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Ability Capitalism: Law's Constitutive Role in Constructing Disability

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ABSTRACT

In proposing a theory of ability capitalism, this paper considers how, where, when, and why law plays a constitutive role in labour market constructions of disability. In problematising typical or mainstream accounts that see markets as 'natural' social orderings, the paper suggests a constitutive economic sociology of law lens that shifts beyond the embeddedness metaphor to focus on feedback loops. Such an approach can highlight the market's legal priors as well as the ways in which economic and legal phenomena are iteratively re-co-constituted at market boundaries. It can also highlight the role of legal redistribution and processes of commodification in the construction of disability as a market rationality. Through the commodification of labour-power, the law makes visible standard employment relations whilst rendering non-standard relations, preferences, assumptions and norms—typically those reflecting disabled people's experiences—invisible. Thus, the paper extends historical materialist accounts of the construction of disability, explaining how and why rights-based narratives are not, and cannot be the sole response to market-generated exclusions, disadvantages, and inequalities. A cornerstone of equality legislation, the reasonable adjustment, offers a case study of natural market narratives in action and how law demurs to underlying efficiency calculations that determine a disabled worker's inclusion in labour markets. While mainstream, natural market narratives assume rights to be a function of efficiency, a constitutive lens reveals efficiency to be a function of (predistributed) rights. This indicates additional sites at which the law constructs disability disadvantage, suggesting alternative pathways to its challenge. The theoretical contributions set out here are explored in the light of the COVID-19 pandemic's normalisation of remote working and the resulting radical inclusion gains for disabled communities. The paper queries whether shifts in background labour market norms—where and when work

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tasks are carried out—might adjust some of the assumptions that feed into the efficiency calculations underlying the reasonable adjustment of remote working. If so, the prefiguration of alternative market practices suggests an additional way of challenging entrenched inequalities such as the intractable disability employment and pay gaps.

1. INTRODUCTION. 'THE GREAT PREFIGURATION': 'AS IF' REMOTE WORKING WERE THE NORM¹

'All the time they told us [remote working] wasn't possible was a lie, because as soon as the pandemic hit, it became possible.'² The UK's first lockdown in March 2020 saw a rapid pivot to remote working for those able to do so.³ In the process, spaces emerged in which new labour market norms could be explored.⁴ This construction of new ways of doing and thinking, that is, the *prefiguration* of counterfactual realities, offered an opportunity to move beyond traditional, speculative, '*what if*' research questions, inviting us to act '*as if*' remote and hybrid working had become normalised.⁵ These new prefigured spaces resulting from *The Great Prefiguration*, or 'Great Homeworking Experiment', allowed the querying of labour norms about where and when work tasks might be carried out, producing curious effects on relations of power and agency in the wider labour market.⁶ For disabled workers and other

¹The phrase '*The Great Prefiguration*' riffs on Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Boston: Beacon Press, 1985).

²Interview with disabled employee, data on file with author. F. Renz and C. Williams, 'Imagining Inclusive Workspaces for Disabled People: Interim Report' (University of Kent 2022) Interim Report <<https://research.kent.ac.uk/disability/>>.

³The ability to work remotely depends, *inter alia*, on job design and organisational operation. Stephen Hansen and others, 'Remote Work Across Jobs, Companies and Space' (2023) Working Paper 31007 National Bureau of Economic Research Working Paper Series 2–3 <<http://www.nber.org/papers/w31007>> accessed 03 August 2024.

⁴I acknowledge the problems associated with the phrase 'the labour market', with its assumptions of commodified bodies, actions, and time, as noted in K. Rittich, 'Making Natural Markets: Flexibility as Labour Market Truth' (2014) 65 *Northern Ireland Legal Quarterly* 323. On the phenomenon of the COVID-19 as social experiment, see A. Van Hootegem and T. Laenen, 'A Wave of Support? A Natural Experiment on How the COVID-19 Pandemic Affected the Popularity of a Basic Income' (2023) 58 *Acta Politica* 695.

⁵A. Perry-Kessarar, *Doing Sociolegal Research in Design Mode* (London: Routledge, 2021); N. Buonocore Porter, *The Workplace Reimagined: Accommodating Our Bodies and Our Lives* (Cambridge: CUP, 2023).

⁶See Renz and Williams (n 2). A. Felstead, 'Outlining the Contours of the 'Great Homeworking Experiment' and Its Implications for Wales' (Senedd Economy, Infrastructure and Skills Committee Commissioned Report 2021) < <https://business.senedd.wales/documents/s500006852/Remote%20working%20report%20Professor%20Alan%20Felstead.pdf>> accessed 22 July 2024.

cohorts who had long requested and been denied remote working, the sudden shift to, and normalisation of, remote working felt like a pyrrhic victory.⁷ The technology to enable remote working had existed for years. What had been lacking was the impetus to persuade non-disabled workers to challenge the spatial and temporal norms of formal working practices as a technique of inclusion. The first UK lockdown offered just such an opportunity, ironically 'disabling' much of the population overnight who, now effectively house-bound, were no longer able to access their daily workspaces.⁸ Circumstances thus placed disabled and non-disabled workers on a more level labour market playing field, and some interesting insights began to emerge that extended beyond the affective relations of workplace power and agency.⁹

This paper maps out and begins to explore some of the questions arising from *The Great Prefiguration* in terms of the normalisation of remote working. Specifically, it asks to what extent this normalisation forced a rethink of the underlying cost-benefit analysis of the reasonable adjustment of remote working; an efficiency calculation determinative of disabled people's inclusion in the labour market. It identifies a dual location of the reasonable adjustment of remote working; firstly, as a labour market bounding mechanism by which the state or employer, acting individually or jointly, determines who is included in or excluded from the labour market. Secondly, it sites the reasonable adjustment at an archetypal interface of economic, social and legal spheres, referred to as the econo-socio-legal nexus,¹⁰ at

⁷Language used aligns with the British social model of disability that recognises disadvantage arising from environmental and social inadequacies. See A. Lawson, 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' (2011) 40 *Industrial Law Journal* 359, 361. On the various models and terminological pitfalls surrounding language and definitions of disability, see I. Cerasella Chis, 'The Centrality of Disablement Subjectivation to the Reproduction of Capitalist Social Relations: Considerations for Critical and Global Political Economy' (2023) 2 *Global Political Economy* 164.

⁸C. Williams, 'Undisabled by Covid: Reflections of a (Usually Disabled) Socio-Legal Scholar' (2022) 20 *International Journal of Constitutional Law* 1326.

⁹Our research found that disabled workers experienced strong affective responses, mostly positive, to remote working that centred on their ability to choose where and when they carried out work tasks. Data on file with author. Renz and Williams (n 2).

¹⁰The 'deliberately awkward' phrase 'econo-socio-legal' identifies 'the interconnectedness that characterizes the intersections between economic and legal aspects of social life', see A. J. Perry-Kessaris, 'Approaching the Econo-Socio-Legal' (2015) 11 *Annual Review of Law and Social Science* 57. Following Alessandrini, I use the term 'nexus' to emphasise 'the dynamic nature of the entanglements that implicate one sphere with another', D. Alessandrini, *Value Making in International Economic Law and Regulation: Alternative Possibilities* (London: Routledge 2016) 15.

which impairment comes to be translated into regimes of disablement.¹¹ In turn, this translation is constitutive of generative and performative rationalities of disability that, appreciated through a constructivist and constitutive Economic Sociology of Law (ESL) lens, is mutually re-co-constitutive of the labour market's legal priors and economic allocations.¹²

Mainstream narratives rely on the 'natural market' fallacy with 'regulative' and 'facilitative' roles for law that make visible or 'see' formal, standardised legal relations whilst rendering invisible non-standard relations, contextual inequalities, biases and assumptions as well as actors' preferences.¹³ Typical accounts tend to start with the 'natural' market; a spontaneously arising, self-regulating phenomenon that can give rise to inequalities. In response, the law comes in later to offer remedies in the form of *ex post* rights-based narratives. By contrast, a constitutive account of law's role urges us to consider markets as fundamentally legal constructs, based on a 'legal redistribution' of rights and interests determinative of actors' preferences, assumptions, and biases.¹⁴ We typically see the standard employment relationship (SER) in the legal form of the standard employment contract (SEC) which commodifies labour-power.¹⁵ Through these coding or

¹¹The terms impairment, disablement and disability are contested within disability studies. I distinguish impairment, or differences in body, mind or energy from disablement and the socially-constructed concept of disability in line with the UPIAS definition and British social model of disability. See UPIAS, 'Fundamental Principles of Disability' (Union of the Physically Impaired Against Segregation (UPIAS) and The Disability Alliance 1975) < <https://disability-studies.leeds.ac.uk/wp-content/uploads/sites/40/library/UPIAS-fundamental-principles.pdf> > accessed 20 July 2024. For a historical overview, see A. Borsay, *Disability and Social Policy in Britain Since 1750* (London: Palgrave Macmillan, 2005).

¹²Drawing on Frerichs' rankings of social interaction, 'regimes' comprise 'the totality of inter-relations in a given society' whilst 'rationalities comprise the basic principles located in the "deep" structure/culture of society' or the 'epistemic categories that organize our perceptions and evaluations of reality'. See S. Frerichs, 'Re-Embedding Neo-Liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' in C. Joerges and J. Falke (eds), *Karl Polanyi, globalisation and the potential of law in transnational markets* (London: Hart, 2011).

¹³L. B. Edelman and R. Stryker, 'A Sociological Approach to Law and the Economy' in N. J. Smelser and R. Swedberg (eds), *The Handbook of Economic Sociology*, 2nd edn (Princeton: Princeton University Press, 2005); A. Lang, 'Market Anti-Naturalisms' in J. Desautels-Stein and C. Tomlins (eds), *Searching for Contemporary Legal Thought* (Cambridge: CUP, 2017); D. Ashiagbor, 'Race and Colonialism in the Construction of Labour Markets and Precarity' (2021) 50 *Industrial Law Journal* 506; Z. Adams, 'Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform' (2021) 50 *Industrial Law Journal* 434.

¹⁴M. Somers, 'Legal Redistribution, Market Justice, and Dedemocratization: Polanyi and Piketty on Law and Political Economy' (2022) 3 *Journal of Law and Political Economy* 225.

¹⁵J. Fudge, 'The Future of the Standard Employment Relationship: Labour Law, New Institutional Economics and Old Power Resource Theory' (2017) 59(3) *Journal of Industrial Relations*, 374–92; Frerichs, 'Re-Embedding Neoliberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law' (n 12).

commodification processes, the law both constructs and invisibilises the (re) production of social regimes of disablement and rationalities of disability. In turn, the proposition of disability-as-rationality can offer clues as to how disability takes on a life beyond the labour market, operating as a technology of power to code and rank bodies, labour and relations. A constitutive view, therefore, suggests pathways toward *ex ante* analyses and challenges to ongoing oppression. Noting that disability is, then, both fundamental to, and constitutive of, capitalist labour market function, I suggest that we might term the continual re-co-construction of both disability and markets at the econo-socio-legal nexus as *ability capitalism*.

