Socio-legal perspectives on agency work:

Liminal employment, innovation and the crisis of UK labour law

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Thesis summary

UK labour law is in turmoil. Large numbers of people are today working in the UK economy in ways that align with neither side of the traditional binary of employment and self-employment that shaped Western labour markets in the decades after 1945. Political and judicial discourse has referred to this segment of the labour market as the 'gig economy', 'atypical work', 'false self-employment' or 'casual work', among other terms. In light of its shared characteristic of falling between and beyond the categories of traditional employment and self-employment, I refer to this labour market segment as liminal employment. Even 'freelancers' and 'consultants', though usually better-paid than the average atypical worker, are part of this highly heterogenous category. In my thesis, I explore how work relations that are mediated by employment agencies, umbrella companies and other private labour market intermediaries – which comprise a wide range of liminal employment – have been constructed and shaped by three professional communities since the 1970s: doctrinal labour lawyers, labour market institutions and representatives of the 'recruitment industry' themselves. My study adopts these three perspectives, all of which are key to grasping current trends in the world of work, in turn. It asks how the doctrinal community and the regulatory community have largely insulated agency-mediated work from employment and labour protections since the mid-1970s, and how the business community has creatively engineered this form of work in such a way that it could permeate most sectors of the UK economy.

My thesis takes a socio-legal approach to these questions that is inspired by the empirical tradition of labour law research and by recent discussions in socio-legal theory. I have employed three sets of empirical material. My qualitative reading of UK case law relating to agency-mediated work stretching from 1975 to 2018 is the core of my analysis of the doctrinal perspective. 29 semi-structured interviews that I have conducted with employment solicitors and barristers, recruitment industry representatives, trade union officials, state enforcement officers and other experts with relevant practical experience dealing with agency-mediated work form the substance of my analysis of the regulatory and business perspectives. I have supplemented my interview material with government, trade union and industry reports that shed light on relevant time periods and developments that my interviews had not sufficiently covered.

My thesis aims to contribute to the English-language literature diagnosing a crisis in the field of labour law on the one hand, and to recent scholarship in the economic sociology of law on the other hand, which I understand at once as a distinct set of questions regarding the linkages between law, economy and society and as a pluralist theoretical framework seeking to answer them. In conversation with the crisis of labour law literature, my thesis traces the evolution of the legal framework for determining the employment status of atypical workers in the UK, particularly agency workers, from the 1970s to today. It also explores exactly how agency-mediated work has been constructed – by judges, state regulators, trade unions and employment agencies – as largely outside the scope of employment and labour protection. It offers, finally, a reading of the crisis of labour law as a growing tension between the doctrinal and regulatory perspectives on the one hand, for which agency-mediated work has remained largely invisible, and the business perspective that has designed stable categories by which this form of work can

be offered and sold. Historicising the discourse of a crisis of labour law, I further develop the hypothesis that this formalisation of liminal employment is intimately linked with the economic priorities of the current historical phase, which has been to stimulate production rather than consumption.

I probe these tendencies further by drawing on the economic sociology of law, which allows me to go beyond more established socio-legal approaches by way of its sensitivity to processes of market-making – and more widely through its systematic acknowledgement that legal, social *and economic* phenomena need to be analysed both in their interrelation and in their distinctiveness. In relation to this field of scholarship, I seek to contribute my conception that professional communities construct distinct ways of relating to the dimensions of the legal, the social and the economic. Recent contributions to this literature help me formulate how the doctrinal, regulatory and business communities have each cohered around a specific way of relating to these dimensions of reality. Alongside the growing tension between the doctrinal and regulatory perspectives and the business perspective on agency-mediated work, the ways in which each professional community has positioned itself in relation to the econo-socio-legal have produced tensions within each community that have disturbed its internal stability. Since the late 2000s these disturbances have seemed to uncover elements of the doctrinal, regulatory and business perspectives that had previously been unspoken, which includes the recruitment industry's fundamental reliance, for its success, on an ongoing transformation of social conceptions of work. On this basis, I argue that the formalisation of liminal employment has been a simultaneous process of market-making and law-making.

I conclude my thesis by reflecting on the emancipatory possibilities that the smouldering crisis of labour law might offer. These may include the repurposing of existing categories for transforming the employment/self-employment binary, which is the foundation on which the contemporary organisation of work relations is built. My thesis warns, on the other hand, against considering any material perspectives on agency-mediated work and other forms of atypical work in isolation when developing reform proposals and political strategies.

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List of abbreviations

ALP	Association of Labour Providers
BERR	Department for Business, Enterprise and Regulatory Reform
BIS	Department for Business, Innovation and Skills
DHSS	Department of Health and Social Security
DLME	Director of Labour Market Enforcement
DTI	Department of Trade and Industry
EDM	Elective Deduction Model
EALO	Employment Agencies Licensing Office
EAS	Employment Agency Standards
GLA	Gangmasters Licensing Authority
GLAA	Gangmasters and Labour Abuse Authority
LITRG	Low Incomes Tax Reform Group
LMI	Labour Market Intermediary
MSC	Managed Service Company
MSO	Managed Service Provider
MPSC	Managed Personal Service Company
NFSE	National Federation of Self Employed and Small Businesses
OAC	Overarching Contract of Employment
PDPD	Pay Day by Pay Day
PSC	Personal Service Company
PSL	Preferred Supplier List
REC	Recruitment and Employment Confederation
RPO	Recruitment Process Outsourcing
WEC	World Employment Confederation

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Chapter 1

Agency work, liminal employment and the crisis of labour law

One of the first sustained discussions of atypical work in the context of British labour law, published in 1986, presciently captured and foreshadowed key elements of future analyses and debates. In a collection aimed at providing 'a clear, detailed, and contextual exposition of the entire field of labour law',[1] Patricia Leighton begins her chapter on 'marginal workers' by listing the types of work relations that 'fall outside the mainstream of labour law'. Such workers might be 'self-employed, casual, homeworkers' or 'described as "freelance", "agents", "temps", "trainees" or "consultants"' and 'are [only] linked by one basic characteristic: they pose particular problems for and are treated differently, and usually disadvantageously, by labour law'. For Leighton, whose view I share, this heterogeneity makes the topic of atypical work 'hard to define and to present in a coherent way'.[2] Its heterogenous character and marginal position has continued to be a hallmark of the labour law discourse on atypical work.

In this thesis, I treat the marginal position that atypical work – and agency work in particular – holds within the field of labour law as a privileged site for analysing the state of crisis in which contemporary British labour law appears to be caught. I do so by exploring how the encounter between labour law and agency-mediated work in the UK has unfolded on the levels of legal doctrine, labour market regulation and business practices since the late 1970s. I thereby draw on case law and doctrinal commentary, semi-structured interviews with legal practitioners, recruitment professionals, trade union and enforcement officers and other legal actors, and on documents produced by these actors, including in the context of government consultations. The share of agency work, in which an employment agency hires and employs a worker who works for a client firm, is steadily growing in labour markets worldwide. At 3 to 5 percent of the working age population, the British labour market has over the last decade commanded the highest rate of this working arrangement within Europe – and the second-highest or highest one in the world. It is the only European labour market in which agency work exceeds all other atypical forms of employment, that is, those which deviate from the standard model of full-time, continuous work

[1] Lewis (1986), p. xi.
[2] Leighton (1986), p. 503.

with a single employer.[3] Agency work exemplifies, in such diverse settings as retail warehousing, office administration and public service provision, a business strategy of passing competitive pressures on to workers by way of outsourcing Human Resource activities to employment agencies. This contracting out in turn creates physical and mental health risks for workers themselves – which has repeatedly been the subject of public and academic controversy.[4]

Since its first detailed judicial treatment in 1970,[5] agency work has posed a fundamental challenge to British labour law doctrine since it does not fit with the dominant understanding of the employment contract as a bilateral contract between an employer and an employee. Existing legal protection of agency workers does not account for the particularities of this working arrangement.[6] Further, deep ambiguity persists as to whether employment agencies and client firms owe any legal obligations to agency workers at all, and if so, to what effect.[7] How has this constellation come about, how has it been sustained, and what does it tell us about wider changes in the world of work? These are the questions guiding this thesis. An underlying motivation, moreover, has been to trace the effects of the categorical distinction between employment and self-employment, which has structured the legal regime governing work relations in the UK since the 1940s. This binary distinction has since given rise to adjustments, to the creation of additional categories and to calls to overcome the distinction altogether. Atypical work – of which agency-mediated work will be my case study – is 'treated differently by labour law', as Leighton observed, in the sense that it is both different from employment, labour law's traditional matter of concern, and different from self-employment, which is the obvious 'other' of employment. As a grey area falling between and beyond labour law's traditional distinction, agency work and other forms of atypical work are therefore a privileged site from which to approach the state of UK labour law more broadly.

This Chapter sets the scene for my investigation into these matters. The following section places my study in the context of contemporary transformations in labour law, which have under

[3] WEC (2020), p. 12; Ciett (2011), pp. 99-100; Ciett (2015), p. 29. A plausible alternative estimate is that agency workers accounted for 5 per cent of the active UK workforce in 2007. Prassl (2015), p. 40. These figures are likely to underestimate the real number of agency workers in light of definitional and reporting difficulties. Judge and Tomlinson (2016), pp. 12-16.

[4] E.g., BBC (2013); Underhill and Quinlan (2011).

[5] See the introduction to Chapter 3.

[6] Agency Workers Regulations 2010, reg. 5; Davies (2013).

[7] Mark Freedland, for instance, has emphasised the 'extremely difficult issues [that] arise as to whether the worker has an employment contract, if so of what kind and with whom'. Freedland (2003), p. 34.

the label of a 'crisis of labour law' been the object of intense debate within and beyond labour law over the past two decades. Subsequent sections set out how agency-mediated work in the UK provides an ideal case study for exploring the crisis of labour law in detail, present my research questions and the contribution I seek to make to the crisis of labour law literature, and provide an overview of my thesis structure.

1. Diagnosing a crisis in labour law

UK labour law is in turmoil.[8] Large numbers of people are today working in the UK economy in ways that align with neither side of the traditional binary of employment and self-employment that shaped Western labour markets in the decades after 1945. In recent years, many court decisions and political debates relating to this group of workers have been discussed under the umbrella term of the 'gig economy',[9] while previous attempts to categorise comparable segments of Western labour markets have involved such terms as 'marginal work', 'atypical work', 'non-standard work' or – in a slightly different register – 'informal work'.[10] Each of these terms lays emphasis on a different aspect of the wider phenomenon: peripheral work tasks as opposed to core tasks; the contrast between atypical or non-standard work and the regulatory ideal of the Standard Employment Relationship (SER), which is characterised as indeterminate, full-time employment with a single employer; and informality as opposed to the visibility of a work relation to a legal system in the Western tradition.[11] But common to most of these accounts is the observation that the legal characterisation of work relations has ceased to be straightforward in an increasing number of cases, usually leading to a loss of labour law protection for increasing numbers of individuals and a concomitant deterioration in working conditions. How to make sense of these shifts has caused much debate among academic labour lawyers, both in the UK

[8] In this thesis, I use labour law to refer not only to the legal rules relating to the individual employment contract but also to the legal regime governing labour more generally, which includes such matters as contractual construction and the relationship between employing entities. I use the term employment law to refer to the field of legal practice.
[9] E.g. Prassl (2018), pp. 12-24.
[10] E.g. Leighton (1986); Davies (2013); Fudge (2012), pp. 4-10.
[11] Similarly, gig work contrasts with a traditional career path, knowledge work with traditional industrial production, and the digital platform economy with more materially rooted 'brick-and-mortar' companies. On the Standard Employment Relationship, see initially Mückenberger (1986).

and internationally, who have since the early 2000s frequently explored the extent and character of the 'crisis' befalling the discipline and its object of study.[12]

The theme of labour law's latent failure, however, to meet its goals – of protecting workers who are in a disadvantaged bargaining position in relation to their employer, redistributing the wealth created, and facilitating economic production[13] – is not unique to the current academic debate. The general sense of urgency and novelty that the 'crisis of labour law' literature and the wider political discourse regarding the 'new world of work' radiate is punctuated by the occasional recognition that the crisis is not entirely new. A number of scholars have drawn attention to the fact that UK labour lawyers have diagnosed a conceptual or normative crisis at least since the 1980s,[14] and some have sketched historical parallels with earlier, related moments of deep-seated crisis (in the early 20th century and during the 1960s and 1970s) in the regulation of work in the UK.[15] This awareness resembles the move of historicising – or being attentive to the 'historically specific forms' of – social phenomena and the categories that we use to make sense of them, which critical theorists like Nancy Fraser and Fredric Jameson have often insisted on.[16] The kind of historical awareness that Fraser and Jameson endorse refrains both from 'essentialist and ahistorical' conceptions of the social world and the terms we use to interpret it, and from embracing 'strictly local' and 'ad hoc' theorising as the only conceivable alternative.[17]

Further historicising the 'crisis of labour law' in this sense would mean to foreground, on the one hand, the different forms that this phenomenon has taken historically and, on the other hand, the manner in which its analytical categories are themselves 'inflected by temporality'.[18] The specific manner in which the state has been involved in relations between workers and companies repeatedly came to be considered inadequate over the course of the 19th and 20th centuries, which in turn led to a recalibration of state involvement in this field.[19] This recalibration has in the UK taken the successive forms of the criminalisation of industrial action, the facilitation of collective bargaining by the state, state corporatism, and the expansion of the

[12] The English-language literature includes Collins (2000); the contributions in Barnard et al. (2004), Davidov and Langille (2006), Davidov and Langille (2011), Fudge et al. (2012), and Ludlow and Blackham (2015); Freedland and Kountouris (2011); Davidov (2016).
[13] Fudge (2011), p. 123.
[14] Davies and Freedland (2004), p. 157; Deakin (2006), p. 89; Davidov (2016), p. 1.
[15] Deakin (2006), pp. 89-90; Dukes (2014), pp. 92-94; see Fudge (2011), pp. 120-124; Prassl (2018), ch 4.
[16] Fraser and Jaeggi (2018), p. 62; Jameson (1991), p. ix.
[17] Fraser and Nicholson (1988), pp. 379, 382.
[18] ibid, p. 390.
[19] E.g. Dukes (2008), pp. 343-344, 352-358.

individual rights regime.[20] Against this backdrop, the currently widespread dissatisfaction with the state of labour law appears as a specific moment in a series of political disputes over the proper relationship between legal and economic institutions in the field of wage labour. What is more, the specific position that the state has occupied in each phase has been intimately linked to the political economic model favoured in a given time and place.[21]

The notion of a 'crisis' has itself been used in a wide variety of ways in this regard. In the Germany of the early 1930s, Hugo Sinzheimer – one of the founders of the discipline – declared the project of labour law a failure that could only be revitalised through a 'renewal of the existing economic order' and a 'bold' confrontation with the dogmas of private law.[22] The corporatist approach of the Nazi state arguably had a strong influence on Otto Kahn-Freund, the founder of labour law in the UK, who favoured a merely auxiliary role for the state so as not to import the model of 'suppress[ing] class contradictions' by way of constructing a 'national community' to the UK.[23] The theme of a 'crisis' returned to British labour law discourse in a different form in the work of Bill Wedderburn during the 1980s, who diagnosed a crisis or slow disintegration on the level of labour law's foundational concepts.[24] The reorientation that Wedderburn proposed, which has since served as a 'rallying cry' to left-leaning labour lawyers in the UK, was to increase labour law's 'autonomy' from common law procedures and reasoning.[25] Wedderburn's vision of autonomy was less hostile to legislative measures aimed at safeguarding basic working and bargaining conditions than Kahn-Freund's approach had been.[26]

This detour through the undercurrents of contemporary labour law debates allows me to locate the current moment of crisis in more precise terms. In the UK, this crisis is inextricably linked to the prevailing ideal of what labour law should be – namely, relatively autonomous from 'common law control'[27] – and to the growing realisation that this project is failing. It is not only

[20] For an overview, see Deakin and Morris (2012), pp. 6-49.
[21] E.g. Fudge (2017), pp. 6-15.
[22] Sinzheimer (1976b), p. 141.
[23] Dukes (2009), pp. 224-229; Kahn-Freund quoted ibid, p. 227; Kahn-Freund quoted in Blanke (2005), p. 96. As Dukes (2014), pp. 92-94 has traced, that model reached its own crisis in the 1960s and 1970s.
[24] Clark and Wedderburn (1983), pp. 144-155; Wedderburn (1987), pp. 5-7.
[25] Wedderburn (1987); Bogg et al. (2015), p. 2. This vision has a distinctively British character, as outlined by Bogg (2015), pp. 307-309
[26] Dukes (2015), p. 382; Bogg (2015), p. 309.
[27] Wedderburn (1987), p. 4.

failing on the level of judicial reasoning, which is often considered formalist or legalistic[28] and which permits complex, erratic incursions of contract law doctrine into the body of labour law.[29] The narrative of a steady expansion of labour law's protective reach has also collapsed on the level of enforcement, which has been characterised by a light-touch, highly selective approach. More recently, the government has come under criticism for its persistent failure to bring forward legislation to implement the core recommendations of the Taylor Review.[30] Each of these trends has tended to contribute to the one-sided, employer-friendly flexibility that is at times being idealised as 'the British way' in industrial relations.[31] In a further historicising move, these dimensions of crisis may be associated with the political economic model that has dominated the UK since the 1980s and that arguably requires the overall deterioration of workers' pay and conditions.[32]

2. Legal segmentation, liminal employment and agency work

But how exactly have judges, enforcement bodies and other legal actors contributed to today's crisis of labour law? This question is raised with urgency by proponents of the legal segmentation thesis, which brings the diagnosis of a crisis in labour law in conversation with the segmentation approach in industrial relations theory. Deepening the idea that the labour market is divided into structurally and functionally different segments (along a continuum stretching from stable, well-paid employment typically held by 'prime-aged' white men to irregular, low-paid work in the secondary labour market typically held by women, ethnic minorities and disabled workers),[33] the idea of *legal* segmentation emphasises the crucial role of law in generating this division. Legal processes thus not only 'amplify and perpetuate' the effects of the 'economic forces and social norms which give rise to [labour market] segmentation',[34] but also create their own effects. A key effect that doctrine and regulation have had on labour market processes is that, rather than

[28] For instance, a former employment judge and a senior employment barrister have used these terms to draw a distinction between judicial decisions that are based on a sense of 'this doesn't sound fair to me' and those that seek 'a principled way of trying to deal with the problem'. Interview transcript J1; interview summary B3.
[29] Collins (2015), pp. 59-71. As I will trace in Chapter 2, the labour law doctrine of 'mutuality of obligation' in particular is a crucial bottleneck that excludes many atypical workers from employment-related protection.
[30] See Ferguson (2020). On parliament's inaction more generally, see *James* v *Greenwich London Borough Council* [2008] ICR 545, paras 56-61; Bogg (2016), pp. 70-71.
[31] E.g. Taylor et al. (2017), pp. 7, 33, 51, 93.
[32] Harvey (2018), pp. 353-354. I return to this point in section 3 of Chapter 6.
[33] For an excellent review of labour market segmentation theories, see Peck (1996), pp. 46-82.
[34] Deakin (2013), p. 1.

'exposing *all* groups to competition' (which is how labour market deregulation has usually been framed), they have in fact 'increase[d] the scope for inequality … by removing protection' from 'weak' groups in the so-called secondary labour market.[35] As I will explore in this thesis, the opposite is just as true: labour law doctrine and labour market regulation have also determined exceptional circumstances in which a degree of protection exists even for workers in generally disadvantaged labour market segments, such as extreme labour exploitation.[36]

The most significant way in which law structures the labour market is through rights and privileges that attach to employment. While the category of employment opens the door to employment rights claims and trade union representation in a straightforward manner, its polar opposite is entrepreneurial self-employment, which normally bars access to employment rights and trade union representation but reduces work-related tax payments as compared to employment. The kinds of work relations that trouble the traditional binary distinction are often located in disadvantaged labour market segments, in which socially marginalised workers are overrepresented.[37] These may be homeworking or casual, fixed-term, part-time or agency work, each of which lacks one of the key characteristics of the Standard Employment Relationship (respectively: working on the employer's site, regularity, indeterminate duration, full-time hours and a bilateral work relation). The expansion of such forms of work over the past four decades in most Western economies has been the main trigger and focal point of the crisis of labour law literature, and it brought forth insightful analyses of labour market segmentation. Seen through the lens of the legal segmentation of the labour market, however, these irregular forms of work may be captured with yet more precision.

The idea of legal segmentation yields three particularly important insights into the nature of atypical forms of work and their interaction with standard forms of work. First, it clarifies the dialectical relation between standard and atypical forms of work. As Simon Deakin has succinctly summarised this relation:

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[35] Rubery, Wilkinson and Tarling (1989), p. 44 (emphasis added).

[36] See Chapters 3 and 4. These de facto exceptions include extreme labour exploitation (from the perspectives of labour law doctrine and state regulators) and working practices that closely resemble those in the 'primary', most privileged segments of the labour market (from the perspective of trade unions).

[37] In one of the earliest contributions giving a detailed account of the phenomenon of 'segmented labour legislation', Judy Fudge and Leah Vosko explore the 'growing and persistently gendered polarization between standard workers and non-standard workers and among non-standard workers themselves', which they refer to as the 'feminization of employment relationships'. Fudge and Vosko (2001), p. 273.

> 'The stricter the [legal] protections associated with the SER …, the greater the pressure on the law to permit alternative forms of employment, such as fixed-term work, as an alternative to the SER. At the same time, attempts to regulate atypical work by requiring equivalent or pro-rata treatment of fixed-term or part-time workers by comparison to permanent and full-time workers indirectly validate, and thereby protect, the core SER concept.'[38]

In other words, the expansion of employees' legal rights and privileges risks inflating the use of atypical forms of work, while distinct legal rules governing atypical work tend to reinforce its difference from standard work.[39] Beyond labour law's 'privileging function' by which it 'actively promot[es] specific parts of the labour force', Irene Dingeldey and colleagues also consider the extent of its 'equalising function'. Where employment protections apply to most or all individuals in the labour market, labour law can reduce the overall 'gradation in protection' from market pressures.[40] Over the course of the period covered by my study, this equalising function deteriorated. Even those employment-related rights with the widest personal scope, which are contained in anti-discrimination law, were granted to an increasingly narrow set of workers, as I trace in the third section of chapter 3. A notable exception is the most recent, expansionary case law on worker status, which the UK Supreme Court endorsed in its 2021 judgment in *Uber BV* v *Aslam*.[41] I return to this exceptional instance of UK labour law's equalising effects of segmentation in the labour market in the third section of chapter 3.

Secondly, regarding the nature of atypical forms of work, the legal segmentation lens highlights the elusiveness of atypical work as a legal category. As I will address in my discussions of employment status law in chapter 3 and of regulatory strategies in chapter 4, at least since the 1970s neither labour law doctrine nor labour market regulation captured legal relations outside the binary categories of employment and self-employment within a *stable* third category. This is not only because 'no third personal role name was available or was found',[42] but also due to the notorious 'proliferation of distinct atypical employment forms',[43] especially in a jurisdiction like

[38] Deakin (2013), p. 5 (references omitted).
[39] On the dominance that the SER has continued to exert on international attempts to regulate atypical forms of work, see Vosko (2010), pp. 100-102, 133-139, 172-182.
[40] Dingeldey et al. (2020), pp. 2, 18-20; on the expansion of norms promoting formal equality in international labour regulation since the 1950s, see also Vosko (2010), pp. 65-70.
[41] [2021] UKSC 5.
[42] Freedland (2015), p. 243.
[43] Deakin (2013), p. 5.

the UK[44] where work contracts may in principle take any shape that the parties choose. New forms of atypical work have thus sprung up, most notably zero-hours contracts under which no future work is guaranteed. In chapter 5, I will examine how employment agencies and other intermediaries have – unlike courts and labour market regulators – successfully developed positive categories of agency work on their own initiative.

Thirdly, an insight underpinning the legal segmentation lens that is rarely made explicit is the qualitative difference between employment and self-employment on the one hand and atypical forms of work on the other. While from a technical legal perspective the traditional two categories offer clear legal classifications, any work relation that does not fit those categories in a straightforward way lands on much less stable ground. As I have outlined, the category of atypical work relations lacks internal consistency. Thus, where an activity cannot self-evidently be characterised as traditional employment or self-employment, the 'active assignment of legal consequences to legal character'[45] will usually differ according to its specific purpose – such as unfair dismissal, compensation for injury at work or tax liabilities – and the wider socio-economic context.[46] Given such fragmentation of one work relation into numerous legal categories, depending on the specific purpose, doctrinal labour lawyers have struggled to address atypical work as a coherent category.[47] Like the ancient Indian allegory of the elephant taken to be a snake, a tree and a rope by the blind men partially examining it,[48] doctrinal labour lawyers have analysed specific elements of the phenomenon, using existing legal categories.

I will grasp this set of work relations analytically rather than doctrinally, using the term *liminal employment* to refer to those forms of work that, from a technical legal perspective, might conceivably fall on either side of the traditional distinction between employment and self-employment. In other words, these work relations are defined by what they are not –

[44] The legal rules and procedures discussed in this thesis do not differ as between Scots law and English law. Equally, the labour market institutions and business actors discussed do not distinguish between the two jurisdictions.
[45] Fudge (2018b), p. 424.
[46] ibid, 426.
[47] The restatement approach of prominent labour law scholars Mark Freedland and Nicola Kountouris does not take existing legal categories as its point of departure, but instead seeks to establish a set of new legal categories – in particular, the personal work relation and the personal work nexus – that would guide the legal characterisation of work relations. See Freedland and Kountouris (2011).
[48] A similar comparison is drawn by Stokes et al. (2014), pp. 9-10. Bill Wedderburn used the allegory to refer to the wide range of factors that courts have come to consider when determining the existence of an employment contract in Wedderburn (1986), p. 116.

straightforward employment or self-employment.[49] This negative definition seeks to acknowledge that the post-1945 binary of employment and self-employment permeates all existing legal categories governing work relations, though without reinforcing the normative priority of employment as 'standard' or 'typical'. My tripartite conception of the positive categories of *employment* and *self-employment* and the 'negative' space of *liminal employment* between and beyond them is not meant to downplay the significance of intermediate categories such as 'worker' status, secondary representation by trade unions and licensing regimes for employment agencies. My emphasis on the 'negativity' of liminal employment merely pertains to the nameless placeholder that 'frames the endless set' of those positive intermediate categories that may be deployed to capture this in-between space.[50] Particularly the concept of 'worker', which was at the heart of the individual employment rights introduced by the New Labour government, was a promising attempt to capture the grey area of liminal employment in a positive legal category.[51] As I trace in the third section of Chapter 3, however, at least until very recently not even the 'worker' concept succeeded at bringing considerable numbers of atypical workers within the scope of employment and labour protections.

My analysis in Chapters 3 to 5 suggests a stark contrast between those intermediate categories that were mobilised by doctrinal and regulatory actors – all of which have only benefitted narrow sets of agency-mediated workers – and the intermediate categories created by agencies and other private labour market intermediaries, which have succeeded at structuring the segment of the UK labour market that is now called the recruitment market. From the perspective of employment agencies and other intermediaries, work relations that fall within the liminal category beyond straightforward employment and self-employment have thereby acquired a range of positive labels, such as 'temp', 'contractor' and more recent inventions. From the perspectives of labour law doctrine and labour market regulation, however, such liminal work relations have largely been constructed as a 'negative', invisible phenomenon. I seek to grasp this contrast by speaking of the *polymorphic formalisation of liminal employment*. Agency work and other forms of liminal employment have, in other words, acquired a distinct form since the late 1970s. Yet, its form changes drastically depending on the standpoint from which one approaches it.

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[49] Like in the category of the 'undead' as opposed to the living or the dead, the negation is thereby displaced 'from the predicate' (being employed, or being alive) 'onto the subject' itself, in a 'purely negative gesture of excluding' them from one domain 'without for that reason locating them in the [other] domain'. Žižek (1993), pp. 112-113.

[50] Žižek (2012), p. 650.

[51] Much earlier, in the Employers and Workmen Act of 1875, statutory recognition had already been extended in much the same way to the intermediate category of 'workman'.

Agency work in the UK, which has frequently been regarded as a paradigmatic case of the disintegration of employing entities and the 'fragmented exercise of employer functions' that tends to accompany it,[52] will serve as my case study for exploring the ongoing transformation of work relations that I have outlined. As Jeremias Prassl has put it, agency work is 'a good *pars pro toto* illustration' of atypical work more generally in the sense that 'agency work problems are mirrored in areas such as subcontracting, and the use of personal service companies'.[53] The complex forms of liminal employment that constitute the UK's recruitment market today emerged out of multiple, overlapping categories of non-standard or atypical work that lack one or several of the characteristics of the standard employment relationship (SER). When labour lawyers and labour market scholars in the UK began to survey the growth of atypical work and the underlying process of labour market segmentation in the 1970s and 1980s,[54] agency work was simply one form of atypical work populating the secondary labour market among many. While some forms of atypical work relations may be described as 'jobs without employers', as in the case of false self-employment and subcontracting, in other cases workers encounter 'employers without jobs', for instance in casual work and in fixed-term and part-time work prior to its regulation.[55]

Agency work occupies a unique position on this spectrum. Even in its basic triangular form, it joins employers (of some sort) without regularly available jobs – namely, employment agencies and such intermediaries as umbrella companies – with the 'jobs without employers' that the end users of labour-power and certain upstream intermediaries provide.[56] This form of work is constructed in such a way that the legal and economic centres of gravity diverge. The legal right to direct and discipline the worker is usually exercised by the agency or other intermediary qua 'employer without jobs', while most of the economic benefit of work performed – without the strings of employment protection attached – accrues to the end user. This amalgamation of both prototypes of atypical work has made agency work arrangements, whether in their basic or increasingly complex forms, particularly adaptable to different economic sectors. Precisely who

[52] Collins (1990), pp. 366, 378 and Prassl (2015), pp. 40, 42-54, respectively.
[53] Prassl (2015), p. 40. My conception of agency work, or agency-mediated work, includes individuals using a personal service company to contract with an agency.
[54] Hepple and Napier (1978); Leighton (1986); Rubery and Wilkinson (1981).
[55] Kravaritou-Manitakis (1988), pp. 38-39; see similarly Friedman (2014), p. 171.
[56] For a detailed account of the intermediaries that have sprung up in the UK recruitment market, mediating both the hiring and the marketing relation, see Chapter 5.

bears which burden, and how the arrangement is put into practice, may be fine-tuned in numerous ways.

As for the timespan of my study, analysing developments in the legal nature and treatment of agency work since the mid-1970s allows me to trace longer-term trends from the very inception of agency work as a technical legal category. As I discuss in chapters 3 to 5, Parliament agreed to regulate aspects of agency-mediated work during the 1970s – much earlier than other forms of atypical work – and courts began to engage more regularly with this form of work. I cover developments in labour law doctrine, labour market regulation and business practices until 2018, which is the year when I conducted my last interview.

What is particularly striking about agency work is that its variations span the whole range of liminal employment and its contractual shape can be infinitely adapted and complicated. Most commonly, not only an employment agency is interposed between a worker and a traditional employer but further intermediary companies – contractually interposed between the agency and the worker, or the agency and the user firm – also fulfil some traditional employer functions, such as processing pay or allocating workers to specific tasks and worksites. Modulating this tripartite or increasingly multipartite structure, agencies and other intermediaries can make agency work appear like (false) self-employment or (false) employment, and swing workers into and out of either category. Given the growing complexity of what was initially a tripartite relation, I will also use the term *agency-mediated work*. Agency work has been adapted for the most vulnerable work settings and for some of the most privileged and established alike. Mirroring these two extremes of vulnerable and more privileged work relations, agency workers have developed into two distinct types: temps on the one hand, who are regarded as self-employed for employment law purposes only, and contractors on the other, who are self-employed for tax law purposes.

3. Research questions and contribution

The adaptability of agency-mediated work to judicial, legislative and regulatory interventions and to different economic sectors raises important questions about the legal nature and construction of this form of work. Addressing these questions will in turn shed light on the wider state of UK labour law. My two main research questions relate to how the three sets of actors on which I focus have engaged with agency-mediated work as a form of liminal employment. My first

research question is: how have doctrinal labour lawyers and labour market regulators insulated agency work? That is, how have they constructed agency work as liminal employment falling outside of employment and labour protections and, to a considerable extent, employment-related taxation? This research question departs from my observation that both the doctrinal community and the regulatory community have largely withdrawn from agency-mediated work relations during the past four decades. I am therefore interested in the practical work that they have done to push most agency-mediated work out of their sight and to sustain this disengagement.

My second research question centres on those businesses that now form the UK's recruitment industry. It asks how employment agencies and other private labour market intermediaries have engineered and assembled different forms of liminal employment. That is, how have they constructed their business models in relation to the binary of employment and self-employment, and how have they combined different elements of atypical work that have been constructed – through doctrine and regulation – as falling outside of employment and labour protections? This research question is focused on how agencies, other intermediaries and their legal advisers have developed their business models in such a way that they have expanded the reach of agency-mediated work within the UK labour market and rendered it adaptable to different legal and economic circumstances.

I hope to make three interrelated contributions to the existing literature on the crisis of labour law. Most concretely, I trace the evolution of the legal framework for determining the employment status of atypical workers in the UK, particularly agency workers, from the 1970s to today. To date, no systematic overview of the development of the law governing agency work in the UK has been undertaken. In a more analytical vein, secondly, my study explores exactly how agency-mediated work has been constructed – by judges, state regulators, trade unions and employment agencies – as largely 'outside the scope of employment and labour protection',[57] and thus as liminal employment. The market for agency-mediated work in the UK, termed the recruitment market by industry insiders, has for the most part been insulated from the legal regime governing traditional, 'standard' employment through both doctrinal and regulatory means since the 1980s. The resulting legal vacuum has been occupied by employment agencies and other private labour market intermediaries. Agencies and other intermediaries developed a

[57] Fudge (2012), p. 1; Freedland (2015), p. 247.

range of sophisticated work relations that escape the traditional legal treatment of employment and self-employment by colonising the internal contradictions of existing labour law categories.[58]

My third contribution to the crisis of labour law literature relates to the wider trajectory of UK labour law, and seeks to pinpoint in what sense the existing legal ordering of work relations in the UK has reached a crisis or tipping point. While existing scholarship has tended to locate the impasse of British labour law either on the normative or on the conceptual level – and relatedly on the level of either the goals or the means of labour law – my study does not centre on these distinctions. Instead, my analysis of developments in labour law doctrine, labour market regulation and business practices leads me to focus on the internal contradictions or discontinuities of the existing legal regime as they manifest themselves in these three perspectives. I elaborate this point in my methodological discussion in the following chapter. What seemed to be reaching a limit point during the late 2010s is, respectively, the coherence of the legal framework, the pragmatism of trade union activities and the credibility of state enforcement, and the innovative force of the recruitment industry itself.

I further hope to make a contribution to existing scholarship in the economic sociology of law, which I review in the following chapter. Through my use of the concept of epistemological perspectives, I suggest that the interplay of such dimensions of reality as the legal, the economic and the social is constructed differently from different perspectives. In my study of the doctrinal, regulatory and business perspectives on agency-mediated work in the UK, it has been remarkable how some of these dimensions have seemed to drop out of particular perspectives – only to return, towards the end of the period I have studied, as a key concern. This has seemed to be the case, for instance, with economic considerations in the form of labour market needs, which initially dropped out of the doctrinal perspective on agency-mediated work, and with social attitudes towards work – held by individuals and employers – that were initially disregarded by the business perspective.

4. Chapter outline

[58] I will account for this process in more depth in Chapters 2 and 5 of this thesis. With a view to the existing legal segmentation literature, I am further offering a case study in which not only doctrinal categories, but also regulatory strategies and business efforts to engineer existing work arrangements exert significant structuring effects on the labour market.

In Chapter 2 I will enlist a second literature that is crucial for my study and to which I hope to make an original contribution, which is the economic sociology of law (ESL). This literature will help me adopt the epistemological perspectives of labour law doctrine, labour market regulation and business practices independently of one another, before probing their interrelation. I will approach ESL scholarship via recent empirical scholarship in labour law, which serves as a bridge between my two key literatures. My review of the recent empirical scholarship in labour law and of ESL scholarship allows me further to deepen the conceptual framework developed in the present chapter by turning to the ideas of epistemological perspectives and their stabilisation and linkages. On this basis, I will outline the methodology that I employ in the empirical chapters of my study.

Chapters 3 to 5 constitute the empirical core of my thesis. They correspond with the sub-questions contained in my overall research questions. Chapter 3 makes a start by addressing my first research question in relation to doctrinal labour lawyers. How have they insulated agency-mediated work, in the sense of constructing agency work as liminal employment that falls outside of employment and labour protections? This interaction between labour law doctrine and agency and other atypical work has centred on the question of employment status, which provides the threshold for accessing employment-related rights. Judges have been uncomfortable with liminal employment in general and agency work in particular, since both point to a fissure in the traditional, binary edifice of employment status. Based on a close examination of the relevant case law and doctrinal commentary over this period, I trace the emergence of a novel approach to the legal classification of work relations in the early 1980s that gravitates around the concepts of 'mutuality of obligation' and employer intention. This approach draws in a peculiar way on the contract law doctrines of consideration and intention as requisites for the formation of a contract. Its effect is largely to insulate agency work from employment rights claims. In the second part of this chapter, I outline four distinct waves of legal challenges to the post-1980s framework, which shed light on the contours of the implicit distinction underlying the existing legal framework. In light of how common law rules on the employment status of atypical workers were repeatedly adjusted in reaction to these challenges, I argue that the concepts of mutuality of obligation and employer intention have been used to afford liminal employment a paradoxical legal status: one in which the individual is subordinated in a socially meaningful, though not in a technical legal manner. This chapter owes its focus on the technical legal means by which agency workers have tended to be excluded from employment rights to the crisis of labour law literature.

Chapter 4 takes a step away from labour law doctrine and engages with my first research question in relation to traditional labour market institutions – that is, trade unions and state regulators. How have they constructed agency-mediated work as liminal employment falling outside of employment and labour protections, thereby insulating it from such protections? These actors have made choices that ultimately impact on the business practices of employment agencies and other intermediaries, and have contributed to the construction of a 'recruitment market' as distinct from the traditional labour market. It is striking how state regulators and trade unions have tended to accept the recruitment industry's premise that agency-mediated work fundamentally differs from more typical forms of work. This implicit acceptance manifests itself in regulatory bodies' marked reluctance to disturb the balance of creative legal engineering and de facto subsidies on which the UK recruitment industry depends. Trade unions, in turn, have often taken less of an interest in representing agency-mediated workers than in the more typical workers who they consider their core constituency. Much like the doctrinal community, both sets of labour market institutions have exhibited discomfort towards agency work, which confronted them with an expanding fissure in their treatment of different work relations. Both trade unions and state regulators have struggled to approach agency-mediated work in a manner that acknowledges it as distinct from traditional employment on the one hand and self-employment on the other. In effect, the strategies employed by them have insulated most agency work relations from the regulatory protection afforded to traditional employees. Chapter 4 is grounded in semi-structured interviews that I have conducted with key actors representing trade unions and state regulators and in industry and government documents I have analysed. I will discuss my methodological choices in chapter 2, where I also outline how this chapter is inspired by the methodological inventiveness of recent empirical scholarship in labour law.

