SETTING LABOUR LAW'S COVERAGE: BETWEEN UNIVERSALISM AND SELECTIVITY

Guy Davidov

Elias Lieberman Chair in Labour Law, Hebrew University of Jerusalem

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Who is covered by labour law? And who *should* be covered by labour law? These are among the most contentious and crucial questions in the field. The problem manifests itself in different ways. Live-in domestic workers in the US are excluded from working time laws.[1] Journalists in Israel are often being classified by their employers as "freelancers", outside the boundaries of labour law altogether.[2] Agriculture workers in Canada are not allowed to bargain collectively through the same supportive system as other employees.[3] A large majority of workers in India are considered "informal" and do not enjoy many labour law protections.[4] Casual workers in the UK are often denied employment rights by employers based on the claim that no ongoing "contract of employment" exists.[5] This is just a small set of examples to illustrate the wide variety of issues that arise as part of the coverage question.

The importance of this topic is obvious. Domestic workers in the US are not entitled to overtime payments, unlike other employees. Freelance journalists in Israel do not have vacation days, sick days and many other employment protections. Agriculture workers in Canada have to endure severe inequality of bargaining power, without the ability to make demands through a union. And so on. Is this justified? And if not, what can be done to correct this? Given the crucial importance of such questions, it is not surprising that the topic has attracted voluminous case-law and scholarly discussions, throughout the world.[6]

The main goal of this paper is to suggest a new framework that could assist in (and illuminate) discussions on the coverage of labour law, at the descriptive as well as the normative level. Part I explains who are the actors/agencies that participate in delimiting the coverage of labour law. The literature on the scope of labour law is

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* Elias Lieberman Chair in Labour Law, Hebrew University of Jerusalem.

1 Fair Labor Standards Act 1938, as amended, 29 U.S.C. 213(b)(21).

2 See, eg, *Shaul Stdaka v The State of Israel*, 36 PDA 625 (2001).

3 See, eg, Ontario Labour Relations Act 1995, s. 3(b1).

4 Kamala Sankaran, 'Protecting the Worker in the Informal Economy: The Role of Labour Law', in *Boundaries and Frontiers of Labour Law* (Guy Davidov & Brian Langille eds., Hart 2006) 205.

5 See, eg, *Wickens v. Champion Employment*, [1984] I.C.R. 365 (EAT); *Carmichael v. National Power Plc.*, [1999] 4 All E.R. 897 (H.L.).

6 Most attention was given to the question of who should be considered an "employee". For recent collections that include discussions of this topic see Guy Davidov & Brian Langille (eds.), *Boundaries and Frontiers of Labour Law* (Hart 2006); Judy Fudge, Shae McCrystal & Kamala Sankaran (eds.), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012).

mostly concerned with the judicial role in deciding who is an "employee" and who is an "employer", but legislatures and enforcement agencies also play an important role in deciding who is covered by labour law and who is not. Part II argues that we are currently experiencing a coverage crisis in many countries – the "labour law crisis" which many scholars have been lamenting for some time is for the most part a crisis concerning coverage. Part III then introduces the concepts of universalism and selectivity, imported from the welfare state literature, and argues that the continuum between them is a useful way to describe and explain the coverage of labour law in different contexts. The movement from selectivity to universalism, and to some extent back, is described, and the pros and cons of each pole are considered. Part IV puts forward five proposals for improving the balance between universalism and selectivity in setting the coverage of labour law: untie the connection to non-employment-related rights; correct the unjustified exclusion of specific (vulnerable) groups; add an intermediate groups of "dependent contractors"; use purposive interpretation for additional "corrections"; and add special protections for groups that are especially vulnerable. These proposals are all based on developments that already occur in the labour laws of some countries. Part V employs the universalism-selectivity concepts as an aid to critically consider several new proposals to expand the reach of labour law. I distinguish between three different arguments: to expand the *field* of labour law (what laws it includes); to expand *protection* (to periods before/after employment); and to expand the *scope* of labour law (the group of people that enjoy it). I focus on the last one which is directly concerned with coverage and show when this line of arguments is useful and when it becomes problematic.

I. Who's Involved in Setting the Coverage

To understand the different sources setting the coverage of labour law, it would be useful to consider a specific regulation. Take the UK National Minimum Wage Act 1998 as an example (the structure is very similar in other UK labour laws and in the labour laws of other countries). The Act is designed to ensure that workers earn at least £6.19 per hour (as of the time of writing[7]). But as a specific worker, in order to actually get this sum you will have to cross a few hurdles.

First, you have to fall into the definition of a "worker"[8] (the term used in this Act instead of the more common "employee"). However, the definition included in the Act itself is very vague – you have to work under a "contract of employment" or otherwise perform work personally for another who is not your "client or customer" – so the question is actually whether you are a "worker" based on the tests developed by courts. Additionally, the Secretary of State has the power to decide that certain people

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7 National Minimum Wage (Amendment) Regulations 2012.

8 National Minimum Wage Act 1998, Section 54.

shall be deemed "workers" even if they do not fall within the scope of this term as interpreted by courts.[9]

Second, you have to make sure that your job is not excluded from the Act. Some groups are entirely excluded (for example "au pairs", share fisherman, members of the armed forces), and some are only entitled to a reduced minimum wage rate (workers younger than 21 and apprentices).[10]

Finally, you have to enforce your right. Of course most workers are paid more than the minimum wage anyway, and as far as the low-wage workers are concerned, many employers will comply with the law even without active enforcement. However cases of non-compliance are certainly not unusual.[11] In such cases, the chances of the State apparatus ensuring compliance without a complaint initiated by the worker are extremely low. You can either sue in the employment tribunal, or complain to an officer appointed for the purpose of enforcing the Act.[12] To sue, you will also have to know who your legal "employer" is, which in cases of triangular or sham arrangements is not always clear.

It is immediately apparent from this brief description that the three branches of government all play important roles in setting the coverage of labour law. The legislature is setting the general structure, but a lot is left for the other branches to fill in. Judges are given the task of interpreting open-ended terms, including by way of developing tests and indicia to determine who is an employee and so on. And the relevant governmental officials are often given the power to include or exclude some groups of workers. The three branches thus create together the boundaries of legal coverage. But there is still some difference between *legal* coverage and *actual* coverage. Here the courts and governmental enforcement agencies step in and their role is to minimize this difference.

The point I wish to stress here is the connection between several labour law questions that are usually discussed separately. Who is (and who should be) an "employee"/"worker"/"employer"? Which exclusions/exemptions from specific labour laws are justified? What can be done to prevent sham arrangements and otherwise prevent evasion by employers from labour law responsibilities? What are the compliance levels and what can be done to improve enforcement? These are all

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9 *Ibid*., Section 41.