Why explore the value of law's constitutive role in the construction of disability? While mainstream responses to labour market exclusion on grounds of disability tend to rely on *ex post* rights-based narratives, from the intractability of the disability employment and pay gaps (DEG and DPG), we might query whether such narratives are serving us well.¹⁶ *The Great Prefiguration* highlighted the potential of exogenous labour market shocks to prefigure alternative norms, such as where and when work tasks are carried out. The radically different patterns of labour market inclusion that resulted from the normalisation of remote working highlighted some invisibilised preferences and norms central to ability capitalism. But they also suggest that, in shifting such norms, the background context against which underlying market rationalities like the cost-benefit analyses of reasonable adjustment calculations also shifted. This suggests additional sites at which ability capitalism is produced, and can therefore be challenged.

A. A Changing Landscape

In 2022, in response to our own experiences of the enabling effects of remote working, a colleague and I launched the project '*Re-imagining Inclusive*

¹⁶The disability employment gap is the difference in employment rate between disabled and non-disabled people. Similarly, the disability pay gap is the aggregate difference in pay between disabled and non-disabled people. The disability employment gap remains around 30%, despite fluctuation. See DWP, 'Official Statistics: Employment of Disabled People 2022' <<https://www.gov.uk/government/statistics/the-employment-of-disabled-people-2022/employment-of-disabled-people-2022>> accessed 03 August 2024; M. Jones and V. Wass, 'Understanding Changing Disability-Related Employment Gaps in Britain 1998–2011' (2013) 27 *Work, Employment and Society* 982; TUC, 'Disability Pay and Employment Gaps' <<https://www.tuc.org.uk/research-analysis/reports/disability-pay-and-employment-gaps>> accessed 03 August 2024; M. L. Baldwin and W. G. Johnson, 'Labor Market Discrimination against Men with Disabilities in the Year of the ADA' (2000) 66 *Southern Economic Journal* 548.

Workspaces for Disabled People, conducting 41 semi-structured interviews with disabled workers over a series of months.¹⁷ Emerging trends from the data confirmed that we were not alone in finding the shift to remote and hybrid working revelatory for disabled communities. Yet, at the same time, the invisibilisation of disability through remote working, and disabled people's inclusion in the labour market through widespread exclusion from workplaces, raised questions about how the seemingly intractable disability employment gap (DEG) might be challenged.

Home or remote working is one type of flexible working that all employees can request.¹⁸ However, disabled people can make a request for remote or flexible working as a reasonable adjustment under the Equality Act 2010.¹⁹ While employers may refuse a statutory flexible working request, requests for flexible working as a reasonable adjustment are, in theory, harder for employers to refuse. Nevertheless, research has challenged the notion that remote working as a reasonable adjustment is accessible, and such requests are regularly refused 'on business grounds'.²⁰ The assessment of what is 'reasonable' by the employer is an ongoing source of uncertainty, with businesses likely to take a cautious approach in recruitment that contributes to the maintenance of the DEG. For employers, as well as for judges, 'reasonableness' will entail a cost-benefit analysis of the requested adjustment that

¹⁷Renz and Williams (n 2). Our focus was on physical or mobility impairments, but participants disclosed a range of bodily, cognitive, sensory, learning, and energy differences.

¹⁸From 2025, employees will be able to make two flexible working requests in each 12-month period. Separate legislation introduced alongside the bill in response to the government's consultation on making flexible working the default will also grant workers the right to make a flexible working request from day one of their employment. See Y. Qureshi and B. Taylor of Bolton, *Employment Relations (Flexible Working) Act 2023 Private Members' Bill (Ballot Bill) 2023*; BEIS, 'Consultation on Making Flexible Working the Default: Government Response' (Department for Business, Energy & Industrial Strategy 2022) <<https://assets.publishing.service.gov.uk/media/638a16148fa8f569f4902036/flexible-working-consultation-government-response.pdf>> accessed 03 August 2024.

¹⁹Equality Act 2010; A. Lawson, *Disability and Equality Law in Britain: The Role of Reasonable Adjustment* (London: Hart, 2008); A. Lawson, 'Disability and Employment in the Equality Act 2010' (n 7). An employee must be able to demonstrate a disability, and a provision, criteria or practice (PCP) that places them at a substantial disadvantage. The employer must consider what adjustments might remove or reduce this substantial disadvantage, and whether such adjustments are reasonable.

²⁰There is a legal duty for employers to make reasonable adjustments when an employee is disabled and placed at a 'substantial disadvantage' because of their disability. The cost of the adjustment offers one of the few ways that an employer can deny a reasonable adjustment. Equality Act 2010 s 20; Renz and Williams (n 2); Business Disability Forum, 'The Great Big Workplace Adjustments Survey 2023: Recommendations for Employers' <<https://businessdisabilityforum.org.uk/gbwas-2023-recommendations-for-employers/>> accessed 03 August 2024.

the government's 2023 White Paper renewed a commitment to reducing the DEG, noting that '[b]y improving work incentives, we will enable more people to enjoy the financial benefits of a regular pay packet, as well as the positive impact on health and wellbeing for the individual and the wider benefits to society and the economy'.²⁸ While the broader economic, social, and political context might be essential to the success of the initiative, it is important to note that any exploration of the benefits of flexible or remote working for disabled people is with the caveat that these should apply to those *who want to work and are able to do so*.

The paper proceeds as follows. Section 2 explores disablement and disability, locating the translation of impairment to disablement at the boundaries of the labour market according to Marta Russell's Marxian-Polanyian historical materialist lens. The discussion extends this analysis with reference to law's constitutive role which is explored in depth in Section 3, noting 'regulative' and 'facilitative' roles for law in mainstream 'natural' market discourses.²⁹ The discussion uses the example of the legal duty to make reasonable adjustments to explore the underlying efficiency calculus that determines what is reasonable and what is not, entrenching natural market narratives in the process. In response, section 4 proposes an economic sociology of law (ESL) lens as one '*truly constitutive*' approach that can illuminate not only law's redistribution of rights, but the mutual, recursive, re-co-constitution of disability through labour market bounding processes. It suggests that a constructivist ESL lens focusing on feedback loops can offer tools for appreciating law's constitutive role that section 5 builds on to propose a theory of ability capitalism in which the econo-socio-legal re-co-construction of rationalities of dis/ability are key to efficient and effective labour market function. Ability capitalism suggests that meaningful challenges to ongoing exclusion and oppression might usefully explore *ex ante* distributions of preferences, assumptions, and norms, complementing dominant *ex post* rights-based narratives. In the light of *The Great Prefiguration*, the section posits prefigurative counterfactuals as both (de)commodification strategy and research method. Section 6 concludes.

²⁸Department for Work and Pensions, 'Transforming Support: The Health and Disability White Paper' (n 27).

²⁹K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton: Princeton University Press, 2019); Somers (n 14); Edelman and Stryker (n 13); Lang (n 13).

state through their commodification into consumers of goods (such as a wheelchair) and services (such as a bed in a care home).³⁵ Thus, according to Russell's historical materialist account, rights-based narratives challenging ongoing exclusion from the labour market on grounds of disability cannot, and *were never designed to* enable the universal inclusion of disabled people in the labour market.³⁶ Indeed, the maintenance of a surplus pool of labour—defined economically as those for whom employment entails additional costs that reduce potential to generate surplus value—is a necessary mechanism for control of wages and means of production. Disabled people are the obvious choice here, and their dynamic exclusion thus becomes a prerequisite for efficient and effective labour market function.

While, conceptually, disability encapsulates a complex combination of health, social, and environmental factors, most statistical and empirical research measures disability as a subjective binary or ternary.³⁷ This conceals the fact that, even when categories of disability are defined more closely, a diversity of experiences and needs even within categories can result in unequal labour market outcomes. Nevertheless, the figures reveal a depressing picture: disabled people 'experience low rates of employment and lower wages compared to non-disabled people'.³⁸ The commentary is often framed in an 'ableist medicalised and deficit approach to disability' whereby disability is understood to convey being 'less than'; less productive, less efficient, less reliable, or otherwise incurring additional costs to the employer.³⁹ Moreover, '[d]isabled people are discriminated against by receiving lower wages and less or no opportunities for career development and progression, in turn experiencing material impacts on their lifelong

³⁵Ibid.

³⁶Ibid.

³⁷The Labour Force Survey (LFS) is illustrative here. It asks respondents whether their 'day-to-day activities are limited because of a health problem or disability which has lasted, or is expected to last, at least 12 months'. Possible answers are 'no', 'yes a little', and 'yes a lot', with those identifying in the latter two categories counted as 'disabled'. Visibility, duration, and age of onset are all crucial factors in the extent of discrimination experienced, but are not captured in much of the data. Melanie Jones and others, 'Inequality and the Economic Cycle: Disabled Employees' Experience of Work during the Great Recession in Britain' (2021) 59 *British Journal of Industrial Relations* 788, 11.

³⁸United Nations, 'Committee on the Rights of Persons with Disabilities (2022) General Comment No. 8 (2022) on the Right of Persons with Disabilities to Work and Employment' (United Nations 2022) UN Doc. CRPD/C/GC/8 <<https://documents.un.org/doc/undoc/gen/g22/518/57/pdf/g2251857.pdf?token=lue8a6xNsuhrfqOe19&fe=true>> accessed 03 August 2024; cited in Linda Steele, 'Ending Disability Segregated Employment: 'Modern Slavery' Law and Disabled People's Human Right to Work' (2023) 19 *International Journal of Law in Context* 217.

³⁹Steele (n 38) 217.

economic, health and social outcomes.⁴⁰ Tending to be 'last hired, first fired' and more 'affected by recession-induced change', disabled communities are more vulnerable to labour market downturns and tend to be 'encouraged by the government' into precarious and under-regulated employment.⁴¹ Even when access to the labour market is achieved, disabled people are perceived as less competent than their non-disabled peers, regardless of qualifications, skills, or experience.⁴²

B. Locating Legal and Economic Disablement Materially and Historically

The social model of disability that emerged in Britain in the 1970s in response to the hitherto dominant individual model identifies a 'social group defined by oppression', with a 'materialist explanation of disability' highlighting 'the way that people with impairments are made dependent, excluded and marginalized by the arrangement of socio-cultural and economic life'.⁴³ Despite a varied and highly contested analytical landscape of disability models, materialist social models see 'cultural and ideational constructs as real forces that shape the experiences of disabled people but which are nonetheless rooted in and inseparable from material life'.⁴⁴ A historical materialist lens posits disability as a 'socially created category derived from labour relations', or the distinction between those who are exploitable and those who are not.⁴⁵ Oliver's foundational

⁴⁰ibid 218.

⁴¹D. Kruse and L. Schur, 'Employment of People with Disabilities Following the ADA' (2003) 42 *Industrial Relations* 31, 31; Jones and others (n 37) 2, 21–22; Kumar and Provost (n 21) 28–9.

⁴²Odile Rohmer and Eva Louvet, 'Implicit Stereotyping Against People with Disability' (2018) 21 *Group Processes and Intergroup Relations* 127; Cf. K. Smith and others, 'Employer Satisfaction with Employees with a Disability' (2004) 21 *Journal of Vocational Rehabilitation* 61.

