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Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships

Noah D. Zatz

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Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships

Noah D. Zatz*

INTRODUCTION	859
I. PRISON LABOR AND CONVENTIONAL EMPLOYMENT LAW ANALYSIS	867
A. <i>The Basic Contours of Contemporary Prison Labor</i>	868
B. <i>Prison Labor and the Control Dimension of Employment</i>	871
C. <i>Prison Labor and Statutory Exclusions</i>	875
D. <i>Moving Beyond Control and Exclusions</i>	879
II. EMPLOYMENT'S DISPUTED ECONOMIC DIMENSION	882
A. <i>Prison Labor as Noneconomic: The Exclusive Market Approach</i>	884
1. Involuntariness	886
2. Exchange	888
3. Bargain	890
B. <i>Prison Labor as Economic: The Productive Work Approach</i>	892

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C.	<i>Generalizing From Prison Labor to Paid Nonmarket Work</i>	897
1.	Employment as Productive Work.....	897
2.	Employment as Exclusively Market Work ..	900
III.	HOW BOTH ACCOUNTS OF THE ECONOMIC DIMENSION FAIL.....	903
A.	<i>The Impossibly Restrictive Exclusive Market Standard</i>	904
1.	The Embeddedness Critique of the Exclusive Market.....	905
2.	Employment's Embeddedness in Systems of Punishment.....	907
3.	The Embeddedness of Employment More Generally	910
4.	A Mostly Market Standard?.....	913
B.	<i>The Indiscriminately Expansive Productive Work Standard</i>	914
1.	Locating Economic Activity Outside Market Institutions	915
2.	Productive Work Without Exchange: The Volunteer Problem	918
3.	Differentiating Among Forms of Exchange	921
IV.	HOW LAW CONSTITUTES EMPLOYMENT AS ECONOMIC.....	925
A.	<i>Employment as a Relational Package</i>	925
1.	Relational Packages and Relational Work.....	926
2.	Prison Labor's Employment Status as an Object of Relational Work.....	929
a.	<i>Free Labor, Independence, and Competence</i>	930
b.	<i>The State as a Nonmarket Entity</i>	934
c.	<i>The Labor Market as Public Space</i> ...	935
B.	<i>Employment Law's Role in Packaging Employment</i>	937
1.	Law's Facilitative, Regulatory, and Constitutive Roles	938
2.	A Constitutive Analysis of Law and Employment.....	942
a.	<i>Regulatory Mandates as Relational Markers</i>	943

b.	<i>Indirect Influence of Regulatory Mandates on Relational Markers</i>	946
c.	<i>Normative and Cognitive Influences of Legal Classification</i>	947
d.	<i>Institutionalizing and Differentiating Employment as a Package</i>	949
CONCLUSIONS		951
A.	<i>The Employment Status of Paid Nonmarket Work</i>	952
B.	<i>Revisiting the Market Character of Ordinary Employment</i>	954
C.	<i>Rethinking the Significance of Pay in the Analysis of Nonmarket Work</i>	956

Prisoners are essentially taken out of the national economy upon incarceration.

—Vanskike v. Peters¹

Let the prisoners pick the fruits. We can do it without bringing in millions of foreigners.

—U.S. Rep. Dana Rohrabacher²

INTRODUCTION

The “who” question is prominent in recent legal scholarship about work: Who is recognized as a worker, and who is left out?

Roughly speaking, two distinct conversations pursue this question. One analyzes the centrality of *market work* and questions whether other activities—*nonmarket work*—should be incorporated into legal regimes of worker support and protection. This inquiry emerges from feminist scholarship, focuses on families and caregiving, and primarily considers reforms in who counts as a worker for the purposes of family, welfare, social insurance, and tax law.³ The

1. 974 F.2d 806, 810 (7th Cir. 1992).

2. Carl Hulse & Rachel L. Swarns, *Conservatives Stand Firm on Immigration*, N.Y. TIMES, Mar. 31, 2006, at A12.

3. See generally MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*]; MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Kathryn Abrams, *The Second Coming of Care*, 76 CHI.-KENT L. REV. 1605 (2001); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403 (2001); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1 (2005); Gillian Lester, *Unemployment Insurance and Wealth Distribution*, 49 UCLA L. REV. 335 (2001)

boundaries of *employment* largely are taken for granted, and the problem is whether to go beyond employment and recognize unpaid work performed outside the market's boundaries.⁴ A second conversation responds to the proliferation of contingent work, outsourcing, and workforce intermediaries like temporary staffing agencies, and it proceeds to question how yesterday's employment statutes engage today's restructured labor market. This inquiry emerges from labor and employment relations scholarship, focuses on firms in conventional labor markets, and primarily considers reforming the employee/independent contractor distinction or reconfiguring labor protections to be less dependent on a single, or even any, employer.⁵ In this second case, the restriction of work to the

[hereinafter Lester, *Unemployment Insurance*]; Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1, 61; Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871 (1994); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881 (2000); Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994); Katherine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Nancy C. Staudt, *Taxing Housework*, 84 GEO. L.J. 1571 (1996); Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441 (2001) [hereinafter Williams, *From Difference to Dominance*]; Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994); Noah D. Zatz, *What Welfare Requires From Work*, 54 UCLA L. REV. 373 (2006) [hereinafter Zatz, *What Welfare Requires*].

For important work in a similar vein by scholars in other disciplines, see generally JEANNE BOYDSTON, *HOME & WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (1990); NANCY FOLBRE, *THE INVISIBLE HEART* (2001); NANCY FRASER, *JUSTICE INTERRUPTUS* (1997); EVA FEDER KITTAY, *LOVE'S LABOR* (1999); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT* (1998); VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* 56-57 (2005); Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990); Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58 AM. SOC. REV. 303 (1993).

4. The major exception is scholarship that connects nonrecognition of family labor to the ambiguous position of paid domestic and caring work within employment law. See sources cited *infra* note 464.

5. See generally BOUNDARIES AND FRONTIERS OF LABOUR LAW (Guy Davidov & Brian Langille eds., 2006); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* (2004); Mark Barenberg, *Workers*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 563 (Peter Cane & Mark Tushnet eds., 2003); Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527 (1996); Stephen F. Befort, *Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work*, 24 BERKELEY J. EMP. & LAB. L. 153 (2003); Guy Davidov, *Joint Employer Status in Triangular Employment Relationships*, 42 BRIT. J. INDUS. RELATIONSHIPS 727 (2004); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357 (2002) [hereinafter Davidov, *The Three Axes of Employment*]; Mark Freedland, *From the Contract of Employment to the Personal Work Nexus*, 35 INDUS. L.J. 1 (2006); Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOOD HALL L.J. 609 (2006); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983 (1999); Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor*

market largely is taken for granted, and the problem is whether the employment relationship includes enough paid work.⁶

This Article brings these two conversations together⁷ by identifying a fundamental problem in employment law that has escaped scholarly attention. The boundary between market and nonmarket work is central to legal definitions of employment. Determining who is an employee requires deciding where to draw that boundary, or whether to do so at all. The opening quotation from *Vanskike v. Peters* reveals this dynamic. There, the Seventh Circuit decided that prison inmates could not demand the minimum wage for their work as janitors, kitchen aides, and garment workers in an Illinois prison.⁸ The penal context of their labor rendered it nonmarket work; this nonmarket character rendered the relationship noneconomic; and absent an economic relationship to the prison, inmates could not be employees, bearers of labor rights.⁹

This Article uses legal disputes over prison labor as a window onto the much larger field of employment's economic character.¹⁰ Scholars of contemporary employment law take for granted employment's place within "the labor market." But, as I will show,

Law, 21 COMP. LAB. L. & POL'Y J. 187 (1999); Orly Lobel, *The Slipperiness of Stability: Contracting for Flexible and Triangular Employment Relationships in the New Economy*, 10 TEX. WESLEYAN L. REV. 109 (2003); Shirley Lung, *Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers*, 34 LOY. U. CHI. L.J. 291 (2003).

6. See, e.g., Judy Fudge, Eric Tucker & Leah Vosko, Report for the Law Commission of Canada, *The Legal Concept of Employment: Marginalizing Workers* 105-06 (Oct. 25, 2002), available at http://www.atkinson.yorku.ca/ace/publications/Law_Commission_of_Canada.pdf (defining "workers" as "persons economically dependent on the sale of their capacity to work," and arguing for "extending labour regulation to all contracts for the performance of work"). In a recent article, Mark Freedland suggests that loosening this restriction may become an important component of his research. Freedland, *supra* note 5, at 14-18 (developing the umbrella concept of a "personal work nexus" to avoid unduly confining attention to contractual forms of work); see also Colin Fenwick, *Regulating Prisoners' Labour in Australia: A Preliminary View*, 16 AUSTL. J. LAB. L. 284, 286, 317 (2003).

7. See also Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in THE GLOVES-OFF ECONOMY (Annette Bernhardt et al. eds., forthcoming 2008) (manuscript on file with Vanderbilt Law Review). Notably, the Supiot Report on the future of European labor and employment law addresses both the scope of the employment relationship and the inclusion on nonmarket work within a broader concept of "membership in the labour force." ALAIN SUPIOT, *BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE* 24-51 (2001). Nonetheless, the Report treats these as analytically distinct issues. *Id.*

8. *Vanskike v. Peters*, 974 F.2d 806, 811-12 (7th Cir. 2002).

9. *Id.* at 812.

10. For a full catalog of the more than 60 such cases, see *infra* notes 101-104. Included are all reported opinions deciding federal employment law claims—predominantly for the minimum wage, but occasionally for employment discrimination—brought by inmates serving a criminal sentence of incarceration or by individuals in others forms of involuntary confinement. Also included is a less systematic sampling of similar claims arising under the federal constitution or state statutes.

employment law systematically faces disputes over both *how* to draw a market/nonmarket distinction and *whether* that distinction matters legally. Moreover, employment law helps to create the very divide between economic and noneconomic relationships to which it purports to respond. Thus, this Article identifies employment law as an important site where the market and its boundaries are produced.

Understanding employment law's economic dimension allows us to make sense not only of prison labor but also of a broader class of doctrinal controversies. In these overshadowed and undertheorized disputes regarding what I call "paid nonmarket work," individuals receive pay directly linked to their labor in welfare work programs, graduate student teaching and research assistance, and rehabilitative programs for individuals with disabilities, among other institutional settings. When these workers assert employment rights, they face fierce resistance on the ground that their work lies outside of the labor market. The dispositive legal question always is whether an employment relationship exists. Courts determine the answer by asking whether the relationship is economic in nature.

I aim to make two principal contributions by analyzing these disputes over employment's economic dimension. First, by demonstrating that controversies over paid nonmarket work form a coherent class with a consistent structure, the Article shows that work's location inside "the economy" is a fundamentally important, and systematically contested, aspect of the modern employment relationship.¹¹ These disputes cannot be understood with the

11. In contrast, the limited existing legal literature generally treats the employment status of each form of paid nonmarket work as a separate problem specific to its institutional setting and sometimes to a particular statute. It overlooks both the systematic connections among these contexts and the links to broad questions about the boundaries of the economy, and it does not clearly differentiate the issue at hand from the traditional questions of control. Colin Fenwick's excellent article on Australian prison labor briefly suggests connections among some of these work settings, see Fenwick, *supra* note 6, at 319-20, but he grounds these connections in a concept of involuntariness that I think captures only part of what is at stake. See discussion *infra* Part II.A.1.

On prison labor, see generally Fenwick, *supra* note 6; James J. Maiwurm & Wendy S. Maiwurm, *Minimum Wages for Prisoners: Legal Obstacles and Suggested Reform*, 7 U. MICH. J.L. REFORM 193 (1973); Alexander B. Wellen, *Prisoners and the FLSA: Can the American Taxpayer Afford Extending Prison Inmates the Federal Minimum Wage?*, 67 TEMP. L. REV. 295 (1994); Paul R. Comeau, Comment, *Labor Unions for Prison Inmates: An Analysis of a Recent Proposal for the Organization of Inmate Labor*, 21 BUFF. L. REV. 963 (1972); James K. Haslam, Comment, *Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?*, 1994 BYU L. REV. 369; Matthew J. Lang, Comment, *The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers*, 5 U. PA. J. LAB. & EMP. L. 191 (2002).

On graduate student labor, see generally Grant M. Hayden, "The University Works Because We Do": *Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233 (2001);

traditional tools used to analyze the scope of the employment relationship—tools derived from agency law and focused on the issue of organizational control over the worker.¹² The economic dimension of the employment relationship concerns matters analytically distinct from these familiar questions of control, and so new tools are needed.

Employment's economic dimension, however, is as confused as it is important. What precisely makes a relationship "economic"? Here begins conflict over the role of the market. Judges vacillate between two competing accounts of employment's economic character, each suggesting a different result. According to what I label the "exclusive market" view, market relations provide the essence of economic life, and thus nonmarket relations necessarily are noneconomic. Implicit here is a familiar view of the market economy as asocial.¹³ Insofar as prison labor *does* have a social character—because it is part of a "rehabilitative or penological" relationship between prison and

Martin H. Malin, *Student Employees and Collective Bargaining*, 69 KY. L.J. 1 (1980); Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243 (2004); Ryan Patrick Dunn, Comment, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities are Not "Employees" Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851 (2006).

On student internships, see generally Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95, 96-97 (2000) (focusing primarily on Title IX education discrimination, not Title VII employment discrimination); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1998); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002). See also Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71 (2006).

Two analyses of workfare programs discuss some connections to FLSA cases involving other forms of nonstandard work, including prison labor, but they treat these cases as involving an ill-defined "totality of the circumstances" *alternative* to a control-oriented test, rather than seeing them as raising a distinct and coherent set of issues. Nan S. Ellis, *Work Is Its Own Reward: Are Workfare Participants Employees Entitled to Protection Under the Fair Labor Standards Act?*, 13 CORNELL J.L. & PUB. POL'Y 1, 4, 13-16 (2003); Kevin J. Miller, Comment, *Welfare and the Minimum Wage: Are Workfare Participants "Employees" Under the Fair Labor Standards Act?*, 66 U. CHI. L. REV. 183, 184 (1999).

On the closely related questions raised by volunteer labor, see generally Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

12. To see the incompleteness of an agency analysis, it is enough to note that agency law—unlike statutory employment law—will label someone an "employee" based on a principal's control over her work, regardless of whether that individual gets paid at all. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(b) (2006); see also discussion *infra* Part III.B.2 (addressing the volunteer/employee distinctions).

13. Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, in THE SOCIOLOGY OF ECONOMIC LIFE 51, 51-52 (Mark Granovetter & Richard Swedberg eds., 2d ed. 2001); Greta R. Krippner, *The Elusive Market: Embeddedness and the Paradigm of Economic Sociology*, 30 THEORY & SOC'Y 775, 778 (2001).

prisoner¹⁴—inmates' work must be noneconomic and therefore not employment. The second account emphasizes the value of the goods and services that workers produce. According to this "productive work" view, inmate labor is employment because production provides employment's economic character; determining whether the work lies inside or outside the market becomes irrelevant.

I offer a provocation by way of illustration: prisons are like families. The claim is preposterous in some ways, but in at least one way it is not.

Like the more familiar housework and caregiving performed by family members at home, prisoners' labor is located outside the economy on conventional maps of social spheres drawn by lawyers, demographers, and economists.¹⁵ In familiar schemes of separate spheres,¹⁶ "the economy" typically is identified with "the market" and, in particular, with the market organization of productive work.¹⁷ The market's centrality relegates other sites of production—to the extent that they can be recognized as such—to the common position of nonmarket work, separated by many particularities but joined by what they are not.¹⁸ The prison and the family both are sites of nonmarket work.

14. *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).

15. For instance, the Bureau of Labor Statistics provides a "comprehensive body of data on the labor force, employment, unemployment, and persons not in the labor force" with its Current Population Survey. Bureau of Labor Statistics, Current Population Survey Home Page, <http://www.bls.gov/cps/home.htm> (last visited Feb. 17, 2008). This survey excludes "residents of penal and mental institutions and homes for the aged and infirm." Bureau of Labor Statistics, Handbook of Methods ch. 1 (Apr. 17, 2003), http://www.bls.gov/opub/hom/homch1_b.htm; see also U.S. Census Bureau, American Community Survey, Puerto Rico Community Survey, 2006 Subject Definitions, http://www.census.gov/acs/www/Downloads/2006/usedata/Subject_Definitions.pdf (last visited Feb. 17, 2008) (defining institutionalized individuals as "not in labor force"). But cf. Bureau of Economic Accounts, A Guide to the National Income and Product Accounts of the United States 9 n.21, available at <http://www.bea.gov/scb/pdf/misc/nipaguid.pdf> (last visited Mar. 16, 2008) (including "compensation of prison inmates" as "wages and salaries," but not defining which payments to inmates are included as "compensation").

16. See, e.g., MICHAEL WALZER, SPHERES OF JUSTICE 232-33 (1983); Fred Block & Peter Evans, *The State and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 505 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498-1502 (1983).

17. See, e.g., John Krinsky, *Work, Workfare, and Contention in New York City: The Potential of Flexible Identities in Organizing Opposition to Workfare*, 24 CRITICAL SOC. 277, 277-81 (1998); Orloff, *supra* note 3, at 304-06; Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in RETHINKING COMMERCIALIZATION: CASES AND READINGS IN LAW AND CULTURE 362, 364-65 (Martha M. Ertman & Joan C. Williams eds., 2005); Viviana Zelizer, *Culture and Consumption*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 331, 336.

18. See Andrew Abbott, *Sociology of Work and Occupations*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 307; TIMOTHY MITCHELL, *RULE OF EXPERTS* 244-45

These distinctions among spheres possess ample appeal and descriptive power. Few people would confuse relationships between parents and children with those between bosses and their employees, and few would want to.

Nonetheless, these schemes also cause trouble. A major reason is labor's fungibility. To keep a suburban lawn trimmed, a parent might direct her child to mow it as a household chore or, instead, hire a commercial lawn service that pays an employee to perform the task. The lawn gets mowed either way, and yet distinct relationships are mobilized to bring about this result. Similarly, Colorado recently began to provide its farmers with state prisoners as a substitute for the customary agricultural workforce of undocumented migrant workers from Mexico; the latter labor supply had dwindled in the wake of intensified immigration enforcement.¹⁹ Again, mobilizing two different relationships can accomplish a single goal—in this case, getting crops to market.

This coexistence of distinctive relationships and fungible results creates dilemmas of interpretation and regulation. For the forms of work I discuss here, these dilemmas are particularly acute. Unlike most family labor, inmate workers typically receive pay tied directly to their work, and that work is organized through large, bureaucratic institutions in forms quite similar to conventional employment.²⁰ Paid nonmarket work thus readily brings into view the conflicting implications of different ways of understanding economic action.

Conflict over the economic character of employment has deep roots, and unearthing them leads to reconceptualizing the project of employment law itself. Neither the exclusive market nor the productive work approach provides a viable account of employment's economic character. The former fails because even nominally "market" relations always are embedded in the social, as sociologists and historians of work and economic life have demonstrated persuasively.²¹ The productive work approach faces the opposite problem. Linking employment's economic character to production alone threatens to proliferate the employment relationship beyond all

(2002); Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING CLASS HIST. 56 (1995).

19. Dan Frosch, *Inmates Will Replace Wary Migrants in Colorado Fields*, N.Y. TIMES, Mar. 4, 2007, § 1, at 25.

20. On the connections between compensation as a form of payment and bureaucratized, impersonal employment relationships, see Viviana A. Zelizer, *Payments and Social Ties*, 11 SOC. F. 481, 482-83 (1996).

21. See discussion *infra* Part III.A.1.

the boundaries between social contexts that the law seeks to recognize and respect. As a matter of meaningful social categories, a worker is not simply anyone who works.²²

Rather than attempting to solve the existing doctrinal puzzle by choosing between the exclusive market and productive work approaches, I argue for a different understanding of how employment law relates to the social phenomenon of employment. In disputes over employment status, courts take themselves to be deciding a question of social fact. They must understand the contours of "employment" as an extra-legal social category and decide whether the disputed relationship falls inside or out. Against this view, I show that employment law also is part of a *constitutive* legal environment.²³

The Article's second major contribution is to identify this constitutive role for employment law with respect to the boundaries of economic life.²⁴ Rather than being external to the economy, law helps produce employment and the labor market as social fields separate from other types of relationships.²⁵ In other words, law does more than give employment relationships a particular character. It produces employment as a relationship both coherent unto itself and distinct from others, coherent and distinct based on its economic character. In doing so, however, employment law draws on and rearticulates extant institutional forms and cultural categories. This is, in other words, a story of "the endogeneity of both law and the economy."²⁶ Understanding employment law in this way runs counter to the usual view of employment law as simply *regulating* a labor market that exists, and exists as a market, prior to legal intervention.

22. This conclusion complicates arguments by feminist scholars, myself included, who seek to restructure the legal treatment of nonmarket activities associated with the family by characterizing them as productive work. See discussion *infra* Conclusions Part C.

23. Lauren B. Edelman & Robin Stryker, *A Sociological Approach to Law and the Economy*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 527; Lauren B. Edelman & Mark C. Suchman, *The Legal Environments of Organizations*, 1997 ANN. REV. SOC. 479.

24. As I discuss below, my account draws on but differs from those of other scholars, primarily labor law historians, who have taken a similar approach to labor and employment law during other historical moments and with regard to other aspects of the employment relationship. See, e.g., WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT (1991); ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001); CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

25. My argument about the relationship between law and work is akin to analyses of the relationship between law and race developed by legal scholars working in the Critical Race Theory tradition. See, e.g., IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (rev. ed. 2006); Devon W. Carbado, (*E*)Racing the Fourth Amendment, 100 MICH. L. REV. 946 (2002); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993).

26. Edelman & Stryker, *supra* note 23, at 542.

The Article proceeds as follows. Part I introduces prison labor and the conventional tools used to analyze employment status in terms of control. It traces how courts have concluded that these tools could not grapple with the problems presented by prisoners' employment law claims. Part II shows how courts agree that prison labor is employment only if it is an economic relationship but split between exclusive market and productive work tests for this economic character. Furthermore, it illustrates how the same pattern recurs throughout employment law controversies over paid nonmarket work. Part III demonstrates that neither the exclusive market nor the productive work account is viable, although each provides important insights. Part IV offers an alternative interpretation of the dispute over employment's economic status, one in which there is no essential feature that marks employment as an economic relationship. Instead, employment is a contingent "relational package"²⁷ that is the object of ongoing struggle over its boundaries and constituent parts. Employment law helps to bind that package and to differentiate it from other relationships, in part by generating some of the very features that courts label "economic."

Exactly how employment law *ought* to play this constitutive role is a weighty normative question that I do not attempt to resolve here. But part of what I show is how unavoidably normative this role is; it implicates fundamental questions both about the purposes of employment regulation and about maintaining the integrity of distinct but interconnected relationships. These difficult normative questions cannot be avoided by substituting an empirical inquiry into the boundaries of the economy. I conclude with brief reflections on how to address these problems and on the broader implications for employment law, legal analysis of nonmarket work, and the regulation of work more generally.

I. PRISON LABOR AND CONVENTIONAL EMPLOYMENT LAW ANALYSIS

This Article identifies and characterizes the economic dimension of the employment relationship. As a preliminary step, this Part shows how the traditional legal tools for analyzing employment status perform only part of their task. It explains how courts began to focus on employment's economic character in the course of deciding a large number of prisoners' statutory employment claims since the

27. ZELIZER, *supra* note 3, at 56-57.

1980s.²⁸ The traditional considerations of supervisory control and statutory exceptions came up short. Most courts agreed that there were differences between prison labor and ordinary employment—and among forms of inmate labor—that sometimes indicated that no employment relationship existed, even though there was sufficient control and no applicable statutory exception. Importantly, courts refused to hold that the law strips prisoners of protection simply because they are prisoners. Instead, they sought answers in the general nature of employment as a distinct type of social relationship. Before tracing these doctrinal developments, I provide some basic background information about prison labor in the contemporary United States.

A. *The Basic Contours of Contemporary Prison Labor*

Although laments over the “idleness” of prisoners are not uncommon,²⁹ well over 600,000, and probably close to a million, inmates are working full time in jails and prisons throughout the United States.³⁰ Perhaps some of them built your desk chair: office furniture, especially in state universities and the federal government, is a major prison labor product.³¹ Inmates also take hotel reservations at corporate call centers, make body armor for the U.S. military, and manufacture prison chic fashion accessories, in addition to the iconic task of stamping license plates.³²

28. Methodological considerations drive my emphasis on prison labor, which has generated far more decisions of employment status than other forms of paid nonmarket work. As a result, courts have refined their approach in the face of factual variations and open conflict over the proper analysis. See *infra* Part II.

29. See Stephen P. Garvey, *Freeing Prisoners' Labor*, 50 STAN. L. REV. 339, 339-40 (1998); Robert D. Atkinson, *Prison Labor: It's More than Breaking Rocks*, PROGRESSIVE POL'Y INST., May 2002, at 1, http://www.ppionline.org/documents/prison_labor_502.pdf.

30. One survey of state and federal prisons counts roughly 650,000 inmates at work, approximately half of the total prison population. See CRIMINAL JUSTICE INST., THE 2002 CORRECTIONS YEARBOOK: ADULT CORRECTIONS 118, 124-25 (Camille Graham Camp ed., 2002). The total would be approximately one million if similar proportions hold true in jails, where work programs also exist. See PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 215092, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2005, at 2 (Nov. 2006), available at <http://www.ojp.gov/bjs/pub/pdf/p05.pdf> (local jail population of approximately 750,000); ROD MILLER ET AL., DEVELOPING A JAIL INDUSTRY: A WORKBOOK 1 (2002). Participation has more than doubled in the federal system between 1985 and 2003; it has increased more slowly in the states. CRIMINAL JUSTICE INSTITUTE, *supra*, at 119; K. Daniel Glover, *Inside Job*, NAT'L J., Apr. 10, 2004, at 1113.

31. CRIMINAL JUSTICE INST., *supra* note 30, at 126; Glover, *supra* note 30, at 1111; *Prison Industries Survey Summary*, CORRECTIONS COMPENDIUM, Sept. 2002, at 8, 15-18.

32. *Hale v. Arizona*, 993 F.2d 1387, 1390 (9th Cir. 1993) (en banc) (Best Western); GEORGE E. SEXTON, WORK IN AMERICAN PRISONS 9-10 (1995) (TWA call center); David L. Teibel,

These “prison industries”³³—prison labor programs producing goods or services sold to other government agencies or to the private sector—are the highest-profile and most controversial form of prison labor. Since roughly the New Deal era, prison industries have been tightly regulated, most prominently through the Ashurst-Sumners Act’s criminal prohibition on the sale of inmate-produced goods in interstate commerce.³⁴ Government purchasers always have been exempted, however,³⁵ as part of the broader New Deal-era compromise permitting prison labor for “state use.”³⁶ Limits on other purchases gradually have relaxed over the past thirty years.³⁷ Additionally, few restrictions apply to the growing sale of *services* performed by prisoners.³⁸ Today, prison industries generate \$2 billion in revenue annually.³⁹

Prison industries operate within a number of different organizational forms. In the most common one, sometimes known as the “state account” system, a government agency (usually within the

Prisoners Pound Out Purses As Gifts, TUCSON CITIZEN, Dec. 15, 2006, at 1A; Wayne Woolley, *Prisons’ Military Gear Factories Take Flak*, STAR-LEDGER (Newark, N.J.), Nov. 30, 2006, at 1.

33. See *Prison Industries Survey Summary*, *supra* note 31.

34. 18 U.S.C. § 1761 (Supp. II 2002).

35. *Id.* § 1761(b). Indeed, prison industries often receive preferential treatment in bidding for government contracts. See Glover, *supra* note 30; Philip C. Mitchell, *Federal Prison Industries: Ending Their Mandatory Source Status*, 83 MICH. B.J. 18, 21 (2004).

36. See ALEX LICHTENSTEIN, *TWICE THE WORK OF FREE LABOR* 160-68 (1996); Garvey, *supra* note 29, at 344. *But see* Walsh-Healey Act, 41 U.S.C. § 35(c) (2000) (generally barring use of convict labor in federal contracts for goods).

37. In 1979, Congress created the Private Industry Enhancement (“PIE”) program that allows unrestricted sale of goods produced by inmates under specified conditions. Justice System Improvement Act of 1979, Pub. L. No. 96-157, § 827(a), 93 Stat. 1215 (1979) (codified at 18 U.S.C. § 1761(c)). Originally authorized for only five jurisdictions, PIE expanded steadily to its current size of 42 participating jurisdictions employing 5,579 inmates. NAT’L CORR. INDUS. ASS’N, PRISON INDUSTRY ENHANCEMENT CERTIFICATION PROGRAM: CERTIFICATION & COST ACCOUNTING CENTER LISTING: STATISTICS FOR THE QUARTER ENDING SEPTEMBER 30, 2007, at 1 (2007), available at <http://www.nationalcia.org/quarterlydata.html>; see SEXTON, *supra* note 32, at 3. In 1996, Congress removed all restrictions on prison production for sale to nonprofit organizations. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 101(b) (tit. I, § 136), 110 Stat. 1321 (1996) (codified at 18 U.S.C. § 1761(b)). The federal government promotes prison labor through its funding of research and technical assistance designed to assist the establishment of new prison and jail industries. See, e.g., MILLER ET AL., *supra* note 30, at iii (describing government effort “to identify the range of practices in U.S. jails, learn about successful programs and strategies, promote interest in the concept [of jail industries], and provide new resources to help counties develop—or expand—industry efforts”). Much of this work is done collaboratively with the National Correctional Industries Association, a trade organization of corrections departments and private firms that operate prison industries. See National Correctional Industries Association, <http://www.nationalcia.org> (last visited Mar. 16, 2008).

38. See, e.g., Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000, 17,009 (Apr. 7, 1999) (explaining inapplicability of Ashurst-Sumners Act to services).

39. CRIMINAL JUSTICE INST., *supra* note 30, at 124-25.

department responsible for operating the prison itself) wholly manages the facility and work process, sells the products, and receives the revenue.⁴⁰ An alternative “contract” system places these functions within a private firm that operates the program pursuant to a contract with the prison.⁴¹ The latter system was widespread in the nineteenth century, largely disappeared by the early twentieth, and now seems to be reemerging.⁴²

The most common, but least visible, form of prison labor is what I term “prison housework.” Prison housework is a subset of “state use” in which a prison manages production and also consumes its output, as inmates contribute directly to prison operations by cooking meals, doing laundry, or cleaning the facilities.⁴³ Inmates also may be used directly by other units of the jurisdiction incarcerating them, such as the Iowa prisoners who bake cookies for the Governor’s holiday parties and other events.⁴⁴ Placing a value on this work is difficult, but one Kentucky county estimated that inmate labor saved it \$3 million during 2006.⁴⁵

Inmates working in these various programs typically are paid by the day or the hour.⁴⁶ Wage rates vary widely by program and jurisdiction, but in 2002, the average statewide rates ranged from \$0.17 to \$5.35 per hour.⁴⁷ Thus, these rates almost always fall below the federal minimum wage set by the Fair Labor Standards Act

40. See Garvey, *supra* note 29, at 344; Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. at 17,008 (describing “customer model” of private sector involvement in prison industry); CRIMINAL JUSTICE INST., *supra* note 30, at 125.

41. See Garvey, *supra* note 29, at 344; Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. at 17,008 (describing “employer model” of private sector involvement in prison industry).

42. For a helpful review of the evolution of prison labor in the United States, see Garvey, *supra* note 29. See also SEXTON, *supra* note 32, at 3; Gordon Lafer, *Captive Labor: America's Prisoners as Corporate Workforce*, 46 AM. PROSPECT 66, 66 (1999); Robert P. Weiss, “Repatriating” Low-Wage Work: *The Political Economy of Prison Labor Reprivatization in the Postindustrial United States*, 39 CRIMINOLOGY 253, 253-54, 260 (2001); Brian Hauck, Note, *Prison Labor*, 37 HARV. J. ON LEGIS. 279, 279-80, 286-87 (2000) (reviewing legislative initiatives to allow private prison labor in New York and Wisconsin).

43. CRIMINAL JUSTICE INST., *supra* note 30, at 118. Approximately 550,000 inmates perform this type of work. *Id.*

44. William Petroski, *Iowa Prison Inmates Bake Up Yuletide Cheer*, DES MOINES REG., Dec. 24, 2006, at 1B.

45. *Inmates Save County \$3 Million*, GRAYSON COUNTY NEWS-GAZETTE (Ky.), Apr. 2, 2007, available at http://www.gcnewsgazette.com/articles/2007/04/02/local_news/news90.txt. Applying the same methodology of attributing \$7 per hour and estimating conservatively that 550,000 prison inmates work thirty-five hours a week, fifty weeks a year, CRIMINAL JUSTICE INST., *supra* note 30, at 118, yields a very rough national estimate on the order of six to seven billion dollars per year in prison housework.

46. CRIMINAL JUSTICE INST., *supra* note 30, at 120-21.

47. *Id.*

("FLSA");⁴⁸ often they are a bare sliver of it.⁴⁹ Inmates have observed the discrepancy and sued. These suits put us on the road to the economic dimension of employment because the FLSA guarantees minimum wages only to "employees."

B. Prison Labor and the Control Dimension of Employment

Most controversies about employment status revolve around the question of which person or organization, if any, exercises control over the worker.⁵⁰ When someone works independently of any employer's control, she is "in business for herself," an independent

48. 29 U.S.C. § 201(a)(1)(A)-(C) (2000).

