Putting the Purpose of Labour Law to Work

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Unedited version; final version forthcoming in the *Jerusalem Review of Legal Studies* as part of a book symposium on *A Purposive Approach to Labour Law* – a reply to comments by Einat Albin, Harry Arthurs, Simon Deakin, Ruth Dukes and Guy Mundlak

In writing *A Purposive Approach to Labour Law*,[1] my goal – and hope – was to contribute to the future development of this field, in a direction that will better ensure the achievement of labour law's goals. There is little doubt that many people around the world who need the protection of labour law are not covered by it. Moreover, legislatures and courts continuously have to respond to new challenges – new employment practices, new threats to labour rights and interests – and often fail to do so. To interpret labour laws, to reform them, to fill lacunas and respond to new challenges – we need to have a clear understanding of what we are trying to achieve. The book attempts to assist this endeavour by providing a discussion of goals (general as well as specific); by showing how these goals can be put to work – in practice – when interpreting labour laws and thinking about reforms; and by offering some legal tools that can help ensure ongoing adaptation of labour laws and their actual enforcement. The wonderful comments included in this symposium – for which I am extremely grateful – raise some doubts about this project and especially aspects that are missing from it. This is a great opportunity for me to clarify some points which I probably failed to explain clearly enough in the book, refine some of the arguments, and also acknowledge some limitations of the methodology employed in the book.

1. Putting the 'Crisis' in Place

Harry Arthurs' main critique is against the book's focus on *law*; a critique, in fact, about the relevance of law for the lives of workers and the ability of the law to make a difference. At first this seems to be a strange critique because we both agree – and it seems fair to assume that all the readers will agree – that law has at least *some* impact on our lives, and at the same time, this impact is limited, in the sense that sometimes law fails to change reality and often times other factors (which Arthurs calls political economy) have a bigger impact than the law on our lives. There will be different views about where we stand on the spectrum between the law having zero impact and full impact – depending probably on one's experience from his or her own legal system. But it would be strange to argue that law matters so little so as to make it useless to make proposals on how to improve it and how to interpret it.

Arthurs comes quite close to this position, which amounts to saying that any normative study of law is futile. However, at the very beginning of his comment and again towards the very end, he does admit (somewhat reluctantly) that this kind of scholarship can be useful. Accordingly, although he makes clear throughout his comment that he finds little value in trying to revive or improve labour law, he frames his critique not against the normative study

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* Elias Lieberman Professor of Labour Law, Hebrew University of Jerusalem. I am deeply thankful to Einat Albin for organizing this symposium (and generally for being a great colleague!), and to all the participants for the extremely thoughtful and helpful comments. I am honoured that you have all engaged so deeply with my book.

1 Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

of law in general, but around the claim of an unfulfilled promise in the book: to 'solve' the 'crisis' of labour law.

It should be made clear that my book is not *about* the crisis of labour law. As I say in the introduction, crisis is a perpetual state in labour law, and while current times are especially challenging, the arguments made in the book about how to interpret and improve labour laws are independent of any crisis.[2] I do make reference to the language of crisis in the introduction, only to put the book in the context of other contemporary discussions. For this purpose, I explain what in my view are the manifestations of the current crisis (generally speaking, a mismatch of goals and means) and argue that the purposive approach can help address this crisis. I do not claim that this is the only crisis or that my proposals will solve all our problems. More than that: my entire discussion revolves around the crisis of labour *law*. The book is about labour law, I discuss the problems with labour law and offer solutions to improve labour law. In contrast, Arthurs' critique revolves around a different level altogether: not the crisis within the law – but the larger problems faced by the labour class, by workers, by unions. Simply put, he talks about the crisis of *labour*, not the crisis of labour *law*.