⁴³M. Clear and B. Gleeson, 'Disability and Materialist Embodiment' (2002) 49 *Journal of Australian Political Economy* 34, 41; Julie Anderson and Ana Carden-Coyne, 'Enabling the Past: New Perspectives in the History of Disability' (2007) 14 *European Review of History: Revue europeenne d'histoire* 447, 447.

⁴⁴Clear and Gleeson (n 43) 41; see also C. Grover, 'Commodification, Disabled People, and Wage Work in Britain' (2015) 4 *Canadian Journal of Disability Studies* 106; Bonita Heath, 'Foreword: 'From Each According to Ability?' Capitalism, Poverty, and Disability' (2015) 4 *Canadian Journal of Disability Studies* 1. A social lens tends to a-historicise experiences, dislocating the construction of disability from its temporal production. See Anderson and Carden-Coyne (n 43). Cf. Borsay (n 11) 11–14, who argues that a materialist lens is the only approach that fully aligns with the social model of disability.

⁴⁵S. Bengtsson, 'Out of the Frame: Disability and the Body in the Writings of Karl Marx' (2017) 19 *Scandinavian Journal of Disability Research* 151; Russell (n 31) 87; M. Russell and R. Malhotra, 'Capitalism and Disability' (2002) 38 *Socialist Register* 211, 211–212; M. Oliver, *The Politics of Disablement* (London: Macmillan Education, 1990); M. Lee, F. R. Cooper and P. Reeve (eds), *Dis/Ability in Media, Law, and History: Intersectional, Embodied and Socially Constructed?* (London: Routledge, 2022).

work on the social construction of disability recognized the role of capitalism's commodification of labour and the social difficulties for disabled people that stem from competitive market relations.⁴⁶ By emphasising the struggle against 'institutional discrimination' constitutive of disability through labour market exclusion, Oliver and Barnes emphasise the role of rights-based narratives in challenging the resulting inequality.⁴⁷ Accordingly, they emphasise paid work as the ideal response to poverty alleviation and social inclusion through its creation of 'particular forms of social relations'.⁴⁸ Posing labour market inclusion as the solution to myriad problems, though, raises the spectre that 'the disability rights movement's goal [is] only to see that some, not even all, disabled persons are "free" to be boldly exploited like everyone else'.⁴⁹

Despite referring to disability substantively rather than conceptually, Marx's works have provided fertile ground not only for the genesis of the social model of disability, but for the development of materialist theories that highlight the alienation of the integrity of mind and body resulting from the logics of capitalism.⁵⁰ Marx, likely disabled himself, saw disability as a product of capitalist logics and the confluence of multiple contexts, and argued that disability was 'proof of a failing system' that recourse to law or rights-based narratives could not remedy.⁵¹ Social membership was associated with work ability and the bodily functionality to coordinate cognitive and physiological abilities, and Marx identified the disabling, or crippling effects of the division of labour which increased its 'socially productive power [...] for the benefit of the capitalist' by 'crippling the individual worker'.⁵²

By contrast, political economist and historian Karl Polanyi did not address either law or disability explicitly. His primary contribution was from

⁴⁶M. J. Oliver, 'Capitalism, Disability and Ideology: A Materialist Critique of the Normalization Principle' <https://www.um.es/discatif/PROYECTO_DISCATIF/Textos_dis-capacidad/00_Oliver.pdf> accessed 03 August 2024; M. Oliver and C. Barnes, *The New Politics of Disablement*, 2nd ed (London: Palgrave, 2012).

⁴⁷Oliver and Barnes (n 46); Oliver cited in Heath (n 44).

⁴⁸Oliver and Barnes (n 46).

⁴⁹Russell (n 31) 94.

⁵⁰On Marxian critiques of disability, see Bengtsson (n 45).

⁵¹*ibid.* 157. Marx's chronic health problems are well documented, and his ongoing skin condition is speculated to have been Hidradenitis Suppurativa. Marx notes in the Preface to the First Edition of *Capital* the interruptions of 'an illness of many years' duration' which delayed the continuation of his work. Karl Marx, *Capital: A Critique of Political Economy, Vol. 1* (Ben Fowkes tr, London: Penguin Books 1976) 89; Disability Action Research Collective (DARK), *Disabled Communists and Anarchists* (2024) 10 <<https://seditionist.uk/wp-content/uploads/2024/03/Disabled-Communists-and-Anarchists-Reader-DARK-2024.pdf>> accessed 03 August 2024; S. Shuster, 'The Nature and Consequence of Karl Marx's Skin Disease' (2008) 158 *British Journal of Dermatology* 4.

⁵²Marx (n 51) 486.

the historically grounded observation of the embeddedness of markets in society, and his exposition of the self-regulating market ‘as a chimera of liberal economic thinking’ that ‘creates havoc when it is implement by force.’⁵³ Despite entrenching an ontological separation between the economic, legal, and social domains, the embeddedness thesis has proved seminal for considering the role of the law in constructing a market society.⁵⁴ Polanyi’s insights into the ‘fictive commodities’ of land, labour, and money, then, give us clues as to the constitutive role of law in constituting the standard employment relationship to commodify intangibles such as labour.⁵⁵ In the process, we can appreciate how certain labour market norms are revealed while others are concealed, coding in aspects of (legal) privilege and preference to an (economic) labour market that favours those with standard bodies and minds while excluding those with non-standard characteristics. However, Polanyi’s writings give us much less on disability and have tended to inspire less in the way of disability theorising. Van Toorn, drawing on Fraser, notes that this might be due to the fact that, while neoliberalism has a disability blind spot, neoliberalism’s “‘other’; Keynesianism, has its own problematic history in regards to disability’, with the result that disability has tended to remain the poor relation of race and gender in terms of the availability of both to theoretical analyses and legal redress.⁵⁶ Thus, the possibilities for rethinking the demonisation of marketisation through the lens of the ‘always embedded market’ has generally failed to note ‘that protections have often served to entrench hierarchies and exclusions’ at the expense of gendered, raced, and disabled cohorts.⁵⁷

⁵³Sabine Frerichs, ‘Transnational Law and Economic Sociology’ in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (Oxford: OUP 2021); Polanyi (n 1).

⁵⁴C. Williams, *An Economic Sociology of Law Reimagined: Beyond Embeddedness* (London: Routledge, 2022).

⁵⁵Polanyi (n 1) 74 cited in J. Fudge, ‘Labour as a ‘Fictive Commodity’: Radically Reconceptualizing Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 121.

⁵⁶G. Van Toorn, ‘Neoliberalism’s Friends, Foes and Fellow Travellers: What Can Radical Feminist and Disability Perspectives Bring to the Policy Mobilities Approach?’ (2021) 53 *Environment and Planning A: Economy and Space* 723. See also A. Lawson, ‘Disability and Employment in the European Union: Collective Strategies and Tools’ in J. Heymann, M. A. Stein and G. Moreno (eds), *Disability and Equity at Work* (Oxford: OUP, 2014); Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* (Cambridge: CUP, 2010) 216.

⁵⁷F. Block and M. R. Somers, *The Power of Market Fundamentalism: Karl Polanyi’s Critique* (Cambridge, MA: Harvard University Press 2014); N. Fraser, ‘Can Society Be Commodities All the Way down? Post-Polanyian Reflections on Capitalist Crisis’ (2014) 43 *Economy and Society* 541 cited in Van Toorn (n 56) 727.

Drawing together insights from both Marx and Polanyi, Marta Russell's historical materialist analysis observes that market rationalities not only take primacy over, but indeed *require* discrimination on grounds of disability. Russell's starting point is that '[d]isabled is used to classify persons deemed less exploitable or not exploitable by the owning class who control the means of production in a capitalist economy'.⁵⁸ Building on the 'theory of labour power relations' to elucidate 'capitalism's role in defining disability', Russell shows that 'our economic system produces the state of disablement' whereby 'the prevailing rate of exploitation of labour determines who is considered disabled and who is not'.⁵⁹ In the process, the labour market is bounded or delimited, offering sites of inclusion and exclusion through systematic and planned unemployment that exercises downward pressure on wages. In turn, this perpetuates the state of disablement beyond the labour market, whereby disability is conceptualized as 'a product of the exploitative economic structure of capitalist society'.⁶⁰ As such, the conceptual creation of the 'so-called "disabled body"' becomes a key labour market management tool that permits 'a small capitalist class to create the economic conditions necessary to accumulate vast wealth'.⁶¹

Appreciated thus, it stands to reason that a 'primary basis of oppression of disabled persons (those who could work with accommodations) is their exclusion from exploitation as wage labourers'.⁶² Russell's analysis makes apparent that the ineffectiveness of law to remedy ongoing exclusion from the labour market is 'neither accident nor a result of the "natural order of things"', but is instead by design.⁶³ As human labour was conceptually reconstituted as a 'fictitious commodity', shifting from a political to an economic concept, 'disabled persons [came to] rank at the bottom of the economic ladder'.⁶⁴ Thus, if 'the prevailing rate of exploitation determines who is disabled and who is not',⁶⁵ the costs of employing someone with an impairment, including making the necessary (legal) reasonable adjustments and accounting for their potentially reduced productivity and periodic sick leave, can introduce uncertainty, making their employment uneconomical and creating a class of 'unemployables'.⁶⁶

⁵⁸Russell (n 31) 87.

⁵⁹Ibid.

⁶⁰Ibid.

⁶¹Ibid.

⁶²Ibid. 88.

⁶³Ibid.

⁶⁴Ibid. 88; Polanyi (n 1).

⁶⁵Russell (n 31) 89.

⁶⁶Ibid. 93.

While offering a useful starting point for locating disability as a technology of power central to the reproduction of labour-power and the valorisation of capital, I suggest that we need to go further and explore the processes by which labour is commodified, that is, the processes through which 'the fictions of the economic discipline are translated into legal concepts.'⁶⁷ Thus, to understand the reproduction of disability, we need an account of law's constitutive role in commodifying labour-power through legal coding mechanisms such as, *inter alia*, the standard employment relationship, typically seen in the form of the employment contract. Legal coding has redistributive effects⁶⁸ and, moreover, processes of legal coding reveal and conceal in equal measure. Some preferences, assumptions and norms are explicitly codified into SEC, such as where and when work tasks will take place and are thus available to *ex post* legal challenge and reasonable adjustment requests, however (in)effective these may be in practice. While these norms tend to presuppose standard, and standardised (non-disabled) workers, other norms, such as assumptions that the worker has the ability to independently get themselves up and dressed and leave the house, that they will not be late, that they will dress a certain way, and that they are able to navigate an exclusionary built environment to reach the workplace, are essential for the function of the employment contract but are concealed. These, in turn, tend to represent non-standardised workers and non-standard (disabled) bodies and minds. The invisibilisation by the law of these preferences, assumptions and norms renders them unavailable to *ex post* rights-based narratives. The construction of labour market exclusion through this wider, largely invisible, repertoire of preferences, assumptions and norms offers sites at which disability is continually reproduced.

The delimiting of labour markets and the construction of legal and economic disablement performs a second economic function. In other words, the disability employment gap (DEG) performs an essential labour market function in maintaining a surplus pool of labour that serves to drive down wages. This delimiting of markets, by employers or the state, might take the form of Department for Work and Pensions (DWP) Work Capability Assessments and programmes such as Access to Work in the UK, which define the acceptable costs of enabling integration into the labour market of a disabled worker according to the prevailing economic conditions at the time. For Stone, labour is a resource to be manipulated, like land and

⁶⁷Frerichs (n 53) 17.