10 National Minimum Wage Act 1998, Sections 37, 43; National Minimum Wage Regulations 1999, Reg. 2(2), 12.

11 In the UK, see, eg, *National Minimum Wage: Low Wage Commission Report 2012* (March 2012), Chapter 4 (http://www.lowpay.gov.uk/lowpay/report/pdf/2012_Report.pdf). In the US, see, eg, Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment in Labor Laws in American's Cities* (Center for Urban Economic Development, University of Illinois, 2009, http://labor.ucla.edu/publications/reports/brokenlaws.pdf).

12 National Minimum Wage Act 1998, Sections 17-21.

aspects of the same problem: the coverage of labour law. This does not mean that they should not be discussed and studied separately (as they have). But at the same time it would be useful, for some purposes, to take a holistic view and examine all aspects of the coverage issue together.

II. The Coverage Crisis

Labour law has been in crisis for some time now – or at least so it is perceived by a large number of scholars.[13] There is no agreement, however, concerning the causes of the crisis or how it manifests itself. To some extent the feeling of crisis surely results from the dominance of the neoliberal discourse over the last three decades – mostly in politics but to some extent also in academia – which puts any "intervention in the free market" on the defensive.[14] Labour law is seen in this discourse as an impediment on efficiency and economic growth, while deregulation – in the labour market as elsewhere – is hailed as a solution. Such arguments have lost a lot of their clout in more recent years but their impact has been (and to some extent still is) significant – which can certainly provide an explanation for the feeling of anxiety among those believing in labour law. Feelings aside, however, we haven't seen many labour laws repealed. There were certainly changes in some countries, with the overall direction being lessening the burden on employers. But, while I do not intend to downplay the importance of such changes, for the most part these were changes in details and not in the general structures of labour regulation. So one might ask: in what sense is there a crisis?

Some scholars believe that labour law is having an "identity crisis" as a scholarly field. They argue that the laws traditionally known as "labour law" – those regulations that directly establish rights for workers vis-a-vis their employers – give us only a partial view of the law that affects workers and work relations. Accordingly there are

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13 See, eg, various chapters in Guy Davidov & Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011), especially by Alan Hyde and Brian Langille; and see Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011) 5.

14 See Keith Ewing, 'The Death of Labour Law?' (1988) 8 *OJLS* 293, 299 ("[L]abour law as a force for good is tied to the principle of democratic socialism. If democratic socialism perishes [meaning the Labour Party in the UK], then so will labour law."). See also Paul O'Higgins, 'The End of Labour Law as We Have Known It?', in *The Future of Labour Law: Liber Amicorum Bob Hepple* (Catherine Barnard, Simon Deakin & Gillian S. Morris eds., Hart 2004) 289, 301 ("the balance of power between Labour and Capital arrived at in the course of the twentieth century has now been changed to the benefit of Capital as a result of the growing influence of economic liberalism..."). And see Dennis Davies, 'Death of a Labour Lawyer?', in *Labour Law in an Era of Globalization* (Joanne Conaghan, Richard M. Fischl & Karl Klare eds., OUP 2002) 159 (arguing that cries about the "death of labour law" are based on the wrong assumption that labour law is inextricably linked to a particular political project).

calls to expand the scope of labour law as a field of study,[15] perhaps using "labour market regulation" as a new name for such a broadened field.[16] Richard Mitchell and Christopher Arup have suggested that labour law needs "a new paradigm"[17] because the old paradigm "lacks both explanatory and normative power";[18] however, in practice they seem to focus their proposals on the *study* of labour law rather than the law itself. As usefully summarized by Simon Deakin, the idea seems to be to urge a change of focus in several ways: studying the impact of other laws (not traditionally within labour law) on working life and work relations; studying different forms of regulations (including new/alternative ones); acknowledging a multitude of purposes beyond the protection of workers (e.g. promoting employment opportunities, competitiveness); and a preference for inter-disciplinary methodologies (with special attention to historical analyses).[19] Mitchell and Arup importantly document these new trends, which they support and participate in. But the changes they discuss are mostly in the realm of labour law *scholarship*, which does not explain the crisis in labour law itself.

Elsewhere, Mitchell points to the dramatic changes in labour markets over the last few decades – the proliferation of non-standard forms of employment, globalization, the decline of unions etc. – to explain why we need a new paradigm.[20] The importance of such changes is undisputed. However, this does not necessarily lead to the conclusion that we need "a new paradigm" for the regulation of work, or a new normative basis, as Brian Langille has been arguing.[21] The empirical changes do indeed necessitate changes in labour law, which must be adapted in various ways to achieve its goals. This does not mean that our goals have changed (or should change). It would also be exaggerated in my view to argue that such changes – however important – necessarily amount (or should amount) to "a new paradigm". The basic building blocks and

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15 Richard Mitchell, 'Where are we Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 *Australian Journal of Labour Law* 45; Judy Fudge, 'Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law', in Guy Davidov & Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 120; John Howe, 'The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work', in Davidov & Langille, *ibid.* at 295; Freedland and Kountouris, above note 13.

16 Richard Mitchell and Christopher Arup, 'Labour Law and Labour Market Regulation', in Christopher Arup et al. (eds.), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 3. And see Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP, 2005).

17 Mitchell and Arup, above note 16, at 4.

18 Mitchell and Arup, above note 16, at 3.

19 Simon Deakin, 'A New Paradigm for Labour Law?' (2007) 31 *Melbourne U. L. Rev.* 1161.

20 Mitchell, above note 15.

21 Brian Langille, 'Labour Law's Theory of Justice', in Guy Davidov & Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 101.

regulatory structures of labour law are still the same, and it has not been suggested that they should be replaced (broadening aside).

The crisis of labour law, then, is not a crisis of goals, but rather results from a mismatch between these goals and the changing reality.[22] The problem is that labour law in many countries has failed to respond to changes in employment practices and other changes affecting the labour market.[23] This stagnation has led to a mismatch which in practice means that many workers are left outside the scope of protection (entirely or partially), with case-law and legislation in many systems failing to adapt to prevent that. The problem of precarious work is for the most part the result of this coverage problem.[24] Deregulation has been less dramatic but added to the same problem, usually by way of adding exemptions that exclude more workers from the scope of protection.[25]

A separate problem – but as explained above, closely related – is the problem of enforcement. As a result of increased global competition and other economic developments, employers now have a growing *interest* in avoiding labour law responsibilities (costs), and at the same time an increased *ability* to do so.[26] Most notably, the role of labour unions in ensuring compliance with labour law has diminished significantly, together with the overall union density.[27] With a system that relies mostly on self-enforcement, this means decreasing levels of compliance – that is, many workers who are legally covered by labour law are in fact unable to enjoy it.