To be sure, there is a connection between the two. Take, for example, the failure of the law to cover many workers who are in need of protection – an issue which I address in chapter 6. The causes of this problem are diverse, and can be seen as part of the larger crisis of labour. But the problem manifests itself within labour *law*, for example in the way the term 'employee' is interpreted by courts, which has not been updated and thus lost the connection with the goals behind it (i.e. a mismatch of goals and means). This can be solved if the term 'employee' is interpreted differently. Of course, such a solution requires the will of judges (or in other cases, legislatures) that will have to adopt it. I have no illusions that this will be easy. Also, there could be other ways to address the same problem, outside of the law (in the realm of political economy). In this respect, the book's goals and claims are much more modest than what Arthurs has in mind. I am not claiming that the purposive approach can solve all the labour-related problems in the world; rather, the idea is to offer ways to adapt the law to new realities, where there is will to do so.

A much milder argument about the place of law in the world is offered by Simon Deakin. Following the reflexive approach, he argues that the ability of labour law to achieve the stated purposes is often limited, or at least not straight-forward. According to this view, law *does* matter, but it does not always lead directly to the expected result; often, for example, businesses find ways around it, and sometimes the law 'backfires'. This should be in our mind when devising means: if we want to actually achieve the purpose, we cannot be naïve and assume that employers will simply do what the law requires. I agree, and discuss these issues to some extent – with a focus on creating positive incentives for compliance – in chapter 9. At the same time, the point should not be overstated: the discussion in chapter 5 of the book regarding the minimum wage shows that despite common claims that it leads to unemployment and harms the weakest workers, studies show a much more benign picture.

2. The Planet of Labour Law and the Universe Around It

It is common to divide the legal apparatus into 'fields', among them the field of labour law (which in North America is further divided into the separate fields of employment law, (collective) labour law, and workplace discrimination law). This division into fields usually

[2] Page 4. See also the supporting comments of Deakin in this regard (this issue).

has no legal or normative significance; for the most part, it is used merely for convenience of teaching and research. It is not strict and obviously does not preclude teaching and research combining two fields or otherwise breaking the loose 'boundaries' between fields. It has been argued by Arthurs as well as Einat Albin that the book fails to consider the connections between labour law and other areas of regulation. Obviously, I am not against research exploring these connections, quite the contrary; I explicitly mention its importance.[3] But Arthurs and Albin maintain that discussing the connections between the fields is not only a possible and important route, but a *necessary* one as part of my current project. Here I must disagree.

The book is about the small planet of labour law, more or less as traditionally understood, and how we can invigorate and improve it. Arthurs and Albin both focus their attention, in different ways, on what is *outside* of this planet. Such comments are very helpful in putting the book – and the planet of labour law – in context, by asking what goes on outside of it. It is certainly worthwhile to look at the surroundings, at other planets in the same part of the universe. But the planet of labour law is big enough and important enough to justify a separate study. And the book is one such study.

There is one exception in which the boundaries of legal 'fields' *do* become meaningful, and this exception provides further support for the choice to focus on a specific field. When confronted with an interpretive question, a judge has to refer to the specific piece of legislation being interpreted, but also, to some extent, to the broader context. When interpreting a minimum wage law, for example, our focus should be first and foremost on the law itself; but when we think about the justifications behind it – which is what purposive interpretation requires – it is impossible to ignore the connection to other laws *in pari materia*. For this purpose, there is a need to decide what laws are dealing with 'the same matter', which in a sense requires us to define the boundaries of the field. The book adopts the 'traditional' understanding of labour law for this purpose – i.e. labour law as including every regulation of the relationship between employer and employee(s).[4]

Arthurs and Albin both argue that we should expand our view to other laws, for example welfare laws, or consumer/tenant laws, or family law, and consider them together with labour law. Obviously, there is a crucial difference between laws that place responsibilities on an employer, and laws that place responsibilities on the state, or on a spouse. Also, there are important differences between the vulnerabilities faced by employees and those faced by welfare recipients, consumers, tenants and wives. I argue in the book that the goals of labour law can be understood at several levels of abstraction. For some purposes, it is useful to think about broad goals such as protecting human dignity, advancing equality, and so on – and at this level, clearly there are other 'fields' of law that share the same purposes. However, for other purposes – such as interpreting the terms 'employer' and 'employee' – we need to look at the unique characteristics of employment relations, i.e. justifications at a more concrete level. Here the differences from other fields of law become much sharper.

