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Articles

The Minimum Wage as a Civil Rights Protection: An Alternative to Antipoverty Arguments?

Noah D. Zatz[†]

This Symposium concerns “Civil Rights and the Low-Wage Worker,” and this Essay addresses the relationship between the core concepts in that title: “civil rights” and “low wages.” In what way, if any, do low wages implicate the body of normative concerns associated with civil rights and the body of law devoted to vindicating those concerns? Minimum wage law plainly rests on the notion that wages can be too low to be legally tolerable, and so we might pose the question more concretely as follows: does the minimum wage protect workers’ civil rights?

By extending my recent work on antidiscrimination theory,¹ I suggest that, yes, the minimum wage aims to remedy an injury to workers’ civil rights. If I am right, then much of the ongoing debate about the minimum wage is fundamentally misframed.

[†] Professor of Law, UCLA School of Law. For especially helpful comments and conversations, I thank Cheryl Harris, Frances Olsen, Jonathan Zasloff, Kirk Stark, Paul Sonn, and Rick Abel, audiences at *The University of Chicago Legal Forum* Symposium and at the Third Annual Colloquium on Current Scholarship in Labor & Employment Law, and the editors of the *Legal Forum*. I am grateful for valuable support from the Princeton University Program in Law and Public Affairs and research assistance from Hailey Loomis.

¹ Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent* (forthcoming 2009, Colum L Rev) (unpublished manuscript on file with U Chi Legal F).

Antagonists in that debate largely take for granted that the minimum wage is an antipoverty policy and dispute its appropriateness as a means to that end. My suggestion is that supporters of the minimum wage may be right about the ultimate policy question even if they are wrong to deny or evade many economists' empirical claims about distributive and disemployment effects relative to alternative antipoverty policies.

Conventional contemporary legal typologies, in contrast, would answer "no."² "Civil rights" most often is identified with antidiscrimination law, or more broadly with legal responses to inequality and subordination along lines of socially significant group differences—race, sex, disability, and so on.³ This body of law is notoriously relative. To know whether one worker's wages implicate civil rights concerns, we need to compare them to other workers' wages. A corporate lawyer's pay may violate her civil rights if a man would be paid more for the same job, even if both far exceed the median wage for all workers. Inversely, the vastly smaller amount paid to her firm's janitors would not be the concern of a conventional civil rights lawyer so long as all janitors are paid the same.⁴

The minimum wage appears to take a fundamentally different approach and directly address what might be termed "economic substance," evaluating working conditions in absolute

² For instance, unlike employment discrimination, the minimum wage does not appear as a topic in civil rights casebooks. See, for example, Theodore Eisenberg, *Civil Rights Legislation: Cases and Materials* (LexisNexis 5th ed 2004); Charles F. Abernathy, *Civil Rights and Constitutional Litigation: Cases and Materials* (West 4th ed 2006). The same holds true even in an innovative casebook addressing the intersection of race, gender, and economic justice. See Emma Coleman Jordan and Angela P. Harris, *Economic Justice: Race, Gender, Identity and Economics* (Foundation 2005). Within labor and employment law, employment discrimination typically is treated as a conceptually distinct topic. See, for example, Orly Lobel, *The Four Pillars of Work Law*, 104 Mich L Rev 1539 (2006); Marion G. Crain, Pauline T. Kim, and Michael Selmi, *WorkLaw: Cases and Materials* (LexisNexis 2005).

³ On the historical development of this understanding of civil rights in U.S. law, see Risa L. Goluboff, *The Lost Promise of Civil Rights* (Harvard 2007). A different sense of "civil rights"—one focused on access to civil contract and the courts—arises from T.H. Marshall's influential analysis of citizenship in terms of political, civil, and social rights. See T.H. Marshall, *Citizenship and Social Class*, in T.H. Marshall, *Citizenship and Social Class and Other Essays* 1 (Cambridge 1950).

⁴ By using a private sector example governed by Title VII of the Civil Rights Act of 1964, I mean to emphasize that "civil rights" are not necessarily a matter of constitutional law in today's legal landscape. Nor is there anything essentially nonconstitutional about labor rights, as shown by recent scholarship on the evolving jurisprudence of the 13th Amendment. See Goluboff, *The Lost Promise of Civil Rights* (cited in note 3); William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L J 165 (2001); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum L Rev 122 (2002).

terms. At issue is the economic balance between workers and their employers, not distinctions among an employer's workers. At this level of abstraction, the minimum wage typically would be grouped with other "minimum standards" concerning non-wage benefits and protections. This kinship extends to labor law's empowerment of workers acting in concert vis-à-vis their employers, so as to rectify the underlying imbalance that yields low labor standards.

This conceptual and institutional divide between "labor" and "civil rights" has come under critical scrutiny, with a particular focus on the contingent historical process through which the distinction emerged. Risa Goluboff's recent book *The Lost Promise of Civil Rights* reveals a pre-*Brown* world in which leading civil rights attorneys challenged Jim Crow as "a system of *both* racial oppression *and* economic exploitation,"⁵ and in which African American industrial workers facing exclusionary or segregated shops complained to civil rights organizations in terms that "emphasized *both* the racial basis of the discrimination *and* the severe economic consequences it visited on [them]."⁶ It remains unclear, however, what the institutional manifestation would be of a new labor/civil rights regime that addresses discrimination and economic injustice in an integrated fashion. Nor is there a well-formed normative foundation that fully integrates labor and civil rights within a single conceptual framework, in contrast to a "both/and" approach that keeps them conceptually distinct even while emphasizing how they arise in concurrent, cumulative, or mutually reinforcing ways.

This Essay aims to make a modest start down that much longer path, and to stimulate others to join in, by considering the narrower question of how the minimum wage might be justified. In particular, I will do so in a way that emphasizes problems common to minimum wage regulation and to employment discrimination law. Shared problems suggest that solutions, if they exist at all, might share conceptual foundations or at least draw from the same repertoire. In other words, I suggest that, yes, the minimum wage is civil rights legislation, and that seeing it as such may help us understand the strongest case for its existence.

The labor/civil rights nexus aside, this effort is independently worthwhile because, in my view, legal theorizing about the

⁵ Goluboff, *The Lost Promise of Civil Rights* at 7 (cited in note 3) (emphasis added).

⁶ Id at 85 (emphasis added). See also Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton 2008).

minimum wage is tragically moribund. This neglect, in particular relative to employment discrimination law,⁷ is especially remarkable given the minimum wage's continuing prominence in national politics;⁸ its vibrant role in state and local economic justice campaigns;⁹ and its upsurge in importance as a litigation tool, especially in legal advocacy for immigrant workers.¹⁰ Despite this, the most powerful recent scholarly accounts have been relentlessly critical, integrating positive and normative analyses of minimum wage regulation drawn from law and economics with a particular emphasis on institutional design.

The thrust of arguments such as Daniel Shaviro's is that even if the minimum wage attempts to address a real problem, it does so in a way that is clearly inferior to feasible institutional alternatives—some form of cash transfer funded out of general tax revenues—and possibly counterproductive.¹¹ Arguments like Shaviro's have become hegemonic, in the sense that counterarguments largely remain within the same terms of debate while seeking to eke out a victory nonetheless.¹² Arguments for the minimum wage marshal evidence that more low-income workers are helped than the critics charge; fewer jobs are lost; the alternatives have their problems, too; and so on.¹³

Spirited as this debate is, it is remarkably narrow. Both sides basically agree that the minimum wage should be eva-

⁷ As just one very crude measure, a search of article titles in the LexisNexis "US Law Reviews and Journals, Combined" library on Jan 23, 2009 produced 170 hits for "<minimum wage>" or "living wage" or FLSA or F.L.S.A. or "fair labor standards"> and 1737 hits for <(work or employ!) & discriminat!) or "title vii">.

⁸ For instance, raising the minimum wage was at the top of Democrats' domestic policy agenda in the 2006 Congressional election and succeeding 110th Congress. See Carl Hulse, *House, by a Wide Margin, Backs Minimum-Wage Rise*, NY Times, 2007 WLNR 568900 (Jan 11, 2007).

⁹ Paul K. Sonn and Stephanie Luce, *New Directions for the Living Wage Movement*, in Annette Bernhardt, et al, eds, *The Gloves-Off Economy: Workplace Standards at the Bottom of America's Labor Market* 269 (Cornell 2008).

¹⁰ Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Harvard 2005); Benjamin Sachs, *Employment Law as Labor Law*, 29 Cardozo L Rev 2685 (2008); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 Colum L Rev 319 (2005).

¹¹ Daniel Shaviro, *The Minimum Wage, the Earned Income Credit and Optimal Subsidy Policy*, 64 U Chi L Rev 405 (1997). See also David Neumark and William L. Wascher, *Minimum Wages* (MIT 2008). But see David Card and Alan B. Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton 1995).

¹² On the emergence, and limitations, of the current terms of debate, see Oren M. Levin-Waldman, *The Rhetorical Evolution of the Minimum Wage*, 3 Rhetoric & Pub Aff 131 (2000).

¹³ Consider Economic Policy Institute, *Minimum Wage Issue Guide* (Aug 2008), available at <http://www.epi.org/page/-old/issueguides/minwage/epi_minimum_wage_issue_guide.pdf> (last visited Mar 24, 2009).

luated as an antipoverty program; they disagree merely about how the policy fares under that rubric. Supporters insist that “if you work, then you shouldn’t be poor,”¹⁴ and opponents counter that minimum wage regulation can undermine that goal by causing job loss and that tax-and-transfer programs like the Earned Income Tax Credit (“EITC”) can more efficiently target low-income workers. Notably, supporters largely have given up on alternative arguments grounded in notions of employer exploitation or superior bargaining power that once held more sway.¹⁵

In contrast, far greater normative pluralism reigns in employment discrimination law. The same basic analytic strategy used against the minimum wage can be deployed there, too. Law and economics scholars argue that (at least much of) antidiscrimination law disrupts the results of competitive labor markets by forcing employers to take on additional costs for the benefit of specific groups. Even if such redistributive goals are justified, labor market regulation is an inferior way to advance them because the tax-and-transfer system can target the proper beneficiaries of redistribution more efficiently and without perversely discouraging employers from hiring the very people targeted for benefits. When the imperial armies of law and economics have marched on antidiscrimination law, however, many more scholars and political actors resist. Something more seems to be at stake: basic civil rights.

This intellectual terrain seems to reflect the divide between “economic” issues and “civil rights” already sketched. The minimum wage seems an economic issue appropriate to economic analysis, but that analysis arguably misses the point when it comes to the separate domain of civil rights. My suggestion is that ongoing resistance to economic reductionism in the realm of civil rights—as occurs in antidiscrimination law—is forging intellectual tools of wider significance.¹⁶ Perhaps the defense of anti-

¹⁴ See Jeff Chapman, *If You Work, Then You Shouldn’t Be Poor*, Economic Snapshots (Economic Policy Institute Mar 22, 2006), available at http://www.epi.org/economic_snapshots/entry/webfeatures_snapshots_20060322/ (last visited Mar 24, 2009). For a book length argument in this vein, see Jerold L. Waltman, *The Case for the Living Wage* (Algora 2004).

¹⁵ On the history of competing theories of the minimum wage, see Seth D. Harris, *Conceptions of Fairness in the Fair Labor Standards Act*, 18 Hofstra Lab & Emp L J 19 (2000).

¹⁶ Compare Robin D.G. Kelley, *Identity Politics and Class Struggle*, 6 New Pol 84, 88 (1997) (rejecting criticism that “identity politics” is intrinsically divisive and arguing that “[t]he failure to conceive of these social movements as essential to the emancipation of the whole remains the fundamental stumbling block to building a deep and lasting class-based politics”); Danielle S. Allen, *Talking to Strangers: Anxieties of Citizenship Since*

discrimination law can teach us something about how to defend the minimum wage.

Two basic intuitions underlie my hunch that something deep connects those two bodies of law, something that cannot be reduced to antipoverty politics. First, for many of us, wage disparities can offend a commitment to human equality. And equality seems as good a watchword for antidiscrimination law as any. There remains, however, a crucial ambiguity as to whether the offense lies in the low value placed on another's labor or in the low purchasing power that results. When T.H. Marshall famously struggled with whether labor market inequality could be squared with equal citizenship, unequal consumption was at the forefront.¹⁷ If, instead, the offense of low wages cannot be reduced to the offense of low income, then we have the beginning of an argument why income redistribution should not displace wage regulation.

