to the control exercised over the employee or the control exercised by one firm over another. This approach would apply to triangular relationships involving labour-only contracting in which the contractor provided labour and no supervision. It would also apply to cases of shell corporations that are used to limit the liability of the real employer. But, the problem with this approach is that it does not appreciate new configurations and transfers of risk; in the face of new organizational forms the task is not simply one of re-conceptualizing the enterprise to come up with a binary relationship.<sup>90</sup> There is a need to move beyond the idea of an employer exercising control over the employee or over another firm that controls the employee and to develop a conception of the enterprise that includes networks and markets.<sup>91</sup>

The second approach, which is prevalent in France and other continental European legal systems, is to piece together the constituent parts of an enterprise to get a picture of its social and economic unity.<sup>92</sup> This approach would cover the first two of the three types of arrangements identified above in which managerial or co-ordinating functions are distributed across separate legal entities. In situations involving shared management of workers, both justifications for imposing liability (coordination and risk absorption) for employment-related obligations on all entities engaged in a common enterprise are pertinent. The basis for liability

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<sup>89</sup> Gunther Teubner, “Nouvelles formes d’organisation et droit” (1993) 96 Revue française de gestion 50-68. For a discussion of organizational and social theoretical conceptions of the enterprise and their relationship to a juridical conception that is grounded in German law see Gunther Teubner, “Company Interest: The Public Interest of the Enterprise ‘in Itself’” in Ralf Rogowski and Ton Wilthagen, eds., *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (Kluwer: Deventer and Boston, at 21).

<sup>90</sup> Morin, *supra* note 81.

<sup>91</sup> Collin, *supra* note 19 at 336; Davies & Freedland, *supra* note 1 at 290; Supiot, *supra* note 62 at 22.

<sup>92</sup> Freedland, *supra* note 62; Hepple, *supra* note 2 at 65; Morin, *supra* note 81; Supiot, *supra* note 68 at 21-22. As Vallée notes, *supra* note 77, this concept is also familiar in Quebec.

would not be contractual, but rather would be conceived of in terms of tort. Imposing liability on this basis conforms better with the reality of work arrangements, in which workers have little opportunity to bargain over the form of the enterprise that employs them, even though the organizational form that the enterprise takes will dramatically impact upon the risks the employees bear. The solution would be to impose joint and several liability on all of the entities engaged in the enterprise in order to ensure the internalization of responsibilities and prevent the more powerful firms involved in the enterprise from shifting risk on to other entities who do not have the capacity to absorb them. The benefit of this approach is that it is simple and it would provide the workers with recourse against all of the entities that were engaged in the common activities of the enterprise.

This approach would capture the management and coordination as well as the risk-absorbing and spreading functions of an enterprise, and it should be used in all three subfields of labour law. In arrangements characterized by the distribution of management and coordination functions, the enterprise should provide the space in which comparative fairness prevails.<sup>93</sup> The technique of imposing joint and several liability with respect to all of the labour-related obligations would avoid the complexity of the functional approach suggested by Deakin, in which a particular entity would be responsible for specific employment-related obligations.<sup>94</sup> He proposes that in a situation involving labour-only contracting, for example, the user firms would be responsible for the workers' health and safety, whereas the contractor would be responsible for wages and social insurance remittances. However, imposing joint and several liability is much simpler, and conforms to the principle of spreading the risk throughout the enterprise. Moreover, the parties engaged in the enterprise are much better situated to work out which entity should actually pay for the risk through indemnification clauses in contracts with each other. This approach, combined with the technique of joint and several liability, is designed to address complex multilateral personal work arrangements in network organizations.

Teubner's third approach to the issue of ascribing employment-related responsibility is to examine contractual and financial relationships in order to retrace the chain of responsibility. According to Morin, the aim here

is neither to crack down on fraud in order to identify the real employer nor to piece together a full picture of the enterprise, but to take account of inter-firm relationships so as to determine

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<sup>93</sup> Collins, *supra* note 19.

<sup>94</sup> Deakin, *supra* note 73 at 81-2.

each firm's respective share of responsibility for such events as may occur over the course of the employment relationship.<sup>95</sup>

This approach would cover the third type of situation, where there is no common ownership and management functions are not distributed across the enterprises, but where the firms are functionally integrated in a common enterprise. It responds to the need to develop regulatory mechanisms to apply universally across labour or supply chains, and to provide effective countervailing power to the new configurations of capital.<sup>96</sup> It could also apply in certain instances to corporate groups when the separate corporations are controlled (owned) by one firm but the management of labour is not diversified across firms.

This approach is justified on the ground that entities should internalize the risks they create,<sup>97</sup> and it is especially compelling in situations where one or two firms are engaged in a common enterprise and thus have the power to shift risk to other firms, with the result that workers are left bearing them. It emphasizes the risk absorption and spreading function of the enterprise. The technique of joint and several liability could be used to operationalize this approach in the context of economic governance and social insurance. Contract compliance in the field of social justice could be used as a means for ensuring that firms, which manage labour within the common enterprise, are accountable to other firms in the enterprise that benefits from the labour. However, since the management function is not distributed amongst the entities in the enterprise, the principle of comparative fairness would not apply to the enterprise.