But imagine for the sake of argument that welfare law (for example) and labour law share the exact same goals. How would this change the analysis of the book? At the level of identifying the goals, it would not make any difference, if you assume that the goals are the same. When interpreting a specific labour law, for example a minimum wage law, again it would not make

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3 Page 7.

4 For a recent sophisticated defence of labour law as a field concerned with employment relations see Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 Int J Comp Lab Law & Ind Rel 7.

any difference if you believe the goals are the same. The only relevance of this kind of critique is at the level of legislative reform, which holds a small part in the book. In this context, a purposive analysis – which focuses on the goals of existing laws in a given 'field' – is limited, in the sense that it cannot be used to justify *radical* proposals. For example, if one derives from laws such as the minimum wage a purpose, this analysis can lead to proposals on how to improve the minimum wage and its operation, but it cannot lead to a suggestion to eliminate the minimum wage altogether in favour of universal basic income. I am happy to acknowledge this limitation of the purposive approach. Adopting a purposive approach does not mean objecting to the possibility of radical reforms; they are just not within this project, which is focused on improving the planet of labour law and not the entire universe around it. The purposive approach is used first and foremost for interpretation of existing laws, and can also be used to reform these laws in a way that will better advance their goals. If you want to pursue other goals altogether, or eliminate these laws altogether, then the purposive approach will not be of use.

One might answer that radical reforms are what we need most; that they are necessary to improve the lives of workers, and there is no point in focusing on how to improve the current system. I disagree; there is still a lot we can do. Current labour laws are still needed, in fact they are needed even more than before. They are still justified. And the book proposes ways to make sure that they cover the workers who need them, and that they are adapted to changing realities.

3. What to Expect from a Normative Account of Labour Law

The book discusses the goals of labour law at a normative level. It is not concerned with hidden goals and agendas, or trying to understand what are the forces that have shaped the law as a matter of practice. These are important topics but not my own. The point of the book is to ask what labour law *should* be. This is why I consider various justifications. To be useful, such an exercise cannot be completely detached from current law. Although one can also try to propose justifications for an entirely new labour law on a new world with no history and no law, in real life we do not have such a 'blank slate'. If we want the normative discussion to be useful for interpreting and improving *existing* laws, then the discussion of justifications has to be based on these laws. The methodology employed in the book is looking at these laws at a rather high level of abstraction. I am not examining the specifics (including, for example, the way the law has been interpreted in practice), because the whole idea is to check whether the specifics need to be changed. I am asking how the law can be explained and justified at the level of general principles and values.

Arthurs appears to be dismissive towards such normative analyses, consistent with his pessimistic approach towards law in general. This attitude manifests itself in his critique of the book as being focused only on a 'legal-doctrinal' analysis. A normative discussion such as the one included in the book is not doctrinal; it is based on philosophical arguments alongside social science research, which together lead to conclusions about how labour laws can be justified. These conclusions are not based on the law itself (or some claimed internal coherence of it) but on external purposes. I also refer to 'context' where appropriate, for example when suggesting how to interpret freedom of association in light of the fall in union density and rise in aggressive union-bashing by employers.[5] Overall, however, when thinking *at the normative level* how labour laws can be justified, questions of politics should not interfere. The same is

[5] Pages 216-21.

true when we think about the best way to interpret a legislative term or the best legal tools to achieve a certain goal. Political economy is surely crucial when we want to understand the forces that actually shaped labour law, as a matter of practice – but that's an entirely different project.

Ruth Dukes argues that the justifications I put forward for labour law are not 'sufficiently objective'. But I make no claim for objectivity (can anyone?). The point of such a normative analysis is not to find 'the truth' and declare that the articulations of goals and the various proposals included in the book are the only possible or acceptable ones. The point is rather to make an argument as supported and as convincing as possible about what the law should be.[6] Guy Mundlak suggests that the arguments in the book regarding the purpose of labour law cannot 'prove right over wrong' but can be used as means of persuasion. I accept this characterization but must add that the book is not merely stating my own opinions, but rather my reading of the *law* which was adopted by legislatures and sometimes judges. Otherwise put, I am not trying to convince the readers to accept my own views about what is right/good, but to accept the reasoned arguments I am making as to why a certain position about purpose is the best representation of the law.