⁶⁸Somers (n 14).

capital, and ‘the disability concept was essential to the development of an exploitable workforce in early capitalism and remains indispensable as an instrument of the state in controlling labour supply.’⁶⁹ ‘Disability became an important boundary category through which persons were allocated to either the work-based or needs-based system of distribution’, tying the fluid definition of disability explicitly to the needs of the labour market.⁷⁰ In setting labour market boundaries by delimiting acceptable costs, the welfare state similarly delimits inclusion and equality according to the prevailing socio-economic conditions at the time; a calculus that is both legal and political, as well as iterative and mutually constitutive. Such calculations tend to rely on so-called natural market narratives, to which the next section turns.

3. THE NATURAL MARKET FALLACY IN THEORY AND PRACTICE: CALCULATING REASONABLE ADJUSTMENTS

Within critical accounts that challenge prevailing market naturalisms, that is, the belief that the market is a spontaneous and self-regulating sphere of activity, the ‘vaguely radical’ and yet simultaneously ‘banal’ understanding is that ‘markets are constituted through legal rules, norms and institutions, whatever other forces, economic, social, cultural, and political, are also at work.’⁷¹ The question of law’s constitutive role is not new, and a wealth of literature has emerged,⁷² positing various roles for law in shaping and bounding social and economic relationships and institutions,⁷³ constructing markets through money,⁷⁴ and even creating and shaping the natural environment.⁷⁵ At a certain level of abstraction, critical accounts of law’s

⁶⁹Deborah A Stone, *The Disabled State* (Basingstoke: Macmillan 1984) cited in Russell (n 31) 92.

⁷⁰Stone cited in Russell (n 31) 92.

⁷¹Lang (n 13); see also Kerry Rittich, ‘In the Middle of Things: The Political Economy of Labour Beyond the Market’ (2022) 1 *European Law Open* 781, 782.

⁷²Lang (n 13).

⁷³D. Kennedy, ‘Introduction’, *A World of Struggle: How Power, Law, and Expertise Share Global Political Economy* (Princeton: Princeton University Press, 2016). Kennedy has argued that law plays a constitutive role in shaping social economic relationships by creating categories of people and things that define the boundaries of legal and political actors. See also M. Tushnet, ‘An Essay on Rights’ 62 *Texas Law Review* (1984) 1363.

⁷⁴C. Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* (Oxford, UK: Oxford University Press, 2014).

⁷⁵J. Purdy, *After Nature: A Politics for the Anthropocene* (Cambridge: Harvard University Press, 2015).

constitutive role tend to align with 'market anti-naturalisms' in the neo-Polanyian sense that markets cannot spontaneously arise as natural social orderings without some pre-existing distribution of rights.⁷⁶ The notion of law's redistribution of rights and interests also strikes at the heart of dominant binaries that counterpose state and market, public and private, noting their interdependence in contrast to the posited spontaneously arising and natural market.⁷⁷

A. Market Naturalisms: Regulative and Facilitative Accounts of Law's Role

Traditional accounts of the role of law in structuring markets can be split into law's 'regulative' or 'facilitative' roles whether these are, respectively, exogenous or endogenous to transactions and whether they tend to modify an actor's opportunity sets or preferences.⁷⁸ We might note the Law and Economics school, along with ordoliberal, institutional (old and new), functional, and realist approaches as presenting either regulative or facilitative accounts of law's role in markets, or, more commonly, some combination of the two.⁷⁹ Thus, mainstream analyses, such as those seen in the underlying calculus of the reasonable adjustment, tend to combine market naturalisms to determine the underlying efficiency of the adjustment. Before the next section explores what this might look like in practice, it is useful to briefly outline some of the key assumptions of these two models.

'Regulative' understandings, as 'methodological premise, or as an ontological assumption, or both', take law 'to operate coercively through the modification of the opportunity sets available to market participants'.⁸⁰ This is done by 'incentivising and disincentivising different behaviours', based

⁷⁶Lang (n 13).

⁷⁷Block and Somers (n 57).

⁷⁸It appears that the taxonomy of 'regulative, facilitative, and constitutive' is borrowed from earlier work by Edelman and Stryker. See Lang (n 13); Edelman and Stryker (n 13) 535.

⁷⁹I differentiate legal institutionalism here. See Simon Deakin and others, 'Legal Institutionalism: Capitalism and the Constitutive Role of Law' (2017) 45 *Journal of Comparative Economics* 188. I also distinguish some realist approaches which explicitly note the legal construction of laissez-faire economies but which, nonetheless, tend to align with more facilitative accounts as set out in Lang (n 13), although cf. J. Britton-Purdy and others, 'Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis' (2020) 129 *Yale Law Journal* 1784; Birchall also notes that even some ordoliberal accounts tended to acknowledge that 'liberty, including economic liberty, required a guiding hand from the state', see D. Birchall, 'Human Rights and Political Economy: Addressing the Legal Construction of Poverty and Rights Deprivation' (2022) 3 *Journal of Law and Political Economy* 393, 396.

⁸⁰Lang (n 13) 326.

on an understanding that the ‘value of exchanged goods, and the efficiency of any particular market arrangements’ are ‘independent of the legal order which underpins that market.’⁸¹ Normatively, a regulative approach may justify more or less ‘interventionist’ regulatory policy, however the supposed independence of markets and their underlying legal ordering permits an assessment of the ‘objective efficiency’ of a particular market ordering.⁸² On the other hand, ‘facilitative’ understandings of the law-market nexus ‘treat all essential aspects of market transactions as in principle prior to law in an analytical sense, even if in practice they require a developed legal framework to be realised.’⁸³ Such approaches appreciate the role of law in modifying the opportunity sets available to market participants and in reducing categories of (typically transaction) costs.⁸⁴ As with regulative models, facilitative models take the ‘underlying value of exchanged goods [to be] determined extra-legally—by reference to the “social utility” of the good’ even if there is an appreciation that real world prices will be affected by law.⁸⁵ Again, though, the independence of the legal and economic variables enable assessment of the ‘relative efficiency of the different legal frameworks which underpin different market orders.’⁸⁶ This gives us a framework to explore law’s role in the underlying efficiency calculation of the reasonable adjustment.

B. Market Naturalisms in Action: Calculating Reasonable Adjustments

Legal responses to market inequalities generally take the form of *ex post* rights-based narratives that correlate the disabled person’s right with a corresponding duty.⁸⁷ The legal duty to make reasonable adjustments sits at a clear econo-socio-legal nexus, operates as a dynamic labour market bounding tool, and has a dual normativity.⁸⁸ On the one hand, proponents argue, equality of access to labour market opportunities is the right thing to do. It is fair, just, and a reflection of an inclusive society, notwithstanding arguments

⁸¹ *Ibid.* 326–7.

⁸² *Ibid.*

⁸³ *Ibid.* 327.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ W. N. Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *The Yale Law Journal* 710.

⁸⁸ Labour market bounding is dynamic in the sense that inclusion or exclusion will vary by sector, by labour market requirements, by the socio-economic conditions of the time, and so on.

that, in 'protecting' disabled people from labour market operation, measures can be infantilising and detrimental to the cause of rethinking disability.⁸⁹ On the other hand, there is a recognition that appeals to fairness will not achieve much without a clear business case for the workplace inclusion of disabled people, however (in)effective such arguments are in practice.⁹⁰ In replicating typical labour market misconceptions about disability, neoclassical analyses have generally 'been slow to acknowledge the possibility that the market failure associated with inadequate dissemination of information and understanding will result in inefficiency'.⁹¹ The result is a (natural market-based) consensus that reasonable accommodations are inefficient, at least for the employer, but also potentially more broadly for society.⁹² However, there is little consensus on 'where the line should be drawn between private inefficiency and public efficiency'.⁹³

The typical narrative is that a rights-based paradigm in the form of rights to reasonable adjustments can challenge exclusion through the pursuit of (both formal and substantive) equality, as seen in the UK in the Equality Act 2010.⁹⁴ However, despite the laudable aims of justice and equality, efficiency calculations based on market naturalisms continue to inform what is reasonable, and what is not. In the UK, the test of what is reasonable includes an assessment of the costs involved, and employers need not accommodate disability 'at whatever cost'.⁹⁵ Similarly, at the European Court of Justice, AG Poiares Maduro in *Coleman* emphasised that while equality might be the driving force, 'the economic argument is not entirely absent'.⁹⁶ Under the EU's Employment Equality Directive, employers must provide reasonable accommodations to employees with disabilities, to the extent that doing so

⁸⁹D. Foster and N. Hirst, 'Legally Disabled? The Impact of Covid-19 on the Employment and Training of Disabled Lawyers in England and Wales: Opportunities for Job-Redesign and Best Practice' (Cardiff, UK: Cardiff Business School and The Law Society, 2020) <<http://legallydisabled.com/wp-content/uploads/2020/11/Covid-report-TLS-Oct-2020-FINAL.pdf>> accessed 03 August 2024.

⁹⁰Nevertheless, Foster and Hirst found that a clear business case for a reasonable adjustment was not a reliable indicator of a successful outcome. D. Foster and N. Hirst, 'Doing Diversity in the Legal Profession in England and Wales: Why Do Disabled People Continue to Be Unexpected?' (2022) 49 *Journal of Law and Society* 447. Cf Kumar and Provost (n 21).

⁹¹Lawson, *Disability and Equality Law in Britain* (n 19) 248.

⁹²*Ibid.* 238–41. Much scholarship originates in the US, owing to an underwhelming scholarly response to the Disability Discrimination Act 1995 in the UK.

⁹³Stein (n 21) 84.

⁹⁴Equality Act 2010, s 20.

⁹⁵*Cordell v The Foreign and Commonwealth Office* [2011] Employment Appeal Tribunal UKEAT/0016/11/SM [36].

⁹⁶*Coleman v Attridge Law* [2008] ECJ C-303/06; Steele (n 38) 243.

would not impose a disproportionate burden on the employer.⁹⁷ Likewise, the UN Convention on the Rights of Persons with Disabilities (CRPD) defines reasonable accommodations as ‘Necessary and appropriate modification and adjustments *not imposing a disproportionate or undue burden*’, while the Americans with Disabilities Act 1990 opts for an ‘undue hardship’ test.⁹⁸ As section 4 unpacks, the natural market fallacy that informs the efficiency calculus underpinning the reasonableness test is not only a function of rights that are determined by legal priors, but tends to be elided by adherence to a cost-benefit analysis that exemplifies regulative and facilitative accounts of law’s role.