In short, then, the current crisis of labour law is best understood as a coverage crisis. All the sources setting the coverage are implicated in this crisis. Courts have failed – to one extent or another (depending on the country) – to respond to increased evasion

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22 Guy Davidov, 'Re-Matching Labour Law With Their Purpose', in Guy Davidov & Brian Langille (eds.), *The Idea of Labour Law* (OUP, 2011) 179.

23 For an extreme example – the US labour law – see Cynthia L. Estlund, 'The Ossification of American Labor Law' (2002) 102 *Columbia L. Rev.* 1527; Cynthia L. Estlund, 'The Death of Labor Law?' (2006) 2 *Annu. Rev. Law & Soc. Sci.* 105.

24 For recent discussions of this problem see Leah Vosko, *Managing the Margins: Gender, Citizenship, and the International Regulation of Precarious Employment* (OUP, 2010); Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, 2011).

25 As, eg, in the recent amendment to the UK Employment Rights Act 1996, requiring two years of continuous employment to be eligible for unfair dismissal protection, instead of one year (amendment of 2012).

26 Guy Davidov, 'Enforcement Problems in Informal Labor Markets: A View from Israel' (2006) 27 *Comparative Labor Law & Policy Journal* 3, 8.

27 On the role of unions in ensuring compliance, see eg David Weil, 'Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets' in *Emerging Labor Market Institutions for the Twenty-First Century* (R.B. Freeman, J. Hersch & L. Mishel eds., University of Chicago Press, 2005) 13. On the decline of union density see eg J. Visser, 'Union Membership Statistics in 24 Countries' (Jan. 2006) *Monthly Labor Review* 38.

attempts by employers. Most notably, they have often failed to adapt tests setting the scope of labour law, resulting in the exclusion of workers in non-traditional work arrangements who are in fact in need of protection.[28] Legislatures have similarly failed – again to one extent or another – in updating legislation concerning the scope of labour law and in otherwise responding to increased evasion attempts and other situations in which changing employment practices led to the unjustified exclusion of workers.[29] Enforcement agencies have failed – for lack of resources or other reasons – to ensure high levels of compliance with labour law, especially for marginal groups of society (migrants and other minorities).[30]

In all of these contexts, some solutions have been tried, and other solutions have been suggested. The situation is obviously very different in different countries: from India where a large majority of workers is completely excluded from the scope of labour law;[31] through the United States where large groups of workers are legally excluded from specific protections;[32] to many countries where the rights of low-wage workers' are not sufficiently enforced.[33] Some legal systems have adapted their laws better than others to confront the changes in labour market realities. But the overall situation appears to justify the claim of a global coverage crisis.

III. Between Universalism and Selectivity

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28 See, eg, Sandra Fredman, 'Labour Law in Flux: The Changing Composition of the Workforce' (1997) 26 Industrial Law J. 337.

29 See, e.g., Katherine V.W. Stone, 'Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers' (2006) 27 *Berkeley J. Emp. & Lab. L.* 251.

30 See International Labour Office, *The Employment Relationship, Report V(1)* (Geneva, 2006), at 16 (available at http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-v-1.pdf). On the reduction in enforcement action in the US, for example, see Hina B. Shah 'Broadening Low-Wage Workers' Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries' (2010) 28 *Hofstra Lab. & Emp. L. J.* 9, 38.

31 Sankaran, above note 4.

32 American Rights at Work, *The Haves and the Have-Nots: How American Labor Law Denies a Quarter of the Workforce Collective Bargaining Rights* (November 2008), available at http://www.americanrightsatwork.org/dmdocuments/ARAWReports/havesandhavenots_nlracoverage.pdf ; Charles B. Craver, 'The National Labor Relations Act at 75: In Need of a Heart Transplant' (2010) 27 Hofstra Lab. & Emp. L. J. 311, 318.

33 See, e.g., David Weil, *Improving Workplace Conditions Through Strategic Enforcement- A Report to the Wage and Hour Division* (May 2010), available at http://www.dol.gov/whd/resources/strategicEnforcement.pdf; Bernhardt, above note 11; Law Commission of Ontario, *Vulnerable Workers and Precarious Work* (December 2012), available at http://www.lco-cdo.org/vulnerable-workers-final-report.pdf; Anna Pollert, 'How Britain's Low-paid Non-unionised Employees Deal with Workplace Problems', in *Challenging the Legal Boundaries of Work Regulation* (J. Fudge, S. McCrystal & K. Sankaran eds., Hart Publishing, 2012) 285.

In literature analyzing the welfare state, the concepts of universalism and selectivity are used to describe the scope of various benefits provided by the State – to distinguish between two very different methods of benefits' provision. The universal approach is to provide the benefits to everyone; in the selective method benefits are provided only to those who are in a special economic need (usually based on means tests). Social-democratic countries generally prefer universal programs: whether it's education and health care, provided to all without charge, or direct payments such as age-old benefits and child benefits, paid to all citizens or all residents irrespective of need. In liberal welfare states (notably the US) fewer programs are universal, and preference is given to selective benefits paid only to the very poor. In the latter model taxation is lower and the overall redistribution of resources is much lower – for the most part people are expected to get what they want or need in the market. In social-democratic countries, on the other hand, people pay more taxes and get more services – the State assumes a much larger role in mitigating risks.

There is a continuum between complete universalism and extreme selectivity. Child benefits, for example, are considered universal if they are paid irrespective of economic need – but they are still paid only to those with children of a certain age, not to the entire population. Health services could be provided by the State to all, but if the services provided are very minimal, and anything over the minimum must be bought on the market, then arguably it is not a universal program but somewhere in the middle of the spectrum.

It would be useful to employ the concepts of universalism and selectivity to the context of labour law coverage as well. Consider the legislative level first. Here we face policy choices: should labour regulations be extended to every person who works for another? Or limited only to "employees"? Perhaps extended also to "dependent contractors", or some other groups? At the same time, should we exclude specific groups (say, agriculture workers, or supervisors) from some regulations? Alternatively, should we devise labour laws that are targeted only to specific groups, such as construction workers, or domestic workers for example? These choices can be conveniently represented on a continuum between universal and selective. Changes over time, and differences across countries, can then be captured in terms of this important dimension.

The same concepts are useful when assessing the scope of labour law as delineated by courts and enforced by governments. In most countries, labour laws apply to "employees" – with legislatures leaving the task of deciding who is an "employee" to courts. But there are differences, between countries and across time, in the tests and indicia developed by courts and especially in the way they are being applied. There are similarly differences in the levels of compliance achieved by enforcement agencies. The overall picture of labour law's coverage – based on all components – can be described on the same continuum between the most universal (everyone who works for others enjoys the protection of all labour laws) and most selective (only selected groups are covered, and only by specific laws).