49. In 2002, the federal minimum was \$5.15 per hour. U.S. DEPT OF LABOR, HISTORY OF FEDERAL MINIMUM WAGE RATES UNDER THE FAIR LABOR STANDARDS ACT, 1938-2007 (2007), available at <http://www.dol.gov/esa/minwage/chart.pdf>. In the Kentucky county referenced above, inmates received sixty-three cents per day. *Inmates Save County \$3 Million*, *supra* note 45.

50. Most federal employment statutes contain brief, vague, and often circular definitions of the related concepts of employee, employer, and employment. See, e.g., 42 U.S.C. §§ 2000e(b), (f), 2000e-2(a) (2000) (forbidding "employers" from discriminating with regard to "terms, conditions, or privileges of employment" or "otherwise adversely affect[ing] [a person's] status as an employee," and defining an "employee" as "an individual employed by an employer" and an employer as "a person . . . who has . . . employees"). The Supreme Court has held that, absent specific provisions to the contrary, such definitions incorporate the common-law test for employment developed in agency law. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992). This test emphasizes "the hiring party's right to control the manner and means by which the product is accomplished." *Id.* at 323 (quoting *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989)); accord *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 445-46 (2003). Also relevant are a nonexclusive list of additional factors:

the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-24.

The FLSA broadens the traditional agency definition by specifying that " 'employ' includes to suffer or permit to work." 29 U.S.C. § 203(g) (2000); accord *Darden*, 503 U.S. at 326. Nonetheless, institutional control remains the touchstone under the FLSA. Control simply is understood more broadly to encompass power over the basic economic terms of the relationship. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (characterizing the requirement as one of "functional control over workers even in the absence of . . . formal control"); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1212 (11th Cir. 2003) (focusing on control as indicated by "economic dependence"); see also *Goldstein et al.*, *supra* note 5, at 1138; *Lung*, *supra* note 5. Courts characterize this broader inquiry as focusing on the "economic reality" of the work relationship. *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32-33 (1961); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988). This catch phrase notwithstanding, FLSA analysis of employee status typically proceeds by examining a non-exclusive list of factors, most of which also appear in statements of the agency test. Compare *Martinez-Mendoza*, 340 F.3d at 1208-09, and *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469-70 (9th Cir. 1983), with *Cnty. for Creative Non-Violence*, 490 U.S. at 751-52.

contractor rather than an employee.⁵¹ When multiple organizations exercise power over one worker—such as a temporary staffing agency and its client where the worker is placed—they may be “joint employers.”⁵² The precise contours of these principles, and their sometimes subtle variations between statutes,⁵³ are the bread and butter of litigation and scholarship concerning the existence of an employment relationship.⁵⁴

These issues of control once provided the doctrinal basis for courts’ rejection of employment claims by inmate workers. Since the 1980s, however, courts have accepted that prison labor usually satisfies the relevant tests for control. Therefore, the problem, if any, with classifying prison labor as employment lies elsewhere.

Until the 1980s, inmates’ employment claims usually alleged FLSA minimum wage violations based on their work for a private entity with commercial operations located on prison grounds. Although unusual, this arrangement allowed inmates to name as the defendant-employer a private entity rather than the government-run prison.⁵⁵ Federal courts consistently analyzed these claims in terms of the familiar issues of control. For decades, this analysis led to the conclusion that no employment relationship existed.⁵⁶ For instance, in

51. An employer may also lack control over a worker—thereby precluding an employment relationship—when the worker herself controls the employer, as in the case of certain high-ranking executives. See *Clackamas*, 538 U.S. at 451.

52. See *Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Zheng*, 355 F.3d at 61; *Hunt v. Mo. Dep’t of Corr.*, 297 F.3d 735, 742 (8th Cir. 2002); *Bonnette*, 704 F.2d. at 1469.

53. On the FLSA’s “economic realities” test, see *supra* note 50.

54. See U.S. COMM’N ON THE FUTURE OF WORKER-MGMT. RELATIONS, FINAL REPORT 12 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2; sources cited *supra* note 5. The debate in Europe is similar. See SUPLOT, *supra* note 7, at 14 (comparing employment definitions based on “technical submission to someone else’s orders in the performance of work” with those based on “depending on that other person for one’s livelihood”).

55. Until 1974, most public entities were excluded from FLSA coverage by statute. Between 1976 and 1985, they were excluded by the Supreme Court’s decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (relying on the Tenth Amendment to bar application of the FLSA to state and local governments), which was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). See *Garcia*, 469 U.S. at 533-34 (recounting history of FLSA coverage of public employers). Until recently, prisons were almost exclusively operated by public agencies, see generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 455-58 (2005), and so before 1985 prisons were not proper FLSA defendants for the same reasons as other public employers. Today, the Supreme Court’s sovereign immunity ruling in *Alden v. Maine*, 527 U.S. 706 (1999), sharply limits suits against public prisons under the FLSA and other employment statutes. Private prison operators and contractors, however, remain amenable to suit and must rely on specific characteristics of prison labor to avoid liability. See *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

56. See *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1326-27 (9th Cir. 1991); *Alexander v. Sara, Inc.*, 721 F.2d 149, 150 (5th Cir. 1983); *Rhodes v. Schaefer*, Civ. A. No. 98-3323-GTV, 2002 WL 826471, at *2-3 (D. Kan. Mar. 20, 2002); *Young v. Cutter Biological*, 694 F.

Sims v. Parke Davis & Co.,⁵⁷ a pharmaceutical research facility did not employ its inmate workers because the firm could “exercise only limited control over the inmates and [lacked] authority over hiring and firing. . . . As prisoners, plaintiffs were ordered by prison authorities to perform services for defendant drug companies, just as they would be ordered to work in any other [state-use] prison industry.”⁵⁸

Sims acknowledged, however, that “the inmates are supervised by defendant drug companies in the day-to-day performance of their work at the clinics,”⁵⁹ ordinarily a very strong indicator of an employment relationship.⁶⁰ This crack in the control analysis later widened to a breach, and courts began to hold that prison labor *did* satisfy the control test for employment.

The turning point came in 1984 with the Second Circuit’s opinion in *Carter v. Dutchess Community College*, the first reported federal ruling in favor of an inmate worker.⁶¹ In keeping with prior case law, the district court had found no employment relationship with the private entity (a community college) because the prison retained “ultimate control” over the work situation.⁶² The appellate court, however, objected that requiring “ultimate control” would “permit[] an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party’s veto, to escape compliance with the [FLSA].”⁶³ Instead, the

Supp. 651, 655-57 (D. Ariz. 1988); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 783-87 (E.D. Mich. 1971), *aff’d*, 453 F.2d 1259 (6th Cir. 1971); *Hudgins v. Hart*, 323 F. Supp. 898, 899 (E.D. La. 1971); *Huntley v. Gunn Furniture Co.*, 79 F. Supp. 110, 116 (W.D. Mich. 1948).

57. 334 F. Supp. 774. The inmates worked up to 112 hours per week performing clerical or maintenance tasks for a pharmaceutical company that was testing drugs on other inmates; they were paid between \$0.35 and \$1.25 per day. *Id.* at 779. At the time, the federal minimum wage was in the vicinity of \$1.25 per hour. See U.S. DEP’T OF LABOR, *supra* note 49.

58. *Sims*, 334 F. Supp. at 783, 786. This analysis closely followed *Huntley v. Gunn Furniture Co.*, the first reported FLSA case involving inmate labor. 79 F. Supp. at 110. The inmates in *Huntley* were forced to use a state-owned metal-stamping facility to produce shell casings for a World War II defense contractor. *Id.* at 111. The court treated the contractor as essentially a customer of the prison, reasoning that “plaintiffs were employees of the Michigan prison industries and not of the defendant,” because the contractor had “no contractual relationship or personal dealings with the plaintiffs.” *Id.* at 113, 116 (emphasis added).

59. *Sims*, 334 F. Supp. at 786.

60. See *supra* note 50. In nearly identical circumstances, the Fifth Circuit likewise noted that “[o]n the surface, at least, [the private company’s] relationship with the inmates appears to have all the characteristics of an employment relationship, even though the state agency had the ultimate authority over the inmates.” *Alexander*, 721 F.2d at 150.

61. 735 F.2d 8 (2d Cir. 1984).

62. *Id.* at 10.

63. *Id.* at 14. As the court noted, such an “ultimate control” analysis is incompatible with the doctrine of joint employment, which was growing in importance during this period. *Id.* at 12-

court looked to “how many typical employer prerogatives are exercised over the inmate by the outside employer, and to what extent” and held that sufficient indicia of control existed for the plaintiff’s claim to survive summary judgment.⁶⁴

Carter’s control analysis quickly gained adherents. Most important was a 1990 opinion that has come to stand for the enduring proposition that an employment relationship may exist when an inmate works for a private firm as part of a work release program. In *Watson v. Graves*, the Fifth Circuit found an FLSA employment relationship where a Louisiana sheriff farmed out jail inmates to his son-in-law’s construction company at a rate of \$20 a day; when not at work they returned to the prison.⁶⁵ Control analysis supported the inmate’s claim because the contractor “not only determined which inmate would work for him, but also when, how frequently, how long, and on what projects the inmate would work, as well as what specific functions the inmate would perform.”⁶⁶

Unlike *Carter*, however, *Watson* suggested that control was necessary but not sufficient to establish an employment relationship.⁶⁷ In particular, the court distinguished, but did not reject, the earlier cases that had held against inmate plaintiffs.⁶⁸ It emphasized the economic significance of inmate labor to the contractor and the local construction industry by virtue of the labor’s competitive impact:

[The defendant contractor] had at his disposal a ‘captive’ pool of workers whom he had only to pay token wages. . . . Obviously, [other] construction contractors in the area

13 (citing *Falk v. Brennan*, 414 U.S. 190 (1973)); see also *Speedrack Prods. Group, Ltd. v. N.L.R.B.*, 114 F.3d 1276, 1280, 1282 (D.C. Cir. 1997) (rejecting arguments that a prison’s “ultimate control” over inmates in work release program disqualified them from participating in a union election at their worksite employer).

64. *Carter*, 735 F.2d at 14.

65. 909 F.2d 1549, 1554-55 (5th Cir. 1990). The other case to follow *Carter* and rule for an inmate was *Baker v. McNeil Island Corrections Center*, 859 F.2d 124, 128 (9th Cir. 1988); see also *Hale v. Arizona*, 967 F.2d 1356 (9th Cir. 1992) (following *Carter*), *vacated en banc*, 993 F.2d 1387 (9th Cir. 1993) (distinguishing *Carter*). More recently, in another Louisiana case raising suggestions of corruption, a court applied *Watson* to deny summary judgment against an inmate FLSA plaintiff alleging that he had performed personal chores for the local mayor and contributed labor to the police chief’s private businesses. See *Williams v. City of DeQuincy*, No. 2:04-CV-612, 2006 WL 3747449 (W.D. La. Oct. 31, 2006), *dismissed on other grounds* 2007 WL 2736224 (W.D. La. July 19, 2007).

66. *Watson*, 909 F.2d at 1553. Applying a test for employment status widely followed in FLSA cases addressing joint employment and independent contractor issues, the court asked whether the putative employer “(1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.” *Id.* (quoting *Carter*, 735 F.2d at 12 (relying on *Bonette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983))).

67. *Id.* at 1555-56.

68. *Id.*

could not compete with [the defendant's] prices because they had to pay at *least* minimum wage for even unskilled labor [J]ob opportunities for non-inmate workers in the area [were] severely distorted by the availability of twenty dollar per day workers from the parish jail.⁶⁹

One crucial feature connects the two lines of control analysis discussed above, despite their opposite results. Neither treats the bare fact that a worker is serving a criminal sentence as militating against the existence of an employment relationship.⁷⁰ Incarceration affects the nature and distribution of control, but these control features are assessed against the standard applicable in employment cases generally.

C. Prison Labor and Statutory Exclusions

Once *Carter* and *Watson* turned control analysis to inmate workers' favor, courts began to question whether some other aspect of incarceration sometimes might preclude an employment relationship. One obvious place to look is another familiar feature of employment law: the explicit statutory exclusion from legal protection of specific work relationships that otherwise would qualify as employment. Perhaps inmates simply have been carved out of statutory protection, just as the National Labor Relations Act ("NLRA") excludes employees performing agricultural or domestic work.⁷¹

Shifting focus from control to exclusions would accomplish little, however, because neither the FLSA nor any other major employment statute specifically excludes prisoners from the "employee" category.⁷² Nor are there any broader statutory exclusions

69. *Id.* at 1555. *Carter* raised similar issues, though the court did not emphasize them. The plaintiff complained after learning that, outside the prison, the college employed teaching assistants at several times his sub-minimum wage. *Carter*, 735 F.2d at 11.

70. If anything, *Watson's* reference to a "captive" pool of workers suggests that the coercive context of prison labor heightens the importance of employment law coverage. *Watson*, 909 F.2d at 1555.

71. 29 U.S.C. § 152(3) (2000) ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home . . .").

72. Courts routinely acknowledge this point, even when they rely on other grounds to find no employment relationship. See, e.g., *Hale v. Arizona*, 993 F.2d 1387, 1392 (9th Cir. 1993) (en banc). Nor do any provisions relieve prisons or other private prison industries of obligations as employers. All government-operated prisons are covered as employers because they are state or local governmental agencies. 29 U.S.C. § 203(d), (s)(1)(C); see also *supra* note 55; cf. *Pa. Dept. of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (allowing state prisoners to bring ADA Title II claims against state prisons because the latter are "public entities"). Most privately operated prisons, prison contractors, and work-program placement sites are covered based on the volume of business that they conduct, 29 U.S.C. § 203(d), (s)(1)(A).

into which prisoners plausibly fall.⁷³ Bills to create such statutory exclusions have been introduced in Congress, but none has become law.⁷⁴

Because there are no explicit exclusions, courts from *Carter* onward consistently have rejected the existence of a prisoner exclusion. *Vanskike*, for instance, accepted that "prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners."⁷⁵ Instead, employment law coverage turns simply on

73. In contrast, employment-related federal social insurance and antipoverty programs typically *do* have specific provisions excluding prison labor from covered employment. See 26 U.S.C. § 32(c)(2)(B)(iv) (2000) (excluding from "earnings" for EITC purposes any "amount received for services provided by an individual while the individual is an inmate at a penal institution"); 26 U.S.C. § 3306(c)(21) (excluding "service performed by a person committed to a penal institution" from "employment" subject to the Federal Unemployment Tax Act); 42 U.S.C. § 410(a)(6), (a)(7)(D)(i), (a)(7)(E), (a)(7)(F)(ii) (2000) (same for Social Security purposes for service performed for governmental entities); 42 U.S.C. § 418(c)(6)(B) (same for Medicare); see also 26 U.S.C. § 3121(b)(7)(F)(ii), (u)(2)(B)(ii)(II) (analogous provisions for wages subject to Social Security and Medicare payroll taxes). The U.S. Department of Labor takes the position that inmates working for private entities, including private prisons, are covered by Social Security. Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000, 17,006 (Apr. 7, 1999). Prior to Congressional action in 1997, see Balanced Budget Act of 1997, Pub. L. No. 105-33, § 5406, 111 Stat. 251, 605 (1997) (enacting 26 U.S.C. § 3306), it took the same position with regard to Unemployment Insurance. Letter from Armando Quiroz, Reg'l Adm'r of the U.S. Dep't of Labor, to Alfred B. Lee, Chief Deputy Dir. of the Cal. Employment Dev. Dep't (Sept. 6, 1995) (on file with Vanderbilt Law Review).

74. Following the Ninth Circuit's panel decision applying the FLSA to inmate workers, *Hale v. Arizona*, 967 F.2d 1356 (9th Cir. 1992), Senator Reid introduced legislation to amend the FLSA and bar such claims. S. 3160, 102d Cong. (1992). Reid and other legislators continued to promote such an amendment even after the Ninth Circuit reversed course en banc, *Hale*, 993 F.2d 1387. S.J. Res. 63, 104th Cong. tit. 1, § 105 (1996) (section of appropriations bill); S. 1943, 104th Cong. (1996); S. amend. to H.R. 3755, 104th Cong. § 107 (1996) (amendment inserted by Senate Appropriation Committee); H.R. 868, 104th Cong. (1995); H.R. 3705, 103d Cong. (1993); S. amend. 705 to H.R. 2519, 103d Cong. (1993) (appropriations bill for judiciary); S. 1115, 103d Cong. (1993); H.R. 5850, 102d Cong. (1992). None of these bills ever came to a vote before either house of Congress. The bills faced opposition from organized labor and from some businesses concerned about competition with inmate labor, and the U.S. Department of Labor also was skeptical. *Implications of the Fair Labor Standards Act for Inmates, Correctional Institutions, Private Industry and Labor: Hearing on S. 1115 Before the S. Comm. on Labor and Human Resources*, 103d Cong. 26, 32, 40 (1993) [hereinafter *Hearing*]. In the early 1970s, Representatives John Conyers, Ron Dellums, and Edward Roybal each introduced legislation that would have granted inmate workers rights to the minimum wage and, in some cases, to form labor unions. H.R. 7792, 93d Cong. (1973); H.R. 6745, 93d Cong. (1973); H.R. 16534, tit. II, 92d Cong. (1972). Rep. Dellums reintroduced his bill in each session through 1981. H.R. 2583, 93d Cong., 119 CONG. REC. 1759 (1973) (introduced Jan. 22); H.R. 2803, 94th Cong. (1975), 121 CONG. REC. 2430 (introduced Feb. 2); H.R. 341, 95th Cong., 123 CONG. REC. 351 (1977) (introduced Jan. 4); H.R. 256, 96th Cong., 125 CONG. REC. 439 (1979) (introduced Jan. 15); H.R. 4833, 97th Cong., 127 CONG. REC. 19,565 (1981) (introduced Aug. 4). None of these bills advanced beyond committee.

75. *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992).

whether inmates satisfy the general definition of “employee.”⁷⁶ This reflects a broader pattern of insisting that only an explicit exclusion can remove from coverage someone who otherwise qualifies as an employee.⁷⁷ Courts avoid ad hoc exceptions based on context-specific consideration of the statute’s policy goals.⁷⁸ In other words, courts reject a “purposive”⁷⁹ approach to defining the employment relationship and take a “descriptive” one instead.⁸⁰

76. *Id.* at 807-08 & n.2; accord *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Hale*, 993 F.2d at 1393-95; *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993); *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir. 1990); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984).

77. See *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 517 (1950) (“[S]pecificity in stating exemptions strengthens the implication that employees not thus exempted . . . remain within the Act.”); cf. *Pa. Dep’t of Corr.*, 524 U.S. at 209 (applying Title II of the ADA to claims by state prisoners against state prisons based, in part, on the absence of any statutory exceptions).

78. See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324-25 (1992). It is widely believed, for instance, that the policy rationale for a minimum wage does not apply to a teenage worker living in the household of wealthy parents, but there is no question that nonetheless such workers are protected so long as they are employees and subject only to statutory modifications in coverage. See 29 U.S.C. § 206(g) (allowing temporary subminimum wage for teenage employees). The FLSA did not treat teenage employees differently from other employees until 1989. See Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 6, 103 Stat. 941 (1989) (providing for a “training wage”).

79. Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2318-19 (1998) (contrasting purposive and descriptive approaches to legal categorization); Guy Davidov, *The Reports of My Death are Greatly Exaggerated: ‘Employee’ As A Viable (Though Over-Used) Legal Concept*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 5, at 133, 151-52 (criticizing U.S. employment law for rejecting a purposive approach). Under the NLRA, the NLRB acts as an independent agency that interprets the Act in the first instance through administrative procedures, and it has shown greater willingness to engage in purposive forms of interpretation than have the courts under other statutes. See discussion *infra* Part III.A.4.

80. Some readers have suggested to me that Congress so obviously could not have intended employment law protections for inmates that an explicit exclusion would have been superfluous. Courts ruling against inmate workers sometimes sympathize with that view, but never rely upon it. *Bennett v. Frank*, 395 F.3d 409, 409 (7th Cir. 2005); *Hale*, 993 F.2d at 1398; *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991). This position founders on the well-established applicability of the FLSA to work release programs under *Watson*, a result endorsed by the U.S. Department of Labor and even by those members of Congress who have advocated amending the FLSA to limit coverage of inmate workers. *Watson*, 909 F.2d at 1556; H.R. 3755, 104th Cong. § 107 (1996) (Senate version reported out of Appropriations Committee and incorporating language from S. 1943, 104th Cong. (1996)); *Hearings*, *supra* note 74, at 11-12 (statement of Maria Echaveste, Wage and Hour Adm’r, U.S. Dep’t of Labor). Indeed, in enacting the PIE program, see *supra* note 37, Congress apparently anticipated that inmates could be employees and took care to preserve that possibility. See 18 U.S.C. § 1761(c)(3) (2000) (providing that participants “have not solely by their status as offenders, been deprived of the right to participate in benefits made available by the Federal or State Government to other individuals on the basis of their employment, such as workmen’s compensation”). Because coverage of at least some prisoners is widely accepted, some explanation is owed as to why exclusion of other prisoners is self-evident, and how to identify the line between these classes.

A descriptive approach treats the legal category of employment as having the same content as an extra-legal category of social relations. Thus, whether someone is an employee is simply a matter of social fact, absent technical modifications. For example, the FLSA provides that the statutory term “employee” excludes “employee[s] in the legislative branch or legislative body.”⁸¹ The structure of this provision implies that, descriptively, a member of a state legislator’s paid staff ordinarily would be an employee in the general, nontechnical sense. Starting from that baseline, certain employees next are removed from the technical statutory definition by explicit congressional action.⁸² Thus, if the general descriptive category is inadequate for Congress’s purposes, it falls to Congress to modify the definition.

The structure of such definitions makes clear that “employee” is not simply a label attached by courts after they have decided who should be covered by the statute, as would be the case under a purposive approach. Instead, “employment” captures some coherent extra-legal relationship that the statute means to regulate. That is why statutes use the ordinary language term “employment,” rather than some legalistic jargon, and why courts sometimes look to dictionaries for help in defining the word.⁸³ In Part IV, I criticize this

Underlying the claim of self-evident exclusion is the assumption that FLSA coverage is tied to the moral desert and economic need of putative employees. *Cf.* *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 n.18 (1945) (characterizing the FLSA’s purpose as “to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage”). The difficulty is that other rationales for the FLSA also exist. *See, e.g., Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 36 (1987) (“While improving working conditions was undoubtedly one of Congress’ concerns, it was certainly not the *only* aim of the FLSA. In addition . . . , the Act[] reflects Congress’ desire to eliminate the competitive advantage enjoyed by goods produced under substandard conditions.”); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 592 (1944) (characterizing the FLSA as “a statute that is intended to secure to [‘human beings’] the fruits of their toil and exertion”). *See generally* Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000). Once these considerations are added to the mix, it is far from obvious what conclusion policymakers would draw. This indeterminacy is part of what led the Supreme Court in *Darden* to eschew a purposive approach. *See* 503 U.S. at 326-27.

81. 29 U.S.C. § 203(e)(2)(C)(ii)(V) (2006); *see also id.* § 213(a)(8) (removing from FLSA protection “any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand” (emphasis added)).

82. Such a two-part definition of employment is like a statute that defines “animal” as “any animal other than a service animal being used by an individual with a disability.” “Animal” is a category that comes to law from outside, notwithstanding subsequent legal tweaking. *Cf.* 28 C.F.R. § 36.302(c)(1) (2006) (forbidding, under the ADA, a “no pets” policy that excludes service animals).

83. *See, e.g., N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 90 (1995); *see also Darden*, 503 U.S. at 327 (characterizing common law definitions of employment as reflecting

descriptive approach, but it plays an important role in how courts seek to determine employment status.

D. Moving Beyond Control and Exclusions

Once neither control nor statutory exclusions prevent inmate labor's classification as employment, two possibilities remain. First, inmate labor generally could qualify as employment, contrary to the results of the pre-*Carter* case law. Second, inmate labor in such cases might *not* qualify as employment, but for some reason neither previously articulated nor applicable to cases like *Watson* in which inmates were employees. Courts have followed this second path.

Before charting this path, however, it is instructive to follow the first one to see how far reaching cases like *Watson* and *Carter* could be. Consider the facts of *Vanskike v. Peters*, the Seventh Circuit opinion that reversed the tide in favor of inmate claims.⁸⁴ The inmate-plaintiff was forced to perform janitorial, kitchen, and garment work in the Illinois Department of Corrections facility in which he was incarcerated; his work was assigned, managed, and consumed by the prison.⁸⁵ This sort of prison housework generally is seen as the weakest candidate for employment among all forms of prison labor. Under a control analysis, however, the case for employee status is even easier than in *Watson* or *Carter* because there is no division of control between the prison and a third party.⁸⁶ Between the presence of control and the absence of a statutory exclusion, these considerations suggest that the employment relationship includes prison labor in almost all of its forms.

Indeed, a similar analysis carried the day in like circumstances involving work performed by people involuntarily institutionalized based on their mental or developmental disabilities. As of the early 1970s, tens of thousands of such individuals worked for a pittance or without any pay at all, providing their institutions with food service, cleaning, and building maintenance.⁸⁷ The parallels with *Vanskike*-style prison housework are manifold: involuntary confinement,

"common understanding"); see also *SUPIOT*, *supra* note 7, at 5 ("The general principle, applied everywhere, is that ascertaining whether or not a given worker is self-employed [rather than employed] is contingent not upon the existence of a conventional arrangement, but rather on the circumstances actually prevailing.").

84. 974 F.2d 806 (7th Cir. 1992).

85. *Id.* at 806.

86. *Id.* at 808-10.

87. See Paul R. Friedman, Comment, *The Mentally Handicapped Citizen and Institutional Labor*, 87 HARV. L. REV. 567, 567-68 (1974).

involuntary work, work controlled by the confining institution, work performed inside that institution and in support of its operations, and work performed by a stigmatized and subordinated population.⁸⁸

Litigation established that an FLSA employment relationship existed between mental institutions and their patient-workers.⁸⁹ As in *Vanskike*, the leading decision of *Souder v. Brennan* refused to imply an exclusion where none existed in the statute, and sufficient control clearly was present.⁹⁰ At this point, the court decided that the only remaining question was whether the plaintiffs were engaged in "work."⁹¹ It answered "yes" because "many of the patient-workers perform[ed] work for which they [were] in no way handicapped and from which the institution derive[d] full economic benefit."⁹² The U.S. Department of Labor later codified *Souder's* analysis in regulations that remain in force.⁹³

Souder thus made explicit something that *Watson* had only suggested: The institutional context of inmate or patient labor *could* defeat the existence of an employment relationship, but not because of inadequate control or an implied exclusion. Instead, that context at least raised the question whether the activity subjected to control was work. *Souder* answered that question affirmatively by finding "consequential economic benefit" to the employing institution, notwithstanding any therapeutic value the activity also might have had for the patient-worker.⁹⁴ *Watson* similarly had emphasized how economically valuable the inmates' labor was to the employing construction contractor, though it did not articulate the doctrinal significance of this fact.⁹⁵

The institutionalized workers in *Souder* provide a close analogy to inmate workers. The one clear factual distinction is the civil, rather

88. These parallels are a particular instance of the widely recognized similarities between institutions of penal and medical confinement. See, e.g., Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006).

89. *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 449 (E.D. Wis. 1974); *Souder v. Brennan*, 367 F. Supp. 808, 813 (D.D.C. 1973); see also *Miller v. Dukakis*, 961 F.2d 7, 8 (1st Cir. 1992) (per curiam) (endorsing these cases, but distinguishing civil confinement of sex offenders following completion of a criminal sentence).

90. 367 F. Supp. at 812-13. But see *Bayh v. Sonnenburg*, 573 N.E.2d 398, 408 (Ind. 1991) (doubting "that Congress intended to require states to pay patients in mental hospitals").

91. *Souder*, 367 F. Supp. at 813 (defining "employ" as including "to suffer or permit to work" (quoting 29 U.S.C. § 203(g) (2000))).

92. *Id.*

93. 29 C.F.R. § 525.4 (2006).

94. *Souder*, 367 F. Supp. at 813.

95. See *supra* text accompanying note 69.

than criminal, basis for confinement. Inmate status, however, is precisely the factor on which courts since *Carter* have refused to rely.⁹⁶

A clear argument for inmate employee status thus begins with work release in cases like *Watson* and extends all the way to prison housework in cases like *Vanskike* and, by analogy, *Souder*. The argument relies on the traditional employment considerations of control and statutory exclusions, and it adds a refinement limiting employment to economically valuable work. In this way, *Watson* need not be read as an exceptional case. Real conceptual work must be done to limit its wider application.

The Seventh Circuit took up this task of limiting *Watson* when, in *Vanskike*, it produced the first ruling against inmate workers that eschewed reliance on control issues.⁹⁷ After acknowledging that conventional analysis of control and exclusions pointed in the plaintiff's favor, the court set off in search of a sound theory for why "our common linguistic intuitions . . . are at least strained by the classification of prisoners as 'employees' of [the prison]."⁹⁸ Control analysis, the court reasoned, addresses "just one boundary of the definition of 'employee,' and we are concerned with a different boundary."⁹⁹ Accepting *Vanskike*'s basic approach, subsequent courts have devoted nearly all their efforts to mapping this "different boundary" and no longer treat control as an obstacle to classifying inmate workers as employees.¹⁰⁰ The next Part analyzes these efforts.

96. See *supra* notes 75-76 and accompanying text.

97. *Vanskike v. Peters*, 974 F.2d 806, 809-10 (7th Cir. 1992).

98. *Id.* at 807. Note again the invocation of ordinary, nonlegalistic meanings.

99. *Id.* at 810.

100. The shift away from control analysis was hastened by the rise of cases in which inmate workers sued prison authorities directly, rather than private entities. Previously, courts had used the prison's extensive control over inmates' work as a factor weighing *against* finding an employment relationship with a private entity. See discussion *supra* notes 56-58 and accompanying text. Once inmates named the prison as the employer, however, this control began to weigh *in favor* of finding an employment relationship. Issues of control may continue to be relevant when inmates work under the direct supervision and control of a non-prison entity but the prison controls who participates in the program and how much the inmates are paid. See, e.g., *Reimonenq v. Foti*, 72 F.3d 472 (5th Cir. 1996); *Henthorn v. Dep't of Navy*, 29 F.3d 682 (D.C. Cir. 1994); *SEXTON*, *supra* note 32. In such circumstances, the prison performs functions analogous to those of a temporary placement agency. This division of control between the two entities might put into question the employer status of either one for reasons analogous to those that arise in "triangular employment" outside the prison context. See *Lafer*, *supra* note 42, at 67 (noting the analogy to temp agencies); *Weiss*, *supra* note 42, at 275 (same).

II. EMPLOYMENT'S DISPUTED ECONOMIC DIMENSION

Employment involves something more than the presence of employer control and the absence of a statutory exception. This Part shows that courts also rest employment status on the existence of an economic relationship. They are, however, of two minds about what constitutes this economic character. The difference is outcome determinative.

In the prison labor context, courts generally rely on an "exclusive market" view of employment's economic character and use it to classify inmate work as noneconomic. They do so because prison labor does not fit a paradigm of discrete, financially motivated market transactions that are independent of any other relationship between the parties. Under the exclusive market view, the inability to separate inmate labor from the institutional context of the prison renders it a nonmarket relationship, and thus a noneconomic relationship, and thus not an employment relationship. Cases rejecting inmates' claims for minimum wages under the FLSA develop this analysis most fully,¹⁰¹ but decisions under other statutes adopt the same approach.¹⁰²

101. The following are all the reported cases, as of April 2008, in which inmate FLSA claims failed for lack of an employment relationship: *Loving v. Johnson*, 455 F.3d 562 (5th Cir. 2006) (per curiam); *Adams v. Neubauer*, 195 Fed. Appx. 711 (10th Cir. 2006); *Bennett v. Frank*, 395 F.3d 409 (7th Cir. 2005); *Hill v. Johnson*, 2000 WL 294051, 210 F.3d 368 (5th Cir. 2000) (per curiam) (table); *Cook v. Lehman*, 1999 WL 638647, 188 F.3d 512 (9th Cir. 1999) (table); *Rawlins v. Arizona Dep't of Corr.*, 1998 WL 231130, 152 F.3d 928 (9th Cir. 1998) (table); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119 (11th Cir. 1997); *Nicastro v. Reno*, 84 F.3d 1446 (D.C. Cir. 1996); *Burleson v. California*, 83 F.3d 311 (9th Cir. 1996); *Danneskjold v. Hausrath*, 82 F.3d 37 (2d Cir. 1996); *Reimonenq*, 72 F.3d 472; *Phillips v. Mondragon*, 76 F.3d 393, No. 95-2152, 1996 WL 47423 (10th Cir. 1996); *Gibson v. Kronzer*, 1995 WL 150568, 51 F.3d 275 (7th Cir. 1995) (table); *Jovanovich v. Angelone*, 1995 WL 378678, 59 F.3d 175 (9th Cir. 1995) (table); *Larum v. Silver State Indus.*, 1995 WL 29484, 46 F.3d 1142 (9th Cir. 1995) (table); *Seleen v. County of Spokane*, 73 F.3d 370, 1995 WL 766268 (9th Cir. 1995) (table); *Morgan v. MacDonald*, 41 F.3d 1291 (9th Cir. 1994); *McMaster v. Minnesota*, 30 F.3d 976 (8th Cir. 1994); *Henthorn*, 29 F.3d 682; *Franks v. Okla. State Indus.*, 7 F.3d 971 (10th Cir. 1993); *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc); *Harker v. State Use Indus.*, 990 F.2d 131 (4th Cir. 1993); *Vanskike*, 974 F.2d 806; *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320 (9th Cir. 1991); *Alexander v. Sara, Inc.*, 721 F.2d 149 (5th Cir. 1983) (per curiam); *Wentworth v. Solem*, 548 F.2d 773 (8th Cir. 1977) (per curiam); *Emory v. United States*, 2 Cl. Ct. 579 (1983); *Kavazanjian v. Naples*, No. 06-CV-3390, 2006 WL 2795220 (E.D.N.Y. Sept. 26, 2006); *Lockett v. Neubauer*, No. 05-3209-SAC, 2005 WL 3557780 (D. Kan. Dec. 28, 2005); *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329 (W.D. Wis. 1995); *George v. Badger State Indus.*, 827 F. Supp. 584 (W.D. Wis. 1993); *Young v. Cutter Biological*, 694 F. Supp. 651 (D. Ariz. 1988); *Worsley v. Lash*, 421 F. Supp. 556 (N.D. Ind. 1976); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (per curiam); *Hudgins v. Hart*, 323 F. Supp. 898 (E.D. La. 1971); *Huntley*, 79 F. Supp. 110; *Lavigne v. Sara, Inc.*, 424 So. 2d 273 (La. Ct. App. 1982).