Acknowledging that a significant part of the legal characterisation of agency-mediated work takes place in practice leads me to turn, in Chapter 5, to employment agencies and their legal advisers. This chapter addresses my second research question: how have employment agencies and other private labour market intermediaries engineered and assembled different forms of liminal employment? That is, how have they constructed their business models in relation to the binary of employment and self-employment, and how have they combined different forms of atypical work that have been constructed – through doctrine and regulation – to fall outside of employment and labour protections? Agencies and other intermediaries have built this country's recruitment industry on the fissure – and over time, gaping abyss – at the heart of British labour law and labour market regulation that I call liminal employment. The UK

market for what industry insiders call agency recruitment boomed in the wake of deregulatory measures in the early 1990s, which prompted a number of reluctant re-regulatory steps by the incoming New Labour government in the late 1990s and early 2000s. Rather than disappear, however, the recruitment industry continued to develop creative new models of hiring agency workers and of marketing their services to potential end clients. I conclude the chapter by outlining how private labour market intermediaries have recently emerged with new vigour from the economic recession. Throughout the past decades, agency-mediated work has tended to be not only less secure and less well-paid than more typical employment, but it has also been internally segmented into such intermediate categories as low-paid 'temps', better-paid 'contractors' and more recent hiring models such as 'travel and subsistence contracts' and Pay Between Assignment contracts. The discussion in this chapter is anchored in semi-structured interviews that I have conducted with solicitors, barristers, agency managers and trade unionists who have been exposed to and participated in these developments. This chapter draws particular inspiration from the economic sociology of law, which seeks to examine the interrelation of legal and economic phenomena through sociological means. I will address this interrelation, and discuss the methodological choices regarding my interviews, in chapter 2.

In Chapter 6 I bring together my findings and reflect back on the crisis of labour law literature and the economic sociology of law. In relation to the crisis of labour law, I elaborate my argument that the evolution of agency-mediated work since the mid-1970s constitutes a formalisation of liminal employment. By this I mean that the doctrinal and regulatory insulation of agency-mediated work has constructed the majority of such work relations as being of no concern to employment rights adjudication and the enforcement of labour standards. It thus appears as a mere remainder of labour law's categorical distinction between employment and self-employment. From the perspective of the recruitment industry, by contrast, agency-mediated work takes a more defined shape: the intermediate categories of temps, contractors and others that have been created through legal engineering and the assembly of existing forms of atypical work into complex agency-mediated 'labour supply chains' have given a positive form to liminal employment. My reflections on the economic sociology of law include the question of how the doctrinal and regulatory insulation of agency-mediated work from the employment regime could be sustained in the face of persistent challenges since the 1990s in particular. As I analyse in my empirical chapters, adjustments internal to the levels of doctrine, regulation and business practices were significant throughout this period. However, during the 2010s external, economic categories became central to the stability of labour law doctrine and labour market regulation.

Business practices that had been guided by economic profitability, in turn, seemed to approach a limit located not within economics but within the legal framework, namely the distinction between straightforward employment and the negative category that I call liminal employment. These reflections allow me to be more specific about the nature of the current crisis of labour law. Rather than crisis being either a permanent feature of the legal ordering of work relations or a mere perception of a narrow community of labour lawyers, I come to understand the current crisis of labour law as the exhaustion of a particular legal regime governing work relations that is slowly collapsing in on itself. I will conclude this chapter, and my thesis, by situating the insights gained from my study within the wider literature on the future world of work and inferring potential avenues for future intervention.

Chapter 2

The crisis of labour law in context? Empirical scholarship and economic sociology of law

'[I]n times of sudden change, where the old disappears and the new craves recognition, a purely technical insight into the existing legal order is not sufficient.'[1] This piece of methodological advice was offered by Hugo Sinzheimer, one of the founders of labour law in the early 1920s, and it appears as prescient today as it was then. While most contemporary work on the crisis of labour law has focused on legal doctrine in its technical and normative guises,[2] some contributions have heeded Sinzheimer's advice and turned to sociology. Work of the latter kind is as crucial to the questions addressed in this study as the more doctrinal approach that has shaped the crisis of labour law literature. Such sociological or socio-legal work has taken the form of empirical methods in labour law scholarship on the one hand and a theorisation, on the other, of law, the economy and society in their interrelation.

In this chapter I will elaborate how these two strands of socio-legal work help me grasp the crisis of labour law – as it manifests in agency-mediated work – beyond its doctrinal aspects. As I have noted in my introductory chapter, each of the three epistemological perspectives that guide my analysis (legal doctrine, market regulation and business practices) interrelates with one of the three literatures on which I draw and to which I seek to make a contribution. The literature diagnosing a crisis in contemporary labour law, which may be seen as the erosion of (competing formulations of) labour law's autonomy, sets the scene for my investigation of shifts in employment status doctrine pertaining to atypical workers in chapter 3. The methodological inventiveness of the recent empirical socio-legal scholarship in labour law, on the other hand, provides the starting point of my engagement with the practical enforcement of labour standards and tax law – and its shortcomings – in chapter 4. Research in the economic sociology of law, thirdly, has helped shape my analysis, in chapter 5, of how agencies and other private labour market intermediaries have constructed the UK recruitment market.

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[1] Sinzheimer (1976a), p. 39 as translated in Clark (1983), p. 88.

[2] The widespread terminology contrasting the 'means' and 'goals' of labour law, and the 'conceptual' and 'normative' dimensions of its crisis, permeates the contributions to key edited collections, especially Davidov and Langille (2006); Davidov and Langille (2011).

In the first section of this chapter, I will review and complicate the empirical socio-legal scholarship in labour law. While the case for such scholarship is compelling, its conceptualisation of legal, social and economic phenomena could often be more nuanced. The work of Lizzie Barmes, Emily Grabham and Jeremias Prassl – who, to different degrees, are influenced by constitutive theories of law – constitutes important exceptions. In the second section of this chapter I will consider, following Sabine Frerichs, constitutive and other advanced socio-legal theories as the latest of three waves in the wider literature on market-making and the interrelation between law, markets and society that is known as the economic sociology of law (ESL). This literature engages with the processes by which the routinised economic activities that occur in markets are shaped and stabilised. It further explicitly addresses the conceptual questions regarding the nature and interplay of economic, legal and social phenomena that most empirical socio-legal scholarship in labour law has thus far neglected.

In the third section of the chapter, I will situate the approach that I take to my empirical work within the ESL literature and sketch how the epistemological perspectives that I adopt in chapters 3 to 5 (legal doctrine, market regulation and business practices) relate to one another. Each of these perspectives has taken different considerations for granted and has relied on different categories during phases of instability. Unquestioned constants that were required from the doctrinal, regulatory and business perspectives, respectively, have been the coherence of employment status law, pragmatism in the face of labour market change and constant contractual innovation in the service of maintaining profits. Where these goals were at risk, judges have tended to fall back on economic concerns such as whether implying an employment contract was necessary from a business perspective; regulators seemed to recur to the perceived limits of their institutional mandates; employment agencies and other intermediaries ultimately seemed to rely on the ongoing transformation of social attitudes towards work. The fourth section of this chapter outlines, on the basis of this deepening of my conceptual framework, how I have adjusted my methodology to the three perspectives.

1. Empirical labour law scholarship

The past decade has seen a turn towards employing empirical methods such as interviews, ethnography and quantitative data analysis to shed light on difficult questions in labour law. At

times described as a wider 'empirical turn' in labour law scholarship,[3] an interest in empirical research methods and other forms of methodological innovation has been an obvious trend in recent work in labour law in the UK. As many scholars involved in such work explicitly acknowledge, an interest in methodological innovation already informed the discipline of labour law at its inception. Not only have 'the effects of labour and employment laws' been studied empirically 'since the inception of modern social legislation',[4] but a sociological approach to the study of industrial relations was in fact indispensable to the evolution of labour law as an academic discipline. The analyses of collective agreements undertaken by Hugo Sinzheimer and the Webbs ventured beyond those sources of law that were recognised by doctrinal scholars, and rendered visible the immense 'social and legal significance of the growth in collective bargaining' that occurred during the early 20th century.[5] Both Sinzheimer and, following him, Otto Kahn-Freund drew heavily on the emerging legal sociology of their time, which studied 'the relation between legal norms and social reality'.[6] While neither denied the significance of doctrinal or 'technical', 'deductive' legal analysis,[7] they shared the intuition that 'the function and development of labour law can be comprehended only if "technical" legal analysis is complemented (and enriched) by sociological understanding'.[8]

The same intuition guides contemporary labour law scholars who have turned – or rather *re*turned – to the empirical methods of the sociology of law. As the editors of a 2015 edited collection that exemplified the empirical turn in labour law have put it, 'empirical labour law research … can significantly enhance, though not supplant, traditional legal doctrinal scholarship'.[9] The analytical value added by empirical methods may take the form of providing 'more developed and nuanced understandings of how labour law operates in practice'[10] – including 'how adjudication is working on its own terms'[11] – and of generally 'enrich[ing] … existing research projects' and allowing scholars to 'ask new research questions'.[12] A richer, more nuanced understanding of labour law 'in action' has indeed been generated with regard,

[3] See Barmes (2015b), p. 122; Fudge (2016), p. 274; Lord (2019), p. 3; Howe (2016), p. 8.
[4] Deakin (2011), p. 31.
[5] Clark (1983), 84; see Kahn-Freund (1981a), pp. 82-85.
[6] Kahn-Freund (1981c), p. 162.
[7] Sinzheimer (1976a), pp. 38-9; Kahn-Freund (1965), pp. 7-8.
[8] Clark (1983), p. 82.
[9] Blackham and Ludlow (2015), p. 4.
[10] ibid, pp. 2-3.
[11] Barmes (2015b), p. 112; see Kahn Freund (1981b).
[12] Blackham and Ludlow (2015), p. i.

for instance, to the dysfunctional outcomes of prison privatisation,[13] the marginalised position of social care workers,[14] the fragmentation of employing entities,[15] and the ineffectiveness of legal protections regarding behavioural conflict at work.[16] Such scholarship further includes insightful studies of adjudication that explicitly treat case law as qualitative empirical material.[17] In the same vein, my study explores the workings of adjudication, how the rights of workers are enforced and how employers shape rights entitlements in the area of agency work.

A further motivation for labour law scholars to use empirical methods has been the sense of frustration within the discipline with the social realities of weakening employment protection and collective organisation at work across Western countries, coupled with the apparent inability of labour law to counter these trends. Following Ruth Dukes' perceptive suggestion, one might thus 'understand the crisis in the field of labour law as having at its heart a *crisis of methodology*'.[18] The hope associated with the use of empirical methods is better to understand, and potentially to counter, this deep-seated perception of labour law being in crisis. One particularly impactful contribution in this regard has been a journal publication by Abi Adams and Jeremias Prassl on which the UK Supreme Court relied in a landmark ruling that repealed Employment Tribunal fees.[19] Adams and Prassl's analysis of claimants' behaviour thus significantly reduced the exclusion of low-paid workers from enforcing their employment rights.

The light that Adams and Prassl shed on the relation between legal norms and social reality – which remains the fundamental concern of most uses of empirical methods in labour law – in this instance is clear. Through statistical analysis, they were able to demonstrate the social impact of an incoming legal rule (namely, the introduction of Employment Tribunal fees), which led to the repeal of the rule. However, the interrelation between legal and social dynamics is not usually as straightforward. Indeed, exactly 'how empirical research can (or should) relate to traditional legal doctrinal scholarship' remains an open question that recent empirical

[13] Ludlow (2015), chs 4, 6-7.
[14] Hayes (2017).
[15] Prassl (2015).
[16] Barmes (2015a), chs 8-9; see Pollert (2012).
[17] Barmes (2015a), chs 4-7; Barmes (2012).
[18] Dukes (2018), p. 408 (emphasis original). In the same vein, Adams and colleagues argue that 'the critical questions facing labour law today, as a mode of regulation and as a disciplinary field, cannot be answered except through a combination of interpretive and empirical analyses'. Adams et al. (2017), p. 62.
[19] Adams and Prassl (2017); see *R (UNISON)* v *Lord Chancellor* [2017] UKSC 51.

research in labour law aims to clarify.[20] Often the relation is understood as a complementary one, as expressed by the ambitions of 'enriching' or 'enhancing' a doctrinal perspective, or of bridging legal doctrine and social science,[21] all of which stand in the tradition of Kahn-Freund's call for an 'integrated' approach.

Not all labour lawyers who have contributed to the recent turn towards empirical scholarship subscribe to this understanding. One outstanding scholar whose conception of legal norms and social reality is more nuanced is Lizzie Barmes, who is attentive at once to the doctrinal and the sociological dimension of labour and equality law without reducing one to the other. In her meticulous study *Bullying and Behavioural Conflict at Work*, Barmes does not start from existing legal categories such as harassment, direct discrimination and negligence, but rather from the social category that provides the title of her study.[22] Unlike Kahn-Freund and the majority of contemporary labour lawyers using empirical methods, she does not immediately seek to 'integrate' the two dimensions, but rather juxtaposes them and examines the tensions between them. As one of the key themes of her work, she emphasises the duality of proliferating individual rights and their weakening enforcement.[23] Her insistence on acknowledging this important tension rather than seeking immediately to resolve it appears methodologically persuasive to me, and dovetails with my decision initially to survey the doctrinal, regulatory and business perspectives on the proliferation of agency work independently of one another. A further influence that Barmes has had on my study is her treatment of case law as qualitative empirical material, which I will address in the methodological section of this chapter. With a view to the duality of individual rights expansion and their weakening enforcement, my study suggests that – at least with a view to agency work – the expansion of employment rights and state enforcement has been taken as an occasion to exclude agency workers from protection while standard employees enjoyed the benefits of these developments. I will expand on this 'seesaw', as a senior employment barrister has called it,[24] when I articulate my contribution to the crisis of labour law debate more explicitly in chapter 6.

[20] Blackham and Ludlow (2015), p. 6.
[21] See Deakin (2013b).
[22] Barmes (2015a), pp. 6, 59-62.
[23] E.g. Barmes (2015c), p. 20. A similar attentiveness to the trajectory of legal terms characterises Judy Fudge's work on 'illegal working', which she traces from its political and economic context to its enactment in positive law, and back to the wider discursive effects of the legal term, in Fudge (2018a).
[24] Interview summary B3.

A second exponent of the empirical labour law literature whose work moves beyond the traditional socio-legal topologies that dominate it is Emily Grabham. While Barmes holds open the space between labour law doctrine and practice and allows her reader to appreciate it as an often irreducible gap, Grabham seeks to occupy this space by way of a highly original treatment of legal form. 'Following' technical terms 'across their legal lives', potentially from drafting processes through to their application in formal and informal settings, allows her to witness their meandering movements and their responsiveness to the wider social constellations in which they are invoked.[25] Her work might be said to 'integrate' the analysis of legal norms and social reality in a novel way, by taking legal concepts as a starting point and tracing their movements beyond the narrow sphere of doctrine.[26] Grabham's work has strongly influenced both my way of reading case law in chapter 3, which takes case reports at face value, and my attention to the presence of technical legal categories in the supposedly non-positivist discourse of labour market regulation and business practices in chapters 4 and 5. I will return to these matters in the fourth and third sections of this chapter, respectively.

A third labour law scholar who systematically exceeds the traditional exploration of legal norms and their social context is Jeremias Prassl, whose work on the concept of the employer and on the gig economy often couples a socio-legal approach with particular attention to economic phenomena.[27] Through his explicit engagement with the interplay between macroeconomic processes and trends in individual work relations,[28] Prassl acknowledges the complexity of conceiving an alternative, more inclusive framework of employment protection. I will situate his reform proposals in relation to existing approaches to employment status law in the following chapter. Among empirical labour law scholars, explicit engagement with economic logics remains rare.[29] The economic dimension, however, and its dialectical relation with the legal dimension, seem crucial to understanding the functioning and shortcomings of contemporary labour law. An insight that my study contributes in relation to Prassl's research interests is that the impact of 'socio-economic circumstances', or so-called market forces, on

[25] Grabham (2016b), p. 402; see in particular Grabham (2016a), ch 5.

[26] Ritu Birla's research design is characterised by the same attentiveness to legal concepts and how they pass through the domains of both legal doctrine and social reality. See my discussion in the following section.

[27] Dukes (2020a), p. 221 discussing Prassl (2018); see Prassl (2015), pp. 159-60.

[28] E.g., Prassl (2015), pp. 59-62; Prassl (2018), pp. 18-24.

[29] For another major exception besides Prassl's work, see Deakin and Wilkinson (2005). Regarding the traditional phase of empirical labour law research, Sinzheimer and Kahn-Freund were concerned with the perspective of economics on its own terms at a particular historical moment, namely during the '*Krisis*' of labour law in the Weimar Republic that became palpable in the early 1930s. Clark (1983), p. 98; Sinzheimer (1976b); Kahn-Freund (1981c), p. 176.

atypical workers' access to employment rights has often been exercised through concrete economic concerns that were transplanted into legal doctrine. As I argue in the third section of this chapter, such propping up of legal discourse by non-legal means may at times be necessary. I will outline how I have sought to fold the economic dimension into my analysis in the fourth section of this chapter; how the economic dimension may be adequately integrated into our thinking about the crisis of labour law and potential interventions is a question to which I return in chapter 6.

In designing my own study, I have sought to adopt elements of all three scholars' approaches. What I have adopted from Barmes in this regard is her patient, separate engagement with the spheres of doctrine on the one hand and regulatory and business practices on the other before examining their interrelation. Taking my cue from Grabham's work, I have at the same time sought to fold the doctrinal scholar's attention to legal technicalities into my analysis of labour market regulation and business practices by observing how the categories of employee and self-employed, but also such legal concepts as the 'reality' of a relationship or the duties of an employer appear from these non-doctrinal perspectives. As I move from one perspective to another in Chapters 3 to 5, technical terms and other themes slide in and out of view, which is a complication of Grabham's attempt to follow legal technicalities across their 'lives' on a consistent analytical plane. I will return to this aspect in the section on epistemological perspectives below.

Like Prassl, finally, I engage explicitly with economic discourse and practices, particularly in my discussion of how economic concepts have propped up doctrinal legal discourse in Chapter 3, in my attention to the economic context of regulatory shifts in Chapter 4, and in my tracing of how the economic profitability of agency-mediated work has been maintained in Chapter 5. Unlike Prassl, however, I have sought to approach the legal, the social and the economic from a distinct epistemological standpoint that problematises these perspectives themselves rather than adopt one of them or oscillate between them.[30] I will return to this challenge in the section below on epistemological perspectives, and again in Chapter 6. Before doing so, I will widen the scope of the conceptual and methodological discussion by reviewing a literature that has its roots not only in the classical sociology of law that has shaped British labour law but also in the discipline of economic sociology, and that takes the efforts

[30] Prassl seeks to cast his arguments for legal reform from *within* those perspectives, rather than from a standpoint that problematises these perspectives themselves.

made by Barmes, Grabham and Prassl in particular to escape the confines of traditional empirical research in labour law yet further.

2. Economic sociology of law

A process at the core of my study that neither the doctrinally influenced literature on the crisis of labour law nor the empirical socio-legal literature in labour law can fully capture is the making of a new sub-set of the UK labour market, which is often called the recruitment market. Examining this process of market-making requires a particular sensitivity to the interplay not only of legal and social but also of economic phenomena. I address this interplay most directly in chapter 5 on the practices of agencies and other private labour market intermediaries, which explicitly introduces, through my tracing of how profits are generated and maintained, the dimension of economic rationality into my analysis. I also do so in chapter 3 on economic categories 'propping up' the post-1980 framework of employment status law in moments of intense contestation in the late 2000s and early 2010s.

The interrelation between the fields of doctrinal law, empirical sociology and economics – and how adequately to conceive of it – is the foundational concern of a literature often called economic sociology of law (ESL). It was inaugurated under this name in 2011 by a group of scholars keen to develop 'shared understandings of how and why one might use sociologically-inspired approaches (analytical, empirical, and normative) to investigate relationships between legal and economic phenomena'.[31] Influenced by a wide range of existing scholarship, they sought to avoid both the 'undersocialising' modes of analysis of scholarship guided by orthodox economics and the 'oversocialising' tendency of traditional socio-legal and other sociologically-inclined scholarship.[32]

A useful genealogy of the economic sociology of law – also termed a 'sociology of law and economics',[33] or an analysis of the 'econo-socio-legal'[34] – has been offered by Sabine Frerich. She distinguishes the intellectual generation of Weber, Polanyi and other founders of econo-socio-legal thinking from that of the US legal realists, and subsequently such social

[31] Ashiagbor et al. (2013), p. 1; Ashiagbor et al. (2014), p. 259.
[32] Ashiagbor et al. (2014), p. 261; Granovetter (1985); similarly Haldar (2014).
[33] Dukes (2019), p. 399.
[34] Perry-Kessaris (2015).

theorists writing in the tradition of Continental critical theory as Luhmann, Habermas and Bourdieu.[35] The contemporary ESL literature builds on each of these three generations, with scholars differing in the precise composition of their intellectual inspiration. I will consider the influence of each generation in turn, with a focus on how the relative place and role of legal, economic and social processes have been conceived.

The ideas of both Polanyi and Weber feature prominently in almost every contribution to the contemporary literature, most visibly in the form of Polanyi's notion of 'embeddedness' as an extremely influential account of how market economies relate to the social. The idea attributed to him that capitalist markets are, notwithstanding appearances to the contrary, in fact deeply 'embedded' within social life has not only become the 'core concept – or lowest common denominator – of economic sociology',[36] but has also informed contemporary ESL. The latter literature, however, adopts a more sceptical stance towards the concept. As the editors of two important special editions in the field of economic sociology of law have put it, a number of ESL scholars have grappled with the 'receding utility of that touchstone of economic sociology: "embeddedness" … [in light of its] oxymoronic and ill-defined qualities'.[37] The question is not only exactly '*what* is embedded', but also '*in what*'.[38] Moreover, the concept paradoxically 'conjures up an image of separate spheres or systems',[39] despite Polanyi's insistence on the complex interrelation between market and society. This scepticism does not neglect the crucial insight that propelled the concept of embeddedness into the centre of economic sociology, which was that 'markets are [socially] constructed rather than being natural',[40] and that the market and society are 'co-constitutive' rather than the former being 'analytically autonomous'.[41] Drawing on this insight, ESL scholars have attempted to formulate less 'blunt' accounts of what exactly markets are 'situated in … beyond themselves'.[42]

Two alternative conceptions that have been influential within this literature are Viviana Zelizer's concept of relational work and Roger Cotterrell's notion of community. Both imply a refinement of Polanyian thinking that emphasises the micro-level of individual social

[35] Frerichs (2012).
[36] Frerichs (2009), p. 20.
[37] Ashiagbor et al. (2013), p. 4; Ashiagbor et al. (2014), p. 262.
[38] Cotterrell (2013), p. 53.
[39] Ashiagbor (2014), p. 268.
[40] ibid, p. 267; see generally Rittich (2013).
[41] Ashiagbor (2014), pp. 268-9 (quoting Krippner and Alvarez).
[42] Haldar (2014), p. 321.

(inter)action, arguably inspired by the attention that Weber paid to it.[43] Zelizer underscores the intimate links between social action and economic processes by showing how individuals actively construct and define – in a dynamic that she calls relational work – how they want their relations to appear to others, for instance as a primarily economic transaction or as a romantic relationship.[44] On a meso-level, individual instances of such relational work congeal into larger 'relational packages', such as friendship, romance, standard employment or casual work, which designate conventional categories of social relations.[45] Zelizer's concept of relational work perceptively brings to the fore the processual quality of the boundaries drawn between the social and the economic sphere. It also leaves space for instances in which the initial outcome of the parties' own relational work may be rejected by a court, which would itself engage in a particular kind of relational work that Zelizer calls 'legal relational work'.[46] Similar challenges are conceivable on the part of other legal subjects, investors or competing market participants. The question remains, however, how much leeway courts and other actors might have in obstructing the parties' initial relational work and on what factors their leeway might depend. This problem might in fact be seen as a return of the original problem that Zelizer's concept was employed to resolve, namely how different forms of relational work – including legal and 'everyday' forms[47] – relate to one another.

A second conception that may be considered a more fine-grained alternative to the 'embeddedness' of the economy within society is Cotterrell's notion of 'networks of community'. His approach foregrounds those social relations that possess a basic communal 'quality' in the form of 'a degree of stability and permanence … – but not necessarily very much'.[48] Such social relations with a minimum of stability cluster in networks in which different ideal types of social interaction – following Weber, those that have an instrumental, traditional, belief-based or affective character – will 'almost always [be] mixed together in complex patterns'.[49] Like Zelizer, Cotterrell aims to acknowledge that economic phenomena arise from particular kinds of social activity, and can usually not be distinguished from them with precision.

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[43] See Perry-Kessaris (2011), pp. 403-404; Dukes (2019), pp. 409-411.
[44] Zelizer (2005), ch 1; Zelizer (2012).
[45] Zelizer (2012), pp. 151-5; Zatz (2008), pp. 927, 942-3. Ruth Dukes' use of Weber's notion of 'labour constitution' expresses a related concern in the specific field of work relations. Dukes (2019), pp. 411-413.
[46] Zelizer (2012), p. 153; see Block (2011), pp. 33-4. On the related notion of legal characterisation, which I briefly address in section 3 below, see also Fudge (2018b).
[47] Zelizer (2012), p. 153.
[48] Cotterrell (2013), p. 55.
[49] ibid; see Perry-Kessaris (2013), pp. 403-404.

But his abstract assertion that some networks of community 'are dominated by (but rarely exclusively made up of) economic [instrumental] relations' ultimately seems to neglect how the particular character of a network of community comes about.[50] Economic phenomena thus threaten to dissolve into the contingent complexity of the specific social interactions that constitute them.

A third Weberian approach has been charted by Ruth Dukes, for whom Weber's thought is also 'especially useful when it comes to the analysis of [such phenomena as] contracting for work *at the micro level*' – but not only.[51] Like Cotterrell, Dukes closely follows Weber in her distinction between different ideal types of social action, namely those that are motivated by either 'material or ideal interests', or 'by habits or emotions'.[52] Her crucial contribution to conceptualising how social, economic and legal phenomena relate to one another seems to be her use of Weber's 'observation that, in the modern market economy, economic action [is] routinely oriented [not only to other actors but also] to the legal order'.[53] When concluding a purchase or sale with another party, for instance, an individual will take into account the background stability provided by relevant legal norms as well as the enforcement of these norms.

Excavating this aspect of Weber's work helps Dukes to engage more actively with the legal dimension of social reality than both Zelizer and Cotterrell do. While Zelizer's approach tends to treat the legal characterisation of social relations, undertaken for instance by courts, as the ultimate determinant or arbiter of social meaning,[54] Cotterrell's statements regarding law's relevance for economic processes are so ambiguous that the analytical category of 'the legal' often appears superfluous.[55] For Dukes, by contrast, any form of social action – and economic action in particular – is both shaped by *and shapes* relevant legal norms.[56] Dukes regards both legal and economic relations as key dimensions of social reality.[57] In the conception of 'contracting for work' that she develops, it

[50] Cotterrell (2013), pp. 51, 56-57.
[51] Dukes (2019), p. 407 (emphasis added). Dukes goes on to stress Weber's innovative use of the meso-level and macro-level concept of the 'labour constitution', on which I seek to build as I explain further below in this section.
[52] ibid, p. 409.
[53] ibid.
[54] Zelizer (2012), pp. 153-4. On the concept of legal characterisation, see Fudge (2018b).
[55] Cotterrell (2013), pp. 60-5.
[56] Dukes (2019), pp. 398, 419.
[57] In the words of philosopher Kojin Karatani, both 'state [and] capital … have their own real bases' and need to be understood at once on their own terms and in their interrelation. Karatani (2014), p. xvi.

> 'ought to be conceived of as, at once, economic, social *and* legal: as likely economically motivated, but influenced too – and perhaps to a significant degree – by actors' perceptions of the applicable legal rules, social norms, and shared understandings of what is standard or fair or reasonable practice in the specific context.'[58]

In much clearer terms than Zelizer, Dukes thus articulates the *parallel* significance of overlapping economic, social and legal processes in constituting reality. She goes so far as to speak not only of economic social action, but also of 'legal social action' such as adjudication.[59] Overall, her approach to the 'sociology of law and economics', which she deploys in the field of labour law, breaks free from the problematic Polanyian image of an economy embedded in society. It asserts the significant impact of legal processes on social reality while at the same time treating both legal and economic relations as socially constructed.

Beyond Polanyi and Weber, the ideas initially elaborated by the US legal realists have also been a recurrent point of reference for some ESL scholars. The openness of most legal norms to a range of interpretations has been incorporated into the ESL literature by a number of scholars.[60] Kerry Rittich in particular has revived the related insight that the manner in which legal norms are created and applied in a particular field is itself a process of 'constructing, altering or reinforcing' the relative position of market participants.[61] Her critique of the project of labour market flexibility further draws on the realist argument that the application of law and the consequent making of markets is always informed by political preferences.[62] Along the lines of Dukes' conception of the interrelation between economic and legal phenomena, Rittich explicitly refers to the legal realist tradition when she argues that 'the market is itself always a mixed legal and economic institution'.[63] This interrelation between law and the economy has been interrogated further by Prabha Kotiswaran's discussion of the public/private and market/family distinctions as they have been constructed and upheld by law. Kotiswaran contrasts care work, which tends to be subjected to 'private' economic competition, with sex work primarily subjected to 'public' fundamental legal concerns.[64]

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[58] Dukes (2019), p. 406.
[59] ibid, p. 416.
[60] Rittich (2014); Block (2013); Kotiswaran (2013).
[61] Rittich (2014), p. 328; see Block (2013), p. 31.
[62] Rittich (2014), pp. 330-337.
[63] ibid, p. 328.
[64] Kotiswaran (2013), pp. 117-123.

A third point of reference in the existing ESL literature has been Continental social theory, in particular in its Foucauldian and systems-theoretical variants. Rittich is one of the ESL scholars who place great emphasis on Foucault's concept of governmentality, by which is meant the treatment of the economy – since the late eighteenth century – as 'a specific sector of reality'[65] that 'possesses natural property that must be respected', especially by the state.[66] The implication that the autonomy of the economy from society is at once *socially effective and illusory* is an important advance over the embeddedness model. Rittich illuminates how the term 'labour market flexibility' has served as both 'a discourse and a set of practices' that define what constitutes meaningful and legitimate social conduct within labour markets.[67] Ritu Birla elaborates, also drawing on Foucault's work, how the rise of governmentality in Western countries and subsequently in India affected not only the role of the state towards the economy, but also ideals of family relations and individual conduct.[68] Both Rittich and Birla insightfully engage with Foucault's interest in the relation between *homo economicus* and the legal subject. Birla's genealogy of the corporate person in colonial India's legal history uncovers how the creation of corporate personality turned the abstract legal subject (rather than traditional economic actors) into the basic unit of economic activity, and thus contributed to the making of capitalist markets.[69]

Birla does not lose sight of either the legal or the economic dimension of her object of study, which seems to be a consequence of her analytical starting point. By rigorously centring her study on the corporate person as a key intersection 'between the legal subject and *homo economicus*', she captures the site where both of these dimensions meet.[70] By contrast, Rittich approaches her object of study – labour market flexibility – through the lens of law reform and 'governance', which prevents her from clearly distinguishing between legal and economic dynamics.[71] Like Birla, Frerich also weaves this distinction into the fundamental research design of her study of money, which she appreciates as a 'social phenomenon' that is at once 'an economic commodity and a legal relation'.[72] As this formulation indicates, Frerichs and Birla

[65] Birla (2013), p. 103 quoting Foucault.
[66] Rittich (2014), p. 330.
[67] ibid, p. 333.
[68] Birla (2013), p. 103-4; see Rittich (2014), pp. 329, 338-341.
[69] Birla (2013), pp. 98-100, 113-114.
[70] ibid, p. 92; see Frerichs (2013).
[71] Rittich (2014), pp. 330-8.
[72] Frerichs (2013), pp. 7-8.

further concur in the place that they accord to the social. Unlike Dukes, who seems to treat the economic, legal and social dimensions of reality as possessing broadly similar significance for instance for work relations,[73] Frerichs and Birla see a qualitative difference between the economic and the legal on the one hand and the social on the other.

ESL scholars have tended to subject systems theory to a more critical reception than Foucault. Dukes rejects the narrow manner in which Teubner defines the economic system, which for him 'extends no further, apparently, than the market and individual market actors' but does not include trade unions.[74] Similarly, Dukes takes Teubner to task for downplaying 'the importance of the role that states … continue to play in constituting' the economic sphere.[75] What is significant about systems theory in the present context, however, is its interest in the radical gap between different social systems, such as law and the economy, which adhere to fundamentally different logics. While most pioneers of the economic sociology of law – such as Weber and Polanyi, and Foucault and Habermas – tended to emphasise how the social is increasingly being colonised by economic and legal processes, systems theory instead focuses on the enduring boundaries between, for instance, law and the economy.

In summary, Polanyian approaches paradoxically tend to overemphasise the society/economy distinction, while Zelizer's and Cotterrell's Weberian approaches risk downplaying it. By contrast, Dukes, Birla and Frerich's analytical starting points – contracting for work, the corporate person and money – each lend themselves to being examined as both a legal and an economic relation, which yields a more nuanced picture than abstract analyses. The latter two scholars are further attentive to a qualitative difference between the economic and legal dimensions on the one hand and the social on the other.[76] A key question remains as to how the economic and the legal might be 'at once distinct [from] and the same' as the social.[77] In the next section I outline the contribution that I hope to make to ESL and empirical labour law scholarship.

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[73] Esp. Dukes (2019), p. 406.
[74] Dukes (2014), p. 295.
[75] ibid.
[76] But see Dukes on economic action being routinely oriented towards the legal order, perhaps vice versa too, which would emphasise their similar quality as opposed to the social. Her use of the terms 'legal social action' and, more traditionally, 'economic social action' suggests a similar presumption.
[77] Ashiagbor et al. (2013), p. 4 (referring specifically to the economic and the social).

3. A processual understanding of the econo-socio-legal

While I am just as interested in the relation between legal, economic and (other) social aspects of the growth and stabilisation of agency-mediated work as ESL scholars are with regard to the econo-socio-legal interplay in their objects of analysis, I choose a distinct approach to understanding it. My three-fold approach responds to a key concern of ESL scholarship – to explore how 'relationships between legal and economic phenomena' may be studied[78] – by recourse to the notion of *epistemological perspectives*, to the ways in which they are *stabilised* and to the *hinges* that allow us to move between them. I start from the assumption, first, that different ways of looking at an empirical phenomenon such as agency work will inform how we see it. Each perspective imposes distinct registers, focal points and units of analysis when directed at one and the same empirical phenomenon. Such ways of seeing the world are shared – and reproduced – by a particular community, for instance one composed of a particular profession. We might, then, position ourselves within orthodox economics, legal doctrine or classical sociology. These perspectives may be thought of as the main habitat – if not the origin – of the economic, legal and social sphere in the modern sense, respectively. Moreover, what is common to these three perspectives is that each has generated a vocabulary and logic that appear to rely only on its own internal (economic, legal or social) categories. In the language of systems theory, they are thus 'operationally closed'.[79]

Our perception of agency-mediated work, for instance, from the perspective of *orthodox economics* may centre on the financial considerations that lead companies to move part of their workforce onto agency contracts or on the macroeconomic circumstances in which agency work is more or less prevalent. If we looked at agency work through the lens of *classical sociology*, we might instead gravitate towards the motivations and experiences of individuals on agency work contracts, pay attention to which social groups are more likely to work through employment agencies and why, or consider how employer perceptions of permanent and temporary work have been actively shaped by employment agencies.[80] Adopting the perspective of *legal doctrine* – as I do in the following Chapter – yields yet another picture, which is dominated by concerns as to whether agency workers can claim employment rights and in relation to which employing entity, and to what extent trade unions are entitled to represent and bargain for agency workers. In particular, labour law doctrine has foregrounded technical legal

[78] ibid, p. 1.
[79] E.g. Luhmann (1991), p. 1440.
[80] See Hatton (2011).

considerations while pushing back against those approaches to determining the employment status of agency workers that rely on social context.

In the interstices of these dominant perspectives, other perspectives can be adopted. One would be a *regulation* perspective, which is guided by non-technical, social preferences and motivations but similarly acknowledges economic considerations.[81] This is the perspective from which I approach agency-mediated work in Chapter 4, where I explore how labour market institutions – namely, trade unions and state regulators – have sought initially to maintain a distance from agency-mediated work and later pragmatically engaged with it in accordance with their own priorities. Another hybrid perspective would be the purely *commercial* approach that reportedly ran through the early activities of employment agencies in the UK, which took no interest in the legal framework that might be seen to apply to them.[82] Such a commercial perspective on agency work would be guided by economic considerations while at the same time seeking to capitalise on the diverse (social) preferences of the consumers and providers of labour, that is, end users and agency workers. A third exemplary perspective that is situated between the concerns of legal doctrine, orthodox economics and classical sociology may be described as *legal engineering*,[83] in which businesses take economic interests as their starting point but similarly engage with legal technicalities. This is the perspective that I adopt in Chapter 5, in which I trace how employment agencies and other private labour market intermediaries have pursued innovations in the way they contract with individual workers, with end users and with one another. Such innovations have been driven by a motivation to remain profitable.

Each of the three perspectives that I adopt in my empirical chapters are characterised by a type of consideration that they prioritise, and a different type of consideration to which they react or against which they position themselves. This constellation is summarised in figure 2.1 below.

[81] The same is true of much empirical socio-legal scholarship, as well as the practices of advisers who are not legally trained. See e.g. Banakar and Travers (2005); Busby et al. (2013). As I will explore in Chapter 6, differences seem to arise with regard to the main 'antagonist' of the regulation perspective on the one hand and the socio-legal advisory perspective on the other, and when considering their underlying (though usually implicit) political orientation.

[82] Interview transcript S1; interview transcript S6; Green (2018).

[83] I owe this term to Doreen McBarnet, whose conception of legal engineering I address in the following section.

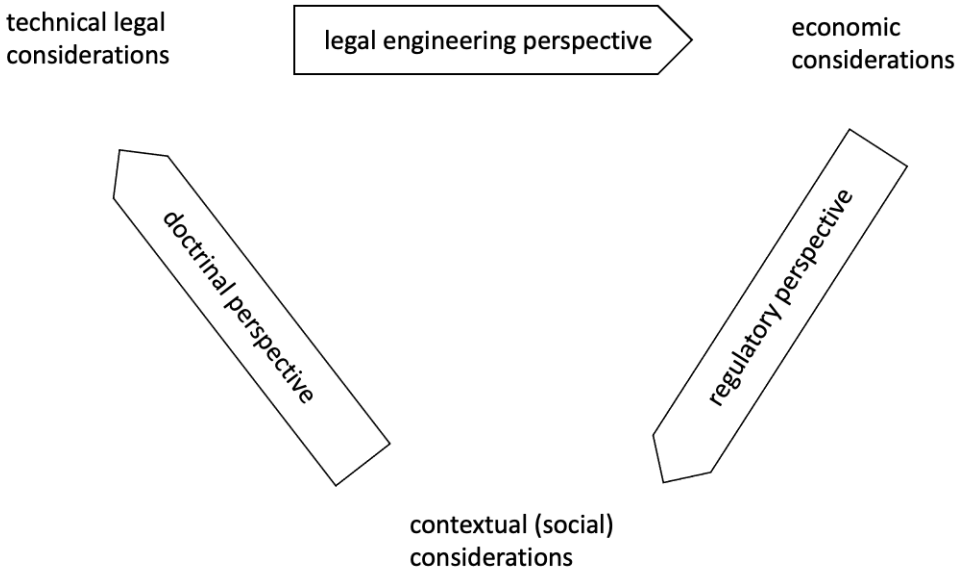

Figure 2.1: Prioritised and antagonised considerations of each perspective

This initial conception of the three epistemological perspectives that I adopt in my study follows Barmes' methodological choice of keeping different perspectives on her concrete object of study distinct from one another. Similarly, by choosing agency-mediated work as my analytical departure point, I have like Barmes chosen an object that at its core is a social phenomenon – rather than departing for instance from the technical legal terms that have been employed to describe aspects of it (such as agency work in the narrow sense of existing legislation; temps and contractors; or the supply of temporary labour). Like Grabham, I have sought to trace elements of agency-mediated work across different planes that are conventionally regarded as separate. These recurring elements include the legal, social and economic considerations to which my three epistemological perspectives relate in different ways, as I have illustrated in figure 2.1. They further include the categories of employment and self-employment and, to some extent, such intermediate categories as workers, temps and contractors. In the remainder of this section, I will expand on how each of my three perspectives on agency-mediated work constructs economic, social and legal factors, and is stabilised in relation to them, before addressing how the categories of employment, self-employment and others operate as hinges between these perspectives.