C. Analysing Reasonable Adjustments

Neither natural market account, regulative or facilitative, can offer the employer or judge much in the way of certainty, or much in the way of any clear, objective test of reasonableness.⁹⁹ In offering flexibility depending on the severity of the impairment, the availability of adjustments, the size of the business and the relative costs involved compared to similar cases, the employer has multiple grounds on which to argue for the disabled person’s inclusion or exclusion according to the relative efficiency of the accommodation.¹⁰⁰ In assuming that the market value of the disabled person’s labour is presumed to exist prior to and independently of the market, the underlying calculus of the reasonable adjustment reflects ‘regulative’ understandings outlined above.¹⁰¹ These understandings also assume that a disabled person’s reduced value in the labour market derives from their impairment, reflecting and reproducing the individual model of disability. Similarly, a ‘facilitative’ reading presumes the law to *inter alia* reduce participants’ transaction costs, but again, reproduces individual models of disability reflecting

⁹⁷European Commission. Directorate General for Employment, Social Affairs and Inclusion., *How to Put Reasonable Accommodation into Practice: Guide of Promising Practices*. (Publications Office 2020) 12 <<https://data.europa.eu/doi/10.2767/867043>> accessed 03 August 2024. See Article 5, Council Directive 2000/78/EC.

⁹⁸Convention on the Rights of Persons with Disabilities 2006 Article 2, emphasis added; Russell (n 31) 90.

⁹⁹*Cordell v The Foreign and Commonwealth Office* (n 95). See also Stein’s note that Judges Posner and Calabresi were both unwilling to enunciate precisely how a cost-benefit analysis should be applied in practical terms; Stein (n 21) 82.

¹⁰⁰*Cordell v The Foreign and Commonwealth Office* (n 95).

¹⁰¹Lang (n 13).

natural market approaches.¹⁰² The result is a lack of clarity and certainty in the law about what is reasonable and what is not.

In response to uncertainties surrounding any test of reasonableness, Stein offers a continuum of disability-related accommodation costs that combines regulative and facilitative accounts of the natural market.¹⁰³ These range from 'Wholly Efficient Accommodations [...], Socially Efficient Accommodations (including Semi-Efficient Accommodations [...]) and Social Benefit Gain Efficient Accommodations [...]), to Wholly Inefficient Accommodations [...].'¹⁰⁴ As studies have shown though, determining which costs to include, and where to draw the line between benefits accruing to the employer, the employee, and society at large is not always straightforward.¹⁰⁵ Accommodations can have positive spillover effects within the workplace,¹⁰⁶ and any quantification will likely fall short of recognising the joy, agency and social capital that can result from labour market inclusion.¹⁰⁷ Reduced reliance on welfare continues to linger as a final backstop arbiter in most discussions.¹⁰⁸ Those excluded from the labour market on the grounds that adjustments are 'inefficient' and therefore 'unreasonable' are recipients of the supposedly objective 'moral economy of market justice' that not only masks the values and preferences that go into such a calculation, but, as the following section explores, the invisibilised legal priors that predistribute rights and interests and construct actor preferences.¹⁰⁹ Moreover, regulative and facilitative accounts of law's role in markets, and the resulting market justice of distributional or allocative outcomes, tend to collapse back on to *ex post* rights-based narratives as the principal, albeit largely ineffective, remedy for resulting inequalities. Finally, regulative and facilitative accounts tell us little about their social or cultural meaning, or about the construction of the market. An appreciation of law's constitutive role can, by contrast,

¹⁰² Ibid.

¹⁰³ Stein (n 21).

¹⁰⁴ Ibid 85. Wholly efficient accommodations are Pareto optimal, while socially efficient accommodations are Kaldor-Hicks welfare enhancing interventions. Wholly inefficient accommodations cannot, accordingly, be justified.

¹⁰⁵ S. Schwochau and P. D. Blanck, 'The Economics of the Americans with Disabilities Act Part III: Does the ADA Disable the Disabled?' (2000) 21 *Berkeley Journal of Employment and Labor Law* 271.

¹⁰⁶ Lisa Schur and others, 'Accommodating Employees With and Without Disabilities' (2014) 53 *Human Resource Management* 593.

¹⁰⁷ Renz and Williams (n 2).

¹⁰⁸ P. Blanck, 'Disability Inclusive Employment and the Accommodation Principle: Emerging Issues in Research, Policy, and Law' (2020) 30 *Journal of Occupational Rehabilitation* 505.

¹⁰⁹ Somers (n 14) 235.

bring to the fore the ‘socio-economic regimes and scientific rationalities that shape our very understanding of both the law and the market and, by implication, also of the “other rules” by which these idealisations of legal and economic theory are “complemented” in reality: social norms and social institutions.’¹¹⁰

4. LAW’S CONSTITUTIVE ROLE IN MARKETS: AN ANTI-NATURALIST ECONOMIC SOCIOLOGY OF LAW (ESL)

A. Anti-Naturalist Accounts: Legal Priors and Predistribution

Responses to natural market narratives have tended to draw on interdisciplinary approaches re-conceptualising the econo-socio-legal nexus, but align with the broad premise that ‘capitalism cannot be understood independently of the constitutive role of law’.¹¹¹ Such approaches emphasise the ‘moral economy’ of capitalism, ‘as it is buttressed by a moral regime of *market justice*, which justifies inequality and social exclusion’, along with the legal constitution of markets as ‘institutions organized by power, coercion, and predistribution’.¹¹² In contrast to regulative and facilitative models of law’s role in markets, ‘truly constitutive’ models ‘proceed from the proposition’ that essential elements of market transactions ‘cannot meaningfully be said to exist prior to law’.¹¹³ Instead, ‘[o]bjects of exchange are produced in and through law, actors’ opportunity sets are reconstituted beyond recognition through the establishment of a market’s legal foundations, and [...] *actors’ preferences and desires themselves emerge through their interaction with the legally constituted social order* in which they formulate and pursue particular economic projects’.¹¹⁴ It follows then, that ‘the market value of exchanged products is relative to—fundamentally structured by—the legal order which underpins the market order’, meaning that ‘it is not possible to assess the efficiency of a legal-economic order’ because ‘efficiency is itself a concept which only takes meaning in relation to an assumed, pre-existing legal order’.¹¹⁵

¹¹⁰Frerichs, ‘Transnational Law and Economic Sociology’ (n 53) 11.

¹¹¹Deakin et al (n 79) cited in Somers (n 14) 229. Approaches have tended to align with economic sociology and ESL lenses in Europe that echo a revival of Law and Political Economy (LPE) traditions in the US.

¹¹²Somers (n 14) 228, emphasis in original.

¹¹³Edelman and Stryker (n 13); Lang (n 13) 329.

¹¹⁴Lang (n 13) 327, emphasis added.

¹¹⁵Ibid.

Accordingly, it makes little sense to ask which legal ordering is the most 'efficient', as efficiency is, through a 'truly constitutive' lens, a function of rights.¹¹⁶ The constitutive relations of the law-market nexus are understood to operate such that power and opportunity are distributed to establish a pre-market framework of reference within which economic actors formulate their preferences, imagine possible futures, and enter into particular transactions.¹¹⁷ Through such a lens, any act of market valuation necessarily 'rests on legal priors, either implicitly or explicitly', revealing a 'market anti-naturalism' approach.¹¹⁸ If '*market value is a function of law*', through a truly constitutive approach, we can appreciate that the economic calculus that determines whether it is economical or not (whether adjustments are reasonable or not) to employ a disabled worker is, also, a function of legal priors.¹¹⁹

As the three roles of law (regulative, facilitative and truly constitutive) operate in complex combinations, we can note that for the construction of legal and economic disablement at the boundaries of the labour market, the commodification of labour is an analytical prerequisite. 'Legal institutions are judged to be more or less efficient depending on the extent to which they enable a society to capture the potential gains from trade, and to realize the "latent" value ready to be derived from voluntary transactions which are otherwise impeded by the presence of transaction costs'.¹²⁰ So, the law 'unlocks' pre-existing value through the commodification of (ableised) labour, in the process shaping actors' preferences and assumptions.

Thus, objects of market transactions—be they widgets, financial assets, or indeed labour—'[have] no meaningful existence prior to the legal acts through which [they have] been constructed'.¹²¹ It therefore becomes impossible to conceive of any transaction without certain legal priors. The commodification of labour in forms such as the standard employment relationship (SER) 'provoked a revaluation—and devaluation—of work itself', and in the process categorised it as either 'productive' (and available to market exchange) or 'reproductive' (and thus beyond the scope of the market),

¹¹⁶N. Mercuro and S. G. Medema, *Economics and the Law, Second Edition: From Posner to Postmodernism and Beyond*, 2nd edn (Princeton: Princeton University Press, 2006); Lang (n 13).

¹¹⁷W. J. Samuels, 'The Legal-Economic Nexus' (1989) 57 *George Washington Law Review* 1556.

¹¹⁸Lang (n 13) 324.

¹¹⁹*Ibid*, emphasis in original.

¹²⁰Lang (n 13) 320.

¹²¹Lang (n 13) 323.

thereby separating out the traditional ‘workplace’ from the ‘household’;¹²² Additionally, not only is the worker’s labour commodified, but arranged dynamically according to the requirements of various markets (such as formal/informal) and sectors (knowledge, service, care, etc). Simultaneously, legal technologies such as the employment contract render visible standard employment relations whilst eliding non-standard relations, along with the preferences, assumptions and norms that re-co-construct such relations.

Processes of legal ‘coding’ that commodify phenomena suggest a key site at which the (largely invisible) construction of disability can be analysed and challenged.¹²³ The law offers a ‘legal scaffolding of production’ that delimits commodification and defines how actors’ opportunity sets, preferences, and decisions coalesce to construct (economic) value.¹²⁴ And, in commodifying (ableised) labour-power, the law is determinative of the normative standards that assume that non-standard bodies and minds are less exploitable. The following section turns to an ESL lens for deeper insights into the market mentalities that might inform such predistributive coding processes.

B. An Economic Sociology of Law (ESL) and Mutual Re-co-constitution

An ESL lens proposes that we focus on ‘the economic constitutions that make up market society’; or ‘the economic life of the law’, noting not just the predistributive implications of law, but the recursive and mutually re-co-constitutive effects of all elements at the econo-socio-legal nexus.¹²⁵ An ESL lens can offer two insights. Firstly, it can extend the ‘truly constitutive’ or ‘predistributive’ narrative by exploring how markets and rights are mutually and iteratively re-co-constitutive, closing the loop and insisting that the generative implications of rights and markets, socially constructed, run in both directions.¹²⁶ It can do this primarily by interrogating the ways in which regimes of practice and rationalities of thought are mutually

¹²²Rittich (n 71) 788; Fudge (n 55).

¹²³Pistor (n 29).

¹²⁴Rittich (n 71) 797.

¹²⁵S. Frerichs, ‘The Legal Constitution of Market Society: Probing the Economic Sociology of Law’ (2009) 10 *Economic Sociology, The European Electronic Newsletter* 20, 24; D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris, ‘Introduction: Moving Towards an Economic Sociology of Law’ (2013) 40 *Journal of Law and Society*; D. Ashiagbor, P. Kotiswaran and A. Perry-Kessaris, ‘Continuing Towards an Economic Sociology of Law’ (2014) 65 *Northern Ireland Legal Quarterly* 259.

¹²⁶R. Dukes, ‘The Economic Sociology of Labour Law’ (2019) 46 *Journal of Law and Society* 396.

re-co-constituted through micro- and meso-level actions and interactions respectively.¹²⁷ Secondly, by shifting labour law's typical focus from the micro- and meso-levels to the macro- and meta-levels of social regimes and rationalities respectively, it can reveal the assumptions, preferences and biases concealed within the superficially neutral legal equality of the 'juridical form' of the employment contract.¹²⁸ In shifting focus to structural and systemic accounts, we can begin to appreciate the emergence of disability as a defining rationality of labour markets and its operation as a technology of power.