102. The following are all the reported cases, as of April 2008, in which inmate employment claims have failed under federal statutes other than the FLSA and under state analogues to the

The competing “productive work” approach to employment’s economic character rises to the fore in the smaller body of cases in which courts *do* classify inmate labor as employment.¹⁰³ These opinions find an economic relationship because the putative employer benefits economically from inmates’ labor, either by selling the resulting goods and services or by avoiding the hiring of other workers.

Furthermore, this conflict over employment’s economic character recurs throughout statutory employment law whenever institutions organize work in ways that do not fit easily into a market paradigm. Some examples include work integrated into graduate education, welfare receipt, and vocational rehabilitation, as well as work performed by individuals institutionalized under legal authority other than a criminal sentence.¹⁰⁴ In these other contexts, too, courts

FLSA: *Banks v. Roberts*, No. 1:06-CV-01232, 2007 WL 1574771 (M.D. Pa. May 31, 2007) (relying on lack of FLSA coverage to dismiss claims under the False Claims Act and the Federal Tort Claims Act); *Wade v. Cal. Dep’t of Corr.*, 171 Fed.Appx. 601, No. 05-15653, 2006 WL 701135 (9th Cir. 2006) (Title VII); *Battle v. Minn. Dep’t of Corr.*, 40 Fed.Appx. 308, No. 02-1599, 2002 WL 1370059 (8th Cir. 2002) (ADA); *Portley-El v. Zavaras*, 188 F.3d 519, No. 99-1028, 1999 WL 542631 (10th Cir. July 27, 1999) (Title VII); *Coupar v. U.S. Dep’t of Labor*, 105 F.3d 1263 (9th Cir. 1997) (whistleblower claim under Clean Air and Toxic Substances Control Acts); *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991) (Title VII); *Kounelis v. Sherrer*, 396 F. Supp. 2d 525 (D.N.J. 2005) (New Jersey whistleblower statute); *Rhodes v. Schaefer*, No. 98-3323-GTV, 2002 WL 826471 (D. Kan. Mar. 20, 2002) (Title VII); *McCaslin v. Cornhusker Indus.*, 952 F. Supp. 652 (D. Neb. 1996) (Title VII); *Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996) (ADA); *Walton v. Fed. Prison Indus.*, No. 89-3257-R, 1991 WL 126708 (D. Kan. June 13, 1991) (Title VII); *Harris v. Yeager*, 291 F. Supp. 1015 (D.N.J. 1968), *aff’d*, 410 F.2d 1376 (3d Cir. 1969) (per curiam) (challenging prison control over disposition of earnings from prison labor); *McGinnis v. Stevens*, 543 P.2d 1221 (Ala. 1975) (analyzing Alaska minimum wage statute using FLSA standards); *Manville v. Bd. of Governors of Wayne State Univ.*, 272 N.W.2d 162 (Mich. Ct. App. 1978) (Michigan minimum wage statute); *Pettis v. Danzig*, EEOC Dec. No. 1964038 (Mar. 2, 1999) (Title VII); EEOC Dec. No. 86-7, Fair Empl. Prac. Cas. ¶ 6865 (CCH) (Apr. 18, 1986) (Title VII).

103. Although there are no reported cases involving a final judgment in favor of an inmate worker on a federal statutory employment claim, the following decisions have held at the Rule 12(b)(6) dismissal or Rule 56 summary judgment stages that an employment relationship could be established on the facts of the case: *Barnett v. Young Men’s Christian Ass’n, Inc.*, No. 98-3625, 1999 WL 110547, at *1 (8th Cir. Mar. 4, 1999) (FLSA); *Watson v. Graves*, 909 F.2d 1549 (5th Cir. 1990) (FLSA); *Baker v. McNeil Island Corr. Ctr.*, 859 F.2d 124 (9th Cir. 1988) (Title VII); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984) (FLSA); *Williams v. City of DeQuincy*, No. 2:04-CV-612, 2006 WL 3747449 (W.D. La. Oct. 31, 2006) (FLSA), *dismissed on other grounds* 2007 WL 2736224 (W.D. La. July 19, 2007); *Walker v. City of Elba*, 874 F. Supp. 361 (M.D. Ala. 1994) (Title VII); *Cleveland v. Iowa*, No. CL 82312, 2001 WL 888718 (Iowa Dist. Ct. July 12, 2001) (Title VII). A long line of precedent under the NLRA assumes that inmates working for private employers through work release programs are employees and holds that they may participate in NLRB-supervised union elections. *See Speedrack Prods. Group, Ltd. v. N.L.R.B.*, 114 F.3d 1276, 1282 (D.C. Cir. 1997). *But see Rosslyn Concrete Const. Co. v. N.L.R.B.*, 713 F.2d 61, 63 (4th Cir. 1983) (reserving judgment on the issue of NLRA employee status).

104. A number of FLSA cases apply prison labor precedents to deny claims by individuals who were not serving a criminal sentence. *See Tourscher v. McCullough*, 184 F.3d 236 (3d Cir. 1999) (pre-trial detention); *Villarreal v. Woodman*, 113 F.3d 202 (11th Cir. 1997) (pre-trial

find themselves torn between the exclusive market and productive work approaches.

Insistence on an economic relationship—and uncertainty about what that entails—is a robust feature of employment law, as fundamental to employment status as the familiar element of control. In most employment disputes, however, this economic element is not controverted, and, perhaps for that reason, scholars and courts have not recognized this dimension of employment.¹⁰⁵ Work at the boundaries of markets brings the issue to the fore, and recognizing this dispute over employment's economic character allows us to see the continuity between controversies previously regarded as distinct.

A. Prison Labor as Noneconomic: The Exclusive Market Approach

The case of Larry George¹⁰⁶ illustrates the exclusive market approach to drawing the “different boundary” of the employment relationship invoked by *Vanskike*,¹⁰⁷ the boundary between economic and noneconomic relationships. George worked in Racine, Wisconsin for Badger State Industries (“BSI”), the trade name of Wisconsin Prison Industries. BSI held a data entry subcontract from SC Data Center, a private firm that was an information services contractor for Swiss Colony, Inc., a Wisconsin mail order company. George and his co-workers entered written catalog requests and customer orders into a computer. Work at BSI was organized in ways characteristic of a traditional firm: job applications, interviews and typing tests, a probationary period, opportunities for performance-based promotion and pay increases, disciplinary demotions or terminations, time clocks, and time-and-a-half pay for overtime. The base rate of pay,

detention); *Miller v. Dukakis*, 961 F.2d 7 (1st Cir. 1992) (per curiam) (post-incarceration civil commitment for sex offenders); *Alvarado Guevara v. I.N.S.*, 902 F.2d 394 (5th Cir. 1990) (per curiam) (immigration detention); *Shaw v. Briody*, No. 2:02CV500FTM-33SPC, 2005 WL 2291711 (M.D. Fla. 2005) (post-incarceration civil commitment for sex offenders). *But see* *Weidenfeller v. Kidulis*, 380 F. Supp. 445 (E.D. Wis. 1974) (commitment to mental health facilities); *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973) (same).

105. My analysis in terms of control and economic dimensions bears a close resemblance to the typology of work developed by Chris Tilly and Charles Tilly in their masterful book, *Work Under Capitalism* (1998). They place all forms of work in a two-dimensional space defined by dimensions of “time-discipline” and “short-term monetization” and identify employment with high levels of both. *Id.* at 30-31. They do not, however, apply their model to forms of paid nonmarket work like those considered here, and their definition of “short-term monetization”—“extent to which workers invest effort, or fail to do so, contingent on the prospect of monetary compensation in the immediate future”—is ambiguous on precisely the point that courts find so analytically confounding. *Id.* at 30. *See* discussion *infra* notes 292-293 (discussing ambiguities in the concept of “compensation”).

106. *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329 (W.D. Wis. 1995).

107. *Vanskike v. Peters*, 974 F.2d 806, 807 (7th Cir. 1992).

however, was only \$1 per hour, and George sued for FLSA minimum wage violations.

George's lawsuit named both BSI and SC Data Center as defendants, but the district court held that neither organization had an employment relationship with George.¹⁰⁸ SC Data Center was not George's employer for reasons sounding in control: it was simply BSI's customer and lacked a direct relationship with George. BSI, not SC Data Center, owned the equipment on which and premises where George worked, set his pay and schedule, supervised his work, and so on. In short, SC Data Center did not employ George because BSI possessed all the traditional indicia of employer status based on control.

Yet the court held that George was not employed by BSI either, notwithstanding its control. What stood in the way was "the essentially penological nature of labor performed by prisoners for a prison." This penological character negated an essential feature of employment, the "bargained-for exchange of labor for consideration." This language and reasoning came directly from *Vanskike*, where the Seventh Circuit had held that prisoners were "not in a true *economic* employer-employee relationship."¹⁰⁹

Since *Vanskike*, courts rejecting employment protections for inmate workers have treated imprisonment and employment as fundamentally irreconcilable social positions. They are incompatible because they are located in two separate spheres: the prison and the economy. Incarceration represents entry into a "separate world of the prison," such that "[p]risoners are essentially taken out of the national economy."¹¹⁰

Courts elaborate this distinction between the economic practice of employment and the penal practice of inmate labor by identifying economic relationships with contractual relationships. The penal context is portrayed as inhospitable to contract. This incompatibility with contract can be broken into three components: first, there is no "free contract" when prison labor is involuntary; second, there cannot be a contract when there is no exchange between the parties; third, whatever exchange exists fails to take the distinctively contractual form of a discrete bargain.

108. This paragraph and the next reference *George*, 884 F. Supp. at 329, 332-34.

109. *Vanskike*, 974 F.2d at 812 (emphasis added).

110. *Id.* at 810 & n.5; see also *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (quoting *Vanskike*); *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) (en banc) (same).

1. Involuntariness

Inmates obviously face coercion of a different order than conventional employees.¹¹¹ Courts denying employment status are quick to invoke this difference. When the distinctively coercive character of the work environment becomes questionable, however, they have been reluctant to reach a different result. Instead, coercion becomes a proxy for a deeper problem: inmate labor is ineradicably embedded in a penal institution.

"Free labor" long has been associated with contractual employment and opposed to chattel slavery and other bound labor.¹¹² Prison inmates have a unique constitutional status under the Thirteenth Amendment, which bans "slavery or involuntary servitude *except* as a punishment for crime."¹¹³ Plausibly, this unique situation might influence inmates' employment status. As one court put it, "[T]he FLSA presupposes a free-labor situation constrained by the Thirteenth Amendment."¹¹⁴

But why would the FLSA protect only those protected by the Thirteenth Amendment? Congress, after all, could provide a statutory right to compensation even though the Constitution does not require it.¹¹⁵ Contract provides this connection between voluntariness and employment.¹¹⁶ A prisoner has not "freely contracted . . . to sell his labor" when he has been "legally compelled to part with his labor as

111. *But cf.* DARIO MELOSSI & MASSIMO PAVARINI, *THE PRISON AND THE FACTORY: ORIGINS OF THE PENITENTIARY SYSTEM* 188 (Glynis Cousin trans., Barnes & Noble Books 1981) (1977) (arguing that this distinction is "subtle" because "for the worker the factory is like a prison" and "for the inmate the prison is like a factory").

112. *See* RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* 160-62 (2007); STANLEY, *supra* note 3, at 76; JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 33-36 (2004); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989).

113. U.S. CONST. amend. XIII, § 1; *see also* Colin Fenwick, *Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law*, 27 HUM. RTS. Q. 249, 279-82 (2005) (examining analogous penal exception to bans on involuntary servitude in international human rights instruments). On the constitutionality of involuntary prison labor, *see* *Loving v. Johnson*, 455 F.3d 562, 564 (5th Cir. 2006) (*per curiam*); *Ali v. Johnson*, 259 F.3d 317, 318 (5th Cir. 2001); *Vanskike*, 974 F.2d at 809-10; *Murray v. Miss. Dep't of Corr.*, 911 F.2d 1167, 1167-68 (5th Cir. 1990) (*per curiam*); *Wendt v. Lynaugh*, 841 F.2d 619, 620-21 (5th Cir. 1988); *Sigler v. Lowrie*, 404 F.2d 659, 661 (8th Cir. 1968); *Draper v. Rhay*, 315 F.2d 193, 197-98 (9th Cir. 1963); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 793 (E.D. Mich. 1971), *aff'd*, 453 F.2d 1259 (6th Cir. 1971) (*per curiam*); *Holt v. Sarver*, 309 F. Supp. 362, 365, 369-72 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

114. *Villarreal v. Woodman*, 113 F.3d 202, 206 (11th Cir. 1997).

115. *Vanskike*, 974 F.2d at 809-10.

116. Fenwick, *supra* note 6, at 302-05.

part of a penological work assignment.”¹¹⁷ In such circumstances, he is not an employee but “truly an involuntary servant”¹¹⁸ whose labor arises not out of contract but instead as “part of [his] sentence[] of incarceration.”¹¹⁹ Involuntariness, in other words, is a marker of a relationship that arises out of the institutions of punishment, not the institutions of the labor market.

If involuntariness bears much weight, then there should be no barrier to employment status for voluntary work by inmates.¹²⁰ A few cases have suggested this,¹²¹ but more often courts back away from a Thirteenth Amendment involuntariness standard when adhering to it would cut in inmates’ favor.¹²² For instance, a number of cases invoke “involuntariness” to deny employee status in circumstances that would not be considered “involuntary” under the Thirteenth Amendment.¹²³ In one scenario, inmates are required to work but have

117. *Henthorn v. Dep’t. of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994).

118. *Id.*

119. *Vanskiike*, 974 F.2d at 810.

120. Additionally, other forms of involuntary labor would fall outside FLSA protections, but instead the FLSA has been applied to involuntary work. See *Chellen v. John Pickle Co.*, 344 F. Supp. 2d 1278, 1294 (N.D. Okla. 2004) (finding that workers were FLSA employees in a case alleging human trafficking); *Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1294 (N.D. Okla. 2006) (subsequently finding both FLSA violations and false imprisonment); *Manliguez v. Joseph*, 226 F. Supp. 2d 377, 384-85, 389 (E.D.N.Y. 2002) (allowing FLSA and Thirteenth Amendment claims to proceed together in case brought by domestic worker); *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 449-51 (E.D. Wis. 1974) (allowing FLSA and Thirteenth Amendment claims to proceed together in case brought by residents of mental institution); KATHLEEN KIM & DANIEL WERNER, CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 29-41 (2005), available at <http://www.lafla.org/client-services/special-projects/VictimsTrfficking0405.pdf> (discussing FLSA claims for victims of human trafficking).

121. See *Henthorn*, 29 F.3d at 686 (relying on involuntariness to find no employment and distinguishing contrary cases as involving voluntary labor by inmates); *Vanskiike*, 974 F.2d at 808-10 & nn.4-5 (same); see also *Watson v. Graves*, 909 F.2d 1549, 1554-56 (5th Cir. 1990) (finding employment status and distinguishing contrary cases as involving involuntary labor); *Hale v. Arizona*, 967 F.2d 1356, 1366, 1368 (9th Cir. 1992) (same), *vacated en banc* 993 F.2d 1387 (9th Cir. 1993).

122. One condition of the PIE program, see discussion *supra* note 37, is that inmates participate voluntarily. 18 U.S.C. § 1761(c)(4) (Supp. II 2002). Nonetheless, both case law and the applicable administrative guidelines suggest that PIE participation is not necessarily employment. See *Hale*, 993 F.2d at 1397 (denying employee status to PIE participant); Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000, 17,008 (Apr. 7, 1999) (stating that payment of a minimum wage is not intended to imply that inmate workers are employees).

123. See *United States v. Kozminski*, 487 U.S. 931, 944, 952 (1988) (requiring “physical or legal coercion” for involuntariness, and rejecting a broader standard based on the worker’s lack of meaningful choice). The *Kozminski* standard does appear to have been met in some cases denying employee status on involuntariness grounds. See *Henthorn*, 29 F.3d at 683; see also *Vanskiike*, 974 F.2d at 807 (characterizing inmate work as “forced labor”); *McCaslin v. Cornhusker State Indus.*, 952 F. Supp. 652, 654-55 (D. Neb. 1996).

some choice over how they fulfill this requirement.¹²⁴ In another, the prison does not require work but sometimes may prevent it.¹²⁵ In these circumstances, courts still find coercion one or two steps removed from the particular job at issue.¹²⁶ Because the prisoner is "in no sense free to bargain with would-be employers for the sale of his labor[,] his work at the prison was merely an incident of his incarceration."¹²⁷

Once the issue becomes whether the work was simply "an incident of incarceration," voluntariness ceases to do analytical work of its own.¹²⁸ Recognizing this, when faced with inmates pressing strong arguments that their work was voluntary, some courts have dispensed with an involuntariness criterion altogether. Instead, they turn to other aspects of inmate labor to distinguish it from employment.¹²⁹

2. Exchange

Again invoking contract, courts deciding prison labor claims frequently identify employment with a "bargained-for exchange of

124. For instance, the plaintiff in *Morgan v. MacDonald* "chose to fulfill" his labor requirement by working as a computer technician for the prison educational center run by a local community college. 41 F.3d 1291, 1292 (9th Cir. 1994). The Thirteenth Amendment bars only employer-specific coercion. Criminal sanctions for refusal to work do not give rise to involuntary servitude when individuals retain choice among employers. See *Moss v. Superior Court*, 950 P.2d 59, 66-67 (Cal. 1998) (upholding criminal contempt conviction based on failure to hold employment while subject to child support order, and noting that order did not bind the parent to any particular employment or type of employment); see also *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999) (upholding constitutionality of criminal conviction for failure to maintain employment as required by a child support order).

125. *George v. Badger State Indus.*, 827 F. Supp. 584, 588 (W.D. Wis. 1993).

126. *Burleson v. California*, 83 F.3d 311, 314 (9th Cir. 1996) (rejecting the relevance of the "voluntary nature of [the] assignment" primarily because the "consensual nature of a particular work assignment in a hard-labor state does not remove the penological purpose from the work relationship"); *Morgan*, 41 F.3d at 1293.

127. *Morgan*, 41 F.3d at 1293; *George*, 827 F. Supp. at 588 ("[L]abor performed in the prison for the prison or even for a separate state entity operated by the Department of Corrections is labor performed as part of a sentence of incarceration."). *Contra* Pa. Dep't of Corr. v. *Yeskey*, 524 U.S. 206, 211 (1998) (characterizing prisoners as participating in some prison activities voluntarily).

128. Indeed, Robert Steinfeld persuasively argues that this problem plagues the voluntary/involuntary distinction more generally. STEINFELD, *supra* note 24, at 239 ("[F]ree labor is a political and moral conclusion (or a legal or constitutional one) rather than a thing, a conclusion, moreover, that is subject to revision.").

129. See *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996) (holding that voluntary work "serves all of the penal functions of forced labor . . . and, therefore, should not have a different legal status under the FLSA"); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993) (holding voluntariness irrelevant where "[i]nmates perform work for SUI not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training," and therefore the prison has "a rehabilitative, rather than pecuniary, interest in [the inmate worker's] labors").

labor for consideration”¹³⁰ in which “[an inmate] and the prison . . . contract with one another for mutual economic gain.”¹³¹ This subpart considers how prison labor might lack any exchange whatsoever; the next subpart will address the specific bargain form of exchange required in contract.

First, there might be no exchange if the inmate’s efforts lack economic value to the employer.¹³² Courts frequently characterize inmate labor as fundamentally rehabilitative and educative and, therefore, not employment: “Inmates perform work for [the prison industry] not to turn profits for their supposed employer, but rather as a means of rehabilitation and job training [for themselves].”¹³³ Insofar as this statement speaks to the effects of inmates’ work and not solely to its purpose, the implication is that the prison got nothing out of the arrangement.¹³⁴

Rather than focusing on whether employers receive something of value, however, courts often conflate that issue with questions of purpose. Thus, they conclude that rehabilitative effects on inmates imply that the “[putative employer] has a rehabilitative, rather than pecuniary, interest in [the inmate’s] labors.”¹³⁵ Driving this argument is the notion that rehabilitative or educational value *to the inmate* is incompatible with economic benefit *to the putative employer*, that penological and economic matters do not coexist.¹³⁶ This is the essence of the exclusive market approach: reasoning from the presence of any nonmarket dynamics to the absence of an economic relationship.¹³⁷

130. *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992).

131. *Morgan*, 41 F.3d at 1293.

132. Outside of the prison context, such a theory is used to distinguish between employees and students or trainees. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150, 153 (1947) (holding that railroad brakeman trainees were not FLSA employees because their “work does not expedite the company business, but may, and sometimes does, actually impede and retard it”).

133. *Harker*, 990 F.2d at 133; accord *Danneskjold*, 82 F.3d at 42; *Vanskike*, 974 F.2d at 809; *George v. SC Data Ctr., Inc.*, 884 F. Supp. 329, 333 (W.D. Wis. 1993).

134. On this point, courts taking a productive work approach would agree that the inmates must be doing *work* to be employees.

135. *Harker*, 990 F.2d at 133.

136. This tendency to lose sight of prison labor’s productive character may be reinforced by the discourse of rehabilitation itself, with its suggestion that inmates enter prison lacking the skills and habits to perform useful work. See *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (stating one goal of prison labor as “to equip them with skills and habits that will make them less likely to return to crime outside”); *Danneskjold*, 82 F.3d at 43 (characterizing prison labor as something that “trains prisoners in the discipline and skills of work”); see also discussion *infra* Part IV.A.2.a.

137. Cf. Harris, *supra* note 25, at 1737-40 (discussing legal conceptions of whiteness defined in terms of racial purity and the absence of African-American “blood”).

The second way that exchange might be lacking is if inmate work, while productive, is in the prison's possession from the start, rather than being transferred in an exchange between the parties. An argument along these lines appears to underlie courts' frequent assertion that inmates cannot be employees because "the economic reality is that their labor belong[s] to the institution."¹³⁸ Not owning the labor they perform, inmates have nothing to exchange.¹³⁹ Any payments from the prison are gifts, even if occasioned by inmate labor.¹⁴⁰

3. Bargain

Courts also discern a noneconomic relationship based on prisons' "rehabilitative or penological interest in inmate labor" in the sense of prisons' motivations for instituting inmate labor programs.¹⁴¹ These nonpecuniary interests remove prison labor from "the bargained-for exchange of labor" for mutual economic gain that occurs in a true employer-employee relationship."¹⁴² Courts specifically invoke the doctrine of consideration, according to which contract formation requires that each party offer something of value to the

138. *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993); *accord Burleson v. California*, 83 F.3d 311, 314 (9th Cir. 1996); *Morgan v. MacDonald*, 41 F.3d 1291, 1293 (9th Cir. 1994); *Vanski*, 974 F.2d at 809; *Alexander v. Sara*, 721 F.2d 149, 150 (5th Cir. 1983); *Young v. Cutter Biological*, 694 F. Supp. 651, 657 (D. Ariz. 1988); *Hudgins v. Hart*, 323 F. Supp. 898, 899 (E.D. La. 1971); *Huntley v. Gunn Furniture Co.*, 79 F. Supp. 110, 113 (W.D. Mich. 1948).

139. *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994) (reasoning that an inmate cannot "freely contract[] with a non-prison employer to sell *his* labor" (emphasis added)). *Henthorn* held that even when an inmate voluntarily works for a third party and is paid, there is no employment relationship with the third party "where any compensation he receives is set and paid by his custodian." *Id.* Apparently, an economic exchange exists only between the third party (which receives *the prison's* labor) and the prison. *But see Benavidez v. Sierra Blanca Motors*, 922 P.2d 1205, 1207 (N.M. 1996) (rejecting analogous argument under state workers' compensation statute).

140. *Harris v. Yeager*, 291 F. Supp. 1015, 1017 (D.N.J. 1968) ("The moneys under consideration are not wages in a realistic economic employer-employee relationship. They are, rather, a gratuitous payment."), *aff'd*, 410 F.2d 1376 (3d Cir. 1969) (per curiam); *McGinnis v. Stevens*, 543 P.2d 1221, 1224 n.2, 1238 (Ala. 1975) (characterizing payment to inmate worker as a "gratuity"). *But see Allen v. Cuomo*, 100 F.3d 253, 261 (2d Cir. 1996) (holding that state prison regulations confer a property interest in inmate wages); *Cal. Highway Comm'n v. Indus. Accident Comm'n*, 251 P. 808, 810 (Cal. 1926) (rejecting characterization of payments to inmates working on public highways as gifts rather than wages). *Cf. Zelizer, supra* note 20, at 482-83 (contrasting compensations and gifts as payment forms, and associating "subordination and arbitrariness" with the latter).

141. *Danneskjold*, 82 F.3d at 43-44; *Reimonenq v. Foti*, 72 F.3d 472, 476 (5th Cir. 1996); *Vanski*, 974 F.2d at 809.

142. *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993); *accord Hale*, 993 F.2d at 1394; *Vanski*, 974 F.2d at 809; *George v. Badger State Indus.*, 827 F. Supp. 584, 588-89 (W.D. Wis. 1993).

other in order to elicit the other's contribution to the exchange. Thus, even if inmate labor incidentally confers an economic benefit on the prison, there would not be a bargain if achieving that result was not part of the prison's apparent purpose.¹⁴³

Courts rely on the mutual exclusivity of economic and nonpecuniary goals in their interpretation of prisons' motivations. Once a nonpecuniary motive appears, economic ones disappear from view.¹⁴⁴ For instance, the Ninth Circuit's *Burleson* opinion cites the existence of a "penological purpose" to overcome the work program's explicit mandate to turn a profit.¹⁴⁵ There is no room in this view for the coexistence of penological and pecuniary aims.¹⁴⁶ Once the prison appears, the economy vanishes.

Making the penological context essential also underlies a second way of separating inmate labor from the bargain form. A corollary of contractual parties' wholly self-interested purposes is that they encounter one another as strangers who engage in a discrete transaction and then part ways.¹⁴⁷ In contrast, prison labor arises out

143. Arguably, insofar as the prison desired to secure the inmate's participation in a punitive or rehabilitative activity, the inmate's agreement to do so would provide consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. d & illus. 9 (1981); *id.* § 79 & illus. 4. In the prison labor context, however, courts rely on a narrower understanding of consideration as involving "economic gain" and do not consider the extent to which contract law itself is not so limited.

144. A number of rough indicators suggest that most prison work programs are not designed to maximize the financial benefit to the prison. First, inmate labor programs often operate at a financial loss, or no significant profit, for prison authorities. CRIMINAL JUSTICE INST., *supra* note 30, at 124-25. Second, product lines and work organization often are selected to be relatively labor intensive in order to increase the hours of inmate labor required. See U.S. GEN. ACCOUNTING OFFICE, PRISONER LABOR: PERSPECTIVES ON PAYING THE FEDERAL MINIMUM WAGE, GAO/GGD-93-98, at 8-9 (1993). Third, prison industry programs typically have long waiting lists for participation, implying that inmates would be willing to participate at lower wages. See Glover, *supra* note 30, at 1112; FLORIDA CORR. COMM'N, 1997 ANNUAL REPORT § 8.3.2 (1997), <http://web.archive.org/web/20001102045827/www.fcc.state.fl.us/fcc/reports/final97/97pub.html>.

145. *Burleson v. California*, 83 F.3d 311, 314 (9th Cir. 1996); *accord Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997); *George*, 827 F. Supp. at 588 ("The voluntary nature of the Prison Industries program does not manifest a bargained-for-exchange of labor. Instead, it reflects the program's emphasis on rehabilitative objectives as opposed to the punitive ones traditionally associated with forced labor in prisons.").

146. In contrast, standard contract doctrine would find consideration if eliciting the exchange were some part of the prison's motive, even if not the exclusive or predominant one. See RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c.

147. In fact, contract doctrine does not require a discrete transaction between strangers, but again, such transactions widely are taken to be paradigmatic. See Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 569. Expecting that employment matches this model of discrete contracts is particularly odd, given that the distinction between the two is the central topic of economic analysis of the firm, see R.H. COASE, *THE FIRM, THE MARKET AND THE LAW* 53-54 (1988), and that ongoing subjection to supervisory control, or subordination to the employer more generally, is essential to

of an ongoing relationship of incarceration. Thus, courts conclude that inmate labor is not a bargained-for exchange because the parties "do not deal at arms' length."¹⁴⁸ A criminal conviction brought them together, not the prospect of exchanging work for pay.¹⁴⁹ As one court put it, this "opportunity is open only to prisoners."¹⁵⁰ Moreover, goals incident to imprisonment—punishment, maintaining order, preventing recidivism, changing attitudes or personality traits linked to offending behavior—shape work programs.¹⁵¹

At root, it is the ever-present mark of the prison context that removes inmate labor from the market economy. According to these courts, the prison and the economy are mutually exclusive.

B. Prison Labor as Economic: The Productive Work Approach

The exclusive market approach dominates the prison labor case law, but courts sometimes analyze the economic dimension of employment in a different fashion. The alternative focuses on inmates' production and receipt of valuable resources, not on the bargain form. Focusing on productive work supports classifying inmate workers as employees. Where the exclusive market view sees economic relationships as fundamentally incompatible with noneconomic institutions, the productive work approach takes the opposite tack: economic conduct has no intrinsic institutional form and may occur in diverse contexts.

Among prison labor cases, the productive work approach is most clearly articulated by Judge Norris's dissent from the Ninth Circuit's *en banc* decision in *Hale v. Arizona*: "The economic reality is

distinguishing employment from "independent contracting" along the control dimension. See discussion *supra* Part I.B.

148. *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993).

149. See, e.g., *McCaslin v. Cornhusker State Indus.*, 952 F. Supp. 652, 657 (D. Neb. 1996) ("The prisoner does not enter into a bargain with the prison to become a prisoner in order to be able to work in the prison industries, as might a private individual who contracts with an employer"; instead, the work "arises out of the prisoner's conviction for a crime . . .").

150. *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996); see also *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991) (finding no Title VII coverage because the "relationship . . . arises out of his status as an inmate, not an employee"). Moreover, an inmate who leaves a prison work program remains a prisoner. At a structural level, however, it is possible that levels of incarceration will be determined, in part, by prisons' ability to utilize prisoners' labor or provide it to outside interests. See GEORG RUSCHE & OTTO KIRCHHEIMER, *PUNISHMENT AND SOCIAL STRUCTURE* (1939); Garvey, *supra* note 29, at 397-98.

151. The same is plausibly true from inmates' perspectives, though courts show little interest in them. In addition to cash and future marketable skills, work may relieve boredom, create opportunities for social interaction, provide outlets for creativity, and facilitate self-worth linked to productivity.

that [the inmates] work. Their labor produces goods and services that are sold in the channels of commerce. And [the prison industry] pays them for their efforts.”¹⁵² Similar reasoning carried the day in *Watson*, where the local sheriff farmed out inmates to his son-in-law’s construction company.¹⁵³

The productive work analysis plays some role even in opinions that ultimately come down against employee status. Before ruling against the plaintiff-inmate, the Eleventh Circuit acknowledged that “[i]n general, work constitutes employment when there is an expectation of [even] in-kind benefits in exchange for services.”¹⁵⁴ The recognizably productive character of inmates’ work at least provides initial plausibility to their employment claims.

As *Watson* and the *Hale* dissent suggest, arguments grounded in production typically articulate the economic value of inmate work by focusing on its effects on third parties, especially through the putative employer’s customers or its other workers. The basic mechanism at work is the fungibility of inmate-produced goods and services with those produced by ordinary employees or purchased in ordinary consumer markets. Employers of prison labor can substitute inmates for other workers, and consumers can substitute products of inmate labor for those produced by other means.

Based on these points, most courts accept that inmates are employees in at least some circumstances: when they voluntarily work for and are paid by private firms that are located outside the prison and are not in the business of supplying goods or services to the prison. However, when inmates bring claims in scenarios that possess some but not all of these factors—location, prison not private management, voluntariness, prison not private consumption—courts often turn the logic of fungibility against inmates’ claims.

For instance, many courts differentiate between work for private firms located inside prisons (not employment) versus outside prisons (employment).¹⁵⁵ *Watson* suggested that work performed

152. *Hale v. Arizona*, 993 F.2d 1387, 1403 (9th Cir. 1993) (Norris, J., dissenting).