I have already suggested that the manner in which legal, economic and social considerations are perceived and weighed differs as between the doctrinal, regulatory and legal

engineering perspectives on agency-mediated work. With Zelizer, one might refer to the process by which each epistemological perspective orients itself towards the interplay of the legal, the economic and the social as relational work, or simply as *boundary-drawing work*. The primary type of boundary-drawing work undertaken from the doctrinal perspective on agency-mediated work is employment status analysis. During the early 1980s, the doctrinal labour law community came to prioritise technical approaches to legal concepts – such as 'control' or 'obligations' – while pushing back against more contextual approaches that would emphasise the social context in which these concepts are applied. Labour market regulators, by contrast, have tended to develop pragmatic enforcement strategies that prioritise the specific socio-political context while responding to economic changes and challenges. The boundary-drawing work of employment agencies and their legal advisors, thirdly – which I have called legal engineering – has given priority to the economic goal of keeping their business models profitable in the face of legal change.

For most of the past four decades each perspective has thus revolved around – and been stabilised by – a characteristic consensus among its constituent communities. This consensus provided guidance as to what to take into account when drawing the boundary between employment and self-employment. Building on Zelizer's concept of relational work, this consensus might be called a relational work protocol – or *boundary-drawing protocol* – since it guides how members of the doctrinal, regulatory or business community engage with concrete instances of agency work in practice. Achieving a consensus within an epistemic community as to which boundary-drawing protocol is plausible, however, is a contested process. In each of the three communities, a new boundary-drawing protocol emerged around 1980, and has been subject to internal challenges since then. Moreover, the different ways in which employment has been distinguished from self-employment – and how the grey area that I call liminal employment has been placed in relation to this binary – from the three perspectives have themselves been in competition with one another. Crucially, those intermediate categories by which employment agencies and their legal advisers have sought to capture liminal employment have been more enduring than either the intermediate concepts developed from a doctrinal perspective or intermediate regulatory approaches.

Such boundary-drawing protocols, as the consensual approaches to agency-mediated work that has held the three epistemic communities together, are what has helped me delimit the three perspectives from one another where they potentially overlap. This has been the case with trade

unions, which have mostly engaged with agency-mediated workers through their efforts to recruit them, through their campaigning on agency workers' behalf and through their political efforts at drawing legislators' attention to their particular grievances. Beyond these activities – which I discuss under the perspective of labour market regulation in Chapter 4 – trade unions have at times also supported agency workers' legal claims before courts and tribunals. I have treated the latter type of activity as distinct from the former, since it has required trade union representatives to engage with a different logic of approaching agency-mediated work – that is, with a different boundary-drawing protocol. The same applies to employment solicitors and barristers. They may either approach atypical work relations from the doctrinal perspective by navigating between technical legal and contextual social factors of employment status, or they may adopt the perspective of legal engineering by prioritising their clients' economic concerns and responding to technical legal factors. One and the same lawyer might even take one perspective when representing one client and the other when representing another client.

With a view to key themes of ESL scholarship, my use of Zelizer's concept of relational work allows me to refine what it means for 'the rationality of the market' to be 'hegemonic as a driver of [legal] reform' in the current historical phase of neoliberalism, as Rittich has aptly observed.[84] Economic categories have indeed guided how employment agencies have appropriated and refashioned the categories of employee and self-employed and further legal concepts such as 'temporary workplace' or 'company'. As I will show in Chapter 4, state regulators and trade unions alike have responded to shifts in the economic position of the British state and of trade union members. Since the late 2000s, moreover, even judges have been explicit in their reliance on economic categories – in the form of 'business necessity' and 'bargaining power' – when resolving conflicts between a technical and a contextual understanding of legal terms relating to agency work.

Precisely why agencies and other intermediaries have been more successful at structuring the space of liminal employment than judges and litigants on the one hand and trade unions and state regulators on the other appears to be a more complex problem than the notion of hegemony – or Zelizer's concept of relational work – can account for. It is an open question that I will touch on throughout the following chapters and that I discuss in more depth in sections 2 and 4 of Chapter 6. The tentative hypothesis that emerges from my substantive analyses of the doctrinal, regulatory and business perspectives on agency work in Chapters 3 to

[84] Rittich (2014), p. 327.

5 is that the three perspectives have differed fundamentally as to the final guarantor of their stability. While the doctrinal and the regulatory community seem ultimately to fall back on a fixed notion of the needs of the labour market and the limits of their legal mandate, respectively, the legal engineering community ultimately seems to rely on *ever-changing social* conceptions of work and work relations. I will elaborate this hypothesis and situate it within existing ESL scholarship in sections 2 and 4 of Chapter 6.

The concept of epistemological perspectives on the reality 'around us' invites the question of whether all we can ever do is adopt one or the other existing perspective on a particular phenomenon. In the context of this study, I would suggest that the answer is a two-pronged 'yes, but …'. As I trace in Chapters 3 and 4, one option pursued by some litigants and judges, and by a minority of trade unions and state regulators, has been to reverse the conventional manner in which agency-mediated work should be approached as a matter of doctrinal and regulatory consensus, which I have called their boundary-drawing protocol. Some litigants and judges have thus given precedence to contextual factors over technical legal ones, with the intention of bringing certain groups of agency workers within the scope of employment rights protection. As I outline in the first section of Chapter 3, this foregrounding of social context may be described as a purposive approach. At times, a minority of trade unions and state regulators have similarly tried to reverse the conventional regulatory approach to agency-mediated work by prioritising economic considerations over contextual ones. Examples include the Inland Revenue's brief pursuit of higher-paid agency workers in the late 1990s and a grassroots trade union's efforts to take an assertive stance against arbitrary costs imposed on its agency worker members. Both dissenting initiatives flew in the face of the wider socio-political context, which has been the bedrock of both trade unions' and state regulators' strategies regarding agency-mediated work. To date, however, such attempts to invert existing perspectives have remained an appendage of the perspectives they have sought to destabilise.

A second option of how one might relate to existing epistemological perspectives on agency work is to explore their respective inner logics as well as their interplay. This is the line of thinking that I favour in this study, and which reflexively tries to account also for the first, more immediate critique.[85] Besides uncovering what holds each perspective together and what

[85] This is the departure point for my attempt to problematise the perspectives of legal doctrine, economics and sociology on atypical work relations themselves, as I suggested in relation to Prassl's work in the first section of this Chapter. I will explore this point further in the last three sections of Chapter 6, in which I also address the transformative potential held by the second, immanent approach that I favour.

might explain the legal engineering community's relative success in continuously forcing the doctrinal and regulatory communities to respond to its innovations, this line of thinking also asks how the three perspectives intersect. For all their different emphases and registers, all three perspectives revolve around the binary categories of employment and self-employment, and grapple with the grey area between the two. Both employment and self-employment correspond with what Zelizer has called 'relational packages',[86] that is, patterns of social activity that are conventionally recognised as a particular category. More specifically, Dukes' Weberian understanding of a 'labour constitution' – as a 'particular regime of labour relations' that share the same social, legal and economic characteristics – aptly captures such patterns in the field of work relations.[87]

Traditional employment in the sense of a full-time, stable work relation with one and the same employer, of indefinite duration, may be seen as one such pattern, usually referred to as the regulatory ideal of the Standard Employment Relationship.[88] Judges, litigants, trade unions, state regulators and employment agencies all recognise and refer to this category of work. A second category of this kind is traditional self-employment, characterised by the entrepreneurial use of capital in the pursuit of profit, which involves investment decisions, managerial oversight and marketing strategies. Again, all of the actors I have studied recognise this (much narrower) pattern of work. Both employment and self-employment may further be seen as having legal, economic and social salience. That is, these categories operate as hinges for instance between an employer's finance department authorising new hires, the solicitors drafting the relevant employment contracts and the individuals who are being hired. In this example, the respective economic, legal and social meanings of employment are congruous with one another and join the disparate perspectives involved.[89]

In the context of the ESL scholarship reviewed in the previous section, this conception of certain linkages or hinges between epistemological perspectives – and between the (ontological) dimensions of the legal, the economic and the social that form the starting point of the economic sociology of law – mirrors Birla, Frerichs and Dukes's respective analyses of the corporate person, money and contracting for work. The strength of their analyses is that

[86] Zelizer (2012), pp. 151-5

[87] Dukes (2019), p. 412.

[88] See my discussion of this regulatory ideal, and its relation to atypical work, in the second and third sections of Chapter 1.

[89] My use of the term 'hinge' is inspired by Emily Grabham's in Grabham (2016), pp. 34-36.

they aim to adopt at least two perspectives on their empirical object at once. At the same time, their work also indicates that such a bifocal view is not easy to maintain. Birla's study, for instance, of the crystallisation of the corporate person in Indian society since the mid-19th century acknowledges both how so-called 'family firms' have been characterised from a technical legal perspective and how they have operated from the perspective of economics. [90] Her study then turns, however, into a discussion of relevant legal doctrine examining significant judicial decisions – which veers away from her earlier, parallel adoption of an economic perspective.[91] Similarly, Frerich's simultaneous attention to economic and legal considerations, in her discussion of money, slides into an uncoupling of both perspectives. Rather than dropping one perspective altogether, Frerich ends up addressing the economic and legal perspective on money independently of one another, one in the context of Weber's work and the other in the context of Polanyi's writing.[92] In the present study, I have tried to avoid such complications by devoting one substantial Chapter to each of the perspectives of labour law doctrine, labour market regulation and legal engineering. On that basis, I hope to be able to draw more detailed links between the three perspectives in my concluding Chapter.

An even more intricate set of difficulties arises, however, when I turn to the space between traditional employment and self-employment as it is perceived by the doctrinal, regulatory and legal engineering communities. In this regard, the hinges between the three perspectives seem broken. Whom the manager of a recruitment agency calls a temp may well be considered a worker by an employment tribunal, an employee by HMRC and a self-employed individual by a trade union. Plausible combinations of this kind abound, and my interview respondents would regularly slip between different registers, correct themselves and at times even explicitly address such divergences between different sets of terminology. Particular attention will be paid in the following three Chapters to how agency-mediated and other atypical work relations – that is, work relations falling between the categories of traditional employment and self-employment – have conventionally been characterised from the three perspectives over time, and which exceptions have been carved out. The overall picture, which I assemble in more detail in Chapter 6, is paradoxical: while the lion's share of liminal employment has remained invisible and unnamed from the doctrinal and regulatory perspectives during the last four

[90] Birla (2013), p. 99. Birla reveals how law initially characterised the organisational forms in which those living under colonial rule traded and conducted business as 'private', and thus not formally part of the market economy. At the same time, she notes that these 'family firms' were already deeply integrated into the colonial economy.
[91] ibid, pp. 107-14.
[92] Frerichs (2013), pp. 25-26; compare pp. 10-16 with pp. 18-25.

decades, most work relations falling within this grey area may easily be (positively) classified from the perspective of employment agencies and other intermediaries. I refer to this paradoxical tendency as the formalisation of liminal employment, since it renders most agency-mediated work relations at once marketable to individuals and businesses *and* invisible to the framework of employment and labour protections.

4. Methodological implications

Since my ambition has been to adopt the perspectives of labour law doctrine, labour market regulation and legal engineering on agency-mediated work in a manner that is both plausible and insightful, I have taken three key methodological decisions. My first decision relates to my general reading of the material from which I have reconstructed each perspective. When I began to move back and forth for instance between case reports, trade union publications and interviews with employment agency managers, regulators and employment law practitioners during the second year of my research, I developed a sense that I would need to bring the fundamental differences between these materials as regards their focus and register to bear on my analysis and writing. Over time, I recognised that I was accentuating different aspects and considerations myself when writing from the perspectives of doctrine, regulation and legal engineering. I was doing so to such an extent that at least one internal reviewer seemed puzzled, during a progress review, by the formal contrasts between what are now chapters 3, 4 and 5. Two particular comments that stayed with me were the question of which of these three perspectives I felt most comfortable writing from, and the view that my rendering of doctrinal labour law discourse seemed to take the meandering paths on which legal technicalities wound themselves through the case reports of the past four decades almost too seriously or too literally.

Rather than try to even out these differences between the empirical chapters of my thesis, I have slightly elevated them in line with those characteristics of each perspective that began to stand out to me more clearly. I therefore took *legal technicalities* as the main concern of the doctrinal perspective; I treated the *socio-political context* in which trade unions and state regulators operated as the key concern of the regulatory perspective; and I positioned the *economic profitability* of different business models as the central concern of the legal engineering perspective. Within the sociological tradition, my approach might be described as constructing ideal-types of the three perspectives. It follow's Weber's interest in the 'one-sided accentuation'

of certain aspects of his objects of study, which Weber understood as a 'synthesis of a great many diffuse, discrete … concrete individual phenomena … arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct'.[93]

The process of deliberately elevating these concerns has differed from one perspective to the next. In the chapter in which I trace labour law doctrine in relation to agency-mediated and other atypical work, I have been guided by the sensitivity to technical legal devices – mainly concepts in my case, but potentially also specific actions and physical objects – that permeates the work of Annelise Riles and Emily Grabham.[94] I have thus sought to register how such concepts as 'mutuality of obligation' or the putative employer's intention (not) to enter an employment contract have been enlisted in individual court decisions, in textbooks and doctrinal articles and by individual solicitors and barristers. More significantly, I have tried to cultivate a sensitivity for how these individual uses of certain concepts – and of their constituent elements – have referred to one another. The result is a tracing of how those concepts that are today regarded as essential to determining the employment status of atypical workers emerged, how they influenced one another and how they underwent changes. If this tracing is seen as overly literal, or comically slow, that may be because I have aimed to take the doctrinal labour law discourse at face value: for instance, in examining the sudden emergence of 'mutuality of obligation' as a relevant concept for determining the existence of an employment contract around 1980 I have tried to assess how this concept was first contemplated and how relevant precedent was only later identified.

In the chapter in which I examine the strategies used by trade unions and state regulators in relation to agency-mediated work, I followed my interlocutors' lead and foregrounded such socio-political developments as changes of government and the public discourse on EU immigration and modern slavery. My primary supervisor often reminded me too that the political and wider social context in which these actors revised their strategies was key to understanding their activities. The focus of chapter 4 is therefore on particular socio-political constellations, which were the immediate backdrop against which both trade unions and state regulators have pragmatically adjusted their approaches to agency work.

[93] Weber (1949), p. 90 (emphases omitted).
[94] See in particular Riles (2003), Riles (2011), Grabham (2016a).

In adopting the perspective of employment agencies, other private labour market intermediaries and their legal advisers, I have found Doreen McBarnet's work on practices of 'legal engineering' in the areas of tax and finance particularly useful as a methodological compass. McBarnet's research has centred on practices of 'creative transaction structuring in which the driving characteristic is to deliberately and systematically thwart regulation and bypass regulatory control'. She has described legal engineering as 'integral to the construction [for instance] of innovative financial products in banking' that would otherwise be economically profitable but in obvious violation of legal rules.[95] In the case of the emerging UK recruitment industry, its innovative products (temps, contractors and other alternatives to traditional employment and self-employment) have been designed directly by lawyers and the recruitment businesses for whom they work.[96] Indeed, in my conversations with representatives of agencies and other intermediaries and with their legal advisers, I was struck by how frequently my interlocutors referred on their own initiative to the economic challenges and benefits of different business models. These are the considerations that I have thus deliberately foregrounded in chapter 5.

My second methodological decision relates to how I have selected and produced the specific material on the basis of which I have reconstructed the perspectives of labour law doctrine, labour market regulation and legal engineering. My guiding principle in this regard has been to build each perspective from within, starting from a conventional understanding of what doctrine, labour market regulation and agencies' business practices are and looking at the material frequently referenced by each perspective. Key sites of labour law doctrine, I have thus assumed, are case reports, textbooks and specialist journal articles and practitioners' commentary. Like Barmes, I have approached these documents from a qualitative empirical angle: not as documents that cohere, if interpreted in the right way, into a wider legal framework but as artefacts of a particular form of discourse that follows its own internal logic, elements of which I may be able to illuminate. I have sampled 56 reported cases, nine leading labour law textbooks and a small number of doctrinal commentary by established scholars. Again like Barmes, I have coded this material with a view to specific doctrines and legal issues, discrepancies between headnote and content of a case report, particularly emphatic or affective language, and references to economic categories and the wider labour market. I have done so

[95] McBarnet (2010), pp. 2-3.

[96] In McBarnet's account, product innovation in the financial markets has differed insofar as pricing and mathematical models are logically prior to the task of making new products formally comply with relevant legal rules; ibid, p. 3.

using the data analysis software NVivo. In my approach to leading textbooks, I have further traced changes of content over time, usually sampling at least one edition per decade – if possible including one edition before and one edition after significant doctrinal events such as major Court of Appeal decisions in 1984 and in 2008 – and comparing the sections specifically dealing with employment status, agency work and related issues. These materials form the backbone of chapter 3 but continue to be a point of orientation in subsequent chapters.

I have similarly sought to build the perspectives of labour market regulation – personified by the traditional labour market institutions of trade unions and state regulators – and of agencies' and other intermediaries' legal engineering from within. I have done so by assuming that trade unions' and state regulators' key encounters with agency-mediated work are the grievances that workers share with trade unions, trade union research and strategies, and the enforcement practices and internal research of the relevant state regulators.[97] As for agencies and other intermediaries, I have assumed key sites of their engagement with agency-mediated work to be their general orientation towards specific sectors and types of work and their communication and contractual arrangements with other businesses and with individual workers. To explore these aspects of the regulatory and legal engineering perspective, I have conducted 29 qualitative, semi-structured interviews with solicitors, barristers, agency managers, trade unionists, state enforcement officers and other experts who have relevant practical experience of agency work and the recruitment industry. I contacted potential participants by way of a mix of snowballing and individual approaches. I also used large and medium-sized professional events as occasions to introduce myself and my research and to ask for an interview. In line with the formal ethics approval that I obtained from the Faculty of Social Sciences Research Ethics Advisory Group in February 2017, I shared a detailed participant information sheet and a consent form with prospective participants several days ahead of an interview.

[97] As I detail in Chapter 4, I have included the Employment Agencies Licensing Office/Employment Agencies Standards, the Inland Revenue/HMRC and the Gangmasters Licensing Authority/Gangmasters and Labour Abuse Authority in my analysis.

S1: specialist employment solicitor	A1: interview cancelled	U1: trade union officer
S2: employment solicitor	A2: interview cancelled	U2: trade union leader
S3: interview cancelled	A3: agency recruiter	U3: trade union officer
S4: employment solicitor	A4: agency director	U4: trade union officer
S5: employment solicitor	A5: industry representative	U5: trade union officer
S6: two specialist employment solicitors	A6: agency director	U6: three trade union officers
S7: specialist employment solicitor	A7: interview cancelled	E1: labour market expert
S8: employment solicitor	A8: agency recruiter	E2: labour market expert
S9: specialist employment solicitor	A9: interview cancelled	R1: enforcement officer
B1: employment barrister	A10: interview cancelled	
B2: interview cancelled	A11: agency manager	
B3: specialist employment barrister	A12: interview cancelled	
B4: employment barrister	A13: umbrella director	
J1: former employment judge	A14: interview cancelled	
	A15: interview cancelled	
	A16: industry representative	

Figure 2.1 List of interviews and identifiers

I loosely divided my interviews into three parts. I would begin by asking my interlocutors broad questions about their first encounters with agency work issues and how their approach to such issues had evolved over the course of their careers. I would then, in the main part of our conversation, pick out more specific subject areas that they had mentioned, issues and actors that I otherwise knew they had engaged with, and relevant questions that had emerged but had been left unanswered in previous interviews. I would usually end the interview by asking some broader questions about what changes my interlocutors would expect to see, and would like to see, in relation to the themes we had covered. As for the form of my interviews, I noticed that I adopted slightly difference styles of communication and ways of presenting my research focus in accordance with the respective professional habits and political leanings of the trade unionists, HR professionals, different groups of solicitors and barristers, judges and enforcement officers who I was interested in speaking to. At times this was deliberate, at other

times I did so without realising. While it is advisable to approach potential interviewees and explain research interests in a language and style that appears meaningful and appropriate to them, the different approaches that I initially adopted intuitively seem to point to the stark differences in how members of the doctrinal, regulatory and legal engineering communities conduct themselves and speak about agency-mediated work. In hindsight, these discursive and aesthetic differences seem to validate my interest in studying these communities' perspectives separately before analytically bringing them together.

My interviews lasted between 35 minutes and two hours, with the majority lasting slightly more than one hour. I recorded all but two interviews and transcribed all recordings myself. Immediately after the two interviews that I could not record, I used my audio recorder to capture my memory of the interview, which helped me write up my written notes into more detailed interview summaries. I have anonymised any direct quotations and other references to my interview participants in all published material as necessary, with a view to ensuring that participants cannot be identified. I have instead referred to their professional background, the nature of their exposure to the legal regulation of agency work and to some extent demographic information. Throughout my study, I have been the only one who had access to the entirety of the data produced. I have stored the interview transcripts – and recordings for up to ten days after an interview – in encrypted, password-protected form on my personal laptop. I have regularly created encrypted backups of the hard disk of my laptop using an external hard drive that I keep in a safe location at home. The core of my discussion in chapters 4 and 5 is rooted in the data produced in these interviews. I have supplemented my interview data with documents published by government bodies such as HMRC, trade magazines and trade union publications.

My third methodological decision relates to the two-pronged approach that I have taken to analysing these sets of material. I initially focused on the level of content, by which I mean those legal concepts, regulatory strategies and business innovations that are frequently emphasised in my empirical material as well as their interrelation. My thematic coding has been very helpful in this regard, since it allowed me to identify the recurrence of themes across case reports, interview transcripts and other documents and how such themes have been placed in relation to other relevant themes. On the level of content, my coding eventually also allowed me to distinguish different phases in each epistemic community's engagement with agency-

mediated work with regard to those concepts and practices that seemed salient at particular times.

Analysing the content of my interviews, case reports and further empirical material alone, however, did not prove sufficient for answering my research questions. I recognised this shortcoming of content analysis when trying to make analytical sense of trade union approaches to agency-mediated work over the past four decades. Besides their occasional support of significant litigation pursued by atypical workers to which I refer in chapters 3 and 4, I had difficulty prompting any comments in my interviews – or identifying written documentation – about how trade unions engaged with agency workers prior to the late 1990s. In trying to understand this lacuna of my empirical material, I came to the conclusion that I had to interpret this absence of material itself. Regarding what trade unions and state regulators have done and failed to do as similarly important, I developed my argument that trade unions and state regulators have tended to insulate the recruitment market from the enforcement of labour standards since its emergence. This view was later confirmed with regard to trade unions in an interview that I conducted with an experienced trade union organiser-turned-researcher.[98] With a view to state regulators, I could eventually reconstruct their early perspective from published reports. Building on the idea of absences in my empirical material, I also began to understand a lacuna I had encountered when seeking to identify legal practitioners with experience in the field of agency work. Employment solicitors frequently appeared puzzled when I asked them, for instance at professional conferences, if they could think of any colleagues who regularly dealt with atypical worker issues or who might be considered experts in that area. Such issues seemed to have no proper place within the sub-fields of employment law practice. One employment solicitor merely commented that these are basic issues requiring no specialist knowledge that every employment lawyer occasionally has to deal with.

Beyond content analysis, I would now describe my approach to analysing my empirical material as developing a sensitivity for the discontinuities and silences in my material. By discontinuities I mean the near lack of material on trade union engagement with agency work prior to the late 1990s and the puzzlement or disinterest of most (general) employment lawyers to whom my questions suggested that agency workers and other atypical workers might give

[98] Interview transcript E2.

rise to their own sub-set of employment law issues.[99] I also refer to the sensitivity that I have sought to develop for the near absences of certain types of considerations from each of the three perspectives that I have adopted. As I explore in chapters 3 to 5 and elaborate in chapter 6, labour law doctrine has tended to exclude *economic considerations* from its discourse, while trade unions and state regulators have tended not to address *technical legal matters* and agencies, other intermediaries and their legal advisers have tended to exclude the *social context* of their practices from their perspective on agency-mediated work. My analytical synthesis of the three perspectives has greatly benefited from work in the economic sociology of law and its sensitivity to the interrelation between the legal, the economic and the social. Lastly, my attention to discontinuities has allowed me to formulate and refine my concept of liminal employment, which I regard as the discontinuity or rupture afflicting labour (and tax) law's foundational binary of employment and self-employment.

All three of my key methodological decisions – to elevate the distinct focal points and registers of the three perspectives, to reconstruct each perspective from within and on the basis of its typical empirical output, and to pay attention both to the content of this material and the gaps within it – are derived in equal measure from existing work in the economic sociology of law and in empirical labour law research and from my own engagement with my material. A particular wealth of empirical material was available for my analysis of the doctrinal perspective on agency-mediated work, while the methodological temptation of following the traditional legal analysis adopted in case reports and textbooks initially seemed particularly strong. Thanks to the reminder issued by ESL scholarship that law exists in interrelation with the social and the economic, I could steer clear of that temptation and develop my own reading of labour law doctrine pertaining to agency-mediated work.

[99] Most general employment law practitioners seem oblivious even of the existence of the sub-field of agency worker law, which is more commonly called 'recruitment law' by specialists.

Chapter 3

Insulation through labour law doctrine: Technical legal concepts for agency work

British labour law was stymied by its basic conceptual categories in 1970 when a judge 'exhibited discomfort' with a work relation that looked neither like employment nor like self-employment.[1] Because the work relation was mediated by an employment agency, the judge held that 'where A contracts with B to render services exclusively to C, the contract is not a contract for services [or a contract of service], but *a contract sui generis, a different type of contract from either of the familiar two*'.[2] Why were British judges unable to recognise such mediated work relationships as employment? I read this and subsequent case law as expressions of particular choices that judges and litigants made. The doctrinal community came to regard agency-mediated work not only as a 'different type of contract', but more importantly also as outside the scope of employment and labour protection. This Chapter addresses the first part of my first research question in precisely these terms. It explores how agency-mediated work has been actively constructed as falling largely outside the scope of employment and labour protection, and thus as liminal employment.

The (re)emergence of a liminal category of workers who fell outside the scope of labour law was bound up with labour law's complex inheritance of categories derived from tax law on the one hand and general contract law on the other.[3] While tax law provided the basic distinction between employment and self-employment, the general contract law doctrines of consideration and intention were deployed during the early 1980s to complicate this binary distinction. Moreover, in the tax domain – which invests individuals with duties and privileges in relation to the state – judges have tended to look at the socio-economic 'reality' of a relationship, while favouring technical legal considerations in the law of contract, which governs legal relations between private individuals. This divergence, which mirrors labour law's fundamentally contested position between public law and private law, gave rise to a body of law that merely appears to remain true to its foundations in tax law and contract law. Judges, litigants and

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[1] McCann (2008), p. 147.

[2] *Construction Industry Training Board* v *Labour Force Ltd* [1970] 3 All ER 220 (QBD), 225 (emphasis added).

[3] See s 10 of the 1875 Employers and Workmen Act on the definition of 'workmen' status (namely, those manual workers engaged either under a contract of service or under a 'contract personally to execute any work or labour'), and my discussion of attempts since the 1990s to positivise liminal employment in section 3 below.

doctrinal commentators have in fact moulded the categories inherited from these two bodies of law into an autonomous distinction, with the effect of largely insulating agency work from individual employment rights claims. The concept of boundary-drawing work, which I introduced in the previous chapter, helps me rephrase the research question that this chapter seeks to answer by placing greater emphasis on the conceptual boundaries involved. Namely, how has the boundary-drawing work of judges, litigants and commentators shaped the doctrinal perspective on agency work?

This In a first phase, judges and employer representatives explicitly distinguished the liminal category of atypical work from easily recognisable employment and self-employment in the 1980s. They did so by giving precedence to a technical approach to employee status, which superseded the previously dominant contextual approach. Over the following three decades, judges, defendants and commentators thwarted attempts made by claimants, parliament and a minority of judges to capture mediated and other atypical workers – which had been relegated to a legal limbo in the 1980s – in a positive category. It was not only that 'no third personal role name was available or was found',[4] but the alternative types of arguments advanced were authoritatively rejected one after the other. Whenever judges rejected alternative arguments, the explicit distinction between employment and liminal employment established in the 1980s was slightly reformulated. Such reformulations at times gave rise to new counter-arguments, and further revealed the implicit basis of the doctrinal boundary drawn between employment and liminal employment, which is a peculiar appropriation of contract law doctrine.

Since the late 1990s, four waves of common law and statutory challenges led courts to articulate the boundary between employee status (for labour law purposes) and the 'grey zone'[5] of ambiguous status more clearly. I will analyse these challenges in the third section of this Chapter. Without rendering atypical workers significantly more visible to labour law, or even recognising them under a positive, stable third category, judicial reactions to these challenges have, however, revealed the logic of the new, post-1980s legal framework.

[4] Freedland (2015), p. 243.
[5] Burchell, Deakin and Honey (1999), p. 8.

1. Concepts and timeline

It will be useful briefly to return to three concepts that are central to this chapter, namely *technical and contextual approaches* to legal concepts and the *boundary-drawing protocol* that expresses a consensus within an epistemic community as to how the boundaries between employment, liminal employment and self-employment should be constructed. These concepts hark back to my review of the economic sociology of law in the previous chapter and deepen the processual understanding of the econo-socio-legal that I developed on that basis. They allow me to capture both the concrete thresholds that the doctrinal (and the regulatory, and the legal engineering) community has created for agency-mediated workers to access employment-related rights *and* the manner in which these communities have constructed the econo-socio-legal interplay. I can therefore approach my research questions in two interrelated ways. I can initially tell a story of how doctrine and regulation have insulated agency-mediated work, and how the recruitment industry has engineered and assembled different forms of liminal employment, that underlines the concrete concepts, strategies and models, respectively, through which most agency work relations have been trapped in the liminal space between traditional employment and self-employment. In a distinct narrative step, I can account for these attitudes towards agency-mediated work by distilling how each epistemic community has foregrounded and responded to the dimensions of the economic, the social and the legal. My conceptual remarks will be interwoven by a more detailed timeline of how agency work has been assessed from a doctrinal perspective over the past four decades.

The distinction between *technical and contextual approaches* to employment status law goes to the core of how agency work and other forms of liminal employment have been rendered largely invisible to labour law doctrine. Since the doctrinal community settled on a technical approach to categorising atypical workers in the early 1980s, a triangular agency work relation in which an individual has not expressly concluded an employment contract with the end user of her work has usually disappeared from sight despite it appearing, *within its social context*, as a straightforward relation of subordination. The doctrinal community has mobilised this contrast between technical legal considerations and contextual social considerations to relegate most agency-mediated work to the grey area of liminal employment. At the same time, this distinction is crucial to the manner in which employment agencies and their legal advisers have constructed and fine-tuned their contracting practices, as I will scrutinise in chapter 5. The distinction between technical and contextual approaches was aptly summarised by an experienced

employment barrister whom I interviewed, who volunteered an account of 'two kinds of tribunals'. More 'legalistic' judges, in that account, focus on 'what's on the paper' and accordingly approach claimants with an attitude of 'you signed the document [indicating self-employed status], so why are you saying something different now?' The 'young enthusiasts', on the other hand, are 'very sceptical' of contractual documents or are indeed 'not taking proper account' of them.[6] These off-the-cuff characterisations express the difference between two kinds of approaches to the employment status of atypical work that I have encountered in the case law, and that resonate with the distinction frequently made in labour law literature between a 'legalistic' and a 'purposive' approach to legal concepts.[7] While a technical approach foregrounds legal concepts in their relation to one another, a contextual approach places more emphasis on the social interactions within which legal concepts are invoked. I would only add that ultimately it is specific legal arguments, rather than individual judges or litigants themselves, that adhere to one paradigmatic approach or the other.

When the existing doctrinal framework for determining atypical workers' employment status was established in the early 1980s, this area of law underwent a fundamental shift in how judges approached the key categories of an employee and an employment contract. At least since the middle of the 20th century, judges tended to adopt a broad approach to employment status that foregrounded the contextual appearance of a particular work relation. Judges took the overall picture of a work relation as decisive, an inquiry that included looking at the exercise of control, the distribution of economic risks and benefits, or even 'the meaning which an ordinary person would give' to the working arrangement.[8] In a momentous shift that shook British labour law in the early 1980s, a narrower focus on technicalities loosely derived from contract law – namely, the concepts of 'mutuality of obligation' and employer intention – largely displaced the earlier approach. The tension between a technical focus on contract law and a contextual focus on the socio-economic nature of a work relation was further heightened by the different legal purposes for which employment status matters. Unlike employment rights claims, where the technical approach was predominant, the contextual approach remained dominant where tax liabilities were at issue.

[6] Interview summary B3.

[7] Hepple (1986), p. 81 and Davidov (2016), respectively. See Sinzheimer (1976a).

[8] *Cassidy* v *Ministry of Health* [1951] 2 KB 343, 353 (approvingly quoting from *Simmons* v *Heath Laundry* [1910] 1 KB 543).

Over the course of the 1980s, judges and employer representatives in particular successfully turned the two concepts of *'mutuality of obligation'* and *employer intention* into a new consensus within the doctrinal community as to how the boundary between employment and self-employment is drawn. In chapter 2, I used the concept of boundary-drawing protocol to refer to this consensus within an epistemic community as to how agency-mediated work should be position in relation to the binary categories of employment and self-employment. The two technical concepts of 'mutuality of obligation' and employer intention marked the threshold that atypical, not clearly identifiable work relations would ordinarily need to surmount to qualify as employment and trigger the applicability of key employment rights.[9] 'Mutuality of obligation' generally referred to the idea that employee status required a mutual – or arguably, one-sided – exchange of obligations to perform work and pay for it. The putative employer's express intention to enter into a contract of employment with an individual, on the other hand, tended to be treated as a decisive indication of whether such a contract had been formed. It was not clear yet exactly how 'mutuality of obligation' and employer intention were being applied by judges, but their effect was usually to the detriment of atypical workers claiming employment rights.

Beginning in the mid-1990s, litigants and a minority of judges deployed four waves of counter-arguments, seeking to displace the dominance of 'mutuality of obligation' and employer intention that excluded most agency workers and other atypical workers from employment rights. The first wave (1996-2000) posed a challenge to 'mutuality of obligation' that rested on the alternative technical argument that the contract law doctrine of consideration would be satisfied whenever a specific exchange of work for wages occurred ('specific engagement'). This challenge was rejected by reference to the contextual argument that an agency's de facto control over the work performed was required for employee status. The second wave (1996-2011) targeted 'mutuality of obligation' from the opposite standpoint. Relying on the contextual factors relevant to the law of agency and the traditional employment status tests, this second wave of contestation comprised agency workers' claims under two intermediate statutory statuses ('employment under a contract personally to do work' and 'worker'). In defeating this second challenge, judges asserted the importance of technical considerations, namely an individual's future obligations and formal subordination. These first two waves aimed at 'mutuality of obligation' highlight the persistence of technical over against contextual

[9] As I briefly discuss in section 3 below, some employment rights were already conferred at the time on individuals who were not employees.

approaches to atypical workers' employment status. Even more so, they indicate how malleable the dominant doctrinal position has been: if they serve to exclude atypical workers from employment rights, contextual arguments have indeed found favour with the doctrinal community. It is thus more appropriate to say that the doctrinal community maintained a consensus to exclude atypical workers from employment rights, rather than a consensus to adopt a technical approach as such.

Rather than seeking to displace 'mutuality of obligation' as the first two waves had done, two further waves of litigation targeted the concept of 'employer intention', which was the other technical argument that had since the 1980s shaped whether an atypical worker was characterised as an employee. In a third wave of litigation (2000-2008), a minority of judges and a growing number of litigants invoked the possibility of implying an employment contract between an agency worker and a user firm in the absence of express employer intention. An implied contract of this kind was based on a series of contextual arguments that negated the dominant technical argument according to which the putative employer's express consent to be contractually bound was needed. Litigants and a small number of judges thus focused on the social context in which work was carried out to argue (1) that the user firm exercised de facto control over the work, (2) that the user firm acted through the agency in their dealings with the agency worker, (3) that there was a contract as a matter of 'social reality', (4) and that the user firm must have implicitly agreed to contract with the agency worker. This third wave was followed by a fourth (2007-2015), which was grounded in a mixed, at once technical and contextual argument that contract terms may be a 'sham' where they do not represent the true intentions of the parties. As yet, these challenges to the dominance of employer intention have failed to displace the dominant technical argument as much as the earlier challenges had failed to displace the technical approach to 'mutuality of obligation'. However, they were defeated not by technical arguments but by reference to economic considerations, which had been external to the doctrinal perspective on agency work. Employment contracts between user firms and agency workers were thus only to be implied, following the fascinating case of *Muscat* in 2006,[10] where 'business necessity' exceptionally required it. Contract terms would only be deemed a 'sham', on the other hand, where there had been an exceptional inequality of bargaining power between the contracting parties.

[10] *Cable & Wireless Plc* v *Muscat* [2006] EWCA Civ 220; [2006] ICR 975, which I analyse in section 3 below.

Overall, the boundary-drawing work undertaken by the doctrinal community has generated and repeatedly sustained the exclusion of most agency workers from statutory employment rights. It has done so by deploying threshold requirements that I describe, in sections 2 and 3, as an excess of duty on the part of the individual and as the employer's contractual intention. These requirements have had the effect that, from the doctrinal perspective, ordinary agency work arrangements have since the 1980s simply not qualified as employment. Moreover, the doctrinal community's boundary-drawing practices have increasingly denied agency workers the employment rights attached to intermediary statuses such as 'worker' too. Subsequent attempts to contest the overall focus on contract law technicalities and shift it back to the 'reality' of a work relation as gleaned from its social context have so far been unsuccessful. It is worth noting, lastly, that litigants and even Parliament have since the mid-1990s only contested one or the other implicit requirement for atypical workers' employee status at a time – that is, either an individual's excess of duty or the employer's contractual intention – rather than both at once. Before turning to the crisis of the existing framework of employment status law, I will now briefly situate its emergence around 1980 within the previous regime governing work relations.

2. From fissure to abyss: transplanting the doctrines of consideration and intention, 1977-1999

The period of the 1960s and 1970s can certainly be seen as one in which 'things fall apart' with regard to the British model of collective *laissez-faire*,[11] which had entailed state inventions in support of collective bargaining. A new labour law framework grounded in statutory rights began to replace the 'administrative regulation' that had promoted collective bargaining.[12] Legislative initiatives and judicial attitudes were instrumental in shaping the emerging, albeit still volatile, legal architecture, in which the status of 'employee' carried significant weight. It acquired statutory form for the first time, and was tied to the existence of a contract of employment, in section 8(1) of the Contracts of Employment Act 1963, which defined an employee as:

[11] Hepple and Fredman (1986), p. 44.
[12] Ewing (1998).