Arthurs similarly critiques the purposive approach by claiming that lawyers 'do not decide' on goals. But the point of my discussion is not to 'decide' for society what goals to choose. Rather, the point is to read the existing laws in the best possible light – to suggest the best way to interpret them. Interpretation *is* the task of lawyers. There are also smaller parts in the book where I suggest ways to amend legislation in light of changes in the labour market to preserve the general goals of labour law. Obviously, legislatures can ignore such proposals if they disagree with my articulation of the goals. But given the fact that they never decided to abolish most labour laws, it is possible that at least some of them, some of the time, support these laws and the goals behind them, and would want to improve the laws to secure the achievement of these goals.

A basic normative claim made in the book is that judges, legislatures and lawyers should constantly think about purposes and whether our laws properly achieve them. This is hardly an original argument, but one I am pushing in the book especially by trying to show its usefulness for solving current labour law problems. The second move taken in the book is to put forward a list of goals, and also various options regarding means, that together create a 'toolbox' that can help others pursue their own purposive analyses and come to their own conclusions. Finally, along the way I am making some arguments about preferred goals and means that can be used in specific contexts, and try to convince readers that these are the best choices. Mundlak argues that the purposive approach can serve as 'an invitation to the hall of debate' but not 'a focal point of agreement'. He seems to accept the first and second moves, but finds the third one problematic because it lacks a formula that can explain the choices made. The first and second moves have significant independent value, so if they can be of service, I am happy with that, even without the third step. But I should note that normative arguments are rarely based on a clear formula that leads to one 'true' solution. So Mundlak's expectation might be too high, if he accepts the idea of normative scholarship in general. And in fact, even without a formula, it is far from being an entirely subjective process.

Take the level of interpretation, which most of the book is concerned with. Judges performing purposive interpretation have discretion. They can choose between several options. But this

[6] And see Bogg (n 4) 34 (normative theories must be 'contestable').

does not mean that it's all politics and subjective opinions. If they accept the view that purpose must guide them – which in many countries they do – then there is only a limited range of options they can choose from among the purposes that can reasonably be attributed to the legislation in question. For this task, the first role of the book is to help the analysis by providing an academic discussion of goals. Even judges who come to different conclusions then myself based on this analysis can find it useful. At the same time, I am not shy about offering my own conclusions, which I believe follow from the analysis. Can others reach different conclusions? Yes. But they will have to justify their choices, as I do in the book. And the range of reasonable options that can be said to rely on purpose is not that wide.

The example of the Israeli *Schwab* case discussed in the book[7] and by Mundlak is a good case in point. The Israeli National Labour Court decided to accept a fictive, sham arrangement by which a subcontractor was considered the employer, even though all the signs pointed to the State being the legal employer. Mundlak agrees with me that this was a bad decision, but argues that we cannot claim truism here, because the court applied its own reasonable interpretation based on the goal of the State to achieve more flexibility. But the 'goal' was to achieve flexibility by evading the law. This is not a legitimate goal. The legislature can legitimately achieve more flexibility by changing the legislation, and the government can do so by re-negotiating its collective agreements. But they chose to do neither of those, instead they simply evaded the law by using a sham arrangement. This goes against every goal of labour law. It was not a valid option for the court to choose, in my view.

4. How to Define (or Choose) the Purpose

Notwithstanding the critiques discussed so far, neither one of the commentators objects to purposive interpretation in principle. They do, however, have some concerns about the way it is performed in the book. These concerns are sometimes the result of misunderstandings about the method of purposive interpretation, or at least the kind I adopt and perform in the book. Thus, both Arthurs and Dukes seem to equate the purposive approach with the search for 'original intent', even though I explicitly reject the originalist view in the book;[8] the whole point is to look *beyond* the original intent of legislatures.

Arthurs further argues that goals are inconsistent and incoherent and that they are changing all the time, and also that there are often hidden goals against labour. But remember that we are not looking at what a specific legislature wanted to achieve or the attitude of the current legislature towards the law. I am asking what is the best way to understand this law, what are the normative justifications behind it.