Second, only an ostrich could fail to notice how often the lowest paid workers hail from groups central to antidiscrimination projects, though exactly which group varies greatly—and sometimes provokes bitter conflict during periods of transition—with occupation, locale, and historical moment. Consider the appalling labor conditions that have risen to prominence during the reconstruction of New Orleans after Hurricane Katrina.¹⁸ And yet simply conceiving of low-wage work as the sum of discrete forms of discrimination seems to miss the way these labor conditions may signal injustice by their very existence.

Intuitions can be wrong, of course, and so I do not mean to suggest that there *must* be a way to defend the minimum wage. Indeed, there are specific reasons to be suspicious. Locating economic injustice in the wage bargain risks catering to a kind of “everyday libertarianism”¹⁹ that sanctifies the results of market transactions while remaining hostile to overt wealth transfers.

Brown v. Board of Education (Chicago 2004) (building a general theory of citizenship in part from African American political thought responsive to civil rights struggles). I have tried to do something similar in my recent research extending feminist theories of non-market work beyond the context of gendered household labor in which they initially developed. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 Vand L Rev 857 (2008).

¹⁷ Marshall, *Citizenship and Social Class* (cited in note 3).

¹⁸ Judith Browne-Dianis, et al, *And Injustice for All: Workers' Lives in the Reconstruction of New Orleans* (Advancement Project 2007), available at <<http://www.advancementproject.org/reports/workersreport.pdf>> (last visited Feb 3, 2009).

¹⁹ Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 31–37 (Oxford 2002).

Furthermore, it risks catering to the lingering appeal of a family wage system that would structure the household economy around a sole (presumptively male) wage-earner whose “dependents” are economically unproductive and consigned to second-class or derivative citizenship as a result. That ideal shaped social policy, including wage regulation, in the decades leading up to passage of the Fair Labor Standards Act (“FLSA”),²⁰ and it resonates particularly strongly in arguments that one worker’s minimum wage should support a family.²¹ Thus, the intuitions should be conflicted, even for someone whose loyalties generally lie to the left. But theories can be wrong, too, so what else can we do but hope that digging for the roots of our dissatisfaction might lead us to something new.

I proceed as follows. Part I briefly surveys existing justifications for the minimum wage and their established critiques. Part II outlines an intellectual agenda for defending the minimum wage. The key hurdles are characterizing the harm in terms of wage rates rather than household income and justifying a remedy that focuses on employer wage payments rather than compensatory cash transfers from the state. These challenges parallel those that antidiscrimination law faces when it goes beyond a principle of impartiality into terrain marked as “accommodation” or “redistribution.” Part III considers how an antidiscrimination framework might address the first of these problems either through “disparate impact” analysis of how subminimum wages disproportionately affect groups traditionally protected by civil rights or through broadening those groups to incorporate a concept of discrimination based on economic class. I conclude that these tend to reproduce rather than overcome the standard objections to the minimum wage, and so I turn in Part IV to a different approach. I extend my recent argument that preventing “membership causation” (harm traceable to membership in a protected class) provides a theoretical synthesis of “disparate treatment” and “accommodation” theories in antidiscrimination

²⁰ For a general discussion of the “family wage” and its role in social policy, see Alice Kessler-Harris, *In Pursuit Of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* (Oxford 2001); Linda Gordon, *Pitied but not Entitled: Single Mothers and the History of Welfare* 53 (Free Press 1994); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* 33–34 (Belknap 1992); Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Cornell 1998).

²¹ On disputes among feminists over the living wage concept, see Michèle Barrett and Mary McIntosh, *The “Family Wage”: Some Problems for Socialists and Feminists*, 11 *Capital & Class* 51 (1980).

law. The basic idea here is that sufficiently low wages indicate that the worker's earnings have been suppressed by morally arbitrary factors (including but not limited to race and sex), even if those factors cannot be identified with precision in the individual case. Requiring an employer to pay supra-market wages is like making an employer provide an accommodation that allows an employee to work as productively as if she had no (morally arbitrary) impairment. I conclude with some preliminary thoughts on the second hurdle, making the employer responsible for redressing low wages.

I. THE LIMITS OF EXISTING THEORIES OF THE MINIMUM WAGE

Currently there are two basic approaches to justifying the minimum wage. The first begins with the substantive outcome for the worker and objects to how poor the low wage leaves her. The minimum wage then advances distributive justice by mitigating her poverty. Even accepting that distributive goals can override standard libertarian and utilitarian defenses of free contract, the antipoverty justification faces a seemingly insuperable challenge on institutional design grounds: other mechanisms could achieve the desired redistribution more precisely, more completely, and with fewer adverse side effects.

The second approach casts contracts for subminimum wages as procedurally defective. Instead of a valid agreement, the employer exploits the worker, essentially stealing some of her labor without compensation. In the Marxist tradition, such exploitation inheres in any wage contract. The reformist liberal version is narrower, seeing only some contracts as afflicted by an "inequality of bargaining power" that leads to expropriation. In both cases, powerful critiques suggest that these arguments are empirically false, fundamentally misleading, or simply incoherent.

This Part reprises these basic justifications and critiques. Inevitably, I will ride roughshod over subtle but potentially significant distinctions, ignore other plausible and sometimes more nuanced typologies without explaining why, and treat certain battles as lost even when some combatants wish to fight on. My purpose is not to provide a comprehensive review and evaluation but simply to say enough to motivate searching for a new approach and to identify challenges that such an approach would do well to overcome.

A. Redistributing to the Working Poor

In many contexts, and especially in political and policy arenas, the most prominent arguments for the minimum wage are straightforward appeals to distributive justice:²²

- 1) Someone who works full-time shouldn't be left with so little as \$X.
- 2) Therefore, their wages should be high enough to leave their earnings greater than \$X.

For present purposes, I focus on the second proposition, which offers an institutional implementation of the widely held normative commitment that “if you work you shouldn't be poor.” Thus, I simply bracket objections to that normative principle. Furthermore, I bracket arguments that the minimum wage contravenes other principles that compete with the first, such as libertarian invocations of free contract and utilitarian objections to blocking mutually beneficial exchanges. That said, I'll also assume that if two policies are *equally* effective at vindicating the “if you work you shouldn't be poor” principle, then these other considerations could break the tie.

There are two basic institutional design objections to the minimum wage: targeting and perversity. The targeting objection concerns the closeness of fit between the group of people wronged according to the “if you work you shouldn't be poor” principle and the group of people whose wages are raised by instituting a minimum wage. The perversity objection asserts that imposing a minimum wage causes employers to cut jobs or work hours, thereby reducing some workers' incomes contrary to the normative goal.²³ My focus here is on the targeting objection because it is more closely tied to the antipoverty rationale.

The core insight of the targeting critique is that the minimum wage “targets people with low hourly wages, rather than

²² David Neumark and William Wascher, *Minimum Wages and Low-Wage Workers: How Well Does Reality Match the Rhetoric?*, 92 Minn L Rev 1296, 1302–03 (2008).

²³ The basic argument is a straightforward microeconomic analysis: if you increase the price employers must pay for certain individuals' work, employers will buy less of it. The existence, magnitude, distribution, and form of this disemployment effect have been hotly disputed within the economics literature since empirical studies by prominent economists David Card and Alan Krueger found no evidence of short-term job losses after a modest wage increase. Card and Krueger, *Myth and Measurement* (cited in note 11). But see Shaviro, 64 U Chi L Rev at 439–57 (cited in note 11); Neumark and Wascher, *Minimum Wages* (cited in note 11).

those who are poor.”²⁴ Conventional conceptions of poverty measure economic need (1) using total income, not only wage income; (2) using fixed periods of time much longer than an hour; (3) using a metric that varies with household size; and (4) using income from all household members.

By collapsing “income” into “wages,” the minimum wage withholds distributive benefits from nonearners, even if they are poor. This feature more or less implements the “if you work” proviso. Therefore, I will set aside (for now) objections to what is, in effect, a very stringent work requirement on poverty relief. Even so, the minimum wage defines “work” extremely narrowly. By tying the intervention to employment, it ignores low-income freelancers, independent contractors, and entrepreneurs.²⁵ That would be no concern if the policy attacked a phenomenon specific to the employer-employee relationship (such as inequality of bargaining power), but treating it as a response to *poverty* disclaims such an analysis.

Even when wages are the only source of income, income is a function not only of the wage rate but also of hours worked. Translating the “if you work you shouldn’t be poor” principle into hourly wages requires specifying an amount of time devoted to work during a week, year, or whatever period over which income is measured. Part-year and part-time workers fit awkwardly into this system. If such workers ought not to be poor even though they don’t work full-time, then the minimum wage will be too low for them if it is calculated based on full-time work. But raising the rate to relieve poverty for part-time workers will result in it being higher than necessary for full-time workers. Similarly, a rate set based on full-time work will be too high when applied to those who work *more* than full-time. Avoiding these difficulties would require varying the minimum wage by hours of work.

Just as a minimum wage does not vary with hours,²⁶ neither does it vary with family size.²⁷ And yet poverty is a function of both income and household composition. In 2009, the U.S. pover-

²⁴ Shaviro, 64 U Chi L Rev at 433 (cited in note 11).

²⁵ For an overview of the scope of “employment” relationships in U.S. law, see Noah D. Zatz, *Working Beyond the Reach or Grasp of Employment Law*, in Annette Bernhardt, et al, eds, *The Gloves-Off Economy: Workplace Standards at the Bottom of America’s Labor Market* 31 (LERA 2008).

²⁶ Overtime rules present an exception, but not one designed to address the problem described in the text.

²⁷ See Lawrence Zelenak, *Redesigning the Earned Income Tax Credit as a Family-Size Adjustment to the Minimum Wage*, 57 Tax L Rev 301, 309 (2004).

ty line for a family of four was \$22,050 per year and for a single individual was \$10,830.²⁸ Someone who works forty hours a week, fifty-two weeks a year, at \$7.25 (the minimum wage as of July 2009²⁹) will earn \$15,080, smack in the middle. If poverty is the benchmark, then the minimum wage is 50 percent too high for someone who lives alone and 25 percent too low for someone supporting a family of four. It will not do to quibble that the poverty thresholds themselves are too high or too low, that the wage is too far from or too close to one threshold or the other, or that one should assume a different number of hours per year. Such adjustments can only bring wage income closer to one threshold by pushing it further from the other. This problem is inevitable unless the minimum wage itself varied with household size. But that solution would violate the widely held principle of “equal pay for equal work” and, more generally, the notion that the wage places a value on the work performed.³⁰

The household unit of poverty analysis poses a second problem, namely that poverty is a function of the income of *all* household members. As an antipoverty policy, however, the minimum wage is premised on the idea that one worker’s earnings support the entire household. In this way, it reflects the reigning family wage ideology of the early 20th century. Once one accepts households with multiple wage-earners, the linkage between any one worker’s wage and family income breaks down. If we assume that each household includes two adult earners, then translating the “if you work you shouldn’t be poor” principle into wage policy would counsel a minimum wage producing earnings equal only to *half* the poverty line. Or, again, one could introduce inequality into the minimum wage itself, making it higher for so-called “primary” breadwinners, with all the attendant problems noted previously with regard to wage variations by family size or work schedule.³¹ Instead, antipoverty arguments in favor of a minimum wage generally ignore this tension between the antipoverty

²⁸ Department of Health and Human Services, *Notice of Annual Update of the HHS Poverty Guidelines*, 74 Fed Reg 4199, 4200 (2009), available at <<http://aspe.hhs.gov/POVERTY/09poverty.shtml>> (last visited Feb 6, 2009).

²⁹ 29 USC § 206(a)(1)(C) (2006).

³⁰ But see Alice Kessler-Harris, *A Woman’s Wage: Historical Meanings and Social Consequences* (Kentucky 1990).

³¹ Sex discrimination in pay has often been based on the notion that men’s wages need to support a family whereas women’s wages do not. For a general discussion, see *id.* Since 1989, the FLSA has permitted a temporary sub-minimum wage for teenagers. Fair Labor Standards Amendments of 1989, Pub L No 101–157, 103 Stat 938 (1989), codified at 29 USC § 206(g) (2006).

goal and a minimum wage that does not vary with household structure.

