



REGULAR-IRREGULARITIES: PRECARIOUS LABOURERS AS THE EXSCRIPTION OF THE LABOUR MARKET

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Abstract

Irregular migrant labour, gendered labour, and the working poor (or ‘welfare-dependent’ labour) are constructed categories signifying work that is precarious (unstable, low waged, vulnerable to exploitation by employers). Advocacy efforts seeking to remedy the overt injustices inherent in precarious working environments have invariably been unsuccessful in addressing the extent of the problem. Precarious labour in its ubiquitous guises persists. I examine how precarious labourers are kept beyond the scope of legal regulation. I argue that the conditions that maintain precarious labour are embedded into the current dominant paradigm of law, to the extent that we must re-conceptualise our notion of law if we are to address the root causes of precarious labour. I use Jean-Luc Nancy’s concept of *inoperative community* as a lens through which to recognise the socially constructed narrative of citizenship and labour expressed through the nation-state.

Law, understood through Nancy’s concept of *inoperativity*, must address the actual coming together of people in common, in community. Nancy refers to this as ‘originary sociability’ (Nancy 1991: 28), which, if recognised for being the site of community and the site of law’s constitution, rejects socially constructed categories. This ‘originary sociability’ and common-as-law must acknowledge the participation of all labourers in the economy, precluding categories and definitions that render some workers regular legal citizens, and others irregular, foreign or private (sub-citizen).

A re-conception of law is imperative if we are to effectively address the problems of precarious labour. Otherwise, as Nancy warns, we will be abandoned “to political and technological economies, . . . this will be the end of our communities, . . . Our world, as far as politics is concerned, will be a desert, and we will wither away without a tomb—which is to say, without community, deprived of our finite existence” (Nancy 1991: xli).

Introduction: ‘migrants’, ‘benefit scroungers’ and ‘home-makers’

Government rhetoric vows to eliminate the ostensible menace of an irregular migrant labour force while policies and practices of state sovereignty perpetuate the

economic reliance on the type of labour migrant workers supply. In the United Kingdom (UK), the prevalence of irregular migration is among the highest in the EU (Cherti 2013).¹ In policy documents that discuss these trends, irregular migrants are relegated into one of three categories: irregular entrants²; persons exceeding their permission to stay or who do not abide by conditions of stay³; or children of irregular migrants who do not have the leave to remain.⁴ In response to alleged opposition to immigration expressed in public opinion⁵, the UK government has committed to decrease immigration and to create a ‘hostile environment’⁶ for illegal migrants. Yet irregular migrants are not clearly illegal and concerns for migration parallel fears of economic decline, unemployment and drains on social welfare programmes. David Cameron, Prime Minister of Britain, deems that “immigration and welfare are two sides of the same coin.”⁷ Typically, he declares a need for increased control over both: a need to restrict immigration of low-skilled workers to prevent them from ‘stealing’ British jobs or becoming ‘benefit scroungers’, and a need to check welfare dependence amongst a citizen population of ‘work-able’ poor. When media and politicians blame migrants and welfare beneficiaries, attention averts from the figurative coin itself: the labour market. Positioning immigration and welfare as the cause of economic ills obscures the priorities of the globalised market economy. These priorities, to maximise financial gain and maintain economic competitiveness, depend on deregulated employment, which results in high rates of precarious labour.

Leah Vosko (2009: 3) defines precarious employment as:

“work for remuneration characterized by uncertainty, low income, and limited social benefits and statutory entitlements. Precarious employment is shaped by the relationship between *employment status* (i.e. self- or paid employment), *form of employment* (e.g.

¹ Researchers have suggested that this is due to the lack of regularisation programmes, which have been implemented in other EU countries, as well as a policy of returning migrants (deportation, and assisted voluntary return) and a focus on preventing future migration. Miriam Cherti and Brhmie Balaram, “Returning irregular migrants: Is deportation the UK’s only option?” (IPPR 2013).

² False papers, or avoid recognition during border crossing—illegal entry.

³ For example students who are working in excess of permitted hours, or workers working additional hours for other employers.

⁴ Gordon, Ian, Kathleen Scanlon, Tony Travers, and Christine Whitehead, “Economic impact on the London and UK economy of an earned regularisation of irregular migrants to the UK” *GLA Economics* (London: Greater London Authority, 2009). 4-5.