Using these concepts, the historical development of modern labour law can be described as a movement from selectivity to universalism and to some extent back. When laws setting employment standards first appeared at the beginning of the 20th Century, they were designed to protect only the weakest workers (women, children, specific vulnerable sectors). But over time such protections were extended to broader groups. Consider the minimum wage in the US, for example. It started in laws limited to specific groups, then extended to all employees but was still subject to some broad exceptions, and later on the exceptions were gradually narrowed.[34] The general trend has been similar with regard to other labour laws and other countries, throughout most of the 20th Century.[35] Legal distinctions between "blue collar" (manufacturing) and "white collar" (service) workers have mostly disappeared.[36] There are still some labour laws targeted to specific sectors in some countries – for example the construction sector – but such laws have become a relatively rare exception.[37]

However, during the last two or three decades, legislatures have started to back away from universalism, usually by creating new exemptions from labour laws or expanding old ones. Moreover, other developments have been even more crucial in creating a significant decline in overall labour law coverage during the same period. Numerous workers are now employed in "atypical" precarious work arrangements.[38] Often employers choose such arrangements specifically to evade responsibilities. In other cases there are more benign reasons for this choice, and the exclusion from employment protection is only a by-product. Either way, millions of workers fall outside of labour law's coverage. Courts could have prevented it, to some extent, but have not done enough to update their understanding of who is an "employee" (or a "worker") and who is an "employer". Legislatures could have stepped in to correct that, but in most cases neglected to do so. Enforcement agencies also share the blame, because even workers who do fall within the *legal* coverage of labour law have increasingly found themselves unable to enjoy those benefits. Obviously there are variations between countries and some exceptions to this crude description, but some degree of over-simplification is necessary to make such a general claim – which is useful for understanding broad trends. There has been a trend away from universalism over the last three decades and back to a regime in which only selective groups are

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34 William P. Quigley, ‘‘A Fair Day’s Pay For A Fair Day’s Work’: Time to Raise and Index the Minimum Wage’, (1996) 27 St. Mary’s L. J. 513.

35 See for example the expansion of protection against workplace discrimination in the UK.

36 See for example, in Germany, Manfred Weiss, ‘Individual Employment Rights: Focusing on Job Security in the Federal Republic of Germany’ (1988) 67 Neb. L. Rev. 82, 85; Berndt Keller, ‘The Public Sector in the United States and Germany: Comparative Aspects in an Employment Relations Perspective’ (2013) 34 Comp. Lab. L. & Pol’y J. 415, 429.

37 See for example, in Canada, the Ontario Labour Relations Act 1995, ss. 126-168, dedicated to the construction industry; in India, the Building And Other Construction Workers Act 1996; in the USA, the Railway Labor Act, 45 USC Chapter 8.

38 For recent empirical data, see Sonia McKay, Steve Jefferys, Anna Paraksevopoulou and Janoj Keles, *Study on Precarious Work and Social Rights* (2012).

covered (in practice) by labour law. But this time it is not the weakest groups that are targeted by labour law. On the contrary, these are the groups now being excluded – a form of regressive (perverse) selectivity.

There is voluminous literature on the pros and cons of universalism vs. selectivity in the welfare state. Selective programs are usually considered to be more efficient, because resources are not wasted on people who do not need them, and because presumably they require smaller administration (being much smaller in scope).[39] The last point is contested, however, because having to check the need (and the means) of each applicant is much more burdensome and expensive (in terms of administration) than simply paying to everyone.[40] Universal programs have some other advantages. First, they are less volatile and less likely to suffer cuts when States introduce austerity measures: when the middle class also enjoys the benefits, there is less political pressure to cut them.[41] Second, their take-up rate is much higher; selective benefits generally require that the beneficiary submit a claim, and many people are not aware of their rights or fail to claim them for other reasons.[42] As a result the goals of the program (for example, reducing poverty) are not fully achieved. Third, universal measures avoid the stigma associated with being dependent on welfare benefits, because everyone is getting them.[43] Finally, universal schemes help us in distributing resources over the life-cycle (i.e. shifting some resources, even for those who have them, to periods in life in which the need in higher).[44] Obviously this also carries with it the problems associated with paternalism: some people prefer to manage their own economic affairs, rather than having the State take a significant chunk of their money, only to return it in times when it thinks they need it more.[45]

Just like in the context of welfare benefits, I would argue that labour law should balance between universal and selective schemes. Adapting the above-mentioned arguments to the labour law context, we can say that universal labour laws have

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41 William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* (University of Chicago, 1987); Theda Skocpol, "Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States", in *The Urban Underclass* (Christopher Jencks and Paul E. Peterson eds., Brookings Institution, 1991) 437; Amartya Sen, "The Political Economy of Targeting", in *Public Spending and the Poor: Theory and Evidence* (Dominique van de Walle and Kimberly Nead eds., Johns Hopkins University, 1995) 11, 14; Thandika Mkandawire, *Targeting and Universalism in Poverty Reduction*, UN Research Institute for Social Development, Social Policy and Development Programme Paper No. 23 (2005).

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several important advantages. First, they are likely to enjoy broader support and more durability, compared with laws that protect only a small specific group. Second, they are more likely to reach a larger segment of the population that needs them (the equivalent of a higher take-up rate): the fact that the same laws apply to all workers makes it easier for them to know their rights and enforce them (and more difficult for employers to evade). Third, universal labour laws are better in fostering solidarity and avoiding the naming of certain specific groups as being in need of special protection (stigma). Finally, they are designed to intervene in private decisions that could be harmful for us; just as welfare programs help us distribute resources over the life-cycle, labour laws ensure that we take vacations, avoid working too many hours, save for difficult times (for example through severance payments) etc. – all interventions that are sometimes paternalistic (saving us from our own bad decisions) and sometimes protect us from accepting disadvantageous conditions due to our vulnerabilities.

In contrast, selective labour laws have their own advantages. They are more efficient and arguably more just in targeting benefits to those who really need them. This is not only a question of whether the law applies or not, but also concerns the *level* of benefits. For example, a (universal) law designed to ensure annual vacation for every employee is likely to set a lower number of vacation days than a (selective) law targeted specifically to those who work in the most straining jobs. There is an advantage in providing special protection for those with special needs/vulnerabilities – regulations that are better tailored to the actual needs of different workers. In a similar vein, selective programs can be used to provide partial protection for those who need only the protection of *some* laws (and not the entire bundle of rights) – for example dependent contractors. Under a universal scheme such workers are usually excluded altogether because they do not fall into the "regular" group of employees; but if we assume that they share some of the characteristics (and vulnerabilities) of employees, they can and should enjoy selective application of relevant laws.