> 'an individual who has entered into or works under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be expressed or implied, oral or in writing, and whether it be a contract of service or of apprenticeship'.

This wide definition bolstered the 'fundamental division between *employees* and the *self-employed*' that had been established in law with the National Insurance Act 1946, superseding the previously central distinction between 'manual and non-manual workers'.[13] It established the employee even more firmly as the 'principal actor in the drama' of labour law than it had been in the late 1940s, when Otto Kahn-Freund underlined its centrality in these terms.[14]

The statutory definition of an employee functioned as a hinge between the existing common law concept of the 'contract of service' and subsequent legislation on redundancy, unfair dismissal, equal pay and discrimination on the grounds of sex and race,[15] which attached an increasing number of employment rights (mainly) to employee status. The incorporation of the common law governing the contract of service into the statutory definition of an employee brought with it both the well-established, contextual tests of the degree and manner of 'control' exercised over the work – a clear remnant of the old master and servant regime – and of an individual's 'integration' into the business 'organisation'.[16] A third test, derived from economic categories, was developed in the field of tax and national insurance law and was increasingly applied also by courts and tribunals faced with employment rights claims. At times considered 'the fundamental test' of employee status, it asked whether an individual bore a risk of loss and a chance of profit, and whether she was thus 'in business on her own account'.[17] Each of the three tests indicated 'a primarily social frame of reference' or, in the case of the third, a socio-economic one.[18] This reference to the 'social [or socio-economic] power of the employing enterprise'[19] reflected British labour lawyers' traditional insistence that state law should be secondary, both politically and methodologically, to actual working and bargaining practices. In

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[13] Deakin and Wilkinson (2005), pp. 94-95.
[14] Kahn-Freund (1949), p. 28.
[15] Redundancy Payments Act 1965, Industrial Relations Act 1971, Employment Protection Act 1975, Equal Pay Act 1970, Sex Discrimination Act 1976, Race Relations Act 1976.
[16] Hepple and Fredman (1986), p. 76; Wedderburn (1971), pp. 53-56; Rideout (1972), pp. 6-7; Davies and Freedland (1979), pp. 457-458.
[17] *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173; *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 WLR 1213, *Young & Woods Ltd v West* [1980] IRLR 201; see Davies and Freedland (1984), p. 87; Wedderburn (1986), p. 113; Hepple and Fredman (1986), p. 77.
[18] Davies and Freedland (1984), 88.
[19] ibid.

short, the 'control' and 'integration' tests relate to the manner in which a work relation is performed, which I have called a contextual approach. The 'in business on own account' test similarly takes contextual factors into account but is ultimately centred on the economic category of an individual's loss or profit. In short, judges, litigants and textbook authors tended to deploy contextual and increasingly economic considerations when drawing the boundary between employment and self-employment.

With the rise of statutory intervention in labour law, the purposes for which employment status was primarily being determined – in the open-ended process that I have called boundary-drawing work – underwent considerable change during the 1970s, which in turn affected judicial practices. Since the 1940s, employment status had been most relevant for assessing liabilities for national insurance contributions and, for an increasing proportion of the population, income tax.[20] In light of the lower rates payable for self-employment, both parties to an ambiguous work relation often had an interest in being classified as self-employed, and still do today. The judicial use of the common law tests of 'control', 'integration' and 'in business on own account' had – in line with the state's interest in maintaining tax revenues – restricted the ability of employees to categorise themselves as self-employed in order to reduce tax. It evidenced an increasing willingness of British courts to take a contextual rather than a narrow technical approach and look behind the contractual label (if any) that the parties had attached to their working arrangements.[21] Justified by social interest, it was a trend consistent with similar, 'paternalist' developments in contract law.[22] Moreover, the test of whether an individual is 'in business on her own account', which was first applied in a national insurance case, reversed the prior direction of assessment: referring to characteristics that are ascribed to self-employment rather than employment, it made it more likely that ambiguous work relations were found to constitute employment.[23]

Given the expansion of individual employment rights in the 1970s, by contrast, delineating their personal scope became a parallel, and eventually primary, site of employment status law. The number of statutory rights claims that reached the newly established industrial

[20] Deakin and Wilkinson (2005), pp. 248, 252, 307. See *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497; *Market Investigations*.
[21] This development culminated in *Ferguson* and *Young & Woods*; but see *Massey v Crown Life Insurance Co* [1978] 1 WLR 676.
[22] Smith (2005), pp. 11-16.
[23] *Market Investigations*; Davies and Freedland (1984), p. 88.

tribunals rose rapidly, more than trebling between 1972 and 1976.[24] In innumerable instances of boundary-drawing work, judges and litigants consequently had to negotiate when an atypical work relation constituted employment for the purpose of employment rights claims. But the logic and implications of status determinations for this purpose differed fundamentally from the earlier focus on taxation, since the interests of putative employees and employers no longer tended to be aligned. Now, characterising ambiguous work relations as employment enabled employees to access statutory rights but implied higher costs for employers; at the same time, the effects of better pay and working conditions on the British economy were being hotly debated outside of courtrooms. Against this backdrop, the doctrinal community sought and found an alternative, technical rather than contextual approach to the determination of employment status, which in turn caused status determinations under labour law and tax law significantly to diverge.

The emergence of 'mutuality of obligation' as a variation of consideration

Throughout the late 1970s and early 1980s, judges, litigants and doctrinal commentators struggled over the preferred approach to the employment status of atypical workers. Employment rights claims made by individuals who were working – often intermittently – in the absence of written contractual documentation brought the tension between the interests at stake in tax law and labour law to the fore. Such workers' claims continued to arise before industrial tribunals, the Employment Appeal Tribunal, and the Queen's Bench Division of the High Court throughout the late 1970s and early 1980s. Hardly any specific case law seemed to exist that could guide the doctrinal community's increased boundary-drawing workload. But according to the statutory definition of employee status, an employment contract could of course be made orally or in writing, and could even be 'implied'.[25] Litigants and judges approached the preliminary question of employment status in two distinct ways, which differed both in their epistemological focus and in their engagement with contract law.

The first approach was to adhere to the existing doctrinal protocol on how to assess more typical work relations. Judges would balance considerations based on the traditional, contextual tests of 'control' and 'integration' and the economically focused test of 'in business

[24] Hepple and Fredman (1992), p. 64.
[25] Contracts of Employment Act 1963, s 8(1).

on own account', giving particular weight to the third. In line with the ideal of labour law's autonomy from general common law rules and reasoning, contract law played no role in the analysis. The more difficult statutory hurdle to be surmounted by claimants would then be a separate one, namely 'continuity of employment'. Although this requirement constituted a de facto 'quantitative exclusion from … employee status' for workers in intermittent and other atypical employment,[26] the stated exceptions were being interpreted in an increasingly inclusive manner.[27] In this traditional approach, ambiguous work relations were at least likely to pass the hurdle of employee status. Even so, courts and tribunals at times pointed out the potential impact of their legal classification on prevailing industry practices for instance in the manufacturing, agricultural and hospitality sectors.[28]

In other cases, cutting across various kinds of statutory claims, a different course materialised, initially on an unclear doctrinal basis. What united these decisions was the attempt creatively to address the perceived shortcomings of extending existing tests of employment status to casual work relations, which had not been established through a readily recognisable written employment contract but orally or even by course of conduct. Rejecting the claim for a guarantee payment raised by a part-time worker without a written contract, an EAT judgment in 1977 thus filled the perceived lacuna with a particularly technical approach. Namely, the EAT regarded the applicable statutory hurdle of being 'normally … required to work in accordance with [a] contract of employment' on the relevant day as decisive. Without referring to any other criteria that might be relevant, the EAT's initial interpretation of an 'implied' contract of employment – bizarrely portrayed in the reported summary of the ruling as the only alternative to a 'written' one – thus relied exclusively on the specific statutory wording of being 'required' to work that was applicable in the context of guarantee payments.[29]

In a subsequent case before the EAT, the employer's representative asserted in a similarly technical vein that the purported lack of obligations to 'provide work' and 'take work',

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[26] Countouris (2007), p. 68. The only employment right that did not require 'continuity' is the right not to be dismissed for trade union non-membership or membership or activities, which was the subject matter of the *O'Kelly* case discussed below.

[27] The relevant exceptions are, pursuant to paras 9(1)(b) and 9(1)(c) of Schedule 13 to the Employment Protection (Consolidation) Act 1978, cases of 'temporary cessation of work' and where absence from work occurs 'by arrangement or custom'. See *Ford* v *Warwickshire County Council* [1983] 2 AC 71 (HL).

[28] *Cope v Airfix Footwear Ltd*, 32512/77 (IT), para 4; *Airfix Footwear Ltd v Cope* [1978] ICR 1210 (EAT), 1214-1215; *White and Others v Christopher Neame Ltd*, IT 8741/79-8748/79, [41]; *O'Kelly and Others v Trusthouse Forte Plc*, EAT 286/83, 23.

[29] *Mailway (Southern) Ltd* v *Willsher* [1978] ICR 511.

respectively, thwarted any finding of an employment contract. Although the appeal tribunal did not accept that notion, reference was nonetheless made to it in the very first paragraph of the case report.[30] Besides being derived from the phrase 'required to work' that had been at issue in the previous EAT judgment, the argument that a particular kind of mutual obligation is required for an employment contract to exist may also have been inspired by an emerging labour law scholar's – namely, Mark Freedland's – analysis of the employment contract which was already widely received by labour lawyers at the time.[31] His perceptive analysis pointed to a category of very particular cases in which courts had denied, in the employee's interest, the existence of a contract of employment despite a clear exchange of 'service for remuneration'. More generally, Freedland referred to the element that may be lacking in certain work relations as 'mutual obligations for future performance'.[32] [check: any reference to 'implied' contract?] The common element of these early instances of what later became the employment law doctrine of 'mutuality of obligation' was the assumption that for a contract of employment to be in existence, an individual (at least) had to be under an obligation to perform work.

Judges and legal representatives incrementally advanced this technical approach to classifying casual work further, at times drawing explicitly on the contractual logic of consideration – that is, the rule that a contract is only valid if it involves an exchange of benefits or detriments. Introducing this argument on his own initiative, a judge in the Queen's Bench Division held in 1981 that an employment contract only existed where an individual had undertaken to 'provide himself to serve' in 'consideration' for being paid, as opposed to merely providing 'his services'.[33] A distinction was thereby drawn between consideration in general and a specific kind of consideration, '*providing oneself to serve*'. I will return to this remarkable phrase in the second part of the chapter. One year later, by contrast, a different judge in the Queen's Bench Division took up a reference to consideration in the general sense in a frequently cited precedent and concluded that the simple 'performance of some service' in exchange for wages was sufficient for a contract to arise.[34] These two cases indicate the remaining tensions even among advocates of a technical approach to characterising atypical workers. Moreover, the particular boundary-drawing work of law reporting becomes evident here: while the earlier,

[30] *Airfix* (EAT), 1210, 1213.
[31] Freedland (1976), pp. 20-21; see Elias (1977); Hardouf (1979; Hepple (1986), p. 71.
[32] Freedland (1976), pp. 10-11, 19-21.
[33] *WHPT Housing Association Ltd v Secretary of State for Social Services* [1981] ICR 737, 748, 751.
[34] *Alpine (Double Glazing) Co Ltd v Secretary of State for Social Services* [1982] Lexis Citation 824, citing *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515.

more exclusionary judgment appeared in the Industrial Cases Reports, the later, more inclusive judgment did not and was consequently rarely cited.

A similar ambivalence characterised what was required of the employer to enter into a contract of employment. In *Nethermere*, which would become a leading case, counsel for the putative employer in the EAT was unsure whether the precise 'extent of the employer's obligation' should be 'to provide work or to pay wages'. Counsel's wider argument that there can be no contract of service without 'mutual obligations' was embraced in the minority opinion of the legally trained EAT chairman.[35] As I will discuss below, a further appeal was heard by the Court of Appeal. Despite the remaining conceptual ambiguities, the EAT proceedings in this case constituted the first time that both parties' representatives acknowledged a requirement of mutual obligations for the existence of an employment contract,[36] which is why one might in hindsight refer to a 'Nethermere consensus'. Another two and six months later, respectively, the EAT upheld a grotesquely strict approach to the requirement of an employee's obligation to perform work, and an industrial tribunal cited the Queen's Bench judgment of 1981 and the latter EAT decision in its finding that a 'regular casual' waiter was not an employee.[37] These cases demonstrated a growing judicial consensus in favour of the technical approach to employment status analysis. They similarly validated its stricter, more exclusionary variant as opposed to the alternative technical argument that simple consideration – an exchange of work for wages – sufficed for a work relation potentially to constitute employment.[38]

This strand of decisions was grounded in the surging interest in contract law on the part of labour law judges and scholars, which had resulted from the weakening of collective *laissez-faire*.[39] Nonetheless, these decisions show that technical contract law categories were imported into labour law in an extremely loose way. In these instances of boundary-drawing, consideration tended to be understood as requiring a highly specific detriment to be agreed on by the putative employee, such as 'providing himself to serve', rather than (within the limits of the contract law doctrine) any relevant detriment or benefit – which seems at odds with the principle of freedom of contract. Moreover, the express oral contract was effectively erased from the continuum of contract types, leaving only the express written contract and the

[35] *Nethermere (St Neots) Ltd v Gardiner and Another* [1983] ICR 319, 326, 328.
[36] ibid, 325.
[37] *Ahmet v Trusthouse Forte Catering Ltd* [1983] 250 IDS Brief 10; *Flanagan v Ring Brymer Ltd*, IT 577/83/LS, para 3.
[38] As I discuss in section 3 below, this alternative argument resurfaced in the mid-1990s.
[39] E.g. *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221 (CA); Freedland (1976); Napier (1976).

doctrinally controversial implied contract. Contrary to the technical logic of the law relating to contract formation, no reported attempts were made to ascertain whether the requirements of offer and acceptance had in an atypical work relation been met verbally or even by conduct.

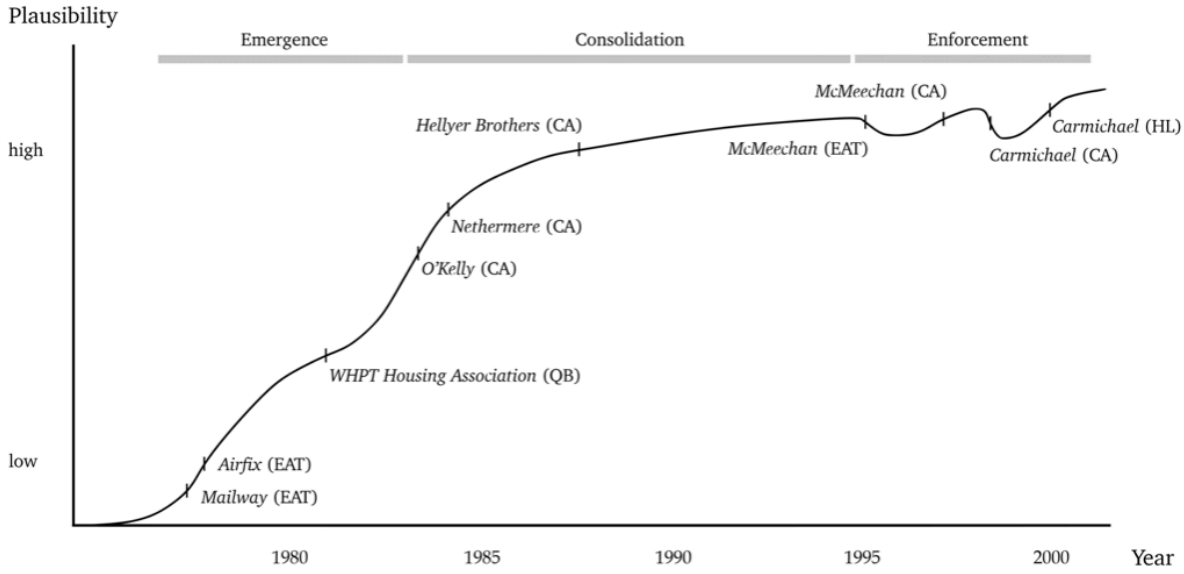

Figure 1. Plausibility within the doctrinal community of the 'mutuality of obligation' requirement in casual work cases, 1977 to 2000

Judicial attempts since 1977 to classify casual workers without a clearly recognisable contract of employment had thus given rise to two categorically different types of legal practices. While the deployment of the traditional – contextual and economically-oriented – legal tests continued the inclusionary trend that had dominated the case law over the course of the 1970s, it was slowly being superseded by a technical emphasis on specific, future-oriented 'mutual obligations' as a requirement for an employment contract. This conception of 'mutuality of obligation' was used by the courts all but interchangeably as a requirement for the existence of a contract and as a test of employment status once a contract was established.[40] It also seemed to reinterpret the statutory threshold of 'continuity of employment', and to defuse the existing contextual exceptions to it.[41]

[40] See Countouris (2007), pp. 150-151.
[41] *Nethermere* (EAT), 326.

The consolidation of the new framework and the role of intention

The court decisions that followed continued the emerging trend of detaching atypical work relations from the traditional categories of both employment and self-employment, and systematically insulating them in the negative legal category that I call liminal employment. Judges and employer representatives managed to do so by elevating the notion of 'mutuality of obligation' to a determinative category while also enlisting a further, similarly hybrid legal concept based on the contract law doctrine of intention. The first process – of elevating a technical reading of 'mutuality of obligation' to a determinative category – was marked by three Court of Appeal decisions on the employment status of casual workers that respectively endorsed the requirement of 'mutuality of obligation' in ambiguous terms in *O'Kelly* in 1983, resolved the remaining ambiguity to the detriment of casual workers in *Nethermere* in 1984, and confirmed such a restrictive understanding of the requirement in *Hellyer Brothers* in 1987.[42] The proceedings before the Court of Appeal were the first time that counsel for the defendants carried out their boundary-drawing work in the same technical way, arguing that the claimants had been 'working under no contract at all'.[43] This argument made explicit how the new labour law doctrine of 'mutuality of obligation' inserted an additional step into the earlier legal analysis. Where previously the two plausible legal findings had been a contract of employment or a contract for services, the key question had now become: *was there a contract at all, and if so,* was it one of employment?[44] The possible outcome that a particular work relation did not constitute a contract at all corresponds exactly to the negative space of liminal employment in which atypical workers found themselves.

After *Hellyer Brothers* was decided, no further case in which the employment status of atypical workers was contentious reached the Court of Appeal for eight years.[45] This circumstance can be read as a consolidation of the newly formed consensus within the doctrinal community that casual workers will only be held to have worked under a contract of

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[42] *O'Kelly and Others v Trusthouse Forte Plc* [1984] 1 QB 90 (CA); *Nethermere (St Neots) Ltd v Gardiner and Another* [1984] ICR 612 (CA); *Hellyer Brothers Ltd v McLeod and Others* [1987] 1 WLR 728 (CA).

[43] *Nethermere* (CA).

[44] The same development can be observed in the law of unfair dismissal around that time, considering that the leading judgment in *Western Excavating* established a new two-step test inquiring whether a dismissal had occurred at all, and if so, whether it had been unfair.

[45] See *Lane v Shire Roofing Company (Oxford) Ltd* [1995] IRLR 493 (EAT); but see *Lee Ting Sang v Chung Chi-Keung and Another* [1990] 2 AC 374 (a Privy Council decision on a casual worker's compensation claim for injury at work, which was also the legal claim in *Lane* and has been granted to a slightly wider range of individuals performing intermittent and/or informal work).

employment, and thus be classified as employees, if 'an obligation on the alleged worker to do work, and on the alleged employer to provide work' existed.[46] The primacy of analysing whether such 'mutuality of obligation' had bound an individual to their putative employer in cases where employment status was perceived to be ambiguous was further asserted in two decisions overruling the EAT and the Court of Appeal, respectively, in the second half of the 1990s. In both cases, the approach adopted by the lower court was overturned because it had not taken any account of, or had illegitimately circumvented, the presence or absence of 'mutuality of obligation' within the work relation and the underlying question of whether an ongoing contract between the parties had been in place at all.[47] Both reversals of the lower court's decisions cemented the consensus in favour of the strict technical approach.

A parallel development was the increasing reference made by industrial tribunals and courts determining the employment status of atypical workers to the contract law doctrine of contractual intention. The parties' intentions as to the nature of their contract had already been at the heart of employer – and at times employee – strategies to contract out of employment-related tax and insurance payments, which had given rise to judicial disputes during the 1970s. While a number of Court of Appeal judges had held in a contextual vein that the 'reality' of a relationship ultimately determines the specific nature of a contract,[48] a sizable minority had instead contended for the technical approach that, at least where doubts persisted whether a contract was one of employment, freedom of contract and thus the parties' express intentions should take priority.[49]

Crucially, this technical approach was loosely endorsed in *O'Kelly*, the first of the three Court of Appeal decisions of the 1980s affirming the requirement of 'mutuality of obligation'. In this case, in which the claimants were supported by their trade union, the Court upheld the first-instance tribunal's technical approach to intention. [some more detail][50] It thereby further increased the likelihood that judges, litigants and commentators would take the same approach to characterising casual workers – with the effect that they would not be seen as working under

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[46] Hellyer *Brothers* (CA), 131-132.

[47] *McMeechan v Secretary of State for Employment* [1997] ICR 549; *Carmichael and Another v National Power Plc* [1999] 1 WLR 2042.

[48] See the majority judgment in *Ferguson*; *Young & Wood*.

[49] See the minority judgment in *Ferguson*; *Massey*.

[50] *O'Kelly* (CA), affirming *O'Kelly and Others v Trusthouse Forte Plc (trading as Grosvenor House)*, IT 7583/83/LC-7585/83/LC, paras 24-27. On the striking ambiguity of the Court of Appeal's holding, see Leighton (1984a), p. 62; K.W. Wedderburn (1986), p. 127.

an ongoing employment contract, and thus unable to claim statutory employment rights. The Court of Appeal did so at a time when the exclusionary effect of 'mutuality of obligation' was threatened by the argument that if 'each hiring was a separate contract', the existence of mutual obligations to provide and accept work in the future would be irrelevant.[51] However, even more so than in previous cases where a technical focus on how a work relation was designated in the written legal documents was favoured, the conclusion endorsed by the Court of Appeal majority – that the parties had not intended to enter into an employment contract – was barely rooted in any findings of fact made by the tribunal.

A similarly superficial, speculative conclusion thwarting an employment rights claim was drawn by the Court of Appeal in *Hellyer Brothers*, in which the Court seemed to imply – as other courts had previously done – that a 'continuing' or 'umbrella' contract of employment was prima facie incompatible with the existence of individual agreements of a potentially contractual nature.[52] This argument is based on the rigorous technical presumption that where parties have already expressed their intention to enter into a particular kind of legal relation with one another — that is, a new contract for each new hiring – they have by implication rejected 'alternative modes of conducting their … relationship' such as entering into a more permanent contractual relationship.[53] The concept of contractual intention further functioned as a judicial stopgap in the case of *Carmichael* in the late 1990s in a House of Lords judgment that sought to rehabilitate the requirement of 'mutuality of obligation' after its forceful deconstruction by the Court of Appeal. The House of Lords refuted the latter analysis by simply rejecting the Court's jurisdiction to review the first-instance decision as to the claimants' employment status. It did so on the ground that determining employment status was a question of fact; where written documents were 'intended' by the parties to constitute the entire agreement between them, which 'of course' is itself a question of fact, employment status was held to be beyond the scope of appellate review.[54] In neither case did the judges refer to any (?) factual indications of the parties' relevant intentions. In light of the litigating parties' opposing views regarding the nature of their legal relationship, the intentions of the putative employer far outweighed the claimant's intentions in both cases.

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[51] *O'Kelly* (CA), 117, 126 discussing *O'Kelly* (IT) and *O'Kelly and Others v Trusthouse Forte Plc*, EAT 286/83, 16-17; but see O'Kelly (CA), 122, 126-127 (the majority judges rejecting the pertinence of the claim that the claimants had worked under 'separate' contracts of employment each time they were hired).

[52] *Hellyer Brothers* (CA).

[53] Freedland (2003), p. 61; see *Airfix* (EAT), 1215; *Hellyer Brothers Ltd v McLeod and Others* [1986] ICR 122 (EAT), 132.

[54] *Carmichael* (HL), 2049.

This technical, highly flexible usage of the concept of contractual intention was firmly aligned with the exclusionary thrust with which the doctrine of 'mutuality of obligation' came to be applied over the course of the 1980s. In their treatment of the parties' intentions, the one-sided, almost exclusively employer-friendly outcomes of EAT and Court of Appeal decisions on the employment status of atypical workers between 1983 and the end of the 1990s followed three main paths. First, where parties had expressly designated work relations as self-employment, or where other evidence could be construed as indicating the parties' intention not to enter into an employment contract, courts emphasised their desire to give effect to the presumed intentions of the parties.[55] Second, where individual hirings were not linked up in readily recognisable legal form, courts tended to deny the existence of an ongoing contract of any kind between the individual and the employing entity.[56] Third, the claimants' intentions to enter into an employment contract were only exceptionally recognised and upheld – on the basis of the particularly long duration of an informal working pattern lacking written documentation,[57] where the prevention of injury at work and thus a 'real public interest' was at issue,[58] and in a case in which compensation for unpaid wages was being claimed from the state.[59]

In short, a claimant's intentions to enter into an employment contract were countenanced only in exceptional circumstances. In principle, the courts' boundary-drawing work gave effect to the putative employer's intentions not to enter an employment contract. Whether or not written contractual documents were found to exist, judges barely took account of the parties' conduct or other contextual circumstances that might have indicated the contractual intention required to establish an ongoing employment contract.[60] Instead, the concept of contractual intention was repeatedly deployed in a narrow manner that foregrounded the technical question of whether the putative employer had expressly consented to being

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[55] *O'Kelly* (IT), and *O'Kelly* (CA) (the parties' intentions as to the nature of the contract derived from wider practices in the sector); *Calder v H Kitson Vickers & Sons (Engineers) Ltd* [1988] ICR 232, 251; *Pertemps Group Plc v Nixon*, 1 July 1993, EAT/496/91 (the parties' own views were held to clarify an agency worker's ambiguous employment status); *Carmichael* (HL) (the parties' intentions whether written documentation constituted their whole agreement). See previously *Massey* and the minority judgment in *Ferguson*.

[56] *O'Kelly* (CA), 121, 124; *Hellyer Brothers* (CA); *Ironmonger v Movefield Ltd t/a Deerings Appointments* [1988] IRLR 461 (EAT); *Clark v Oxfordshire Health Authority* [1998] IRLR 125 (CA).

[57] Nethermere (CA); *Boyd Line* (EAT). See previously *Airfix* (EAT), 34.

[58] *Lane*, para 12; *Lee*.

[59] *McMeechan* (CA).

[60] See similarly the challenges to the conventional treatment of the parties' intentions that were raised in the 2000s, as I discuss in the following section. On procedural conventions being tilted against workers in the context of historical master and servant law, see also Frank (2013), pp. 19-20.

contractually bound, and that thereby excluded most atypical workers from employee status. This element of the employment status case law pertaining to atypical workers has rarely been acknowledged by doctrinal commentators, let alone by judges.[61]

The adaptable interplay of the requirement of 'mutuality of obligation' on the one hand and the judicial enforcement of the putative employer's contractual intentions on the other is exemplified by the frequent use of 'no mutuality' and 'substitution' clauses in express atypical work contracts. The former is a contractual term purporting to deny any obligations binding an individual to the employing entity and vice versa beyond an individual phase of work, while the latter clause provides that an individual is not obliged to perform the work herself and may instead send a substitute. Both types of clauses have resulted from the boundary-drawing work of employing entities themselves, which relies on the doctrinal community's preference for technical over contextual considerations and which I examine in chapter 5. Both types of clauses have been widespread in atypical work contracts at least since the mid-1990s,[62] and have been invoked in litigation to argue that a given work relation did not satisfy the requirement of 'mutuality of obligation'. Indeed, appellate courts have generally upheld their intended effect.[63] Such '[m]ore subtle forms of contracting out' added to the 'relabelling' of contracts as contracts for services (with the consequence of workers being self-employed), which had been inserted into atypical work contracts at least since the 1980s.[64] The sum of these clauses replaced earlier employer strategies of including express waivers of statutory employment rights into the contracts they offered to non-permanent staff, a route that had long been criticised by courts and that was temporarily foreclosed by legislation in the mid-1990s.[65]

Overall, when assessing whether claimants considered to be working in atypical ways could avail themselves of employment-related rights, the traditional tests of employment status had thus become all but inoperative by the mid-1980s. Most judges, litigants and commentators adopted the technical thresholds of 'mutuality of obligation' and contractual intention instead.

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61 For exceptions, see Brodie (1998); Burchell, Deakin and Honey (1999), pp. 12-13, 69-75; Deakin and Morris (2001), p. 154.

62 See Burchell, Deakin and Honey (1999), pp. 69-71.

63 *Pertemps* (EAT); *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 (CA). See subsequently *Staffordshire Sentinel Newspapers Ltd v Potter* [2004] IRLR 752 (EAT); *Consistent Group Ltd v (1) Kalwak and Others, (2) Welsh Country Foods Ltd* [2008] IRLR 505 (CA).

64 Deakin and Morris (2001), p. 154; Deakin and Morris, (2012), pp. 152-155; see *Hellyer Brothers* (CA); *Lee*.

65 See *Rennison v Minister of Social Security* (1970) 10 KIR 65; *Ferguson*, 1222; Trade Union and Labour Relations (Consolidation) Act 1992, s 288; Employment Rights Act 1996, s 203. But see more recently *M & P Steelcraft Ltd v Ellis* [2008] IRLR 355, 363.

Cases involving safety at work constituted the only consistent exception.[66] A leading labour law scholar at the time expressed her concern already in 1986 that the traditional tests had in practice come to be treated as 'inappropriate' especially for agency workers.[67] The general outlines of the more restrictive, technical protocol for the categorisation of atypical workers can be gleaned from the case law developments I have summarised so far. As I have noted, the technical step of establishing whether or not the individual had been working under a contract (with the respondent and of the required length and form) at all would now already thwart the claims of many atypical workers. The doctrine of 'mutuality of obligation' 'effectively left [many workers] in a "grey zone" between employment and self-employment'.[68] Where express contracts were found, appellate courts came to construe factual details – without specifically discussing their nature and potential implications – as indicating a lack of intentions to create an ongoing employment contract. In the boundary-drawing protocol for atypical work, these technical steps of analysis came to logically precede the traditional tests of employment status. With the introduction of these additional steps of analysis, the doctrinal community largely rendered itself oblivious to agency work and other forms of atypical work. The technical considerations that judges, commentators and litigants came to prioritise meant that nothing could be said about agency work arrangements from a doctrinal labour law perspective: they simply fell outside the scope of most employment rights. The negative or 'sui generis' legal space that judges, litigants and commentators had thus constructed as beyond the binary of straightforward employment or self-employment – and thereby largely insulated from the employment rights regime – is the gaping abyss of liminal employment.

By contrast, the characterisation of individuals in the labour market for tax and national insurance purposes underwent no such seismic changes during this period. The test of whether an individual was in business on their own account that had been developed in a leading national insurance case in 1969 remained in use,[69] and the employment rights case law on 'mutuality of obligation' was not transplanted into the categorisation of atypical workers under tax law. Instead, the two leading cases on the latter subject-matter that were decided in this period, both during the 1990s, affirmed that a number of factors or 'badges' exist that may point towards employed or self-employed status. Moreover, 'depending on the context' each factor 'may carry

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[66] See *Lee*; *Lane*.

[67] Leighton (1986), p. 513.

[68] Burchell, Deakin and Honey (1999), p. 8.

[69] *Market Investigations*, applied in *Warner Holidays Ltd* v *Secretary of State for Social Services* [1983] ICR 440 and in *Andrews* v *King (Inspector of Taxes)* [1991] STC 481.

greater or lesser weight'.[70] The guidance issued to future judges thus still resembled the analysis of employment status in labour law in the late 1970s, prior to the emergence of 'mutuality of obligation' and contractual intention as new doctrinal conventions. In the field of tax and national insurance, the task of the court was still seen as forming 'an overall view giving due weight to the relative significance of the various badges in the particular context'.[71] This emphasis on 'the particular context' of each case contrasts sharply with the narrow, exclusionary labour law approach shaped by the concept of 'mutuality of obligation' and buttressed by reference to the doctrine of intention.

The precise contours of the implicit requirements underlying 'mutuality of obligation' and the one-sided judicial recourse to the parties' intentions nonetheless remained uncertain in this phase. The next section turns to deliberate attempts by atypical workers, their legal representatives and a minority of judges to rearrange this field of law in order to shed more light on the technical consensus that has dominated employment status law as it relates to atypical work since the 1980s.

3. Attempts to bring socio-economic reality back in: 1995-2015

Since the mid-1990s, litigants and a minority of judges deployed counter-arguments that sought to displace the strict technical protocol as to how atypical workers are to be assessed from a doctrinal perspective. These counter-arguments were deployed in four waves, the first two of which took aim at the exclusionary technical use of 'mutuality of obligation'. In a first wave, a small number of litigants and judges expressed the alternative technical argument that the contract law doctrine of consideration would be satisfied whenever a specific exchange of work for wages occurred ('specific engagement'). The second wave targeted 'mutuality of obligation' from the opposite standpoint. Relying on the contextual factors relevant to the law of agency and the traditional employment status tests, this second wave of contestation comprised agency workers' claims under two intermediate statuses ('employment under a contract personally to do work' and 'worker'). These challenges were absorbed into labour law doctrine through internal adjustments to 'mutuality of obligation' – which reveal, at the core of the doctrinal

[70] *Barnett* v *Brabyn* [1996] STC 716, 724; see similarly *Hall (Inspector of Taxes)* v *Lorimer* [1994] STC 23, 28.
[71] *Barnett*, 724.

perspective on agency work, an implicit requirement that employees provide more of themselves than they have contractually agreed.

Besides 'mutuality of obligation', the second technical concept that has since the 1980s shaped whether an atypical worker is an employee – namely, employer intention – was the target of two further waves of contestation that shook the doctrinal community. In the early 2000s, a minority of judges and a growing number of litigants invoked the possibility of implying an employment contract between an agency worker and a user firm. An implied contract of this kind was based on a series of contextual legal arguments. This third wave was followed by a fourth, which was grounded in a mixed, at once technical and contextual argument that contract terms may be a 'sham' where they do not represent the true intentions of the parties. As yet, these challenges to the dominance of employer intention have failed to displace the technical concept as much as the earlier challenges had failed to displace 'mutuality of obligation'. However, they were defeated not by technical adjustments but by reference to economic considerations, which had previously been external to the doctrinal perspective on agency work. As I will explore when juxtaposing the doctrinal, regulatory and legal engineering perspectives in chapter 6, such apparently external considerations may be the ultimate driver of each of the three perspectives over the past four decades.

A return to simple consideration? 'Specific engagement' and intermediate statuses

The second half of the 1990s saw two waves of boundary-drawing work that sought to open up statutory employment rights to a broader range of individuals in the labour market. Both were aimed at decoupling employment protection from the close, ongoing bond with the employer required under the strict technical understanding of 'mutuality of obligation'. The first of these challenges, brought about by judges rather than litigants, initially sought to rein in the EAT decision in the case of *McMeechan* that was derided by a doctrinal commentator writing in the influential, relatively worker-oriented *Industrial Law Journal*.[72] Faced with a written contract, the EAT had ignored the new boundary-drawing protocol of examining – prior to or at least in addition to the traditional employment status tests — whether 'mutuality of obligation' was present. While both a subsequent, unreported EAT decision and the widely cited Court of Appeal ruling in *McMeechan* took a softer stance and explicitly discussed 'mutuality of obligation',

[72] *McMeechan v Secretary of State for Employment* [1995] ICR 444 (EAT); McKendrick (1996).

these decisions also severely restricted the doctrine's significance. The unreported decision seemed to propose a much clearer alignment of the new labour law doctrine with the general contract law doctrine of consideration, such that nothing more than 'mutuality of obligation … to pay wages for work actually done' was required for a contract of employment to arise – and thus no obligations for the employee to be available for future work.[73] Indeed, which type of obligations was required had been disputed throughout the emergence and consolidation of the doctrine. The second ruling was rooted even more deeply in earlier case law. In it, the Court of Appeal distinguished, on the basis of previous judicial distinctions between individual stints of work and umbrella contracts,[74] 'specific engagements' such as the four days' work for which the claimant had not been paid by an employment agency from 'general', ongoing ones. Future-oriented obligations – that is, obligations on the parties 'in future to offer, or to accept, another engagement' – were considered 'irrelevant' for categorising a specific, individual exchange of wages for work.[75]

In short, both decisions reduced the significance of a 'second level' of future-oriented obligations,[76] above and beyond the general requirement of consideration and the traditional tests of employment status, as a precondition for a contract of employment. They countered the strict technical approach that had become conventional within the doctrinal community with an alternative, more inclusive technical approach. Such a shift in the case law had the potential of bringing large numbers of individuals working on an intermittent basis, whether in a bilateral or mediated manner, within the personal scope of employment-related rights granted to employees. The underlying legal argument had antecedents in case law from the early and mid-20th century in which simple contractual consideration in the form of a 'bare exchange of work for wages' was considered to be the essence of a manual worker's or an employee's contract, albeit usually not in the worker's favour.[77]

A similar potential was inherent in the intermediate employment statuses that took on a greater significance towards the end of the 1990s. At that time, a persistent concern among academic and practicing labour lawyers that the personal scope of statutory employment

[73] *City & East London FHS Authority v Durcan* EAT/721/96.
[74] See especially *O'Kelly* (EAT); *O'Kelly* (CA); Leighton and Painter (1986).
[75] *McMeechan* (CA), 565.
[76] See Freedland (1976), p. 21. As Countouris emphasises, Freedland intended his analysis of the 'second level' of employment contracts to contribute to a more analytical understanding of the contract of employment, and not to add a further hurdle to the finding of employee status. Countouris (2007), p. 49.
[77] Deakin and Wilkinson (2005), pp. 85-86; *Ready Mixed Concrete*.

protection and the organisational patterns found in the labour market were increasingly diverging coincided with a growing 'faith in finding workable solutions to [the] plight' of workers excluded from employment protection.[78] Drawing on previous, more sporadic attempts to 'move the goal posts'[79] and allocate certain employment rights to individuals that do not seem to fit the binary of employment and self-employment, the New Labour government placed the category of 'worker' at the heart of the new employment rights that it enacted. This category had been defined in section 230(3)(b) of the Employment Rights Act 1996, which had the effect of protecting both employees and other 'workers' against, initially, unauthorised wage deductions. The latter group, often referred to as 'limb (b) worker', includes those who are subject to:

> 'any other contract [other than a contract of employment] … whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business carried on by the individual.'