In theory, the minimum wage could remain a good policy notwithstanding all these ways in which it can be over- and under-inclusive relative to the “if you work you shouldn’t be poor” principle. For one thing, I have not attempted to assess the *magnitude* of these deviations. What percentage of minimum wage workers live in poor households? What percentage of minimum wage workers are sole breadwinners? What percentage of minimum wage workers have “dependents”? And so on.³²

To my mind, though, disputes over these questions occupy far too much of the debate over the minimum wage. They have a “half empty vs. half full” quality, with critics emphasizing how often the policy mistargets and supporters emphasizing how often it hits the mark. These questions would be vitally important if we faced a choice between the minimum wage and doing nothing. Even in that situation, we would need to know how to weigh instances of targeting against those of mistargeting: over-inclusiveness is problematic only if it generates some harm without antipoverty benefit.

The real force of the targeting critique comes when it is coupled with the argument that an alternative policy provides a closer fit. If that alternative hits the target at least as often as the minimum wage and misses the target less often, then it becomes difficult to understand how the minimum wage ever could be the preferable policy. It is simply beside the point whether it is better than nothing because that is not the choice at hand. This focus on alternatives is what distinguishes the contemporary institutional design critique from a simply rejectionist position.

The leading alternative is the EITC.³³ Of course, the EITC already exists, so the question usually is posed as a trade-off between raising the minimum wage and expanding the EITC, but in principle one could repeal the minimum wage and rely entire-

³² For data answering these and related questions, see Richard V. Burkhauser and Joseph J. Sabia, *The Effectiveness of Minimum-Wage Increases in Reducing Poverty: Past, Present and Future*, 25 Contemporary Econ Pol 262 (2007); Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, *Characteristics of Minimum Wage Workers: 2007*, available at <<http://www.bls.gov/cps/minwage2007tbls.htm>> (last visited Mar 25, 2009); Amy Chasanov, *No Longer Getting By: An Increase in the Minimum Wage Is Long Overdue*, (Economic Policy Institute 2004), available at <http://www.epi.org/publications/entry/briefingpapers_bp151/> (last visited Mar 25, 2009).

³³ 26 USC § 32 (2006). See Shaviro, 64 U Chi L Rev 405 (cited in note 11); Neumark and Wascher, *Minimum Wages* (cited in note 11).

ly on the EITC, or vice versa. The two programs might properly coexist, but the case will be strongest if they serve distinct functions, rather than being two approaches to implementing the “if you work you shouldn’t be poor” principle. More generally, the EITC stands in for a broader class of tax-and-transfer mechanisms for delivering cash to low-income workers, whether through a redesigned EITC,³⁴ other programs administered through the tax system, or through spending programs located in other agencies and financed from general revenues.³⁵

The EITC fits very well with the “if you work you shouldn’t be poor” principle. It provides additional cash to low-income households that have earnings from either employment or self-employment, keeping the minimum wage’s tight connection between “work” and earning but also broadening it beyond wages alone.³⁶ Someone without earnings gets nothing, and the benefits increase steadily with increasing work hours, up until the point one earns in the vicinity of \$10 thousand to \$15 thousand. This maximum benefit range roughly corresponds to full-time, full-year work at the minimum wage. Consequently, for a low-wage worker, the EITC varies with work hours roughly as the minimum wage does: part-time or part-year workers get less than would be necessary to lift them to the poverty threshold, but they are not disqualified for insufficient work.³⁷ When hours above full-time lead to higher income, however, the value of the EITC declines.

Unlike the minimum wage, the EITC conditions its benefits on low household income, not merely low individual earnings. Someone with substantial unearned income receives a lower benefit, or none at all. Additionally, the EITC aggregates household members’ incomes. Therefore, for a household with two adults working full-time, full-year at roughly the minimum wage, the EITC will be well into its “phase-out” range, delivering far less than if the household contained only one such worker.

³⁴ See Zelenak, 57 Tax L Rev 301 (cited in note 27).

³⁵ See Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 Yale L J 967 (1999) (comparing various forms of employment subsidy); Edmund S. Phelps, *Rewarding Work: How to Restore Participation and Self-Support to Free Enterprise* 103–21 (Harvard 1997) (proposing a wage subsidy delivered through tax credits to employers).

³⁶ Noah D. Zatz, *Welfare to What?*, 57 Hastings L J 1131, 1137 (2006).

³⁷ For higher-wage workers, however, the EITC will grant full benefits for part-year or part-time work because it measures only earnings, not hours. Lawrence M. Mead, *Rebuilding Welfare into a Work-Based System*, Poverty Research News 8, 9 (2001) (criticizing this aspect of the EITC).

The difference is explained by the fact that the household is less poor, if it is poor at all, because of the higher aggregate income. The minimum wage, in contrast, delivers much higher benefits to the household with more workers because they work more hours at enhanced wages.

The EITC also varies in size depending on household composition. A modest benefit is available to those without children, but substantial increases are available for the first and second child, though not thereafter. This approach only roughly tracks conventional poverty measures because there are no adjustments for the number of adults or for three or more children. Nonetheless, it is much more responsive to varying household needs than is the minimum wage. More generally, and unlike the minimum wage, the EITC's basic administrative apparatus easily could be modified to incorporate other family size variations and to alter the benefit increments associated with different household configurations.

Surprisingly, the targeting argument for favoring the EITC (as is or suitably redesigned) over the minimum wage critique has received little sustained rebuttal that seriously engages the force of its arguments. Nonetheless, three basic types of response come to mind and can be found to some degree in the popular debate and shorter academic treatments. The first approach simply minimizes the extent of the minimum wage's mistargeting relative to the EITC's.³⁸ For instance, in a paper that endorses expansions of both the minimum wage and the EITC, Isabel Sawhill and Adam Thomas acknowledge the targeting critique and find that only a quarter of minimum wage workers were poor in 1998.³⁹ They note, however, that a much higher proportion—55 percent—of minimum wage workers lived in households with incomes below 200 percent of the poverty line, which constitute roughly the bottom third of the income distribution. Moreo-

³⁸ A related set of criticisms compares the EITC to other actual or potential tax-and-transfer programs, for instance noting that the EITC's use of the year as the unit of analysis and transfer delivery may be too unresponsive to shorter-term experiences of poverty and their immediate consequences. See Anne L. Alstott, *The Earned Income Tax Credit and Limitations of Tax-Based Welfare Reform*, 108 Harv L Rev 533, 579–84 (1995); David A. Weisbach and Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 Yale L J 955, 1022–23 (2004). Because traditional means-tested transfer programs do not share this problem, it has less force in a general comparison between the minimum wage and transfer payments.

³⁹ Isabel Sawhill and Adam Thomas, *A Hand Up for the Bottom Third: Toward a New Agenda for Low-Income Working Families* 17 (Brookings Institution 2001), available at <http://www.brookings.edu/~media/Files/rc/papers/2001/05useconomics_sawhill/20010522.pdf> (last visited Mar 25, 2009).

ver, they present data showing that 61 percent of workers in poor families had wages at or below their proposed minimum wage of \$6.15 (a \$1 raise from the rate at the time). While these data imply that the minimum wage is accurately targeted more often than not and that most of those targeted benefit from the minimum wage, Sawhill and Thomas provide no argument that the minimum wage is *superior* to the EITC in either regard. Indeed, they later show that 90 percent of the value of the EITC goes to households with incomes under 200 percent of the poverty line.⁴⁰ We are simply left to wonder what the affirmative argument is for utilizing the minimum wage at all.

The second type of response to the targeting critique invokes political feasibility. The core political advantage of the minimum wage is that, as a matter of overt form, it does not involve the government taxing some people in order to give money to others. In other words, it does not overtly engage in redistribution. It trades libertarian resistance to regulation against libertarian resistance to taxation. From the perspective of public budgets, the minimum wage is free.⁴¹

This political advantage can be viewed two different ways. If, in fact, the purpose of the minimum wage is to redistribute to poor workers, then its political advantage derives from its supporters' ability to trick people. Regardless of whether the policy orders employers to pay their workers more or orders taxpayers to pay the government more so that it can give the money to workers, state power is being used to redistribute.⁴² Ironically, EITC supporters play much the same game, taking pains to distinguish the EITC from a transfer payment, instead styling it as merely a tax refund. Both camps fall over themselves to distinguish their favored policy from that horror "welfare," and indeed to argue that some of the policy's affirmative value comes in saving deserving hard-working folks from the shame of needing government assistance to avoid poverty. Such smoke screens may be necessary in the rough and tumble of politics,⁴³ and I do not

⁴⁰ *Id* at 22.

⁴¹ See Barry Bluestone and Teresa Ghilarducci, *Making Work Pay: Wage Insurance for the Working Poor*, Levy Economics Institute Public Policy Brief No 28 16–17 (Bard 1996), available at <<http://www.levy.org/pubs/ppb28.pdf>> (last visited Feb 6, 2009) (arguing that the minimum wage's "first and foremost" virtue is that "it increases workers' earnings without placing a burden on the taxpayer").

⁴² Consider Shaviro, 64 U Chi L Rev 405 (cited in note 11).

⁴³ See Waltman, *The Case for the Living Wage* at 90, 106 (cited in note 14) (arguing for the political virtues of the lack of transparency in the distribution of the minimum wage's costs and benefits).

purport to pass judgment on those employing these strategies so long as they are understood for what they are.⁴⁴

Another possibility, however, is that the political virtues of the minimum wage stem not simply from political elites' ability to manipulate the masses but instead from its appeal to widely held normative goals that do not fit easily into the antipoverty framework. On that view, the mismatch between political appeal and policy analysis suggests lack of intellectual clarity and creativity among those framing the minimum wage in antipoverty terms, not gullibility in the public.

The third type of rebuttal to the institutional design argument against the minimum wage suggests that shifting costs from the government to employers is not a trick at all. Instead, it is the proper goal. In contrast, policies like the EITC subsidize employers, letting them off the hook of paying their workers higher wages.⁴⁵ This occurs in two ways. First, given some baseline wage level, increasing a worker's income through the EITC rather than raising the minimum wage allows the employer to continue paying wages that are "too low," and shifts the costs of correcting the problem to innocent third parties, the taxpayers at large. Second, given some baseline wage level, adding an EITC will actually lead employers to *lower* wages. Workers do not capture the entire wage subsidy but rather split it with employers, just as payroll taxes nominally levied against employers are passed along to workers to some degree.⁴⁶ This phenomenon has been referred to as the "Speenhamland effect" after a notoriously disastrous wage insurance policy instituted in Great Britain in the early nineteenth century.⁴⁷

⁴⁴ Of course, if everyone understood them this way, they would no longer be as effective.

⁴⁵ See Bluestone and Ghilarducci, *Making Work Pay* at 23–24 (cited in note 41); J.W. Mason, *The Flattering Tax: Does the Country's Leading Anti-Poverty Program—the Earned Income Tax Credit—Actually Help Keep Wages Low?*, City Limits (June 2002), available at <http://www.citylimits.org/content/articles/viewarticle.cfm?article_id=2768> (last visited Mar 25, 2009).

⁴⁶ See Alstott, 108 Yale L J at 1019–22 (cited in note 35); Nada Eissa and Austin Nichols, *Tax-Transfer Policy and Labor-Market Outcomes*, 95 Am Econ Rev 88, 90–92 (2005).

⁴⁷ Bluestone and Ghilarducci, *Making Work Pay* (cited in note 41). See also Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* 98–124 (Beacon 2001). To put an even finer point on it, some workers who would receive a raise from the minimum wage may actually find their income *lowered* by the EITC—low-wage workers who qualify for little or no EITC (because they have no children or have a significantly higher earning spouse, for example), but who work in occupations with many EITC recipients. See Jesse Rothstein, *The Unintended Consequences of Encouraging Work: Tax Incidence and the EITC*, Princeton University Center for Economic Policy

The crucial point about this “subsidy” argument is that it relies upon abandoning an antipoverty rationale. It values *not* simply how much money ends up in the worker’s pocket but instead, or also, how much she *gets paid by her employer*. It also takes as its baseline the wage levels that exist in a labor market without an EITC.

The subsidy rebuttal thus offers the most robust challenge to the targeting critique because it implies a fundamentally different set of criteria with which to evaluate the relative merits of the minimum wage. Making good on that challenge, however, requires articulating and defending a justification for the minimum wage that eschews reliance on its antipoverty effects.