IV. Setting Labour Law's Coverage

Looking at labour law's coverage through the lens proposed in the previous part, it becomes clear that a balance must be struck between universal and selective components – to maximize the advantages and minimize the drawbacks associated with each method. Surely there can be different ways to achieve such a balance and different views about the best balance. It is important, however, to take the pros and cons of universalism and selectivity into account. My own proposal for improving the balance includes five components in which reforms are needed. Such reforms have already started in some countries. And obviously they are not needed in all countries in the exact same way. But these five components are relevant for many countries, throughout the developed world.

(a) Untie Connection to Non-Employment-Related Rights

Alain Supiot has used the image of four concentric circles to explain the coverage of social rights (meaning labour law and social security law).[46] The first circle covers rights guaranteed to everyone irrespective of work status (for example, in most countries, health care). The other three circles rely on what the Supiot Report calls "labour market membership". The second circle includes unpaid work of various kinds, which is protected by some social laws (for example, retirement benefits linked to child rearing, accident coverage for volunteer work). The third circle covers all "occupational activity", that is, independent contractors alongside employees. It includes, for example, health and safety protections (in many countries) and anti-discrimination laws (in some countries). The fourth and final circle covers paid employment and includes the many provisions traditionally known as labour law.

Supiot's four circles are very useful in drawing our attention to universality-selectivity issues. A society in which every adult person is employed in an employment relationship does not have to bother with such problems because all the circles converge in terms of their membership. There is still a difference between the circles in terms of the purpose behind the regulations each circle includes. But if the same people occupy all four circles and enjoy all regulations there is no reason to fine-tune the distinctions. A few decades ago, most men worked in an employment relationship, and social benefits were distributed through them to their families. It was probably assumed that the circles are converging and not much attention was placed on keeping them separate. To be sure, even then many people were left unprotected by this system. But changes of recent decades have made it ever more obvious that we cannot rely on the employment status for the delivery of all social rights. That would mean ignoring the many millions of people who are either unemployed or work outside of a traditional employment relationship.

The most extreme example of benefits unjustifiably associated with employment is health care in the US system. Most people in the US rely on health insurance provided to them by employers as part of their employment benefits package.[47] But the need for health care has nothing to do with one's employment. This is not insurance for work-related accidents or illnesses. Admittedly, US law does not *require* employers to provide health insurance, so the connection is not legally mandated and health care is not strictly speaking part of labour law – but there are incentives (tax-related for example) by which the law supports this system.[48] From a normative perspective,

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46 Alain Supiot, *Beyond Employment: Changes in work and the Future of Labour Law in Europe* (OUP 2001) 54 (a report prepared for the European Commission; hereinafter "the Supiot Report").

47 See Kathryn L. Moore, 'The Future of Employment-Based Health Insurance After the Patient Protection and Affordable Care Act' (2010-2011) 89 Neb. L. Rev. 885.

48 David Pratt, 'The Past, Present and Future of Health Care Reform: Can it Happen?' (2007) 40 J. Marshall L. Rev. 767; Moore, above note 47, at 892.

there is no reason to exclude people without employment – or without "good" employment that provides such benefits – from the scope of health care protections. A right to basic health care should be extended to all citizens or residents, as indeed is the case in most countries. Recent reforms in the US are supposed to ensure a more universal health care coverage, but the basic structure which ties health insurance with employment for most people has not changed.[49] This connection not only leads to the exclusion of many people from health coverage (which the US legislature is now trying to solve by other means), it also exacerbates evasion attempts by employers trying to avoid the expenses associated with such benefits. If all employees of a company are entitled to costly health insurance – whether through collective agreements or through unilateral employer promises – there would be greater temptation to misclassify some employees as independent contractors or as employees of another employer (a subcontractor, or a temporary employment agency, for example).

Other examples are health and safety protections, non-discrimination, protection against sexual harassment, and basic old-age benefits – all rights that should not be limited to "employees", but rather extended to independent contractors and to some extent to unpaid workers as well. To use Supiot's concentric circles, to the extent that such regulations are included in the fourth (inner) circle, they should be moved to the second and third circles.[50] And indeed, such developments have already occurred in some countries.[51] It does not matter much if we call these circles "labour law" or not – the important point is that some work-related rights/regulations should apply only to "employees", but others should not. Rights that do not depend on the existence of a specific employer (that can and should take responsibility) should be separated from the employment relationship.

(b) Correct Unjustified Exclusion of Specific Groups

It is common for labour laws to include provisions that exclude some workers (or exempt some employers) from their scope. This method obviously makes coverage less universal, but there is nothing wrong with it in principle. There could certainly be valid justifications for such exceptions in some cases. Consider, for example, a law that prohibits dismissals without "just cause", but exempts employers with a small number of employees who work alongside them. This exemption can be justified based on autonomy and efficiency considerations.[52] Or consider a law that sets

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49 Moore, above note 47, at 902.

50 This is further developed by Freedland and Kountouris, above note 13, although they prefer a more loose continuity over four circles.

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52 Guy Davidov, 'In Defence of (Efficiently Administered) Just Cause Dismissal Laws' (2007) 23 *Int. J. Comp. Lab. L. & Ind. Rel.* 117, 136.

maximum working hours per day, but excludes some workers in unique settings (like seafarers).[53]

At the same time, however, there are numerous exemptions and exceptions that are difficult to justify. Consider, for example, the exclusion of agriculture workers and care workers in many countries.[54] Or the fact that many rights include a threshold of one or two years in employment.[55] In some cases, exclusions have perhaps been justified in the past but they can no longer be justified today. Other exclusions can be explained only by political reasons with no normative basis. For each specific exclusion we should examine whether it can be normatively justified. If it is not, there are a number of possible routes towards correction. Aside from the obvious (but often politically infeasible) possibility of legislative reform, there is also the option of a constitutional challenge. This has recently proved successful to some extent in Canada, where agriculture workers excluded from the collective bargaining regime have challenged the infringement of their freedom of association.[56] There is also some room for limiting unjustified exceptions by way of judicial interpretation. In Israel, for example, managers and workers in a special fiduciary relationship are excluded from working time regulations, but these terms were interpreted very narrowly to avoid unjustified exclusions.[57]

(c) Add an Intermediate Group of Dependent Contractors

The binary divide between employees and independent contractors has evolved in recent years by the addition of an intermediate group in many countries. The idea is that workers who share only *some* of the characteristics of employment should enjoy some (but not all) of labour law's protections. "Dependent contractors" or "employee-likes" have been part of the law in Germany, Sweden and Canada for decades.[58] In more recent years intermediate categories were introduced in the UK, Austria, Italy and Spain as well.[59] The addition of intermediate groups should be welcomed; they

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53 See, e.g., the Israeli Hours of Work and Rest Law of 1951, s. 30

54 See, e.g., the US National Labor Relations Act 1935, s. 2(3); the Ontario Labour Relations Act 1995, s. 3.

55 See, e.g., the UK Employment Rights Act 1996, s. 108.

56 *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016; *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3.