This definition may be seen as an explicit attempt to formalise the 'different type of contract' which atypical workers enter into — and thereby create a positive, comprehensive legal category for liminal employment. Aspects of the 'worker' definition closely resemble the employee status tests of 'control' and 'in business on own account',[80] which look at socio-economic realities rather than technical requirements. Mirroring the construction of the earlier anti-discrimination legislation, moreover, the new legislation does not stipulate any length of 'continuity' required for a right to be effective. The 'client or customer' exception in the 'worker' definition did, though, mark a slight departure from the personal scope of anti-discrimination rights. The additional rights that were now attached to this legal category were those relating to the national minimum wage, working time, and the protection of whistleblowing and part-time workers.[81] Writing in the wake of the introduction of these legislative measures, Patricia Leighton expressed her hope that this new intermediate status would succeed in extending employment-

[78] McCann (2008), p. 41.
[79] Smith and Thomas (2003), p. 32.
[80] See Davies (2004), p. 87-88.
[81] National Minimum Wage Act 1998; Working Time Regulations 1998; Public Interest Disclosure Act 1998; Part-Time Workers Regulations 2000.

related protections – beyond the increasingly narrow category of employees – to 'the phoney/para-subordinate/relatively dependent "entrepreneur"'.[82]

At that point, the previously enacted statutory protections against employment-related discrimination were already one step ahead of worker status. Not only had their personal scope been defined more widely than the definition of when somebody is a 'worker', but statutory provisions that explicitly referred to relationships between a 'principal' and a 'contract worker' had in several cases since 1995 been interpreted as comprising the user/agency worker relationship.[83] This was the context in which two eminent British labour law scholars heralded the law against employment-related discrimination as a model for extending other statutory employment rights to individuals who do not meet the high technical threshold of the category of 'employee'.[84]

Both intermediate statuses – that of a 'worker' and that of 'employment' under non-discrimination law – thus emphasised the social context of a work relation, in an effort to capture labour market activity beyond the traditional employment law paradigm of the 'dependent or subordinate work relationship'.[85] Like the contemporaneous case law including *McMeechan* that restricted the relevance of future-oriented 'mutuality of obligation' when categorising 'specific engagements' of work, the statutory definition of 'worker' status and the wide application of non-discrimination rights inevitably called into question the strict technical application of 'mutuality of obligation'. Both intermediate statuses dispensed with the particular legal element of an ongoing legal bond between employee and employer that 'mutuality of obligation' requires over and above a simple exchange of wages for work.

As an alternative conceptual anchor, the traditional, contextual employment status tests of 'in business on own account' and 'control' were being reasserted explicitly in the case law on 'specific engagements' and implicitly in the definition of 'worker' status. The successful anti-discrimination claims of agency workers, moreover, were based on the doctrine of agency that

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[82] Leighton (2000), p. 300; see similarly Burchell, Deakin and Honey (1999), p. 17.

[83] *BP Chemicals Ltd* v *Gillick* [1995] IRLR 128 (EAT); *Patefield* v *Belfast City Council* [2000] IRLR 664 (NICA); *Abbey Life Assurance Co Ltd* v *Tansell*, [2000] IRLR 387 (CA). The three cases cited concerned claims of sex and disability discrimination. See similarly *Harrods Ltd v Remick* [1998] ICR 156 (involving a different type of intermediary); Deakin (2001). The relevant statutory provisions were Sex Discrimination Act 1975, s. 9; Race Relations Act 1976, s. 7; Disability Discrimination Act 1995, s. 12(6).

[84] Davies and Freedland (1999), pp. 234-236.

[85] ibid, 234.

allows courts to look behind the technicalities of contractual chains to identify an entity on behalf of which another entity is 'actually' acting. Adopting a contextual approach, courts and tribunals thereby disregarded an agency's formal intermediation of the work relationship for the purposes of binding the end user as a 'principal' to obligations under anti-discrimination law. A momentous shift in the doctrinal perspective as to which work relations trigger employment-related protections seemed to be underway.

Purchasing the capacity to work: the judicial reassertion of 'control', future-oriented obligations and 'subordination'

The enthusiasm of observers who supported an expansive understanding of the scope of statutory labour rights turned out, however, to be short-lived. On the one hand, the inclusive technical approach adopted by the Court of Appeal in *McMeechan* was rolled back almost immediately. After receiving a lukewarm obiter endorsement in a subsequent Court of Appeal decision,[86] its significance as precedent was already stalled with the next agency worker claim based on a 'specific engagement' that came up before the higher courts. Although the lay members of the EAT in that case adopted the analysis of the 1996 Court of Appeal judgment, holding that the claimant agency worker had been employed by her agency for a two-year 'specific engagement' despite a lack of mutual obligations to maintain the work relation in the future,[87] the Court of Appeal disagreed. It endorsed instead the EAT minority view to the effect that even if an absence of future-oriented 'mutuality of obligation' was not decisive, the claim had to be dismissed since the exercise of 'control' by the putative employer (the agency) was a second 'irreducible minimum' for the existence of an employment contract.[88] A contextual understanding of 'control' was thus effectively elevated from one of several traditional tests or factors to an absolute requirement for atypical workers to qualify as employees.

This adjustment of the doctrinal protocol for categorising atypical work not only made the finding of an employment contract between an agency worker and an agency highly improbable; it also reasserted the link between an individual's open-ended personal subjection to the employer and employment-related rights that the judicial move away from future-oriented 'mutuality of obligation' had been trying to bypass. Judges repeatedly applied the

[86] *Clark v Oxfordshire Health Authority* [1998] IRLR 125, paras 15-22.
[87] *Montgomery v (1) O & K Orenstein & Kopple Ltd, (2) Johnson Underwood Ltd*, EAT/716/98, paras 31-37.
[88] *Montgomery v Johnson Underwood Ltd* [2001] ICR 819 (CA), paras 28, 40, 46.

double requirement of some type of 'mutuality of obligation' on the one hand, and 'control' on the other hand, in subsequent cases to reject agency workers' claims that they had been employees of the agency that had placed them with an end user.[89] The first challenge to 'mutuality of obligation' – relying on a more inclusive reading of the contract law technicality of consideration – was thus rejected by reference to the contextual argument that an agency's de facto control over the work performed was required for employee status. It is worth noting that, at this point, the doctrinal community exceptionally came to prefer a contextual argument over a technical one. The adjusted boundary-drawing protocol brought to an end attempts by a growing number of agency workers to claim statutory employment rights in relation to an employment agency.[90]

The possibility of formalising liminal employment that was opened up by the 'worker' definition soon met a similar fate. Far from establishing a genuinely intermediary legal category, the EAT's approach in the first detailed judicial treatment of the new status — in *Byrne Brothers* in 2001, in which the claimants were supported by their trade union, UCATT — simply 'appear[ed] to replicate that taken at common law' when determining employee status.[91] This appearance did not only stem from the tribunal's explicit statement that the distinction between 'workers' and independent contractors involves 'all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services—but with the boundary pushed further in the putative worker's favour'.[92] It also arose specifically from its discussion of 'mutuality of obligation', which was deemed to be 'a necessary element in a "limb (b) [i.e., 'worker'] contract"' without the tribunal being altogether clear which elements of the doctrine it was referring to.[93] The need for 'mutuality of obligation' to be present was confirmed in the following year when EAT judge Patrick Elias less ambiguously – albeit in the

[89] *Dacas v Brook Street Bureau* [2004] ICR 1437 (CA), para 64; *Bunce v (1) Postworth Ltd (t/a Skyblue), (2) Great Railway Maintenance Ltd (t/a Carillion Rail)*, UKEAT/0052/04/MH, para 15; *Bunce v Postworth Ltd (t/a Skyblue)* [2005] IRLR 557 (CA), para 29. Obiter dicta in *Stephenson* (EAT), paras 10-11; *James v Greenwich London Borough Council* [2007] ICR 577 (EAT), para 17; *Stringfellow Restaurants Ltd v Quashie* [2012] EWCA Civ 1735, paras 10-14.

[90] See McCann (2008), p. 148. Beyond the context of agency worker cases, the case law on how 'mutuality of obligation' should be applied where an individual stint of work was at issue still gave rise to two diverging decisions. In the first, a particularly harsh approach by the EAT demanded the existence of ongoing obligations even for an individual engagement to constitute an employment contract (*Kendal v Caley Fisheries Ltd*, UKEAT/0507/04/ILB). In a different case, the Court of Appeal affirmed that individual engagements could constitute contracts of employment even in the near absence of 'control' (*Cornwall County Council v Prater* [2006] ICR 731). But neither ruling received any significant attention in future decisions.

[91] Brodie (2005b), p. 254 discussing *Byrne Brothers (Formwork) Ltd v Baird and Others* [2002] ICR 667 (EAT).

[92] *Byrne Brothers* (EAT), para 17(5).

[93] ibid, para 25.

language of 'mutuality of obligation' – emphasised the general contract law requirement of consideration.[94] In a third leading case, the EAT again endorsed the transposition of the technical labour law understanding of 'mutuality of obligation' into the 'worker' category but seemed to be invoking the particular requirement for the employer to provide work and for the employee to 'hold himself available for such work'. This dominant sense of 'mutuality of obligation' goes beyond simple consideration and instead requires once again an ongoing relationship,[95] which tends to exclude agency workers and other atypical workers.

Although Deakin and Morris, the authors of a leading employment law textbook, assume these to be mere references to the contract law rule of consideration,[96] other commentators have been more critical of this trend. With a view to the elusive nature of the labour law doctrine of 'mutuality of obligation', Davidov warned at the time that '[i]mporting the formalistic interpretation of "mutuality of obligations" into the "worker" category will thwart the very idea of this category'.[97] Indeed, if the strict technical understanding of 'mutuality of obligation' is imported into the doctrinal protocol for distinguishing self-employment from 'worker' status, the latter category fails as much as employee status does to capture most agency workers and other atypical workers – that is, most liminal employment. In a subsequent decision interpreting the concept of 'worker', Elias seemed to heed this view, addressing the role of 'mutuality of obligation' in worker status at length and concluding that promises of future performance had 'little, if any, significance' in this context.[98] This approach seems to revive, in the context of 'worker' status, the inclusive technical argument endorsed by the Court of Appeal in *McMeechan*.

And yet, Elias' ruling left the door ajar for the strict, future-oriented dimension of the doctrine to come back in, by way of the curious remark that 'mutual obligations' are '[a]t most … merely one of the characteristics of the relationship which may be taken into account'.[99] This ambiguity has indeed flared up again more recently in *Bates van Winkelhof*, a whistleblowing case in which the Supreme Court reversed a Court of Appeal ruling that had treated 'subordination'

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[94] *Stephenson v Delphi Diesel Systems Ltd* [2003] ICR 471 (EAT), paras 11-14. Since *Stephenson* was an unfair dismissal case, Elias' remarks on 'worker' status would be considered obiter.
[95] *Cotswold Developments Construction Ltd v Williams* [2006] IRLR 181 (EAT), para 56.
[96] Deakin and Morris (2001), p. 167; Deakin and Morris (2012), p. 177.
[97] Davidov (2005), p. 64.
[98] *James v Redcats (Brands) Ltd* [2007] ICR 1006 (EAT), para 93.
[99] ibid.

as an additional requirement of worker status.[100] Although the criterion of 'subordination' was derived from a wide interpretation of this term by the European Court of Justice,[101] British judges have repeatedly signalled a proximity between 'subordination', the obligation for personal service required by the 'worker' definition, and future-oriented 'mutuality of obligation'.[102] For the time being, the Supreme Court has curtailed the move towards a worker status threshold 'quite close to that for employee status'.[103] However, if this approach found favour across the doctrinal community, it would mean that the boundary drawn between worker status and self-employment would effectively come to converge with the threshold for employee status.

Even the particularly inclusive personal scope of anti-discrimination legislation ('employment under a contract personally to do work') has not escaped the restrictive effects associated with the technical labour law understanding of 'mutuality of obligation'. The first moment of rollback occurred with the EAT's and later the Court of Appeal's decision not to grant an agency worker permission to argue his claim for anti-discrimination protection on the basis that he had been placed with the user firm (the 'principal') as a 'contract worker', as agency workers and other atypical workers had successfully been arguing in the late 1990s.[104] This contextual argument, which had been the most powerful argument available to atypical workers' anti-discrimination claims, was thus defeated by the higher courts' unexplained decision not even to hear it as a ground of appeal.[105] The argument that an employment agency contracting with an agency worker was acting *on behalf of* the user firm was not upheld in any subsequent discrimination cases. Moreover, the inclusive contextual phrasing of the general anti-discrimination legislation itself came under attack soon after in a similarly abrupt departure from previous case law. In *Hashwani*, an arbitrator's claim to have been illegally discriminated against by his putative employer, the Court of Appeal's then-orthodox contextual view that the distinctive 'width' of the protective remit of anti-discrimination law encompasses 'employment

[100] *Bates van Winkelhof v Clyde & Co LLP (Public Concern at Work intervening)* [2014] UKSC 32; *Bates van Winkelhof v Clyde & Co LLP* [2012] EWCA Civ 1207.
[101] See *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328 (ECJ), paras 67-68.
[102] *Hashwani v Jivraj* [2011] UKSC 40, paras 38-39 citing *James v Redcats* (EAT), paras 67-68; *Windle and another v Secretary of State for Justice* [2016] ICR 721 (CA), 731; see Dhorajiwala (2017), pp. 270-271; Deakin and Wilkinson (2005), pp. 65-66 (on the close historical link between the categories of 'exclusive service' and 'mutuality', the precursors of the contemporary legal requirements of 'personal service' and 'mutuality of obligation').
[103] Dhorajiwala (2017), p. 277; see *Bates van Winkelhof* (SC), para 39; *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29, paras 41, 49; *Uber BV v Aslam* [2021] UKSC 5, paras 74-75, 87.
[104] *Muschett v HM Prison Service*, para 30 (EAT); *Muschett* … (CA), paras 8, 25; see Royston (2011), p. 95.
[105] See also the questionable obiter analysis of the point undertaken nonetheless by the EAT judge in *Muschett* (EAT), para 30.

in the broadest sense'[106] was overruled by the Supreme Court. The latter narrowed the remit of anti-discrimination law by injecting it with a barely defined, initially wide but malleable technical requirement of 'subordination' derived, as I just mentioned, from the jurisprudence of the European Court of Justice. Since the arbitrator was not 'subordinated' to or working under the direction of the parties to the arbitration, the Supreme Court held he did not fall within the scope of anti-discrimination rights.[107]

By 2015, the Court of Appeal had fully embraced the position that 'subordination' was a requirement for anti-discrimination law to apply. This notion of 'subordination' has provided the entry point for a full-fledged technical analysis of obligations to accept and provide future work – that is, for 'mutuality of obligation' as it had emerged within labour law since the early 1980s – to be proclaimed a potentially 'relevant factor' for courts even when deciding on anti-discrimination claims.[108] This logical connection is baffling since 'the two requirements aim to identify [entirely] different dynamics within work relationships': while the former focuses on 'dynamics of personal subordination', the latter tends to capture instances of 'continuous, long-term engagement with a single employing entity' with the effect of excluding casual and agency workers.[109] If one relates this judicial move towards conflating worker status with 'employment' under anti-discrimination law to the parallel tendency towards raising the legal threshold for worker status to that of employee status, it becomes clear that aligning the personal scope of the rights entitlements linked to all three statuses is a preference held by a sizeable share of judges, litigants and even textbook authors.[110] Rather than capturing liminal employment in a stable third category, this trend threatens to dissolve the entirety of ambiguous work relations yet again into the liminal, legally invisible zone between employment and self-employment. For the time being, however, worker status in particular continues to cover a wider range of individuals in the labour market than employee status.[111]

Why did neither the technical focus on consideration in 'specific' wage-work bargains nor the contextual approaches inherent in the two intermediary statuses succeed in establishing a free-standing third category of work relations beyond the narrow category of employment

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[106] *Hashwani v Jivraj* [2010] ICR 1435 (CA), paras 13-14, 17

[107] *Jivraj* (SC), paras 23, 27, 40, 45; see *Allonby*, paras 66-68.

[108] *Windle and another v Secretary of State for Justice* [2016] ICR 721 (CA), 721, 731 overturning *Windle and another v Secretary of State for Justice* [2015] ICR 156 (EAT), para 54.

[109] Dhorajiwala (2017), 273-274.

[110] Regarding the latter group, see especially Cabrelli (2016), pp. 122-130.

[111] See the case references in n 103 above.

contracts and the entrepreneurial contract for service? Focusing on intermediary statuses, Mark Freedland – who introduced the notion of 'mutual obligations' in the 1970s and became a key figure in UK labour law scholarship since – argues that 'no third personal role name was available or was found [by judges] for that wider category of intended inclusion'.[112] His analysis may be extended to attempts made at common law to single out individual wage-work bargains. A second, similarly pertinent explanation may be derived from the persistence of technical over against contextual approaches to atypical workers' employment status that mark the ways in which the doctrinal community responded to the first two waves of litigation contesting the post-1980 judicial settlement. Moreover, even contextual arguments exceptionally found favour with a majority of judges, litigants and doctrinal commentators if they serve to exclude atypical workers from employment rights. That was the case with de facto control as an 'irreducible minimum' besides mutuality of obligation, which was the argument deployed by judges to defeat the notion that any exchange of work for wages could constitute employment. This malleability of the dominant doctrinal position suggests that it was the goal of excluding certain groups of the workforce from employment-related rights – rather than the legal characteristics of the working arrangements themselves – that has shaped the doctrinal perspective on agency-mediated work.

But the core of the problem seems to lie elsewhere. The inclusive potential of both contract law consideration and the intermediary statuses of 'worker' and 'employment' in anti-discrimination law was defused in strikingly similar ways. The requirements of employer 'control' over the claimant, future-oriented obligations on the part of the claimant and 'subordination' to the employer, which judges have reasserted in response to these challenges, all involve *an asymmetrical, open-ended duty on the claimant to do 'something more'* – without which employment-related rights tend not to be available. In other words, an atypical worker can in principle only acquire key employment rights if she had a duty to provide more of herself than was explicitly agreed by contract with her putative employer. The individual's open-ended duty, or *excess of duty* beyond what was contractually determined, remained implicit in most of the court decisions that I have analysed. An exception to this merely implicit assumption is the High Court judge's reference in 1981 to a duty to provide oneself to serve – as opposed to providing certain specified products or services – that I quoted in the second section of this

[112] Freedland (2015), p. 243.

chapter.[113] Thus, what atypical workers are lacking from the technical perspective that has dominated employment status doctrine since the early 1980s is the one thing that reliably applies to the socio-economic reality of their working arrangements: namely, the duty always to do more than they have explicitly agreed to.[114] The use of 'mutuality of obligation' that was developed by the doctrinal community around 1980 and has been reinforced since has not only rendered agency-mediated work invisible to labour law doctrine. More specifically, it has obfuscated the fact that agency-mediated and other atypical work relations involve the sale and purchase of an individual's *capacity* to work as much as traditional employment relations do.[115]

A glance in the direction of general contract law reveals that the doctrine of consideration is as malleable as its labour law derivate 'mutuality of obligation'. As one leading contract law scholar observes, 'judges deciding cases on this category [i.e., consideration] frequently say not that the arrangement lacked consideration *simpliciter*, but that it lacked "good" or "valuable" consideration', which can be taken as 'an acknowledgement that consideration exists in the literal sense' but does not technically suffice.[116] Among the diverse categories of putative contracts that courts decide not to enforce by reference to the requirement of consideration are 'social and domestic promises, promises that are contrary to public policy, and promises for which a formal requirement of validity is appropriate'.[117] These insights resonate with the exclusionary use of consideration in labour law since the early 1980s, first in the guise of 'mutuality of obligation' and later also in judicial reactions against more inclusive assertions of simple consideration. Although contract law scholars routinely remark that the underlying rationale of the doctrine remains puzzling,[118] in the context of employment status it

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113 In a leading tax law case, by contrast, the distinction between selling one's 'skill or labour' and selling 'the product of [one's] labour' – and between buying 'the man' as opposed to 'the job' – was rejected. *Hall*, 30.

114 With Hugh Collins, this constellation might be described as a contract that is not only 'incomplete by design' – as employment contracts tend to be, so as to allow employers 'to require alterations in production methods and to redirect labour' – but also provides no guidance as to how such gaps may be filled. Collins (1999), p. 161. In employment contracts, the doctrine of managerial prerogative and the employee's 'diffuse obligation of obedience' provide precisely such guidance, according to which it is the employer that in principle determines matters that are not contained in the express terms of the contract. Deakin and Morris (2012), p. 261 quoting Gouldner (1954), p. 152. In atypical work arrangements that are not recognised as employment, economic pressures on the individual are likely to bring about a similar outcome.

115 On Marx's notion of a worker's capacity to work and the production of surplus-value that this capacity enables, see Harvey (2018), p. 104. On the view that patriarchal social relations obfuscate the production of surplus-value that occurs through domestic labour, see also Dalla Costa (1972), 32-36.

116 Smith (2005), p. 110 n33; see Gordley (1991), p. 165.

117 Smith (2005), p. 109.

118 E.g. Collins (2003), p. 69; S. A. Smith (2004), pp. 215-216.

has been a highly effective device for fine-tuning and reasserting case outcomes in accordance with an economic category: namely, assumed though rarely articulated labour market needs.

A more fine-grained approach to contractual intention? Implied contracts and 'necessity'

Besides 'mutuality of obligation', the second exclusionary concept that has since the 1980s determined whether an atypical worker is characterised as an employee – namely, the employer's intention to be contractually bound – became the target of two further waves in which agency workers, their representatives and a small number of judges contested the post-1980s protocol of employment status analysis. In the early 2000s, a growing number of litigants and a minority of judges invoked the possibility of implying an employment contract between an agency worker and a user firm. The increased use of contextual legal arguments indicating an implied contract coincided with an immense increase in employment rights claims by agency workers around 2000. Agency workers' hopes to establish a sufficient legal link with the employment agency had been shattered when courts insisted from 2000 onwards, as I have just discussed, that both 'mutuality of obligation' and 'control' were the minimum requirements even for a 'specific' employment contract. Neither requirement would ordinarily be considered met as between an agency worker and an agency. Lacking alternative routes towards employment protection, agency workers, their representatives and later sympathetic judges sought to rethink the potential basis of an employment contract between an agency worker and the 'end user' of his or her labour. The key obstacle, however, in the way of construing that relationship as an employment contract is the usual absence of any written contractual documentation between the two parties on which a technical analysis could be based. The relationship between an agency worker and the client for whom they effectively work is as a rule 'hardly documented at all', as Mummery J found in a later case of this kind.[119] Summing up the view on this question that was orthodox within the doctrinal community prior to the early 2000s, Smith and Thomas, the authors of a popular textbook, affirmed that for an agency worker to 'transmute over time' into being an employee of a user firm was 'generally thought to be impossible … without the deliberate, separate hiring of a good temp on to the permanent staff'.[120]

[119] *Franks v Reuters Ltd and another* [2003] ICR 1166 (CA), para 21.
[120] Smith and Thomas (2003), p. 22.

This understanding that agency workers would never be employees of the user firm changed with the 'bombshell case'[121] of *Motorola Ltd* v *Davidson*, in which the EAT upheld a tribunal finding that an agency worker had been an employee of the user firm.[122] Somewhat surprisingly, the company's appeal had been specifically restricted to the criterion of 'control', which its representative submitted referred to the putative employer having the 'right or power to control' the work done.[123] The EAT, dismissing such a technical reading of the 'control' test, instead followed the tribunal decision and took into account the significant 'practical degree of control' exercised by the user firm over what the applicant 'did on a day-to-day basis'.[124] Prioritising contextual over technical considerations, this ruling marked a divergence from the courts' long-standing 'focus … upon the contract terms themselves as indicators of employment status' — to the detriment of the wider factual picture — that had dominated this body of law since the early 1980s.[125] The ruling in *Davidson* seemed to effect a shift in the doctrinal community's boundary-drawing protocol from prioritising the technical legal analysis of contractual rights and obligations towards a focus on the contextual or social dimension of a work relation. It thereby mirrored the contextual thrust of the intermediate employment statuses – 'worker' status and 'employment' under anti-discrimination law – that became increasingly significant in the late 1990s.

The emphasis on day-to-day control was quickly supplemented with three additional contextual arguments that sought to challenge the previously unquestioned technical view that the absence of a written contract generally ruled out an employment contract with the user firm. The first was to consider, based on '[t]he major exception' to the requirement of the parties' express consent to a contract,[126] an employment agency to have been an agent acting for the user firm for the duration of an assignment. As outlined in the previous sub-section, this argument had been successfully deployed in anti-discrimination law in light of statutory references to the user firm acting as 'principal'.[127] In the context of unfair dismissal, an employment tribunal accepted this argument to attribute both the payment of wages by the

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121 ibid.

122 [2001] IRLR 4.

123 ibid, para 13.

124 ibid, para 12 affirming and quoting from the decision of the employment tribunal.

125 Burchell, Deakin and Honey (1999), p. 12. The assertion of a contextual understanding of 'control' in *Davidson* may have had an implicit influence on the Court of Appeal's judgment in *Montgomery* ten months later. As I discussed at the beginning of this section, the Court of Appeal deployed a contextual notion of 'control' to refute the notion that a 'specific engagement' could easily constitute an employment contract.

126 Collins (2003), p. 128.

127 See the references in n 83 above.

agency and the agency's power to terminate the contract with the worker to the client firm 'at the behest' of which the agency had been acting.[128] After an initial resistance to this conception on the part of the EAT, some of its rulings soon embraced the designation of an employment agency as an agent acting for the end user by paying the agency worker, or even as an agent acting for the end user in some respects and for the worker in others.[129]

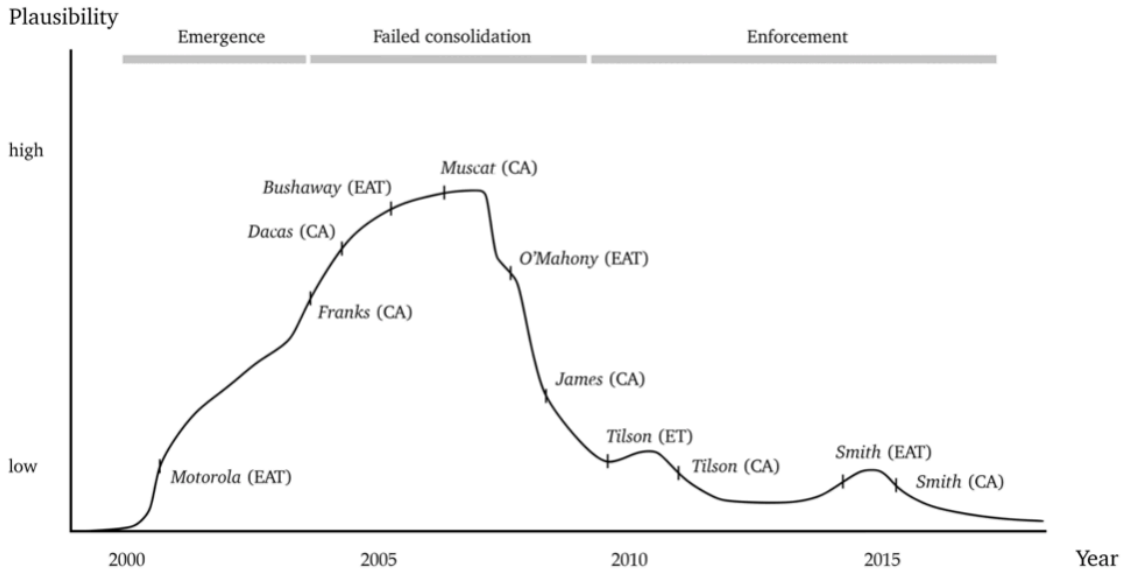

Figure 2. Plausibility of an implied contract between an agency worker and a user firm, 2000 to 2018

Beyond day-to-day control and a principal/agent relation, the third and interrelated contextual argument that served further to destabilise the established doctrinal protocol relating to the agency worker/user firm nexus was to refer explicitly to the social 'reality' of the relationship between the two parties, which may appear to observers and at times even to the parties themselves as an ordinary employment relationship.[130] This view also formed the basis for the argument advanced by litigants and judges that the long duration or regularity of a work relation that had initially lacked formal, ongoing mutual commitments can nonetheless give rise to a contract of employment.[131] The contract law notion of 'variation over time' that is implicit in

[128] See *Hewlett Packard Ltd v O'Murphy* [2002] IRLR 4 (EAT), para 27 quoting from the employment tribunal decision in the same case. With a view to the exercise of control, this argument was already contemplated in *Davidson*, para 12.

[129] *Royal National Lifeboat Institution v Bushaway* [2005] IRLR 674, paras 41 and 48; *Astbury v Gist Ltd (No 1)*, EAT/446/04/LA, para 35. For earlier judicial scepticism, see also *Hewlett Packard* (EAT); *Stephenson* (EAT); *Dacas* (CA), paras 61, 102-103.

[130] *Stephenson* (EAT); *Franks v Reuters Ltd and another* [2003] ICR 1166 (CA).

[131] *Dacas* (CA), para 75. See previously, *Airfix* (EAT) and *Nethermere* (CA).

this argument begs the question, however, which factual indications of the parties' changing intentions are legally significant and which ones are not.[132] A similarly deep-seated tension between a technical and a contextual view of a particular work relation returned soon after in the judicial debate on 'sham' terms and contracts.

Lastly, a fourth, even more direct challenge to the restrictive technical understanding of contractual intention briefly surfaced in the reported and unreported cases of this period. In a 2002 case before the EAT, an agency worker's representative argued that given the end user's de facto exercise of control the worker 'must have impliedly agreed to be bound by the terms which conferred [such] control'.[133] While such a conception could potentially capture a wide range of work relationships in which the parties have not expressly consented to being contractually bound,[134] it was effectively ignored both by the EAT in that case and subsequently.[135]

By the end of 2005, support for the emerging boundary-drawing protocol – which prioritised contextual over technical considerations when categorising agency workers – seemed to exist not only at the levels of employment tribunals and the Court of Appeal, but also in the more sceptical EAT. These developments took a different turn, however, over the course of the following two years. On the one hand, the employer representative and Court of Appeal judges in the important case of *Muscat* greatly diminished the authority of the two existing Court of Appeal decisions (*Franks* and *Dacas*) that had been invoked as the highest precedent for implying an employment contract between an agency worker and a user firm. *Franks* was interpreted as providing no more than procedural guidance while *Dacas* was deemed merely persuasive.[136] No reference whatsoever was made in the text of *Muscat*, the excoriating third judgment, to the contextual arguments based on a principal/agent relationship, on variation of the contract over time and on implied contractual consent that had been employed in previous cases. The Court of Appeal chose, however, to engage at some length with the putative employer's submission that the Court's judgment in *Dacas* — its most influential previous decision on implied agency worker contracts — had neglected the common law test that a

132 See Brodie (2005a), p. 71.
133 *Stephenson* (EAT), para 26.
134 See e.g. Collins (2003), pp. 129-131.
135 For two exceptions, see the explicit rejection by Mummery LJ in *Dacas* (CA), para 61 and the support that Sedley LJ lent to the claim ibid, para 76.
136 *Cable and Wireless Plc v Muscat* [2006] EWCA Civ 220 (CA), paras 15, 26, 36, 54.

contract should only be implied where it is 'necessary' to do so 'in order to give business reality to a transaction'.[137] This threshold centres on a different category than earlier technical and contextual approaches to employment status analysis: it explicitly asks whether *economic* considerations require that a contract be implied. Struggling to defend the notion that the test had been satisfied in its previous decision and would be so on comparable facts, the Court signalled the test's potential for impeding the implication of agency worker contracts in future. Since the case was ultimately decided in the applicant's favour in light of its exceptional facts,[138] the applicant could lodge no further appeal.

No less than three out of the five EAT decisions that ensued within five months over the winter of 2006/07 applied the economically-oriented test of 'business necessity' when drawing the line between employment and self-employment, each time in a restrictive manner to the detriment of the agency worker's claim.[139] Treating 'business necessity' as the only valid justification for deeming the parties to have intended to establish a contract proved more effective at reining in attempts to imply agency worker contracts than directly engaging with the emerging contextual arguments.[140] The newly deployed requirement of 'necessity' for the implication of a contract was quickly embraced by the EAT. The use of law of agency arguments, and potentially refined notions of contractual consent and variation, had been side-lined both in litigation and in scholarly accounts of the case law developments that had occurred in this area of law since the early 2000s.[141] The remaining legal contestation between the strict, economically-oriented application of the 'necessity' test and the previously deployed technical requirement of 'mutuality of obligation' was decisively settled by the Court of Appeal in *James*

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137 *The Aramis* [1989] 1 Lloyd's Rep 213, 224; see *Muscat* (CA), paras 43-48.

138 An uncontentious contract of employment had been transformed into a multi-partite agency arrangement without any practical change in the way in which work was performed. *Muscat* (CA), para 48. This exceptional continuity in day-to-day working arrangements may be regarded as an indication of employer intention.

139 *Cairns v Visteon UK Ltd* [2007] ICR 616; *James* (EAT); *Craigie v London Borough of Haringey*, EAT/556/06/JOJ.

140 Assertions advanced in favour of a narrow construal of contractual intention included the view that the commission retained by an agency from the end user's payment refutes any suggestion that the agency is a mere agent of the end user, the view that the 'control' test requires the legal right to control the worker and the work performed, and the warning that the mere time elapsed over the course of a work relation does not authorise courts to impute a contract.

141 For exceptional references to these arguments after 2005, see Wynn and Leighton (2006), p. 314 (dismissing the argument that an employment agency could ordinarily act as an agent for an end user); McTigue (2007), pp. 59, 62 (asserting that intention to be bound may be implied from conduct, and that a contractual relationship may evolve over a long period of time); Leighton and Wynn (2011), pp. 32-33 (stating that the lack of contractual intent between agency worker and end user precludes the implication of a contract).

in favour of the former in early 2008.[142] The Court thereby followed three EAT decisions that had already favoured the economically-oriented over the technical legal approach.[143]

Overall, the exclusionary use of the contract law doctrine of intention that agency workers, their representatives and sympathetic judges had sought to challenge had simply taken a different form. While the case law of the 1980s and 1990s had only privileged the intentions of the putative employer implicitly, the test of 'business necessity' has made this asymmetrical privileging of the employer's intentions explicit. Whether a contract is needed 'to give business reality to a transaction' is an economic criterion contemplated by an employer or other business entity, but normally not by an individual engaged in a work relation. Instead of the acknowledgement of contextual reality for which agency workers and their representatives had contended – that agency workers are de facto treated like employees of the user firm — the courts ultimately endorsed a test that considers only the employer's (usually lacking) economic interest in a contract with an agency worker relevant. This explicit privileging of the putative employer's interest further reinforces the asymmetry between atypical workers and employing entities that the narrow understanding of 'mutuality of obligation' has created. For the beneficiary of labour to be deemed an employer, in other words, depended on their clear intention and economic interest, while an express duty to do more than they have explicitly agreed to (in particular, performing work in the future or submitting to ad hoc demands) is required of atypical workers.

Capturing invalid consent to a contract? 'Sham' and inequality of bargaining power

When the move to imply contracts between agency workers and end users began to look unconvincing to a growing number of judges, the mixed, at once technical and contextual argument that contract terms may be a 'sham' where they do not represent the true intentions of the parties initiated the fourth wave in which the post-1980s protocol of employment status analysis was contested. Closely related to the contract law categories of 'improper pressure' such as duress, and contracts that are illegal because of an intention to deceive,[144] the case law on the employment status of atypical workers gave rise to a specifically employment-related doctrine

[142] *James v Greenwich London Borough Council* [2008] ICR 545 (CA), para 45.
[143] *James* (EAT); *Wood Group Engineering (North Sea) Ltd v Robertson*, EATS/0081/06/MT, paras 20-21; *National Grid Electricity Transmission Plc v Wood*, EAT/0432/07/DM.
[144] See Treitel (2004), pp. 176-177, 195.

of 'sham' terms and contracts between the late 2000s and the early 2010s. Such a doctrine was first advanced in the wake of the decline of implied agency worker contracts, when Patrick Elias, the same EAT judge who had played an important part in defeating the latter initiative,[145] was faced with yet another agency worker case.

Claimants of Polish nationality had been recruited from abroad by a British employment agency that arranged their accommodation upon arrival in the UK and placed them with a user firm for which they would work in a meat processing factory. They claimed they had been dismissed for trade union membership or activities by the agency and the client firm. In order to succeed, they first needed to establish that they were employees. In light of the applicants' recent arrival in the UK and 'for the most part, limited English', the employment tribunal had held express contractual provisions between the agency and the workers that granted the workers 'the right not to accept work or to work for other employers' to be 'a sham inserted into the documents to give the appearance of relieving the first respondents [i.e., the agency] from the burdens of being employers'.[146] This case can be seen as initiating a second phase of judicial engagement with the agency/worker nexus after the failure of agency workers to pursue the end user. The judge, EAT President Elias, dismissed the narrow assertions advanced on behalf of the agency that a written agreement could only be a sham if it had been 'consciously and deliberately designed to mislead a court', which was based on precedent in the context of hire-purchase contracts.[147] Elias preferred a different line of argument, rooted in employment law precedent, that stressed the importance of 'what legal obligations bind the parties' as opposed to 'how the contract was actually carried out'.[148] Since there was found to be 'no realistic possibility' that the applicants 'would be free to accept work as and when offered, nor to work for someone else whilst the contract … remained in place', the EAT upheld the first-instance decision on this point and ultimately dismissed the applicants' claim.[149] *Kalwak* was the first sustained discussion of the legal category of 'sham' in an employment status case.

The EAT's approach was initially struck down by the Court of Appeal, which approved instead the submission of the agency's representative that both parties' intentions to 'misrepresent their true contractual relationship' was required for express terms to be set

[145] See *Stephenson* (EAT); *James* (EAT).
[146] *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (EAT), paras 5, 18.
[147] ibid, para 54; see *Snook v London and West Riding Investment Ltd* [1967] 2 QB 786.
[148] *Kalwak* (EAT), para 56; see *Express and Echo Publications v Tanton* [1999] ICR 693.
[149] *Kalwak* (EAT), paras 58, 82.

aside.[150] Already in the following year, however, a differently composed Court distanced itself from that traditional contractual approach and held, in line with the EAT judgment in *Kalwak*, that the tribunal or court determining whether a contract is a 'sham' 'has to consider whether or not the words of the written contract represent the true intentions or expectations of the parties'.[151] It thereby rejected the requirement for both parties to have the intention to misrepresent the agreement. The Court also took the opportunity to comment explicitly on the place of technical contract law reasoning in an employment law context, a theme that already underlay the EAT decision in *Kalwak*: 'To speak of terms "solemnly agreed in writing"' – as the Court of Appeal had done in *Kalwak* – 'is more redolent of a commercial agreement reached between two parties of equal bargaining power than the kind of "take it or leave it" situation which can prevail in some agreements in the field of work'.[152] Exactly how the parties' true intentions or expectations may be identified, however, remained unclear.

The same, wider conception was adopted soon after by the Court of Appeal in a third decision, in *Autoclenz*, which included a reference to the relative bargaining power of contractual parties in a commercial and employment context.[153] Echoing the guidance that the EAT President had given in the first case prominently discussing 'sham' in an employment context, one of the Court of Appeal judges emphasised that 'where there is a dispute as to the genuineness of a written term in a contract, the focus of the enquiry must be to discover the actual legal obligations of the parties'; the evidence to be examined to that end was deemed to include both the written document or documents and the parties' conduct and expectations.[154] The relevant evidence would thus comprise both technical and contextual accounts of the work relation at issue.