Before beginning to consider such justifications, I note that focusing on wage payments (as opposed to total income) may heighten the importance of the perversity critique, which I have set aside for now. Perversity’s engine is the attempt to make employers foot the bill for getting more money to their own low-wage workers. EITC-like transfers funded from general revenues remove employers’ incentive to substitute away from low-wage employment.⁴⁸ They do so by breaking the link between the minimum wage’s funding source (low-wage employers) and its beneficiaries (low-wage workers). That, of course, is precisely what galls those who accuse the EITC of “subsidizing” employers’ wrongfully low wages.

B. Correcting Defects in the Wage Bargain

The second major approach to justifying the minimum wage is to offer it as a corrective to defects in the wage bargain between employer and employee. In its most stylized form, the minimum wage remedies employer theft. If an employer refuses to pay a worker the agreed-upon wage for work performed, the employer is a thief. The same is true if the employer forces the worker at gunpoint to agree to work for no wage at all or tricks her into the same. Furthermore, it can make no fundamental difference if what the employer steals is not the entire wage but only some fraction of it.

To be sure, wage theft is a recurring problem.⁴⁹ Outright refusals to pay are not uncommon in the informal economy, espe-

Studies Working Paper No 165 (May 2008), available at <<http://www.princeton.edu/~ceps/workingpapers/165rothstein.pdf>> (last visited May 9, 2009).

⁴⁸ Shaviro, 64 U Chi L Rev at 455 (cited in note 11).

⁴⁹ Kimberly A. Bobo, *Wage Theft in America* (New Press 2009).

cially in short-term relationships like day labor or in the final days of an undercapitalized firm's demise. And large, sophisticated firms accomplish something similar by falsifying time records.⁵⁰ Furthermore, employers sometimes resort to physical coercion (imprisonment, violence, or threats thereof) or legal coercion (for instance, manipulating immigrants' vulnerability to deportation by controlling access to their passports). In such circumstances, the FLSA provides a short-cut to legal success, up to the amount of the minimum wage. The worker need not prove the exact wage agreed upon nor the force or trickery used to cheat her out of it. Nonpayment alone establishes a violation and entitlement to a remedy.

Wage theft of these sorts, however, is marginal to the core issues at stake in the minimum wage debate. In principle, it can be addressed through general laws regulating theft, duress, and fraud. The real meat of the minimum wage is its application when employers pay the agreed-upon wage in full and the wage agreement was not tainted by any employer-specific misconduct. In other words, what matters most about the minimum wage is that it is no defense to show that the employer simply paid the going rate in a competitive market.

Can an employer's payment of market wages nonetheless be analogized to theft, even absent broken promises, force, or fraud? The radical answer is "yes, always." One strand of Marxist thought sees theft as intrinsic to any wage bargain because the employer necessarily appropriates "surplus value." A labor theory of value attributes to labor all value created in the production process, and so employers' profits (that is, returns above the cost of capital inputs) necessarily involve retaining for themselves wealth created by their workers and to which the workers have rightful claims.⁵¹ On this view, wage labor necessarily involves an unequal exchange in which the employer exploits the worker.

A minimum wage would be rather weak medicine for an affliction this severe, but that problem aside, theories of exploitation based on the labor theory of value largely have been aban-

⁵⁰ See, for example, Steven Greenhouse, *The Big Squeeze: Tough Times for the American Worker* 53–55 (Knopf 2008).

⁵¹ See John E. Roemer, *Property Relations vs. Surplus Value in Marxian Exploitation*, in John E. Roemer, ed, *Egalitarian Perspectives: Essays in Philosophical Economics* 37 (Cambridge 1994); Gerald A. Cohen, *The Labour Theory of Value and the Concept of Exploitation*, in Gerald A. Cohen, ed, *History, Labour, and Freedom: Themes from Marx* 209, 210 (Clarendon 1988).

done, even by leftist economists and philosophers bent on preserving Marxism's core insights.⁵² I won't belabor the point here, but one basic problem is that the labor theory of value appears simply to be false. A single worker's productivity rises or falls in part with the quality of the tools and supplies with which she works, and not just because of differences in prior labor inputs into those tools and supplies.⁵³

"Inequality of bargaining power" provides the moderate alternative to the labor theory of value. Indeed, it is a ubiquitous slogan throughout and a ready justification for labor and employment law.⁵⁴ Unfortunately, there are serious reasons to doubt that it has any substantial intellectual content. As Duncan Kennedy argued long ago, "unequal bargaining power" typically functions as a placeholder for the conflict between two commitments: inchoate disgust with the outcomes of market processes under conditions of systematic inequality and fundamental support for liberal institutions.⁵⁵ Thus, we believe that market bargains are the appropriate way to order economic life, but in the case before us the outcome is appalling. Therefore we conclude that the bargaining process must have been defective: the victimized party had unequal bargaining power.

The concept of unequal bargaining power promises to preserve the substance/procedure distinction and identify wrongful bargains *without* regard to their substantive outcomes. With a partial exception to which I will return later, attempts to make good on this promise have failed. As scholars of various political and intellectual stripes have argued, the conventional criteria for identifying unequal bargaining power go nowhere, or at least not very far: take-it-or-leave-it terms, "big" employers versus "little" workers, workers' "brutal need" for an income.⁵⁶ At least in relatively competitive labor markets, none of these hold much sway.

⁵² See John E. Roemer, *Should Marxists Be Interested in Exploitation?*, 14 *Phil & Pub Aff* 30 (1985); Roemer, *Property Relations* (cited in note 51); Cohen, *Labour Theory* (cited in note 51).

⁵³ See Cohen, *Labour Theory* at 233 (cited in note 51); Philippe Van Parijs, *Real Freedom for All: What (if Anything) Can Justify Capitalism?* 151–53 (Clarendon 1995).

⁵⁴ See Guy Davidov, *The (Changing?) Idea of Labour Law*, 146 *Intl Lab Rev* 311, 312–13 (2007); Mark Barenberg, *Workers*, in Peter Cane and Mark Tushnet, eds, *The Oxford Handbook of Legal Studies* ch 26 at 566–67 (Oxford 2003); Ian Ayres and Stewart Schwab, *The Employment Contract*, 8 *Kan J L & Pub Pol* 71, 74 (1999).

⁵⁵ Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Md L Rev* 563 (1982).

⁵⁶ See *id* at 615–20; Ayres and Schwab, 8 *Kan J L & Pub Pol* at 74–79 (cited in note 54).

Moreover, there is little reason to think that deviations from this assumption—such as a degree of employer monopsony—are disproportionately important at the bottom end of the wage scale or that minimum wage laws can correct for them effectively.⁵⁷

Furthermore, wage terms are especially poor candidates for reconstructing “unequal bargaining power” in terms of market failure. They are not public goods in the ways that union solidarity and workplace safety arguably are;⁵⁸ they do not concern protections against low probability events or acts of employer bad faith, as workplace safety and protections against unjust dismissal arguably do;⁵⁹ they do not concern what otherwise would be “gaps” in the employment contract or conflicts between what employees expect and what the written or default terms actually provide;⁶⁰ and they do not concern topics on which workers have particularly poor information.⁶¹ Instead, wages are probably the simplest, most prominent, easiest understood aspect of employment. Thus, even if one is inclined toward neoclassical or behavioral economic justifications for constraints on the substance of employment contracts,⁶² the minimum wage provides the weakest case—and therefore an ideal one in which to try to develop alternatives to that entire family of analysis.

What then is left of “inequality of bargaining power”? Many scholars think nothing at all.⁶³ One final possibility, though, builds on the notion that low-wage workers have nowhere else to turn, and therefore are at a disadvantage because they cannot simply refuse to work. The problem here is disadvantage *compared to what*? Not compared to an idealized bargaining process, but instead compared to an alternate state of affairs in which the parties enter the market with different resources: the worker has the option of living off savings, or a trust fund, or family members instead. Now, however, we have begun to travel away from a procedural theory and back toward a substantive account of just distribution. Because ideas along these lines have been ex-

⁵⁷ Shaviro, 64 U Chi L Rev at 451–53 (cited in note 11).

⁵⁸ Samuel Estreicher and Gillian Lester, *Employment Law* 211 (Foundation 2008); Keith Hylton, *Efficiency and Labor Law*, 87 Nw U L Rev 471 (1992).

⁵⁹ See Estreicher and Lester, *Employment Law* at 9, 54, 211 (cited in note 58).

⁶⁰ See Cynthia L. Estlund, *How Wrong Are Employees About Their Rights and Why Does it Matter?*, 77 NYU L Rev 6 (2002).

⁶¹ See Estreicher and Lester, *Employment Law* at 8, 210 (cited in note 58).

⁶² For skepticism that these are so many just-so stories, see Kennedy, 41 Md L Rev at 563 (cited in note 55).

⁶³ See id at 615–20; Ayres and Schwab, 8 Kan J L & Pub Pol at 74–79 (cited in note 54).

plored rigorously in the Marxian tradition, I briefly review those developments.

The demise of the labor theory of value does not exhaust the possibilities for a theory of labor exploitation. Most notably, John Roemer has developed such a theory as part of the broader intellectual movement known as “analytical Marxism.”⁶⁴ According to Roemer, “Marxian exploitation” occurs whenever “the amount of labor embodied in the goods which the worker can purchase with his income (which usually consists only of wage income) is less than the amount of labor he expended to earn that income.”⁶⁵ Exploitation of this sort is likely to occur when there is inequality in the ownership of productive assets.⁶⁶ In a stylized two-person model, if one person owns the factory, another owns nothing, and both are equally capable of working, then the ratio of income to productive work will plainly be higher for the factory owner than for the proletarian.

If exploitation of this sort were considered intrinsically wrongful, a minimum wage might be thought to be a partial remedy. It would increase the returns to labor of at least some workers. Note, however, that low absolute wages would not necessarily correspond to high levels of exploitation. That would depend on the extent to which wage dispersion is caused by differences in ownership of productive assets, rather than by differences in workers’ productivity.

Roemer argues, however, that exploitation ultimately is normatively uninteresting, perhaps even misleading. What can make exploitation morally objectionable is the underlying inequality in productive assets that yields it. That is the relevant sense in which there is “unequal bargaining power” between workers and employers. If, however, one considers that inequality to have arisen justly (for instance because one party scrimped and saved while the other squandered), it is not so clear what is objectionable about exploitation without resorting to a labor theory of value. Inversely, under plausible assumptions, unequal distributions of productive assets sometimes may *not* yield exploitation, or even yield exploitation of the more-proprietyed by

⁶⁴ See John E. Roemer, ed, *Analytical Marxism: Studies in Marxism and Social Theory* (Cambridge 1986).

⁶⁵ Roemer, 14 Phil & Pub Aff at 30 (cited in note 52).

⁶⁶ This observation connects Roemer’s analysis to traditional Marxian concern with control of the “means of production.” See also Cohen, *Labour Theory* at 234 (cited in note 51).

the less-proprieted, and thus a focus on exploitation may blind us to injustice in those distributions.⁶⁷

Thus, Roemer concludes that a focus on exploitation yields a “fetishism of labor”⁶⁸ and that, instead, leftist political theory ought to focus on deciding “[p]recisely when the asset distribution is unjust.”⁶⁹ “Unequal bargaining power” of the sort that requires correction is simply a label applied to the labor market consequences of an unjust distribution of wealth. Ironically, this approach leads to intellectual convergence with liberal egalitarianism.⁷⁰

Roemer’s analysis of exploitation thus mirrors, at a higher level of abstraction, the tax policy critique of the minimum wage. Receiving minimum wages is an imperfect, but not useless, proxy for a worker’s unjust disadvantage, and paying minimum wages is an imperfect, but not useless, proxy for an employer’s unjust advantage. The wage itself, however, is uninteresting. To the extent it is possible to attack directly unjust inequalities in the distribution of productive assets, that would be preferable to regulating the employee-employer relationship. And indeed, Roemer’s major institutional proposal is a system of “equal shares” in ownership of productive capital.⁷¹ Broadly similar in their aspiration are proposals from Bruce Ackerman and Anne Alstott for “citizens’ stakes”⁷² and from Philippe Van Parijs and others for a “universal basic income.”⁷³ In all these cases, programs of egalitarian wealth or income distribution are central, labor market outcomes are epiphenomenal, and redistribution might even enable labor market deregulation.⁷⁴ In other words, there may be

⁶⁷ The assumptions involve more-proprieted individuals with preferences for relatively high consumption and low leisure. Roemer, 14 *Phil & Pub Aff* at 58–59 (cited in note 52).

⁶⁸ *Id.* at 64.