Building on Polanyi's thesis of the 'always embedded' market, we can understand embeddedness 'in terms of the relative "ranking" of "different principles of social organisation"':¹²⁹ Accordingly, analytical approaches or concepts and relationships are manifestations of rationalities, while normative approaches or values and interests emerge in the form of regimes.¹³⁰ Thus, as Perry-Kessaris has noted, for Polanyi, 'disembeddedness is associated with the dominance of rationalities and regimes that rank liberal, economic above other approaches'.¹³¹ An 'analytically disembedded approach is one that thinks of *society as economy*; which uses liberal economic concepts and relationships to think not only about economic and other instrumental actions, but also about affective, belief-based and traditional actions'.¹³² For our purposes, this implies thinking in the manner of the ideal economic actor, *homo economicus*. It implies analytically re-co-constructing those preferences and assumptions that underpin labour market operation which tend to be both invisible and ableist. In the context of the reasonable adjustment, it entrenches the normalisation of these preferences and justifies the underlying efficiency calculation as one of the dominant rationalities of labour market bounding.

¹²⁷ Frerichs (n 125) 20.

¹²⁸ Ibid; Ashiagbor (n 13); Adams (n 13). Adams uses 'juridical form' to denote 'the historically specific form which social relations assume in the context of capitalism'.

¹²⁹ A. J. Perry-Kessaris, 'Reading the Story of Law and Embeddedness Through a Community Lens: A Polanyi-Meets-Cotterrell Economic Sociology of Law?' (2011) 62 *Northern Ireland Legal Quarterly* 401, 405; F. Block, 'Introduction', *The Great Transformation, Karl Polanyi* (Boston: Beacon Press, 2001); Polanyi (n 1).

¹³⁰ Perry-Kessaris, 'Reading the Story of Law and Embeddedness Through a Community Lens' (n 129) 405.

¹³¹ Ibid.

¹³² Ibid. This references Roger Cotterrell's community lens which is not developed further here for reasons of space. See R. Cotterrell, 'Rethinking Embeddedness; Law, Economy, Community' (2013) 40 *Journal of Law and Society* 49; R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective*, new ed. (, Oxford: Clarendon Press 1997).

A ‘normatively disembodied approach is one that both puts *economy before society* and takes *economy for society*.¹³³ In the process, it produces ‘regimes which privilege economic values and interests, usually claiming this to be for the good of all types of social action.’¹³⁴ In the context of the reasonable adjustment, a normatively disembodied approach confirms a market-based efficiency rationale in the re-co-construction of the regime, feeding back into the reproduction of analytically disembodied rationalities. By bringing both analytical and normative disembodiment into view, an ESL lens can identify sites at which the natural market fallacy is reproduced and where it justifies labour market exclusion on grounds of ability difference, aligning with regulative and facilitative understandings of law’s role. This not only gives us the tools to identify the degrees to which this occurs in any given social, cultural, and political context, but to challenge its reproduction.

Accepting that markets are always embedded, cognitively and normatively, to a greater or lesser extent, in social relations, Frerichs notes a dual function for law, as market-constitutive (commodifying) or market-constraining (decommodifying).¹³⁵ The latter is ‘evident in socially oriented legislation’ while the former ‘goes down to fundamental legal concepts.’¹³⁶ These dual functions have ‘distinctive, or even antagonistic, rationalities’, or those ‘deep, epistemic categories’ that structure our ways of thinking, which in principle would counteract each other in one and the same political-economic system.¹³⁷ The re-embedding, or market-constraining, role of rights-based narratives, then, has a dual aim: acting as a bulwark against the excesses of the market, while also decommodifying, or, more precisely, judiciously recommodifying, its underlying subjectivities.¹³⁸ In a market society, ‘the “disembedding” of the market from social relations and its “embedding” in economic thinking are explained by the “discovery” of economics as a science of society, which stipulates new laws of nature.’¹³⁹ Yet, while,

¹³³Perry-Kessaris, ‘Reading the Story of Law and Embeddedness Through a Community Lens’ (n 129) 405.

¹³⁴Ibid.

¹³⁵Block (n 129); Polanyi (n 1); Frerichs, ‘The Legal Constitution of Market Society: Probing the Economic Sociology of Law’ (n 125); S. Frerichs, ‘Karl Polanyi and the Law of Market Society’ (2019) 44 *Österreichische Zeitschrift für Soziologie* 197.

¹³⁶Frerichs, ‘Karl Polanyi and the Law of Market Society’ (n 135) 205.

¹³⁷Ibid.

¹³⁸Perry-Kessaris notes a triple role for law: embedding, disembodiment, and re-embedding. See Perry-Kessaris, ‘Reading the Story of Law and Embeddedness Through a Community Lens’ (n 129) 410.

¹³⁹Frerichs, ‘Karl Polanyi and the Law of Market Society’ (n 135) 201.

superficially, the law of the market is naturalised, policies of *laissez-faire* remain reliant on regulatory functions. 'Law becomes instrumental in the commodification of land, labour and money, with property relations, work relations and debt relations being subjected to market forces.'¹⁴⁰ Thus, the role of legal, predistributive priors in coding labour into ableised labour-power and predistributing rights, interests and preferences is brought to the fore, whilst the recursive nature of regimes and rationalities hints at the re-co-constitutive relations that emerge.

C. A Constructivist and Constitutive ESL Lens: Disability as Labour Market Rationality

An ESL lens based on the embeddedness metaphor, that is, the embeddedness of markets in society, entrenches the metaphorical fiction of the ontologically separate law, economy and society.¹⁴¹ Such an approach therefore denies a constructivist appreciation of the market's ableised legal priors and their role in the construction of disablement at macro- and meta-levels of social interaction. To bring the construction of disability-as-rationality into view, a constructivist ESL lens might move beyond the embeddedness metaphor, proposing a focus on the operation of feedback loops that highlight the iterative re-co-construction of econo-socio-legal phenomena.¹⁴² Appreciated thus, there are no longer legal priors per se, because we can now think of econo-socio-legal phenomena as *mutually imbricated and recursively re-co-constituted throughout each (social) interaction* that extend beyond the labour market. The chicken and egg question of what comes

¹⁴⁰ Ibid.

¹⁴¹ Williams (n 54).

¹⁴² I use the term 'feedback loops' as it highlights ontological and epistemological relationality, as well as being accessibly descriptive. The term is borrowed, loosely, from Giddens' structuration theory, although it has been used by scholars from diverse traditions including *inter alia* Callon, Raworth, and Silbey. See A. Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge: Polity, 1984); M. Callon, 'What Does It Mean to Say That Economics Is Performative?' in D. MacKenzie, F. Muniesa and L. Siu (eds), *Do Economists Make Markets?* (Princeton: Princeton University Press, 2008); K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st-Century Economist* (London: Random House, 2018); S. S. Silbey, 'Studying Legal Consciousness: Building Institutional Theory from Micro Data': (2018) N° 100 *Droit et société* 685, 73. Alternative accounts refer to the 'co-evolution' of law and social reality, or the 'reflexivity' of law. See, respectively, S. Deakin, 'Evolution for Our Time: A Theory of Legal Memetics' (2002) 55 *Current Legal Problems* 1; Bhumika Billa, 'Law as Code: Exploring Information, Communication and Power in Legal Systems' (2024) 2 *Journal of Cross-Disciplinary Research in Computational Law* [CRCL] 10–11 <<https://journalcrcl.org/crcl/article/view/39>> accessed 03 August 2024.

first, legal coding and the generation of preferences and biases, or market value and ‘market justice’, falls away as coding can only unlock latent value where it exists. By accepting the proposition that economic and legal phenomena are two sides of the same, social, coin, the concept of the legal prior falls away, to be replaced by mutual feedback loops whereby the processes of commodification and valuation are recursive, co-dependent, and mutually re-co-constitutive.¹⁴³

While we can appreciate that interactions, structures and rationalities are mutually re-co-constitutive, we can also appreciate that the feedback loops themselves are recursively re-co-constituted through iterative interactions between actors and between actors and structures. Thus, the econo-socio-legal is suggestive of the mutual re-co-constitution of economic, legal, and social phenomena. But, moreover, disability as rationality, that is, a defining technology of power and governance operating at all levels of social ranking, is reproduced and informs the econo-socio-legal *and the feedback loops* through which it is instantiated.

We can appreciate that feedback loops operate among actions, interactions, regimes and rationalities, among economic, legal and social regimes and rationalities, and between the regime of disablement and the rationality of disability. Furthermore, that this latter spills beyond the labour market to instantiate the rationality of disability that carries the preferences, assumptions and biases back to be constructed (tacitly) throughout social interactions. Thus, the underlying efficiency calculation of the reasonable adjustment is determined according to prevailing market preferences, assumptions, biases and norms that are re-co-constructed through these myriad feedback loops, coming to produce an ablesed *homo economicus* against which the worker and their abilities are (tacitly) compared. Assumptions about worker productivity and competence therefore go into the efficiency calculation as ‘unthought knows’, regardless of the worker’s qualifications or experience and are reproduced as an overestimation of costs and underestimation of benefits.¹⁴⁴ Disability, therefore, acts generatively in constructing more than just market rationalities, and performatively suggesting how disability is to be enacted socially in non-market settings as well as how actors perceive themselves and others. Thus, as *The*

¹⁴³Williams (n 54).

¹⁴⁴R. Bernstein and others, ‘There Is No Local Here, Love’ in Dave O’Brien and Peter Matthews (eds), *After Urban Regeneration: Communities, Policy and Place* (Bristol: Policy Press, 2016).

Great Prefiguration hinted, by shifting background assumptions and preferences through the prefiguration of alternative labour market norms, we can identify and interrupt some of the feedback loops that translate normative and analytical biases into disability-as-rationality through the reasonable adjustment efficiency calculation.

Moreover, by focusing on feedback loops, a more nuanced account of processes of commodification and ableisation might emerge that visibilises preferences, biases, and assumptions. Through such a lens, dis/ability is not just produced at the boundaries of the labour market through legal priors that determine actor preferences, but is continually reproduced, entrenched, and further invisibilised through recursive, iterative feedback loops. We can also begin to appreciate how wider social, political and cultural assumptions and preferences come to be instantiated in and reproduced through the commodification of labour-power into juridical forms such as the employment contract. Such preferences for standardised workers realise assumptions about *inter alia* where value is created, and where work tasks should be performed. As this latter usually assumes situations of co-presence such as an office or factory, further tacit assumptions come into play that workers are not excluded by the built environment, insinuating an ableised *homo economicus* figure. For those excluded, the *ex post* rights-based narrative of reasonable adjustments aims to mitigate normalised physical, energy and mental standardisation. However, these narratives not only fail to challenge the underlying ableism of coded and predistributed norms *ex ante*, but tacitly confirm the (devalued) price that the market attaches to normalised, ableised labour-power.