153. *Watson v. Graves*, 909 F.2d 1549, 1554-56 (5th Cir. 1990); see discussion *supra* Part I.D.

154. *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997).

155. See, e.g., *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (per curiam); *Barnett v. Young Men’s Christian Ass’n, Inc.*, No. 98-3625, 1999 WL 110547, at *1-2 (8th Cir. Mar. 4, 1999); *Vanskike v. Peters*, 974 F.2d 806, 808-09 (7th Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1330 (9th Cir. 1991) (Rymer, J., concurring in part and concurring in the judgment); *Banks v. Roberts*, No. 1:06-CV-01232, 2007 WL 1574771 (M.D. Pa. May 31, 2007); *McCaslin v. Cornhusker State Indus.*, 952 F. Supp. 652, 657 (D. Neb. 1996); *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 786 (E.D. Mich. 1971), *aff’d*, 453 F.2d 1259 (6th Cir. 1971) (per curiam); *Cal. Highway Comm’n v. Indus. Accident Comm’n*, 251 P. 808, 809-10 (Cal. 1926); *Manville v. Bd. of Governors of Wayne State Univ.*, 272 N.W.2d 162, 165-66 & n.7 (Mich. Ct. App. 1978).

“within the confines of the prison” avoided “unfair competition among workers in job markets outside the prison.”¹⁵⁶ But as one judge tartly observed, “[T]he logic escapes me”: regardless of where production occurs, the competitive effects are the same if the products are then sold in the same markets.¹⁵⁷ Thus, courts sometimes hold that work outside prison walls cannot be distinguished from work on the inside that previously had been classified as not employment.¹⁵⁸

Similar problems plague another commonly cited factor—whether inmates work for a governmental agency (including the prison itself) or a private firm.¹⁵⁹ Either way, that organization produces widgets with fewer non-inmate workers and, if it sells the widgets, competes with other widget makers who lack an inmate labor supply.¹⁶⁰ Federal Prison Industries vividly makes this point in its advertising, which promotes its data and communications services as “the best kept secret in outsourcing.”¹⁶¹

Recognizing the force of these points, a few courts eschew reliance on geography or organizational form and focus on whether the goods or services in question are for the prison’s use. In *Danneskjold v. Hausrath*, the Second Circuit swept aside the plaintiff’s arguments that he was an employee because his labor was voluntary, not forced, and was managed by a third party, not the prison.¹⁶² Although other courts had relied on such factors to rule against inmates, the Second Circuit dismissed them as mere matters of organizational form that made no material difference to the ultimate product.¹⁶³ Instead, inmates cannot be employees whenever “their labor”—in this case, work as a teaching assistant in a prison education program—“provides

156. 909 F.2d at 1555.

157. *Gilbreath*, 931 F.2d at 1334 (Nelson, J., dissenting).

158. *Danneskjold v. Hausrath*, 82 F.3d 37, 44 (2d Cir. 1996) (ruling against inmate workers, but rejecting relevance of an inside/outside distinction); *Henthorn v. Dep’t. of Navy*, 29 F.3d 682, 685-86 (D.C. Cir. 1994) (same).

159. See *Loving*, 455 F.3d at 563; *Barnett*, 1999 WL 110547, at *2; *Villarreal*, 113 F.3d at 206; *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1123 (11th Cir. 1997); *Vanski*, 974 F.2d at 808-09; *McCaslin*, 952 F. Supp. at 657; *George v. Badger State Indus.*, 827 F. Supp. 584, 588 (W.D. Wis. 1993).

160. *Danneskjold*, 82 F.3d at 43-44; *Henthorn*, 29 F.3d at 685; *Hale v. Arizona*, 993 F.2d 1387, 1401-03 (9th Cir. 1993) (Norris, J., dissenting). Presumably for this reason, the Ashurst-Summers Act, see *supra* notes 34-37, does not distinguish between publicly and privately managed prison industries. 18 U.S.C. § 1761(a) (Supp. II 2002).

161. Unicor Federal Prison Industries, Inc., http://www.unicor.gov/services/contact_helpdesk/ (last visited Feb. 1, 2008); see also Jon Swartz, *Inmates vs. Outsourcing*, USA TODAY, July 7, 2004, at 1B, available at http://www.usatoday.com/money/economy/employment/2004-07-06-call-center_x.htm.

162. 82 F.3d at 43.

163. *Id.* at 39.

services to the prison.”¹⁶⁴ The reason offered was that such services have no impact on the general labor market, in contrast to “prison labor . . . employed to produce goods or services that are sold in commerce,”¹⁶⁵ as in *Watson*. Other courts apply similar reasoning to goods and services consumed by government units other than the prison itself.¹⁶⁶

Labor’s fungibility, however, also undermines this wall around prison consumption. To the extent that prison laundry is cleaned by prisoners, either the prison or its contractor need not hire employees out of the ordinary labor market.¹⁶⁷ Moreover, inmates’ contributions toward prison operations typically come in those areas where large institutions often face a decision between performing a function itself and contracting out: laundry, food, and maintenance services are classic objects of subcontracting, in prisons and elsewhere.¹⁶⁸ Without inmate labor, firms providing these services would receive more business.¹⁶⁹

164. *Id.* at 39.

165. *Id.* at 44.

166. In *Gilbreath v. Cutter Biological, Inc.*, Judge Nelson would have held that inmates working inside a prison for a private plasma center were employees, based on their work’s economic significance in competitive product markets. 931 F.2d 1320, 1334 (9th Cir. 1991) (Nelson, J., dissenting). She distinguished the case of “prison maintenance or produc[ing] goods used solely by the state,” because in such cases “economic fairness in a competitive market does not come into play.” *Id.*; see also *Hale v. Arizona*, 993 F.2d 1387, 1400 (9th Cir. 1993) (Norris, J., dissenting) (arguing that FLSA coverage should be triggered by the sale of prison labor products in interstate commerce); *Harker v. State Use Indus.*, 990 F.2d 131, 134 (4th Cir. 1993) (reasoning that goods sold only to government entities pose “no threat to fair competition”); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (per curiam) (“[T]he payment of sub-minimum wages to [prisoners] poses no threat of unfair competition to other employees . . . because the [prison] does not operate in the marketplace and has no business competitors.”).

167. See *Vanskike v. Peters*, 974 F.2d 806, 811 (7th Cir. 1992); see also *Jovanovich v. Angelone*, 59 F.3d 175, No. 94-15015, 1995 WL 378678, at *2, (9th Cir. 1995) (table) (rejecting plaintiffs’ argument that, when inmates provide services that the prison is constitutionally obligated to deliver to other inmates, “if no qualified inmates had been available in the inmate population, the prison would have had to turn to the outside market”).

168. See *Danneskjold*, 82 F.3d at 43 (noting functional interchangeability of laundering prison garments in a prison-operated laundry and one operated by a subcontractor); *Lockett v. Neubauer*, No. 05-3209-SAC, 2005 WL 3557780, at *5 (D. Kan. Dec. 28, 2005) (considering claim by inmate who worked for private contractor that operated prison cafeteria); see also *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 687-88 (D.C. Cir. 1994) (considering claim by an inmate who was used to provide maintenance services). Insofar as requiring free labor is a way for prisons to make inmates bear the costs of confinement, note that the same end could be achieved by charging all inmates, or all inmate workers, for prison expenses. See discussion *infra* at Part IV.B.2.

169. See, e.g., Tracy Harmon, *Inmates Build a Prison*, PUEBLO CHIEFTAIN (Colo.), Dec. 29, 2006, available at 2006 WLNR 22680979 (reporting that use of prisoners in constructing additional prison cells saved Colorado millions of dollars, which presumably otherwise would have been spent hiring a private contractor). An episode in the history of prison labor illustrates the permeability of the line between internal government operations and market economic

Stripped of arbitrary restrictions, grounding employment status in competitive effects converges with grounding employment status in productive work. As the Seventh Circuit observed in *Vanskike*, "[C]arried to its logical conclusion, prisoners must be paid minimum wage for anything they do in prison that can be considered 'work.'"¹⁷⁰ For the *Vanskike* court, this conclusion proved the weakness of the underlying argument. Nonetheless, it underscores the coherence of this alternative account of employment's economic character and the difficulty of limiting it to cases like *Watson*.

Returning now to the contractual heart of the exclusive market account, we can see that each of its elements—voluntariness, exchange, and bargain—is quite independent of the existence of productive work. As Judge Norris's *Hale* dissent pointed out, "The fact that a prisoner may lack the choice not to work does not reduce the unfair competitive effect of his work product when it enters the channels of commerce."¹⁷¹ Similarly, the productive character of the work does not depend on whether it arises from, is motivated by, or advances the goals of penal incarceration. If a prison forces an inmate to produce a widget and then pays him for it in order to teach the value of obedience, to cause suffering, or to prepare him for post-release employment, such penal or rehabilitative purposes do nothing to stop the widget from being sold. As Judge Norris concluded, "[T]his relationship is both penological *and* pecuniary."¹⁷²

The productive work approach rejects the notion that economic activity originates within a separate market economic sphere and remains sequestered there. Instead, it emphasizes the ease with which inmates' work products can move across boundaries between

activity. Early twentieth-century prison labor reformers sought to suppress the contracting out of prison laborers to private firms in order to avoid competition with free labor. Instead, they favored state-use systems like the chain gang. Within a few decades, however, the chain gang itself was suppressed, in part because new constituencies realized that this work could be reallocated to a non-inmate labor force, such as the unionized employees of private construction firms or unemployed laborers who sought "work relief" on public works. LICHTENSTEIN, *supra* note 36, at 158-59, 188-91; see also Walsh-Healey Act, 41 U.S.C. § 35(c) (2000) (barring use of convict labor in federal contracts for the production of goods).

170. 974 F.2d at 811; see also *Wickard v. Filburn*, 317 U.S. 111, 128 (1942) ("Home-grown wheat . . . competes with wheat in commerce.").

171. 993 F.2d at 1403 (Norris, J., dissenting). As this quotation suggests, even when courts insist on the economic character of inmate production, they usually focus on competitive effects on third parties. This stands in some tension with the fact that employment law coverage generally is not limited to employers whose labor practices affect competitors in product markets. In particular, the FLSA applies across-the-board to state and local governments, regardless of whether there is any nongovernmental entity directly competing to provide the same services.

172. *Id.*

institutions that differ in their internal logic, linking them together without rendering them the same.¹⁷³

C. Generalizing From Prison Labor to Paid Nonmarket Work

As shown above, the prison labor cases consistently require an economic relationship to establish employment, but they divide between the exclusive market and productive approaches to assessing this economic character. This Section shows that this pattern extends well beyond both prison labor and the FLSA. The prison labor cases present in microcosm a tension that runs throughout statutory labor and employment law.

In varied settings, courts struggle with the employment status of what I loosely term “paid nonmarket work.”¹⁷⁴ Adults often perform productive work, and getare paid as a result, within institutions structured by mechanisms and goals that differ sharply from those conventionally associated with the labor market. To resolve this apparent contradiction, courts turn to the exclusive market and productive work approaches, with the respective restrictive and expansive implications seen above.

In the interest of space and clarity, I do not provide a comprehensive survey but instead offer a sampling of cases sufficient to demonstrate the vitality of the pattern. Because the productive work approach is less fully developed in the prison labor cases, I begin with its more robust influence in other controversies over paid nonmarket work.

1. Employment as Productive Work

In many cases involving paid nonmarket work, courts focus on the economic benefits to the putative employer and, often, how access to these benefits influences the employer’s downstream participation in labor and product markets. These cases do not treat institutional specificity, or the relative absence of arms-length, financially motivated bargaining, as a barrier to the existence of an employment relationship. Instead, they see workers as simultaneously occupying both employment and other social roles.

173. See generally Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS: COMMODITIES IN CULTURAL PERSPECTIVE* 3 (Arjun Appadurai ed., 1986); Viviana A. Zelizer, *Circuits Within Capitalism*, in *THE ECONOMIC SOCIOLOGY OF CAPITALISM* 289 (Victor Nee & Richard Swedberg eds., 2005).

174. The phrase is imperfect because it elides the *contested* relationship to the market that is central to my topic.

The productive work approach dominates legal authority on the FLSA employment status of civilly committed patients in mental institutions, as we briefly saw above.¹⁷⁵ The workers' creation of "economic benefits" for the institution provided the affirmative case for finding employment status in *Souder v. Brennan*.¹⁷⁶ Crucially, though, the court had to confront the employers' objections that the work programs in question had therapeutic value for the patients and were instituted for that reason.¹⁷⁷ Analogous arguments usually carry the day in prison labor cases, but not here. *Souder* reasoned that accepting this objection "would be to make therapy the sole justification for thousands of positions as dishwashers, kitchen helpers, messengers and the like."¹⁷⁸ The court described patient-workers based on what they do—"dishwashers" and "messengers"—rather than by their relationship to the institution.¹⁷⁹ Like ordinary employees, they productively wash dishes and carry messages.¹⁸⁰

Souder's emphasis on productive work, not institutional status, echoes in a modern Supreme Court opinion that has received surprisingly little attention in the case law and scholarship on employment relationships. In *Tony & Susan Alamo Foundation v. Secretary of Labor*, the putative employer was a not-for-profit religious organization.¹⁸¹ It raised revenue by selling products and services to the public through enterprises ranging from gas stations to hog farms to candy stores.¹⁸² These operations also "function[ed] as 'churches in disguise'—vehicles for preaching and spreading the gospel to the public."¹⁸³ The businesses were staffed by "'associates,' most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation."¹⁸⁴ The Foundation provided the associates food, shelter, and clothing, some of which were conditional on work performance.¹⁸⁵

175. *Supra* Part I.D. Recent NLRA cases involving individuals with severe mental disabilities have taken a different approach by emphasizing the rehabilitative nature of the individuals' work. See discussion *infra* Part II.C.2.

176. 367 F. Supp. 808, 813 (D.D.C. 1973).

177. *Id.* at 813 & n.21.

178. *Id.* at 813.

179. *Id.*

180. *Id.*; see also 29 C.F.R. § 525.4 (2008) (defining activity by patient workers as producing an "economic benefit" if it is "of the type that workers without disabilities normally perform, in whole or in part in the institution or elsewhere").

181. 471 U.S. 290, 292 (1985).

182. *Id.* at 292.

183. *Tony & Susan Alamo Found.*, 471 U.S. at 298-99.

184. *Id.* at 292.

185. *Id.* at 292, 301 n.22.

The Foundation opposed FLSA coverage with a “religious, not pecuniary purpose,” defense analogous to the one courts frequently accept with regard to prison labor.¹⁸⁶ Its operations were “infused with a religious purpose” that shaped its relationship with the associates.¹⁸⁷ The Foundation “minister[ed] to the needs of the associates . . . both by providing rehabilitation and by providing them with food, clothing, and shelter.”¹⁸⁸ The associates shared this understanding. They viewed the work as “‘volunteering’ . . . services to the Foundation” as “part of [their] ministry” and not as motivated by “material rewards.”¹⁸⁹

Unanimously, the Court rejected these arguments because they failed to account for how the associates’ work was part of broader circuits of exchange: “[T]he admixture of religious motivations does not alter a business’s effect on commerce.”¹⁹⁰ Those motivations, “however sincere, cannot be dispositive” in the face of the substantive economic character of what the associates produced and received.¹⁹¹ Here, the Supreme Court applied precisely the reasoning that underlies the productive work approach to prison labor, there a minority view.

Recently, the Second Circuit relied on similar reasoning to hold that welfare recipients could be Title VII employees when they worked for local government agencies as a condition of receiving public assistance. In *United States v. City of New York*, the city argued that these “workfare” jobs were not employment because they were integrated into a comprehensive relationship of assistance.¹⁹² The court, however, rejected any “artificial dichotomy” requiring that “one must be either a welfare recipient or an employee and cannot be

186. Compare *id.* at 298 with *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) (en banc) (characterizing prison labor as “penological, not pecuniary”).

187. *Tony & Susan Alamo Found.*, 471 U.S. at 298.

188. *Id.*

189. *Id.* at 300; see also *McClure v. Salvation Army*, 460 F.2d 553, 557 (5th Cir. 1972) (rejecting a similar argument under Title VII).

190. *Tony & Susan Alamo Found.*, 471 U.S. at 299; see also *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990) (rejecting similar “personal ministry” arguments against FLSA coverage of teachers and support staff at a religious school).

191. *Tony & Susan Alamo Found.*, 471 U.S. at 301. “That the associates themselves vehemently protest coverage” did not alter this analysis. *Id.* at 302. To explain why, the Court turned to the no-waiver principle. Allowing coverage to require the consent of the workers could permit employers “to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act,” which, in turn, “would be likely to exert a general downward pressure on wages in competing businesses.” *Id.*; accord *SUPIOT*, *supra* note 7, at 5.

192. 359 F.3d 83, 87, 92 (2d Cir. 2004). In the interest of full disclosure, note that I co-wrote an *amicus* brief in support of the plaintiffs.

both.”¹⁹³ Instead, an employment relationship could exist because the workers had received cash and other benefits contingent on their performing labor that was “useful” to the city.¹⁹⁴ For the purpose of establishing employment, this productive work provided the requisite economic aspect, notwithstanding the nonmarket aspects of the relationship that also shaped its character.¹⁹⁵

2. Employment as Exclusively Market Work

Notwithstanding these applications of a productive work analysis, the exclusive market approach also has had its day outside the prison labor context and beyond the FLSA.¹⁹⁶ These cases rely on

193. *Id.* at 94. In this regard, *City of New York* specifically repudiated the analysis of FLSA coverage of workfare workers offered by the Tenth Circuit in *Johns v. Stewart*, 57 F.3d 1544 (10th Cir. 1995); see also *Elwell v. Weiss*, No. 03-CV-6121, 2007 WL 2994308, at *3 (W.D.N.Y. Sept. 29, 2006) (finding workfare workers to be FLSA employees primarily based on *City of New York*, and distinguishing *Johns*); *Stone v. McGowan*, 308 F. Supp. 2d 79, 86 (N.D.N.Y. 2004) (construing *City of New York* to dictate FLSA coverage of workfare workers); *infra* text accompanying notes 207-209.

194. *City of New York*, 359 F.3d at 97. Relying directly on the work’s value to the employer reflects a difference in emphasis from *Tony & Susan Alamo Foundation’s* focus on “effect[s] on commerce,” 471 U.S. at 299, but they amount to nearly the same thing. Workfare’s benefits lessen the city’s demand for hiring in the regular labor market. See David T. Ellwood & Elisabeth D. Welty, *Public Service Employment and Mandatory Work: A Policy Whose Time Has Come and Gone and Come Again?*, in FINDING JOBS: WORK AND WELFARE REFORM 299, 300 (David E. Card & Rebecca M. Blank eds., 2000); Steven Greenhouse, *Many Participants in Workfare Take the Place of City Workers*, N.Y. TIMES, Apr. 13, 1998, at A1; see also *Souder v. Brennan*, 367 F. Supp. 808, 813 n.20 (D.D.C. 1973) (noting, but not relying on, the argument that regular employees “who perform non-professional staff work at various institutions” face downward pressure on their labor standards through “the use of unpaid and underpaid patient-workers”).

195. See also *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230, 1235 (11th Cir. 2004) (relying on *City of New York* to find Title VII employee status for a graduate student “even though [her] course work obligations required her to complete a rotation in three laboratories and much of her work . . . was to fulfill the program’s requirements”).

196. The relatively few non-FLSA prison labor cases echo the familiar themes and results. See *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir. 1991) (denying employment status under Title VII because the “relationship . . . arises out of [plaintiff’s] status as an inmate, not an employee”); *Rhodes v. Schaefer*, No. 98-3323-GTV, 2002 WL 826471, at *2 (D. Kan. Mar. 20, 2002); *McCaslin v. Cornhusker State Indus.*, 952 F. Supp. 652, 657 (D. Neb. 1996) (reasoning, under Title VII, that “[t]he prisoner does not enter into a bargain with the prison to become a prisoner in order to be able to work in the prison industries, as might a private individual who contracts with an employer”); *Pierce v. King*, 918 F. Supp. 932, 942 (E.D.N.C. 1996); *Walton v. Fed. Prison Indus.*, No. 89-3257-R, 1991 WL 126708, at *1 (D. Kan. June 13, 1991); see also *Kounelis v. Sherrer*, 396 F. Supp. 2d 525, 533 (D.N.J. 2005) (denying an inmate coverage under a state employee whistleblower statute because his “assignment arises from the custodial relationship” with the prison).

Some courts have suggested that they rejected inmate FLSA claims in part because of FLSA-specific concerns about workers’ standard of living and downward competitive pressure on wages, and thus that the result might differ under another statute. *E.g.*, *Vanskike v. Peters*, 974

an opposition between market-driven economic relationships and institutionally specific work arrangements governed by distinct goals and structures.

The exclusive market approach has been particularly prominent in a series of recent National Labor Relations Board ("NLRB") rulings. In a case addressing the NLRA union organizing and collective bargaining rights of paid workers in a special program for individuals with severe disabilities, the Board denied employee status on the ground that their work was "primarily rehabilitative" rather than part of an "arms-length economic relationship[]." ¹⁹⁷ This reasoning precisely tracks the dominant strand of prison labor cases, and it accepts the employer arguments that courts rejected in *Souder*, *Alamo Foundation*, and *City of New York*. ¹⁹⁸ Similarly, the Board recently held that graduate student teaching and research assistants are not employees because they "have a primarily educational, not economic, relationship with their university." ¹⁹⁹ In so doing, it reversed its four-year-old decision that nothing prevented workers from being employees "simply because they also are students." ²⁰⁰

The exclusive market approach also won out in *Marshall v. Regis Educational Corp.*, another case involving an educational setting. Before rejecting FLSA claims involving college students who received rental and tuition assistance in exchange for serving as residence hall assistants, the Tenth Circuit acknowledged that the students' work "economically benefited [the college]." ²⁰¹ Nonetheless, it held that no employment relationship existed because the students' work was an "isolated aspect[]" of a total program which must be

F.2d 806, 810 n.5 (7th Cir. 1992). Such courts also typically cite the Ashurst-Sumners Act's restrictions on commerce in prisoner-produced goods, reasoning either that FLSA coverage would be superfluous or that the existence of the Ashurst-Sumners regulatory structure implies that Congress assumed that the FLSA did not apply to inmates. *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters.*, 112 F.3d 1119, 1124 (11th Cir. 1997); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Hale v. Arizona*, 993 F.2d 1387, 1397 (9th Cir. 1993); *Harker v. State Use Indus.*, 990 F.2d 131, 134 (4th Cir. 1993); *Vanskike*, 974 F.2d at 811-12. *But see Hale*, 993 F.2d at 1404-05 (Norris, J., dissenting). As it turns out, however, the absence of these considerations under different statutes has never made a difference.

197. *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, 985 (2004).

198. *See also Williams v. Strickland*, 87 F.3d 1064, 1067 (9th Cir. 1996) (holding that a worker in Salvation Army thrift store was not an FLSA employee because his "work therapy was not performed in exchange for in-kind benefits, but rather was performed to give him a sense of self-worth, accomplishment, and enabled him to overcome his drinking problems and reenter the economic marketplace").

199. *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004).

200. *N.Y. Univ.*, 332 N.L.R.B. 1205, 1209 (2000), *overruled by* 342 N.L.R.B. 483 (2004).

201. *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326-27 (10th Cir. 1981).

considered within the full educational context.”²⁰² The court subsequently applied its *Regis Educational* approach to a workfare program, holding that plaintiff welfare recipients were not employees because the “overall nature of [their] relationship . . . is assistance, not employment.”²⁰³

Similar points can be made about cases that are much closer to prison labor. Relying explicitly on prison labor precedents, a body of case law finds no employment relationship in paid work by persons confined through post-incarceration civil commitment,²⁰⁴ pre-trial detention on criminal charges,²⁰⁵ and non-criminal immigration proceedings.²⁰⁶ These relationships involve “a custodial relationship, not an employment relationship.”²⁰⁷ Insofar as the relationship is custodial (or educational, or rehabilitative, or penological), it is not employment.²⁰⁸

* * *

Across a wide range of institutional settings, courts clash repeatedly—and sometimes equivocate within a single opinion—over whether someone paid by an employer and under its control is (a) an employee because she performs productive work or (b) not an employee because the relationship is not at root a free market exchange. This pattern recurs not only broadly but also spontaneously. Often without any apparent awareness of, or cross-citation to, analogous cases in different institutional contexts, the courts and parties repeatedly turn to the same competing ways of understanding economic life. This recurrence suggests a problem deeper than a technical doctrinal disagreement. The next Part plumbs these depths.

202. *Id.* at 1327.

203. *Johns v. Stewart*, 57 F.3d 1544, 1558 (10th Cir. 1995).

204. See *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992) (per curiam) (applying “prisoner” rather than “patient” precedents to civil commitment of persons previously convicted of a crime); see also *Shaw v. Briody*, No. 2:02CV500FTM-33SPC, 2005 WL 2291711, at *3 (M.D. Fla. Sept. 20, 2005).

205. *Tourscher v. McCullough*, 184 F.3d 236, 243-44 (3d Cir. 1999); *Villarreal v. Woodham*, 113 F.3d 202, 207 (11th Cir. 1997).

206. *Guevara v. INS*, 902 F.2d 394, 396 (5th Cir. 1990).

207. *Villarreal*, 113 F.3d at 207. These decisions show that the reasoning of the prison labor cases has not, in fact, been limited by inmates’ special status within the criminal justice system or under the Thirteenth Amendment.

208. In one case, the court even found that a pre-trial detainee’s FLSA claim failed because his “employment bears no indicia of traditional free-market employment,” even though his Thirteenth Amendment involuntary servitude claim may have had merit. *Tourscher*, 184 F.3d at 241-42. But see cases cited *supra* note 119 (reasoning that voluntariness is essential to employment status).

III. HOW BOTH ACCOUNTS OF THE ECONOMIC DIMENSION FAIL

When deciding the employment status of paid nonmarket work, courts largely talk past each other. Without acknowledging it, they use two quite different ways of assessing whether the relationship at hand is economic. Precedent supports both the exclusive market and productive work approaches, and courts that rely on one generally still recognize the other to some degree. In any particular case, giving precedence to one analysis or the other will resolve the dispute in opposite directions.

Where do we go from here? One way to resolve this impasse would be to adopt and consistently apply either the exclusive market or productive work approach. Rather than arguing over the true meaning of the word “economic,” we could simply select one approach for the purpose of determining employment status.²⁰⁹ Doing so would require confronting basic questions about why employment protections are warranted in the first place. An exclusive market analysis has affinities with theories that justify employment law as a response to injustices or other flaws that are specific to market mechanisms.²¹⁰ A productive work analysis has affinities with theories that justify employment law based on the importance of work in individuals’ lives and on the claims to belonging and support that arise from contributing to one’s community.²¹¹

This Part tacks in a different direction, despite the genuine appeal of resolving the dispute over employment’s economic dimension within its existing terms. Instead, I show that neither the exclusive market nor the productive work account provides a viable method for identifying employment relationships. Rigorously applying either one would lead to results radically inconsistent with common understandings of employment as a social category and, not coincidentally, with settled law outside the confused domain of paid

209. Cf. Williams & Zelizer, *supra* note 17, at 371 (arguing that debates over commodification should be reframed as disputes over how economic relationships should be organized, not whether they should have any economic character).

210. See, e.g., Alan Hyde, *What Is Labour Law?*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 5, at 37, 53-57; Brian Langille, *Labour Law’s Back Pages*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 5, at 13, 22-26.

211. See, e.g., Langille, *supra* note 210, at 32-35; Schultz, *supra* note 3, at 1886-92; Seana Valentine Shffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 FORDHAM L. REV. 1643, 1666-69 (2004). A third common view is that labor and employment laws protect other workers and firms against unfair competition. See, e.g., Harris, *supra* note 80, at 99-141. I doubt that this position can be anything but derivative of some combination of the first two; otherwise, it begs the question of what renders the competition unfair. The most plausible answers involve undermining the bargaining power of other workers or interfering with other workers’ access to substantive labor standards.

nonmarket work. Either choice would both shift the law off the foundation of a descriptive approach to employment status and yield results incompatible with any plausible purposive alternative.²¹²

In brief, unleashing the restrictive tendencies of the exclusive market approach would not simply defeat employment status for contested paid nonmarket work. Instead, it would eat into, and arguably devour, quite conventional employment relationships. In complementary fashion, unleashing the expansive tendencies of the productive work approach would not simply grant employment status to paid nonmarket work. Instead, it would incorporate into employment countless relationships that lie securely and sensibly outside the reach of employment law.

These runaway tendencies have deep roots. They lie in the familiar but troubled notion of the economy as a distinct sphere of human activity, a sphere that operates separately from other institutions and, therefore, that can be regulated separately. To make this connection, I draw on two literatures that long have struggled with the boundaries of the economy: economic sociology and anthropology and feminist theories of work and family.

A. The Impossibly Restrictive Exclusive Market Standard

When courts define employment as economic in the sense of a market relationship, they rely on a theory of separate spheres: the economy is both internally coherent—defined by the market—and fundamentally distinct from other institutions. This account of the economy and its relationship to other social practices is commonplace. It appears throughout popular discourse, political philosophy,²¹³ and traditional divisions of labor among social sciences.²¹⁴ It is no wonder that courts and parties turn to it again and again.

Despite this familiarity, a number of scholarly traditions sharply criticize the separate spheres model. The model ignores how the existence and maintenance of these spheres depends on entrenched but nonetheless contingent institutional arrangements and cultural understandings, and it elides the ineluctably social character of what we label market relationships.

212. See *supra* Part I.C.

213. See, e.g., WALZER, *supra* note 16.

214. See, e.g., Frank Dobbin, *The Sociological View of the Economy*, in *THE NEW ECONOMIC SOCIOLOGY: A READER* 1, 2-4 (Frank Dobbin ed., 2004).

These difficulties doom any attempt to rely on market exclusivity as a test for employment status.²¹⁵ Paradigmatic employment settings regularly possess the same “nonmarket” characteristics that, when seen in prison labor and related cases, courts sometimes take to negate the existence of an employment relationship. Consistently applied, the exclusive market analysis would leave little or nothing as employment.

1. The Embeddedness Critique of the Exclusive Market

When courts contrast prison labor with “traditional free-market employment”²¹⁶ that is a “true economic employer-employee relationship,”²¹⁷ they invoke the familiar picture of what economic historian Karl Polanyi called the “self-regulating market.”²¹⁸ Polanyi’s widely influential work documents a “great transformation” in Western economic thought and institutions during the nineteenth and early twentieth centuries.²¹⁹ Ascendant was the idea, and the aspiration, of an economy in which individuals rationally and separately pursue their self interest, particularly financial gain. Laws of supply and demand govern resource allocations that emerge through aggregations of individual bargains. Actors meet to conduct discrete transactions, and any ongoing relationships simply are long-term contracts. Matters of sentiment, intimacy, loyalty, morality, spirituality, and kinship belong to other domains and interfere with the smooth and proper functioning of markets.²²⁰ The divide between economy and society thus maps onto a divide between markets and other institutions.

An account of what the market is not plays a crucial role in the exclusive market approach to identifying employment relationships. Linking prison labor to institutions and practices designated as *noneconomic* distances it from market employment. The absence of an economic relationship is established by locating prison labor in a separate social sphere: the criminal justice system’s institutions of punishment.²²¹

215. Cf. MITCHELL, *supra* note 18, at 301 (arguing that an analysis of the particularities of any specific market practice will “lead[] away from a closed economy . . . into farming, households, family, state, and power. The closure unravels.”).

216. Villarreal v. Woodham, 113 F.3d 202, 207 (11th Cir. 1997).

217. Vanskike v. Peters, 974 F.2d 806, 812 (11th Cir. 1992).

218. KARL POLANYI, *THE GREAT TRANSFORMATION* 44-45, 74 (Beacon Press 2001) (1944).

219. *Id.* at 3.

220. See ZELIZER, *supra* note 27, at 20-32; Granovetter, *supra* note 13, at 53.

221. DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY* 17, 282-83 (1990) (characterizing “penalty” as a distinct “social institution” such as “the family, the law, education, government,

On what basis is punishment designated a noneconomic field? For Polanyi, what he termed a "formalist" definition of economic action linked the self-regulating market to a freestanding economic sphere.²²² Formalism identifies the economic with means-ends rationalizing behavior by individuals seeking to maximize the realization of their discrete interests, construed narrowly to emphasize material or financial concerns.²²³ In other words, economic action is the "economizing" behavior associated with conduct in the self-regulating market of modern Western economies.²²⁴ Insofar as institutions are characterized by other forms of action, they are not economic in nature.

This exclusive market view has been criticized trenchantly by, among others, proponents of "the new economic sociology." This school of thought has built a wide-ranging research program on Polanyi's antiformalist idea that economic activity is necessarily "embedded" in social relations.²²⁵ Mark Granovetter's foundational article rejects the claim that core economic institutions—including labor markets—can be understood adequately based on models of "self-interested behavior affected minimally by social relations."²²⁶ Instead, for Granovetter, economic action is structured in fundamental ways by "ongoing social relations."²²⁷ A classic example is the structuring of job searches

the market, the military, and religion," but arguing that "these institutional worlds are only partly self-contained"); Bernard E. Harcourt, *Public Economy, Commerce, and Punishment: The Birth of Natural Order* 28-29 (Univ. of Chi. Law Sch., Working Paper presented July 12, 2007, on file with Vanderbilt Law Review) (critically exploring the intellectual history of economy and criminality as separate spheres); see also Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 J. POL. ECON. 385, 391-92 (1993) (advocating an economic approach to crime).