⁶⁹ *Id.* at 65. See also Cohen, *Labour Theory* at 238 (cited in note 51) (concluding that “[i]nstead of desperately shifting about for some or other way of defending the labour theory, Marxists and quasi-Marxists should address themselves to the crucial question, which is whether or not private ownership of capital is morally legitimate”).

⁷⁰ Paul Warren, *Should Marxists Be Liberal Egalitarians?*, 5 *J Pol Phil* 47, 55 (1997).

⁷¹ John E. Roemer, *A Future for Socialism*, in John E. Roemer, *Equal Shares: Making Market Socialism Work* 7 (Verso 1996).

⁷² Bruce Ackerman and Anne Alstott, *The Stakeholder Society* (Yale 1999) (advocating a one-time grant of \$80 thousand to each citizen upon reaching early adulthood).

⁷³ Van Parijs, *Real Freedom for All* (cited in note 53). On the potential for such policies to empower workers vis-à-vis employers, see Erik Olin Wright, *Basic Income, Stakeholder Grants, and Class Analysis*, 32 *Pol & Socy* 79 (2004).

⁷⁴ Alstott, 108 *Yale L J* at 1008–09 (cited in note 35).

room to debate the merits of the EITC relative to other forms of redistribution, but the minimum wage would miss the point.

II. A CONVERGENT MINIMUM WAGE AND ANTIDISCRIMINATION AGENDA

The preceding Part followed arguments for the minimum wage around in a circle. We began with an antipoverty theory, saw that the minimum wage functioned poorly relative to alternative approaches to raising household income, and then fastened on the possibility that the antipoverty framework missed a distinct problem of unfairness in the wage relation. Turning to theories of employer exploitation and superior bargaining power, however, we saw that these carried little force, except insofar as they could be reconstructed as the knock-on effects of a wrongfully unequal distribution of wealth. And so we come back to the minimum wage as a redistributive device and risk going round all over again.

This Part identifies two points at which this circle might be broken. I do not claim to establish that this can be done, but I do hope to show that it would be worthwhile to try. As a source of inspiration, I turn to employment discrimination law and observe that it faces similar challenges. Perhaps we can draw on some of the moral intuitions, as well as the more elaborated theories, developed in the antidiscrimination area and make them fruitful elsewhere.

A. Between Poverty and Exploitation: The Injustice of Low Wages

As an antipoverty policy, the minimum wage faces a basic mismatch between means and ends. It regulates *wages*, not income, and it does so with regard to individuals, not families. The institutional design critique attacks this mismatch. A robust theory of the minimum wage should explain why low wages are, or can be, wrongful for reasons independent of the resulting low income. But it should do so without relying on concepts of exploitation or unequal bargaining power, unless these can be reconstructed in new ways.

Employment discrimination law faces a similar challenge. Like instances of wage theft discussed above, a set of cases is uncontroversial. These involve employers who, all else being equal, treat some employees worse because of their race, sex, disability, etc. Moreover, the *reason* the employer engages in

such “disparate treatment” is that they wish to harm members of these groups, disrespect their abilities, or seek to interact with them only as subordinates or outsiders. As with the application of minimum wage laws to instances of wage theft, application of employment discrimination law to these cases can be justified as simply a context-specific manifestation of general principles of intentional tort.⁷⁵ Discrimination of this sort runs afoul of a principle of impartiality that treats as illegitimate an employer’s desire to structure the workplace in ways differentiated by protected group membership. Instead, they should focus on making money.⁷⁶

The wrongfulness of such conduct is not a function of the economic condition in which it leaves the worker or her household. This point is reflected in the fact that antidiscrimination law applies without regard to workers’ wage levels, incomes, and household structures. The point is not to redistribute income to the poor but to protect workers’ civil rights to be treated as equals. Employers who act with animus or contempt treat workers wrongfully.⁷⁷ The law prohibits them from doing so and, when employers act otherwise, the law demands a remedy in the spirit of corrective justice. The worker’s economic situation is beside the point. So, too, with cases of wage theft.

As with the minimum wage, the difficulty arises when employment discrimination law ventures outside this uncontroversial area of corrective justice focused on employer wrongdoing vis-à-vis its employees. Crucially, antidiscrimination law does so with a vengeance.⁷⁸ In myriad ways, it forbids employers from adhering to practices of market rationality designed to maximize profits. Requirements that employers provide reasonable accommodations to individuals with disabilities provide the most obvious example. Employers must avoid practices that result in individuals with disabilities suffering workplace disadvantage because of their disability, so long as there are reasonable alternatives that prevent such disadvantage. Even if the design and application of these practices relied entirely on ordinarily inno-

⁷⁵ On the connections between certain forms of discrimination and intentional torts, see Mark Kelman, *Market Discrimination and Groups*, 53 *Stan L Rev* 833, 853–55, 892–93 (2001).

⁷⁶ See, for example, *id.*

⁷⁷ Larry Alexander, *What Makes Wrongful Discrimination Wrong?: Biases, Preferences, Stereotypes, and Proxies*, 141 *U Pa L Rev* 149 (1993).

⁷⁸ See Christine Jolls, *Antidiscrimination and Accommodation*, 115 *Harv L Rev* 642 (2001); Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 *Cal L Rev* 751 (1991).

cuous business reasons, the employer cannot refuse such alternatives merely because they impose some cost, so long as they do not rise to an undue hardship.

Importantly, this deviation from the paradigm of intentional tort is not at all limited to the doctrinal category of “reasonable accommodation.” It arises even within the category of “intentional discrimination” forbidden by all employment discrimination statutes and constitutional principles of equal protection. Employers cannot use employees’ class membership as a decision-making criterion even when doing so involves accurate “statistical discrimination” that allows an employer to identify workers who will be more productive or less costly to employ, or who will live longer, or with whom customers or co-workers would prefer not to deal. In addition, the “disparate impact” theory bars employers from practices that disproportionately harm one group or another, even if they do so for ordinarily permissible reasons and even if avoiding doing so would be somewhat disadvantageous in ordinary business terms of cost or productivity.

Relying on such examples, scholars sometimes refer to all antidiscrimination prohibitions on cost-justified employer conduct as “accommodation” mandates or bans on “rational” discrimination. Application of antidiscrimination law to these forms of “rational” discrimination is analogous to application of the minimum wage beyond the easy case of wage theft. Such accommodation mandates have been analyzed, and often criticized, as forms of “redistribution” to protected groups insofar as they modify the outcomes of market bargains, and do so without identifying wrongful employer acts that demand a response sounding in corrective justice.⁷⁹

If antidiscrimination law had to rely on an antipoverty rationale, all these forms of “accommodation” would face targeting challenges similar to the minimum wage. If the problem of “rational” discrimination were limited to its consignment of individuals (or of a group disproportionately) to poverty (or perhaps unemployment), there would be no reason to prohibit such discrimination when it occurs well above the margin of poverty. But

⁷⁹ Kelman, 53 *Stan L Rev* 833 (cited in note 75); Samuel Issacharoff and Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 *NC L Rev* 307, 357 (2001); Jolls, 115 *Harv L Rev* 642 (cited in note 78); Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard 1992); Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 *Va L Rev* 825 (2003).

high-paid professionals, and workers with high-paid spouses, enjoy the full protection of our antidiscrimination laws, even if the discrimination in question only concerns the difference between being solidly middle class or better off than that. This feature of the Americans with Disabilities Act's ("ADA")⁸⁰ reasonable accommodation mandate has received criticism along the lines suggested above. Amy Wax argues that "[s]ome workers, even assuming their disability compromises their productivity, might still earn enough even on a deregulated wage market to cover basic needs. The reciprocity paradigm—which protects the deserving poor—does not demand that these individuals be brought up to the level of compensation received by everyone in the same job category."⁸¹ More generally, Mark Kelman and others criticize the ban on "rational" discrimination for allowing members of protected groups to "jump the queue"⁸² in front of others whose economic circumstances provide at least as strong a claim to receive redistributive transfers.⁸³

Justifying these "accommodation" mandates, and their apparent redistribution along lines other than relative economic disadvantage, arguably is the central task of antidiscrimination theory. There are a number of strategies for doing so. Some attempt to convert certain cases of rational discrimination back into problems of corrective justice involving wrongful motivations.⁸⁴ These are analogous to theories of exploitation and unequal bargaining power in the minimum wage context, which portray the minimum wage as correcting a deviation (like force or fraud) from idealized market behavior rather than as disrupting (through redistribution) the results of well-functioning markets.

More interesting for my purposes are approaches that simply eschew the corrective justice paradigm. The most common of

⁸⁰ 42 USC § 12101 et seq.

⁸¹ Amy L. Wax, *Disability, Reciprocity, and "Real Efficiency": A Unified Approach*, 44 *Wm & Mary L Rev* 1421, 1449 (2003).

⁸² Mark Kelman and Gillian Lester, *Jumping the Queue: An Inquiry into the Legal Treatment of Students with Learning Disabilities* (Harvard 1997).

⁸³ Kelman, 53 *Stan L Rev* 833 (cited in note 75); Wax, 44 *Wm & Mary L Rev* 1421 (cited in note 81). Similar issues arise when race-based affirmative action is accused of mistargeting to the extent that it enhances (relative to the status quo) the prospects of some middle-class members of minority groups while not doing so for economically disadvantaged whites.

⁸⁴ For a general discussion, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* (Yale 1996); Alexander, 141 *U Pa L Rev* 149 (cited in note 77); Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 *U Pa L Rev* 579 (2004).

these shift the unit of analysis to large social groups and see “rational” discrimination as perpetuating or producing their subordination.⁸⁵ Another, which I have been developing, sees “rational” discrimination as unfair to the worker because—entirely apart from the employer’s motivations—she suffers harm for the morally arbitrary reason that she belongs to a protected group.⁸⁶ Both of these offer a conception of “civil rights” more expansive than a right to a baseline of market contracting and distinct from economic deprivation on an absolute scale. In this way, robust conceptions of civil rights have crucial structural features that a theory of the minimum wage needs to explain why low wages are unjust, without either accusing the employer of theft or coercion or invoking an antipoverty rationale.

B. Remedying Low Wages with Higher Wages: The Employer’s Role

Identifying low wages as an injustice does not necessarily imply specifying higher wages as the remedy. The low wages might not be the employer’s fault, and so it might be unfair to burden the employer with the remedy. Perhaps a compensatory transfer from the state would do. Moreover, shifting costs to the state avoids the risk that employers’ attempts to evade these costs will have perverse consequences.

Note that there actually are two distinct issues here: first, whether the employer should *deliver* the remedy; and second, whether the employer should *pay for* the remedy. The minimum wage places on the employer the responsibility for both. In principle, these could be separated. For instance, the government might pay a wage subsidy to the employer, such that the employer delivers a higher wage without paying for it.⁸⁷ Or, the employer might pay a payroll tax to the state, which would then pay the proceeds to the worker.⁸⁸

Again, employment discrimination raises analogous issues about the proper allocation of costs to employers or the state. Accommodation mandates face criticism for forcing employers to

⁸⁵ See Bagenstos, 89 Va L Rev at 837 (cited in note 79); Sunstein, 79 Cal L Rev 751 (cited in note 78); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 Georgetown L J 1619 (1991).

⁸⁶ Zatz, *Managing the Macaw* (cited in note 1).

⁸⁷ See Phelps, *Rewarding Work* (cited at note 35).

⁸⁸ Shaviro argues that the minimum wage is functionally equivalent to a tax on employers delivered to their employees. Shaviro, 64 U Chi L Rev at 407 (cited in note 11).

take on the costs of remedying injustices that, while real, are not their responsibility.⁸⁹ Doing so may lead employers to reduce employment (or wages) of groups who tend to trigger these costs.⁹⁰ For instance, many argue that employers will limit their hiring of people with disabilities to avoid the costs of accommodating them.