When the Supreme Court granted the employer permission to appeal, it paved the way for an outline of the case law that was not restrained by the reluctance of Court of Appeal judges to openly critique previous decisions by the same court. Indeed, the Supreme Court distanced itself – and the previous two specifically employment-related decisions by the EAT and the Court of Appeal – unequivocally from the narrow contract law approach to the 'sham'

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150 *Kalwak* (CA), para 51.
151 *Firthglow Ltd (trading as Protectacoat) v Szilagi* [2009] EWCA Civ 98 (CA), para 50.
152 ibid, para 51; see *Kalwak* (CA), para 40
153 *Autoclenz Ltd* v *Belcher and others* [2009] EWCA Civ 1046, para 92.
154 ibid, para 53.

doctrine previously taken by the Court of Appeal.[155] It held that 'whether the terms of any written agreement in truth represent what was agreed' was decisive, whereby 'the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part'.[156] The Supreme Court judges thus reiterated the Court of Appeal's reliance on both technical and contextual aspects of a work relation. It went on to offer the clearest statement to date of the significance of unequal bargaining power, which 'must be taken into account' in determining whether a written agreement distorted the intentions of the contracting parties.[157]

In my discussion of implied contracts above, I already alluded to the tension involved in recognising the social or contextual dimension of work relations in contractual analysis. Very similar questions that relate to weighting factual evidence and drawing up legal tests or thresholds arise in the application of an autonomous, employment-focused 'sham' doctrine. How exactly should courts relate the social conduct and relationship of the parties to the express technical terms of elaborate contractual documents?[158] As one leading labour law scholar has noted, the well-established parol evidence rule – according to which a contract 'reduced to writing' precludes the admission of evidence 'not contained in the document' that indicates different contractual terms — does not sit well with the emerging labour law approach to 'sham' contracts.[159] However, his suggestion that courts should instead 'ascertain the parties' intentions as a question of fact on the basis of all the relevant evidence' falls prey to the same fundamental tension between what the parties' true agreement may be as a matter of social intelligibility and technical legal considerations.[160]

The Supreme Court's reference to inequality of bargaining power, on the other hand, can be seen as a potential solution to the question of how far the social reality of a contractual relationship has to depart from the express contractual terms for a 'sham' to be found. While this notion is indeed – unlike the contract law concept of 'business necessity' – a core conceptual resource of labour law, it has remained vague within the Supreme Court's judgment and in subsequent decisions. To date, judges in the higher courts have only in 'some very extreme

155 *Autoclenz Ltd v Belcher and others* [2011] IRLR 820 (SC), para 28.
156 ibid, para 35.
157 ibid.
158 See Campbell and Collins (2003), p. 29.
159 Bogg (2012), p. 334 quoting Peel and Treitel (2011), pp. 211-212.
160 Bogg (2012), pp. 334-335.

cases' of contractual misrepresentation and perceived exploitation invalidated agency worker contracts as 'sham'.[161] Despite the Supreme Court's reference to the foundational labour law concept of unequal bargaining power, contract terms have thus only been deemed a 'sham' where there had been an exceptional inequality of bargaining power between the contracting parties.

The focus on inequality of bargaining power is grounded, like the concept of 'business necessity', in economic considerations. The Polish workers in *Kalwak*, for instance, only had a fraction of the company's resources at their disposal to negotiate their working conditions in their own favour. Although inequality of bargaining power pulls in the opposite direction from 'business necessity' – that is, it would draw the boundary between employment and self-employment more to the advantage of atypical workers – judges have tended to use both concepts to the detriment of atypical workers. In the view that has become consensual within the doctrinal community, 'business necessity' generally endorses or gives effect to the putative employer's express intentions, and thus to its own boundary-drawing work. Unequal bargaining power, on the other hand, has only in particularly extreme cases been deemed to overrule express employer intentions not to form an employment contract. The implicit requirements that judges, litigants and commentators have attached to the intentions of putative employers and employees thus form a stark contrast. A claimant's intentions have only been considered relevant to categorising an individual working arrangement where she was unable truly to express them because of her exceptionally unequal bargaining position; a company's intentions, on the other hand, are deemed decisive in all other cases. The application of both economically-derived concepts – 'business necessity' and inequality of bargaining power – exhibits a similar paradox to the one I described regarding an individual's duty to do more than she expressly agreed to do. Namely, while from a technical standpoint a putative employer has no intention to subordinate an agency worker through an employment contract, a contextual focus on her working conditions often reveals that an agency worker is in fact subjected to greater subordination than a standard employee.

[161] *James* (CA), para 51; see *Alstom Transport v Tilson*, UKEAT/0358/09/CEA (EAT), paras 9, 15-16; *Tilson v Alstom Transport* [2010] EWCA Civ 1308 (CA); *Smith v Carillion (JM) Ltd* [2015] IRLR 467 (CA).

4. Conclusion

In this Chapter I have grappled with my first research question in relation to judges, litigants and doctrinal commentators: how have they constructed agency-mediated work as falling largely outside the scope of employment and labour protection, and thus as liminal employment? Tracing these acts of boundary-drawing has revealed the characterisation of agency-mediated work by the doctrinal community to be an intensely contested process through which this form of work has effectively been insulated from employment rights protection. Phases in which the doctrinal community was particularly split over how to characterise agency-mediated and other atypical forms of work have revealed not only the implicit logic of the framework of doctrinal insulation, but also its eventual reliance on economic rather than technical legal considerations. The initial fissure of 'a different type of contract from either of the familiar two' thus grew into the nameless abyss at the heart of British employment status law on which this country's recruitment industry is built.

In endorsing, rejecting or ignoring specific arguments, judges, but also litigants and commentators have actively shaped which arguments appear persuasive to other members of the doctrinal community – and which approach should be taken to analysing the employment status of atypical workers more generally. A key development by which one approach was sidelined, and novel legal arguments congealed into a new framework for characterising atypical workers, was the emergence of the narrow technical use of 'mutuality of obligation' during the late 1970s and early 1980s. I explored this development in depth in the second section of this chapter. During the early 1980s, the doctrinal community reached a consensus to exclude agency workers and other atypical workers from the sphere of employment after a phase of competition between the traditional focus on socio-economic realities and the emerging technical approach to analysing employment status. The latter approach came to dominate the doctrinal perspective on agency work for labour law purposes – and was reinforced by a one-sided, almost exclusively employer-friendly use of the doctrine of contractual intention – while the traditional contextual approach remained dominant in the tax and national insurance domain. Overall, my discussion of this process demonstrates how the exclusion of agency workers from employment-related rights was based on the invention and consolidation of a complex conceptual framework.

The exclusionary consensus within the doctrinal community, which was based on a technical use of contract law categories, was shaken by four waves of litigation that sought to make employment-related rights accessible to agency and other atypical workers. The result of these waves of contestation were twofold. On the one hand, they succeeded at least temporarily in opening up the category of employment to certain small pockets of atypical workers. The concept of 'sham' contracts, under which individuals seemingly deprived of employment status in situations of an extreme disparity in bargaining power continue to qualify for employment rights, is worth emphasising again in this regard. In recent years, the 'worker' category has similarly been more widely applied to atypical workers, bringing them within the scope of rights to the national minimum wage and working time and whistleblowing protections. On the other hand, analysing the four waves of worker-oriented litigation that have shaken employment status law since the mid-1990s has allowed me to dissect the inner logic of the exclusionary post-1980s consensus, which largely remains in force today. When judges in particular rebutted the innovative arguments submitted by claimants and their representatives – often developed by a small number of sympathetic judges and focused on the social context in which work relations were formed – they tended to reformulate the post-1980s consensus, and in so doing revealed its implicit content.

Thanks to these glimpses of doctrinal labour lawyers' priorities, I could reconstruct the requirements that have shaped the doctrinal perspective on agency-mediated (and other atypical) forms of work since the early 1980s. What judges, employer representatives and at times commentators sought to preserve in the face of sympathetic judges' and workers' challenges since the mid-1990s were two legal concepts that at once *apply and do not apply* to agency-mediated (and other atypical) workers. These are the individual's open-ended duty to submit herself to the beneficiary of her labour beyond the specific terms of the contract, and the beneficiary's intention to subordinate the individual in the form of an employment relationship. An atypical work relation that fails to show both of these features implicit in the characterisation of atypical workers since the early 1980s Is unlikely to qualify as employment. Indeed, neither requirement is met by the lion's share of atypical workers if one adopts a narrow technical approach. As a matter of social reality, by contrast, both the worker's duty to do more than explicitly agreed and the company's intention to subordinate the worker are present in the overwhelming majority of atypical work relations. A casual waiter such as the claimant in the case of *O'Kelly*, for instance, would be under no binding obligation to work longer hours than the contract explicitly provided – but would be likely to accept any such request for fear of

losing her job. Similarly, the putative employer of a casual waiter, bank nurse or supply teacher would technically express no intention to form an employment contract but would usually place demands on the individual that suggest an intention to subordinate them, such as shift changes at short notice or specific conduct requirements.

These two concepts form the core of the boundary-drawing protocol established by the doctrinal community in the early 1980s and repeatedly reasserted since then, which has locked atypical work into a paradoxical state of constituting and not constituting employment at the same time. Employment agencies and their legal advisers knew how to occupy and expand the fissure, and later abyss, that doctrinal labour lawyers have continuously been opening up between straightforward employment and self-employment. Before exploring how they constructed this liminal space for the purpose of expanding their business model of selling mediated labour, I now turn to trade unions and state regulators which have, much like the doctrinal community, insulated agency work from the traditional regime of employment protection.

Chapter 4

Insulation through labour market regulation: Pragmatic strategies for the recruitment market

Employment agencies and other private labour market intermediaries could continuously innovate their business practices thanks not only to the *doctrinal insulation* of agency work from individual employment protection examined in the previous Chapter, but also thanks to the *regulatory insulation* of the recruitment market effected by trade unions and state regulators. The practices of trade unions and state regulators are the focus of the present Chapter, which addresses the second part of my first research question: How has their engagement with agency-mediated work relations, with few exceptions, insulated the market for agency labour from collective bargaining, the enforcement of labour standards and, to a considerable extent, employment-related taxation? The threat of trade union pressure and state enforcement has played a slightly greater role in my interviews with employment agency managers than the risk of employment rights claims. Nonetheless, both sets of labour market regulators have since the early 1980s engaged with agency-mediated work in ways that are strikingly similar to the general doctrinal exclusion from employment-related rights.

Long after their first encounters with agency work arrangements, both trade unions and state regulators continued to struggle to agree on appropriate approaches to this form of work. As an experienced trade union organiser-turned-scholar explained to me, warning that 'this is very much a generalisation':

> 'Generally, [unions] don't recruit [agency workers] because people come and go. Trade unionism, in this country, is all based on the notion of permanent workers in permanent locations … and agency work doesn't fit into that model. And they don't have another model.'[1]

Albeit a generalisation, my findings confirm that trade unions have rarely pursued another model than 'permanent workers in permanent locations' – that is, the traditional model of employment. In the same vein, a senior policy officer at a large public sector trade union conceded that even today agency workers are seen to 'come with a whole host of … logistical

[1] Interview respondent E2.

issues for a union'. Stressing that 'if they're long-term, that's better', my respondent went on to list the main obstacles to union engagement with agency workers: 'Who is the employer? What rights do [unions] have to accompany them in grievance and disciplinary situations, to bargain for them? And if agency workers move around [or] their hours changes, what sub rates do they pay, which branch do you put them in?'[2] In light of these and other perceived obstacles, trade unions have tended to take a distanced approach to agency work relations over the past four decades. The main exception have been those agency workers whose assignments with one and the same end user resemble the regularity and duration of traditional employment.

The conduct of state regulators has similarly had the effect of insulating the recruitment market from active regulatory intervention, which has been an important guarantor of stability for the business practices of agencies and other intermediaries. Particularly the state body charged with overseeing the conduct of employment agencies since 1981 (namely, the Employment Agencies Standards Inspectorate and its precursors) has rarely shaped agency work relations in an active way. Taxation has constituted the main exception to the withdrawal of state regulators from agency work relations, particularly as regards low-paid agency workers. Indeed, the Inland Revenue has been concerned about this issue since the 1970s. In the early 1980s, the Inland Revenue expressed its long-held desire to avoid 'situations where an agency worker, working side-by-side with permanent employees in similar conditions, was taxed on a different basis merely because his or her services were supplied through an agency'.[3] The income of low-paid agency workers – often called temps – has been taxed as income from employment since 1975, while higher-paid agency workers, or contractors, have often escaped such treatment.

In a parallel with doctrinal developments since the early 1980s, trade unions and state regulators have treated agency work as substantially different from traditional employment — and thus largely outside their remit.[4] More specifically, I argue that the boundary-drawing work of trade unions and enforcement bodies has significantly helped construct and sustain the UK recruitment market both by defining what these actors see as the scope of their remit and by

[2] Interview respondent U3.

[3] Inland Revenue press notice, 7 April 1982 quoted in Seely (2018a), p. 6.

[4] The main exception has been the Inland Revenue, later HMRC. Its engagement with particular agency work arrangements has tended to depend, however, on whether payments to the individual worker qualify as income from employment and may thus require 'reclassification'. In other words, the de facto remit of the Inland Revenue/HMRC with regard to agency work has comprised those agency work relations that may conceivably constitute employment.

withdrawing from what they see as its boundaries. In their exceptional incursions into the emerging market for agency work, now known as the recruitment market, both sets of actors have shaped its limits. By generally withdrawing from this labour market segment, on the other hand, they created the conditions for particularly innovative and exploitative business practices within it, to which I turn in Chapter 5.

My discussion in this Chapter proceeds in four steps. In a first step, I elaborate on the two sets of labour market institutions that I examine in this Chapter and on the overall development of their approaches to agency work over the past four decades. In a second step, I discuss trade union practices in relation to agency work, before – thirdly – moving on to the practices of state regulators. In a fourth step, the chapter conclusion seeks to shed light on the interplay between the activities of both sets of actors over the past decades and draw initial insights from the contrast between the processes of doctrinal and regulatory insulation. As with phases of contestation among doctrinal actors, those regulatory initiatives that challenged the general withdrawal of trade unions and state regulators from the recruitment market have provided glimpses of the inner logic of the regulatory approach to agency-mediated work since the 1980s. Overall, labour market regulators have locked agency-mediated work relations into a paradoxical state in which it lacks labour and employment protections (except in circumstances of extreme exploitation) but is often taxed like employment (with the exceptions of most well-paid, incorporated agency workers).

1. Actors and timeline

Trade unions and state regulators have been active players in helping to delineate and stabilise the UK's recruitment market. These institutions have the power directly to engage with — and to confront — businesses such as employment agencies, other intermediaries and end users of agency labour. Their express mandate is thus to *enforce* rules in the fields of working conditions, recruitment practices and tax payments. This mandate contrasts with that of the doctrinal community, which is to apply these rules to contested cases.[5] In the narrative of the agency

[5] As I sketch in Chapter 6, a further difference lies in the type of considerations to which the regulatory community – trade unions and state regulators – tends to respond. Both sets of institutions have seen their task as regulating the labour market, and therefore as responding to economic developments within it. They have done so in a pragmatic spirit, taking particular account of the socio-political context in which they act. This orientation differs

managers I interviewed, HMRC and at times the GLAA were mentioned as antagonists, as were trade unions on rare occasions; agency managers never commented, on the other hand, on doctrinal developments. Indeed, one expressed a general distrust of lawyers, which is a tendency corroborated by a solicitor with experience advising end users of agency work: since agency staff 'tend to be very ambitious people, and … tend to not be terribly legally focused', at times they 'walk through the barriers that have been put in their way … and worry about the consequences afterwards'.[6] In short, the barriers that may be imposed by state regulators or trade unions have usually attracted the attention of agencies and other intermediaries more immediately than those imposed by legal doctrine.

A basic distinction regarding the trade unionists with whom I have spoken runs between the organisational tendencies of managerial unionism on the one hand (5 interviews) and participative unionism on the other (3 interviews). I draw this distinction from the work of trade union researchers Edmund Heery and John Kelly, for whom *managerial* unionism 'is directed towards recruiting and retaining employees in union membership' and places emphasis on 'researching members' needs', 'sliding subscriptions', and 'promotional material and activities'.[7] Within my sample, the unions exhibiting managerial tendencies had more rigid internal structures and were more experienced representing traditional employees than the unions corresponding to Heery and Kelly's participative type. They have struggled significantly more than unions of the participative type to integrate atypical workers into their ranks and to attend to their particular needs. In other words, they have tended to construct their malleable organisational remit — traditional employment and other forms of work[8] — in a narrow way that effectively excludes most agency workers.

Unions with *participative* tendencies, on the other hand, regard their membership 'in activist terms, [as] capable of formulating and prosecuting their own interests', while viewing overly 'bureaucratic' approaches with scepticism and 'full-time officers … as facilitators, assisting members in the task of self-organisation'.[9] The relatively participative unions with whose representatives I spoke recognised agency workers' structural grievances – such as lack

from the concerns dominant within the doctrinal community, which has since the late 1970s responded to contextual approaches to employment status analysis by foregrounding a technical legal approach.

[6] Interview respondent S1; see interview respondent A4.

[7] Heery and Kelly (1994), pp. 7-9.

[8] See Trade Union and Labour Relations (Consolidation) Act of 1992, ss 295 and 296.

[9] Heery and Kelly (1994), pp. 4-5.

of pay transparency and dismissal protection – more explicitly and considered adequate responses beyond the procedural restrictions upheld by unions of a more managerial orientation. At least in the mid-term, however, their limited organisational and financial resources may pose a challenge for the participative unions I encountered. Overall, they have constructed their organisational remit more broadly so as to organise and support agency workers with a view to their economic interests.

The enforcement bodies relevant to the activities of employment agencies and other private labour market intermediaries differ significantly in their remit and enforcement capacity. State regulators first engaged with agency work in a sustained way when they sought to drive back the 'shadow economy' through the enforcement of employment-related taxes. According to the tax rules on agency workers enacted in 1975, payments made directly to agency workers are to be taxed like income from employment. Within the Inland Revenue, Special Offices were tasked with enforcing these and other anti-avoidance rules across the economy, which involve 'control and [non-criminal] investigation activities'.[10] In relation to agency working, an early emphasis lay on 'the taxation of casual agency workers',[11] but more regular, incorporated – and usually more highly paid — agency workers have also reportedly been the target of 'reclassification' operations that characterised agency workers as employees on a case-by-case basis.[12] The National Minimum Wage department became, since its establishment in 1998, an Inland Revenue department with similar importance to the market for casual, low-paid agency labour and equally wide-ranging, though not criminal, enforcement powers.

Moreover, the first of two relevant state regulators focused on labour standards was originally known as the Employment Agencies Licensing Office and is today called the Employment Agencies Standards Inspectorate (EAS). Its mandate is to enforce the statutory standards set for employment agencies regarding fees charged and procedural requirements. Its most coercive power, which has been used very rarely, lies in banning individuals from running an employment agency. Beyond the licensing regime administered by this body until 1995, formal communications and occasional prosecutions have been its standard mode of engagement with employing entities. The market for agency-mediated labour – today referred to as the recruitment market — has thus been covered by a specialised enforcement body, while

[10] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 318.
[11] ibid.
[12] See my discussion in section 3 below.

the threat it has posed to businesses operating in this market has been negligible. The second state regulator concerned with labour standards was established more recently: the Gangmasters Licensing Authority (GLA), already endowed with far-reaching powers when it was established in 2004, saw its powers expand further in 2016 when it was renamed the Gangmasters and Labour Abuse Authority (GLAA). The GLA had since 2004 operated a licensing regime for employment agencies in the agricultural and food processing sectors, while its transition into the GLAA additionally granted it extensive powers of seizure and arrest in relation to extreme forms of labour exploitation.

I will distinguish three phases in the engagement of trade unions and state regulators with agency work, each of which is decisively marked by its socio-political context. The first phase, from the 1970s to the mid-1990s, saw an overall trade union preference for the eradication of agency working, while state regulators sought to enforce employment-related tax liabilities in their dealings with agency workers and agencies but very rarely interfered with working conditions in the nascent recruitment market. A second phase stretching to the late 2000s was marked by the relative openness of the New Labour government towards re-regulating atypical forms of work – that is, liminal employment — and by the influx of Eastern European workers into the UK labour market following EU enlargement in 2004 and 2007. During this time, unions succeeded at organising agency workers at certain workplaces, albeit arguably in a calculated, strategic manner. State regulators intensified their enforcement efforts against agencies and other intermediaries, both in the field of taxation and increasingly (within the sectors covered by the GLA) with regard to a wide range of labour standards. The 2010s, by contrast, were characterised by a reversal of the incipient successes of the 2000s. The key events that shaped this period were the economic recession — triggered by the global financial crisis — that set in in 2008, the defeat of the Labour Party in the 2010 general election, and the implementation of the EU directive on temporary agency workers in the UK. In this context, trade unions scaled down their efforts at integrating agency workers into their organisational structures, while HMRC abandoned the seeds of a more determined anti-avoidance approach. Similarly, the GLA's wide-ranging enforcement efforts were soon limited to extreme labour abuses, increasingly in conjunction with immigration law concerns.

The regulatory perspective on the recruitment market, in sum, has been determined by pragmatic contextual responses to economic challenges: in particular, competition between traditional employees and atypical workers, the loss of tax revenue, the specific threat of Eastern

European agency workers undercutting direct employees, severe exploitation in sectors such as agriculture, and the economic recession after 2008.

2. The practices of trade unions

Several of my interlocutors referred to the dominant model of British trade unionism as focused on traditional employees or core workers and engaged in long-standing rivalries between unions seeking to cover similar professions or sectors. Moreover, the organiser-turned-scholar whose comment I quoted at the beginning of this Chapter noted British trade unions' historical aversion against illegality, which is rooted in the degrees of illegalisation to which their organising efforts were subjected until the late 19th century.

Against this background, Heery, the trade union scholar draws a helpful distinction between three types of trade union responses to atypical or contingent workers. In the terms I developed in Chapter 2 on the basis of the economic sociology of law, these approaches are distinct boundary-drawing protocols, or ways of constructing the boundary between 'actual' employment and liminal employment. On the one hand, trade unions have at times sought to *exclude* atypical workers from their ranks, 'motivated by a desire both to protect workers from insecure employment and to shield existing members from labour market competition'.[13] This approach — oriented towards the economic interests of core workers — was influential within trade unions during the 1980s and 1990s and still resonates in trade union approaches today. On the other hand, unions have pragmatically engaged with atypical workers but have *subordinated* '[their] interests … to those of workers on standard contracts'. This approach, grounded in contextual considerations, accepts 'contingent workers as both participants in the labour market and part of the union constituency, but on a secondary basis'.[14] Thirdly, since the late 1990s an increasing number of trade unions has sought to achieve actual *inclusion* of atypical workers within their organisation on an equal footing with core workers.[15] Although the second and third approach are more difficult to distinguish, the trade union campaigns of the mid-2000s that targeted the conditions of agency workers ultimately seem to fall into the second,

[13] Heery (2009), p. 430.
[14] ibid, p. 431.
[15] ibid.

subordinating category. Sustained attempts at more inclusive approaches may be witnessed since the mid-2010s on the part of relatively participative unions.

Preference for the exclusion of agency workers

A delegate at a large trade union conference in the 1980s used a particularly brutal metaphor in relation to agency workers when he rhetorically asked: 'How do you control rabies? … You destroy rabies—you get rid of it completely and do not allow it to spread'.[16] Another trade union delegate at the time commented that agency work 'was done for pure greed … just to make extra money, not because [workers] need it, but because there is an opportunity to make an extra income'. He thought it necessary to 'remove the vermin of the ranks within the T&G—one member, one job'.[17] The sense of disquiet and even threat expressed by these statements was rarely articulated with such clarity. A senior trade union officer with a longstanding interest in atypical work confirmed to me in more polite terms that an influential view among trade unions was that 'the growing problem of agency working' could best be 'resolve[d] … by ending the use of agency work'.[18] Regarding the boundary-drawing that it implies, the exclusionary strategy differs significantly from the later approaches both in its open insistence on the distinction between core and atypical workers and in its goal of not giving atypical work 'legitimacy'.[19]

I have not encountered any evidence of a widespread trade union strategy to strip agency workers of union membership or actively prevent the growth of agency work, but the exclusionary attitude has lived on beyond the 1980s and 1990s. An example of the subtle aggression towards agency workers that I registered in my interviews was one of the first comments that a regional trade union officer in the energy sector made as part of our interview: in their view, agency workers are 'de facto the beneficiaries of some of the collective bargaining, because in relation to pay, if we get a good pay deal, then they will eventually get the same rate of pay'.[20] The fear of agency workers' freeriding on trade union bargaining in the name of direct

[16] Minutes of the 1985 Transport and General Workers' Union Biennial Delegate Conference, quoted ibid, p. 430.
[17] Minutes of the 1987 Transport and General Workers' Union Biennial Delegate Conference, quoted ibid, p. 431.
[18] Interview transcript U1.
[19] Gumbrell-McCormick (2011), p. 300.
[20] Interview transcript U4.

employees is not far removed from the 1980s trade union delegate's concern about agency workers making an 'extra income'.

Methodologically, I have found it difficult to gauge the significance of this approach in trade union practices, since their disengagement from agency work arrangements — or from sectors in which these are prevalent — has left fewer traces than active campaigning or recruitment efforts. Beyond these fields of engagement, I have come across one significant legal case in which a trade union lent its support to three casual waiters claiming their right not to be unfairly dismissed for trade union activities in 1983,[21] which I discussed in section 2 of the previous Chapter. Trade union attitudes towards atypical workers generally had been strained particularly since the Grunwick strike of 1976-78 that involved a largely female, East Asian atypical workforce and that was not the turning point towards trade union support for atypical workers for which observers had initially hoped.[22]

Towards the strategic inclusion of agency workers

One of my trade union interlocutors contrasted this exclusionary approach to the increasing 'realisation' within trade unions, particularly since the 1990s,

> 'that actually the use of agency working was expanding and that … a challenge for solidarity across the union movement was … for unions to organise not only the core, direct, permanent workforce but also the agency workers working on-site.'[23]

This tendency encapsulates much of the tension within the British trade union movement that groups like agency workers, but also migrant workers and those on zero-hours contracts, bring to the fore. While the challenge of organising agency workers deployed alongside the directly employed core workforce has been taken up by a number of unions, these inclusive efforts have in fact often been undertaken in the interests of the directly employed core workers who make up the constituency on which British trade unions have traditionally relied. In other words, trade unions pursuing this approach have constructed their remit more widely than before, but they

[21] For the Court of Appeal judgment, see *O'Kelly v Trusthouse Forte plc* [1983] ICR 728.
[22] See Sivanandan (1978).
[23] Interview transcript U1; similarly interview transcript U3.

implicitly still distinguish between traditional employment and liminal employment such as agency work.

During the 2000s, individual trade unions undertook more concerted efforts to recruit agency workers while also lobbying the New Labour government to support plans at EU level to extend employment rights to (temporary) agency workers. This is the phase when most of the successes in organising and representing agency workers which my respondents highlighted occurred. Prominent examples are the first trade union recognition by an employment agency that was achieved by the Public and Commercial Services Union (PCS) in a large workplace in 2006,[24] the efforts by Unite[25] to organise both agency and directly employed workers across the meat processing industry in the second half of the 2000s, and the more recent, ongoing campaign by the Communication Workers Union (CWU) aimed at 'closing the loopholes' in the Agency Workers Regulations – later renamed 'Close the Gap' – that pursued a similar strategy of organising both groups of workers at BT call centres. The immediate outcome of these activities was a rise in union membership among agency workers in large workplaces, which often reached the percentage required for a successful claim for recognition. Trade unions then used their rights to bargain on behalf of these workers, which in the examples mentioned led to the creation of new positions with the end user rather than the agency at the site organised by PCS,[26] a decline in the 'use and abuse' of agency workers and the transfer of 1300 agency workers onto direct contracts with the end user in meat processing,[27] and the phasing out of unequal pay for agency workers in the case of the CWU campaign.[28]

In part, this shift in focus grew out of a concern among trade unions about the economic effects of EU expansion in 2004. A report for the TUC lists the 2004 expansion among the background factors for the Unite campaign in meat processing, and correctly describes migration from new EU member states as 'increas[ing] the supply of workers willing to work for lower pay on a temporary basis, thereby allowing employers to use agency workers more easily'.[29] On the flipside, an employment solicitor I interviewed pointed to the

[24] Times & Star (2006).
[25] Initially, until its creation by merger with the Amicus trade union in 2007, the Transport and General Workers' Union.
[26] Just over a third of these positions were filled with workers who had previously been on agency contracts. See Voss et al. (2013), p. 159.
[27] TUC (2011), p. 43.
[28] CWU (2018).
[29] Wright (2011), p. 39; similarly interview transcript U3.

opportunities that this development held for trade unions: workers coming to the UK from Eastern European countries were often 'more amenable to collective organisations', which triggered 'a very big push' on the part of trade unions to increase their membership among the agency workforces in which many Eastern Europeans initially found work.[30] Whether one emphasises the positive or the negative aspects of Eastern European workers having easier access to the UK labour market, unions pragmatically perceived their engagement with this group of migrant workers and the forms of work available to many of them as a 'strategic' necessity at this point.[31]

The trend towards the strategic inclusion of agency workers in union organising and campaigning was mirrored by the prominence of issues relating to agency work in trade union lobbying. One of the senior union officials involved in this process recalled how 'there was a feeling that the Labour government was encouraging a flexible labour market', which led to 'a real push from the unions around a range of issues in the run-in to the 2005 general election around employment rights issues'.[32] These efforts seemed motivated by a fear that New Labour's programme of labour market flexibility would pose economic risks to core workers in stable, traditional employment in particular. They resulted in the 2004 Warwick Agreement between a majority of British trade unions and the Labour Party, which included the ambition of contributing positively to negotiations at EU level about the rights of agency workers. My interlocutor's tone turned bitter when he went on to explain how New Labour's subsequent 'big manifesto commitment' to do so was 'delayed and delayed', both during EU negotiations and in the domestic implementation of the EU directive.[33]

Within the UK, a specific bone of contention during both phases was the point in time when agency workers would acquire rights to be treated the same way as direct employees. A trade union official who took part in both EU-level and domestic trade union campaigning for agency worker legislation admitted that although 'ideally we wanted day 1 rights, … clearly … the only way of getting the directive over the line was to talk about the potential of a qualifying period with the UK government'.[34] From the trade union perspective, the main problem

[30] Interview transcript S6.
[31] Interview transcript E2; see interview transcript U3.
[32] Interview transcript U3.
[33] Ibid.
[34] Interview transcript U1. What is somewhat confusing about my respondent's account is the admission that it was when 'it was becoming more of a fait accompli that the directive was likely to be adopted at the Council and that could have included a day 1 right' that 'the UK government recognised it was going to need to act' and agree

consisted in 'discrimination in the use of agency workers to undercut pay and conditions of permanent staff'.[35] The outcome of UK negotiations between trade union, business and government representatives was to reduce the request of businesses for a 12-month qualifying period down to 12 weeks, on which basis the UK government paved the way for the adoption of the EU directive by lending its support. Trade unions' ultimate acceptance of this 'service qualification[] to restrict access to employment rights' is, drawing again on trade union scholar Heery's work, a further indication of their pragmatic, subordinating approach to agency workers during this period.[36] Moreover, what trade unions seemed to miss during the implementation process, according to both officials involved in these developments, was the avoidance potential of the so-called Swedish derogation. 'No one quite realised at the time', one of the officials insisted, that an exception from equal treatment where agency workers were paid in periods between assignments could be used systematically by UK agencies and end users to avoid the effects of the regulations.[37]

Overall, the shift towards including agency workers in trade union campaigns and lobbying over the course of the 2000s remains ambiguous. Heery already stressed in 2009 that 'its magnitude should not be exaggerated'.[38] Indeed, the emphasis that some of my interviewees placed on the positive outcomes of the specific organising and lobbying efforts that I have mentioned suggests that these relative successes are still exceptional rather than commonplace.[39] In this sense, the 'growing trend of unions to recognise that it is a matter of organising across the board' of which one of these interviewees spoke seems less pronounced than they initially claimed.[40] What may also be a factor is that large trade unions 'don't particularly collect them [i.e., union successes] centrally [and] it's only by accident', or anecdotally, that senior officials learn about the outcomes of relevant smaller-scale organising by local or regional branches.[41] This lack of data collection in itself seems to signal a low level of prioritisation that runs counter

to talks with social partners at the domestic level. This account raises the question of why UK trade unions did not use the opportunity to make day 1 rights a precondition for their support.

35 Ibid.

36 Heery (2009), p. 431.

37 Interview transcript U3. On the use of Pay Between Assignments contracts in the UK recruitment market, see the fifth section of Chapter 5.

38 Heery (2009), p. 432.

39 Interview transcript U1; interview transcript U3.

40 Interview transcript U1.

41 Interview transcript U3.

to the claim that a more inclusive approach has become 'probably more … the norm than not the norm'.[42]

As for the substance of these successes, what becomes evident both from my respondents' accounts and from their concrete outcomes is the extent to which the economic interests of directly employed core workers were still shaping the campaigning and lobbying efforts of trade unions. Motivated in part by the very real risk that incoming migrant workers from Eastern Europe would allow employers to push down wages, the most prominent membership drives among agency workers in the late 2000s were converted into one particular kind of bargaining success, namely the transfer of some agency workers onto direct contracts with the end user. It is worth noting the type of boundary-drawing that is at work here. Pioneering trade unions such as PCS, Unite and the CWU engaged individuals who happened to be agency workers at particular sites and included them within their remit, but they did not (yet) systematically take up the grievances of agency workers as equal in significance to the grievances of directly employed workers. Rather than rendering agency workers invisible beyond the remit of trade union activities, trade unions pursuing this strategic, subordinating approach may polemically be said to render agency workers invisible *within* their remit. The agency workforces that unions targeted in the 2000s – namely those in large workplaces who are in close contact with directly employed staff and who work relatively regular hours – and the bargaining outcomes of these campaigns suggest that the economic interests of core, directly employed union members in reducing the threat to pay and conditions posed by agency and other atypical workers were still paramount. The focus was on shifting the numerical balance further towards directly employed workers rather than addressing the existence of this difference as such.

The same might also be said of trade unions' political efforts at the time. The goal was to achieve 'equal treatment rights for agency workers',[43] an ambition which for Heery is a marker of their inclusion in trade union activities.[44] Although my two respondents who directly contributed to these lobbying efforts depicted the concerns of agency workers as central, in fact their concerns occupied a marginal position within the 2004 Warwick Agreement while the issue is not even explicitly mentioned in Labour's 2005 election manifesto.[45] Large trade unions'

[42] Interview transcript U1.
[43] Interview transcript U1.
[44] Heery (2009), p. 431.
[45] Labour Party (2005), p. 27.

readiness to accept qualifying periods within which agency workers would not yet be granted rights to equal pay and basic conditions indicates how accepting unions have implicitly been of agency workers being used as an economic buffer. All of my trade union respondents who work for a union of the managerial rather than the participative type noted that agency work was an appropriate business strategy for short-term cover, and that employment rights should only be granted after a brief period of time.

These ambiguities cast doubt on the linear shift from an exclusive to a more inclusive approach that many of my trade union respondents made out. It may be more appropriate to regard the second half of the 2000s as a move towards inclusion-in-subordination, or the inclusion of agency workers as de facto secondary to the concerns of directly employed members. The symbolic importance of large trade unions systematically organising agency workers for the first time should nonetheless not be underestimated.

Withdrawing from agency workers in defence of the interests of core workers

When the UK economy went into recession in late 2008 and employers began to reconsider the size of their workforces, trade unions tended to react by protecting their core membership from redundancies at the expense of agency workers, undermining their previous, inclusive efforts. As several of my respondents pointed out, this prioritisation of core members ruined their perception among atypical workers. Trade unions tended to restrict their remit to traditional employment on the basis of economic considerations again, after they had during the 2000s begun to embrace a pragmatic approach aimed at least at a degree of inclusion – which seemed inspired by the more worker-friendly socio-political context of that time. A regional branch officer with three decades of experience at a large generalist union of the managerialist type reluctantly but frankly explained:

> '[P]art of the trade union argument is … about defending the, you know, … directly employed staff in preference over the agency staff. That's maybe something that in time the trade unions are gonna have to … relook at. Because we … welcome them into membership as agency staff, and yet at times we ourselves adopt the view that they

> should be the first to go in any redundancy situation ... and that the directly employed staff should be given preferential treatment.'[46]

An employer-oriented solicitor emphasised the powerful position that trade unions had held in relation to agencies and end users during the late 2000s. '[Y]ou started to see a shift that worried the recruitment industry quite seriously', with businesses asking themselves 'where is this gonna go?'

> '[But] what happened was that the economic crash happened, and the trade unions … took the foot off the gas as far as temporary workers were concerned around the Agency Workers Regulations. And ultimately, it [i.e. the legislation] was allowed to progress pretty much unchecked.'[47]

Judging from the silence of trade union respondents on the momentum that unions had in this brief phase, trade unions seemed to underestimate their own ability to challenge agencies, end users and the government on the conditions of agency work.

On the one hand, this reversal meant that trade unions drastically scaled down their ambitions to engage with agency worker issues again, effectively narrowing their remit to traditional employment. It was a return to the explicit distinction between traditional employment and liminal employment that trade unions had pursued under the exclusionary approach dominant in the 1980s and 1990s. The challenges that agency workers posed to the internal structures of most trade unions in the UK could thus be put off. The representatives of large trade unions that I spoke with all stressed the need to rethink the bureaucratic and financial obstacles to the recruitment and engagement of agency workers, while moments later suggesting that the required changes were unlikely to take place. Accordingly, unions have tended to restrict themselves to ad hoc, individual cases.

The one area, on the other hand, in which trade unions have invested a significant amount of energy was the use of Swedish derogation contracts. The so-called Swedish derogation has been one of the most widely used strategies for avoiding many of the provisions of the Agency Workers Regulations of 2010 on which I elaborate in Chapter 5. According to

[46] Interview transcript U4.
[47] Interview transcript S6.

this derogation, agency workers are exempt from the right to equal treatment as long as they continue to be paid, under what would technically be a 'permanent contract of employment', during those periods in which they are between assignments.[48] The repeal of this exemption, routinely used in large workplaces to continue replacing direct employees with agency workers on a lower pay rate, became the cornerstone of trade union lobbying in this area and was considered a more pressing issue than qualifying periods for equal treatment rights.[49] The emphasis on how agency workers on these contracts are used to undercut the pay and conditions of directly employed workers indicates the economic reasons why addressing these contracts has been of such great importance to trade unions. It signals a refinement of the boundary-drawing work that trade unions undertook under the earlier exclusionary approach of the 1980s and 1990s. In an effort to shelter their directly employed core members, trade unions included within their remit this narrow (though at the time rapidly growing) group of quasi-permanent agency workers.[50]

Both tendencies seen in the 2010s – the preferential protection of core members from redundancies and the lobbying efforts concentrated on repealing the Swedish derogation – reveal the ongoing centrality of the traditional trade union model of representing the economic interests of directly employed core workers. The dominant trade union approach of the 2010s thus falls squarely on the side of subordinating agency workers' interests to those of directly employed workers, often with the effect of excluding them from the remit of trade union representation and bargaining altogether. But the incipient meaningful inclusion of the late 2000s has not dissipated. Some unions have in recent years decided to look more actively for solutions to the frictions between agency work and traditional trade union structures, ultimately in an attempt to go beyond the traditional model and transition towards a broader political vision.

Beyond the traditional trade union model?

The lack of most trade unions' attention to agency workers seems to have stimulated a degree of experimentation by other actors. Least traditionally, this included undercover journalists who

[48] Agency Workers Regulations, SI 2010/93, reg 10.
[49] Interview transcript U1.
[50] See Judge and Tomlinson (2016), pp. 13-15.

have caused agencies and end users significant concerns.[51] Respondents from two very different kinds of trade unions stand for more institutionalised alternative approaches, both of which foreground the economic interests of agency workers *alongside* those of traditional employees. A similar attempt to bridge the interests of both groups of workers underlies recent proposals for legal reform, most notably by the union-oriented Institute of Employment Rights. These alternative approaches appear, however, to neglect the existing tensions between the interests of agency workers – whose representation imposes relatively high costs to trade unions – and those of traditional employees, who continue to benefit from liminal employment as a buffer in phases of recession while at the same time being threatened by its downward pressure on wages and working conditions.