222. Karl Polanyi, *The Economy as Instituted Process*, in *SOCIOLOGY OF ECONOMIC LIFE*, *supra* note 13, at 31; see also Frank Cancian, *Maximization as Norm, Strategy, and Theory: A Comment on Programmatic Statements in Economic Anthropology*, 68 AM. ANTHROPOLOGIST 465, 465-69 (1966); Granovetter, *supra* note 13, at 51-52.

223. Without this last restriction, the "economic" threatens to expand to encompass all of human behavior, as Gary Becker famously argues it should. See generally GARY BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976). Whatever the merits of Becker's approach in other regards, it abandons any distinction between economic and noneconomic conduct. See COASE, *supra* note 147, at 3 (noting that "economists have no subject matter," only "an approach"); Cancian, *supra* note 222, at 466.

224. Cancian, *supra* note 222, at 466; Granovetter, *supra* note 13, at 53; Polanyi, *supra* note 222, at 31-33.

225. For a discussion of the relationship between economic sociology and developments in institutional economics and behavioral economics, see Granovetter, *supra* note 13, at 52-55.

226. *Id.* at 51.

227. *Id.*; see also TILLY & TILLY, *supra* note 105, at 70-93; Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

through social networks and affinity groups.²²⁸ Employers often invoke similar notions when they assert that the firm is really “a family,” suggesting that its relations are shaped substantially by trust, care, and loyalty.²²⁹ Other examples include the role of gender, race, and marital status in influencing wage levels, employees’ acceptance of supervisory authority and relations with co-workers, and the influence of class on occupational choice.²³⁰

2. Employment’s Embeddedness in Systems of Punishment

The embeddedness critique casts doubt on whether circumstances that courts agree *do* constitute employment could satisfy the exclusive market standard against which prison labor regularly falls short. In fact, the judicial opinions analyzing paid nonmarket work avoid this question by relying on strikingly abstract characterizations of ordinary employment. They almost never ask concretely whether the characteristics that allegedly mark work as “nonmarket” are absent from employment. The signal exception to this pattern is *Souder*, which classified institutionalized mental patients as employees.²³¹ Responding to the argument that the patients’ work was not employment because it had therapeutic value, the court observed that “the work of most people, inside and out of institutions,

228. MARK GRANOVETTER, *GETTING A JOB* (2d ed. 1995); TILLY & TILLY, *supra* note 105, at 190-93.

229. SANFORD JACOBY, *EMPLOYING BUREAUCRACY: MANAGERS, UNIONS, AND THE TRANSFORMATION OF WORK IN AMERICAN INDUSTRY, 1900-1945*, at 49-52 (1985); TILLY & TILLY, *supra* note 105, at 117; Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 818-19, 851-52 (1994); *see also* Olsen, *supra* note 16, at 1525-28 & n.101. This notion finds some expression within labor law doctrines that obligate employees to display loyalty, deference, and respect to their employers as part of their “common enterprise.” JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* 84-86 (1983).

230. *See* JACQUELINE JONES, *AMERICAN WORK: FOUR CENTURIES OF BLACK AND WHITE LABOR* 14, 302, 310, 312, 349 (1998) (demonstrating historically how certain jobs and occupations have been coded as “white” or “black” and how white workers have enforced racial restrictions on black coworkers); ALICE KESSLER-HARRIS, *A WOMAN’S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 2 (1990); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1748-55 (1998). Other critiques of the self-regulating model emphasize the foundational role of state policies protecting private property and bodily integrity, enforcing contracts, and promoting competition, *see* Block & Evans, *supra* note 16, at 505; Frank Dobbin & Timothy J. Dowd, *The Market that Antitrust Built: Public Policy, Private Coercion, and Railroad Acquisitions, 1825 to 1922*, 65 AM. SOC. REV. 631, 633, 651-53 (2000); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470-94 (1923), or the importance of a variety of commitments other than maximizing compensation that influence employees’ motivations to work and choose among jobs. *See* TILLY & TILLY, *supra* note 105, at 115-16; Davidov, *The Three Axes of Employment*, *supra* note 5, at 387-89.

231. *Souder v. Brennan*, 367 F. Supp. 808, 813 (D.D.C. 1973).

is therapeutic in the sense that it provides a sense of accomplishment, something to occupy the time, and a means to earn one's way."²³²

Similarly, the penological character invoked to locate prison labor outside the economy can also be found in forms of work accepted as employment. The next section generalizes this point to employment's embeddedness in a wide range of nonmarket institutions. Thus, despite beginning with what arguably are marginal cases, we arrive ultimately at the center. The difficulties of an exclusive market approach cannot be confined to mere fuzziness around the edges.

I begin with an unstable distinction among inmates. "[P]risoners are not employees," Judge Posner explained recently, simple as that.²³³ No matter what else one might say about inmate work, "[t]he prisoner is still a prisoner."²³⁴ Nonetheless, Judge Posner preserved *Watson's* and *Carter's* holdings that prisoners on work release can be employees. In such cases, "prisoners weren't working as prison labor, but as free laborers in transition to their expected discharge from the prison."²³⁵ These prisoners somehow shed their "prisonerness" to become employees. How can this be so?

None of the factors cited to distinguish work release programs from other inmate labor can survive rigorous application of the exclusive market approach. Recall, for instance, how courts overcame claims that some inmate labor was "voluntary." They reasoned that voluntariness is impossible in the pervasively coercive context of imprisonment, or that even voluntary work "serves all of the penal function of forced labor . . . and, therefore, should not have a different legal status."²³⁶ These points apply to work release programs, too, notwithstanding suggestions that their voluntary character distinguishes them from nonemployment forms of inmate labor.²³⁷ For instance, administrators typically tout work release as occupying inmates' time, inculcating vocational skills and responsible habits, and earning money that can defray prison expenses, support inmates'

232. *Id.* at 813 n.21.

233. *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005); *accord* *Loving v. Johnson*, 455 F.3d 562, 563 (5th Cir. 2006) (per curiam).

234. *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996).

235. *Bennett*, 395 F.3d at 410.

236. *Danneskjold*, 82 F.3d at 43; *see also* discussion *supra* note 129.

237. *See Danneskjold*, 82 F.3d at 42 (characterizing inmates participating in work release as "free labor"); *McMaster v. Minnesota*, 30 F.3d 976, 979-80 (8th Cir. 1994); *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994); *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992); *see also* *Benavidez v. Sierra Blanca Motors*, 922 P.2d 1205, 1209 (N.M. 1996) (classifying work release as employment under state workers' compensation statute based on its voluntariness, notwithstanding that all inmates had a statutory duty to work in some form).

families, build savings for release, and enhance consumption during confinement.²³⁸ These are the same penal or rehabilitative purposes cited to cast other inmate work as noneconomic.²³⁹

Similarly, courts characterize work release as an arms-length transaction in which participants “freely contract with a non-prison employer to sell [their] labor.”²⁴⁰ And yet the prison typically screens inmates for eligibility, selects authorized employers, regulates pay and other conditions, and strictly regulates inmates’ disposal of their earnings.²⁴¹ When applying an exclusive market approach, courts rely on such features to conclude that prison labor arises out of “the relationship between prison and prisoner”²⁴² and thus cannot be employment.²⁴³

More generally, the goals and power of the criminal justice system play an important role in employment relationships far beyond the limited case of work release. Approximately five million adults in the United States are under parole or probation supervision,²⁴⁴ and

238. See *Reimonenq v. Foti*, 72 F.3d 472, 476 (5th Cir. 1996); SUSAN TURNER & JOAN PETERSILIA, *WORK RELEASE: RECIDIVISM AND CORRECTIONS COSTS IN WASHINGTON STATE 1* (1996); Jeanne Flavin, *Work-Release Programs*, in 2 *ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES* 1055 (Mary Bosworth ed., 2005).

239. See, e.g., *Danneskjold*, 82 F.3d at 43 (asserting that prison labor “occupies prisoners’ time that might otherwise be filled by mischief; it trains prisoners in the discipline and skills of work; and it is a method of seeing that prisoners bear a cost of their incarceration”); *Vanskike*, 974 F.2d at 809 (characterizing prison labor as “rehabilitative or penological” in character based on a state statute declaring prison labor’s purposes to be “to equip such persons with marketable skills, promote habits of work and responsibility and contribute to the expense of the employment program and the committed person’s cost of incarceration”).

240. *Henthorn*, 29 F.3d at 686; see also *McMaster*, 30 F.3d at 979; *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir. 1990); *Barnett v. Young Men’s Christian Ass’n, Inc.*, No. 98-3625, 1999 WL 110547, at *1 (8th Cir. Mar. 4, 1999).

241. TURNER & PETERSILIA, *supra* note 238, at 3-4; Jeanne Flavin, *supra* note 238, at 1055; *Speedrack Prods. Group, Ltd. v. N.L.R.B.*, 114 F.3d 1276, 1277 (D.C. Cir. 1997) (noting that inmates in work release program were required to work overtime, forbidden to quit without good cause, subject to prison discipline for workplace misconduct, and could be removed at the prison’s discretion). Income often must be allocated to the costs of incarceration, victim restitution, and child support. See *Reimonenq*, 72 F.3d at 474-75; *Watson*, 909 F.2d at 1555; *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 10-11 (2d Cir. 1984); see also Dan Gibbard, *Jail Beefs Up Work-Release*, CHI. TRIB., Oct. 27, 2006, Metro, at 1.

242. *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) (en banc).

243. See discussion *supra* Part II.A. For cases rejecting arguments that these features of work release programs preclude inmates from participating in NLRB elections at their worksite, see *Speedrack Prods. Group*, 114 F.3d 1276; *Rosslyn Concrete Const. Co. v. N.L.R.B.*, 713 F.2d 61 (4th Cir. 1983).

244. LAUREN E. GLAZE & THOMAS P. BONCZAR, *BUREAU OF JUSTICE STATISTICS BULLETIN: PROBATION AND PAROLE IN THE UNITED STATES*, 2005, at 2 (2007), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus05.pdf>; see also MELOSSI & PAVARINI, *supra* note 111, at 6 (noting “penal control ‘in liberty’ such as that of the probation system widely practiced in the United States”).

maintaining employment is a typical condition of release.²⁴⁵ Not only are these individuals subject to incarceration for failure to work²⁴⁶—not exactly the free agents that courts imagine as employees—but they are subject to such coercion because work advances penological and rehabilitative goals. The exclusive market approach would seem to throw employment status into doubt in these circumstances.

Broader still, obligations to provide for family members through direct provision, child support, and alimony are reinforced by legal coercion. At the limit, failure to meet these obligations by obtaining and maintaining employment can trigger dissolution of family relations, criminal sanctions for neglect, or contempt proceedings.²⁴⁷ Employment under these circumstances is deeply intertwined with institutions beyond “the market” and serves interests—including the state’s interest in ensuring private responsibility for childrearing²⁴⁸—well beyond narrow financial interests of employer and employee.

3. The Embeddedness of Employment More Generally

The criminal justice system is just one of many institutions that weaves its distinctive goals and practices into ordinary employment relationships. In *Alamo Foundation*, for instance, associates’ labor and the Foundation’s support were incidents of a larger relationship structured and motivated by shared religious commitment.²⁴⁹ The arrangement was a far cry from the exclusive market model of an arms-length wage bargain independent of any other relationship. An exclusive market approach would have led the Court to the opposite result.

245. See John Rakis, *Improving the Employment Rates of Ex-Prisoners Under Parole*, 69 FED. PROBATION 7 (2005), available at <http://www.uscourts.gov/fedprob/jun2005/employment.html>.

246. ROBYN L. COHEN, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PROBATION AND PAROLE VIOLATORS IN STATE PRISON, 1991, at 3 (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppvsp91.pdf> (reporting that in 1991 well over 1,000 persons were reincarcerated due to failure to secure or maintain employment).

247. See DOROTHY ROBERTS, SHATTERED BONDS 33-34, 179-80 (2002); see also cases cited *supra* note 124 (upholding criminal contempt conviction based on failure to hold employment while subject to child support order). Someone who takes a job in order to avoid such consequences is in a situation similar in many respects to the prisoners who are subject to a general work requirement but remain free to choose how they fulfill it. See *supra* text accompanying notes 123-126. Of course, most workers desire to provide for their families regardless of legal compulsion, cf. ANNE L. ALSTOTT, NO EXIT: WHAT PARENTS OWE THEIR CHILDREN AND WHAT SOCIETY OWES PARENTS 54-56 (2004), but inmates’ desire to work appears similarly independent of legal compulsion. See sources cited *supra* note 144 (noting inmate demand for voluntary labor assignments far in excess of supply).

248. See generally ALSTOTT, *supra* note 247.

249. 471 U.S. 290 (1985); see also *supra* text accompanying notes 181-185.

Another unanimous Supreme Court decision illustrates similar points in a more conventional workplace. *N.L.R.B. v. Town & Country Electric, Inc.* held that union “salts”—members and staff who took electrician jobs with a target firm in order to organize its workers, and who were paid by the union to do so—were employees under the NLRA.²⁵⁰ These workers’ primary motivation was to gain an organizing advantage through their foothold in the workforce, not to get paid by the employer.²⁵¹ Nonetheless, the Court held that these nonfinancial goals did not undermine employment status.

More generally, many organizations hire exclusively or preferentially from a limited pool of applicants with an ongoing non-employment relationship to the employer: membership in a religion, enrollment in a college, residence in specific neighborhood, possession of a family connection, and so on.²⁵² They do so in part because they have goals for the employment relationship other than extracting labor, including benefitting the individual workers or strengthening ties within a particular community. Government and nonprofit employers, as well as for-profit “social entrepreneurs,” are conventional employers, despite organizing work around the achievement of nonfinancial goals. Many employees go to work motivated in substantial part by contributing to others’ well-being, by furthering the interests of an employer they respect, or by establishing their identity within an occupational community.²⁵³ These considerations pervade not just who works in what jobs but also how pay is structured, how work is organized, how co-workers interact, and what expectations exist between employers and employees. Indeed, in other contexts, labor and employment law often characterizes workers’ loyalty, deference, and respect toward their employers as essential aspects of an employment relationship.²⁵⁴ An exclusive market

250. 516 U.S. 85, 96-98 (1995).

251. For organizers already on the union payroll, the union made up any difference between their electrician’s pay and their union salary, and it continued to pay their fringe benefits. *Town & Country Elec., Inc. v. N.L.R.B.*, 34 F.3d 625, 627 (8th Cir. 1994).

252. See, e.g., *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1396-97 (4th Cir. 1990) (finding a Title VII employment relationship notwithstanding religious school’s requirement that workers share its specific religious creed); Rev. Rul. 55-500, 1955-2 C.B. 398 (ruling that, for tax purposes, students were employed by a corporation notwithstanding that an agreement with their college gave students exclusive access to all of the employer’s production jobs).

253. See Zatz, *What Welfare Requires*, *supra* note 3, at 427-29 (discussing and collecting sources).

254. ATLESON, *supra* note 229, at 84-86, 179.

analysis would use all of these phenomena as indicators of a noneconomic relationship.²⁵⁵

Accepting these points does not require rejecting market forces as illusory or irrelevant.²⁵⁶ In *Alamo Foundation*, for instance, there was evidence that meals and various perks were withheld from associates who performed poorly, and it seems likely that hunger, as well as religious conviction, helped motivate work effort.²⁵⁷

By the same token, however, one also can see some market dynamics at work in prison labor and other nominally "nonmarket" work. For instance, prison industries routinely use wage differentials and other perquisites to motivate inmate workers²⁵⁸ and otherwise to "simulate[] a real-world business environment."²⁵⁹ This is precisely the point: Rather than an on/off switch between self-regulating markets untouched by other social relations and noneconomic domains untouched by market dynamics, various forms of co-existence and interaction are the norm. In such circumstances, an exclusive market test is never satisfied. Inversely, an *inclusive* market test that ties employment to the presence of *some* market dynamics seemingly would always be satisfied, again failing to differentiate among relationships.²⁶⁰

255. Indeed, it is partly to avoid such problems that contract law itself never requires the *absence* of nonbargain aspects to a relationship, only the *presence* of some bargain aspect. See *supra* note 146.

256. See Richard Swedberg & Mark Granovetter, *Introduction to the Second Edition of SOCIOLOGY OF ECONOMIC LIFE*, *supra* note 13, at 1, 13; see also ZELIZER, *supra* note 27, 21-22 (criticizing "Nothing-But" reductionisms).

257. *Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 & n.22 (1985).

258. See *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996).

259. *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1121 (11th Cir. 1997) (describing Florida prison labor program); accord *Harker v. State Use Indus.*, 990 F.2d 131, 132 (4th Cir. 1993) (characterizing Maryland prison industry as "resembling a 'private corporate entity as closely as possible'" (citation omitted)); see also GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 25-26, 56-57 (1971) (describing "deals" or "trades" between inmates and prison officials, and the role of incentives in prison labor); Bruce Western, *Introduction*, in *SOCIETY OF CAPTIVES* 13 (2007) (same); sources cited *infra* note 280. A similar analysis could be made of child labor within families. Although it obviously does not fit a strict "free market" model, it is not uncommon for children to be paid for performance of some of their chores. Parents may be motivated not only by the educative functions of household labor and by its relationship to family solidarity, but also by the value to the household economy of not having to do the work themselves or to hire it out. Sampson Lee Blair, *Children's Participation in Household Labor: Child Socialization Versus the Need for Household Labor*, 21 J. YOUTH & ADOLESCENCE 241, 256-57 (1992).

260. See generally BECKER, *supra* note 223.

4. A Mostly Market Standard?

Perhaps a middle way can be found in which an economic relationship requires more than just *some* market character and yet less than an *exclusively* market character. The NLRB claims to take such an approach, classifying an activity as employment based on whether it is part of “a primarily economic relationship,” as opposed to one that is “primarily rehabilitative” or “primarily educational.”²⁶¹ Unfortunately, the NLRB’s actual decisions provide little guidance on how one assesses this balance between economic and noneconomic factors. Instead, they rely on distinctions that are at best obscure and at worst bewildering.²⁶²

Theoretically, a “primarily market” standard poses two distinct difficulties: separating economic and noneconomic components and assigning weights to each component. The first step falters on the fact that even paradigmatic market relationships already incorporate substantial elements of institutional specificity, nonfinancial goals, and nonadversarial conduct. For instance, conventional contract doctrine treats an agreement as a contract—not ninety percent of a contract or ten percent of a contract—when the parties’ commitments take the form of a bargain, even if one party committed itself primarily for reasons other than to secure the return commitment.²⁶³ For example, in the *Town & Country* “salting” case discussed above,²⁶⁴ do the workers’ agreements with the employer count as “economic” because they are conventional contracts? Or do they count as “noneconomic” because they were motivated principally by worksite access, not by the employer’s promise to pay? Case law offers no clear solution, and none is apparent.²⁶⁵

261. *Brevard Achievement Cent., Inc.*, 342 N.L.R.B. 982, 983-84 (2004); *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004).

262. *Compare* *Brown Univ.*, 342 N.L.R.B. 483 (2004) *with* *Research Found. of the State Univ. of New York*, 350 N.L.R.B. No. 18 (2007) (reaching opposite result from *Brown University* on identical facts, except for existence of a nonprofit intermediary foundation that existed solely to be the exclusive administrator of university research programs), *and* *Research Found. of the City Univ. of N.Y.*, 350 N.L.R.B. No. 19 (2007) (same, except that nonprofit intermediary existed solely to administer research programs of several universities). *Compare* *Brevard Achievement Ctr., Inc.*, 342 N.L.R.B. 982, *with* *Goodwill Indus. of N. Ga., Inc.*, 350 N.L.R.B. No. 5 (2007) (reaching opposite result from *Brevard* on facts involving same federal program for workers with severe disabilities).

263. *See* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. c. (1981).

264. *See* discussion *supra* note 250 and accompanying text.

265. Based on related concerns, some economic sociologists have begun to argue that “embeddedness” does not go far enough in dislodging a separate spheres understanding of economic action. The metaphor of one object embedded in another suggests that market and social relations are conjoined but still distinct. Krippner, *supra* note 13, at 778-801. An

Assigning relative weight to economic and noneconomic aspects also raises serious problems. Consider a worker who accepts a job that pays less than half what she could earn for similar work elsewhere, but does so because of an ideological or religious commitment to the employer. In one sense, these noneconomic commitments predominated over financial gain, and yet a "primarily economic" test seems unlikely to deny employment status. Compare a prison labor relationship in which the prison creates a miniature labor market, hiring inmates at the lowest wage possible but allowing inmates to hold out for the highest wage available. Would work under such conditions be *more* economic than in my first example because financial motivations played a larger role, or would it be *less* economic because the parties do not meet at arm's length?

The doubts I have raised here are not conclusive. Perhaps future courts or commentators will be able to refine a primarily market standard into a workable, non-arbitrary tool that does not simply fall back on an exclusive market approach. The difficulties that I have identified, however, create substantial doubt that such a project even makes conceptual sense,²⁶⁶ and they shift the burden of persuasion to defenders of such a market-oriented test.

B. The Indiscriminately Expansive Productive Work Standard

The productive work approach to employment's economic character also draws on a rich tradition of thinking about economic life. Polanyi, and others who share his critique of market-oriented formalism, developed an alternative "substantivist" tradition.²⁶⁷ This view takes markets not to *define* economic activity, including work, but rather to offer one possible mode of *organizing* it. For better or worse, slaves, prisoners, and children can produce widgets that are sold in markets or that otherwise would have been bought in them.²⁶⁸

As a means to identify employment relationships, however, a criterion of productive work is insufficiently discriminating, even if it does capture an important commonality among different relationships.

alternative account would treat market dynamics as a particular *form* of sociality, not something "embedded" in social relations to some degree. Pierre Bourdieu, *Principles of an Economic Anthropology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 75, 84.

266. This claim receives further development *infra* notes 305-306 and accompanying text.

267. See sources cited *supra* note 222.

268. STONE, *supra* note 5, at 13-14; Keith Thomas, *Introduction*, in THE OXFORD BOOK OF WORK xiii (Keith Thomas ed., 1999); Chris Tilly & Charles Tilly, *Capitalist Work and Labor Markets*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY 283, 285 (Neil J. Smelser & Richard Swedberg eds., 1st ed. 1994).

Applied consistently, it sweeps in many recognizably productive relationships that lie well beyond the frontiers of contested employment status.²⁶⁹ The productive work approach provides no account of how the different ways work can be organized might affect the need for and the appropriateness of employment law's particular regulatory forms.

1. Locating Economic Activity Outside Market Institutions

Within economic sociology, proponents of the embeddedness concept largely apply new explanatory tools to familiar objects of study. In terms irreducible to market mechanisms, these scholars analyze the internal dynamics of large corporations, financial markets, or relationships between suppliers and distributors.²⁷⁰ Having eschewed defining economic life in terms of markets, what makes these phenomena economic is that they are "concerned with the production, distribution, exchange, and consumption of scarce goods and services."²⁷¹ On this substantivist view,²⁷² institutions become no less economic when our understanding of them becomes more social. This point lies at the core of the productive work approach: an economic relationship is perfectly compatible with a penological relationship, an educational relationship, a rehabilitative relationship, and so on.²⁷³

Once the social and the economic cohabit, the door opens to seeing the economic in social institutions conventionally located outside the market economy. What remains to be seen is whether these nonmarket activities are economically significant. That question has not interested most practitioners of the new economic sociology,²⁷⁴

269. This expansiveness also is the Achilles heel of the substantivist scholarly tradition. See Cancian, *supra* note 222, at 465-66. A related difficulty is adequately specifying what constitutes "production," but I leave that problem aside because my arguments here do not rely upon resolving it. See, e.g., Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 187-97 (2001) (questioning the distinction between production and consumption); Micaela di Leonardo, *The Female World of Cards and Holidays: Women, Families, and the Work of Kinship*, 12 SIGNS 440 (1987) (characterizing the maintenance of kinship relations as productive work).

270. Swedberg & Granovetter, *supra* note 256, at 6.

271. Neil J. Smelser & Richard Swedberg, *Introducing Economic Sociology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 3, 3; accord Polanyi, *supra* note 222, at 31-32.

272. See sources cited *supra* note 222.

273. See discussion *supra* Part II.C.1 and text accompanying notes 172 and 200.

274. The field focuses principally on what it considers "bread-and-butter" economic institutions, not "the boundaries of the economy." See Swedberg & Granovetter, *supra* note 256, at 6. Doing so preserves the divide between economic and noneconomic spheres but now justifies

but it has been central to the research of feminist scholars in sociology and other disciplines.

Feminist scholarship has pioneered broader accounts of where economic activity, and particularly productive work, occurs. This research focuses principally on activities associated with the family—sexuality, reproduction, housework, and caregiving. As an initial matter, activity within the family directly affects what happens in the economy as conventionally defined, not only through consumption but also by directly affecting production.²⁷⁵ Family labor reproduces current market workers' capacity for productive work on a daily basis—preparing meals, ironing clothes, providing emotional support—and also provides children the physical, mental, and social capabilities necessary for later market work.²⁷⁶ Moreover, these productive activities can migrate between market-based and family-based modes of organization, casting doubt on the usefulness of a reproductive/productive distinction.²⁷⁷ Over the last century, family members, on the one hand, have taken on more responsibility for local transportation (no more daily milk deliveries) but, on the other hand, have shifted childcare increasingly onto paid providers.²⁷⁸ Estimates of the total economic contribution of household labor place it at a substantial fraction of, perhaps even equal to, the entire economy captured by conventional market-oriented measures like the Gross Domestic Product.²⁷⁹

it on empirical grounds: the latter institutions are unimportant as sites of production, distribution, and consumption of scarce goods and services. *See* ZELIZER, *supra* note 27, at 44 (criticizing this tendency); Zelizer, *supra* note 17, at 336-37, 348 (same). Yochai Benkler's important recent study of "commons-based peer production" of information products follows a similar pattern. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006). Although he identifies an important new sector of nonmarket production, he also assumes that, until this recent development, nonmarket institutions were not "an important modality of economic production." *Id.* at 98-99.

275. *See* ZELIZER, *supra* note 3, at 214; Lisa Philipps, *Silent Partners: The Role of "Unpaid Market Labor" in Families*, 14 FEMINIST ECON. (forthcoming Apr. 2008); Silbaugh, *supra* note 3, at 5.

276. *See, e.g.*, FOLBRE, *supra* note 3, at 71-73; Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1633 (1991) (noting how the traditional "breadwinner" himself depends on unpaid services provided by "dependent" wife). *See generally* FINEMAN, *THE AUTONOMY MYTH*, *supra* note 3; Rayna Rapp, *Family and Class in Contemporary America: Notes Toward an Understanding of Ideology*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 49 (Barrie Thorne & Marilyn Yalom eds., 1992).

277. BOYDSTON, *supra* note 3, at xv, 123-25, 131.

278. Abbott, *supra* note 18, at 308.

279. FOLBRE, *supra* note 3, at 66-67; Richard W. England, *Measurement of Social Well-Being: Alternatives to Gross Domestic Product*, 25 ECOLOGICAL ECON. 89 (1998); Duncan Ironmonger, *Counting Outputs, Capital Inputs and Caring Labor: Estimating Gross Household Product*, 2 FEMINIST ECON. 37 (1996). *See generally* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS.,

Characterizing family life as economic in the substantivist sense does not entail explaining behavior in terms of market transactions or self-interested maximization.²⁸⁰ Instead, economic transactions are perfectly compatible with, and indeed may be constitutive of, social relations that are particularistic, intimate, and non-fungible. Sociologist Viviana Zelizer's work has been especially important in making this point, which is the embeddedness insight in reverse.²⁸¹ Zelizer documents the pervasiveness of economic transactions in intimate settings—income sharing among spouses, gift giving among lovers, reciprocal labor among neighbors—and shows how engaging in these transactions need not dissolve social ties or introduce market dynamics.²⁸² To the contrary, economic relations, including money transactions, help to establish and maintain these relationships and to affirm their distinctive character: "[A]ll of us use economic activity to create, maintain, and renegotiate important ties—especially intimate ties—to other people."²⁸³

Nothing limits these insights to family or other intimate settings. Rather, they apply directly to prison labor and paid nonmarket work in other large institutions. So long as productive work provides the basis for classifying a practice as economic, then prison labor becomes a straightforward example. This is self-evident when inmates produce goods and services that circulate beyond the prison. It remains true when, like the family housework examined by

BEYOND THE MARKET: DESIGNING NONMARKET ACCOUNTS FOR THE UNITED STATES (Katharine G. Abraham & Christopher Mackie eds., 2005).

280. Nor does it preclude such analyses. See Paula England & Nancy Folbre, *Gender and Economic Sociology*, in THE HANDBOOK OF ECONOMIC SOCIOLOGY, *supra* note 16, at 627, 639-42 (discussing how feminist economists have extended formalist perspectives to the family and used models of self-interested economic rationality and bargaining to analyze household structure and time allocation between housework and market work). See generally Becker, *supra* note 221. Similarly, prison labor also may be analyzed fruitfully using market models, though courts generally treat inmates as exercising no agency in their participation in prison work programs. But see *Danneskjold v. Hausrath*, 82 F.3d 37, 43 (2d Cir. 1996) (briefly noting that prisons might make labor programs voluntary in order to induce more productive work). Given the limits on eliciting quality work through command, surveillance, and punishment, prison labor administrators and advocates routinely cite some degree of implicit bargaining as one reason why prisons bother to pay inmates for work that legally they could coerce. See AM. CORR. ASS'N, A STUDY OF PRISON INDUSTRY: HISTORY, COMPONENTS, AND GOALS 48 (1986); Tara Gray & Jon'a F. Meyer, *Expanding Prison Industries Through Privatization*, in PRIVATIZATION AND THE PROVISION OF CORRECTIONAL SERVICES: CONTEXT AND CONSEQUENCES 125, 130 (G. Larry Mays & Tara Gray eds., 1996) (quoting a prison industry supervisor as saying, "It doesn't matter how well you treat them. These guys will never work hard unless they get paid. Would you?"); cf. LICHTENSTEIN, *supra* note 36, at 129-33 (describing mixture of physical punishments and cash incentives to elicit work effort in convict leasing system).

281. See ZELIZER, *supra* note 3; VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY (1997).

282. ZELIZER, *supra* note 3.

283. *Id.* at 3.

feminists, prison housework yields goods and services consumed within the institution²⁸⁴ and substitutes for what otherwise might have been purchased in ordinary markets.²⁸⁵ With respect to this economic character, it simply does not matter whether the work is directed toward non-acquisitive goals or whether it is structured by and arises from a comprehensive penal relationship.

2. Productive Work Without Exchange: The Volunteer Problem

The productive work analysis of employment's economic character thus represents a perfectly coherent application of major schools of thought about the nature of work and economic life. But this fact alone does not tell us whether the productive work approach adequately captures the economic character of employment in the sense relevant to a legal determination of employee status. This subsection and the following one show why it does not.

The basic problem lies in the insight that work can be organized through, and helps to shape, so many different relationships. It would be surprising if we treated all of these relationships the same simply because they involve productive work. In fact we do not—in law or in other domains. I begin with an area where, legally, the point is especially clear: volunteer labor.

284. This analogy is strengthened further by perspectives on the prison that treat it as an institution designed to produce future citizens and workers. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., Vintage 1991) (1975); MELOSSI & PAVARINI, *supra* note 111; RE-ENTRY POL'Y COUNCIL, COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY pt. II.B (2005), available at http://www.reentrypolicy.org/reentry/the_report.aspx. This point applies most easily to inmates working in programs that provide education or training to other inmates. See, e.g., *Danneskjold*, 82 F.3d at 43; *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 10-12 (2d Cir. 1984). Additionally, it can be difficult to distinguish between prison housework and work that is part of the process of producing goods or services for sale. See Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000, 17,010 (Apr. 7, 1999) (including as "production of prison-made goods" those "services that are necessary to production, e.g. refuse pickup").

285. To use terminology Zelizer introduces in her most recent work, social settings that often have been conceptualized as separate spheres instead routinely are bridged by "circuits of commerce," "differentiated ties that cut across particular social settings." Zelizer, *supra* note 173, at 292. Despite often concerted efforts to keep them separate and declare their separateness, these circuits inevitably intersect or interact. A purchaser of prison-made goods may participate simultaneously in one circuit marked by the distinctive relationships, and legal restrictions, associated with prison labor, and also in other circuits in which those goods are used for transactions involving entirely different sets of actors and social meanings. Cf. Appadurai, *supra* note 173, at 4 (tracing "the conditions under which economic objects circulate in different *regimes of value* in space and time"). Even when particular goods or people do not migrate across circuits, they still interact when actors are able to choose among circuits to achieve particular ends, such as when a private sector firm decides between "outsourcing" production to prison labor or to another standard firm.