There are two basic alternatives to mandating that employers pay for accommodations. First, employees might receive assistance directly from the government without employer involvement. For instance, instead of holding employers responsible for the racial disparate impact caused by restricting employment of people with criminal records, the government might provide targeted training to enhance their job skills or subsidize certification procedures that would provide assurances of their trustworthiness.⁹¹ Second, the government might offset the employer's costs of avoiding discrimination. For instance, in the ex-offender scenario, the government might provide tax credits for hiring ex-offenders⁹² or subsidize insurance against workplace theft or violence.⁹³

Such proposals trigger resistance mainly for two reasons. One is that they let the employer off the hook. This closely mirrors the Speenhamland objection to the EITC.⁹⁴ Consider, for instance, the possibility that even the prohibition on "irrational" disparate treatment is, on net, costly to employers, because the benefits to the firm of preventing all such discrimination are outweighed by the costs of preventing it (monitoring managers' decisionmaking) or because even invalid claims have a positive settlement value.⁹⁵ Because of these costs, employers might hesi-

⁸⁹ See, for example, Lior Strahilevitz, *Privacy versus Antidiscrimination*, 75 U Chi L Rev 363, 379–80 (2008); Alexander, 141 U Pa L Rev at 172 (cited in note 77). For further discussion of this general position, see Kelman, 53 Stan L Rev 833 (cited in note 75); Epstein, *Forbidden Grounds* (cited in note 79); Bagenstos, 89 Va L Rev 825 (cited in note 79).

⁹⁰ Christine Jolls, *Accommodation Mandates*, 53 Stan L Rev 223 (2000).

⁹¹ Strahilevitz, 75 U Chi L Rev at 379 (cited in note 89). As a further example, see 5 USC § 8104 (2006) (providing for vocational rehabilitation for permanently disabled individuals).

⁹² As it does. See 26 USC §§ 38, 51(d) (2006).

⁹³ As it does. See the United States Department of Labor Federal Bonding Program website, available at <<http://www.bonds4jobs.com/index.html>> (last visited Feb 10, 2009). For a general discussion along these lines, see Scott A. Moss and Daniel A. Malin, Note, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 Harv CR–CL L Rev 197 (1998).

⁹⁴ See Bluestone and Ghilarducci, *Making Work Pay* at 23–24 (cited in note 41).

⁹⁵ See John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan L Rev 983, 1024 (1991); Jolls, 115 Harv L Rev at

tate to hire women and people of color, especially because employers are much less vulnerable to hiring discrimination claims than to claims from incumbent workers.⁹⁶ Does it follow that the state should provide a subsidy to employers to offset the costs of nondiscrimination, and thereby encourage it? Many would be appalled at the thought.

There is also a more technocratic institutional design objection to shifting the delivery and funding of antidiscrimination protections from the employer to the government. Certain goods can be delivered only by an employer, or at least at much lower cost. If what a worker needs is a ten-minute rest break to take medication, there may be no way for the government to deliver that good without involving the employer.⁹⁷ Additionally, allowing the employer to charge the government for the costs of nondiscrimination may open the door to fraud. Employers will have a huge incentive to do what they would have done anyway but claim otherwise and shift costs. Or they may inflate the cost of antidiscrimination practices.

III. LOW WAGES AS A FORM OF DISCRIMINATION?

I have argued that breaking out of the existing minimum wage debate requires meeting two challenges: providing an account of the injustice of low wages and providing an account of employers' responsibility for remedying this injustice through paying higher wages. The similarity to challenges faced by anti-discrimination law is highly suggestive, but no more than that: the minimum wage might be justified for reasons that have no bearing on antidiscrimination law, or vice versa, or both of them might fall to challenges launched by law and economics. In this Part and the next, I explore several approaches that would bring together the justifications for antidiscrimination and minimum wage law. Here, I briefly explore two ways of analyzing low wages in terms of standard antidiscrimination concepts: a disparate impact analysis using existing categories of race and gender, and expansion of the protected categories to include economic class. Although both have some merit, they tend to reproduce rather than resolve the targeting issues discussed above. In Part IV, I

691–94 (cited in note 78).

⁹⁶ See Donohue and Siegelman, 43 *Stan L Rev* 983 (cited in note 95); Jolls, 115 *Harv L Rev* 642 (cited in note 78).

⁹⁷ Compare Gillian Lester, *A Defense of Paid Family Leave*, 28 *Harv J L & Gender* 1 (2005) (discussing analogous issues in the context of parental leave).

will develop a third possibility that shows some promise of avoiding those problems.

I limit my attention to the issues of targeting, leaving aside the allocation of costs between employers and the state. That said, this first step is independently significant even if the second challenge cannot be met. The absence of *employer* responsibility would simply mean shifting to different institutional means of addressing the underlying problem. And those institutional means are not currently in place. Recall that the targeting critique touts the EITC for *excluding* low-wage workers who are not poor. If low-wage work is an injustice, the worker's poverty status aside, then that alone would tell us that work-based anti-poverty programs are not enough. And if the minimum wage is not the solution, the answer may lie in other approaches like individualized wage subsidies.⁹⁸

A. Low Wages as Imposing a Disparate Impact on Protected Groups

Advocates for raising the minimum wage often note that higher wages (setting aside any corresponding job losses) would disproportionately benefit groups that antidiscrimination laws are designed to protect.⁹⁹ The flip side of this same point is that low wages disproportionately harm these same groups, who are segregated into low-wage occupations. Although it is difficult to imagine successfully using Title VII of the Civil Rights Act¹⁰⁰ or the ADA to attack an employer's wage schedule for imposing a disparate impact, a minimum wage nonetheless might be anchored in underlying concerns about group stigmatization or subordination. By analogy, the Family and Medical Leave Act ("FMLA")¹⁰¹ has been defended as a response to the disparate impact on women that arises when employers deny leave,¹⁰² even though Title VII has not been construed to require such leaves.¹⁰³

I think there is something to this argument and will return to it below. But two major limitations render it incomplete at best.

⁹⁸ See Phelps, *Rewarding Work* at 105 (cited at note 35).

⁹⁹ Chasanov, *No Longer Getting By* (cited in note 32).

¹⁰⁰ 42 USC §§ 2000e et seq (2006).

¹⁰¹ 29 USC §§ 2601 et seq (2006).

¹⁰² See *Nevada Department of Human Resources v Hibbs*, 538 US 721 (2003).

¹⁰³ Jolls, 115 Harv L Rev 642 (cited in note 78).

First, if the goal is to equalize the economic standing of social groups, it is unclear why one would specifically target the low end of the wage scale. Raising wages at the middle and upper ends of the distribution seems equally important. More fundamentally, why would we focus on wage levels at all, as opposed to individual or household income levels? As with arguments for the EITC relative to the minimum wage, if the underlying goal is to raise the incomes of women or people of color, some explanation is needed for doing so via the wage mechanism. Or, perhaps we have some account of why *wages* specifically should be higher than they are, independently of the consequences for the distribution of incomes. But disparate impact alone does not provide that account.

Second, a disparate impact analysis may miss harms that cut across protected classes. Low-wage workers are disproportionately women, but it doesn't follow that what's wrong with paying low wages to a man is that he is being treated like a woman. That, however, is all we are left with if the race and gender distributional consequences of low wages are the sole basis for judging them objectionable. Conceptualizing the problem of low wages as the sum of discrimination against a series of distinct groups seems to stop short of capturing what these workers have in common. To return to the wage theft analogy, imagine that employers steal from their female employees more often than from male employees. Although it might represent an improvement, we should not be satisfied if the employer corrects this imbalance so as to steal at equal rates by gender. Similarly, imagine that existing jobs continued to pay the same wages, but that the race and gender composition of these jobs changed so that women and people of color were no longer concentrated in the lowest paying jobs. Would this eliminate the problem of low wages? If the answer is no, as I think it must be, then race and gender disparate impact are not getting at the whole problem.¹⁰⁴

¹⁰⁴ This hypothetical is overdrawn in its simplifying assumption that race and gender affect only the sorting of people into jobs and not the structuring of those jobs, including their compensation. That assumption is false. Nonetheless, the basic point remains so long as eliminating occupational segregation would still leave some jobs with wages that are "too low," even if doing so would improve the wages and working conditions of jobs in which women and people of color currently are concentrated. On wage-setting as a function of the characteristics of job occupants, see generally Kessler-Harris, *A Woman's Wage* (cited in note 30); Roger Waldinger and Michael I. Lichter, *How the Other Half Works: Immigration and the Social Organization of Labor* (California 2003); Paula England, *Comparable Worth: Theories and Evidence* (Aldine de Gruyter 1992).

B. Low Wages as “Class” Discrimination

If the groups conventionally protected by antidiscrimination law fail to map cleanly onto the contours of low-wage work, the obvious solution is to add another group concept like economic “class.” Low-wage workers might then constitute a distinct “working class” or similar designation. Increasing the wages of the lowest-paid workers obviously benefits them relative to other classes, again bracketing the perversity critique for now. In this way, the minimum wage might be thought of as a narrow attempt to incorporate economic class into antidiscrimination law, much the way one might think of the FMLA as a narrow attempt to protect caregivers as a group; all intersect massively with race, gender, and disability but are not strictly reducible to them.

I doubt that this kind of class analysis can advance the ball very far, even without considering the traditional hostility to class analysis in U.S. politicolegal culture.¹⁰⁵ The targeting problems remain severe, for reasons related to the slipperiness of defining class.¹⁰⁶ If class is defined in terms of present economic status,¹⁰⁷ then it is still unclear why wage rates are a better criterion than household income. If, instead, class is defined simply by low wages, then the analysis becomes circular. It hardly adds anything to say that paying low wages discriminates against the class of low-wage workers. If paying low wages is itself wrongful, then reframing the problem in terms of discrimination seems superfluous. If, instead, membership in the class of people who receive low wages is an independent matter of moral concern, then we need some account of the nature of that moral concern other than the correlation between low wages and poverty;¹⁰⁸ otherwise, we are back to the antipoverty rationale.

Roemer’s analysis recounted earlier suggests a reconstruction of class in terms of unequal access to productive resources.

¹⁰⁵ For discussions of this hostility, see Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S Cal L Rev 799 (2003); Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 Buff L Rev 859 (2008).

¹⁰⁶ On competing conceptions of class in sociology, see Erik Olin Wright, ed, *Approaches to Class Analysis* (Cambridge 2005).

¹⁰⁷ For an overview of attempts to incorporate economic discrimination into U.S. constitutional law through concepts of wealth, income, and ability to pay, see Gerald L. Neuman, *Equal Protection, “General Equality,” and Economic Discrimination from a U.S. Perspective*, 5 Colum J Eur L 281 (1999).

¹⁰⁸ For instance, Marxian accounts tie class to labor exploitation. See Erik Olin Wright, *Foundations of a Neo-Marxist Class Analysis*, in Erik Olin Wright, ed, *Approaches to Class Analysis* (Cambridge 2005).

This approach to class, however, pulls the root of the problem further away from the wage relation, or even from the lowest end of the wage spectrum. If the basic problem is equalizing wealth across classes, then the targeting critique returns with a vengeance. Regulating low wages might roughly target disinherited employees and privileged employers, but it seems unduly roundabout compared to focusing directly on the mechanisms by which people unequally acquire capital.

IV. LOW WAGES AS UNEQUAL EARNINGS CAPACITY

This Part proposes a new theory of the minimum wage that draws upon my recent work in antidiscrimination theory.¹⁰⁹ The basic idea, familiar from liberal egalitarian theory, is that we are only partly responsible for our own earnings capacity, for the value of our labor to others. To a large degree, our earnings capacity is a function of morally arbitrary factors. To that extent, inequalities in earnings capacity are unjust. However, it is impossible to measure earnings capacity, let alone break it down into components that track our moral responsibility. The minimum wage enacts a presumption that when wages fall below some level, they are so low for morally arbitrary reasons. Mandating a higher wage brings us closer to a world of wage fairness.

A. Normative Foundations Shared with Antidiscrimination Law

Before elaborating on this account of the minimum wage, let me first make explicit the connection to conventional understandings of civil rights. In a forthcoming article, I propose a theory of employment discrimination law that relies neither on a corrective justice account of discriminatory intent nor on equalizing the status of groups.¹¹⁰ Instead, the core concern of employment discrimination law is “membership causation”: suffering harm at work as a result of one’s membership in a protected class. That harm is inflicted when an employer acts with discriminatory intent. By taking the worker’s race, sex, or disability into account, the employer reaches a different decision depending on the worker’s group membership. This occurs regardless of what motivated the employer to consider group membership, whether it be animus or a desire to save money.

¹⁰⁹ Zatz, *Managing the Macaw* (cited in note 1).