⁵ Scott Blinder at the Migration Observatory has looked at public opinion surveys and immigration discourses. The idea that the public are ‘opposed to immigration’ raises a host of problems which I will not detail here, but to suggest that the demographic spoken about as ‘irregular migrant labourers’ may often not be actual migrants or persons with irregular/precarious immigration status, but either foreign-born nationals or citizens with the freedom of movement and work within the European Union. Scott Blinder, ‘Briefing: UK Public Opinion Towards Immigration: Overall Attitudes and Public Concern,’ *Migration Observatory* (Oxford: University of Oxford, 2012), 2, 6.

⁶ Phrase used by Theresa May in response to the Euro Crisis, 26 May 2012. <http://www.bbc.co.uk/news/uk-18216538> accessed 1 June 2013

⁷ David Cameron, ‘Immigration Speech’ 25 March 2013 <https://www.gov.uk/government/speeches/david-camersons-immigration-speech> accessed 1 June 2013

temporary or permanent, part-time or full-time), and *dimensions of labour market insecurity*, as well as *social context* (e.g. occupation, industry, and geography) and *social location* (or the interaction between social relations, such as gender, and legal and political categories, such as citizenship).”

I suggest that those identified as ‘working poor’ and irregular migrant labour share a parallel experience of precarious labour (and treatment both in media representations and labour practices) with ‘gendered’ forms of work, whose work is de-valued based on a gendered division of labour. These labour categories also experience the brunt of the “relational flexibility of work” where we see the “displacement of protected employees by other unprotected workers and exclusion of these non-employees from labour law’s protections.” (Zato 2011: 235).

The demographics of persons employed in precarious situations exceed these three categories. Nevertheless, the categories serve a particular discursive role as the *exscription* from regular standard labourers. Jean-Luc Nancy describes *exscription* as being “the existence of everything that is ‘in question’ in the text ... is *outside* the text, takes place outside writing.” (Nancy 2003: 338). Precarious labourers are *outside* the text of labour law and employment norms; meanwhile, they remain ‘in question’—vital to the labour market and the function of community. This function of community, however, raises the question of community. For Nancy, community is the communion with others as an ‘originary sociability’ (Nancy 1991: 28). The ‘common’ space that he identifies as being where community takes place is the basic exposure of a finite Being to another finite Being. The experience of this exposure is community; it is the element of people participating that escapes and exceeds signification.⁸ Nancy’s discussion of community, and his unravelling of the immanence of the subject, sheds light on the persistent categories and definitions that render some workers regular legal citizens, and others irregular, foreign and/or external of the labour market.

Nancy writes of the imperative to re-engage with the question of community, in order that we may “expose ourselves to what has gone unheard in community” (Nancy 1991: 26). He proposes an *inoperative community*, which is the “sharing out of singularities” (Nancy 1991: 26), and nothing but this exposition: community is not a bond and it is not the production of something absolute, as if to encompass people into. Indeed, he argues that conceptual formulas used to conceive of a social bond or social production always return to an idea of an individual as if the individual could fulfill its

⁸ Nancy’s work and language speak very specifically to philosophy at the ‘end of metaphysics’, particularly Heidegger’s Being and Bataille’s questioning of the limit and excess. These questions (of finitude, Being, immanence and the limit) reflect philosophical traditions have classically remained in the realm of philosophy or theory, often distanced from politics and practice. Nancy, in *Inoperative Community*, does not specify how and where precisely we practice *inoperative community*. However I argue that when we address labour relegated to the shadow of legal regulation but nevertheless embedded in the market economy, must avoid repeating and reaffirming the conceptual frameworks that maintain a subjugated labour force. Law as the trace of a community, rather than the frame and presupposed limit, would necessarily recognise the economy as a broader circulation of inscription and exscription—both vitally participating and needing to be recognised and therefore not obscured and exploited.

own essence. He identifies our present condition as one where community has been presupposed under rubrics of the human subject and “economic ties, technological operations, and political fusion (into a *body* under a *leader*) represent or rather present, expose and realise this essence [of *human-ness* and the individual subject] necessarily in themselves.” (Nancy 1991, 3). I argue that similarly, the nation-state, the law and the labour market are contingent on an ideal, prototypical worker as the fulfillment of the market economy—as if the realisation of its own essence—while ignoring the work and forms of labour (for example, social reproduction) that are happening in and around the labour market. Recognition of these other forms of work expose the limit and finitude of the market economic model. Nancy’s *inoperative community* is therefore about constantly un-working categories, based on the sharing of singularities happening in excess of socially contingent conceptual frames (Nancy 1991: 29, 31, 41).