Unpaid volunteer labor can be employment, according to a productive work analysis.²⁸⁶ When volunteers adopt a stretch of highway, staff a firefighting company, distribute programs at a performance, or manage an on-line chat room, they perform valuable work, often of the sort that hired employees otherwise would do.²⁸⁷ On this point, the productive work approach contradicts the well-established legal principle that uncompensated volunteers are not employees. *Alamo Foundation* took care to stress this point, explaining that the FLSA does not apply to “[o]rdinary volunteerism” that proceeds without “expectation of compensation.”²⁸⁸

The problem with treating volunteers as employees is most obvious in wage and hour law. In many cases, the whole point of the volunteer relationship is to do something valuable for an organization or its constituency but *not* get paid for it. And yet tying employment status to productive work would eliminate the possibility of such arrangements.²⁸⁹

Employment law constrains the ways in which productive work may be organized within employment relationships. Insofar as those constraints are incompatible with aspects of a relationship that incorporates productive work, either the employment category must be narrow enough to exclude those relationships or those relationships must be assimilated to the standards of employment. Without attempting to explain exactly how or why we ought to distinguish employees from volunteers,²⁹⁰ it suffices for my purposes that some such distinction commands universal assent, both legally and in common parlance. The productive work approach, however, lacks the

286. This assumes that control-related tests are satisfied, as they often will be in highly structured volunteer programs. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(b) (2006) (defining employment, for purposes of respondeat superior, solely in terms of control, and stipulating that “the fact that work is performed gratuitously does not relieve a principal of liability”).

287. See Janelle Brown, *Must AOL Pay “Community Leaders”?*, SALON.COM, Apr. 16, 1999, http://www.salon.com/tech/feature/1999/04/16/aol_community.

288. *Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302-03 (1985); accord *WBAI Pacifica Found.*, 328 N.L.R.B. 1273 (1999) (NLRB); *York v. Ass’n of the Bar of the City of New York*, 286 F.3d 122 (2d Cir. 2002) (Title VII); see also sources cited *infra* note 293. See generally Rubinstein, *supra* note 11.

289. Similar dynamics apply beyond the wage question. Insofar as an important aspect of volunteering is asymmetry of obligation more generally, there necessarily will be a tension with imposing employment law obligations on organizations that benefit from volunteer labor.

290. The distinction is troubled by the difficulty distinguishing between paid and unpaid work, a line that turns out to be fuzzy in practice and unsatisfying in theory. See Rubinstein, *supra* note 11, at 153-57 (discussing the distinction between “pure” volunteers and those who receive reimbursement for expenses); Yamada, *supra* note 11, at 215-38 (discussing professional benefits of “volunteering”).

resources to differentiate among forms of work in this way. For regulatory purposes at least, it renders fungible all relationships in which work occurs, driven by the fungibility of the goods and services that the work produces.²⁹¹

To preserve space for volunteerism, courts generally require both valuable production by the worker and valuable benefits to the worker. One influential Title VII opinion from the Eighth Circuit echoes *Alamo Foundation* by stating the requirement this way: “[A]n employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee.”²⁹² In short, courts require that productive work be part of an economic exchange, though not necessarily a bargain.²⁹³ This exchange criterion requires that the

291. Notably, work that implicates the economic dimension of employment status frequently also generates limitations on the fungibility of its work products. Cf. Appadurai, *supra* note 173, at 24-26 (describing “enclaving”). In addition to restrictions on the circulation of inmate-produced goods, see *supra* notes 34, 38, and 160, “displacement” protections routinely limit the work that may be performed by inmates and other “nonmarket” workers, see, e.g., 42 U.S.C. § 607(f) (2000) (welfare work programs); Prison Industry Enhancement Certification Program Guideline, 64 Fed. Reg. 17,000, 17,002, 17,010-11 (Apr. 7, 1999) (Prison Industry Enhancement program); *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 519-37 (S.D.N.Y. 1998) (trainees), or limit the institutions for which they may work, see, e.g., 41 U.S.C. §§ 46-48c (2000) (granting federal procurement priority to goods manufactured by severely disabled individuals but only when they work for nonprofit firms). Both mechanisms create distinctions among workers, either by blocking their shared membership in the class of “employees” or by preventing their functional interchangeability to an employer.

292. *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990). Although “compensation” could be understood narrowly to refer to payment as part of a bargained-for exchange, cf. Zelizer, *supra* note 20, at 482 (using “compensation” in roughly this way), in practice, courts often characterize payments as “compensation” simply because they are contingent on productive work. The Supreme Court did so in *Alamo Foundation*, 471 U.S. at 301, as have courts finding employment relationships with workfare workers, *United States v. City of New York*, 359 F.3d 83, 97 (2d Cir. 2004) (“[T]he relationship alleged here—which includes the cash payment, the related benefits, and the requirement that the plaintiffs’ work be useful—if proved, establishes the plaintiffs’ as employees for the purposes of Title VII.”), with “volunteer” firefighters who receive death and disability benefits, *Pietras v. Bd. of Fire Comm’rs of Farmingville Fire Dist.*, 180 F.3d 468, 472-73 (2d Cir. 1999), and with “volunteer” choristers who receive an “honorarium,” *Seattle Opera v. N.L.R.B.*, 292 F.3d 757, 760-63 (D.C. Cir. 2002).

293. This leaves considerable room to refine just what counts as compensation that completes this exchange. Compare *Hallissey v. Am. Online, Inc.*, No.99-CIV-3785, 2006 U.S. Dist. LEXIS 12964, at *39-40 (S.D.N.Y. Mar. 20, 2006) (holding that AOL “community leaders” were FLSA employees where unpaid “volunteering” was a prerequisite to future consideration for paid positions); cases cited *supra* note 292 with *Cleveland v. City of Elmendorf*, 388 F.3d 522, 529 (5th Cir. 2004) (holding that gaining experience necessary to maintain licensure is insufficient to create employment rather than volunteer relationship); *City of New York*, 359 F.3d at 107 (Jacobs, J., dissenting) (concluding that benefits received by a workfare worker “cannot be deemed compensation in lieu of wages”); *Jacob-Mua v. Veneman*, 289 F.3d 517, 521 (8th Cir. 2002) (data for a dissertation not “compensation”); *York*, 286 F.3d at 126 (holding that no Title VII employment relationships arose when a bar association volunteer received only reimbursement for actual expenses and administrative support to enable her to carry out her

relationship be economic (in the substantivist sense) in both directions.²⁹⁴

3. Differentiating Among Forms of Exchange

Requiring an economic exchange addresses the volunteer problem, but the underlying difficulties persist. Under the productive work approach as now modified, employment exists regardless of the relationship in which the exchange is embedded and regardless of the role that work plays in that relationship. Were that so, all paid nonmarket work would be employment.

Such a capacious account of employment leaves nothing to stop employment law's march into all institutions that organize economic exchange. That approach arguably produces the correct result in the cases discussed thus far, but additional examples will exhaust even the most voracious appetite for granting employment status. Jurors compensated for their time would become employees of the courts,²⁹⁵ minor children working in a family business would become employees of their parents,²⁹⁶ "volunteer" ushers who receive free admission to the show might become employees of the venue, and so on.²⁹⁷ All of these activities may well be described as "economic," but allowing that

duties); *Neff v. Civil Air Patrol*, 916 F. Supp. 710, 713-15 & n.2 (S.D. Ohio 1996) (classifying member of Civil Air Patrol as volunteer, not employee, despite receiving free military "hops," discounted airplane use, training, and death benefits); *Tadros v. Coleman*, 717 F. Supp. 996, 1003 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990) (holding that title of "Visiting Lecturer" and library privileges are insufficient to create employment relationship).

294. Thus, the mirror image of the volunteer problem arises when a "worker" receives economic benefits without being productive. The usual problem in employment law involves students and trainees who may receive funding or other financial support in connection with some form of "learning by doing." In such circumstances, their physical tasks may be indistinguishable from other employees'. The common denominator of such cases is that to be an employee, the worker must provide services of value to the employer, even if she also improves her own skills in the process. *Walling v. Portland Terminal*, 330 U.S. 148, 153 (1947) (holding that railroad brakemen trainees were not employees because "the railroads receive no 'immediate advantage' from any work done by the trainees"); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-11 (4th Cir. 1989); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271-73 (5th Cir. 1982); *see also Archie*, 997 F. Supp. at 532-35; *Souder v. Brennan*, 367 F. Supp. 808, 813 & n.21 (D.D.C. 1973).

295. *But see Brouwer v. Metro. Dade County*, 139 F.3d 817, 819 (11th Cir. 1998) (holding that jury duty is not employment).

296. *But see* 29 U.S.C. § 152(3) (2000) (excluding from NLRA definition of "employee" "any individual employed by his parent"); 29 U.S.C. § 203(e) (same for agricultural employment under the FLSA); 29 U.S.C. §§ 203(l), 213(c)(1)-(2) (excluding from the FLSA's child labor provisions most employment of a minor child by his parent or guardian).

297. Indeed, a provision of the FLSA clearly anticipates and blocks this sort of result in one narrow situation: "The term 'employee' does not include individuals who volunteer their services solely for humanitarian purposes to private nonprofit food banks and who receive from the food banks groceries." 29 U.S.C. § 203(e)(5).

label to decide their employment status requires us to ignore everything else that might matter about them.

With regard to employment status, the economic exchange becomes the essence of the relationship. Such an analysis is the formal opposite of the exclusive market approach, which ignores any economic aspect of the relationship—and thus excludes it from employment—once it finds some noneconomic aspect. The productive work alternative ignores any noneconomic aspect of the relationship once it finds an economic exchange—and thus classifies the relationship as employment.

This economic reductionism represents a failure to embrace the insight that multiple social frameworks can motivate and structure economic exchange. A productive work analysis of employment thus becomes an example of what Zelizer criticizes as a “Nothing But” approach. Such an approach would infer from the economic character of family life that the family is, at root, fundamentally an economic institution.²⁹⁸ Applied to paid nonmarket work, such an analysis would conclude that beneath all the rubbish about penological purpose or vexed souls lies a brute “economic reality.”²⁹⁹

In this vein, some critics argue that prison labor is fundamentally an economic institution.³⁰⁰ But a clear-eyed awareness of its economic aspects does not compel that conclusion. Instead, the prison’s economic processes may be partially constitutive of, and not necessarily subordinate to, its distinctively penal functions.³⁰¹

298. ZELIZER, *supra* note 3, at 21, 214. Such an analysis might, for instance, treat a stylized breadwinner/housewife marriage as nothing but a relationship of employer-housekeeper/nanny/prostitute. See Hasday, *supra* note 3, at 495-96 (discussing this analysis in both feminist and law and economics literatures); see also GARY BECKER, *A TREATISE ON THE FAMILY* 30-79 (1981); Nancy Folbre, *Exploitation Comes Home: A Critique of the Marxian Theory of Family Labour*, 6 CAMBRIDGE J. ECON. 317 (1982).

299. This reductionist tendency is visible in *Alamo Foundation’s* ambiguous usage of concepts of “exchange” and “compensation.” The associates specifically denied that they were participating in a bargain in the sense of an agreement in which each party’s action stands in “a reciprocal relation of motive or inducement.” RESTATEMENT (SECOND) OF CONTRACTS § 71, cmt. b (1981). They testified that “no one ever expected any kind of compensation, and the thought is totally vexing to my soul.” *Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985). Despite crediting this testimony, the Court nevertheless later characterized the in-kind benefits they received as “in exchange for their services” pursuant to an “implied” “compensation agreement.” *Id.* This interpretation rested on the fact that the benefits were contingent on the services. But that could be true without a bargain, if the benefits were not offered to induce the service or vice versa.

300. Cynthia Young, *Punishing Labor: Why Labor Should Oppose the Prison Industrial Complex*, 7 NEW LAB. FORUM 41-52 (2000); RUSCHE & KIRCHHEIMER, *supra* note 150.

301. See GARLAND, *supra* note 221, at 108; Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L. REV. 1143, 1147 (2006) (arguing for prison labor as a centerpiece of “accountability-reinforcing” sanctions). As an

The difficulty, then, is that when employment law intervenes in an economic relationship, even with regard to its economic terms, it necessarily also intervenes in the relationship's noneconomic aspects. Returning again to prison labor, consider the issue of inmate labor unions, a focal point of prison activism during the 1970s.³⁰² Prison authorities' fierce resistance met Supreme Court approval in *Jones v. North Carolina Prisoners' Labor Union, Inc.*³⁰³ North Carolina justified suppressing the union on the ground that organized inmate workers would threaten prison discipline, especially through possible work stoppages.³⁰⁴ In such a case, union activity cannot sensibly be designated either an economic or a penological aspect of the relationship between inmates and the prison.³⁰⁵ A strike's obvious

example, consider how access to prison labor programs may be used as a tool to promote prisoner discipline more generally. See *George v. Badger State Indus.*, 827 F. Supp. 584, 588 (W.D. Wis. 1993) (observing that "the labor relationship may be terminated for violating a prison disciplinary rule"); GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES* 28 (1971) (describing how participation in prison labor may act as a perk that rewards good behavior but can be taken away for bad). Thus, the prison's decisions about inmate participation may not be motivated principally by the economic consequences of those decisions, real as those may be. *But cf.* TILLY & TILLY, *supra* note 105, at 98 (arguing that "organizations built around nonmarket goals" approach their workers in the same way as profit-making firms do, concerned strictly with "quality, efficiency, and power" in the production process). Of course, the reverse also might be true. See Leah Rupp, *Skilled Inmates to Stay at Penal Farm: Decision Keeps County from Hiring Outside Employees*, CLARION-LEDGER (Jackson, Miss.), Nov. 2, 2006 (reporting decision to exempt some inmates from a planned transfer in order to avoid having to replace their labor with outside hiring).

302. See Maiwurm & Maiwurm, *supra* note 11; Comeau, *supra* note 11; see also Sidney Williams, MPLU Missouri Prison Labor Union (Feb. 14, 2003), http://www.infoshop.org/prisons/public_html/article.php?story=03/02/14/9836866; Texas Prison Labor Union, PRISON LEGAL NEWS, May 1, 1998, available at <http://corpwatch.org/article.php?id=861>.

303. 433 U.S. 119 (1977).

304. *Id.* at 123. The main legal issues in the case concerned the level of deference to give to the state's judgment of this risk and the weight to give to inmates' countervailing expressive and associational interests. *Id.* at 125.

305. Some courts attempt to disaggregate relationships into corresponding employment and non-employment components. For instance, *Stilley v. University of Pittsburgh*, 968 F. Supp. 252, 261 (W.D. Pa. 1996), distinguished a graduate student's relationship to her university in its employment aspects (sexual harassment suffered while performing paid research assignments) from her relationship to her university in its academic aspects (such as an advisor's judgments about satisfactory progress on a dissertation). The faculty member who harassed Stilley "on the job" was also her dissertation adviser, however. *Id.* at 256. It seems fanciful to imagine that she had two independent relationships, one economic and the other educational, to this one person. In the social science literature, Tilly and Tilly take a similar approach, with similar problems. They emphasize that work occurs "within" social relations of "friendship, kinship, religion, ethnicity, class, schooling, informal communication, sexual relations, taste, political affiliation, sports, and shared avocation," but nonetheless treat the "creation of use value" as a "production" component separable from "nonproduction" components of the relationship. TILLY & TILLY, *supra* note 105, at 71, 79 (analyzing "family relationships" as "bundl[ing] together . . . both work and nonwork transactions").

economic significance cannot be hermetically sealed off from other aspects of imprisonment, in particular considerations of authority and discipline.³⁰⁶ Inmates might strike, for instance, over prison conditions outside the workshop.³⁰⁷ And even a strike over working conditions or wages could alter the dynamic between inmates and prison authorities by asserting prisoner power and fostering organization and solidarity.³⁰⁸

Whether welcome or not, such shifts in the relations of imprisonment would be intertwined inextricably with the regulation of prisoners' work. This is the core insight of opinions that dismiss inmate employment claims for lack of a market-economic character, opinions that often are concerned ultimately with the impact of employment regulation on penal policy and administration.³⁰⁹ Those concerns may be misplaced, but the productive work approach cannot tell us why.³¹⁰ Instead, it ignores them.

306. A disaggregation strategy thus reintroduces a separate spheres analysis at the level of the relationship's discrete elements.

307. *Cf. Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702, 704-07 (1982) (considering a dockworkers' strike against handling cargo in commerce with the Soviet Union as protest against its invasion of Afghanistan). Conversely, prison officials might terminate or modify a work assignment in response to inmate behavior that was not work-related.

308. Justice Marshall's dissent suggests precisely this, characterizing the majority opinion as a "manifestation of the extent to which the very phrase 'prisoner union' is threatening to those holding traditional conceptions of the nature of penal institutions." *Jones*, 433 U.S. at 147 (Marshall, J., dissenting). Striking might also help inmates lay claim to a social identity as "workers" and, collectively, a "union," rather than solely "prisoners," and in so doing generate claims to respect and solidarity from workers beyond prison walls. *Cf. Chad Alan Goldberg, Contesting the Status of Relief Workers During the New Deal*, 29 SOC. SCI. HIST. 337, 355 (2005).

309. *See, e.g., Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) ("People are not imprisoned for the purpose of enabling them to earn a living [but to] offset some of the cost of keeping them, or to keep them out of mischief, or to ease their transition to the world outside, or to equip them with skills and habits that will make them less likely to return to crime outside. None of these goals is compatible with federal regulation of their wages and hours."); *Hale v. Arizona*, 993 F.2d 1387, 1398 (9th Cir. 1993) (en banc).

310. The same theoretical problem arises with regard to child labor. Imagine a child whose parents pay her for work in a family business or for household chores. The parents also use this pay to enforce disciplinary rules, docking it for poor grades or staying out past curfew. A productive work view would cast this arrangement as an employment relationship, and under the FLSA these pay deductions would be illegal. The FLSA's mandatory economic terms would preclude maintenance of certain kinds of authority relations. *Cf. 42 U.S.C. § 608(c)* (2000) (providing that monetarily penalizing a workfare worker for a welfare rule violation shall not be deemed a wage reduction for FLSA purposes). That might be for better or for worse, but simply acknowledging the relationship's economic aspect hardly seems to supply the answer.

IV. HOW LAW CONSTITUTES EMPLOYMENT AS ECONOMIC

The previous Part argued that neither the exclusive market nor the productive work account adequately captures employment's economic character. This Part argues that these failures counsel against using an economic/noneconomic distinction to implement a descriptive account of employment relationships.³¹¹ Instead, before reconstructing legal definitions of employment, we must rethink the descriptive relationship between employment *law* and *employment*.

The legal regulation of employment relationships ordinarily is understood as a matter of classification followed by intervention. The law first identifies an extra-legal social phenomenon (employment) and then intervenes to modify it (e.g., mandating higher wages). Neither process affects the type of phenomenon being regulated (still employment, but better paid).

Against that view, this Part offers a constitutive account of employment law as itself shaping what employment is and, most important, what practices are employment. This constitutive argument begins in Section IV.A by characterizing employment as a "relational package," again drawing from Zelizer. Rather than being reducible to any single characteristic, employment is a contingent collection of particular practices, actors, meanings, and institutional contexts. This concept allows me to specify the role of employment law in Section IV.B. Rather than being a spectator to the process by which elements are assembled into the employment relationship and then reacting to that finished product, employment law actively contributes distinctive elements to the package, shapes their interaction, and reinforces their coherence as a package.

A. Employment as a Relational Package

As we saw in Part III, employment relationships always are embedded in and shaped by particular institutional contexts and social relations. On the one hand, employment is irreducible to the arms-length financial bargains envisioned by the exclusive market approach. On the other, it does not arise entirely without distinctions among social contexts, as the productive work approach would suppose. When seeking to capture this specificity, courts return repeatedly to certain features of work relationships—voluntariness,

311. On employment law's descriptive approach, see discussion *supra* Part I.C. For an analogous critique of distinctions between free and unfree forms of labor, see STEINFELD, *supra* note 24, at 239.

payment, location, and others—in their attempts to categorize the relationships as economic or not. Although courts fail in their efforts to analyze these factors as manifestations of a single master criterion of market work, or to combine them in a consistent formula, their decisions are patterned nonetheless.³¹² Moreover, some outcomes are relatively stable, particularly in the prison labor cases.

This Section develops the analytical device of relational packages as a way to characterize these patterns in employment. It examines how they achieve this stability and how law becomes one site of conflict over their boundaries. Some elements of a relational package, “relational markers,” become focal points for attempts to establish or deny the existence of a relationship, or to alter its scope. I illustrate this general framework with the relational markers that recur in the prison labor cases.

1. Relational Packages and Relational Work

An ordinary employee and an inmate worker both participate in economic relationships with the organizations that supervise their work.³¹³ Nonetheless, these relationships are not the same. So, too, are there differences between any two “ordinary” employees, such as a veteran mineworker in a coalmining community and a recent college graduate at an internet startup. To understand how these relationships are, and come to be, treated as the same or different for particular purposes, we need analytical tools to characterize these commonalities and distinctions and to relate these to processes of legal categorization. This subsection introduces the concept of a relational package as a way to do so.

One of Zelizer’s crucial insights is that, while many varied relations involve economic transactions, this commonality need not lead to confusion among, or conflation of, these relations.³¹⁴ Instead, specific variations among these economic transactions help to signify the relationship’s distinctive nature. For instance, Zelizer examines an

312. Cf. Harris, *supra* note 25, at 1740 (noting the failure of “blood” quantum to serve as an objective basis for racial determinations).

313. “Economic” in the production-oriented sense.

314. In this regard, Zelizer’s work provides a powerful challenge to the inevitability of the “domino effect” that figures prominently in Margaret Radin’s critique of commodification. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 95-101 (1996); see Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION*, *supra* note 17, at 8, 17; see also MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 290 (1999) (criticizing anticommodification arguments along similar lines). For an illuminating discussion of the harms of relational confusion, see Mary Anne Case, *Pets or Meat*, 80 CHI.-KENT L. REV. 1129 (2005).

array of finely differentiated, and historically shifting, categories of sexual relationships.³¹⁵ Prostitution, dating, engagement, and marriage all involve both cross-sex sexual intimacy³¹⁶ and, traditionally, direct or indirect income transfers from men to women. Among other things, a specific type of sexual conduct may be appropriate to a specific relationship, and engaging in that conduct also helps establish the type of relationship in question. The same is true for specific types of economic transactions. For example, handing over cash immediately after having sex is not the same as sending an expensive gift several days later or helping to pay the mortgage.³¹⁷

Each of the relationships that Zelizer describes is recognizably economic, but this economic character is situated within and helps to constitute distinct "relational packages."³¹⁸ These packages link together particular types of economic transactions, particular types of sexual conduct, and other relational features (frequency of seeing one another, other activities done together, expected longevity of the relationship, degree of publicity, integration into relationships with friends and family, etc.).³¹⁹ Additional elements implicit in Zelizer's account are questions of identity and status. For instance, familiar struggles contest whether intimates' race and gender are essential components of marriage, as well as other socially legitimated relationships.

Applying the relational packages concept to employment is helpful in two ways. First, it characterizes relationships as aggregations of discrete elements. But these elements acquire their distinctive meaning, and their coherence, from their interaction. They are not separate components that simply add up to one outcome. Second, it follows that when two packages share a common element, they need not be treated as analytically the same, even in that one respect. As a result, we can now pose as a question whether any two

315. ZELIZER, *supra* note 3, at 94-157.

316. Zelizer's examples are all cross-sex, and she does not pursue the sensitivity of these relational packages to variations by gender and sexual orientation.

317. ZELIZER, *supra* note 3, at 117 (discussing the importance of timing).

318. Although the substance of this concept comes directly from Zelizer's work, my terminology differs slightly. I use "relational package" the way Zelizer uses a cluster of terms interchangeably: "relations," "social relations," and "social categories." *Id.* at 37, 56-57. She uses "relational package" more narrowly, to refer to a specific instance of a social relationship in all its particularity, rather than to conventional or institutionalized categories. *Id.* at 56. My usage captures both the specificity to relationships and their structure of linked elements. *Cf.* ERNESTO LACLAU & CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY* 93-148 (1985) (developing an antiessentialist social theory organized around the "articulation" of "elements" into larger discursive structures).

319. ZELIZER, *supra* note 3, at 94-157.

economic relationships are instances of a single relational package. The answer does not follow from labeling them economic. Instead, the economic aspect may connect to other elements in varied ways, each characteristic of different relational packages.

In the relational package of employment, there must be productive work performed under the control of and redounding to the economic benefit of another actor: an employer. The worker, moreover, receives economic benefits from the employer. This much is uncontroversial. But clearly employment is a much richer package than this, notwithstanding controversy about precisely what elements define it.

Envision an employee, and additional elements reinforce those already stated—elements that recur in the case law. Employees work for corporations. Employers distribute their employees' work product and are paid for doing so. Employees work in a place separate from where they live and commute twice a day. They work most but not all days each week. They support family members, especially spouses and children. They are adults, not children, but not elderly either. Employees identify with their work and are so identified by others, even though work is burdensome and competes with other uses of time. And so on.

This description is not meant to be comprehensive or precise, but it surely is familiar.³²⁰ The difficult part is that an element may regularly be present in a relationship, and even contribute toward its recognition as a conventional package, without being essential to it. In the contemporary United States, most employees work primarily during daylight hours, but no one would think that working the night shift is not employment. Such elements often are not unique to employment. Many of those above might apply to an owner of a business or to a volunteer.

Actors care about the relational packages into which their relationships fit. One reason is that classifications matter legally by triggering or avoiding specific statutory requirements. Zelizer applies the term "relational work" to the practices that maintain and demarcate these packages:

For each meaningfully distinct category of social relations, people erect a boundary, mark the boundary by means of names and practices, establish a set of distinctive understandings and practices that operate within that boundary, designate certain sorts of economic transactions as appropriate for the relation, bar other transactions as

320. Cf. Catherine R. Albiston, *Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights*, 39 LAW & SOC'Y REV. 11, 17-18 (2005).

inappropriate, and adopt certain media for reckoning and facilitating economic transactions within the relation. All these efforts belong to relational work.³²¹

Relational work is necessary because the elements of relational packages often overlap. Confronted with such ambiguities, efforts must be made to emphasize elements associated with one package and deemphasize those associated with another.³²² Moreover, as relationships exist over time, efforts are made to incorporate or exclude elements with relational consequences.³²³

2. Prison Labor's Employment Status as an Object of Relational Work

When courts in prison labor cases explain what makes employment "economic," they invoke the market economic form of contract. Nonetheless, when determining whether a particular work situation fits within this form, they look for particular kinds of actors that interact not just in a specific way (contract) but also in a particular place. In other words, courts present employment as a relational package.

To illustrate how this packaging occurs, I again draw from feminist scholarship on separate spheres. This literature explores how the market/family divide relies not just on abstract accounts of how markets and families operate according to different rules, but also on gendered distinctions between men and women, citizen and dependent, and public work and private home. In the prison labor context, these tropes often reappear in modified form. Relative to most discussion of the family, sentimentality is less prominent and racial difference is more so.³²⁴

321. ZELIZER, *supra* note 3, at 35.

322. *See id.* at 187 (noting that, to differentiate themselves from nurses, physicians "typically wear white coats or scrub suits, carry stethoscopes, and insist on being called 'Doctor'").

323. *See id.* at 118 (illustrating how the early twentieth century relationship of "treating" was distinguished from both dating and prostitution with the example of a woman who "rejected certain gifts from men, such as silk stockings, 'because they'd want to put them on [me]'").

324. Regarding sentiment, see generally BOYDSTON, *supra* note 3, at 148-58 (describing the "pastoralization" of housework in the nineteenth century); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997); Silbaugh, *supra* note 3; *cf.* Anthony Kronman, Op-Ed., *Are Graduate Students Workers?*, N.Y. TIMES, May 19, 2001, at A13 (arguing that graduate teaching assistants should not be considered NLRA employees of a university because doing so would "compromise the culture and values they share" in which the school nurtures students' development as "individuals with distinctive views and voices"). Regarding race, see generally BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Angela Y. Davis, *Race, Gender, and Prison History: From the Convict Lease System to the Supermax Prison*, in PRISON MASCULINITIES 35 (Don Sabo et al. eds., 2001); Loïc Wacquant, *From Slavery to Mass Incarceration: Rethinking the 'Race Question' in the US*, NEW LEFT REV., Jan.-Feb. 2002, at 41. Imprisonment rates for black men are seven times that for white men and for black women are

a. *Free Labor, Independence, and Competence*

One way that courts position inmate workers outside employment is to characterize employees as "free labor."³²⁵ In the United States, free labor and related concepts historically have formed an important framework that links political standing, economic participation, and social status.³²⁶ Participation in wage labor organized through contract has been one defining feature of free labor,³²⁷ but free labor also has been constituted through opposition to and distinction from subordinated categories of slaves, paupers, and housewives.³²⁸ These relational contrasts have been articulated through ideas of the working person's economic independence *from* employers and the state, in combination with a family's economic dependence *on* the worker.³²⁹ This independence, in turn, is grounded in particular personal competences, including rationality, discipline, intelligence, and strength. Ascribed race and gender differences help mediate the distinction between the competent, independent citizens

four times that for white women. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEPT OF JUSTICE, NCJ 210677, BUREAU OF JUSTICE STATISTICS BULLETIN: PRISONERS IN 2004, at 8 tbl.11 (Oct. 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>. These disparities cumulate over a lifetime, leading to estimates that one in three black men born in 2001 will be incarcerated at some point in his lifetime, compared to one in seventeen for white men. THOMAS P. BONCZAR, U.S. DEPT OF JUSTICE, NCJ 197976, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 8 tbl.9 (Aug. 2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>. Both race-centered analysis of incarceration, which focuses on *men* of color, and gender-centered analysis of family, which emphasizes *white* women's experiences, benefit from attention to race-gender intersectionality. See generally JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW (1985); ALICE KESSLER-HARRIS, OUT TO WORK (1982); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Davis, *supra*; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER SOC. POL'Y & L. 1 (1993).

325. *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005); *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993) (en banc); *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993).

326. See generally ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN* (1970); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM* (1998); STANLEY, *supra* note 3.

327. STANLEY, *supra* note 3, at 61.

328. *Id.* at 60-61; Goldberg, *supra* note 308, at 338; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1669 (2001); VanderVelde, *supra* note 112, at 438.

329. STANLEY, *supra* note 3, at 138-64; Nancy Fraser & Linda Gordon, *A Genealogy of "Dependency": Tracing a Keyword of the U.S. Welfare State*, in FRASER, *supra* note 3, at 121, 142-44; see also BOYDSTON, *supra* note 3, at 44 (describing similar pattern in early nineteenth century civic republicanism); ELI ZARETSKY, *CAPITALISM, THE FAMILY, AND PERSONAL LIFE* (1976).

of free labor and incompetent, dependent others.³³⁰ This history continues to resonate widely today.³³¹

Beyond simply using the phrase, courts tie employee status to many of these familiar features of free labor that situate wage contracts as just one aspect of a more fully elaborated social position and way of life. Portraying inmates as dependent, courts emphasize prisoners' reliance on the state for the provision of food, housing, and other basic needs:³³² "So long as the [prison] provides for these needs," inmate workers do not fall within the employee class protected by the statute.³³³ Somewhat less frequently, courts also suggest that, were they not imprisoned, inmates would not be able to hold down jobs on

330. BOYDSTON, *supra* note 3, at xviii; GLENN, *supra* note 326; JONES, *supra* note 230; LICHTENSTEIN, *supra* note 36, at 180-84; CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988); Ann Shola Orloff & Renee A. Monson, *Citizens, Workers, or Fathers? Men in the History of US Social Policy, in MAKING MEN INTO FATHERS: MEN, MASCULINITIES, AND THE SOCIAL POLITICS OF FATHERHOOD* 61 (Barbara Hobson ed., 2002); Schultz, *supra* note 3; Wendy W. Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641 (1981). I am here specifically referring to competency for market work. On the complementary role played by gendered ascriptions of competence at familial roles like caregiving, see SHARON HAYS, *THE CULTURAL CONTRADICTIONS OF MOTHERHOOD* 99-107 (1996); Williams, *From Difference to Dominance*, *supra* note 3, at 1448-52.

331. See, e.g., MICHÈLE LAMONT, *THE DIGNITY OF WORKING MEN* 24, 57, 61, 132 (2000) (exploring how white men link race, work discipline, unemployment, and public benefits receipt); Fraser & Gordon, *supra* note 329 (tracing the evolution of "dependency" discourse to the present); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563 (1996).

332. See *Villarreal v. Woodham*, 113 F.3d 202, 206 (11th Cir. 1997); *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1124 (11th Cir. 1997); *Danneskjold v. Hausrath*, 82 F.3d 37, 42 (2d Cir. 1996); *McMaster v. Minnesota*, 30 F.3d 976, 980 (8th Cir. 1994); *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993); *Vanskike v. Peters*, 974 F.2d 806, 810 (7th Cir. 1992); *Miller v. Dukakis*, 961 F.2d 7, 9 (1st Cir. 1992); *Gilbreath v. Cutter Biological, Inc.*, 931 F.2d 1320, 1325 (9th Cir. 1991). In doing so, courts systematically ignore the question of how inmates use their earnings from prison labor, whether as remittances to family, for purchase in prison of consumer products or services beyond basic prison provisions, or savings that are used after release. See DONALD BRAMAN, *DOING TIME ON THE OUTSIDE* 140-42 (2004); Michael G. Santos, *Commissaries*, in *ENCYCLOPEDIA OF AMERICAN PRISONS* 100 (Marilyn D. McShane & Frank P. Williams eds., 1996); David B. Kalinich, *Contraband*, in *ENCYCLOPEDIA OF AMERICAN PRISONS*, *supra*, at 111.

Notably, opinions supportive of inmate employment claims do not challenge this portrayal of inmates as radically unlike "free labor." Instead, they accept the dichotomy but argue that protecting inmate working conditions is necessary to protect free labor. See *Hale*, 993 F.3d at 1403; *Watson v. Graves*, 909 F.2d 1549, 1555 (5th Cir. 1990); *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 13 (2d Cir. 1984).