57 See Hours and of Work and Rest Law 1951, s 30; *Tepco vs. Tal*, 35 PDA 703 (2000) (National Labor Court); *Agron v. Katz*, judgment of October 14, 2007 (National Labor Court).

58 For a brief review see Brian Langille and Guy Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 *Comparative Labor Law & Policy Journal* 6.

59 See Roberto Pedersini and Diego Coletto, *Self-Employed Workers: Industrial Relations and Working Conditions* (Dublin, European Foundation for the Improvement of Living and Working Conditions, 2010) ch 4. And see Guy Davidov, 'Freelancers: An Intermediate Group in Labour Law?', in Challenging the Legal Boundaries of Work Regulation (Judy Fudge, Shae McCrystal and Kamala Sankaran eds., Hart 2012) 171, 178.

have the potential to significantly contribute to the optimal balance between universalism and selectivity. A binary "all or nothing" system leads to under-inclusion – workers who do not seem to justify the application of all labour laws are likely to be left out of the scope of protection altogether, even if they are in need of *some* protections that form part of labour law. Treating them as a separate group that is entitled to partial labour law protection is an example of selectivity (targeting a group with special needs) but the ultimate goal of this move is to enhance universalism – to expand the scope of labour law (even if only parts of it) to additional workers.

The addition of an intermediate category has recently been critiqued by Mark Freedland and Nicola Kountouris. Although they are very critical of the binary divide,[60] they argue that it is not possible to find a clear middle ground in-between the two categories, just as it is not possible to find a clear-cut distinction between employees and independent contractors.[61] Their preferred solution is a "family of contracts" with a "loose grouping".[62] However they never explain how this might work in practice. They seem to support a solution of extreme selectivity – with a different legal treatment for every group of workers. I wholeheartedly agree with the general view which calls for a better connection between regulation and purpose in every context – what Freedland and Kountouris call "linking together category with consequences".[63] But they seem to ignore the problems associated with selectivity – and underestimate the advantages of universalism. Some balance has to be found, and adding an intermediate category offers a better balance than an entirely loose "family" of numerous kinds of work relations. To be sure, adding a third category does not prevent the addition of further variations and subtleties, as suggested in the other sections of this part; but allowing a group of people to know that their status is of "dependent contractors" and that a certain list of rights follows seems highly useful.

Moreover, the argument that it is impossible to reasonably delineate the boundaries of an intermediate group was based on an examination of UK case-law, which has focused on the extent to which the work has been performed personally and on the existence of "mutuality of obligations". In these two limited respects, Freedland and Kountouris argue that it is not possible to find a clear middle ground. However this is not the only way to define the intermediate group, and certainly not the best one. A simple (but in my view powerful) way to understand intermediate groups is by distinguishing between two characteristics of employment relationships: subordination and dependency.[64] These two concepts are often treated interchangeably, but they refer to different vulnerabilities, each justifying separate

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60 Freedland and Kountouris, above note 13, at 104-112.

61 *Ibid.*, at 276-284.

62 *Ibid*., at 284-289.

63 *Ibid*., at 317.

64 Guy Davidov, 'Who is a Worker?' (2005) 34 Industrial Law Journal 57, 61.

parts of labour law. Subordination, if understood broadly as being in a relationship characterized by democratic deficits, can explain the need for regulations setting maximum hours or protecting workers' privacy, for example. Dependency, if understood broadly as inability to spread risks, creating dependency on the specific relationship for economic or social-psychological needs, can explain regulations setting minimum wages or allowing collective bargaining, for example. Most people who work for others are under both subordination *and* dependency, and it is convenient to refer to them as "employees". But increasingly there are also people who are dependent on others but are not subordinated to them; consider, for example, people who have some characteristics of a small business, but have only one major "client". This client should be responsible for them in some respects under labour law. The term "dependent contractor" is thus most fitting, in my view, for the intermediate group.[65]

Countries that do not have such an intermediate group would be wise to add one. But even where it already exists, important improvements are warranted in two main respects. First, in most countries the law requires some degree of subordination even for this intermediate group (or at least this is how legislation has been interpreted).[66] This means that the intermediate group is much smaller than in should be, with many dependent workers still left outside of the scope of (even partial) protection. Second, workers in the intermediate group usually receive only very minimal protections, especially related to social security and sometimes the ability to bargain collectively.[67] In fact, large parts of labour law should apply when a worker is dependent on one client (who should be considered an employer for such purposes).

(d) Use Purposive Interpretation for Additional "Corrections"

Words often have several possible meanings. A piece of legislation therefore has to be interpreted and judges have discretion when choosing how to interpret it. This is most obvious when dealing with concepts such as "employee" and "employer". Through interpretation courts have to decide who falls within these categories and who falls outside of them (and accordingly, out of labour law's coverage). To assist them in this task and create some determinacy, courts all over the world developed tests and indicia. Unfortunately it is the nature of such tests that they are often being applied mechanically and the idea behind them is forgotten. But it is increasingly recognized that terms in legislation have to be interpreted *purposively*.[68] Laws are obviously

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65 See Langille & Davidov, 'Beyond Employees and Independent Contractors: A View from Canada' (1999) 21 Comp. Lab. L. & Policy J. 7, 27; Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52 U. Toronto L.J. 357, 395.

66 Davidov, above note 64, at 60.

67 Langille & Davidov, above note 65, at 33.

68 See Guy Davidov, 'Articulating the Idea of Labour Law: Why and How' (2012) 3 European Labour Law Journal 130.

enacted for a reason, so when courts are entrusted with the task of interpreting them they should strive to achieve the goals behind these laws. Not necessarily the goals that a specific member of the legislature had in mind, or even the majority of members during a specific point in time (in which the law may have happened to pass). The purpose of the law should be understood at a somewhat more abstract level – at the level of justifications – rather than the political compromises that may have brought it about.[69] In any case, the concepts of "employer" and "employee" have to be given meaning in light of the purpose behind them. The tests and indicia used to set the boundaries of these concepts similarly have to be based on the purpose of separating "employees" from "independent contractors" and "employers" from clients – so the tests have to be based on the purpose of labour law itself and on a normative understanding of why it should apply in some cases and not others.