The first alternative trade union approach I encountered in my interviews was explained to me by a full-time union official in the education sector. Their position within a relatively participative union is dedicated exclusively to agency workers, which consists in individual casework, targeted workshops and lobbying.[52] The legalistic orientation of such workshops and the passive attitude taken to casework may be seen as weaknesses of this specific attempt to tailor trade union activities to the needs of agency workers. The second institutionalised alternative to the relative withdrawal of trade unions from agency work relations had been built by a grassroots trade union with strong participative elements in the construction sector. Its model emphasises a real sense of solidarity among organisations supporting atypical workers and a mode of undertaking casework that is both bold and pragmatic. It offers immediate representation, even for existing conflicts at work, rather than the idea of 'recruit first, bargain later' applied by more managerial unions.[53]

Both of these approaches constitute significant advances over the limited, subordinated attention to agency workers of the more managerial unions I was in contact with or was told about. While the first approach genuinely seeks to tailor the union's non-conflictual support to the particular needs of agency workers in the sector, the main appeal of the second approach is its fresh, uncompromising stance towards representing individual workers. Alternatives have also sprung up in the political arena, most notably with the wide-ranging proposals for reforming trade union and individual employment law that have been put forward by the

[51] Interview transcript S6.
[52] Interview transcript U5.
[53] Interview transcript U2; interview transcript U6.

Institute of Employment Rights and adopted in large part by the Labour Party. These proposals seek to go beyond the existing model of trade union organising by reintroducing sector-wide collective bargaining and loosening restrictions on union recognitions,[54] which would eliminate legal and internal bureaucratic obstacles to serious trade union engagement with agency workers.

These alternative approaches imply a drastic expansion of the organisational remit of trade unions as compared to previous, both exclusionary and subordinating approaches. They pose a challenge to these earlier, and still dominant approaches that seeks to acknowledge the economic interests of agency workers alongside those of directly employed core workers. In reaction to these challenges, trade unions of a more managerial orientation have tended to invoke the technical legal limits on their activities. Indeed, the legal risks attached to overstepping their competence and representing or bargaining for atypical workers without being entitled to do so are immense, particularly from the perspective of large managerial unions. As the union organiser-turned-scholar whom I interviewed reminded me, British trade unions' historical aversion against breaking the law has recently surfaced in their overall hesitation to engage with migrant workers against the backdrop of the criminalisation of illegal working.[55] The concern of most trade unions, particularly of a managerial type, with internal procedure and the technical legal limits on their activities currently seems to prevent them from joining the small-scale experimentation with alternative approaches on which more participative unions have embarked.

To return to the research question that has propelled this section, trade unions' general withdrawal from agency-mediated work arrangements was maintained by their prioritisation of the economic interests of directly employed workers throughout the period since the late 1970s. Although the recruitment drives and political efforts of the 2000s had the potential of countering this dynamic, even these more inclusive strategies were ultimately guided by the interests of core workers. Trade union protectionism during the recession rehabilitated the overt insulation of agency workforces from the reach of trade union regulation – with the important exception of Swedish derogation contracts, which posed immediate threats to the pay and conditions of core workers. Throughout, the low union coverage of agency workforces has thus largely removed these workforces from the standard-setting and scrutiny undertaken by trade

[54] Ewing, Hendy and Jones (2016), pp. 19, 22.
[55] Interview transcript E2; see Fudge (2018a), pp. 576-83.

unions. While a small number of innovative trade union approaches over the past years indicate how inroads into the 'recruitment market' might be made by unions, such approaches have also served to underline the technical legal obstacles to supporting agency workers alongside core workers that large managerial trade unions tend to regard as unchangeable.

3. The practices of state regulators

In contrast to trade unions, the state regulators tasked with enforcing tax rules, overseeing the conduct of employment agencies and addressing labour exploitation have pursued the interests of the state. Nonetheless, the perspective of both sets of actors on the market for agency labour bears important similarities. For both, the encounter with agency work posed economic challenges to their core interests. While trade unions were concerned about the pay and conditions of their directly employed membership, state regulators pursued the parallel goals of sustaining employment-related tax revenues and supporting economic growth. In response, both sets of actors tended to adopt pragmatic strategies that corresponded with the particular socio-political context in which they acted. In the case of state regulators, these strategies involved separate protocols for delimiting their remit in the fields of taxation and labour standards. In the field of taxation, agency work relations tended to be treated like traditional employment given that, as the Inland Revenue noted in 1981, 'the potential loss of tax [in the 'shadow economy'] … is of real concern to us'.[56] This strong concern with agency workers' tax liabilities was subject only to the exceptions of particularly difficult enforcement (in the construction sector and regarding homeworkers) and relatively well-paid agency workers operating through their own intermediary company. Labour standards, by contrast, have only been enforced by state regulators in exceptional cases in which the deception and abuse of agency workers by 'rogue' agencies and other intermediaries was at issue.[57] In other words, their boundary-drawing work in this field only tended to treat agency workers like traditional employees, and brought them within the scope of employment protections, where they were subjected to extreme forms of labour exploitation. Like the strategies developed by trade unions, state regulators thus largely insulated the recruitment market from active regulatory intervention, in principle leaving working conditions to be determined by the employing entities alone.

[56] Inland Revenue and Customs and Excise (1983), p. 774.
[57] Oral Answers to Questions, 11 June 1974, Hansard vol 874, c 1398; interview transcript R1.

State regulators began to play a decisive role in the UK labour market during the last quarter of the 20th century. In the field of labour standards, they first turned their attention to agency working in the late 1970s, for which two pieces of legislation had paved the way. The Employment Agencies Act of 1973 introduced a requirement for employment agencies to hold a licence, which would only be granted if certain minimum standards were upheld. These were stipulated by secondary legislation in 1976 and included a prohibition to charge job-seekers a fee and minimum standards relating to the recruitment process and the agency's record-keeping.[58] In practice, however, applications for licences were very rarely refused; revocation of an agency's licence was even rarer.[59] This seemed due not only to the lenience of the Employment Agencies Licensing Office, but also to the evidential requirements for refusal or revocation and to the Office's relative lack of staff and powers.[60] Employment agencies therefore enjoyed 'a great degree of freedom' in their commercial operations, and even '[s]erious breaches of the minimum standards of conduct laid down in the Act and the Regulations made under it occurred despite the licensing system'.[61]

The licensing requirement for employment agencies was repealed in 1995, despite some resistance, in light of the obvious shortcomings of the system as it was operated. The question for participants in the parliamentary debates on this issue was rather what to replace the licensing system with. A government representative defending the proposals in the House of Lords made the dubious argument, impossible to prove, that 'the minimum standards in the Employment Agencies Act 1973 and its regulations have been far more effective than the licensing system in protecting the agencies' users'.[62] In place of licensing, the government proposed to invest the Secretary of State for Employment with powers to apply to an industrial tribunal to seek a prohibition order against individual agency directors. This was suggested to be equivalent to licensing in its deterrent effect while relieving 'the vast majority of worthy,

[58] Employment Agencies Act 1973, s 6; Conduct of Employment Agencies and Employment Businesses Regulations 1976, SI 1976/715, regs 2-4, 7-8.

[59] On average, less than four applications were refused each year, while one agency had its licence revoked every two years. These numbers are minuscule considering the number of licence-holding agencies, which rose from 5,000 in 1977 to over 14,000 in 1993. House of Commons Debate 7 February 1994, vol 237.

[60] House of Lords Debate 4 July 1994, vol 556, cols 1091-2, 1084-5.

[61] Konle-Seidl and Walwei (2001), p. 38; Keter (2008), p. 40.

[62] House of Lords Debate 4 July 1994, vol 556, col 1084.

reputable and honest agencies' from 'the burden of seeking a licence'.[63] The view that the reactive and unwieldy seeking of prohibition orders could not compensate for the abolition of the licensing system, and that the latter should instead be enforced with a larger number of inspectors, did not attract a majority in parliament. With the repeal of its raison d'être, the Employment Agencies Licensing Office became the Employment Agency Standards Office (EAS). Throughout this period, the existence of the Employment Agencies Licensing Office had signalled the emergence of a separate segment of the labour market — increasingly termed the recruitment market – that required a distinct type of regulatory oversight from other parts of the labour market.

The trajectory of this regulatory body highlights the pragmatism inherent in its approach. In the socio-political climate of the 1980s and 1990s, it could not destabilise those parts of the labour market in which businesses had escaped the shackles of traditional employment protection, but it retained its regulatory hold over the recruitment market mainly through light-touch activities. After 1995, EAS continued the 'spot checks' that the Employment Agencies Licensing Office had undertaken, but its potential sanctions seemed to deter agency misconduct less than under the licensing regime. On average, less than three prohibition orders were granted and twelve prosecutions for breach of the 1976 Regulations occurred each year. During this phase, EAS seemed to shift its focus towards the prohibition of recruitment fees and the publicization of its hotline, which signalled its transition towards an advisory role. Deprived of the licensing scheme that had previously constituted the core of its activities, EAS thus effectively withdrew from the deterrence-driven enforcement of recruitment agencies. Nonetheless, it retained its nominal authority over the recruitment market, which it continued to regulate in a very loose sense that includes advising industry representatives.

In the field of taxation, the early piece of legislation that informed how enforcement bodies approached agency working was the Finance (No 2) Act of 1975, which contained the first statutory provision relating to the taxation of agency workers. This provision rendered agency workers liable for the same level of income tax as employed earners, though homeworkers, sub-contractors in the construction sector and workers in the entertainment and fashion sectors were explicitly excluded.[64] The rationale behind (in principle) deeming all agency

[63] ibid, col 1085.
[64] Finance (No 2) Act 1975, s 38(1) and (5).

workers to be employed for tax purposes was not only to establish 'equity' between agency workers and the employees 'working side by side' with them, but also to prevent the erosion of the tax base of employed earners that would occur if 'more and more erstwhile employees contrived to become self-employed agency workers'.[65] Like many trade unions furthering the economic interests of their core members as against agency workers and other atypical workers, the Treasury and Inland Revenue pursued the economic goal of safeguarding the fiscal revenue of the British state.

Tasked with 'work of special complexity … including major cases of avoidance and evasion',[66] the Inland Revenue's Special Offices acquired a key role in enforcing these rules relating to the taxation of agency work.[67] Their assertive approach towards atypical work relations was perceived by an association of self-employed at the time — the National Federation of Self Employed and Small Businesses (NFSE) — as 'blanket blitzes in various sectors where irregular work patterns prevail'.[68] Particular attention was paid to agency work, since agencies and their workers found a way to get around the 1975 tax provision that required them to be taxed the same as employees. The 1975 legislation applied where there was 'a contract between the worker and the agency' relating to the work done by the agency worker for the end client.[69] While 'very few agency workers operated through companies' in the mid-1970s, it had become more common by the early 1980s for better-paid agency workers to incorporate and contract with agencies through their own one-person companies so as to avoid being deemed employed earners.[70] In an effort to combat these tax losses – of a kind that the 1975 legislation had already sought to prevent – the Inland Revenue tended to take a robust view of the existing legal rules and 'vigorously pressed their case in negotiation with agencies and their clients'.[71] Indeed, the stated goal of the activities of the Special Offices was to render the collection of taxes more efficient, and they were the leading section within the Inland

[65] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 134.
[66] House of Commons Debate 11 May 1976, vol 911.
[67] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 322.
[68] NFSE (1984), p. 7.
[69] Finance (No 2) Act 1975, s 38(1)(b). What may at the time have been a matter of defining the scope of the provision or an instance of sloppy legislative drafting might be taken, in hindsight, to constitute an exception. In this vein, a tax adviser noted in the early 2000s that '[i]t is not known for sure why limited companies were excluded from the original agency regulations but the fact is [that] they were'. D. Smith (2004), p. 4.
[70] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 134.
[71] ibid, p. 135.

Revenue in this endeavour.[72] But unless agency workers or agencies sought to evade the 1975 legislation in an obviously wrongful manner, for instance by using 'an old company name or … a certificate of incorporation for a company that no longer exists', even identifying relevant companies often proved difficult.[73]

Thus, while the Inland Revenue dedicated substantial resources to the classification of agency workers as employees in response to the loss of tax revenue, given the socio-political context of labour market liberalisation its pragmatic attempts to widen the scope of employment for tax purposes were only partly successful. Low-paid agency workers for whom incorporation was not feasible or desirable were treated like traditional employees for tax purposes, as were many of those incorporated agency workers who were subjected to a Special Offices investigation. Systematic tax avoidance was made more difficult overall across the nascent recruitment market, though it could still be achieved through good knowledge of enforcement activities and legal-engineering capabilities. As I will probe in the following Chapter, the different tax treatment of incorporated agency workers preserved an important source of profit for employment agencies and other private labour market intermediaries.

The underlying approach to atypical work more generally was branded, both by MPs and by the NFSE, as the systematic 'reclassification' of individuals by the Inland Revenue. This trend involved individuals who had been taxed as self-employed earners but who the Inland Revenue came to classify as employed earners and therefore liable for a higher rate of tax on their income.[74] If in doubt, it appears that the Inland Revenue tended to regard individuals as employed rather than self-employed. In an exploratory study in the early 1980s, Leighton found that status assessments by the Inland Revenue tended to rely on the '[in] business on your own account' test, which – as I discussed in Chapter 3 – makes a finding of employment more likely than alternative tests.[75] The Department of Health and Social Security (DHSS), by contrast, tended to apply the 'control' test, with the consequence that its assessments were more likely to classify individuals as employed.[76] Curiously, one report claims that the respective opposite was the case for 'North Sea Oil divers and actors' working through agencies, whom the Inland

[72] In 1988, a Treasury minister detailed the 'cost-yield ratios' for the main sections of the Inland Revenue between 1983 and 1987. Throughout this period, the ratio of the Special Offices was by far the lowest. House of Commons Debate 28 January 1988, vol 126, col 370W.
[73] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 134.
[74] House of Commons Debates 5 December 1983 and 24 February 1984, vols 50 and 54; NFSE (1984), pp. 10-11.
[75] Leighton (1984b), p. 92.
[76] ibid.

Revenue's boundary-drawing work constructed as self-employed while the DHSS treated them as employees.[77] If that was the case, the crucial division from the two regulatory bodies' perspective did not run between employees, the self-employed and borderline cases in the liminal area between them. Rather, the Inland Revenue and the DHSS treated this liminal area *itself* as split between those individuals who tended to be afforded the benefits of self-employed taxation and employed social security – and those who bore the cost of being taxed as employed earners but were not eligible for social security benefits. I will return to this split between contractors and temps, and its further development, in the following Chapter.

Since there was no statutory guidance on one-person companies used to avoid a direct contract between agency worker and agency, and thus to avoid employed earner status, the government proposed to legislate to cover this regulatory gap in 1981. Severe concerns at the time about the tax revenues lost due to the 'black economy' in general and 'casual and agency workers' tax evasion'[78] in particular seemed to contribute to the proposal to tax payments to the intermediary company at the income tax rate for employed earners.[79] It appears as if these concerns were specifically held and expressed by Inland Revenue staff.[80] Just two months later, however, the proposals were withdrawn by a Treasury minister, citing 'a number of reservations' by affected businesses and individuals which included 'the impact on [the] cash flow' of one-person companies.[81] An independent committee at the time considered this aspect to have been critical to the government's withdrawing of the proposal.[82] The tax payment was to be set off against an intermediary company's corporation tax liability in due course, but it was clear that the company – and by extension, the agency worker – would bear the brunt of the proposal. The workers concerned tended to be relatively well-paid, with the main organisation lobbying on their behalf called the Professional Register of Independent Design Engineers, which was later credited with powering the expansion of the British IT sector.[83]

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[77] NFSE (1984), p. 5.

[78] Inland Revenue and Customs and Excise (1983), p. 772; House of Commons Debate 11 July 1984, vol 63, cols 1187-8; House of Commons Debate 5 June 1981, vol 5, cols 427-8W.

[79] Seely (2018a), pp. 5-6 (quoting at length from Inland Revenue press notice of 3 April 1981).

[80] ibid, pp. 5-7; see Ross (2012), p. 28.

[81] Finance Bill 1981 Debate 4 June 1981, vol 5, col 401W; Standing Committee E 4 June 1981, col 422 quoted in Seely (2018a), p. 6.

[82] *Keith Report*, vol 1, 135.

[83] Ross (2012), pp. 28, 47, 76.

Unlike other agency workers who were unable to incorporate, or for whom incorporation was impractical, this more privileged group of agency workers thus continued to be treated leniently by the Inland Revenue. As before, the Inland Revenue was merely entitled to request information from employment agencies about the relevant companies, which the government suggested would be 'used in a systematic way to monitor tax compliance by these companies and where necessary to improve it'.[84] In the view of an independent committee investigating the enforcement powers of the Inland Revenue at the time, this was merely 'a second best remedy'.[85] Overall, the Inland Revenue's boundary-drawing pragmatically foregrounded — like the EAS did during the 1980s and 1990s — the economic risk of stifling the nascent recruitment market.

No systematic review of this area of taxation was undertaken until the late 1990s, which meant that the assessment of individual work arrangements on an onerous case-by-case basis remained the only means at the Inland Revenue's disposal to counter tax avoidance through one-person intermediary companies. Even after a public outcry over the fact that the Director-General of the BBC had been hired through a company of this kind, the government confirmed this approach: 'We have no plans to [clarify the law in this area]. Whether an individual is an employee for tax purposes is a question of fact and general law and will depend, therefore, on the circumstances of the particular case'.[86]

If one considers the approaches to agency working taken by the Employment Agencies Licensing Office and the Inland Revenue, it is clear that the collection of tax revenue was a far greater priority on the government agenda than the maintenance even of minimum standards for the conduct of employment agencies throughout the period from 1975 to 1995. The weak and ultimately repealed licensing regime stands in stark contrast to the vigorous pursuit of attainable tax revenues. It is instructive to compare the logic that both prongs of this enforcement approach followed. The Employment Agencies Licensing Office only prevented the deception and abuse of agency workers by employment agencies in exceptional cases; a strong concern with agency workers' tax liabilities, by contrast, was the norm, subject to the exceptions of particularly difficult enforcement (in the construction sector and regarding homeworkers) and relatively well-paid agency workers operating through their own

[84] House of Commons Debate 6 April 1982, vol 21.
[85] Committee on Enforcement Powers of the Revenue Department (1983), vol 1, p. 136.
[86] House of Commons Debate 5 March 1993, vol 231, col 337W.

intermediary company. During this period, the nascent recruitment market was at once virtually freed from all restrictions on the recruitment and working conditions of agency workers and in large part subjected to the levels of taxation associated with traditional employment.

Throughout the 1980s and 1990s, state regulators sought to satisfy the opposing economic pressures of safeguarding the tax base while stimulating the economy by adopting a pragmatic approach towards the nascent recruitment market that bridged two opposing principles: that they would ordinarily leave matters of employment status and protection to market participants (particularly agencies), and that the labour around which the recruitment market revolves should normally be taxed in the same way as traditional employment. From the perspective of regulators, then, the paradox of individuals being taxed as if they were employed but without access to employment rights – which has often puzzled commentators[87] – in fact seems to constitute a regulatory success.

Establishing absolute rogues and aggressive tax avoidance as the outer limits of the recruitment market

The election of the New Labour government in 1997 heralded a shift in enforcement practices regarding the now flourishing UK recruitment market. While the light-touch approach pursued by EAS and its predecessor organisations remained in operation, the Inland Revenue acquired new enforcement powers in relation to personal service companies and similar types of intermediaries. Further pressures on the autonomy of the recruitment market were exerted by the civil penalties and criminal sanctions that could be imposed by the Gangmasters Licensing Authority (GLA) after 2005. These new powers of the Inland Revenue/HMRC[88] and later the GLA constituted clear regulatory incursions into the existing recruitment market, though the question at the forefront of the minds of intermediaries and end users seemed to be how these powers would be wielded. Nonetheless, these specific developments should be read against the backdrop of the New Labour government's general enthusiasm for the 'private recruitment industry', which it regarded as 'both a product of the flexible labour market and a contributor to its success', requiring to be freed from 'outdated regulation' and restrictive industry practices.[89] In this sense, under New Labour state regulators broadly continued their balancing

[87] E.g. Redston (2000), p. 10; interview transcript U2.
[88] In the remainder of this section, I will only refer to HMRC even where certain practices or processes already began within the Inland Revenue and were merely continued by HMRC after 2005.
[89] DTI (1999), para 6.6.1 quoted by McCann (2008), p. 156.

act of focusing pragmatically, in light of the given socio-political context, on the economic priorities of sustaining the tax base and stimulating the labour market.

The most contested reform affecting the activities of the relevant regulatory bodies – and arguably 'one of the most controversial tax changes ever proposed'[90] – concerned the taxation of personal service companies (PSCs). This reform came about when the Inland Revenue's ongoing concerns about tax revenue lost to service companies coalesced with other government departments' interests in bringing workers within the scope of employment protection legislation while still encouraging 'genuine' entrepreneurship.[91] The government's initial proposals replicated the plans that had been discarded in the early 1980s in two crucial ways: firstly by placing the liability for tax on the agency or end user contracting with the service company (rather than on the service company itself),[92] and secondly by using the 'control' test to identify employment (rather than rely on the multi-factor approach that had increasingly been adopted by the courts). A vigorous effort by end users, intermediaries, tax advisers and incorporated workers themselves led the government to back down regarding these most contentious aspects of the reform. Rather than agencies or end users bearing some of the burden of this reform, therefore, it was individual – though often well-paid – workers who were affected the most. From the perspective of end users, there was 'no reduction of the incentive … to insist that those providing services to them incorporate'.[93]

It seems difficult to assess the range of approaches that were available to HMRC at the time and which enforcement activities the organisation prioritised. This difficulty had already surfaced in my attempts to weigh up the potential extent of trade union pressure in key historical moments in the first half of this Chapter, for instance regarding the contentious issue of qualifying periods. From the documents that I have been able to access, however, it appears that HMRC did not shy away from using its powers to enforce tax liabilities against private labour market intermediaries. A regular observation that mirrors the Inland Revenue's earlier challenges when collecting taxes under the 1975 tax rules on agency workers is that determining

[90] Redston (2000), p. 3. Another tax adviser commented that '[o]ther than the poll tax no piece of tax legislation has received such orchestrated criticism and lobbying as IR35'. D. Smith (2004), p. 1.
[91] Redston (2000), p. 5; Oats and Sadler (2008), pp. 62-63.
[92] The government proposed an exception to this liability where the agency or end user paying the intermediary company knew that this payment would 'substantially' reach the worker in the form of a salary, whereby the intermediary company would make the appropriate PAYE and National Insurance deductions. Redston (2000), p. 8.
[93] Crawford and Freedman (2010), p. 1051.

tax status is often highly fact-specific. The same weakness was imported into the IR35 regime through its reliance on the common law tests for identifying employment, which as I explored in Chapter 3 are 'laced with uncertainty'[94] and make for a particularly 'resource-intensive' process given the high numbers of cases potentially to be assessed by HMRC.[95] Despite HMRC's decision to dedicate a specialist team to investigating managed service companies (MSCs) – a more complex variation of personal service companies (PSCs) – in 2003, it rarely used the IR35 legislation against MSCs and those operating them.[96] The effective insulation of such entities from the new legislation had been anticipated early on by recruitment market experts.[97] A related difficulty is the ease with which many intermediaries have been able to dissolve or cease their operations when targeted by HMRC, just to move their activities to a new corporate shell. Known as 'phoenixing', this practice is made possible by the strict attachment of tax liabilities to the assetless intermediary business itself, which can in principle not be transferred to its clients.[98]

On the other hand, there are also accounts of HMRC's hesitation to investigate and close down particular tax avoidance strategies. I was told by the director of a small agency that 'HMRC did very little' about the systematic and at one point widespread use of tax relief for travel and subsistence expenses to reduce tax liabilities.[99] In relation to a pioneering scheme of this kind, which reached the First-Tier Tax Tribunal and a degree of prominence, this account seems accurate with a view to the 1990s and early 2000s, after which time HMRC was reported to become less understanding of the scope and legality of the agency's scheme.[100] A former recruiter expressed similar doubts to me about HMRC's willingness to 'catch up with' borderline IR35 cases,[101] and the Chartered Institute of Taxation identified 'a failure adequately to resource the enforcement of IR35 when it was first introduced'.[102] In other words, it appears that HMRC's boundary-drawing work continued to treat only those agency work relations like traditional employment where their tax liabilities were easily enforceable, namely beyond the

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94 Redston (2000), p. 1.
95 HMT and HMRC (2006), p. 60.
96 ibid, pp. 59-60. I discuss both types of entities in more detail in the third and fourth sections of Chapter 5.
97 Jeavons (2000), pp. 8-10.
98 HMT and HMRC (2006), p. 60; interview transcript R1; interview transcript U6.
99 Interview transcript A6. While the self-employed can deduct expenses they have incurred from their tax liabilities, employed earners cannot do so; if workers can deduct such expenses as food and travel from their tax payments they save money. I address this practice further below in this section, and again in the fourth section of Chapter 5.
100 *Reed* v *HMRC* [2012] UKFTT 28 (TC), paras 7, 29.
101 Interview transcript A8.
102 Chartered Institute of Taxation (2007), p. 2.

spheres of relatively well-paid, incorporated agency workers and the construction sector in particular.

But momentum seemed to be building over the course of the 2000s towards regulatory bodies getting more involved in the recruitment market than ever before. Acknowledging that HMRC's specialist team focused on MSCs could not cope with the 'widespread non-compliance' that it encountered,[103] the Treasury and HMRC brought forward proposals in 2006 to create specific legal rules that deemed payments made to individuals by MSCs to be taxable as earnings from employment. These crucially included a definition of MSCs that required somebody other than the worker to exercise 'control over the finances or general management' of the intermediary company,[104] a transfer of debt provision to safeguard against the widespread practice of phoenixing,[105] and a provision rendering relief for regular travel expenses unavailable.[106] Despite some resistance in industry circles to the detail of this legislation, it seems clear that 'concerns about the exploitation of this corporate form abated' once the legislation had been passed in 2007.[107] The taxation of MSC arrangements was effectively implemented and potential loopholes reinforced by HMRC,[108] which was likely helped by the near consensus evident throughout the consultation process that the use of MSCs should be curtailed. In the eyes of a leading employment tax adviser, the rules on the taxation of MSCs 'removed the worst cases from the IR35 legislation', though remaining within its scope 'are people who are either genuinely outside IR35 or who do their best [to] appear to be unaffected'.[109] MSCs had thus been conclusively labelled as transgressing the outer limits of the recruitment market, a conclusion that was still accepted by the incoming Coalition government despite its strong criticism of the original IR35 legislation.[110] More generally, attempts to enforce the tax liabilities of well-paid, incorporated agency workers had thus over the course of the 2000s given way to HMRC successfully focusing on a small pocket of particularly aggressive tax avoidance – with the remainder of the recruitment market largely unaffected.

[103] HMT and HMRC (2006), p. 60.
[104] ibid, p. 42.
[105] ibid, pp. 24-26.
[106] HMRC (2007).
[107] Seely (2018b), p. 40.
[108] See HMRC (2008).
[109] Redston (2010).
[110] Seely (2018b), p. 40.

In the field of labour standards, an unprecedented incursion into the recruitment market affected the agricultural sector, food processing and related industries during this time, which are all characterised by low pay and a large presence of non-British workers. Triggered by the drowning of 21 cockle-pickers in Morecambe Bay in 2004, the UK government established the Gangmasters Licensing Authority (GLA) with the twofold purpose of establishing a licensing scheme for intermediaries (or 'labour providers') operating in the relevant sectors,[111] and monitoring and enforcing the standards of the scheme. The new organisation was able to turn its focus from the former to the latter purpose in 2008,[112] which gave it a wide remit to investigate whether intermediaries in the regulated sectors were granting workers 'safe and decent working conditions and a floor of basic employment rights' in addition to taking appropriate action against severe forms of exploitation.[113] Indeed, the GLA often sought redress both for low-scale breaches of employment law that had been difficult to challenge and for particularly abusive working conditions.[114] It was soon able to 'punch above its weight' in the sense that its high-profile operations and 'effective use of publicity and communications' was successfully 'exaggerated by labour users' and labour providers' anticipation of the main supermarket buyers' and ethical auditing/trading teams' response to … negative publicity'.[115] It thus succeeded in establishing a second firm limit to the operation of the recruitment market, comparable to HMRC's enforcement against MSCs, which consisted in the far-reaching licensing standards that applied to the GLA-regulated sectors.[116] During the late 2000s, the GLA Chairman, trade unions and civil society organisations all tended to share the view that the organisation's activities were ultimately 'a pilot for what really needs to be done'.[117] Its activities proposed a more inclusive boundary-drawing protocol than the light-touch protocol pursued by EAS, which would bring large parts of the recruitment market within the scope of labour standards enforcement.

The immediate success of the GLA in the eyes of sympathetic observers even put pressure on EAS, which had barely interfered with the activities of agencies and other intermediaries but which served – by way of its mere existence – as a counter-argument against

111 The relevant areas of work are defined in section 3 of the Gangmasters (Licensing) Act of 2004.
112 Wilkinson (2010), p. 1.
113 Davies (2014), p. 91.
114 Wilkinson (2010), pp. 10-11.
115 Balch et al. (2009) quoted in Wilkinson (2010), p. 7.
116 Gangmasters (Licensing Conditions) Rules 2009, SI 2009/307, Sched 1.
117 Wilkinson (2010), p. 10 (quoting the then-director of civil society organisation Migrants' Rights Network); see ibid, pp. 60-65, 67.

calls for incursions into the wider recruitment market by the GLA.[118] Rather than allow that to happen, the government chose to reinforce the minuscule resources and public profile of EAS. Despite this decision, those sectors that lie outside the GLA's remit, which constitute the bulk of the recruitment market, remained 'an absolute free for all';[119] one market participant ridiculed EAS as 'the invisible enforcement agency'.[120] The government further announced plans to establish a 'Fair Employment Enforcement Board' which would facilitate the cooperation of a range of enforcement bodies and certain business, trade union and civil society actors.[121] These plans never materialised, but it is noteworthy that the GLA Chairman at the time, along with civil society organisations, agreed with a Citizens Advice counter-proposal of a consolidated government agency enforcing employment rights.[122]

A final indication, though again in the field of taxation, of the step-change that was briefly in the air during the late 2000s are the government consultations on travel and subsistence expenses that were held in 2008 and 2010. Admittedly, these consultations signalled the government's disinterest in a fundamental overhaul of the rules relating to tax relief for travel and subsistence expenses. This was expressed in 2008 by the suggestion that no legislation might be forthcoming after all and the fact that, to the industry's great 'surprise' or delight, the consultation did not cover service companies.[123] Two years later, an equivalent advance concession was that any changes would only affect workers 'paid at or near the NMW'.[124] Nonetheless, the proposals to restrict the use of tax relief for travel and subsistence expenses were on both occasions strongly resisted by industry representatives and parallels were drawn to the 2007 MSC proposals,[125] which may be taken as confirmation of the government's willingness to set further limits on the operation of the wider recruitment market. The concrete outcome of the 2008 consultation was that HMRC reportedly 'refocused its efforts' on travel and subsistence schemes, which by 2010 showed 'continuing levels of non-compliance'.[126] Legislation was introduced in 2010 to prohibit travel and subsistence schemes operating at or

[118] BERR (2008), pp. 7-8.
[119] Wilkinson (2010), p. 42.
[120] ibid.
[121] BERR (2008).
[122] Wilkinson (2010), pp. 66-67.
[123] Contractor Calculator (2008).
[124] HM Government (2010), p. 3.
[125] Contractor Calculator (2008); HM Government (2010b), pp. 9-14.
[126] HM Government (2010b), p. 15.

just above the National Minimum Wage, which had been a flourishing area of aggressive tax avoidance.

These limits on the use of travel and subsistence schemes were eventually implemented by the Coalition government that was elected in 2010. But HMRC's approach to these allowances subsequently seemed to soften. It did publish regular, at one time weekly warnings as to which alternative schemes seeking to avoid the impact of the reformed travel and subsistence legislation it considered illegal;[127] however, in relation to a particularly popular alternative scheme, a lobby group suggested in 2014 that HMRC 'have not taken any … operators to task' despite its assertion three years earlier that the resulting tax relief did not comply with relevant legislation.[128] HMRC's enforcement activities seemed to have returned to a level that was acceptable to the large majority of agencies and other intermediaries in the recruitment market, rather than follow through on the more interventionist trend of the late 2000s.

An even starker withdrawal from potential regulatory engagement with intermediaries right across the recruitment market could be observed in the case of the GLA. While the organisation had in its early years sought to address both particularly serious breaches of employment protections and low-level but widespread ones, its centre of attention gradually shifted towards the former. The GLA's move from the Department for Environment, Food and Rural Affairs to the Home Office in 2014 provided the clearest sign until that point,[129] before the Immigration Act of 2016 tipped the balance of GLA priorities decisively towards enforcing, primarily by way of criminal sanctions, a 'core' of employment-related rights that loosely consists of

> the right not to be subjected to slavery, servitude or forced labour; the right to be paid no less than the NMW; and in very loose terms something approximating a right not to be engaged in work via an unlicensed agent [within the GLA-regulated sectors] or one subject to a prohibition order [within the wider remit of EAS].[130]

[127] Interview transcript S6.
[128] LITRG (2014a); HMRC (2011).
[129] But see already BIS (2009), p. 4.
[130] Davies (2016), p. 440.

Among these concerns, it became 'clear that the [former GLA's] new emphasis is on tackling modern slavery and that it has a harsher approach to illegal working'.[131] This was precisely what some commentators had warned against for years. Trade union representatives had strongly objected to the merging of enforcement activities in the areas of employment and immigration law,[132] and so did academic labour lawyer Anne Davies, who warned immediately prior to the GLA's move to the Home Office that 'the GLA's focus is shifting from employment-focused regulation, designed to secure decent working conditions, to an emphasis on combating serious crime'. She went on to note: 'Although this is not defined exclusively in terms of trafficking, it is clear that dealing with breaches of immigration law is to become a key part of the GLA's remit'.[133] The organisation's renaming into the Gangmasters and Labour Abuse Authority (GLAA) and the granting of police powers to certain GLAA officers further reflected this shift. Its remit in relation to serious breaches of employment law, and indirectly in relation to immigration law, thereby expanded to cover the entire labour market, but particularly encompasses low-paid atypical work which is most prone to the relevant forms of abuse. Overall, this reframing of the organisation's purpose and activities has increased the level of self-regulation of those parts of the recruitment market to which the licensing regime still applies, while establishing a firm new boundary that affects the entire recruitment market in the form of the GLAA's focus on modern slavery, illegal working and severe exploitation.

With the aim of achieving greater coherence in the enforcement activities of HMRC's National Minimum Wage team, the GLAA and EAS, the 2016 Immigration Act also created the new post of the Director of Labour Market Enforcement (DLME), which eventually put into practice the institutional coordination that was briefly contemplated during the late phase of the New Labour government. The post was first held by David Metcalf, who took stock of the interaction and resourcing of the three specific bodies and contributed to conversations about possible reforms. His tenure seemed to provide a counter-balance to the wider governmental preference for merely policing the limits of the recruitment market in the form of aggressive tax avoidance and severe exploitation. Metcalf was also concerned with practices that are commonplace within this market, such as the systematic withholding of holiday pay from low-paid workers and the presence of umbrella companies and other non-agency

131 Fudge (2018a), p. 579.

132 Wilkinson (2010), pp. 68-69.

133 Davies (2014), p. 96. 'While there are good justifications for focusing the GLA's energies on the worst forms of abuse, this should not be allowed to obscure the goal of ensuring decent work in agriculture more generally.' ibid, p. 89. See Fudge (2018b), p. 428.

intermediaries, and explored the potential of higher penalties for offending businesses.[134] However, these attitudes and his relative outspokenness had not translated into a tangible impact on the recruitment market by the time of his resignation in June 2019.

The most recent change in the activities of regulatory bodies that is of particular relevance to the shape and maintenance of the UK recruitment market are the ongoing reforms to the IR35 legislation. Announced in 2016, these reforms once again — after the ultimately suspended proposals of 1981 and 1999 — introduce the principle of the end user or agency that pays a personal service company (PSC) being liable for deducting income tax and national insurance contributions. They have the potential of becoming HMRC's furthest-reaching incursion into the recruitment market since the 2007 provisions that effectively abolished managed service companies, the most aggressive variation of PSCs. If one assesses HMRC's approach to the reforms so far, however, it appears more likely that many intermediaries will find it easy to restructure their hiring arrangements once again, as I will trace in the following Chapter, in line with the ambiguities and exceptions that the new legislation contains. Since the reforms began to apply to end users in the public sector in 2017, HMRC has reportedly 'done very little — if anything' to restrict the practice of end users avoiding liability through 'blanket determinations' as to whether individual work arrangements should be taxed as employment or not.[135] An even more promising avoidance strategy for end users in the private sector, for which the rules have become effective in April 2020, revolves around the explicit exception made for specified 'small companies'.[136]

In brief, both the application of labour standards to the wider recruitment market that was initiated by the GLA and HMRC's attempts effectively to pursue aggressive tax avoidance, particularly involving well-paid, incorporated agency workers, that coincided in the late 2000s were reined in. The government decided to reorient the GLA's remit towards extreme forms of exploitation and even matters of immigration enforcement, and to retreat from an overhaul of income tax legislation that would allow HMRC systematically to pursue tax avoidance in the recruitment market. Much like the possibility of large trade unions organising agency workers on an equal footing with core workers, the possibility of state regulators covering large parts of the recruitment market was thus defeated by procedural considerations.

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134 DLME (2018), pp. 55-57, 104-112.
135 IT Contracting (2019).
136 HMRC (2020), p. 1.

4. Conclusion

With this Chapter I have performed a perspectival shift by approaching agency-mediated work not from the viewpoint of legal doctrine, as I did in the previous Chapter, but from the perspective of labour market regulation. I have engaged with the second part of my first research question, which asks how trade unions and state regulators have insulated the market for agency-mediated work from collective bargaining, the enforcement of labour standards and, to a considerable extent, employment-related taxation. Mirroring the process of doctrinal insulation, the regulatory community has constructed this segment of the labour market as liminal — that is, as falling neither clearly outside nor clearly within the scope of traditional employment — through a process of contestation and internal negotiation. Moreover, both doctrinal and regulatory insulation have had strikingly similar effects. In both cases, the entitlements and protections afforded to employed workers in the UK labour market have been pushed beyond the reach of the vast majority of agency and other atypical workers.

Crucially, those exceptional instances in which trade unions and state regulators have in fact actively engaged with work relations within the recruitment market have set the outer limits of this market. The rare enforcement activities of the Employment Agencies Standards Office in relation to severe abuses of agency workers have been reinforced, since the mid-2000s, by the GLA's and later the GLAA's activities. A further demarcation of the recruitment market was added with HMRC's pursuit of managed service providers in the late 2000s, which constituted a particularly aggressive tax avoidance scheme. Lastly, trade unions became exceptionally active in this market segment during the early 2010s, intending to reduce the prevalence of agency work relations that closely resembled traditional, direct employment without being subject to employment protections. The resulting constellation compares unfavourably to the dynamic of co-regulation to which work relations in the UK were subjected in the post-war era. While the withdrawal of the state left the regulation of work relations to the interplay of trade unions and employers in the earlier period, the general withdrawal of both state institutions *and* trade unions from the market for agency-mediated work has left the field to the sole regulation of the employing entities operating within this market.[137]

[137] Nonetheless, the state retained a significant role during the period of *laissez-faire* in the sense of de-criminalising trade union activities and providing statutory support for collective bargaining and trade union recognition. I am grateful to Diamond Ashiagbor for drawing this parallel to my attention.