333. *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993). But see *Carter*, 735 F.2d at 12-13 (rejecting this argument). This argument draws on one of the FLSA's statutory purposes: to provide a "decent standard of living for all workers." *Gambetta*, 112 F.3d at 1124; accord *Harker*, 990 F.2d at 133.

their own due to their lack of skills or self-discipline.³³⁴ The ubiquitous invocation of prison labor's rehabilitative function suggests something similar.

By highlighting economic dependence on the prison, courts place inmates in opposition to the "free citizens in the labor market" who are self-reliant, independent, and competent waged workers.³³⁵ Instead, judicial images of inmate workers evoke both the figure of the welfare dependent—defined as reliant on state support by virtue of inability or unwillingness to participate in market labor³³⁶—and also that of the slave or servant who, while economically productive, is incorporated into the master's household, rather than using his wages to act as an independent consumer in his own home.³³⁷

The wage earner's independence from state and employer is closely related to family members' dependence on this breadwinner.³³⁸ Drawing on a framework of radical separation between the prison and the rest of society, courts place inmate workers outside this masculinized provider role by characterizing them as lone individuals and ignoring their ongoing ties, and financial obligations, to family members outside the prison.³³⁹ Thus, the prison's provision of food, shelter, and medical care to the prisoner is taken as meeting inmates'

334. See *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005) (asserting that prison labor "equip[s] [inmates] with skills and habits that will make them less likely to return to crime outside"); *Danneshjold*, 82 F.3d at 43 (asserting that prison labor "trains prisoners in the discipline and skills of work"); *Hale*, 993 F.2d at 1398 (explaining that the work inmates do provides valuable skills and job training). In fact, most inmates were employed full-time prior to their arrest. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, NCJ 195670, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, EDUCATION AND CORRECTIONAL POPULATIONS 10 tbl.14 (Jan. 2003, rev. Apr. 15, 2003), available at <http://www.ojp.gov/bjs/pub/pdf/ecp.pdf>. That said, relative to the remainder of the population, inmates in aggregate have lower levels of educational attainment, *id.* at 2 tbl.1, and, were they not incarcerated, would be substantially more likely to be unemployed, Bruce Western & Katherine Beckett, *How Unregulated Is the U.S. Labor Market? The Penal System as a Labor Market Institution*, 104 AM. J. SOC. 1030 (1999).

335. *McGinnis v. Stevens*, 543 P.2d 1221, 1239 (Ala. 1975). Ironically, when evaluating employment's control dimensions, workers' dependence on and subordination to their employers is taken to be the very essence of the employment relationship. See *supra* Part I.B.

336. STANLEY, *supra* note 3, at 98-137; Fraser & Gordon, *supra* note 329, at 121; Goldberg, *supra* note 308, at 338.

337. STANLEY, *supra* note 3, at 18, 166; VanderVelde, *supra* note 112, at 439, 459.

338. KESSLER-HARRIS, *supra* note 230, at 36-37; STANLEY, *supra* note 3, at 138-64; Williams, *From Difference to Dominance*, *supra* note 3, at 1445. Enabling (at least some) wage workers to fulfill this role often has been one explicit purpose of labor and employment regulation. EILEEN BORIS, HOME TO WORK 31, 201, 216, 314 (1994); KESSLER-HARRIS, *supra* note 230, at 68-72; WITT, *supra* note 112, at 35, 127-33. Characterizing non-wage earners as dependent erases their unpaid contributions both to other household members' earnings capacity and to household life more generally. See discussion *supra* Part III.B.1.

339. See generally BRAMAN, *supra* note 332; RE-ENTRY POL'Y COUNCIL, *supra* note 284, at pt. II.B, ch. 13.

basic needs, without considering how family members may have lost access to the inmate's wages.³⁴⁰

Both free labor and contemporary incarceration are intensely racialized terrain, and this racial dimension seemingly bolsters the accounts of prison labor described above.³⁴¹ Characterizing inmates as in need of rehabilitation into disciplined workers evokes longstanding racist discourses—from Reconstruction to contemporary welfare reform—that attribute laziness, unreliability, and incompetence to people of color, especially African American men. In turn, these have been used to justify labor coercion toward those deemed unsuited to the institutions of free labor and to explain away labor market disadvantage.³⁴² Additionally, African American workers have been assumed to possess, or be entitled to, lower material needs than whites.³⁴³ In part, this assumption reflects the racialization of the male breadwinner ideal. Insofar as African American women, unlike their white counterparts, long have been expected to work in the labor market,³⁴⁴ African American men were not always included in policies designed to allow white men to maintain households with nonmarket-working wives.³⁴⁵ And to this day, portrayals of African American men as disconnected from the labor market are closely linked to portrayals of disconnection from family responsibilities.³⁴⁶

340. *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993) (en banc); *Harker v. State Use Indus.*, 990 F.2d 131, 132 (4th Cir. 1993). Thus, courts dismiss as inapposite the FLSA's goal of guaranteeing a basic standard of living.

341. See Wacquant, *supra* note 324, at 52-53 (arguing for the existence of racialized "carceral continuum" between the prison and jobless urban neighborhoods that places African-Americans in opposition to "working families").

342. See LAMONT, *supra* note 331, at 24, 57, 61, 132; LICHTENSTEIN, *supra* note 36, at 180-84; WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS* 113, 118 (1996); Fraser & Gordon, *supra* note 329.

343. GLENN, *supra* note 326, at 82, 154; LINDA GORDON, *PITIED BUT NOT ENTITLED* 47-48 (1994); cf. KESSLER-HARRIS, *supra* note 230, at 15 (discussing linkages among gender, perceived need, and wages).

344. See GORDON, *supra* note 343, at 275-76; SUZANNE METTLER, *DIVIDING CITIZENS* 172 (1998); STANLEY, *supra* note 3, at 148, 188; Roberts, *supra* note 3, at 875 ("The conception of motherhood confined to the home and opposed to wage labor never applied to Black women.").

345. See METTLER, *supra* note 344, at 186; William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1831-38 (2001); see also GLENN, *supra* note 329, at 82.

346. See, e.g., WILSON, *supra* note 342, at 91-92, 104-07; Ronald B. Mincy, Charles E. Lewis, Jr. & Wen-Jui Han, *Left Behind: Less-Educated Young Black Men in the Economic Boom of the 1990s*, in *BLACK MALES LEFT BEHIND* 1, 1 (Ronald B. Mincy ed., 2006); Ron Haskins, *Poor Fathers and Public Policy: What Is To Be Done?*, in *BLACK MALES LEFT BEHIND*, *supra*, 249; cf. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW* 195, 210-11 (Daivd Kairys ed., 2d ed. 1990) (criticizing this tendency for pathologizing African American single motherhood).

Put simply, courts imply that, absent imprisonment, inmate workers would be single, unemployed, and adrift. Their distinction from free labor, in other words, inheres not just in the present organization of their work but also in their persons more deeply. In an analysis that equates employees with free labor, the market becomes an arena inhabited by specific sorts of people leading specific sorts of lives. Insofar as courts imagine prisoners to be quite different, it buttresses the conclusion that their work is not market work.

b. The State as a Nonmarket Entity

Just as courts imagine market *workers* to be certain sorts of people, they also imagine market *employers* to be particular types of organizations, specifically nongovernmental ones. In other words, they draw on that component of the self-regulating market ideal that opposes the economy to the state.

Many prison labor cases give weight to whether a governmental entity versus a private firm supervises inmate workers and controls their work product.³⁴⁷ The watershed *Vanskike* opinion, for instance, set aside prior pro-coverage opinions like *Carter* and *Watson* because those cases involved inmates working for “private, outside employers.”³⁴⁸ Similarly, *Gambetta v. Prison Rehabilitative Industries* held that plaintiff inmates were not “employees” because of a threshold determination that they worked for “an instrumentality of the state.”³⁴⁹ Florida law established the entity in question, the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (“PRIDE”), as a nonprofit corporation mandated to “simulate[] a real-world business environment” and managed independently of the prison system by a gubernatorially appointed board.³⁵⁰

The involvement of a state institution functions to cast the relationship as “penological, not pecuniary,”³⁵¹ even in a case like *Gambetta* that involved “prison industries which generate income for

347. For the weaknesses of this approach, see discussion *supra* Part II.B.

348. *Vanskike v. Peters*, 974 F.2d 806, 808 (7th Cir. 1992).

349. 112 F.3d 1119, 1123 (11th Cir. 1997); *accord* *Larum v. Silver State Indus.*, 46 F.3d 1142, 1995 WL 29484, at *1 (9th Cir. 1995) (table) (“In order to establish a claim under the FLSA, an inmate must demonstrate that he is working with a private person, corporation, association or firm.”).

350. *Id.* at 1121.

351. *Hale v. Arizona*, 993 F.2d 1387, 1395 (9th Cir. 1993) (en banc); *see also* *Sims v. Parke Davis & Co.*, 334 F. Supp. 774, 787 (E.D. Mich. 1971), *aff’d*, 453 F.2d 1259 (6th Cir. 1971) (per curiam) (“[T]he economic reality is that plaintiffs are convicted criminals incarcerated in a state penitentiary.”).

the prison.”³⁵² In contrast, inmates working for outside entities “[are not] working as prison labor, but as free laborers in transition to their expected discharge from the prison.”³⁵³ Again, the identity of the actors involved strongly influences how the relationship is interpreted. That interpretation draws on a pre-existing opposition between market economies and state mandates and further deploys it to entrench a more specific division between market employment and penal labor.

c. The Labor Market as Public Space

Work within the prison complex serves as a marker of nonemployment.³⁵⁴ *Vanskike* consistently fused institutional and physical locations, opposing “private, outside employers” to work “within the prison and for the prison.”³⁵⁵ Some cases specifically invoke the image of prison walls as a relevant demarcation.³⁵⁶ The prison is a confined, particular place, in contrast to an undifferentiated economy, open to all comers.

This spatial contrast bears striking similarity to the way that physical separation between a public workplace and a private home has facilitated the opposition between (market) work and family life.³⁵⁷ This familiar contrast can be extended to the prison labor context. Punishment scholars have identified a process of spatial privatization in which “offenders are now routinely sequestered from the sphere of normal social life, and the ‘problem’ that they represent is managed ‘off-stage,’ in a discrete institutional setting which carefully controls its impact upon the public consciousness.”³⁵⁸ This separation and privatization of punishment, and of offenders, facilitates categorizing prison labor as “noneconomic”; doing otherwise would require integrating offenders into the same institutional mechanisms and legal categories that govern ordinary citizens’ daily

352. *Gambetta*, 112 F.3d at 1124.

353. *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

354. See *supra* text accompanying notes 155-157.

355. 974 F.2d 806, 809 (7th Cir. 1992); see also sources cited *supra* note 155.

356. *Sims*, 334 F. Supp. at 786; *Manville v. Bd. of Governors of Wayne State Univ.*, 272 N.W.2d 162, 165-66 (Mich. Ct. App. 1978).

357. See generally BORIS, *supra* note 338; BOYDSTON, *supra* note 3. Labor performed by women within a family home, even if it is paid directly or is part of the operations of a family business, often has been classified for various regulatory or statistical purposes as part of their family responsibilities, rather than as market participation. See STANLEY, *supra* note 3, at 175-217; Nancy Folbre, *The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought*, 16 SIGNS 463 (1991); Siegel, *supra* note 3, at 1077.

358. GARLAND, *supra* note 221, at 235.

lives. It is not surprising, then, that courts endorsing employment status for work release sometimes go beyond *physical* location to assign participants a liminal *social* location as "free laborers in transition to their expected discharge from the prison."³⁵⁹

* * *

In the instances discussed above, courts engage in relational work (as did the parties before them), invoking the presence or absence of various relational markers and assembling them into a coherent picture of the relational package that best fits prison labor. The premise throughout is that employment exists as a relational package, that these markers clump together, and that when one is absent, it indicates something about the relationship as a whole.

As we have seen already, an actor's relational work need not succeed. For instance, although *Gambetta* found work for a governmental entity to be an essential marker of an employment relationship, other prison labor opinions refuse to place much weight on this marker.³⁶⁰ Prison labor aside, governmental and nonprofit organizations are commonplace employers, and the statutes at issue in these cases specifically recognizes them as such.³⁶¹

I make no attempt here to explain why in some cases, but not in others, an actor's relational work succeeds in achieving recognition of a relationship as an instance of one relational package rather than another.³⁶² Of greater interest is that it can succeed at all, that the terms are so consistent even if the outcomes are not, and that sometimes the outcomes *do* stabilize. Today, patient-workers at mental institutions are employees, but inmate workers doing similar work for a prison are not.

More importantly, the coherence of employment itself endures. Productive work may be found in many relationships, but such relationships are not infinitely varied. Employment is one of them, and the law is not alone in treating employment as a single category that hangs together, even if it may be rough around the edges.³⁶³ This

359. *Bennett v. Frank*, 395 F.3d 409, 410 (7th Cir. 2005).

360. See sources cited *supra* note 160.

361. 29 U.S.C. § 203(d), (s)(1)(C) (2000); 42 U.S.C. § 2000e(b), (h) (2000); see *YMCA of Pikes Peak Region, Inc. v. N.L.R.B.*, 914 F.2d 1442, 1447-49 (10th Cir. 1990) (applying same standards to nonprofit and for-profit employers).

362. For an explanation of the outcome of conflicting efforts at relational work concerning the employment status of New Deal "work relief," see Goldberg, *supra* note 308, at 345-48.

363. On the consolidation of the modern employment relationship within corporate personnel practices, see JACOBY, *supra* note 229.

coherence is particularly remarkable because so much variation exists in the relational markers that seem significant and because actors interested in doing relational work can generate that variation self-consciously. Work can be contracted out or brought in-house, it can be located on prison grounds or off, products can be consumed or sold, and so on. This variability is what makes classification so difficult, and yet it seems neither to shake our confidence in the coherence of the categories nor to overwhelm our ability to use them. Employment law itself is an important part of how this happens, as I argue in the next Section.

B. Employment Law's Role in Packaging Employment

Judicial examination of employment's economic character proceeds against the background assumption that employment is an extra-legal category. The law may be called on to sharpen up some fuzzy boundaries, sometimes to carve out exceptions for distinctively legal reasons, and to adjudicate disputes over classification in particular cases, but at root it is building on a pre-existing category, just the way it would for a law about cats or carrots or carbon. The point of legal classification is to decide whether legal institutions should *do* something, and so of course, in that sense, the law affects what employment is. That, however, is a matter of what happens to instances of employment, not whether they are employment in the first place. A law requiring cats to wear collars affects cats, but it does not turn cats into dogs, let alone carrots.

This Section argues for a different account of the relationship between employment law and employment as a social phenomenon, specifically with regard to differentiation between employment and noneconomic relationships. Insofar as employment exists as a relatively coherent, stable relational package, employment law plays an important (but not all-important) role in achieving and maintaining this state of affairs.³⁶⁴ This argument proceeds first by reviewing recent sociolegal theory and research on the relationship between legal regulation and regulated institutions. In particular, I draw on a useful typology of facilitative, regulatory, and constitutive roles that has been developed by sociologist Lauren Edelman and her collaborators. Next, I illustrate employment's constitutive role vis-à-

364. Cf. Carbado, *supra* note 25, at 967 (arguing that "in the Fourth Amendment context, the [Supreme] Court both constructs race (that is, produces a particular conception of what race is) and reifies race (that is, conceptualizes race as existing completely outside of or apart from the very legal frameworks within which the Court produces it)").

vis employment's economic character, showing a number of ways in which employment law helps to generate the relational markers of employment as a distinct relational package.

1. Law's Facilitative, Regulatory, and Constitutive Roles

Legal disputes are an important forum for relational work. In individual cases, courts decide the category into which the parties' relationship fits for specific legal purposes. That adjudicative process becomes a site in which the parties seek to place themselves into one relational package or another.³⁶⁵ In this way, law provides a "facilitative environment" for relational work.³⁶⁶

More importantly, law helps to determine the elements of these relational packages through its operation as a "regulatory environment."³⁶⁷ As Jill Hasday has argued, the law differentiates among various intimate relationships in order to forbid, permit, mandate, or enforce particular types of economic exchange.³⁶⁸ In this way, law affects the content of a relational package by inserting specific legal consequences among the various elements making up the package. So, for instance, the legal distinction between marital and nonmarital relationships means that agreements to exchange household services for money or other resources are unenforceable within marriage but enforceable outside of it; an agreement involving sex may be criminal outside marriage but permissible (though not enforceable) within it.³⁶⁹

This regulatory aspect extends beyond formal legal mandates. Hasday argues that these relationally specific regulations of economic transactions are "mechanisms to mark and uphold the importance and distinctiveness" of particular relationships.³⁷⁰ In other words, substantive legal mandates also influence the meaning and normative status of other elements of the relational package, in part by differentiating them from similar elements of other relationships. So, for instance, different meanings may attach to payment from patient to doctor versus from customer to plumber, in part because of how the

365. ZELIZER, *supra* note 3, at 39, 49.

366. Edelman & Stryker, *supra* note 23, at 535-36; Edelman & Suchman, *supra* note 23, at 482-83.

367. Edelman & Stryker, *supra* note 23, at 535, 537; Edelman & Suchman, *supra* note 23, at 483, 496.

368. Hasday, *supra* note 3, at 492-94.

369. *Id.* at 502-11.

370. *Id.* at 522.

doctor-patient relationship is legally regulated.³⁷¹ Similarly, Edelman and Suchman differentiate among coercive, normative, and cognitive mechanisms of law's regulatory facet.³⁷²

Insofar as these normative and cognitive aspects of legal regulation are *distinctive* in character, they help to mark the relationship's boundary in addition to shaping its substance. That is, they may communicate that the relationship is of *this* and *not that* sort. These are examples of what I have called relational markers more generally. Borrowing again from differentiation among intimate relationships, the exchange and wearing of engagement or wedding rings may both be elements of particular relational packages—acts that are expected in and impart specific meanings to a relationship—and also relational markers. These acts clarify what type of relationship is at hand, both for participants and for observers.

Helpful as it is, Hasday's expressive account of law and economic relationships leaves out the very problem that is so vexing in the employment law cases involving paid nonmarket work: What type of relationship is it in the first place? Before the law can "mark and uphold the importance and distinctiveness" of particular relationships,³⁷³ it must know how to tell them apart.³⁷⁴

Similarly, judicial analyses of employment largely reflect a view of law as playing a facilitative role in individual disputes and a regulatory role at a structural level. The law attaches certain consequences—rights to minimum wages or against discrimination, and a litigation vehicle to enforce them—to being in an employment relationship. Before triggering such consequences, the law first must determine whether the parties exhibit the extra-legal relational package of employment. According to this view, the law may add elements to the package and shape how the elements interrelate, but these additions do not change the category into which the underlying relationship fits. That determination can be (and must be) made prior to regulation.

Likewise, scholarship on the contemporary employment relationship largely treats it as an extra-legal category arising out of a particular set of economic relations. Consider analyses of the control dimension of employment. One influential approach sees employment law as having more or less "fit" the real relationships that existed

371. *Id.* at 522-24.

372. Edelman & Suchman, *supra* note 23, at 496.

373. Hasday, *supra* note 3, at 522.

374. This may represent a more general weakness with expressive accounts of legal distinctions among relationships characterized by different forms of valuation. See, e.g., CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 70-107 (1997).

during the New Deal, but subsequently having "lagged" behind changes in the nature of employment and the organization of work more generally.³⁷⁵ A more cynical view sees employment law as unable or unwilling to see the *real* employment relationships that are being disguised by evasive employers' manipulation of organizational form.³⁷⁶ Either way, employment law's job is to identify correctly the real relationships out there in the economy, relationships that exist exogenously but require regulation.³⁷⁷

A more robust view of law's role, but still a regulatory one as I use the term here, appears in the tradition of critical labor law history.³⁷⁸ Take, for instance, Christopher Tomlins's important work on nineteenth century U.S. employment law.³⁷⁹ Tomlins argues that "the relations of parties to employment contracts were construed to be relations of domination and subordination."³⁸⁰ During the period in question, "work in America had become a far less heterogeneous relationship . . . , acquiring a uniform definition and set of characteristics as a single universal and impersonal relation founded on wage labor."³⁸¹ Tomlins emphasizes the emergence of the new legal category of employment, but in his account, the scope of that category appears to track external shifts in the organization of productive labor. "Disciplinary power" was "*implanted* in the employment relationship" by courts that applied the common law of master and servant to this new employment relationship.³⁸² This analysis focuses on how law shaped the rules, norms, and meanings operative within employment, not on how law determined which activities were employment in the first place.³⁸³ Applying Edelman and Suchman's

375. See, e.g., STONE, *supra* note 5.

376. See Linder, *supra* note 5. Seeing past such manipulations to what lies beneath is the conceit of the "economic reality" concept under the FLSA.

377. Cf. Carbado, *supra* note 25, at 978 (criticizing the Supreme Court's racial jurisprudence for producing "the notion that race is already 'out there'; the [Court's legal] project is thus to determine what race is").

378. See generally Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981).

379. TOMLINS, *supra* note 24.

380. *Id.* at xi.

381. *Id.* at 260.

382. *Id.* at 261 (emphasis added); see also ATLESON, *supra* note 229, at 90 (arguing that contemporary labor functions "to structure or fill out" the content of "the employment relationship"); TILLY & TILLY, *supra* note 105, at 132 (characterizing the state's role in the labor market as "specifying rights and authority *within the employment relationship*" (emphasis added)).

383. Likewise, Karen Orren, despite developing an elaborate analysis of the "workplace as a jurisdiction" ruled by employers whose authority was enforced by courts, never addresses how it was determined *who* was subject to this jurisdiction. KAREN ORREN, *BELATED FEUDALISM*:

typology of how law regulates, Tomlins's great contribution is to go beyond an analysis of employment law's coercive possibilities³⁸⁴ in order to explore its normative³⁸⁵ and cognitive³⁸⁶ influence on employment relationships.³⁸⁷

What remains to be done, particularly in research on the modern statutory schemes, is to examine the constitutive operation of employment law.³⁸⁸ In Edelman and Suchman's formulation, as a "constitutive environment . . . the legal system constructs and empowers various classes of organizational actors and delineates the relationships between them."³⁸⁹ They suggest as an example that

LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 102-05 (1991); cf. Dobbin & Dowd, *supra* note 230 (arguing that a variety of social process, including antitrust policy, shaped the particular form that competitive markets took, without addressing how they identify market activity). Insofar as Tomlins addresses the scope of the employment relationship, he focuses on the distinction between employees and independent contractors. See TOMLINS, *supra* note 24, at 231, 267-68; see also STEINFELD, *supra* note 24, at 129, 302. Atleson criticizes labor law's exclusions of managerial and supervisory employees from the legal definition of employment, but he does so by contrasting such artificial distinctions to the underlying unity of workers in a well-defined, extra-legal relationship with employers. See ATLESON, *supra* note 229, at 173 ("[The managerial exclusion] represent[s] an attempt to mask or avoid the recognition that a clear confrontation exists between owners, on one hand, and workers, on the other. To blur the confrontation, a vaguely defined group was created composed of those who are neither traditional blue-collar workers nor owners.").

384. Cf. TOMLINS, *supra* note 24, at 292 (characterizing courts as "[t]urning aside challenges from employees to employers' disciplinary power"). In particular, Tomlins rejects the view that employment law should be seen either as failing to intervene (coercively) in power relations originating elsewhere, including in basic inequalities of property, or simply as actively reproducing those power disparities. See TOMLINS, *supra* note 24, at xiii; Tomlins, *supra* note 18.

385. Edelman & Suchman, *supra* note 23, at 496 (describing law as a source of "values, ethics, and role expectations, which organizations (and their members) then elaborate and, to various extents, internalize").

386. *Id.* (describing law as "mak[ing] certain forms of action seem more natural, plausible, and fitting than others").

387. In this sense, and in keeping with a critique of legal classification as a purely descriptive exercise, see *supra* Part I.C, Tomlins insists that "[l]egal discourse does *not* simply catalogue social relations received from elsewhere" and instead "helps determine . . . the very nature of social relations." TOMLINS, *supra* note 24, at 226.

388. There is some risk of terminological confusion here. Tomlins characterizes his work as showing "how the postrevolutionary legal order was constitutive of social relations." TOMLINS, *supra* note 24, at xiii; see also FORBATH, *supra* note 24, at x. As I read Tomlins, what Edelman and Suchman call the regulatory character of law includes what he labels "constitutive." To be sure, Tomlins's usage is hardly idiosyncratic. Cf. FORBATH, *supra* note 24, at x. Indeed, Edelman's later work with Robin Stryker uses "regulatory" in a somewhat narrower fashion more akin to the "coercive" component of regulation in her prior work with Suchman, see Edelman & Stryker, *supra* note 23, at 537 (at one point equating the "regulatory environment" with "substantive rules"), and, citing Tomlins's work as an example, uses "constitutive" in a broader fashion that seemingly includes the "normative" and "cognitive" aspects of regulation, see *id.* at 540-41.

389. Edelman & Suchman, *supra* note 23, at 483; accord Edelman & Stryker, *supra* note 23, at 540-42; see also Tomlins, *supra* note 18, at 67 (discussing "subjection").

"[l]aw generates understandings . . . [of] who is or is not an employee," but they do not elaborate.³⁹⁰ Insofar as scholars have pursued this question, they have done so historically and with regard to differentiation among employment, work performed within the household, and involuntary servitude.³⁹¹ But the differentiation of employment, and in particular its differentiation as quintessentially economic, is an ongoing process in the present. Moreover, it implicates a whole host of institutions positioned as outside the economy, not just the family household.

2. A Constitutive Analysis of Law and Employment

Employment law helps to constitute employment as a relational package. I mean this not just in the regulatory sense of adding to, subtracting from, or otherwise influencing the content of employment relationships, but in the more fundamental sense of giving employment a separate existence and differentiating it from other relationships. Nor do I mean this in the trivial sense that legal institutions decide the *legal* definition of employment. Instead, employment law influences the "facts on the ground" to which legal classification responds. By saying "influences" rather than "determines," I mean to leave room both for the mediation of legal doctrine by other institutions and for reciprocal influence on that doctrine.³⁹² Indeed, I have shown already how employment law draws on and rearticulates extant institutional forms and cultural categories in its analyses of employment's economic character.³⁹³ On display here is "the endogeneity of both law and the economy."³⁹⁴

390. Edelman & Suchman, *supra* note 23, at 503; accord Edelman & Stryker, *supra* note 23, at 540. Critical Race Theory engages analogous issues in studies of judicial racial determinations. See LÓPEZ, *supra* note 25; Harris, *supra* note 25, at 1736-41.

391. See BOYDSTON, *supra* note 3; STEINFELD, *supra* note 24; Siegel, *supra* note 3; Tomlins, *supra* note 18.

392. See generally Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

393. See *supra* Part IV.A.2.

394. Edelman & Stryker, *supra* note 23, at 542. Such an argument necessarily stretches beyond what can be studied directly with the doctrinal materials I have emphasized thus far, and so below I integrate examples from and analogies to others' social scientific research and readily available sources. Additional research using different methods will be able to go much further than what I begin here, as a rich literature already does with regard to how organizations and employees respond to, implement, and reshape antidiscrimination law. See, e.g., Albiston, *supra* note 320; Frank Dobbin & Erin Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203 (2007); Edelman et al., *supra* note 392; Anna-Maria Marshall, *Idle Rights: Employees' Rights Consciousness and the Construction of Sexual Harassment Policies*, 39 LAW & SOC'Y REV. 83 (2005).

This subsection identifies several mechanisms through which this constitutive process operates with respect to employment's economic character. First, the behaviors mandated by regulation may serve as relational markers. Second, organizations' efforts to avoid or comply with these mandates may have secondary effects on behaviors that are relational markers. Third, the normative and cognitive dimensions of regulatory action may alter how existing elements of a relational package are interpreted in ways that influence their availability as regulatory markers. Fourth, by promoting regularity of institutional form and differentiation between employment and other work arrangements, employment law promotes the impression that this regularity arises from some intrinsic connection among elements of the relational package.³⁹⁵

a. Regulatory Mandates as Relational Markers

Employment law sometimes differentiates employment from other relationships by mandating practices that themselves serve as relational markers. For instance, to distinguish inmate labor from employment, courts often cite prisons' control over inmate wages—such as diverting them to victim restitution³⁹⁶ and routing the remainder into restricted accounts or scrip³⁹⁷—and their direct provision of many of inmates' basic needs.³⁹⁸ Inmates thus lack one relational marker of employment: work performed for cash by an independent consumer.³⁹⁹

What complicates matters is that the FLSA itself mandates that employees ordinarily receive minimum wages in the form of cash

395. These mechanisms focus on bottom-line legal outcomes with regard to familiar categories (like employment) and on organizational interactions with substantive legal requirements (like the form and amount of payment) rather than on the rhetorical strategies or conceptual apparatus of the judicial opinions themselves. In this way, I mean to address apt, though sympathetic, criticisms leveled at constitutive claims made in the Critical Legal Studies tradition and to draw on the empirical resources of Law and Society scholarship. See generally Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 LAW & SOC. INQUIRY 903 (1996); see also Gordon, *supra* note 147, at 575-76 (providing a Critical Legal Studies reading of contract law as a "theatre . . . for the expression of ideology").

396. See 18 U.S.C. § 1761(c)(2) (Supp. II 2002) (authorizing deductions of up to 80% of wages in PIE program); sources cited *supra* note 241.

397. See Mary Bosworth, *Commissary*, in ENCYCLOPEDIA OF PRISONS & CORRECTIONAL FACILITIES, *supra* note 238; 19 Op. Off. Legal Counsel 127 (1995) (describing federal system of managing prisoners' funds); 28 C.F.R. § 545.11 (2006) (specifying inmates' obligatory payment schedule out of prison-managed funds, with variation by participation in labor programs); ZELIZER, *supra* note 281, at 17 & n.37, 203.

398. See *Henthorn v. Dep't of Navy*, 29 F.3d 682, 686 (D.C. Cir. 1994).

399. See discussion *supra* Part IV.A.2.a.

"free and clear."⁴⁰⁰ Therefore, were inmate workers classified as employees, the absence of this particular relational marker would be an FLSA violation. Inmates would have a right to retain the same control over their wages as over any outside income and subject to the same restrictions. Moreover, to offset the increased payments, prisons likely would start charging inmates for food and lodging⁴⁰¹ or seek to count their direct provision as an in-kind wage permitted by the FLSA.⁴⁰²

FLSA compliance—triggered by legal classification as employees⁴⁰³—thus would have a recursive effect on the threshold

400. See 29 C.F.R. §§ 531.27-.35 (2006) (interpreting the statutory definition of a "wage" under the FLSA, 29 U.S.C. § 203(m) (2000)).

401. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 144. Thus, inmates' wage income might revert to the prison through general mechanisms requiring inmates to contribute toward the costs of their incarceration. The FLSA would require simply that the prison not single out prison-labor wages as the only resource subject to this reimbursement requirement, and that it distinguish between the two capacities in which the prison and inmate interact. Though the practice may be expanding, currently jurisdictions rarely assess inmates for the costs of incarceration. When they do, the efforts typically target only those who are most able to pay, rather than assessing an across-the-board fee, and governments make only limited efforts to collect unpaid fees after release. BARBARA KRAUTH & KARIN STAYTON, U.S. DEP'T OF JUSTICE, FEES PAID BY JAIL INMATES: FEE CATEGORIES, REVENUES, AND MANAGEMENT PERSPECTIVES IN A SAMPLE OF U.S. JAILS 33 (2005), available at <http://nicic.org/Downloads/PDF/Library/021153.pdf>; U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF PRISONS PROGRAM STATEMENT 5380.06, at 4 (1999), available at http://www.bop.gov/policy/progstat/5380_006.pdf; Fox Butterfield, *Many Local Officials Now Make Inmates Pay Their Own Way*, N.Y. TIMES, Aug. 13, 2004, at A1.

402. See 29 U.S.C. § 203(m) (including in calculation of "wages" the "reasonable cost . . . to the employer of furnishing such employee with board, lodging, or other facilities"); *Hale v. Arizona*, 993 F.2d 1387, 1405 (9th Cir. 1993) (en banc) (Norris, J., dissenting); *Vanskike v. Peters*, 974 F.2d 806, 812 (7th Cir. 1992); U.S. GEN. ACCOUNTING OFFICE, *supra* note 144. Using in-kind provision to satisfy wage obligations would raise difficult questions about valuation, including whether to credit the prison with costs associated with security and confinement. Such costs would be excluded if they are deemed to be "primarily for the benefit or convenience of the employer." 29 C.F.R. §§ 531.3(d)(1), 531.32(c). Moreover, lodging and food costs might fail the requirement that acceptance of in-kind over cash wages must "be voluntary and uncoerced." *Id.* § 531.30. *Cf.* Walter M. Luers, Note, *Workfare Wages Under the Fair Labor Standards Act*, 67 FORDHAM L. REV. 203 (1998) (analyzing analogous issues for treating welfare benefits as wages in workfare programs). A final problem is that the prison's provision of basic needs is not conditional on the inmate's work; inmates would not be starved or evicted if they refused or were unable to participate in a work program, even if they might suffer other punishment.