But this raises the question: at what level of abstraction should this be performed? Should we interpret the term "employee" differently for every piece of legislation, based on the specific purposes of such legislation, or should we look more broadly for the purposes of labour law as a whole, and come up with a unified meaning for this term? This is once again the problem of balancing between universalism and selectivity. The current practice in most legal systems is to prefer universal definitions for "employer" and "employee", at least for labour law purposes (there could be a different meaning for the same terms in tax, torts or other laws). This is understandable given the advantages of universalism listed in part III above, but arguably it fails to give adequate concern to the drawbacks of this method and to the advantages of selectivity. A good balance is to have a general meaning (and general tests) for the term "employee", but to allow for exemptions or extensions in special cases when the purpose of a specific labour law justifies such deviation from the standard.[70]

(e) Add Special Protections to Groups that are Especially Vulnerable

As already noted, at the beginning of modern labour law in the early 20th Century it was targeted specifically to the most vulnerable groups. Protection was expanded over the years and became almost universal, before the turn back to a degree of selectivity, this time regressive selectivity (in practice *excluding* the most vulnerable groups). The question is whether we should strive towards complete universalism, i.e. (in this context) strive to ensure that labour laws apply to all employees, or rather include some selectivity as part of an optimal balance. Should we offer special (separate) protections to the most vulnerable employees? As a rule, I believe we should avoid "separate but equal" regimes which exclude some groups from labour law's coverage, offering them a separate set of protections that is argued to be equal. The Ontario

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69 Henry M. Hart Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge: Tentative Edition, 1958) 1200.

70 Davidov, above note 68, at 140.

legislature, for example, was required by the Supreme Court of Canada to correct the unjustified exclusion of agricultural workers from the law setting rights and rules for collective bargaining.[71] Instead of eliminating the exclusion, the legislature created a separate collective bargaining regime for agricultural workers, which was claimed to be equivalent and to take the special characteristics of this sector into account.[72] Although the Supreme Court eventually accepted the new law as constitutional,[73] it is quite obvious that the regime created for agricultural workers is inferior in terms of the collective rights guaranteed to them.[74] And it is difficult to justify this separate treatment.

At the same time, however, it is sometimes warranted to add selective protections *on top of* the general labour law regime. Workers who are especially vulnerable such as agricultural workers, migrant workers or live-in care workers often face sector-specific barriers to the realization of their labour rights. A recent ILO report dealing with domestic work (which led to a new Convention) has pointedly maintained that domestic work should be treated as "work like any other, work like no other".[75] Domestic workers should *not* be excluded from the regular labour law protections; but they must have special protections to address their special vulnerabilities. Recent legislation in Israel has treated cleaning and security workers through subcontractors in a similar way.[76] There is nothing in the new law to suggest that the regular labour laws do not apply. At the same time, there are specific additional protections which were deemed necessary in light of recent experience with these sectors. The goal is to ensure that these workers enjoy the same level of labour rights, not more. Given the special barriers and vulnerabilities, unique treatment is needed to make this possible.

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Altogether, the five components discussed in this part aim to reach a better balance between universality and selectivity. They are designed to improve the existing model for the regulation of employment, especially (though not solely) with respect to ensuring adequate protection for precarious workers. All five components represent developments that have already started in practice, at least in some contexts in some countries, and I have suggested further development along similar lines. Overall the

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71 *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016.

72 Ontario Agricultural Employees Protection Act, 2002.

73 *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3.

74 Judy Fudge, 'Constitutional Rights, Collective Bargaining and the Supreme Court of Canada: Retreat and Reversal in the Fraser Case' (2012) 41 *Industrial L.J.* 1.

75 ILO Report IV(1), *Decent Work for Domestic Workers* (International Labour Conference, 99th Session, 2010); For an analysis of the convention adopted following the report, see Einat Albin and Virginia Mantouvalou, 'The ILO Convention on Domestic Workers: From the Shadows to the Light', (2012) 41 Industrial LJ 425.

76 Law for Increasing Enforcement of Labor Laws, 2011.

proposals aim to respond to the coverage crisis by advancing a higher degree of universality. At the same time, however, selectivity should be used to fill holes created by "one size fits all" universal programs. The intermediate group is an example of selectivity – a specific group of workers enjoys specific parts of labour law – but given the baseline (no protection at all for this group) it is designed to *broaden* coverage, albeit in a more targeted way. Special protections for vulnerable groups is similarly an example of selectivity aimed at broadening coverage, much unlike the regressive selectivity (exclusion of vulnerable groups) we have become accustomed to in recent years.

V. Assessing Proposals to Expand Coverage

In the previous part I have used the universalism-selectivity continuum as an aid for making several proposals concerning labour law's coverage. It would be useful to use the same concepts to examine some other proposals made in this regard in recent years. I will limit the discussion here to proposals regarding *legal* coverage, i.e. not including proposals to improve compliance/enforcement.

Over the last decade, an increasing number of scholars have been calling for the expansion of labour law "beyond employment". Such expansion can take several forms: expanding the *field* of labour law (the laws included under this heading); expanding *protection* to cover periods before/after employment; and expanding the *scope* of labour law (the groups of people on whom it applies). It is only the latter that really refers to setting labour law's coverage. But let me say a few words about the other two as well, to ensure that the three different arguments are clearly distinguished.

Some scholars have been arguing that the list of topics included under the heading of "labour law" should be expanded: while currently "labour law" is understood to include the regulation of employment relations (at the individual and the collective levels), it has been suggested that laws *indirectly* impacting these relations should be included as well. For example, industrial policies such as tariff protections or policies designed to create new jobs, as well as social security laws, are all relevant for workers.[77] Others have argued that unpaid care work should be a subject of labour law.[78] Broader still, it has been suggested that all aspects of the creation and deployment of human capital (including, for example, education) should be included within labour law.[79] What difference would it make if we refer to these laws/topics as being part of the same legal "field" or same body of laws (whether we call it labour law or otherwise)? Advocates of this kind of expansion have not provided much detail

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77 Howe, above note 15; Mitchell, above note 15.