Thus, dis/ability comes to operate as a technology of power, central to the operation of labour markets, by constructing categories of oppression that are required for the ongoing production of labour-power and valorisation of capital. A focus on the feedback loops that re-co-constitute regimes and rationalities noting the ableised assumptions and preferences that inhere can highlight disability as 'an epistemic category that organises our perceptions and evaluations of reality'.¹⁴⁵ As an instantiated antithesis of market preferences such as efficiency, productivity, and value production, disability as rationality can, over time, become cemented into tacit, taken for granted and therefore unchallenged ontologies of disability that not only comprise the analytical foundations of the labour market, but wider constructions of what we might term ability capitalism, potentially undermining law's efforts

¹⁴⁵ Ashiagbor (n 13) 510.

to decommodify. It is to the proposed theory of ability capitalism and challenges in the form of decommmodification strategies that the final section turns.

5. ABILITY CAPITALISM: DIS/ABILITY AS LABOUR MARKET RATIONALITY

The previous discussion has shown how disability is mutually re-co-constructed at the econo-socio-legal nexus of labour market boundaries and comes to operate as a core rationality of capitalist labour markets. In this section, I suggest that the centrality of ability categorisation and ranking for labour market function offers insights into the wider role of ability differentiation throughout and beyond markets. I propose the term ‘*ability capitalism*’ to describe the mutual imbrication and recursive re-co-construction of ability and markets at the econo-socio-legal nexus and set out in the paragraphs that follow some initial observations and questions.

First, though, why propose a theory of ability capitalism? I suggest that it is not enough to present disability as a social category arising from the needs of capital, or to explore the role of disability as a rationality that structures markets and shapes their function. While materialist theories offer a useful starting point, I suggest going beyond an ‘economic model of disability’ to offer a nuanced account of how, where, when, and why dis/ability and capital have co-evolved and become recursively re-co-constitutive, with ability and markets mutually imbricated, the one responding reflexively to the needs of the other.¹⁴⁶ The demands of capital rest on the ability of the worker; not just to sell their labour-power, but their inherent corporeal abilities to generate surplus-value. As such, the constitutive role of law acts as a fulcrum on which the conflicting demands of capital and labour are balanced, with disability emerging as a keystone concept that both structures and mediates the demands of the one with the other. At the same time, law’s constitutive role can elucidate the processes of commodification and decommmodification through which disability is recursively constructed, deployed and challenged, along with processes of legal redistribution through which transactions are ‘enabled’ and different ‘capabilities’ assigned to actors.¹⁴⁷ Moreover, ability, or its negation, comes to take on a life beyond markets,

¹⁴⁶J. E. Bickenbach, *Physical Disability and Social Policy* (Toronto: University of Toronto Press, 1993).

¹⁴⁷Lang (n 13) 14.

structuring wider categories of social relations according to how society perceives, understands, and performs dis/ability and its dynamic valorisation. While similar arguments can be made for other markets, in the context of labour markets, this is actualized through, and rendered largely invisible by law's constitutive role in defining and making visible standard employment relations. Accordingly, this suggests how and why some dominant *ex post* rights-based narratives might be unequal to the task of challenging everyday manifestations of oppression (such as, in the case of the labour market, the intractable disability employment and pay gaps).

Why specifically 'ability capitalism?'¹⁴⁸ There are three principal reasons. The first derives from historical materialist insights. As Russell notes, '[t]he worker's ability to work, or what Marx terms labour power, which is sold to the capitalist in return for a wage' suggests that 'the basis for capitalist accumulation is the concept of "surplus labour value"' which is derived from ability differentiation and categorization.¹⁴⁹ Thus, the worker's ability (or lack thereof) is the very essence of capitalist labour relations; who is exploitable and who is not.¹⁵⁰ In short, capitalism is both predicated on, and reproduces, technologies of power through the construction of categories of ability that rank and order workers according to their abilities and capabilities. These are, in turn, central to the function and reproduction of capitalism and, notably, constituted by law. The second reason is somewhat more banal and recognises that the term 'ability' is more amenable to various conjugations suggesting flexibility, synergies, and potential, intersectional, future avenues of enquiry. We might note the dis/ability and in/ability conjugations as well as their verb and adjectival forms, dis/able and un/able. But we might also note cap/ability and cap/able, leading us to Sen's and Nussbaum's works on capability theory and querying what this might offer for reframing

¹⁴⁸Chis proposes the phrase 'disabling capitalism' which suggests that 'all people who are impaired, chronically ill, neurodivergent, D/deaf and/or who experience mental distress, share a common experience of living under capitalism – that of structural disablement through oppression and exploitation' See Chis (n 7) 165, 169. Ability capitalism, by contrast, seeks to establish the deep processes and mechanisms through which we can appreciate disability as a key rationality that is essential to the reproduction of capitalism through an examination of law's constitutive role in markets. As such, while complementary, the theories propose different means and ends.

¹⁴⁹Marx, 1967 at 167, cited in Russell (n 31) 88.

¹⁵⁰Marx's famous epithet 'From each according to ability; to each according to needs' has been historically traced through socialist and theological thought. See L. Bovens and A. Lutz, "From Each According to Ability; To Each According to Needs" (2019) 51 *History of Political Economy* 237.

dominant rights-based paradigms.¹⁵¹ Finally, ability capitalism is intended as a flexible and inclusive term that is wide-ranging and covers a variety of ways in which people with different abilities (physical, mental, energy, etc.) experience oppression, and which shows how that oppression is continually re-co-constructed at the econo-socio-legal nexus.

A. Commodification and Decommodification Strategies and Challenges

As noted, an ESL lens can shift our focus from an individualised to a structural account of the production of categories of ability. Owing to the social model of disability, there are already some mainstream strands of disability theorising that argue for structural and systemic accounts of the reproduction of ability oppression. Nevertheless, the law's continuing reliance on combinations of individual, medical and social models of disability suggests that an ESL lens exploring law's constitutive role can offer valuable insights.¹⁵² One key contribution in the context of the labour market is law's role in the commodification of labour-power and the ways in which legal predistribution and coding processes reproduce normalised worker standardisation. Accordingly, three insights are worth noting here.

Firstly, natural market narratives in which the law exclusively makes visible standard employment relations means that relations that fall outside of this norm tend to be invisibilised. Processes and structures that push racialised and gendered workers to the margins of the labour market have been recognised as reproducing racial and gender inequalities.¹⁵³ Given the disability education gap as well as employment and pay gaps, disabled workers are similarly likely to rely on, and indeed be pushed towards, precarious or gig work, and the structural mechanisms that determine lower wages and fewer protections similarly instantiate ableist norms within the labour market.¹⁵⁴ Secondly, a theory of ability capitalism centres the reproduction of ableist norms and practices at the

¹⁵¹Fudge (n 55); Amartya Sen, 'Equality of What?' (1979) <https://tannerlectures.utah.edu/_resources/documents/a-to-z/s/sen80.pdf> accessed 03 August 2024; M. Nussbaum, 'Women and Equality: The Capabilities Approach' (1999) 138 *International Labour Review* 227.

¹⁵²See, *inter alia*, the Equality and Human Rights Commission's consideration of whether long COVID might count as a disability under the Equality Act which relies on a medical, rather than social, model. Equality and Human Rights Commission, 'EHRC Statement on 'Long Covid', Disability and the Equality Act' (2022) <<https://www.equalityhumanrights.com/media-centre/news/ehrc-statement-long-covid-disability-and-equality-act>> accessed 03 August 2024; cited in Kumar and Provost (n 21) 54.

¹⁵³Federici (n 33); Ashiagbor (n 13).

¹⁵⁴M. Bryan and others, 'The Role of Education in The Disability Employment Gap' [2023] Sheffield Economic Research Paper Series <<https://eprints.whiterose.ac.uk/198765/>> accessed

productive-redistributive nexus, or the interface between labour markets and the welfare state. It highlights disability as a key concept that not only regulates labour and manages labour markets, but which is also an econo-socio-legal and political construct. An ability continuum therefore emerges as a central concept in processes of both commodification and decommodification. This leads on to the third insight which results from a shift in focus from the individual worker to structural accounts. A focus on feedback loops can highlight assumptions of ableised labour market regimes, and similarly ableised rationalities of the typical *homo economicus*, and how these are mutually re-constituted. We might consequently begin to imagine pathways to the full realisation of the social model at the econo-socio-legal nexus such that it is unencumbered by lingering medical and individual models.

Thus, an exploration of law's constitutive role and a focus on the feedback loops that reproduce ability capitalism can suggest pathways to challenge oppression, *notably through decommodification strategies*. This leads to the question of how decommodification might 'unbound' the labour market. Additionally, how might decommodification avoid compounding ableised assumptions constitutive of processes of ability capitalism? Finally, how might decommodification be realised in such a way that challenges to the production of ability capitalism do not exacerbate or entrench other grounds of oppression such as race or gender?

'[P]ostwar welfare states – but also the presence of trade unions, collective bargaining, labour regulation and social welfare law – can be understood as a form of de-commodification,¹⁵⁵ offering one way towards 'a transition period of limited commodification.'¹⁵⁶ The role of social rights in the de-commodification of labour 'through the existence of a social safety net and labour standards that ameliorate the harshness of the market' have been highlighted, noting the role of the public sector or state, and positioning *ex post* rights-based narratives as a socio-legal foundation on which resistance can be built.¹⁵⁷ Nevertheless, while scholarship focused on the complex ways

03 August 2024; A. T. Edmonds and others, 'The Role of Nonstandard and Precarious Jobs in the Well-being of Disabled Workers during Workforce Reintegration' (2021) 64 *American Journal of Industrial Medicine* 667; Ricardo Pagán, 'Is Part-Time Work a Good or Bad Opportunity for People with Disabilities? A European Analysis' (2007) 29 *Disability and Rehabilitation* 1910; L. A. Schur, 'Barriers or Opportunities? The Causes of Contingent and Part-Time Work Among People with Disabilities' (2003) 42 *Industrial Relations: A Journal of Economy and Society* 589; Kumar and Provost (n 21).

¹⁵⁵ Ashiagbor (n 13) 513.

¹⁵⁶ N. Leong, 'Racial Capitalism' (2013) 126 *Harvard Law Review* 2151, 2152.

¹⁵⁷ J. Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?'

in which markets race and gender actors can offer useful insights, the coding and ranking of workers on grounds of ability presents different challenges for decommodification strategies to take account of if they are to be effective. It is worth noting three of these challenges.