Forming Precarious Labour: the regular-irregular

The conceptual frames, including what has been *exscribed* as irregular labour, are embedded in the labour market. Jane Wills contends that now “subcontracted employment is becoming paradigmatic” (Wills 2009: 442). Similarly, the London-based *Global Cities at Work* (2010) project demonstrates that the foreign-born worker (often defined as migrant) is the paradigmatic worker (Wills, Datta, Evans et al 2010: 6). The ‘foreign-born worker’ is not paradigmatic because of exponential rates of actual immigration precarity but because the type of low-waged labour provided by foreign-born, or migrant, workers is the standard demanded from citizens and non-citizens alike.

The differential, and subordinate, treatment of low-waged, or non-marketised work is not a new phenomenon. Since the 1970s, the term ‘feminisation of labour’ has described gendered divisions of work that reinforced inequalities between forms of labour. Work that is stereotypically ‘women’s work’, including domestic work, care work, ‘body’ work or ‘reproductive labour’ remains in the shadow of recognised employment in spite of the significant impact the work has on the labour market (Stewart 2011; Fudge 2013/2011; Blackett 2011; Vosko 2009; Conaghan and Rittich 2005).

Concurrently, shifts towards a more overtly globalised labour market in the early twenty-first century have brought to light the impact of immigration and temporary or migrant worker programmes on industries and labour practices (Anderson 2013; Fudge 2011; Guild 2011; Dauvergne 2009; Fudge and McPhail 2009). A migrant labour force has historically supplied labour that fulfilled market priorities by filling gaps in the labour market: migrant workers are flexible, temporary, and a captive labour force. Whereas citizen workers, purportedly with employment choices as well as access to state support, would imaginably not consent to similarly intensive employment conditions which allow employers to cut costs and compete in a global market (Anderson 2013; Ruhs and Anderson 2010). While subcontracted and migrant labour may be paradigmatic, ideals of the ‘good’, regular citizen labourer continue to be engrained in the concepts of citizenship, law, economic productivity and the nation-state.⁹

⁹ Bridget Anderson refers to this as the “community of value” (Anderson 2013: 2).

The impact of a migrant labour force, precarious by definition, is particularly significant in the United Kingdom, where newly recognised EU countries are being integrated into the citizenship labour force. These are workers whose employment had been previously controlled through seasonal worker programmes.¹⁰ The National Farmers Union is currently warning that there is a shortage of agricultural workers. However rather than make employment in these sectors more appealing to workers, industries such as agricultural production/processing and hospitality, are only being further deregulated (Ruhs and Anderson 2012; Wills et al 2010: 7, 23).

As a result of widespread deregulation, responsibility for employment protection is diffused away from the state. Ruth Dukes examines how the effects of this fragmentation of responsibility to protect workers causes a ‘de-solidarisation’ of society, where “social justice is a glaringly ‘absent discourse’ and accountability is a purely contingent and negotiable risk.” (Dukes 2011: 230-231). Forms of accountability are managed through private ‘human rights’ policies and corporate social responsibility that lack enforcement mechanisms. Also, multinational firms that provide outsourced labour can afford, and are taking, the risk of transgressing national employment laws as they maximise their profit and growth.¹¹ Kerry Rittich (2003) refers to the priorities of international labour standards as being guided by ‘countervailing agendas’: protection through core labour rights and promoting labour market flexibility for the benefit of financial institutions. These two priorities mean that, “distributive justice for workers remains a pressing and elusive goal” (Rittich, 2003: 157).

Irregular labour is regular and ubiquitous. It is necessary to the economy of a mythological nation-state. Yet the value of irregular labour is unacknowledged in order to sustain the myth of a nation-state that protects the privileges of its members. However, importantly, “both ‘normal’ work and the average or ideal worker in whose image the organisation and regulation of productive activity, as well as much of the wider social policy agenda in industrialised states, was crafted are increasingly difficult to locate” (Rittich 2002: 119). The prototypical regular worker is elusive and so too are the presumed divisions between market and non-market labour, and between migrant and

¹⁰ Bridget Anderson and Martin Ruhs, ‘Reliance on migrant labour: inevitability or policy choice?’ *Journal of Poverty and Social Justice* 20:1 (2012) 23-30: 25; UK Border Agency, *Migration Advisory Committee report: Review of the UK’s transitional measures for nationals of member states that acceded to the European Union 2004* (UK: Home Office, 2008) <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithus/mac/a8-report/> accessed 5 September 2012; UK Border Agency, *Seasonal Agricultural Workers Scheme*, (UK: Home Office, 2012) <http://www.ukba.homeoffice.gov.uk/eucitizens/bulgaria-romania/saws/> accessed 5 September 2012.