¹¹⁰ *Id.*

The employer's discriminatory intent, however, is merely one mechanism by which class membership can make a difference at work. The same thing occurs when an employer fails to provide a reasonable accommodation. If I cannot operate a machine effectively because of my disability, then my employer may be motivated to fire me because of my poor performance on the machine, without considering my disability. And yet it is still the case that I lose my job because of my disability, one step further back in the causal chain. Perhaps, however, I *could* operate the machine effectively, notwithstanding my disability, if only my employer made reasonable modifications to the machine. In such cases, making a reasonable accommodation or not makes the difference between keeping the job and losing it because of disability.

Although membership causation identifies circumstances in which an employee suffers the distinctive harm of employment discrimination, it does not necessarily follow that the employer bears responsibility for preventing or remedying that harm. Instead, that separate question is addressed by requirements like discriminatory intent, "reasonableness" and undue hardship in the reasonable accommodation context, and negligence standards applied to employer efforts to prevent harassment. This bifurcation between questions of harm and responsibility parallels the two key questions for a theory of the minimum wage: "why care about low wages?" and "why make the employer responsible for raising them?"

Why should we care about membership causation? It provides a special case of the central problem in liberal egalitarian theories of distributive justice in the Rawlsian tradition. These theories hold that individuals' access to resources, and perhaps specifically to employment, should not be a function of morally arbitrary differences. Such theories have been labeled "luck egalitarianism,"¹¹¹ though luck may not be the only source of morally arbitrary difference.¹¹² Daniel Markovits suggests the term "re-

¹¹¹ See Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 *Theoretical Inquiry* L 239, 243 (2008).

¹¹² Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in R. Jay Wallace, et al, eds, *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* 270 (Clarendon 2004).

sponsibility-tracking egalitarianism,”¹¹³ which conveys more directly the foundation in respect for individuals’ equal agency.¹¹⁴

Membership in a protected group is a paradigmatic example of such a morally arbitrary difference. Of course, the precise scope of these concepts is contested in ways that matter tremendously for the identification of protected groups, for instance whether moral arbitrariness requires “immutability” or includes matters of fundamental personal identity that are either consciously chosen or at least subject to change. Nonetheless, the general concept is reasonably clear, and it provides a common thread connecting different forms of prohibited discrimination.

Membership in a protected group, however, is not the *only* example of a morally arbitrary difference. Others arguably include differential childhood access to nutrition, education, and social capital as a result of the family, neighborhood, or nation in which one was raised. Additional differences might involve native talent for forms of work valued in the marketplace, differences that do not possess the form or the magnitude to be medicalized as disability or even impairment.¹¹⁵ All of these affect the wages one can command in the labor market.¹¹⁶

Why, then, does antidiscrimination law pick out for protection only membership in certain groups? This is a large and important problem that I cannot pursue adequately in this forum. But some plausible arguments seem readily at hand. First, certain morally arbitrary considerations may, as a matter of social fact, become the basis for systematic disadvantage, systematic in the sense of affecting many people, affecting them repeatedly at different moments and in different contexts, and affecting them in a consistent direction. It might well be unfair for an employer

¹¹³ Daniel Markovits, *How Much Redistribution Should There Be?*, 112 Yale L J 2291, 2294–95 (2003).

¹¹⁴ Markovits and Shiffrin both argue that this underlying value may, in some circumstances, justify deviations from strictly responsibility-tracking institutions, even if they are appropriate as a first approximation. See Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation* (cited in note 112); Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 Theoretical Inquiry L 271 (2008). This subtlety is not directly implicated by this discussion, though it may return through the analysis of employer responsibility that I have deferred. See Markovits, 9 Theoretical Inquiry L at 307 (cited in note 114).

¹¹⁵ Wax, 44 Wm & Mary L Rev at 1443–44 (cited in note 81). See also Kelman and Lester, *Jumping the Queue* (cited in note 82).

¹¹⁶ For a synthesis of some research in this area, see James J. Heckman, *Schools, Skills, And Synapses*, 46 Econ Inquiry 289 (2008) (discussing findings that “about half of the inequality in the present value of lifetime earnings is due to factors determined by age 18”).

to discriminate against workers who prefer strawberry ice cream,¹¹⁷ but that does not yet make it a social problem large enough to justify deploying against it the power and resources of the state.

Additionally, and part of why one might hesitate before trying to suppress such injustice, it can be very difficult to determine in individual cases whether or not some harm was caused by a morally arbitrary factor. This is a particularly vexing feature of the factors identified above that may unjustly affect earnings capacity, among other things. They often involve very long causal chains stretching back to childhood and intertwining with complex social processes. Moreover, they may be exceedingly difficult to disentangle from disadvantages for which individuals ordinarily are held responsible, like how hard or diligently one works. The relative difficulty of making such determinations provides another possible reason to pay special attention to the causal role of protected group membership, a more readily discernible subset of morally arbitrary influences.¹¹⁸ Furthermore, even with regard to such groups, it provides a reason to focus on their influence when it is proximate to the ultimate harm. In an individual case, it might well be that a racial incident in one's childhood had significant effects on a series of subsequent events decades later, but most often it would be impossible to prove it. Indeed, the reluctance to trace such long causal chains arguably provides one of the most significant limits on conventional anti-discrimination law, which already struggles mightily with evidentiary problems even in conceptually straightforward disparate treatment cases.

So, as a first step in the argument, we have a reason to think that wages can be "too low" in a way that reflects a problem of justice.¹¹⁹ At this point, "too low" simply means lower than they would have been in the absence of morally arbitrary factors suppressing earnings capacity. Conventional antidiscrimination law

¹¹⁷ For skepticism that it is unfair at all, see Murphy and Nagel, *The Myth of Ownership* (cited in note 19).

¹¹⁸ See Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-Discrimination Laws*, 9 Geo Mason L Rev 145, 154 (2000); Deborah A. Stone, *The Disabled State* (Temple 1984) (arguing that medical concepts of disability attempt, albeit with limited success, to clarify the boundaries of personal responsibility for unemployment).

¹¹⁹ Shaviro rather scornfully rejects the possibility of any criterion for "just wages" other than the actual outcome of existing market wage-setting practices. Shaviro, 64 U Chi L Rev at 429-33 (cited in note 11). Widely accepted prohibitions on wage discrimination, from which I generalize here, demonstrate both the familiarity and the conceptual plausibility of accounts of wage fairness that reconstruct market baselines.

can be understood as attacking one particular, and particularly important, form that this injustice can take. Thus, we also have a deep connection to traditional civil rights law, not in the sense that low wages are simply a form of discrimination, but rather in the sense that they are unjust for the same underlying reasons that discrimination is unjust.

Crucially, this first step provides an account of when wages are too low that, in theory, avoids all the key targeting problems afflicting the minimum wage from an antipoverty perspective. If an airline pays male pilots \$100 per hour and female pilots \$90 per hour, the employer violates employment discrimination law. It is simply irrelevant that \$90 per hour is a high wage in the total wage distribution, and that someone earning \$90 per hour is likely to have a relatively high income. The point is that, but for their sex, the women would have been paid more.¹²⁰ The same logic applies to other morally arbitrary factors. If someone earns \$90 per hour but would have earned \$100 per hour had she not been malnourished as a child or had her parents been able to afford living somewhere with better schools, there is unfairness to the worker. That injustice is independent of whether the worker has other sources of income, the size of the household she lives in, and the size of other household members' income. Moreover, it is independent of how many hours she works.¹²¹ The point is not her ultimate income over a month or a year, but rather what she has lost for morally arbitrary reasons.

B. From Low Wages to Minimum Wages

The argument so far has nothing special to say about *minimum* wages, in which unfairness inheres in the absolute level of the wage. Instead, in the nature of antidiscrimination law, the concept of "low" wages described above was entirely relative. A worker high in the wage distribution nonetheless might be paid unfairly little. Similarly a worker low in the wage distribution might be paid fairly. She might be paid less than other workers because she has devoted less time, energy, and money to improving her skills or acquiring a good track record; because a particu-

¹²⁰ Of course, it is not always clear that an employer would avoid discriminating by leveling up rather than leveling down or something in between, but the law understandably shows little pity for the employer on this point.

¹²¹ Hours of work might or might not be fully her own responsibility, but that question is conceptually distinct from the hourly rate. These issues may interact insofar as income effects dominate substitution effects, in which case long hours might be a function of unjustly low pay. Perhaps herein lies the beginning of a theory of overtime.

lar job has nonpecuniary benefits that make up for low wages; or because the worker is acting as a volunteer implicitly donating her labor for less than she could earn elsewhere.¹²²

Because the injustice of low wages is a function of the *reasons* for that rate, not its absolute level, any attempt to correct this injustice with precision requires that we distinguish among people who get paid the same wage. To do so, we need to know why they receive that wage and not another. This is the same basic evidentiary problem that bedevils antidiscrimination law. We need to distinguish between people fired based on their race from those fired for other reasons.

Solving this evidentiary problem on a case-by-case basis is hard enough in traditional antidiscrimination law, but it quickly becomes hopeless when seeking to identify workers who receive unfairly low pay for a broader range of morally arbitrary reasons. Indeed, as noted earlier, this appears to be one reason to restrict antidiscrimination protections to specific characteristics in the first place. Even if we are confident that, all else equal, going to a worse school on average leads to lower wages as an adult, we could never analyze its impact in an individual case; the potential for variation among those from the same school is far too high. Perhaps for one person, going to a better school would have meant not learning to work as hard and later suffering for it, or not having a particular inspiring experience, or becoming friends with someone who later provided a crucial professional connection, or on and on. Assessing the hypothetical is just ridiculous.¹²³

Faced with this evidentiary Everest, we might just give up. Doing so would mean letting countless injustices lie where they fell but could not be seen. Or we could decide to muddle through. That, I suggest, is how we might think of the minimum wage.

At some point, wages become low enough that we can infer unfairness from the brute fact of the poor outcome. True, in any individual case we cannot trace the mechanism with any precision. Nonetheless, the intuition is that if someone is making \$2

¹²² Of course, all of these distinctions require a fleshed-out account of the scope of responsibility for determinants of wages, including questions of native talent and responsibility for one's own preferences. See, for example, Markovits, 112 Yale L J 2291 (cited in note 113). For skepticism that such an account can succeed, see Ian Shapiro, *Democratic Justice* 150–60 (Yale 2001).

¹²³ For an analogous critique of conventional disparate treatment theory, see Kimberly Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 Tex L Rev 167, 192–96 (2004).

per hour, it probably is because she has gotten the short end of the stick in some fashion, probably in many.¹²⁴ *Res ipsa loquitur*. In contrast, if someone is making \$90 per hour, one would require a more case-specific story before suspecting injustice, even though it's a possibility.

Obviously these are rough generalizations. A minimum wage will be underinclusive of cases of wage unfairness above the minimum. It also will be overinclusive of some cases below the minimum. To some extent, the latter problem might be addressed by rules limiting the scope of covered employment relationships. For instance, exclusions of trainees and volunteers might serve that function.¹²⁵ But at bottom, even an imprecise minimum wage may do a better job of preventing unjustly low wages than either simply throwing up our hands or using more targeted laws that require proof specific to identifiable individuals or groups. Sometimes a crude rule is better than an unworkable standard and also better than doing nothing at all.

C. Comparisons to Other Arguments for a Minimum Wage

A theory along these lines has two primary virtues relative to those I considered in Parts I and III. First, as already argued above, it avoids the targeting critique by providing an analysis of wage rates independent of personal and household income. Consider a paradigmatic example that illustrates the EITC's superior targeting under an antipoverty rationale: the minimum wage applies to work performed by a "secondary earner" married to a high-earning spouse, but the spouse's low earnings would not trigger EITC eligibility. Now the tables are turned: if the problem to be addressed is low earnings capacity rather than poverty, the minimum wage is well-targeted, and the EITC falls far from the mark.¹²⁶

¹²⁴ Elsewhere, I suggest that a similar analysis may allow us to theorize disparate theory in antidiscrimination law as a probabilistic method of identifying membership causation when it cannot be identified case-by-case. See Zatz, *Managing the Macaw* (cited in note 1).

¹²⁵ The issue of coverage also raises a different sort of concern about underinclusiveness. The problem of unfairly low earnings capacity can arise outside of employment relationships altogether, in the circumstances of genuine independent contractors or self-employed people.

¹²⁶ Of course, this is no argument against the EITC; poverty relief for the working poor may well be a legitimate goal that the EITC implements admirably. The point is simply that with regard to the different goal of responding to unfairly low earnings capacity, the minimum wage may be better targeted.