Dukes and Arthurs both maintain that the goals of labour law have changed, based on this misplaced understanding of purpose. Take the minimum wage law in the United States as an example. It was legislated in 1938 and exists ever since. Clearly a lot has happened in the world since then, and the fact that the wage itself has not been updated for the past eight years is a clear testament to the animosity of recent Republican majorities in Congress towards this law. Nonetheless, although in theory legislatures could have abolished the minimum wage, almost 80 years after its enactment it is still in force. And now imagine that a court needs to interpret a provision of this law. Dukes and Arthurs apparently presume that such a court will have to interpret the law in light of the animosity coming from the legislature. But this is certainly *not*

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7 Page 144.
8 Page 17.

what the purposive approach prescribes. Rather, the question should be: how can the law be justified, at a normative level? My own answer relies on the ideas of human dignity and redistribution. Other views are also possible. But at this level, did anything change between 1938 and today? It seems to me that the basic vulnerabilities of employees vis-à-vis employers and the need to protect dignity and redistribute are very much the same. And they are also the same across countries. This explains why legislatures in diverse countries and at different times chose to enact minimum wage laws and keep them in force.

Admittedly, there could be variations between legal systems. And I explicitly say in the book that before applying my analysis in a specific context, one has to supplement it with an examination of the local context.[9] But the argument in the book is that there is something in common to all labour laws – and also to all minimum wage laws (or other specific laws) across time and place – that is worth exploring and articulating.[10] I do not say that this is always sufficient. But I do believe that it is always needed to start from such a high level of abstraction, before adding the specific purposes that might exist in a specific time and place. Dukes apparently disagrees, arguing not only that the local context matters but that it's the *only* level that matters. Such a position ignores the many studies cited in the book showing the characteristics of employment that require intervention, characteristics that are shared across time and place. Indeed, Dukes' own work[11] shows the relevance of the analysis performed by Hugo Sinzheimer in Germany a century ago for other countries today. The only way to explain her current critique is by reference to an implied separation she assumes to exist between the question of why we need labour law and questions of legal interpretation or reform. That is, a misunderstanding about the purposive approach, equating it with legislature's intent.

In a somewhat similar fashion, Albin argues that by saying that the goals of labour law have not changed, I am limiting the ability to assess various relevant contexts. It should be clarified that I am not claiming that the goals are *necessarily* the same and cannot change. The book examines the goals as I see them relevant today, not the historic goals. When examined at a high level of abstraction – such as saying that we need labour law to address the vulnerabilities of subordination and dependency, or that we need labour law to advance general goals such as dignity or redistribution – it is hardly surprising that I do not see these goals as being very specific to time and place. Albin's critique could thus be understood as pointing (similarly to Dukes) to the importance of examining the local/contemporary context. I agree that this is important, if it comes on top – and no instead – of the more general/abstract analysis.

A related concern raised by Arthurs as well as Dukes refers to legislation that amends a labour law in a way that goes against its original goals. Here Arthurs brings the example of the 1947 amendment to the National Labour Relations Act (U.S.) while Dukes raises the Trade Union Act 2016 (U.K.), both of which clearly intended to limit the original acts which regulate unionization, collective bargaining and strikes. Again, based on a mind-set that the purpose is legislative intent, they view purposive interpretation as potentially destructive to the goals of the original act in such cases. But interpretation in such cases has to rely on the goals of the original act. Imagine that the original law tried to advance workplace democracy and redistribution at some level, say level 10. Then comes a new legislature with a different agenda, pro-free-market, and decides to make strikes more difficult. The law is amended and weakened to, say, level 7. But the original goals of the law are still the same. The court cannot ignore the changes in the law; if there are specific provisions that now limit the protection or advancement

9 Pages 27-8, 73. I apply this in practice, to some extent, in chapter 8.

10 See also the supporting comments of Deakin in this regard (this issue).

11 Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (OUP 2014).

of the goals to level 7, they should be enforced. But when interpretive questions are raised regarding the law as a whole, the general goals of workplace democracy and redistribution are still valid.