¹¹ For example, the British Hospitality Association, lobby government in favour of increasing the outsourcing of hospitality services in schools and public sector businesses of all forms (NHS, National Defense). This outsourcing is to multinational firms (of whom most of the BHA Board of Directors are representatives of). One of the companies that this work is outsourced to is Sodexo. Sodexo is a ‘quality of life services’ company with 420,000 employees in over 29,000 sites, and offers everything from catering services to private prisons to hospital staff and waste removal services. Sodexo has their own ‘human rights policy’ where they “promote respect for human rights” and “ask suppliers to abide by a code of conduct” along the ILO Group Supplier Code of Conduct. However, there is no enforcement or suggestion that Sodexo is interested in allocating resources to check and ensure compliance with the ILO, or even their own ‘rights policy’.

citizen. These distinctions are not discreet and, consequently, legislation directed at these imagined demographics cannot be precisely effective. Therefore, the precarious employment and legal statuses of irregular migrant labour cannot be addressed solely as an immigration issue because this labour force is not comprised exclusively of migrants. Citizens participating in labour divided based on socially constructed gender differences and values, and ‘failed’ citizens who are in and out of work and/or dependent on welfare support fill the spaces required for an irregular migrant labour force.

Global Myths and Markets

The concept of *exscription* demonstrates how labour has on the one hand been *inscribed* into a myth, or a fiction¹², while on the other hand the myth denies what it *exscribes* away from itself (Derrida 2004: 299). The denial of what is *exscribed* is not an exteriority; the *exscribed* is only exterior to the definition, not to the actual experience. The experience, according to Nancy, is simultaneously what is recognised and what is beyond recognition. In the experience of *inoperative community*, the exscription and inscription are both active. While in the current market economy the *excribed* are clearly denied.

The denial of actual experiences of labour practices and economic participation is entangled in processes of neoliberalisation (Peck 2012). Neo-liberalisation has assumed a totalizing presence¹³ where market exchange is seen as “ ‘an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs’ ... [Neoliberalism] holds that the social good [which we commonly recognise as coming through the nation-state] will be maximized by maximizing the reach and frequency of market transactions.” (Harvey 2005: 3) The ethic of the market makes it seem necessary, but also inevitable, for the nation-state to converge with the market. This establishes the market as if it were paramount and reflective of social order, rather than co-opting the notion of social order into its historically specific form (Harvey 2005; Polanyi 2002).

Neoliberalisation depends the illusory ‘common substance’ of the global. This illusion of a common substance is what Nancy’s *inoperative community* fundamentally challenges (Nancy 1991: xxxviii). Hans Lindhal argues that the differentiation between workers in the economy, and he particularly addresses migrant workers, is allowed to continue because of the idea that migrants, indeed all human beings, have a place, in the

¹² I use these terms somewhat loosely and interchangeably to address the constructed (historically and socially contingent) frame of the nation-state and market. I am drawing on work by Peter Fitzpatrick 2002/1992; Hans Lindhal 2009; Polanyi 2002.

¹³ Jaime Peck, Brennar and Theodore argue, neoliberalism is an ongoing process that is “a crisis induced, crisis inducing form of market-disciplinary regulatory restructuring.” (Peck 2012: 268) It comes with a sense that there is a pending, looming crisis if market growth does not continue. It may be argued that the Occupy movements and ongoing pockets of protest against the global financial system are challenging the ‘false necessity’ (Unger 2009) of neoliberalisation. Additionally, movements that contest boundaries of citizenship (McNevin 2011), and express new forms of labour solidarity different from out-dated trade union models are occurring around the world. I am not focusing on these movement, but instead approach the reconceptualization from a theoretical, conceptual, academic perspective. But these movements may be evidence of Nancy’s *inoperativity* – see Mulqueen and Tataryn 2012.

‘international’ or ‘proto-political global’ market (Lindhal 2009). The ethic of the market, embedded in the nation-state, projects a narrative of inclusion and toleration while establishing an exclusionary agenda: “the claim to a common, encompassing legal space in which, in principle, everyone has her/his own place.” (Lindhal 2007: 9) This presupposition assumes that the domestic market economy exists while some citizens, working in the ‘private’ domain or newly naturalized citizens whose racial or socio-economic profile is not-quite desirable (while the labour demand they fill makes them very desirable as workers) are justifiably refused full participation in the liberal democratic nation-state. The ‘proto-political’ global market suggests a commonality that brings together the national-domestic in response to a foreigner, but a foreigner who has already disrupted the border of the national (Lindahl 2009: 430). And at the same time, the ‘proto-political’ global market reinforces the national citizen as a productive member in the labour market. This presupposition further erases non-market work and care from participating in politics and citizenship.