This matrix, which is based on conceptualizing the enterprise as an activity instead of identifying it with a particular organizational form, is an attempt to develop a framework for ascribing employment-related responsibilities for work arrangements that deviate from the prototype of a personal and bilateral contract characterized by subordination. Combined with the proposal to extend labour protection to all personal work arrangements, it is designed to deal with the “[v]ertical disaggregation and horizontal meshing [that] characterize the shift in organizational forms” and the concomitant fragmentation of employment relationships “as the internalized worker (full time or part time) is supplemented, if not supplanted, by externalized, temporary, and self-employed workers.”<sup>98</sup> The

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<sup>95</sup> Morin, *supra* note 81.

<sup>96</sup> Rubery, *supra* note 30 at 87.

<sup>97</sup> This is even more compelling given that they capture the profits.

<sup>98</sup> Grimshaw, *supra* note 49, 264

fundamental ideas are that enterprises, however organized, should be responsible for the risks that their activities create and that responding to market failures, protecting human rights, promoting solidarity, and creating countervailing power provide compelling public policy reasons for regulating work arrangements.

#### IV. CONCLUSION

Davies and Freedland note that the conceptual crisis in determining the scope of employment has not reached the level of a political or social crisis. In an environment dominated by neo-liberal labour market policies, the resilience of the status quo is not surprising. The proliferation of network organizations and the increase in self-employment are celebrated as evidence of the vibrancy of the market and entrepreneurship. At a time when any form of labour regulation other than the private law of contract is treated with suspicion, it is understandable that calls to expand the scope of labour protection create anxiety. Scholars who treat labour law as a vocation<sup>99</sup> fear that such an extension will either be ineffective at the outer edge or it will dilute labour law's distinctive normative content.<sup>100</sup> They need only look at the recent events in Australia to have their fears confirmed. The Howard government has swept away special state legislation designed to protect self-employed workers and replaced it with a new Commonwealth independent contractors bill, the intent of which is to ensure that labour law stops at the traditional boundary of subordinated workers.<sup>101</sup>

However, the problem with strengthening the boundaries of labour law in order to preserve it is the resulting exclusion of growing numbers of workers as organizations and employment continue to fragment. As the protective scope of labour law narrows, labour law's legitimacy is threatened. Not only will fewer workers be able to enjoy its benefits, those

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<sup>99</sup> Hugh Collins, "Labour Law as a Vocation" (1989) 105 L. Q. Rev. 468

<sup>100</sup> Davidov, *supra* note 62; Freedland, *supra* note 63. In a forthcoming article, Mark Freedland states "that it is entirely legitimate, indeed important, for labour/employment law to advance boldly into those sectors of the developing employment economy – or, at the very least, not to allow those sectors to experience a retreat from them in the face of neo-liberal political pressures." He also advocates exploring an approach that uses the notion of enterprise/activité of French law of ascribing employment related obligations. See "Developing the European Comparative Law of Personal Work Contract" (2007) Comparative Labor Law Journal (forthcoming on file with the author).

<sup>101</sup> Joellen Riley, "A Fair Deal for the Entrepreneurial Worker? Self-employment and Independent Contracting Post *Work Choices*" (2006) 19 Austl. J. Lab. L. However, as Riley notes, even the Howard government has been careful to take steps to ensure that independent contracting is not a form of disguised self-employment and that the most vulnerable self-employed workers, outworkers (home workers) in the garment industry, continue to have access to some form of labour protection.

that can will be the ones who need it least. There is no easy way to avoid the question of labour law's legitimacy—it must be faced head on.

In order to justify the expansion of labour law to personal work arrangements and to develop new methods of ascribing employment-related obligations to respond to vertical disintegration, it is necessary to confront three deeply rooted ideologies that have shaped modern labour law. The first is that independent contractors are entrepreneurs who are able to self-insure and who take profits for risk. The empirical evidence that demonstrates there is no necessary correlation between forms of employment and the rewards that workers enjoy and the risks that they bear. Limiting the scope of labour law to employees can only be understood as the outcome of an historical process that was contingent and contested, and not as an inevitable feature of a natural legal order. The second ideology that labour law must confront is that the private law of contract, property, and tort are *the best* methods of regulating every market, including the labour market. Even commercial law is no longer (if it ever was) a realm of private law unsullied by other forms of regulation; consumer protection and franchise regulations combined with the common law development of good faith add normative pluralism to market regulation. The third ideology derives from company law, “in which the limited liability company is asserted to be the exact and full equivalent of the human employer.”<sup>102</sup> Separate legal personality and limited liability for corporations were not emanations from a natural legal order, but were granted in exchange for the corporation’s willingness to undertake a range of social responsibilities. In the post-war period of market expansion, the large vertically integrated firm became a primary platform for socializing the risk associated with productive activity.

As organizations fragment, the integrative function of the employer identified with the organization is undermined. Older forms of market-based organizations are proliferating and newer types of networks are emerging. The problem is that labour law, which was conceived for Fordist productive relations,<sup>103</sup> does not yet have the conceptual tools to deal with the new forms of organization and work arrangements. In developing these tools, it is important to revert to the goals of labour regulation—responding to market failure, protecting human rights, and promoting solidarity. Now, once again, this last goal is extremely important as the current process of market expansion and fragmentation threatens to undermine the basis for both social solidarity and countervailing power. Expanding the scope of labour

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<sup>102</sup> Davies & Freedland, *supra* note 7 at 276.

<sup>103</sup> Judy Fudge & Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900 - 1948* (Don Mills: Oxford University Press, 2001).

protection to personal service arrangements and ascribing employment-related obligations to enterprises is an attempt to revitalize labour law's distinctive contribution: to strengthen the bonds of social solidarity, to promote countervailing power, and to achieve democratic accountability in the world of work.