403. A legal ruling on the applicability of the FLSA to prison labor is the sort that is especially likely to produce a widespread, proactive, and relatively consistent institutional response. Prisons are large institutions with relatively high organizational capacity; they operate in a highly legalized environment in which inmates can be expected to sue if possible; and they are well organized in a way likely to promote diffusion of "best practices" in response to legal changes. Once FLSA applicability was established, any violations likely would be very easy to detect and very widespread. Payment practices are transparent and systematic, and the FLSA's substantive requirements are quite clear. See Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y REV. 493, 503-06 (2006); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992).

issue of coverage: the inmates now would look more like employees.⁴⁰⁴ In this way, the *absence* of important relational markers sometimes can be interpreted as proof of employment law violations, not as the absence of an employment relationship itself.⁴⁰⁵

A related point applies to the *presence* of relational markers. In the paradigmatic relationships that courts use as a foil to prison labor, employers already largely accept and comply with their employment law obligations. In addition to unconditional cash payment, the FLSA requires certain record-keeping practices.⁴⁰⁶ An organization asserting that a worker is not an employee may exclude her from the employee payroll system or not maintain any records at all.⁴⁰⁷ Doing so makes the relationship look less like ordinary employment, but ordinary employment looks the way it does in part because it already has been subjected to employment law.⁴⁰⁸

404. See Friedman, *supra* note 87, at 576 (noting that paying wages to mental patients and then requiring them to pay for food and lodging creates a new situation where “they are earning their room and board, and are not mere wards of the state, knowledge which carries a sense of accomplishment, self-respect, and dignity”). Zelizer’s work consistently emphasizes the role that distinctive types of payments and economic media play in differentiating among relationships. See, e.g., Zelizer, *supra* note 20. This example shows, however, that determining the type of payment at issue (a wage versus something else) may itself follow from the type of relationship, rather than vice versa.

405. At the extreme, consider cases of involuntary servitude or forced labor involving severe abuse of farm workers, domestic workers, or garment workers. See *Manliguez v. Joseph*, 226 F. Supp. 2d 377 (E.D.N.Y. 2002); Samantha C. Halem, *Slaves To Fashion: A Thirteenth Amendment Litigation Strategy to Abolish Sweatshops in the Garment Industry*, 36 SAN DIEGO L. REV. 397 (1999); *Used and Abused: Five Recent Cases with Slavery Convictions*, PALM BEACH POST (Fla.), Dec. 7, 2003, at 2. It would be most perverse for the extremity of mistreatment to strip these workers of employment law protections by removing the voluntariness ordinarily ascribed to employment. Cf. Fenwick, *supra* note 6, at 313 (voicing similar concern about the role of voluntariness in the employment status of prison labor).

406. 29 U.S.C. § 211 (2000); 29 C.F.R. pt. 516 (2006).

407. See, e.g., *Zheng v. Liberty Apparel*, 355 F.3d 61, 79 (2d Cir. 2003) (rejecting district court’s reliance on the absence of employment records to determine no employment relationship existed); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1057-59 (2d Cir. 1988) (dual record-keeping system for acknowledged employees and those misclassified as independent contractors).

408. JACOBY, *supra* note 229, at 153, 225, 260-61; Michael J. Piore & Sean Safford, *Changing Regimes of Workplace Governance, Shifting Axes of Social Mobilization, and the Challenge to Industrial Relations Theory*, 45 INDUS. REL. 299, 304 (2006). Similarly, regular payment on a time, rather than task, basis is one factor courts use to distinguish employees from independent contractors. State employment statutes played a crucial role in producing this feature of modern employment by mandating payment at regular intervals and based on time worked. STEINFELD, *supra* note 24, at 294, 311-15. Although I do not pursue the point here, the employee/contractor distinction appears amenable to the same sort of constitutive analysis that I develop with regard to the distinction between employment and noneconomic activity.

b. Indirect Influence of Regulatory Mandates on Relational Markers

Once an organization concludes that particular workers will be legally classified as employees, it may make various changes beyond the minimum necessary to comply with specific regulatory mandates.⁴⁰⁹ When these changes touch on relational markers, the relationship's distinctiveness as employment again may follow, rather than precede, legal regulation. For instance, classifying homeworkers as "employees" under wage and hour law puts a greater premium on employer control and monitoring of workers' time; it also encourages regularity of working hours.⁴¹⁰ As regulators stepped up application of employment laws to industrial homework throughout the early twentieth century, many employers responded by reducing reliance on the entire homework model and shifting production into more regimented factory settings.⁴¹¹ Doing so further consolidated the association of employment with large-scale industrial, rather than domestic, sites.

Inversely, organizations seeking to avoid some regulatory mandate may restructure work to remove a relational marker and thereby forestall their workers' classification as employees.⁴¹² Recall courts' reluctance to find an inmate employment relationship when

409. Here it is important to investigate how the demands of compliance are mediated by organizational actors and may be inflected by a variety of other institutional goals. See Edelman et al., *supra* note 392; Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061 (2003).

410. BORIS, *supra* note 338, at 278-90; see also JACOBY, *supra* note 229, at 260-61. Overtime rules create incentives against irregular schedules. Under the FLSA, no overtime is owed when 80 hours of work are split into two forty-hour weeks, but 10 hours of overtime is owed when 80 hours are split into one 50-hour and one 30-hour week. 29 U.S.C. § 207(1)(a) (2000); 29 C.F.R. § 778.104 (2006). For a contemporary example, consider a recent description of hours regulation at the worker-owned restaurant Colors. See Emily Vasquez, *A Post-9/11 Dream Turns into a Struggle to Fill Tables*, N.Y. TIMES, Mar. 7, 2007, at B1. The restaurant management insisted that employees not work a minute past 40 hours in order to avoid overtime. Interestingly, however, the workers in question adhered to this rule in part because the cooperative structure of the business contributed to their identification with organizational interests. See *id.* In this way, one can see that while employment law matters, workers' and their organizations' understanding and practice of their relationship draw heavily on other sources, including ones that may resist conformity to legal categorization. See Albiston, *supra* note 320.

411. BORIS, *supra* note 338, at 340.

412. See Randall W. Roth & Andrew R. Biebl, *A Taxing Matter: When is a Worker an Independent Contractor: How To Avoid Getting Caught in the IRS Crackdown*, J. ACCT., May 1991, at 35, 39 (suggesting steps employers can take to avoid having workers classified as independent contractors); Vicki Smith, *The Fractured World of the Temporary Worker: Power, Participation, and Fragmentation in the Contemporary Workplace*, 45 SOC. PROBS. 411, 417 (1998) (describing various strategies firms use to distinguish temporary workers on assignment from their own employees); cf. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801-05 (1941) (arguing that the contract doctrine of consideration "channels" agreements into certain forms with recognizable legal consequences).

prisoners work directly for a governmental agency. Several states that are committed to running prison labor programs that replicate private sector employment nonetheless place the programs in government corporations, albeit highly independent ones.⁴¹³ One likely explanation is that they seek to avoid application of federal employment law.⁴¹⁴

c. Normative and Cognitive Influences of Legal Classification

The packaged nature of employment⁴¹⁵ means that treating a relationship as employment in one respect yields significant—though not necessarily decisive—pressure to bring other elements into line. In light of the expected congruence between legal and social understandings of employment, legally classifying a relationship as employment in one respect provides a resource for relational work with regard to other aspects of the relationship.⁴¹⁶ Among other things, it may provide leverage for modifying discordant relational markers that had made the classificatory decision ambiguous.

Historical sociologist Chad Alan Goldberg analyzes this dynamic in controversies over the political and legal status of workers in contemporary “workfare” programs and in the “work relief” programs of the New Deal.⁴¹⁷ WPA work program participants sought to leverage the program’s avowed purpose of providing meaningful jobs to the unemployed—as opposed to stigmatizing cash relief—into further claims to be treated like other workers, including wage parity,

413. See *Gambetta v. Prison Rehabilitative Indus. & Diversified Enters., Inc.*, 112 F.3d 1119, 1120 (11th Cir. 1997); *Burleson v. California*, 83 F.3d 311, 314 (9th Cir. 1996).

414. Additionally, a number of states use governmental intermediaries as nominal managers of inmates working under the direct supervision of private employers; these intermediaries function much like temp agencies. See SEXTON, *supra* note 32, at 10-11 (describing “manpower” model of prison-corporation collaboration). Ordinary temp agencies relieve user companies of employer obligations by taking on employer status themselves. These prison intermediaries also relieve user companies of employer obligations by taking on employer functions, but the prison intermediary, unlike the ordinary temp agency, itself avoids employer status due to its governmental character. See Weiss, *supra* note 42, at 274-75.

415. Cf. TILLY & TILLY, *supra* note 105, at 162 (discussing “a labor market segmentation perspective [in which] particular sets of characteristics or governing rules [of work relationships] travel in bunches”).

416. See Janet Walsh & Stephen Deery, *Refashioning Organizational Boundaries: Outsourcing Customer Service Work*, 43 J. MGMT. STUD. 557, 567-69 (2006) (presenting evidence that, relative to in-house employees, workers nominally employed by a subcontractor display lower levels of commitment to the organization for which they work and are less responsive to factors that increase commitment); Dick de Gilder, *Commitment, Trust, and Work Behaviour: The Case of Contingent Workers*, 32 PERSONNEL REV. 588, 599 (2003).

417. Goldberg, *supra* note 308; Chad Alan Goldberg, *Welfare Recipients or Workers? Contesting the Workfare State in New York City*, 19 SOC. THEORY 187 (2001); see also Krinsky, *supra* note 17.

job security, and the right to organize.⁴¹⁸ Critics of FLSA employment status for prison labor worry about a similar dynamic: “[P]aying prisoners the minimum wage opens the door for prisoners claiming unemployment compensation, worker’s compensation, vacations, overtime, and incentive pay.”⁴¹⁹ Notably, this concern is not limited to congruence in employee status across statutes but extends to conventional features of employment—like vacations and incentive pay—that are not legally mandated.⁴²⁰ Insofar as any of these elements are added, doing so would only further entrench the relationship’s identification as employment.⁴²¹

This dynamic interaction among elements of relational packages extends beyond matters of formal institutional design. Also at stake are informal norms and expectations governing workers’ and employers’ relations to one another and to other actors, including the state.⁴²² Such changes in the meaning and relative salience of the

418. Goldberg, *supra* note 308, at 355; see also Goldberg, *supra* note 417, at 205-07.

419. Wellen, *supra* note 11, at 328; accord U.S. GEN. ACCOUNTING OFFICE, *supra* note 144. The addition of one element of a relational package does not *automatically* lead to others, but it increases the relational work necessary to justify splitting apart elements of the package or settling on an unfamiliar hybrid. See Goldberg, *supra* note 417, at 207 (arguing that the introduction of workfare in New York City opened up a new zone of contestation over the boundaries between opposed social categories of dependent welfare recipients and independent wage workers).

420. Formally, a worker’s employee status may vary across different employment, tax, and social insurance laws, as well as voluntary employer-provided benefits like paid vacations and leaves, pensions, health care, and job security. Nonetheless, there is a strong tendency to assume that these elements will be present or absent as a single package—employees get all of them, independent contractors get none of them. See, e.g., Brock v. Superior Care, Inc., 840 F.2d 1054, 1057-59 (2d Cir. 1988) (describing how an employer treated one group of workers as “employees” for both FLSA and payroll tax purposes and another group as nonemployees for both); JACOBY, *supra* note 229, at 254-58 (describing how rise of various New Deal regulatory regimes promoted growth of corporate personnel management departments and policies that also implemented and addressed employee benefits not mandated by law); Smith, *supra* note 412, at 417 (describing how workers classified as employees of a temp agency not only did not receive benefits from the client firm but also wore different identification badges and were excluded from company social events).

421. Inversely, courts sometimes cite the absence of various fringe benefits as a reason to deny employee status, even though such benefits are not legally mandated and many employees lack them. See, e.g., United States v. City of New York, 359 F.3d 83, 91 (2d Cir. 2003) (reversing district court decision that had relied in part on “plaintiffs’ non-receipt of benefits such as pensions, survivors benefits, sick pay, and health insurance”); Tadros v. Coleman, 717 F. Supp. 996, 998 (S.D.N.Y. 1989), *aff’d*, 898 F.2d 10 (2d Cir. 1990) (noting that the “volunteer” “received no salary, no health or dental benefits, no insurance or retirement benefits, no office space, no secretarial help, and no regularly assigned work hours”).

422. See Albiston, *supra* note 320; Loril M. Gossett, *Kept at Arm’s Length: Questioning the Organizational Desirability of Member Identification*, 69 COMM. MONOGRAPHS 385, 399 (2002) (discussing how the lack of an employment relationship dampens norms of mutual responsibility and thereby facilitates termination of workers assigned to the firm by a temp agency); Marshall,

relationship's constituent parts may be significant for ongoing relational work. Research on workfare, work relief, and public job creation programs is again instructive here. Paying participants with a standard paycheck from the agency supervising the work, rather than through a public benefits transfer from the welfare agency, leads to participants' productive work becoming more central to their, and to others', understanding of the relationship.⁴²³ They become more like workers and less like welfare recipients.⁴²⁴ Attention shifts from their poverty, their children, or their prior job loss—some or all of which controlled entry into the program—to their work and the wage they receive for it. Associated with this shift are what Goldberg calls the “material and symbolic profits” that correspond to the name ‘worker.’⁴²⁵ Participants can move from the stigma of “welfare dependency” to the dignity of “work.”

Thus, legally classifying payments as an employee's wage may alter the parties' and others' understanding of what the relationship is really about.⁴²⁶ These understandings are themselves markers of employment's economic character when, for instance, courts consider the purpose or nature of the relationship.⁴²⁷

d. Institutionalizing and Differentiating Employment as a Package

Thus far, I have described mechanisms through which employment law helps to constitute employment by affecting whether relationships contain the elements, the relational markers, that signify employment. There remains one final and more fundamental constitutive mechanism. The processes described above can help reinforce and give substance to the very existence of “employment” as

supra note 394, at 388; Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001).

423. This effect reflects the crucial role that particular economic media play in differentiating specific relational packages. ZELIZER, *supra* note 3, at 37, 105-07.

424. This occurs even when a worker gets a job because the welfare agency refers the worker to the employer and supplies funds to cover the costs of employing the worker. See CLIFFORD M. JOHNSON & STEVE SAVNER, *FEDERAL FUNDING SOURCES FOR PUBLIC JOB CREATION INITIATIVES* (1999), available at http://www.clasp.org/publications/federal_funding_sources.pdf; SONDR A YODELMAN & PAUL GETSOS, *WAGES WORK! AN EXAMINATION OF NEW YORK CITY'S PARKS OPPORTUNITY (POP) AND ITS PARTICIPANTS* (2004), available at <http://cvh.mayfirst.org/files/Wages%20Work%20Layout.pdf>.

425. Goldberg, *supra* note 308, at 355; see also Deborah C. Malamud, “Who They Are—Or Were”: Middle-Class Welfare in the Early New Deal, 151 U. PA. L. REV. 2019 (2003).

426. See Zelizer, *supra* note 20, at 487-89; see also Anna-Maria Marshall, *Injustice Frames, Legality, and the Everyday Construction of Sexual Harassment*, 28 LAW & SOC. INQUIRY 659 (2003) (showing how the legal category of sexual harassment influenced but did not determine how women workers interpreted unwanted sexual attention at work).

427. See discussion *supra* Part II.A.3.

a discrete social category. They do so both by creating regularity in elements of work relationships that cluster together in a single package and by discouraging the existence of partially overlapping packages that would blur the boundary between employment and other relationships.

Take, for example, Eileen Boris's study of wage and hour regulation of industrial homework, such as cigar rolling, garment production, and nut sorting, from the late nineteenth through the mid-twentieth centuries.⁴²⁸ Some reformers attacked the practice for defying a basic incompatibility between the family home and the workplace, thereby corrupting youthful innocence with child labor and interfering with maternal caregiving.⁴²⁹ Although the application of employment law to industrial homework might seem to recognize the home as a workplace, in practice it actually reinforced the gendered opposition between caregiving and paid work. It did so because subjection to employment law contributed to suppression of industrial homework.⁴³⁰ Employment became more firmly associated with work in large, nonresidential facilities and thereby differentiated from family relations at home. Today, it is commonplace—and not without reason—to make arguments about paid employment (often in contrast to unpaid caregiving) that rely in part on this contrast between leaving the intimate home and going to a structured workplace shared with many other workers.⁴³¹ But this now intuitive and familiar contrast is partly the product of employment regulation itself.

Another example is the distinction between volunteers and employees. The FLSA and other employment laws encourage a sharp divide between the two categories. Absent a minimum wage, there might well be a compensation continuum between unpaid volunteers, those who work for a token amount such as \$1 an hour, and those who work at the minimum wage. The FLSA, however, bans this transitional zone, with the result that workers work either for free or for at least \$5.85 an hour.⁴³² This sharpens the distinction between employees working for wages and those donating their time and labor.

In these and other ways, employment law contributes simultaneously to the differentiation of employment from other

428. BORIS, *supra* note 338.

429. *Id.* at 84-85, 122, 299; *see also* VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD* (1985).

430. *See* BORIS, *supra* note 338, at 3, 350.

431. *See* WILSON, *supra* note 342, at 74-75; Schultz, *supra* note 3, at 1883.

432. 29 U.S.C. § 206(a)(1) (2000) (setting out schedule of minimum wage increases culminating in \$7.25/hour in July 2009).

relationships and also to the homogenization of employment.⁴³³ In so doing, it encourages the notions that some essential logic holds these elements together and produces this regularity and that judges should resolve classificatory disputes by seeking this essence.

CONCLUSIONS

Employment is specifically an *economic* relationship. Controversy over this economic character erupts when individuals work in institutional settings, such as prison labor, that readily split apart two senses of the economic that widely are presumed to coincide: the economic as market interaction and the economic as production, distribution, and consumption of goods and services. Upon closer inspection, however, deep problems foil the designation of an economic sphere, one separate from other social institutions and structured by its own internal logic. Distinguishing employment from other relationships does not proceed simply by discerning the presence of an economic character. Instead, distinction emerges out of political contestation in which varied elements are knit together into a contingent and not entirely stable configuration labeled employment. Employment law plays a crucial role in constituting this relational package. In doing so, it makes a difference in ways that go well beyond its direct regulatory mandates. Employment law helps to institutionalize and make real some of the most basic categories through which we organize our lives.

Employment relationships also are building blocks and reference points for broader social fields like "the labor market." Thus, we measure labor market trends by counting employment relationships and their distribution, hours, wages, and so on. And the labor market is taken as one essential component of "the economy" at large. Wage trends and unemployment levels are mainstays of economic indicators, and employee wages are a major component of that snapshot of the economy as a whole, the Gross Domestic Product.⁴³⁴ Thus, employment law helps to constitute the market economy.

So what? As generally is true for social constructionist analyses, specific prescriptions for law and policy do not follow directly

433. See JACOBY, *supra* note 229, at 152-53, 248-49, 260-61 (describing role of federal regulation, including the FLSA, in creating a standardized employment relationship within and across firms).

434. See MITCHELL, *supra* note 18, at 98-99, 262-63; NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *supra* note 279, at 40-43.

from my arguments here.⁴³⁵ They do, however, widen the range of plausible responses to old problems and direct our attention toward new ones. I conclude with some preliminary thoughts about what these new directions might be. I address three general topics, beginning with the disputes over employment status that have been this Article's focus, then broadening out to consider the implications both for "ordinary" employment and for nonmarket work like parental caregiving, which is not employment by any account.

A. The Employment Status of Paid Nonmarket Work

A constitutive view does not deny that employment relationships have an artifactual quality, solid enough that changing the legal definition of employment could leave it fitting a real phenomenon quite badly rather than simply remaking it by fiat.⁴³⁶ For this reason, we should continue to ask how best to identify employment relationships.⁴³⁷ Nonetheless, additional questions and considerations come into view once we see law as participating in the maintenance and policing of employment's coherence and stability, and in its inclusion or exclusion of particular practices.

First, this perspective should affect how we allocate responsibility for delineating the employment relationship, as among courts, executive agencies, and Congress. Insofar as this classificatory task comes to look more political and less an exercise in factfinding, there might be greater reason to structure the judicial inquiry in a way that channels disputes into the political branches. Individual cases still will have to be decided in the meantime, so we might consider reasons for courts to lean in one direction during the judicial phase of a larger decisionmaking process.

One pertinent consideration is parties' institutional capacity and motivation to manipulate organizational form. Many organizations have substantial and systematic incentives to structure a workforce in ways that avoid the strictures of employment law. This provides a reason for judges to err on the side of inclusiveness and, more specifically, to evaluate employment in ways that cannot be manipulated easily. Moreover, these same organizations are well positioned to seek legislative or administrative relief, more so than the relatively disorganized and often politically marginalized persons

435. See Adam M. Samaha, *What Good Is the Social Model of Disability?*, 74 U. CHI. L. REV. 1251 (2007).

436. Cf. Elizabeth Mertz, *A New Social Constructionism for Sociolegal Studies*, 28 LAW & SOC'Y REV. 1243, 1246, 1248 (1994).

437. See Davidov, *supra* note 79.

whose work often is at issue. In these respects, the productive work approach begins to look more attractive, not as an adequate account of who ultimately should be subject to employment law protections but instead as a judicial default rule.

Second, once we see employment as something quite real but also contingent, and in particular as a relational package bound in part by law, then we can interrogate not just the package's boundaries but also its continuing integrity.⁴³⁸ Rather than proceeding directly to the question courts take up—under what circumstances should inmates or other workers be classified as employees?—we should question the use of employment as a singular category through which we recognize, protect, organize, and support valuable work.⁴³⁹

Instead, we might consider a proliferation of employments. A categorical divide between employees and nonemployees is not the only plausible way to manage tensions between employment protections and other valuable features of work relationships. Different forms of employment might vary according to the institutional context of work, allowing for greater protections to those currently excluded from employment without denying the need to accommodate institutionally specific concerns.⁴⁴⁰ To take just one example, religious organizations generate now-familiar tensions between respecting work's religious significance and acknowledging the integration of such organizations into wider economic networks. Current law manages that tension by, on the one hand, permitting by statute a religious school or hospital (unlike other employers) to discriminate among its workers based on their religion while, on the other hand, otherwise applying employment discrimination law to the relationship.⁴⁴¹

Instead of threatening employment status, the contextual specificity of work could instead help to shape its character. The

438. A similar project is well underway among family law scholars who are questioning whether the rights and responsibilities allocated through marriage ought to be disaggregated. See, e.g., Laura Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007).

439. Cf. Lester, *Unemployment Insurance*, *supra* note 3, at 391 (suggesting multiple benefit programs serving different groups of workers); Zatz, *What Welfare Requires*, *supra* note 3 (suggesting multiple transfer programs addressing different reasons for promoting work).

440. Cf. Davidov, *supra* note 79, at 136-37 (discussing proposals for a continuum of labor protections beginning at their maximum in the core of employment and weakening with movement toward a periphery of independent contractors or beyond to all citizens); Judy Fudge, *Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation*, 44 OSGOODE HALL L.J. 609, 637-46 (2006) (suggesting a fragmentation of labor law in which different types of protections apply to different sets of work arrangements, without necessarily establishing any consistent continuum from greater to lesser protection).

441. 42 U.S.C. § 2000e-1(a) (2000).

appeal of such refinements, rather than crude all-or-nothing categorization as an employee or not, again recommends relying less heavily on courts' threshold determinations of employee status as the mechanism through which to strike the appropriate balance. There certainly are competing considerations, but for now the point is that a foundational commitment to the coherence of the employment relationship (defined by markets or by work) need not be among them.

B. Revisiting the Market Character of Ordinary Employment

My analysis also suggests new ways to think about the paradigmatic cases in employment law, not just the marginal ones. By rejecting a "market essentialism"⁴⁴² that reduces typical jobs to an "undersocialized"⁴⁴³ conception of the labor market, we might come to see *all* work as socially situated, and differentially so.⁴⁴⁴ Doing so opens up a broader view of work's multiple roles in people's lives and in their relationship to the state.⁴⁴⁵

Our employment laws routinely embrace, however imperfectly and haltingly, a vision for work's place in our lives that has its own substance—one that links work to some level of material well-being (the minimum wage), democratic organization (labor law), race and gender equality (antidiscrimination law), some balance among different life activities (hours regulation and family leave), and social contribution and mutual support (social insurance). Market mechanisms certainly play a role in this scheme. They can help promote these goals⁴⁴⁶ and also help manage some tensions between them.

Thus, we might think of employment law as selectively incorporating and channeling market processes, rather than as fundamentally oriented toward counteracting markets.⁴⁴⁷ This reinforces the familiar, but too often forgotten, Legal Realist point

442. John Lie, *Sociology of Markets*, 1997 ANN. REV. SOC. 341, 342-43

443. Granovetter, *supra* note 13, at 54.

444. See Zelizer, *supra* note 20 (proposing a mode of analysis that applies across contexts of families, large bureaucracies, and sexual intimacies).

445. Cf. Zatz, *What Welfare Requires*, *supra* note 3 (arguing that distinct reasons for valuing work vary in relevance across policy contexts and may lead to different legal definitions of work).

446. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER* 4 (2003) (arguing that market pressures (in conjunction with employment law) help make the workplace an important site for fostering democratic dialogue and solidarity).

447. See Piore & Safford, *supra* note 408; cf. PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* (1995) (arguing for a fundamental role for market mechanisms in conceiving and achieving an egalitarian approach to distributive justice); Ronald Dworkin, *What is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 284 (1981) (same).

that markets are our creation and should remain our servant. It also adds a complementary insight: the market is not the only source of unjust working conditions,⁴⁴⁸ and therefore employment law need not limit itself to rectifying the market's failures.⁴⁴⁹ Among other things, this means resisting the persistent notion that the balance of economic terms between employer and employee (pay, hours, benefits, and so on) is more centrally the concern of employment law than questions of dignity, authority, respect, and equality among workers, and that these matters can be held apart.

A more critical perspective on employment law also emerges once we take seriously its constitutive role. Market skeptics typically embrace labor and employment law as a way to temper the instrumentalism, individualism, and adversarial stance associated with economic bargains and to infuse other values.⁴⁵⁰ From this perspective, employment law's failings stem from not going far enough toward displacing markets. But my analysis suggests a less sanguine view.

In various respects, employment law actually may help to *promote* market dynamics, embed them in employment relationships, and entrench the idea that they form these relationships' essential core. The FLSA may place a floor below wages, but it also dictates a cash form.⁴⁵¹ The NLRA may facilitate workers' collective action and power, but it also channels this into the form of adversarial bargaining.⁴⁵² Employment discrimination law sometimes demands that equality trump the bottom line, but it also can be enlisted to help police a "sanitized workplace" organized around the strict separation of professional relationships from those thick with desire, antagonism, or solidarity.⁴⁵³ In each case, we face a more complicated picture than the law heroically restraining the market. For better or worse, the law, in part, is producing the market as a force in need of restraint, at once

448. Cf. Michele Goodwin, *Tissue and Organ Taboos* 21 (unpublished manuscript, presented at the University of Chicago Law School, Oct. 29, 2007, on file with Vanderbilt Law Review) (criticizing claims that gift relationships necessarily avoid the harms associated with markets).

449. See ORREN, *supra* note 383, at 3-4 (characterizing the growth of labor law as displacing feudal hierarchy within employment relations); STEINFELD, *supra* note 24, at 314 (arguing that "modern free wage labor was not the product of the rise of free contract in free markets but of the social legislation and court decisions" in the decades spanning the start of the twentieth century).

450. See MARGARET JANE RADIN, *CONTESTED COMMODITIES* 108-10 (1996); Barenberg, *supra* note 5.

451. See *supra* text accompanying note 400.

452. See ORREN, *supra* note 383, at 217.

453. Schultz, *supra* note 409; see also Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80-104 (Wendy Brown & Janet Halley eds., 2002).

offering itself as the source of that restraint but also stripping others away.

*C. Rethinking the Significance of Pay in the Analysis of
Nonmarket Work*

Throughout this Article, I have drawn heavily on feminist scholarship that criticizes the evolving institutional forms and modes of thought that distinguish market work from family life, generally privileging the former and tying women to the latter. In this conversation, it is commonplace to equate "market work" with "paid work" and to contrast these with the equivalents "nonmarket work" and "unpaid work."⁴⁵⁴ We must be more cautious in mapping a market/nonmarket divide onto a paid/unpaid distinction.⁴⁵⁵ This is not simply a point of terminological tidiness but instead a substantive point about whether monetary transactions drive the structure, meaning, and social recognition of the relationships in which they occur.⁴⁵⁶

In prison labor and related cases, work is paid but nonetheless may be classified as nonmarket work and, as a result, placed outside the scope of protections and support gathered around the honored figure of the worker. There are complex implications for ongoing feminist debates about family labor. On the one hand, in line with my earlier suggestions about multiplying employment, disaggregating money and markets opens up possibilities for attaching economic entitlements to nonmarket work without thereby transforming it into market work, or commodifying it, in terms of its social meaning to those performing the work or benefitting from it.⁴⁵⁷ If the degraded, penological character of prison labor can survive the payment of hourly wages to inmates, then surely the intimate, spiritual character of care work⁴⁵⁸ can survive the provision of financial support to parents. On the other hand, and less optimistically, paying nonmarket caregivers also may do less than we hope to change the social meaning

454. See, e.g., Orloff, *supra* note 3; Williams, *From Difference to Dominance*, *supra* note 3; see also Abbott, *supra* note 18. I certainly have done so myself. See Zatz, *What Welfare Requires*, *supra* note 3.

455. See Philipps, *supra* note 275.

456. See generally ZELIZER, *supra* note 3; ZELIZER, *supra* note 281.

457. Hasday, *supra* note 3; Williams & Zelizer, *supra* note 17, at 370-71.

458. See Roberts, *supra* note 324.

and status of their work.⁴⁵⁹ The reason again is that getting paid for work is compatible with a wide range of relationships.

These points suggest that a type of shell game often is played with the concept of work. Practices that purport to recognize and support "workers" in fact are much more partial than the term suggests. To put it crudely, the welfare state purports to follow a neutral principle of supporting productive workers and disclaims the notion that full citizenship is reserved for men and those who follow conventionally masculine life courses; it just so happens that those identified as workers are disproportionately men, thereby systematically leaving women marginalized and insecure.⁴⁶⁰ Feminists rightly have called this bluff by demanding a more inclusive account of what activities constitute productive work. Unfortunately, the force of this demand still relies on the principle that productive work begets full citizenship. Once the bluff is called, however, the criteria may shift so that social citizenship no longer relies on productive work⁴⁶¹ but instead on market discipline, self-sufficiency, or getting out of the house.⁴⁶² Notwithstanding my continuing frustration with the initial bluff, it seems right that production alone is not enough, at least some of the time. Recall here the absurdity of the view that productive work is always employment and thus that organized, unpaid volunteering always violates the minimum wage.

This underdetermination by work and by pay appears clearly in recent feminist scholarship examining monetary transactions within family relationships⁴⁶³ and also paid work involving practices associated with the family, including housework, caregiving, sexuality, and reproduction.⁴⁶⁴ What this literature shows is that whether work

459. Cf. Nancy Fraser, *After the Family Wage: A Postindustrial Thought Experiment*, in FRASER, *supra* note 3, at 41, 57-60. This pessimistic point about paid nonmarket work is somewhat mitigated by the further pessimistic observation that even acknowledged market work may not achieve much recognition or support in a highly stratified labor market. See Zatz, *What Welfare Requires*, *supra* note 3, at 424-35.

460. SUZANNE METTLER, DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY 186-87, 209 (1998); Fraser, *supra* note 459; Carole Pateman, *The Patriarchal Welfare State*, in DEMOCRACY AND THE WELFARE STATE 231 (Amy Gutmann ed., 1988).

461. For a fascinating and depressing empirical study of how the criteria for inclusion may shift in order to preserve male privilege, see Michael Norton et al., *Casualty and Social Category Bias*, 87 J. PERSONALITY & SOC. PSYCHOL. 817 (2004).

462. See WILSON, *supra* note 342, at 72; Schultz, *supra* note 3, at 1899-1900. See generally Zatz, *What Welfare Requires*, *supra* note 3 (distinguishing among arguments for privileging market work).

463. See ZELIZER, *supra* note 3; Hasday, *supra* note 3.

464. Peggie Smith's work has been consistently important in this regard. E.g., Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851 (1999); see also Silbaugh, *supra* note 3; Noah D. Zatz, *Sex Work/Sex Act: Law, Labor,*

is incorporated into and recognized by “market” institutions varies with race, gender, class, and kinship position (both among workers and among those for and with whom they work), and with type of task, place of work, and structure of supervision and payment. Where the carework literature began—unpaid work in one’s own home and directed toward one’s immediate family—is just one configuration that brings these dynamics into play.

This Article opens the door onto an even wider field. The politics of market versus nonmarket work are not limited to the family or to tasks associated with it. Once we begin to look, we can see them in the prison and in the school, in the asylum and in the church; they lurk in the rehab center and in the military, in the factory and in the fields. Work is everywhere, but that barely begins to tell us who the workers are.

and Desire in Constructions of Prostitution, 22 SIGNS 277 (1997). There is also a growing literature outside of legal scholarship. See, e.g., Eileen Boris & Jennifer Klein, *Organizing Home Care: Low-Waged Workers in the Welfare State*, 34 POL. & SOC’Y 81 (2006); Paula England et al., *Wages of Virtue: The Relative Pay of Care Work*, 49 SOC. PROBS. 455 (2002); Cameron Lynne Macdonald & David A. Merrill, *‘It Shouldn’t Have to be a Trade’: Recognition and Redistribution in Care Work Advocacy*, HYPATIA, Spring 2002, at 67.