78 See, e.g., Sandra Fredman & Judy Fudge (forthcoming in *Jerusalem Review of Legal Studies*).

79 Langille, above note 21.

to explain the logic of such proposals.[80] One answer could be that being in the same "field" of law implies a single specialized court with jurisdiction over all of these issues, but this has not been argued so far; in any case, it is not necessary to group all issues under the same heading for this purpose.[81] Another reason for using the same heading could be to encourage scholars to study these topics together (i.e. reframe labour law as a field of study) – perhaps in order to point attention to regulations that have so far been neglected. Certainly when we think about reforming social security systems – or more generally welfare state programs – we have to be aware of changes in the labour market and take the rights and benefits secured by labour law into account. Changes that have lowered the security achieved through paid employment should perhaps lead to corrections in social security and not only in labour law itself. So the point about taking a holistic view is important, whether we use the same heading for these regulations or not. We cannot rely on employment to secure welfare as much as we could in the past. We have to think "beyond" employment about ways to achieve economic security. This does not necessarily mean broadening the field of labour law; to the contrary, it may require us to recognize that employment relations – traditionally the subject matter of labour law – play a more limited role in society than in the past. It is still a very important one, and it still requires heavy regulation (labour law).

A second call for expansion "beyond employment" refers more directly to the content of the law. Such calls are coming from a similar direction as the ones described in the previous paragraph, but instead of the general call to broaden the field conceived as labour law, these are more specific calls for new regulations. It has been argued – most notably in the Supiot Report[82] – that new protections should be added to cover transitions to/from employment (e.g. training/retraining rights), and more generally, that regulations should support the free choice to move between statuses, with paid employment being just one option (the others include unpaid care work, training, voluntary work, self-employment, work in the public interest etc.). This can be achieved by instituting "social drawing rights" which people can somehow accumulate and then use when they choose to. Whether we see this as part of labour law or part of welfare/social security law, the idea itself is certainly important and deserves further development. But it has nothing to do with the coverage of labour law. This might seem to be the case because it is argued that protection should cover not only employees but also people who are before/after paid employment. However the proposal is to create new and separate laws for such situations, not to apply the same laws to a broader group.

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80 See also Matthew W. Finkin, 'The Death and Transfiguration of Labor Law' (2011) 33 *Comp Lab L & Pol'y J* 171.

81 In Israel, for example, the labour courts have jurisdiction over a number of "social" issues – labour law, industrial health and safety, social security, health – but these are still considered separate "fields" of law.

82 Above note 46.

The third and final version of the call to go "beyond employment" is directly concerned with labour law's coverage. It has been argued that labour laws (or some of them), which usually apply only to "employees", should be extended to others as well: dependent contractors, self-employed independent contractors, people performing unpaid care work (for their own family members), and sometimes even every citizen/resident. In the previous part I referred (positively) to the idea of adding an intermediate group of dependent contractors, as well as the need to extend some rights – that are wrongly associated with labour law – to broader groups. What about the argument that labour law should apply to the work of caring for one's own children/family members? Scholars raising this idea have probably meant to suggest expansion of the first or second forms mentioned above. It is obviously not possible to apply the same laws currently known as labour law (minimum wage, maximum hours, collective bargaining and so on) without the existence of an employer.[83] We are left, then, with suggestions to extend labour laws to more people who perform *paid* work for others but are currently excluded. The most radical form of such proposals has been to abolish the distinction between "employees" and "independent contractors" altogether, meaning that independent contractors should be covered by labour law as well.[84]

Applying the universalism-selectivity spectrum to this context, it is easy to understand where this proposal is coming from. It is a response to the coverage crisis; specifically, to the decline in universalism and the move towards regressive selectivity. The five proposals discussed in the previous part are all triggered by similar concerns. The difference is that the proposal to abolish the employee-independent contractor distinction makes a giant over-correction, leading to a much higher degree of universality. Judy Fudge attempts to justify this leap at a normative level, by referring to empirical evidence suggesting that some who are currently classified as "independent contractors" are in fact vulnerable much like "employees".[85] But this does not say anything about the validity of the distinction itself, only on the way it has been applied. Certainly some who are currently left out of labour law's coverage should be reclassified as "employees" or as "dependent contractors". But this does not mean – and it has not been suggested – that *all* of those considered independent contractors are indistinguishable from employees. There are

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83 Guy Davidov, 'The Reports 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: Goals and Means in the Regulation of Work* 133 (Hart, 2006).

84 Marc Linder, *The Employment Relationship in Anglo-American Law: A Historical Perspective* 239-241 (1989); Richard R. Carlson, 'Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying' (2001) 22 *Berkeley J. Emp. & Lab. L.* 295 (2001); Judy Fudge et al., *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada* (2002) 10 *Canadian Lab. & Emp. L.J.* 193 (2002).

85 Judy Fudge, 'Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation' (2006) 44 *Osgoode Hall L.J.* 609.

certainly differences – for example in terms of dependency and subordination – that justify differential treatment. The stronger justification for abolishing the distinction seems to be pragmatic rather than normative: the fact that indeterminacy in the application of the distinction plays to the hands of employers trying to evade the laws.[86]

Concepts such as "employer" and "employee" indeed have a significant degree of indeterminacy inherent in them. This might prove helpful for the more powerful party in the relationship, with resources to obtain legal advice and power to structure the relationship in a way that leaves doubts about the worker's status. The worker, on the other hand, has multiple barriers (financial and otherwise) to sue,[87] so uncertainty about the result makes self-enforcement of his rights even less likely. This is an important point which explains why indeterminacy should be minimized as much as possible. However, the price of abolishing the employee-independent contractor distinction altogether is too high. If labour rights are extended to all those who perform work for others for pay, even as part of their own independent business, this will inevitably lead to lowering the standards. Each and every client of an independent plumber, or tax consultant, or a lawyer working as a sole practitioner, or an independent computer technician, will become the legal "employer" of this service provider for labour law purposes. Can we really demand the same standards from such clients, as we demand from "real" employers in a relationship characterized by the vulnerability of the party performing the work? Because the answer is negative, we cannot expect the same levels of protection to survive.

VI. Conclusion

The question of who is (and who should be) covered by labour law is highly contested and often debated. The goal of this paper was to address several problems related to the coverage question, and employ some novel concepts as an aid to better understand and analyze these problems. I started by explaining the different aspects of the coverage problem and how all the branches of government are involved in setting it. I then explained that we are currently facing a major coverage crisis in labour law. Before discussing possible solutions, I introduced the concepts of universalism and selectivity, long used in the welfare state literature to describe possible methods for the delivery of benefits in terms of their coverage. I have shown that the same concepts can be useful for labour law as well, and adapted the pros and cons of each method – as found in the welfare state literature – to the labour law context. I then

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86 This point is implicit in the writings mentioned in note 84 above.

87 See generally W. Felstiner, R. Abel & A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15 *Law & Society Rev.* 631; D. Weil & A. Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the U.S. Workplace' (2007) 27 *Comparative Labor Law and Policy Journal* 59, 63.

offered several proposals that can assist in achieving a better balance between universalism and selectivity compared to the current situation in many countries. Finally, I critically considered some other proposals to "expand" labour law beyond the confines of the employment relationship, showing the dangers of extreme universalism.