Mundlak raises two other concerns regarding the discussion of purposes. The first is about the trade-off between the goals of labour law and efficiency, which is not considered in my discussion of general goals. I agree, of course, that a trade-off between efficiency and other rights and interests often exists and that it plays a role in shaping labour laws. But I do not consider this trade-off to be the *purpose* of labour law, because of the structure of the legal system: with private law (specifically freedom of contract) enjoying a default position, labour law is the exception deviating from this rule. The goal of efficiency is already advanced by private law rules which are always in the background. Therefore, when we focus on explaining labour law, we only explain the reasons for avoiding private law rules and the free market. There is no need to put forward the goals of private law as well, even though the end result is indeed some balance between the two. However, when we consider the goals of *specific* laws, it *does* make sense to discuss critiques as well, and here efficiency considerations come to the fore. Indeed, they assume a significant role in my discussion of specific laws in chapter 5.[12]

The second issue raised by Mundlak has to do with legislators. Most of the book is concerned with purposive interpretation, but I argue that purpose should guide legislative reform as well. The discussion of purpose – trying to understand what labour laws are for, what are they trying to achieve – could be helpful not only for judges, but also for policy-makers, in the legislature and government. Mundlak rightly points out that legislators already have a purpose in mind when legislating, so it might not be clear why they need academics to explain the purpose of the law to them. My point is this: first, legislators look at the specific detailed solutions and not always see the bigger picture, and the book is an attempt to explain the bigger picture. And second, they often think about these issues intuitively without engaging with the level of values and principles, and also without engaging with empirical studies. They could benefit from a discussion at these levels as well. The book offers a discussion of the 'deep' purpose and not the superficial one. The goal is to help judges and legislatures understand this purpose – the justifications of the law – at a deeper level than what they usually engage with (because of institutional limitations).

5. Articulating the Purpose at Different Levels of Abstraction

In chapters 3 through 5 of the book I offer different ways to present the purpose of labour laws. Looking at the project of labour law as a whole, it can be understood as addressing concrete 'problems' in the labour market (such as inequality of bargaining power, market failures, or the vulnerabilities of subordination and dependency). At the same time, it can also be explained and justified through a list of values and societal interests that labour laws aim to advance (such as equality, human dignity, redistribution and so on). Finally, I argue that we should also look at each specific regulation separately, and the book considers a few examples of the goals of specific laws. At this level, I suggest (and follow this suggestion with regard to three examples) that we also need to consider in detail the expected impact of the law. Overall, I argue that all of these levels are useful and 'correct' at the same time. The challenge is sometimes to decide which level is appropriate to use for each purpose.

[12] On this methodology see also the supporting comments of Deakin (this issue).

Albin accuses me of being insensitive to issues of gender, race and migration. In fact, when discussing the general goals of labour law, I include among them equality, social inclusion, human dignity, redistribution and other goals that cover the needs of workers who are especially vulnerable because of discrimination or other reasons. Can one really argue that the main goal of labour law as a whole is somehow related more specifically to race equality or migration? Or to gender issues, beyond the obvious importance of equality (which I stress in the book)? I am not saying that sensitivity to these issues is not warranted. Also, there are *specific* laws that deal with issues of gender, race and migration.[13] But it would be misleading to present the existing body of labour law as based on such purposes.[14]

The idea of 'levels of abstraction' is discussed also by Deakin, although with a different terminology. He makes a distinction between 'functions' and 'purposes' of labour law. Deakin argues that labour law has a 'market-creating' role.[15] In a sense, labour law is part of the jigsaw puzzle of capitalism, a necessary component, and one cannot complete the puzzle without it. There is no functioning modern market system without some level of labour law. In my book this important view is mentioned as part of the discussion of efficiency as a labour law goal. In his comment, Deakin explains that he understands it on a somewhat different level. He generally agrees with the list of purposes offered in the book but sees the market-creating role of labour law as a 'function' rather than a purpose.