Second, it identifies the wrong of subminimum wages in a way that organically explains why we set a wage floor rather than intervening throughout the wage scale. This is itself an institutional design argument: the ultimate injustice in question does occur throughout the scale, but because its incidence increases as wages decline, the administrative case for intervention at some point tips from con to pro. By justifying the device of a wage floor, my argument differs from those grounded in the intrinsically exploitative character of wage labor or a general inequality of bargaining power between capital and labor. It also distinguishes antidiscrimination arguments grounded in the aggregate economic status of groups.

To put it more schematically, my proposed account combines the virtues of the two leading types of theory discussed in Part I. Like antipoverty theories, it explains a focus on low absolute wages. And like critiques of inequality in the wage bargain, it separates wages from income and households.

Furthermore, a theoretical grounding in responsibility-tracking egalitarianism makes it possible to incorporate the key insights of attempts to frame the minimum wage in the more traditional antidiscrimination terms, those considered in Part III. It is no accident that women, people of color, immigrants, and people with disabilities are concentrated in the lowest wage jobs. In some cases, the mechanisms underlying this fact can be attacked directly through traditional antidiscrimination law theories. But when these theories exhaust the evidentiary capacity of employment discrimination law, the minimum wage can serve as a kind of civil rights safety net, catching some of the cases that would otherwise slip through. While race and gender inequality are not the *only* cause of unfairly low wages, they are important ones that a minimum wage can address in a fashion that complements traditional antidiscrimination law. Additionally, addressing the broad spectrum of morally arbitrary sources of disadvantage captures aspects of a “class” analysis. It takes seriously ways that socioeconomic subordination and marginalization may reproduce themselves across generations, but without conceptually separating these from processes grounded in race, gender, or disability.¹²⁷

¹²⁷ An important question is the extent to which wage inequality would disappear in the presence of just institutions more generally, including those governing the intergenerational transmission of wealth, education, and so forth. It may be impossible or unwise to eliminate all of the ways in which even just inequalities among adults give rise to unjust inequalities among their children, see generally Anne L. Alstott, *Is the Family at*

D. How Low is Too Low?

My argument thus far has focused on the basic institutional design choice between wage regulation and tax-and-transfer schemes. Even if some kind of minimum wage is justified, the particulars remain to be fleshed out. I already have touched briefly on some aspects of the scope of coverage. But the most obvious question is how high should a minimum wage be? Although I do not aim to answer that question here, viewing the minimum wage in terms of unfairly low earnings capacity rather than poverty reduction has at least one negative implication of note. Not surprisingly, at stake in a theory of the minimum wage is not simply whether a general policy can be justified but also, if so, how it should be implemented.

If I am right about why we should have a minimum wage at all, then the size of that wage should not be pegged directly to achieving a minimally adequate standard of living for a household solely dependent on that wage. On my view, a minimum wage is not a family wage. It is not necessarily a “living wage.” It could be more than that. Or it could be less.

I hasten to add that wage fairness is not the whole of economic justice. That is the sense in which I think the institutional design critique is well taken. There is every reason to think that economic justice is a complex affair with many interlocking parts. It may well be, for instance, that publicly-funded family allowances should support parents, that we should equalize access to unearned wealth by instituting a universal basic income, and that we should have a residual safety net for individuals whose resources fall short despite all of this. All of these could properly co-exist with a minimum wage.

I see no reason not to smile on a world in which households bundle together resources from multiple sources rather than relying exclusively on one person’s wage. To think otherwise strikes me as excessively beholden to a basically conservative model of masculinist voluntarism, one built on the fantasy of the “independent” male breadwinner operating in a private market sealed off from the state. Of course, to the extent that model still holds sway in practice or in politics, tactical concession to it may

Odds with Equality? The Legal Implications of Equality for Children, 82 S Cal L Rev 1 (2008), or to eliminate all inequalities arising from differences in native talent. See Markovits, 112 Yale L J 2291 (cited in note 113).

be for the best, but we should not allow that to sow confusion as to ultimate goals.

V. CONCLUSION

In his important article about the place of reasonable accommodation mandates within antidiscrimination law, Samuel Bagenstos rejects the widespread distinction drawn between “core” civil rights protections and distinctly “redistributive” accommodations.¹²⁸ Instead, “[a]ccommodation mandates like the one in the ADA serve the same fundamental interests as do anti-discrimination requirements; they impose costs that cannot be meaningfully distinguished from those imposed by antidiscrimination requirements; and they target conduct that is normatively similar to that targeted by antidiscrimination requirements.”¹²⁹ I believe that this general view can be extended further, breaking down barriers not only within employment discrimination law but also between it and other (though not necessarily all) areas of labor and employment law. And just as Bagenstos hopes to provide the intellectual foundation for solidarity between disability rights activists and “traditional” civil rights constituencies organized around race and gender, I hope that we can go further and identify the common challenges and aspirations that too often march under the separate banners of “labor” and “civil rights.”

Subminimum wages plausibly are wrong for the same kinds of reasons that employment discrimination is wrong. Both deny people what my colleague Seana Shiffrin has termed an “equal opportunity for meaningful freedom.”¹³⁰ That suggests we might think of the minimum wage as a civil rights statute in a robust sense, and not simply as a tool of antipoverty policy. And we can do so while neither reducing economic disadvantage to our society’s stratification by race, gender, disability, and other established categories of civil rights protection (or vice versa), nor treating that stratification as fundamentally unlike injuries of class manifested in the labor market.

In short, we can clear the first hurdle I identified above—specifying the injustice of low wages—without falling back on theories of intrinsically exploitative labor markets or vaguely

¹²⁸ Bagenstos, 89 Va L Rev at 913 (cited in note 79).

¹²⁹ *Id* at 922.

¹³⁰ Shiffrin, *Egalitarianism* at 273 n 5 (cited in note 112).

defined unequal bargaining power. Doing so meets the targeting critique of the minimum wage.

There remains the second half of the institutional design critique of the minimum wage: that employers are the wrong party to bear the program's costs. In the antidiscrimination context, the law demands that employers restructure their workplaces (to a degree) in order to facilitate access by (accommodate) members of subordinated groups. The minimum wage likewise demands that employers restructure a specific practice—their wage scale—to facilitate access to a fair wage. In both cases, it is the employee's claim on work (under certain conditions, wages included) that drives the argument, not misdeeds by the employer. In this way, the minimum wage has the same basic form as an accommodation mandate.

But why should the *employer* be the one to pay for these accommodations, whether they are the incremental cost of changing workplace policies, facilities, or equipment or the incremental cost of raising wages to the minimum? Moreover, won't employers simply respond by avoiding workers who trigger these protections, or by taking it out on them in some other way?

On this point, too, I take my cue from Bagenstos: "I do not object to the statement that both antidiscrimination and accommodation requirements alike must be justified in a manner that takes full account of the incidence and distributive effects of their implicit taxes and subsidies. Indeed, I believe that the most effective way for advocates of *either* antidiscrimination or accommodation to maintain support for these regimes (and I consider myself an advocate of both) is to confront those effects carefully and directly."¹³¹ I would simply include the minimum wage in this statement and emphasize that the same basic challenge applies across the board.

I will conclude with three preliminary thoughts about this remaining challenge. First, the institutional design advantages of the tax system generally, and the EITC specifically, substantially weaken once wage levels become the primary focus. Because of the current structure of the income tax, the IRS has an advantage over employers when it comes to collecting annual income data from all sources, and on a household basis. Employers don't necessarily know about an individual worker's other income sources, let alone her family members', but employers do know how much they pay. Moreover, employers know how they

¹³¹ Bagenstos, 89 Va L Rev at 921 (cited in note 79).

calculate the amount of pay from wage rates and hours of work, something they track as a matter of monitoring employee performance. In contrast, the IRS and other government agencies can track total earnings well but generally do not have independent access to hours and rates.¹³² Therefore, employers may have superior institutional competence to respond to wages as opposed to income.

Second, wages and state transfers are not interchangeable even if they possess the same dollar value.¹³³ Instead, the social meaning of the wage is such that workers may be deprived of equal respect if their work is valued too little, a disrespect that cannot be cured by a payment from a third party. If so, raising wages would be more effective than government transfers. Whether this point matters depends on specifying more precisely the injustice of low wages: is it simply that workers are deprived of an equal opportunity to gain access to money, or is it that they are deprived of participating on particular terms in a richer relationship of economic and social interconnection? The latter point replicates with regard to wages the terms of an established debate over access to employment: is there any reason for the state to guarantee access to jobs or only to guarantee access to income?¹³⁴ The reasons for granting independent significance to wages might also provide a noninstrumental basis for placing some duties on employers. For instance, those reasons might involve insisting that employment is not purely an arms-length relationship but rather brings with it some obligations of mutual regard.¹³⁵ Something like that appears to be the intuition behind the old rallying cry that “the labor of a human being is not a commodity.”¹³⁶

¹³² If the government pays a wage supplement to either the employer or employee, both parties will have an incentive to collude in the fraudulent inflation of hours and deflation of wage rates. Alstott, 108 Yale L J at 1043–44 (cited in note 35). Falsification of hours is a serious problem in the minimum wage context, too, but at least there workers and employers have opposing interests.

¹³³ See Viviana A. Zelizer, *Payments and Social Ties*, 11 Sociological F 481 (1996); Viviana A. Zelizer, *The Social Meaning of Money* (Princeton 1997).

¹³⁴ See, for example, Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 Am Pol Sci Rev 1127 (1990); Seana Valentine Shiffrin, *Race, Labor, and the Fair Equality of Opportunity Principle*, 72 Fordham L Rev 1643 (2004); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L Rev 1821 (2001).

¹³⁵ Consider Kennedy, 41 Md L Rev 563 (cited in note 55); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 Phil & Pub Aff 205 (2000).

¹³⁶ Clayton Act, 15 USC § 17 (2000). Compare Margaret Jane Radin, *Contested Commodities* 108 (Harvard 1996) (suggesting that the minimum wage is an example of “in-

Third, there remains the vexing problem of perversity: even if employers rightly bear some responsibility for paying higher wages, will their successful attempts to evade that responsibility render the policy counterproductive? I worry that objections of this sort permit a heckler's veto. In the employment discrimination context, the theory is that mandating costly protections for women, people of color, and people with disabilities leads to hiring discrimination against them. That's a reality to be faced, but it may counsel intensifying enforcement against hiring discrimination and implementing other means to counteract it. When one person's free speech (access to nondiscriminatory working conditions) provokes heckling or violence (hiring discrimination), we often think that the proper response is not to withdraw the speaker's protection (scale back antidiscrimination law) but instead to suppress or neutralize the heckling. Such efforts will be costly, but so what? That is just the general problem of pursuing distributive justice and rejecting a market baseline. The persuasiveness of the perversity argument seems ultimately to depend on normative sympathy for the heckler (who discriminates in one way in order to avoid the costs imposed by the ban on discriminating in another way), or on prioritizing those harmed by the heckler over those whose protection provokes the heckling.¹³⁷

In the minimum wage context, the analogous argument would go like this: Yes, it is unfair if paying just wages to some causes others to lose their jobs. The latter group lacks employment for reasons beyond their own responsibility. Something must be done. But surely cutting the minimum wage is not the only tool available to fight involuntary unemployment. That tool leaps to mind only if we privilege a market baseline that lacks wage regulation. That baseline, however, is exactly what liberal egalitarians reject.

Instead, the problem of involuntary unemployment created by labor and employment regulation—to whatever extent it occurs at all—is simply a special case of involuntary unemployment more generally. Taking the perversity argument seriously might well lead us toward more robust labor and employment

complete commodification”).

¹³⁷ Compare Strahilevitz, 75 U Chi L Rev at 376–77 (cited in note 89) (criticizing attempts to prevent discrimination against ex-offenders because employers may respond by statistically discriminating against African American men but supporting analogous attempts to prevent discrimination based on HIV status even though it may lead to statistical discrimination against gay men and African Americans).

policies that include job creation and other active labor market practices, rather than toward deregulation.

What I have said here is no more than a beginning. It is entirely possible that these arguments will lead to dead ends. But for those of us who fear that the existing minimum wage debate is leading us to walk in ever smaller circles,¹³⁸ trying to break out in a new direction could be worth the effort and the risk. That would be all the more true if doing so made it easier to envision an integrated set of civil rights, labor, and social welfare policies.

¹³⁸ See Levin-Waldman, 3 *Rhetoric & Pub Aff* 131 (cited in note 12).