Firstly, disability discrimination ‘is a distinct but complex form of oppression, based on the (negligibly to substantially) greater expense to capital of the labour power of impaired people.’¹⁵⁸ Reasonable adjustments, as well as sick leave and so on, cost money. But the reproduction of disabled labour-power, including required assistive aids and additional care, also entails greater expense. In a system of capitalist logics where individual competition between workers informs the production of surplus value, those unable to normalise themselves fully—that is, *inter alia*, to reduce the costs of the reproduction of their own labour-power—are inevitably likely to realise reduced wages when selling that (devalued) labour-power. The funding of social care, for example, then emerges as one decommodification strategy with potential to challenge the devaluing of disabled labour-power and the resulting disability employment and pay gaps. However, social welfare as decommodification strategy seeks the normalisation of the disabled body-mind, aligning it ever more closely with the ableised ideal worker. It does little to challenge the underlying capitalist logics which produce the oppression, and which rely on concepts of inclusion and its dialectical inverse, exclusion, for the form and function of markets in the first place.¹⁵⁹

Secondly, despite above-average union representation of disabled workers, the lack of effective collective bargaining mechanisms in recent decades on matters of disability equality suggests a disinterested union sector and a reduced bargaining power in the labour market.¹⁶⁰ Diversity of ability differentiation means that collective bargaining potential is reduced, especially considering that different disabilities are likely to require different adjustments. A one-size-fits-all decommodification strategy challenging ability oppression is likely to satisfy no one. Similarly, ongoing stigmatisation of disabled people disincentivises workers from identifying or declaring

(2007) *Comparative Labor Law and Policy Journal* 29, 34, cited in Ashiagbor (n 13) 513. On the role of unions against the threats from predistributive dedemocratization and the need to reverse-engineer the dedemocratization built into the market, see Somers (n 14) 259, 262.

¹⁵⁸R. Slorach, ‘Marxism and Disability’ (*International Socialism: A Quarterly Review of Socialist Theory*, 4 January 2011) <<http://isj.org.uk/marxism-and-disability/>> accessed 26 August 2024.

¹⁵⁹V. Neves de Cabral, ‘A Marxist Approach to Disability: Notes on Marx’s Relative Surplus Population’ (2022) 20 *Journal for Critical Education Policy Studies* 36.

¹⁶⁰M. Jones, ‘Disability and Trade Union Membership in the UK’ (2024) 62 *British Journal of Industrial Relations* 28.

themselves as 'disabled', further limiting the pool of potential collective bargainers. Additionally, membership organisations like trade unions cannot represent people who cannot be members, even if they would like to be. Thus, exclusion from the labour market precludes organised collective bargaining against said exclusion, echoing a consensus that disability equality is more a matter for government policy than collective bargaining.¹⁶¹

Thirdly, in contrast to other grounds of oppression, ability has come to be a defining rationality determinative of the productive-reproductive boundary, and it both structures and populates these locations of activity. The universally inclusive welfare state was premised on the basis of 'industrial citizenship', which similarly presupposes labour market activity.¹⁶² While ableist labour markets presume labour mobility, this ableist norm is frequently unattainable to those with non-standard bodies, minds and energy, especially in a wider, relational context of relying on (local) healthcare provision and (local) family and community support. This creates a double-bind for disabled workers who, facing increased barriers to labour market participation in the first place, are less likely to enjoy the 'industrial citizenship' and social welfare protections that derive from labour market participation and are thus similarly excluded from the possibilities of labour migration, be this local or global.

These examples of how and why ability capitalism might require different decommodification strategies hint at a wider issue which is the possibility that in mitigating ability capitalism through shifts in market norms, we can end up entrenching or exacerbating other forms of oppression. Ashiagbor notes that numerous factors such as the 'privatisation of the public sector, deindustrialisation, the rise of the service economy, decline in trade union power and employer preferences for flexibility' have meant shifts away from the standard employment relationship that the law is able to 'see', pushing racialised workers to the periphery of the labour market where they are disadvantaged.¹⁶³ Yet while labour market flexibility has produced detrimental effects for racialised workers, certain forms of flexibility have proven to be radically effective inclusion mechanisms for those with ability differences, as *The Great Prefiguration* illustrated.¹⁶⁴ This underscores the need for an

¹⁶¹L. Beesley, 'Disability Politics and Trade Unionism in Britain' (University of Brighton, 2021) <<https://research.brighton.ac.uk/en/publications/disability-politics-and-trade-unionism-in-britain-comings-together>> accessed 03 August 2024.

¹⁶²Ashiagbor (n 13) 516.

¹⁶³Ibid 527–8; Adams (n 13) 453.

¹⁶⁴M. Brynin and S. Longhi, 'Causes of Gender, Disability and Ethnic Pay Gaps' (Institute for Social and Economic Research (ISER), University of Essex 2016) <<https://www.iser.essex.ac.uk/research/projects/gender-disability-ethnic-pay-gaps>> accessed 03 August 2024.

intersectional analysis of labour market inclusion that can understand the complex ways in which labour markets re-co-construct myriad forms of oppression, whether on grounds of gender, race, ability, class, sexual orientation, or others.¹⁶⁵

B. Prefiguration: 'Unbounding' the Labour Market?

As earlier sections have noted, however, the coronavirus disease 2019 (COVID-19) lockdowns and the consequent, albeit brief, normalisation of remote working shifted some tacit preferences and assumptions of labour market participation. In other words, *The Great Prefiguration* challenged assumptions of where and when work tasks could and should be performed, challenging normalised, ableist standards to which individual workers are expected to conform. In shifting the landscape of labour market norms, analytical sites at which inclusion or exclusion on grounds of ability were realised similarly shifted, altering the context in which the underlying efficiency calculus of the reasonable adjustment of remote working was calculated. The resulting benefits for disabled workers suggest that, while *ex post* rights-based narratives and other decommodification strategies may be more or less effective, when combined with shifts in processes of normalisation through prefiguration, pathways to and sites of meaningful resistance might emerge. In other words, exogenous labour market shocks that mandate alternative labour practices, and that demand adjusted ways of working by non-disabled workers, has powerful potential for radical challenges to the reproduction of ability capitalism beyond the labour market.¹⁶⁶ This leads to two propositions.

Cf. Claudia Dale Goldin, *Career & Family: Women's Century-Long Journey toward Equity* (Princeton, NJ: Princeton University Press, 2023) who notes flexible working as holding potential for addressing the gender pay gap; similarly, see R. Verdin, *Architectures of Inequality: Gender Pay Inequality and Britain's Finance Sector* (Bristol, UK: Bristol University Press, 2024).

¹⁶⁵Intersectional lenses are receiving some attention. See, *inter alia*, European Institute for Gender Equality, 'Gender Equality Index: Intersecting Inequalities' (European Institute for Gender Equality (EIGE) 2024) <<https://eige.europa.eu/gender-equality-index/2022/domain/intersecting-inequalities>> accessed 03 August 2024; E. Roig and N. Magot, 'Inaugural Conference of the Centre for Intersectional Justice (CIJ)' (Institute for Intersectional Justice, Institute for Cultural Inquiry 2017) <<https://www.ici-berlin.org/events/center-for-intersectional-justice/>> accessed 03 August 2024.

¹⁶⁶We might also imagine the prefiguration of alternative patterns of ownership or rights allocation in property markets such that both standard and non-standard owners are incentivized to construct different regimes and rationalities of ownership.

The first is that prefiguration, or asking *all* workers to act *as if* different sets of labour market norms existed, holds potential for challenging ongoing inequalities on grounds of ability, although noting that prefiguration need not be the product of traumatic external market shocks such as a pandemic. At the present time, as the recall of labour to places of co-presence come to dominate once again, employer cries of 'back to normal' risk rolling back the inclusion gains witnessed.¹⁶⁷ Further empirical work is needed to establish the extent to which the prefiguration of alternative preferences and norms might have changed the underlying calculus of the reasonable adjustment of remote working, and any lasting inclusion impact this might have had.¹⁶⁸ However, it is reasonable to expect that employer experiences of remote working might have shifted some of the contextual preferences and assumptions in which reasonable adjustment requests are calculated. Secondly, research is also needed to understand the implications of different patterns of inclusion for the re-co-construction of rationalities of disability beyond the labour market, the production of ability capitalism and ongoing pathways to its meaningful challenge. This might include the role of collective bargaining in 'institutionalising social rights and protecting workers *within* the labour market rather than *from* the market'.¹⁶⁹ Now that patterns of inclusion have been experienced by disabled workers resulting from the normalisation of remote working, it is reasonable to assume a stronger voice in arguing for their embedding in labour markets. Notably though, as the previous section has explored, the limitations of collective bargaining vis-à-vis disability, and the mutually constitutive relationship between productive and redistributive spheres that constructs disability raise questions as to how effective collective bargaining by disability groups might be as a decommodification strategy without the inclusion of all workers in any challenge to ability capitalism.

¹⁶⁷F. Ryan, 'Disabled People in UK Threatened with Sack Unless They Go Back to Work' *The Guardian* (18 May 2020) <<https://www.theguardian.com/society/2020/may/18/disabled-people-in-uk-threatened-with-sack-unless-they-go-back-to-work-coronavirus>> accessed 03 August 2024; F. Ryan, 'Remote Working Has Been Life-Changing for Disabled People, Don't Take It Away Now' *The Guardian* (2 June 2021) <<https://www.theguardian.com/commentisfree/2021/jun/02/remote-working-disabled-people-back-to-normal-disability-inclusion>> accessed 03 August 2024.

¹⁶⁸D. Millsap Shu, 'Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis' (2023) 95 *Temple Law Review* 201.

¹⁶⁹See S. Deakin and F. Wilkinson, *The Law of the Labour Market* (Oxford: OUP, 2005), 201, cited in Ashiagbor (n 13) 514.

6. CONCLUDING REMARKS

This paper has used insights from law's constitutive role at the econo-socio-legal nexus to suggest a theory of ability capitalism. The construction and invisibilisation of ways in which categories of ability that are so central to the operation of capital accumulation come to be ranked, and whereby bodies deemed less exploitable are devalued, requires further investigation both in the context of labour markets and beyond. An exploration of law's constitutive role suggests that insights from commodification processes might be instructive. Dis/ability-as-rationality is an essential aspect of the political economy of labour market management, and is both integral to, and constituted by the law. And, while the law codes and ranks bodies, dis/ability status and patterns of inclusion and exclusion through processes of commodification, it performs the necessary role of maintaining the ontological security of ableism through making standard bodies and relations visible whilst eliding or masking the non-standard.¹⁷⁰ Thus, the econo-socio-legal nexus that emerges as constitutive of labour markets, and systems of capitalisms more widely, comes to construct technologies that are generative of both ableised workplaces and rationalities.

The deep normativities bound up in legal, economic and social constructions of disability mean that the individual can only escape oppression by normalising themselves; by aligning with the normative ideal of an ableised *homo economicus* presupposed in mainstream law and economics. Ability capitalism necessarily rests on and reproduces the historically contingent, spatio-temporal commodification of ableised bodily functionality. An ability capitalism lens, then, that focuses on the embodied and experiential processes through which underlying ableised norms construct dis/ability, might identify sites at which discrimination and oppression can be challenged *ex ante*, suggesting ways of complementing *ex post* remedies of rights-based narratives.¹⁷¹ The potential gains, though, of challenging the production of ability capitalism, especially through an intersectional lens, have the potential to realise impact beyond the disabled communities on whose shoulders resistance tends to fall, promising more inclusive structures and institutions for all workers.

¹⁷⁰F. Kumari Campbell, 'Legislating Disability: Negative Ontologies and the Government of Legal Identities' in S. Lynn Tremain (ed), *Foucault and the Government of Disability*, enlarged and revised edn (Ann Arbor, MI: University of Michigan Press, 2015); Pistor (n 29).

¹⁷¹While there are some legal requirements for employers to address barriers to the workplace proactively (*ex ante*), these are generally dependent on the goodwill and awareness of the individual employer, and suffer from a lack of enforcement and civil society participation.