Inoperative Law and Glimmers of Re-imagination

Existing paradigms of law render it impossible to address precarious labour in the shadows of law and the nation-state. The law continues to maintain a precarious labour force, vulnerable to abuse and exploitation, which exacerbates the social and economic inequalities that labour laws purportedly seek to alleviate. Thinking of labour law as *inoperativity*, through recognising the simultaneity of *inscription/exscription*, suggests the possibility of distinguishing between practice and movement in labour systems, in communities and social reproduction. Thinking of the *inoperative community* begs us to question what it is that forms and informs the law. *Inoperativity* offers a challenge to avoid fictional categories that render some labourers more worthy and desirable than others—whether this is based on what work they do, their place of birth, economic status or passport. As long as precarious work remains in the shadow of law it sustains the mythology of the nation-state. Once illuminated, the transgression inherent in the irregular status challenges that same mythology.

Exscribed labour is not outside or excluded. *Exscription* is an instance of community’s resistance, a “moment—when the in of the ‘in-common’ erupts, resists, and disrupts the relations of need and force—annuls collective and communal hypostases” (Nancy 1991: xl). The participants of economic and social reproduction are ‘in’ the common; and they are disruptive of the presupposed in-common as soon as they are *exscribed*.

For Nancy, law, when it is a trace of the movement generated through communication and communion, is a finitude that “co-appears or compears” (Nancy 1991: 28) because it is not a being onto itself (Nancy 2000: 48). The finitude of law is a communication, something that is multiple and never a singular fixed mode. Law, therefore, like communication, is “not enclosed in a form”, but always “exposing-sharing” which “gives rise, from the outset, to a mutual interpellation of singularities prior to any address in language” (Nancy 1991: 26).

Law is dynamic and necessarily exceeds its inscribed role. The law illustrates the simultaneity of what is finite and what will challenge an idea’s, or a being’s, finitude.

Consequentially, law has to be *inoperative* in that it is without a fixed project or end goal, because it is constantly unworking an inevitably finite form. *Inoperativity* does not suggest that our thinking be oriented towards a limitless movement, or that inoperativity is stagnant or static. Inoperativity does not contradict the fact that law is constituted within the particularity of language, limits and political frames, like the nation-state. Indeed, people are dependent on a limit and a formed identity to inform their own being in the world. However, the simultaneity at work in this inscription of identity is being unravelled by what is in excess of it, what is *exscribed*.

I propose that we must shift our conceptualisation of law, to challenge the recourse to binaries that constantly recur in labour law (Fudge 2013). The work around precarious labour is already speaking about the ‘in-common’ of the economic system understood beyond the market. Nancy’s notion of *inoperative community* offers a conceptual possibility to move away from the historically specific and constructed view of the neoliberal nation-state + globalised market economic, which persists as if it were the only possible contingency of labour and economy. Law, understood through Nancy’s concept of *inoperativity*, is the acknowledgement of the participation of all labourers, in a way that dismantles existing categories and definitions.

Other scholars have proposed international, rights-based, or cosmopolitan-based alternatives for labour and law (Dauvergne 2009; Dukes 2011; Caruso 2011). Notwithstanding the importance of these approaches, *inoperative community* begins with, and in fact never moves away from, questioning the foundation that creates and constitutes the imperative for law. Law cannot be some ‘thing’ that is imposed or placed onto a group of people to address or enforce a situation. Instead law enables, using Nancy’s metaphor, the eruptions of the instances of community, eruptions which manifest the “sharing of singular beings” a sharing which is “always incomplete, or it is beyond completion and incompleteness” (Nancy 1991: 35). The singular beings are the labourers in work and social reproduction, and together they inform the limit of their common interactions, which is the law, constantly un-working the inscription of categories by looking to their exscription. Nancy contends that we constantly “wish to dress the wound [that is the impossibility of a complete comprehensive inscription] with the usual tatters of worn-out finery: god or money, petrol or muscle, information or incantation [new words, new concepts] which always ends up signifying one form or another of all-powerfulness and all-presence.” (Nancy, 2001: 24). For labour law, a field that grapples with the vast temporality and space of work and action activity and identity, we can begin to explore what the inoperative community, inoperative law, might tangibly mean.

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