The issue is, perhaps, whether we should take the rules of private law, which constitute the 'free market', as a starting point. This is what I do in the book, as already noted, on the assumption that these rules have their own valid justifications, and labour laws have to be justified as a deviation from the free market. Deakin can be understood as arguing that the 'function' of labour law can be found already at this preliminary stage. Instead of taking private law for granted and then justifying labour law by looking for the purpose of deviating from private law rules, we should look at them from the beginning together, as two parts of the same puzzle.

This approach certainly has some advantages, specifically because it avoids giving the 'free market' default status. However, for purposes of interpretation, and also when thinking about improving specific laws, I believe that the level of purposes is more useful. At the end of the day, private law rules are generally justified and labour laws apply only in a specific sphere when deviation from the free market rules is justified. Therefore, when looking at specific labour laws we have to ask, why is this deviation justified? Here we need the level of purposes as discussed in the book.

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13 In terms of the goals of specific laws, in the book I only discuss three laws as examples. Neither of them can be said to be focused mainly on issues of gender, race or migration. Still, this angle could be relevant; when discussing the goals of the minimum wage and of collective bargaining laws, I explicitly consider (albeit briefly) the impact on gender and race equality. See pages 81, 92-3; and see Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 MLR 581, 591.

14 In an attempt to show how such sensitivity should work in practice, Albin argues that the goal of the minimum wage is reducing poverty, an alternative I consider and reject in the book in favour of redistribution. The two goals are obviously closely related; but redistribution is more precise and fitting because the minimum wage is not directed only at the poor and most of the poor are not covered by it because they are not working. Therefore, for purposes of interpreting this law or delineating boundaries, understanding it as directed towards redistribution is more correct and more useful. In any case, it is difficult to see why poverty is related to vulnerable groups but redistribution is not.

15 He makes this argument elaborately in Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development' in *The Idea of Labour Law* (Guy Davidov & Brian Langille eds., OUP 2011) 162.

6. Defining 'Employer' and 'Employee' in Light of the Purpose

Once the purposes have been considered and articulated, the next question is how to use them in practice when interpreting labour laws. The book devotes significant space to the concepts of 'employer' and 'employee'. In this particular context, I argue that the appropriate level to rely upon is that of addressing the vulnerabilities of subordination and dependency. Albin suggests that it could be better to rely on purposes articulated at a high level of abstraction, such as maximizing capabilities, which will put into question the justification for the very distinction between employees and independent contractors.[16] Indeed, maximizing capabilities is not less important for independent contractors. But if we accept the starting point of freedom of contract, and labour law as an exception to this rule, then not every situation of working for others justifies the massive legal intervention/protection of labour law. People who run their own independent business do not need the protection of labour law to ensure a minimum level of capabilities. Otherwise put, the distinction between an employee and an independent contractor is the distinction between private law and labour law. When we look specifically at the world of people who perform work for others for pay, some of these situations are covered by private law and others are covered by labour law. High-level goals cannot help in deciding where to put the line between the groups, because independent contractors also have similar interests in maximizing capabilities and so on. The question is whether they can take care of themselves in this regard, or not, and this can be answered by examining the more specific level of vulnerabilities (subordination and dependency).

Albin further argues that even if we focus on subordination and dependency, these vulnerabilities exist to some extent also in unpaid work at home. Accordingly, she criticizes me for 'excluding' unpaid work at home from the scope of labour law. However, when parents care for their own children it may be 'work', but it is certainly not employment. Perhaps the State should provide more support for this kind of work, for example by ensuring a basic level of pension for housework. But because there is no employer, the entire body of labour laws is not relevant. Labour laws deal with the employment relationship and place duties on an employer towards an employee. I fail to see the relevance of such laws (think of working time regulations, for example) for situations of work without an employer.[17] To clarify, this does not say anything against expanding welfare state programs that support unpaid work. I also do not ignore the fact that there is sometimes a connection between labour laws and welfare laws that should be explored; but it is not a necessary, inherent part of understanding and interpreting labour laws.[18]

As Deakin rightly notes, the basic vulnerabilities of employment – subordination and economic risk (or in my terms, dependency) – have not gone away. New forms of work are usually characterized by these same vulnerabilities. Indeed, one of the main goals of my project it to ensure that all those who experience these vulnerabilities will be able to enjoy the protection of labour law, even when employers try to evade such responsibilities by creating new forms of work organization.

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16 For a similar argument see Brian Langille, '"Take These Chains From My Heart and Set Me Free": How Labor Law Theory Drives Segmentation of Workers' Rights' (2015) 36 Comp Lab L & Pol'y J 257.

17 I discuss this a bit further in Guy Davidov, 'The (Incomplete) Purposive Revolution: A Review of Freedland & Kountouris' (2013) 7 JRLS 87 and in Guy Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 OJLS 543.

18 Interestingly, when Albin offers an example (towards the end of her comment) to show how a holistic view of labour law and family law is needed, her conclusion is that such a view supports the *exclusion* of unpaid care work from the scope of labour law – against her own critique throughout the comment.

Things become even more complicated, as Deakin points out, when employers escape responsibility by distancing themselves from direct control over employees, sometimes thanks to technology. This raises the question of how far we can stretch the application of labour laws. I discuss this to some extent in chapter 9. Some scholars argue that we can expect an American brand to assume direct responsibility for workers in Bangladesh (for example), simply because the workers – who are employed by subcontractors – are manufacturing the brand's products. For me this is more complicated. The laws designed to protect employees in their relationship vis-à-vis an employer do not fit such indirect relationship. This is not a situation of a sham use of an intermediary, when there is in fact a *direct* user-worker relationship. Therefore, a simple (direct) application of labour laws on the American company in the above example is not justified. At the same time, I argue that there should be *some* liability, residual liability, for the company at the top of the chain, in specific circumstances. Those interested in the details should refer to chapter 9 in the book. Here I only use this as an example to show that – against what Albin has suggested – I do support the extension of labour-related liability *beyond* the employer-employee relationship when this is justified. But this is not a simple application of labour laws; it requires us to create somewhat different laws for different groups – other planets outside the planet of labour law – and this was not the focus of the current book. The only reason I proposed this particular extension in the book is that indirectly it will help us enforce labour laws by making the 'lead company' put pressure on the subcontractors.

7. Conclusion

The comments in this symposium – all useful and interesting in different ways – can be divided into three groups. Deakin and Mundlak are generally very supportive, adding some context that helps to explain and justify the approach of the book, alongside some specific comments on parts that they found less persuasive (which I've tried to address above). Arthurs and Albin for the most part describe the books they would have written themselves – which I guess they find more interesting or important, but have little to do with providing a normative account of existing labour laws or offering ways to interpret or improve them. There is also an added effort to show that my own arguments are deficient for not addressing those other topics, and I argued above that this effort fails. Finally, Dukes' main critique concerns the distinction between general arguments about the purpose of labour law versus the local context (the purpose in a specific time and place). While I argue in the book that both are important, and focus in the current book mostly on the general level, Dukes apparently believes that *only* the local level matters. I have argued above that this position results from a misunderstanding (or perhaps a disagreement) about the purposive approach – equating it with legislature's intent.

The critiques of Arthurs and Albin seem to imply that the approach of my book is conservative. This may be correct only in the sense that – unlike some others (notably Arthurs) – I still believe in labour law. The book offers ideas to reinvigorate and improve labour law from a *progressive* point of view. One might also say that it is 'conservative' to argue that the basic idea behind labour law – the need for this legal intervention in the 'free market' – is the same as it was in the past. But the idea itself is, of course, far from conservative: it calls for massive redistribution and other interventions in the market in favour of societal goals and individual rights. Moreover, the fact that, in my view, the general goals of labour law are very similar in different countries and at different times should not be confused with saying that things should stay the same. I am certainly *not* making such an argument in the book; quite the contrary. I discuss new theories about what the purpose of labour law is and offer my own new theories. At the level of means as well, I discuss various new ideas about the best means to achieve the goals.

Although I do not include in the book radical proposals such as abolishing labour laws altogether, I make many proposals on how to interpret existing labour laws and sometimes change them. These are the legal 'means' used to advance the goals, and the book calls for many different changes in the hope of 're-matching' them.