These findings illustrate that the shift in perspective from legal doctrine to labour market regulation is also a shift in scale. While judges, litigants and doctrinal commentators are dealing with disputes over what is employment at the individual level, labour market regulators have to decide which work relations fall within their remit at the level of the labour market. From the focus on individual work relations and their technical legal nature (that resembles the vantage point of the doctrinal community) employed in Chapter 3, this Chapter has turned to the concern with the labour market and its boundaries that corresponds to the perspective of trade unions and state regulators.

A further analytical advantage of juxtaposing the two perspectives is that their interplay sheds light on the pressures that recruitment agencies and other intermediaries have been under at different points in time. The second half of the 2000s in particular emerges as a brief period in which the incursions of both unions and state regulators into the wider recruitment market created considerable uncertainty for employing entities in this market. During those years a number of trade unions, the GLA and HMRC all treated an increasing part of the recruitment market as falling within their remit. From the perspective of labour law doctrine explored in my previous Chapter, it was the same period that appeared most volatile – particularly before the Court of Appeal explicitly rejected the argument that agency workers have in many circumstances entered an *implied* contract of employment with the user firm in 2008.[138] Lastly, both sets of actors have often shown an intention to restrict the prevalence of agency work and other forms of liminal employment in the labour market. Repeated attempts to shrink the 'shadow economy' and tax agency work like traditional employment have mirrored trade union campaigns, most notably during the 2000s, that were aimed at turning agency jobs into direct employment with the respective end user. What is thus common to the doctrinal and regulatory perspectives — beyond their parallel, insulating effects and the coincidence of the particular upheavals of the late 2000s — is that both have usually sought to render agency work, as an exemplary form of liminal employment, inexistent.

Both the main regulatory incursions into the recruitment market and those efforts by trade unions, the GLA and HMRC to include greater numbers of agency workers within their remit that were more short-lived offer glimpses of the priorities of regulators' engagement with agency-mediated work. Those incursions that turned out not to be temporary were all motivated by certain forms of agency work posing an imminent threat to regulators' core economic

[138] *James v Greenwich London Borough Council* [2008] ICR 545, which I discussed in the third section of Chapter 3.

interests. Both trade union campaigns against the Swedish derogation and the enforcement of an absolute minimum of labour standards by the Employment Agencies Licensing Office, and later by the GLA and the GLAA, have sought to protect the traditional, employed workforce from having its pay and conditions undercut. In the same vein, HMRC's pursuit of the particularly aggressive tax avoidance of managed service companies was intended to limit the resulting loss of state revenue – which is also true of the Inland Revenue and HMRC's consistent enforcement efforts against non-incorporated, that is low-paid, agency workers.

As for more short-lived regulatory approaches that sought to challenge this dominant orientation, the Inland Revenue's repeated initiatives to clamp down on those forms of tax avoidance that used the device of agency worker incorporation was equally strongly rooted in the goal of safeguarding state revenue. Even trade union attempts to recruit agency workers into their ranks during the 2000s, which were ultimately short-lived, appear guided by economic interests, namely those of core workers. This orientation was veiled by a (nonetheless authentic) concern with the plight of agency workers. The focus of trade union bargaining, however, on transforming agency work relations into a smaller number of directly employed positions rather than addressing the existence of this split within UK workforces suggests a primary concern with core, directly employed workers. Beyond economic considerations, the specific socio-political context during the 2000s also contributed to the momentum that these challenges to the wide-ranging regulatory disengagement from agency-mediated work could garner. The spirit of optimism and reform that swept UK politics with New Labour's election victory of 1997 played a key role in the Inland Revenue's unconventional tax proposals of 1999, while what I have called trade unions' strategic inclusion of agency workers would have been unthinkable in the absence of Eastern European immigration after 2004. The GLA's strategy of 'punching above its weight' and enforcing both low-scale and more serious breaches of labour standards during the late 2000s further evidences how regulators could temporarily enlist socio-political circumstances to reverse the overall regulatory consensus against active engagement with the recruitment market.

The boundary-drawing protocol that can be reconstructed on the basis of consistent and more short-lived regulatory approaches to agency-mediated work revolves around a tension between labour standards and tax rules. Namely, the strategy developed and ultimately upheld by the regulatory community has locked most agency-mediated work relations into a position in which they lack labour and employment protections (except in circumstances of extreme

exploitation or close resemblance of core, employed workers) but are taxed like traditional employment (with the exceptions of well-paid, incorporated agency workers and particularly aggressive forms of tax avoidance). This ambiguous position reinforces the conventional characterisation of agency workers under labour law and tax law, respectively, that I traced in Chapter 3. Those labour market institutions mandated to enforce labour standards – trade unions, EAS and its predecessors and the GLA/GLAA – have primarily pursued the economic interests of core workers and the goal of ultimately not impeding economic growth. They have consequently, with the exceptions that I have discussed, avoided or been encouraged by the government to avoid treating agency-mediated work in a way that resembles traditional employment. The Inland Revenue and HMRC, by contrast, have primarily acted in the interest of safeguarding state revenues, which has encouraged them precisely to tax agency-mediated work at a similar rate as traditional employment.

Trade unions' and state regulators' differentiated withdrawal from the market for agency-mediated work has been skilfully leveraged by employment agencies and other recruitment intermediaries. These businesses have thus created and maintained the cost savings on which a whole 'industry' has come to rely — that is, myriad forms of undercutting labour standards on the one hand and avoiding tax liabilities on the other. I will now turn to the question of how agencies and other intermediaries have occupied the doctrinal and regulatory vacuum in which agency-mediated work has tended to find itself since the 1980s.

Chapter 5

Innovation through legal engineering: Maintaining profit margins in the labour supply chain

Two employment solicitors specialised in the law relating to agency work described their field to me as considerably more stimulating and challenging than ordinary employment law practice. '[Y]ou're always trying to *fit* an atypical employee [or] worker situation into legislation that isn't necessarily made for that … it's a whole new world of brain usage'. Since employment legislation does not consider 'the depths of what recruitment is … you have to try and write the law around it'.[1] Their account hints at a dimension of this legal field that the doctrinal and regulatory perspectives barely capture. The core problem of agency work law – usually called 'recruitment law' by specialists – is not only how to fit atypical work into existing legal categories and regulatory remits, but also how to 'write the law around' atypical work. The latter is the primary contribution of those who advise agencies and other private labour market intermediaries. Over the past four decades, they have done the work of reinforcing and multiplying the categories that capture liminal employment, that is, work relations between and beyond the positive legal categories of employment and self-employment. As I noted in my discussion in Chapter 2 of employment and self-employment serving as hinges that link distinct epistemological perspectives, the intermediate categories deployed by the recruitment industry have succeeded at covering a much wider range of liminal employment than labour law concepts or the strategies developed by labour market intermediaries have.

In this Chapter I trace the diverse contractual structures that have emerged in — and have to some extent disappeared again from — the market for agency labour in the UK since the 1980s. In doing so, I am guided by the second research question of this study, which is how employment agencies and other private labour market intermediaries have engineered and assembled different forms of liminal employment. I am interested in how these actors have constructed their business models in relation to the binary of employment and self-employment, and in how they have combined different elements of atypical work that have been constructed – through doctrine and regulation – as falling outside of employment and labour protections. The 'whole new world of brain usage' in which specialist recruitment lawyers engage, then, has been at the centre of this feat. It has consisted in actively shaping the form

[1] Interview transcript S6.

that agency work takes, rather than seeking to render it invisible as doctrinal and regulatory actors have tended to do. Through the ways in which they have drawn the boundaries between employment and self-employment, employment agencies and their legal advisers have, in other words, not simply excluded most agency work from the legal regime that applies to traditional employment, as the processes that I have called doctrinal and regulatory insulation have done. In Chapters 3 and 4, I showed how doctrinal labour lawyers and labour market institutions have tended to engage with agency-mediated work in such a way that it conveniently slips out of their remit. Instead, agencies and their advisers have taken up elements of the categories of traditional employment and self-employment and constructed new, positive categories of liminal employment out of these.

Such positive categories created by recruitment intermediaries include not only the long-standing categories of temps and contractors but also forms of agency-mediated work that are taxed like traditional employment but only technically resemble employment for labour law purposes. Indeed, because recruitment intermediaries and their legal advisers have – unlike the doctrinal and regulatory communities – tended to think labour law and tax law together, they have been able to experiment more freely with elements adopted from the categories of employment and self-employment. Moreover, these boundary-drawing practices have successfully leveraged the priorities of workers and the Inland Revenue (and later HMRC) against one another. In light of how they have deliberately shaped the boundaries of employment and self-employment, I refer to the boundary-drawing practices of agencies, other intermediaries and their legal advisers as legal engineering.[2]

My analysis points to the intimate connection between legal innovation and market-making in the period since the early 1980s, which has a labour-facing and a capital-facing aspect. The former aspect has attracted most attention from doctrinal labour lawyers and labour market regulators. Thus, while agency-mediated work relations were initially constructed as distinct from traditional employment mainly in technical legal respects, they have come to look increasingly different from traditional employment even to a layperson, that is, as a matter of social intelligibility. Changes in the contractual structure linking an agency worker to the 'end user' of her work have convinced most judges, litigants and doctrinal commentators of the distinct nature of agency-mediated labour, as my discussion of their perspective in Chapter 3

[2] As I note in my methodological discussion in the fourth section of chapter 2, I adopt this term from Doreen McBarnet's work.

revealed. The same holds true for state regulators and trade unions, whose role in the construction of the recruitment market I highlighted in the preceding Chapter. Economic considerations derived from their mandates have provided further reasons for the regulatory community to favour withdrawal from the recruitment market. As for the capital-facing aspect of these developments, businesses that use agency-mediated labour or consider doing so have also adjusted their attitudes towards this distinct commodity over the past four decades. For all of these actors, the legal, social and economic character of agency work has increasingly come to suggest that agency-mediated labour is a qualitatively different commodity – traded on a distinct market – from traditional employed labour. The emerging recruitment industry has created and consolidated myriad ways in which businesses and individuals can access this market as buyers and sellers. Ultimately, it appears that the recruitment industry could build economically profitable business models thanks to its implicit social vision that has involved a thoroughly transformation of both individual and organisational conceptions of work.

My initial goal in this Chapter is to map the contractual make-up of the UK recruitment industry over time. My unit of analysis will be different types of supply chains for temporary labour, by which I mean the relations between employing entities and individuals in different sectors and at different times. These 'labour supply chains', as industry representatives often refer to them, are 'bolted onto' the end client on one side[3] and mediate its relations with individual workers on the other. At least since the late 1990s, the key difference between agency-mediated work and traditional work relations has been the complex string of legal entities that usually separate an agency worker from the ultimate beneficiary of her work. The entirety of such labour supply chains, however, has been neglected by both case law and doctrinal commentary, which have overwhelmingly focused on the status of agency workers under employment law and tax law.[4] In one direction, these contractual chains relay the right to use the 'services' provided by the worker, or to use the 'agency staff' provided by the intermediary.[5] In the opposite direction, they channel the money paid by the end user back to the individual worker, less the fee charged by each intermediary. Since the exchange of rights to the agency worker's labour (or her duties to perform work) against wages paid to the worker passes through such chains of separate legal entities, most doctrinal lawyers have come to agree that there is no consideration as between the worker and the end user, as I explored in Chapter 3. From the

[3] Ward (2003), p. 901.

[4] For an exception, see Prassl (2015), pp. 49-54.

[5] E.g. CTC Recruitment (n.d.), clause 2.1; *Dacas* v *Brook Street Bureau* [2004] ICR 1437, para 27.

legal engineering perspective adopted within the recruitment industry, by contrast, the technical legal status of agency workers is secondary to the economic profit generated by a particular labour supply chain.

The key events that left their mark on the structure and dynamic of agency-mediated labour supply chains tended to be changes in the legal framework to which the recruitment industry responded. These included the effective deregulation of employment agencies in 1994; re-regulative restrictions imposed by the New Labour government in the areas of workers' rights, the taxation of mediated working and minimum standards for private LMIs; the global economic downturn of 2007/2008; and more determined attempts taken since 2016 to tackle large-scale tax avoidance in labour supply chains. Each of these ruptures altered the pressures on business models within the recruitment industry and led to the flourishing of particular hiring and marketing arrangements. Part of the complexity of mapping this process is that each rupture reduced a multitude of previously existing, marginal hiring structures to a small number of dominant arrangements that market actors considered to be best-adapted to the new regulatory environment. Drawing on currently available documents and the memory of my respondents, my research necessarily foregrounds the 'winners' of market evolution at the expense of alternative models that remained marginal.[6]

In the main part of this Chapter, I will first sketch how agencies and their advisers mobilised employment law and tax law separately to formalise elements of liminal employment by way of two new intermediate categories of labour – temps and contractors – in the 1980s. I will go on to consider the impact of the incoming New Labour government on the emerging recruitment market, before mapping how a division of labour emerged between private LMIs focused on the *marketing* and the *hiring* of this liminal type of labour during the late 1990s, and how this division of labour was fleshed out during the 2000s and 2010s. During the 2000s, many agencies reversed their earlier efforts of constructing temps and contractors as partially self-employed – for employment rights and taxation purposes, respectively – and explored the advantages of labelling their workers employees so as to make use of travel and subsistence allowances. This sub-category of 'false employment'[7] seemed to inspire further hiring models that combined employment under tax law with de facto self-employment under labour law. I

[6] Throughout this Chapter, my use of terminology borrowed from evolutionary biology should be understood as a formal analogy rather than a suggestion that social dynamics such as the labour market or competition between businesses follow the same principles as the evolution of biological species.
[7] Interview transcript U6.

will conclude the Chapter by reflecting back on how agencies, other intermediaries and their advisers have cultivated and expanded two distinct sources of profit (by way of avoiding employment law on the one hand and tax law on the other) throughout this period, how they safeguarded the profit of end users and very large agencies in particular – and how their economic success seemed ultimately based on the malleability of social conceptions of work, as held by both companies and individuals.

1. Concepts and timeline

Following the call of economic geographers researching the recruitment markets to scrutinise 'the agency of agencies',[8] I focus my attention in this chapter on trends in the composition of the entities mediating labour supply chains. The length and complexity of labour supply chains have grown considerably over the past two decades, and as labour lawyers Leighton and Wynn pointed out almost 10 years ago, the 'motivation and strategies' of intermediaries and their clients with regard to the legal form that agency arrangements take still remain poorly understood today.[9] This is despite the fact that research in the fields of geography and industrial relations in particular has contributed crucial insights into the shape and development of the so-called recruitment industry in the UK and elsewhere, which include empirical and analytical observations about both the relation between end clients and private LMIs[10] and workers' perspective on mediated forms of work.[11] Nonetheless, the ebb and flow of intermediaries such as umbrella companies, personal service companies and other entities over the course of recent decades, and across different sectors of the labour market, has not been systematically addressed in this body of literature. Over time, moreover, a stark division of labour became visible within the UK recruitment industry between those intermediaries that directly hire and engage with workers and those that market them to and place them with end clients. Drawing on my interviews with legal practitioners, recruitment professionals, trade unionists and other experts, but also on existing studies and policy documents, I intend to sketch these fluctuations and the patterns that they reveal.

[8] Coe et al. (2010), p. 1063.
[9] Leighton and Wynn (2011), p. 14.
[10] Forde (2001); Ward (2003); Purcell, Purcell and Tailby (2004); Enright (2013); Watts (2012).
[11] Forde (1998); Forde and Slater (2005); McDowell et al. (2008).

Contractually interposing one or several intermediaries between an individual worker and the business that uses her labour-power has significant effects on the distribution of legal and economic risk on the one hand and the appropriation of value on the other. Most supply chain models considered in this chapter share the tendency of passing legal and economic risks 'down the chain', with the usually unspoken implication that it is workers themselves – and the legal entity with which they contract directly – that will be 'left holding the baby', that is, 'the risk'.[12] As in the basic triangular model of agency work consisting of agency worker, employment agency and end user, such labour supply chains sever the technical legal authority over the work performed, which is concentrated in the agency or other intermediary 'closest' to the worker, from the economic value produced, which is concentrated in the end user. My study of agency work arrangements thus sharpens Jeremias Prassl's diagnosis that in practice both 'agencies and end-users [are] involved (albeit to different degrees) in the exercise of the full range of employer functions', which include controlling the work performed and receiving its fruits.[13] The recruitment market does indeed harbour 'extremely "varied and variable" … arrangements between different *loci* of employer functions'.[14] The purposes that these arrangements are designed to fulfil, however, seem far from varied.

The crucial split between the legal and economic centres of gravity of labour supply chains becomes apparent in the difference between an intermediary's *hiring relation* – linking it to the individual worker – and its *marketing relation*, which ties it to the end user. Both limbs of the chain often consist of several links. These may include a large agency procuring hundreds or thousands of workers registered with several smaller agencies for an end user ('master vendor'), or an 'umbrella company' that technically acts as an agency worker's employer without in fact being able or willing to grant employment-related rights.[15] The overriding purpose of the marketing relation – which initially consisted in spot contracts but became more formalised and complex over time, potentially involving a master vendor and similar intermediaries – is to administer how the economic value produced is distributed along the supply chain. The main purpose of the hiring relation, by contrast, is to regulate where the legal authority over work

[12] Interview transcript S7.

[13] Prassl (2015), p. 49.

[14] ibid, p. 53, quoting Leighton and Wynn (2008), p. 9.

[15] To be more precise, this is how the distinction between hiring and marketing relation applies to employment agencies performing a traditional match-making function. Strictly speaking, the umbrella companies or personal service companies that may be interposed between such agencies and individual workers market their product and source labour themselves too – as do the master vendors or managed service providers that may be interposed between ordinary agencies and end users.

performed is concentrated. While these are the most visible characteristics of both halves of the labour supply chain, however, each depends on the other. There would be no economic value to distribute in the marketing relation if the hiring relation did not create the conditions for its production. Similarly, the technical legal authority concentrated in the hiring relation derives from the instructions and production processes transmitted, in the marketing relation, from the end user to the intermediary. The formal split, however between the technical legal dimension and the economic dimension of work is at the heart of the boundary-drawing protocol developed and continuously refined by the UK recruitment industry.

The make-up of the *marketing relation* exemplifies the 'price-based competition' that continues to be, as leading scholars of the recruitment industry have observed, a 'stubborn reality' for most recruitment intermediaries.[16] But the dynamic of the UK recruitment market complicates the conclusion reached by these scholars that the industry tends to be reluctant to reinvent itself and to 'fundamentally alter the terms of its competitive structure', especially when it comes to shifting towards greater 'quality- and service-based competition'.[17] In fact, innovative shifts in the marketing relation – that is, as between private labour market intermediaries and end users – may indeed be seen as competition based on the quality of labour and on the services provided. These shifts were particularly marked in the years around 2000, with the provision of 'repeat workers', the introduction of agency staff supervising agency workers 'on-site' and the formalisation of 'temp-to-perm' transfers, which I will discuss in the following section.

At the same time, as I have just noted, the marketing relation is only the most visible half of the value chain. The potential sources of the value created, and thus of the profit made by agencies, other intermediaries and end clients have throughout the past decades been sustained by innovations in the hiring relation. These profits have derived from combinations of tax savings, the avoidance of employment rights, efficiency savings based on quicker 'hiring and firing' processes as compared to direct employment, the intensification of labour and/or decreases in acceptable pay rates, and competition within and in the proximity of the recruitment market. Of these sources of profit, only the last type depends on the structure of the marketing relation rather than the hiring relation. The profit derived from competition in and around the recruitment market is also the only type of profit that clearly fails to add value

[16] Theodore and Peck (2014), p. 44; Peck, Theodore and Ward (2005), pp. 3-4.
[17] Theodore and Peck (2014), p. 44.

to the overall economy or extract surplus value, as one might put it from the perspectives of businesses and workers, respectively. Reductions in labour costs in relation to output, by contrast, conform with Marx's theory of relative surplus value, according to which surplus value is not only created as an absolute surplus – through the extension of working time beyond the price at which a worker could meet her basic needs – but also in relative terms, by changing the ratio of commodity production to the cost of subsistence.[18] Tax savings, thirdly, constitute de facto 'subsidies' for the recruitment sector, as one respondent expressly acknowledged.[19] Each of these types of profit has been created through innovations in the hiring relation, which I will trace in the main part of this Chapter.

The underlying pattern of splitting technical legal authority over the work performed from the main economic benefits extracted from it has rarely been addressed by legislation. It was reversed to some extent in two pieces of legislation enacted in 2007 and 2017,[20] following earlier government plans and agencies' occasional proposals to impose greater legal responsibilities on end clients. The wider consequence of both pieces of legislation, though, was for agencies and other intermediaries to pursue new routes of contractual innovation that would recreate precisely the same split between technical legal authority (concentrated in the hiring relation) and economic value (concentrated in the marketing relation).

The legal nature of the *hiring relation* is what a labour law perspective on agency work typically focuses on. My discussion in Chapter 3 of the narrow, technical approach to this question that is dominant in labour law doctrine revealed the centrality not only of whether there is an exchange of obligations, but also of which entity controls the work that is being performed.[21] My focus on business practices in this Chapter suggests that control and subordination are actively engineered in such a way that an agency worker tends to be technically controlled by the legal entity 'closest' to her, such as an umbrella company, personal service company or small employment agency, which retain the right to direct and discipline the worker – while meaningful, de facto control lies with the end user. This fragmentation of control has allowed courts to reject agency workers' employment rights claims against agencies on the basis

[18] Marx (1990), ch 12.

[19] Interview transcript S6.

[20] The legislation on managed service companies and IR35 reforms in the public sector, which are discussed below in section 4 of this Chapter and in section 3 of Chapter 4, respectively.

[21] See in particular my discussion of the contextual notion of control, which tends to be lacking as between an employment agency and the individual worker, in the third section of Chapter 3.

that the latter had no effective day-to-day control over the workers they supplied.[22] Conversely, courts could and did reject agency workers' claims against end users by reference to the lack of a technical right on the end user's part to control the work performed. The same effect applies to the exchange of obligations required under the labour law doctrine of 'mutuality of obligation'. From a technical standpoint, an agency worker has no work-related obligations towards the agency (that undertakes to pay her), while the end user (for which she undertakes to work) has no relevant obligations towards her.

It is important to recognise that the legal nature of the hiring relation is secondary to the ability of the entire chain of intermediaries to sustain cost savings to the end client as compared to a direct contractual relationship between the individual and her employer.[23] This logic is perhaps best illustrated by the creative use of travel and subsistence allowances from the early 2000s onwards, which generated a sudden turnaround in agencies' attitudes towards agency workers from 'do whatever you can to make sure they don't look like an employee' towards providing many with a specific kind of employment contract so as to capitalise on the associated cost benefits.[24] In this sense, the widespread 'commercialisation of employment', understood as the 'breakdown of the boundary between commercial activities and employment',[25] can even manifest itself in 'false employment', as an interview respondent quoted in this chapter aptly described such nominal employment relationships.

[22] E.g. *Montgomery v Johnson Underwood Ltd* [2001] ICR 819 (CA), para 33.

[23] This prioritisation is reflected in the drafting practices related to me by a senior employment solicitor who regularly advises end users of agency-mediated labour. In his experience, the real focus when drafting the contracts shaping the labour supply chain is not on the character of the hiring relation itself, but on the distribution of economic risk if damages, fines or other costs arise from the hiring relation: '[While] all of this law [on employment status] is about finding somebody to blame for something, … most of the … drafting is not legal but commercial: who's going to pay [if the legal characterisation intended by the intermediaries is rejected by courts or regulators]. The law itself … is manageable, but it's just a traditional dispute over where the balance of power lies in the negotiation.' Interview transcript S2.

[24] Interview transcript S6; see section 4 below on travel and subsistence schemes and overarching contracts of employment. However, managerial and moral considerations on the part of businesses and, as I discussed in Chapter 4, the intervention of trade unions have in certain constellations also affected the contractual status afforded to individual workers.

[25] Fudge (2012), p. 10.

Key legislative events (dates indicate entry into force)	**Predominant workforce model of Superstaff**	**Predominant workforce model of Excelligence**
Repeal of licensing 1994	Contract for services	PSCs
Intermediaries legislation (IR35) 2000	Contract for services, later also composite companies and umbrella companies (T&S)	Composite companies, later also MPSCs
MSC legislation 2007	Umbrella companies (T&S)	PSCs and umbrella companies (T&S)
Agency Workers Regulations 2011	Umbrella companies (T&S) and PBA contracts	PSCs and (less frequently) umbrella companies (T&S)
Reforms to expenses legislation 2016	Umbrella companies (EDM)	PSCs
IR35 reforms 2017 and 2020	Umbrella companies (EDM and PEO)	SOW and umbrella companies (PEO)

Figure 5.2: Schematic response of hypothetical agencies operating in the industrial and in the professional segment of the recruitment market to legislative change

To illustrate the manner in which the boundary-drawing practices of employment agencies continuously 'swung' workers '[in and] out of' particular hiring structures in response to incoming legislation, to use the words of one employment lawyer with over two decades' experience advising agencies,[26] I will refer to two hypothetical agencies modelled after business practices in the industrial segment of the recruitment market on the one hand and in the professional contracting market on the other hand. The stylised trajectories of 'Superstaff' and 'Excelligence' indicate the main shifts undergone by medium-sized agencies during the period under consideration as outlined in figure 5.2. These shifts in hiring structures indicate how the legal engineering perspective adopted by agencies, other intermediaries and their legal advisers

[26] Interview transcript S9.

responded to technical legal change by adapting the flow of economic profit, which I will explore in greater detail in the following sections.

2. Towards a saturated, low-margin recruitment market: temps, contractors and supply agreements

The first significant adaptation to existing legal rules by which employment agencies began – through their construction of the boundary between employment and self-employment – to engineer an economic profit occurred in the hiring relation and gave rise to the distinct market segments in which the labour-power of 'contractors' and 'temps' is traded. Both sub-categories of liminal employment are rooted in the disjuncture at the heart of the doctrinal perspective between how a work relation may be characterised from a technical and from a contextual viewpoint. On the one hand, employment agencies and relatively well-paid workers themselves sought to render contractors as technically self-employed under tax law, with the effect that savings on tax and National Insurance contributions could be distributed between end users, agencies and workers. At least since the 1980s, this strategy became a common way of hiring workers with specialist skills in sectors such as 'petrochemical engineering, computing and design'.[27] Agencies would initially simply 'call[] everyone self-employed' and thus take advantage of reduced rates of national insurance contributions.[28] Increasingly, they would turn to contracting with 'one-person businesses' through which workers would be paid, which were later termed personal service companies (PSCs), so as to create further tax advantages and at the same time cede tax liability to the individual worker-director.[29]

	Labour law	**Tax law**
Contextual approach	Employed	Employed
Technical approach	Employed?	Self-employed

Figure 5.3: The liminal employment status of 'contractors' during the 1980s and early 1990s

[27] Committee on Enforcement Powers of the Revenue Department (1983), ch. 5

[28] Interview transcript A6.

[29] Stanworth and Stanworth (1995), p. 221; National Audit Office (1984), p. 4; Crawford and Freedman (2010), p. 1049.

As a matter of social reality, however, the working arrangements of contractors were initially very similar to those of well-paid traditional employees. Most contractors remained closely integrated into the operations of the end user, and wages and non-wage benefits were the same as or even more advantageous than those in the primary labour market.[30] Agencies thus skilfully leveraged the priorities of workers and the Inland Revenue against one another. Well-paid workers were unlikely to mind the risk of losing employment-related rights in return for tax savings, while the Inland Revenue was reluctant to restrict the growth of the booming 'knowledge economy' in particular.

This group of agency workers significantly differs in their working conditions and levels of income from 'temps', who were labelled as self-employed for labour law purposes and have traditionally been placed into relatively low-paid and insecure clerical, agricultural or light industrial positions.[31] Until the late 1990s, competition among agencies in the temp market revolved around the strategy of marginally undercutting the wages paid by other agencies and by direct employers so as to reduce the overall cost to the end client.[32] A recruitment veteran who started her career 'in the mid-90s doing temporary industrial recruiting' for a high street agency provides a concrete example: 'I can remember placing people on industrial shifts where they were given £3.50 an hour, no holiday entitlements back then, pre-Working Time Regulations'.[33] Under the technical legal approach that has shaped the doctrinal perspective since the early 1980s, this strategy resulted in the exclusion of temps from relevant statutory employment rights that existed until the early 1990s, namely from the floor to wages and working conditions that were imposed by wages councils in relevant low-paid industries until that point.[34] Between the abolition of wages councils and the introduction of the National Minimum Wage and holiday pay in 1998, temps could from a doctrinal perspective claim no relevant employment protection whatsoever.

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[30] See e.g. *Ironmonger* v *Movefield* [1988] IRLR 461.

[31] Leighton (1986), p. 512; *O'Sullivan* v *Thompson-Coon* (1973) 14 KIR 108; *Pertemps Group Plc* v *Nixon* (unreported), 1993, EAT.

[32] Interview transcript A6; see Peck and Theodore (2002), p. 152.

[33] Interview transcript A8.

[34] Until 1980, the removal of these rights derived from the wages council system mainly occurred through legislative reform that sought to further promote collective bargaining. The two-phased abolition of wages councils in the 1980s and early 1990s was instead motivated by labour market considerations. See Deakin and Green (2009), pp. 207-208; Deakin and Wilkinson (2005), pp. 270-271.

As a matter of practice or social context, though, the work performed by most temps differed little from that of traditional low-paid employees. For the duration of their placements, they would work with a high degree of regularity and for one company. Moreover, the income of temps tended to be taxed in the same way as income from traditional employment.[35] As with contractors, agencies adapted to the particular conditions of this labour market segment. In this case, since low-paid agency workers were likely reluctant to challenge their pay and conditions, agencies successfully pursued cost savings in these areas while largely accepting employment-related tax liabilities.

	Labour law	**Tax law**
Contextual approach	Employed	Employed
Technical approach	Self-employed	Employed

Figure 5.4: The liminal employment status of 'temps' during the 1980s and early 1990s

The stability of the 'temp' category in particular has rested on industry representatives' pointed conflation of these four dimensions of employment status, which remains common until today. In a remarkable witness statement at the turn of the millennium, an agency director failed to differentiate between employment law and tax law when he noted that:

> 'Temps are not employed by the clients nor by us [i.e., for the purposes of employment law]. We are not allowed to treat them as self-employed [i.e., for taxation purposes]. I do not know what their status is. No one in the agency business knows the answer. They're in limbo.'[36]

This staged confusion as to how agency work fits into the traditional binary categories has reinforced the impression that the traditional categories have outlived their usefulness. As I will discuss in the following sections of this Chapter, since the late 1990s agencies have increasingly brought the strategies of constructing work relations as falling outside traditional employment

[35] Finance (No 2) Act 1975, 38; Income and Corporation Taxes Act 1988, s 134; interview transcript A8. On the continuing prioritisation of fiscal over worker-protective objectives, see Deakin (2001) ['Changing Concept'], p. 76.

[36] *Montgomery* v *Johnson Underwood Ltd* [2001] ICR 819, para 24.

under either labour law or tax law – thereby undercutting pay and conditions and avoiding tax payments, respectively – to bear on both groups of workers. In their boundary-drawing practices, employment agencies and their legal advisers thus actively interwoven the liminal position of agency work relations under labour law with their liminal position under tax law. At the same time, the divide between temps and contractors has been actively reinforced by government and business actors.

Both types of agency workers have been prevalent in specific economic sectors, which I understand as the ever-changing 'institutional environment[s]' that are 'clustered around' certain sets of commodities or products, which in turn link 'suppliers, customers and regulators'.[37] The category of contractors – technically self-employed under tax law – was typically used by agencies placing workers in the IT and energy sectors and increasingly also in the rail, pharmaceutical and financial industries. Temps – constructed as technically self-employed under labour law – would typically be working in a clerical, manufacturing and agricultural setting, and more recently in warehousing, food processing and even social work. Agency workers in healthcare, education and local government, by contrast, are less clearly associated with one type or another. In those sectors, the working conditions and legal nature of higher-ranking or managerial positions are more similar to contractor positions, while entry-level or less specialised ones resemble typical temp positions. The construction industry, finally, seems to defy agencies' traditionally distinct strategies for placing temps and contractors altogether, since both aggressive tax avoidance and the undercutting of de facto hourly rates had been prevalent in this sector long before agencies began creatively to combine these two approaches in other sectors of the UK economy.[38] Although I am unable to examine sectoral dynamics in the evolution of the UK recruitment industry in a systematic manner in this thesis, there are thus clear structural differences in agency strategies that mirror the explicit and implicit 'rules embedded' in different sectors.[39]

Across all of these sectors, the decade leading up to the year 2000 is commonly considered a turning point in the history of the UK recruitment industry, which grew several times in size and turnover during those years and underwent significant internal restructuring.[40] The lion's share of this expansion appears to have taken place in the second half of the decade,

[37] Bray and Waring (2009), p. 620; Gereffi et al. (1994), p. 2.
[38] See O'Higgins (1968); Freedman (2001), pp. 76-82.
[39] Albin (2014), p. 140; see Bechter et al. (2012).
[40] Forde (2001), p. 631; Ward (2003), pp. 890, 898; Watts (2013), p. 154.

under the influence of the deregulation of employment agencies and buoyed up by the loose labour market and economic upturn of the mid-1990s. The repeal of the licensing regime for employment agencies in 1994 constituted the most significant change in the technical legal rules affecting this segment of the labour market since the Employment Agencies Act 1973,[41] since it removed all previously existing 'barriers to entry' in the shape of legal restrictions on establishing and running an employment agency, as a key industry figure openly acknowledged.[42] Prohibition orders against individuals, which replaced the licensing regime, were subsequently issued in a mere fraction of cases. The following years saw a dramatic increase in the number of employment agencies operating in the UK, a majority of which were small and medium-sized firms.[43]

The urgent search for untapped markets beyond the industry's traditional short-term focus of replacing a 'secretary' who is 'off sick', as an experienced employment solicitor tersely put it,[44] led to 'widespread restructuring' within the UK temporary labour market, with agencies and other intermediaries more 'actively constructing markets for their products'.[45] The UK market thereby performed the same shift that its US cousin had already undergone: namely, from spot contracts towards a more regular relationship between employment agencies and their clients, and towards companies across the economy using agencies and the temporary labour they supplied in a more purposeful and long-term manner.[46] Beyond legal innovations, this construction of the recruitment market also seemed to depend on the transformation of social expectations held by companies and individuals alike, which I briefly address in the concluding section and in the following Chapter.

The legal innovations by which this market-making occurred reformed what I have called the marketing relation of labour supply chains. It became common for end users and agencies to conclude formal supply agreements that most importantly provided contractual stability regarding the quantity of labour supply. Terms concerning the quality of labour supplied similarly spread during the second half of the 1990s. At that time, both kinds of innovations were equally used in the contractor and the temp segment of the emerging

41 Deregulation and Contracting Out Act 1994, Sched 10.
42 Dumrese (2010), p. xxxviii.
43 Stanworth and Druker (2000), p. 7; Kountouros (2008), p. 56; Ward (2004), p. 260; BERR (2008), p. 3.
44 Interview transcript S6.
45 Ward (2003), pp. 889, 903.
46 E.g. Forde (2001); see Theodore and Peck (2014), pp. 32-34.

recruitment market, which allowed agencies to scale up the strategies of undercutting pay and conditions on the one hand and avoiding tax on the other.

Regarding the quantity of labour supply, on the one hand, agencies increasingly achieved contractual stability for (and in their own dealings with) end clients through the device of *national framework agreements* that established the terms of an ongoing agency-client relationship. The conclusion of such agreements implied a high volume of labour supplied to the end client by one agency, though often at the expense of a discounted rate and thus potentially resulting in profit margins that agencies would consider 'ridiculously small'.[47] Economies of scale rendered these agreements viable for large and very large agencies, and still do so today. Some of these agencies attempted to squeeze competitors out of the market by offering extreme discounts to their clients. As the director of a smaller agency interviewed by economic geographer Kevin Ward reported: 'Somebody has said to [our former client], "give it all to us and we'll do it for nothing". That's what is happening and it freezes you out of the market.'[48] In a recruitment market in which business relationships were increasingly formalised, agencies that could not conclude such high-volume agreements with client firms would often enter into formal or informal *'second-tier' arrangements*, agreeing to 'top up' the main agency's labour supply if it falls short of the client's needs.[49] A smaller agency might have access to a local pool of workers that gave it a relative advantage over larger, national agencies. However, the associated profit margins tended to be even lower than under the initial framework contract.[50]

On the other hand, agencies and their clients began to regulate the quality of labour supply in a more formal manner. Under the notion of *repeat workers*, agencies offered recurrently to supply the same individuals, whose skills would be known to match the end user's requirements and who would already be familiar with the relevant work processes. This practice was a key element in the UK industry's shift away from its traditional sphere of short-term cover. Industrial relations scholar Chris Forde notes how 'agency managers [at the time] increasingly saw the provision of "repeat" workers as an essential part of the service they offered', especially 'where employers used large numbers of agency temps' and started to consider their presence a 'practical necessity'.[51] The provision of repeat workers implied a

[47] Forde (2001), p. 636; Ward (2003), pp. 899-900; interview transcript S1.
[48] Ward (2003), p. 901.
[49] Interview transcript A5.
[50] Ward (2003), p. 900.
[51] Forde (2001), pp. 636-637; on this practice in the US market, see Henson (1996), pp. 68-69, 71-73.

significant shift in companies' attitudes towards temporary labour. Since repeat workers would be familiar with the production process, the end users of agency labour could expand their practices of requesting workers at short notice and for specific periods of time. A related service offering was to grant clients the right to hire individual agency workers directly — after a probation period of up to three months and against the payment of a fee — under *'temp-to-perm' schemes*.[52]

With both of these practices, agencies could draw economic benefits from end users' concerns with the quality and reliability of agency-mediated labour. The provision of repeat workers increased end clients' dependence on employment agencies and generated a stable income and profit per worker and hour worked while the agency's involvement was likely to decrease over time.[53] Formalised temp-to-perm transitions provided agencies with both 'a predictable source of income' during the probation period[54] and, if a worker was taken on directly, a 'windfall fee' compensating the agency for the loss of the 'revenue-generating asset' that is its temporary worker on assignment.[55] As I will trace further below, both practices were inscribed into legislation enacted in 2003 and 2010 that further legitimised their use.[56]

Overall, in their dealings with one another agencies and end users seemed to pay little attention to potential legal risks arising in the hiring relation during the 1980s and 1990s. They would conceive of their relation as a purely commercial one undisturbed by any employment rights claim that a worker might bring. After all, as I examined in the preceding two Chapters, in the field of employment status judges and doctrinal lawyers had since the early 1980s embraced the contractual freedom of employment agencies and other atypical employers, while the incursions of trade unions and state regulators into the recruitment market remained limited to the taxation of low-paid temps. Although these legal risks have remained secondary to economic considerations as regards the make-up of the marketing relation until today, they have since the late 1990s been addressed through formal contractual means. On-site supervisors

[52] Forde (2001), pp. 637-639; see Navarro (1996), p. 20; on this practice in the Canadian market, see Vosko (2000), p. 152.
[53] Interview transcript U4; Henson (1996), p. 69.
[54] Forde (2001), p. 639.
[55] Interview transcript S1; interview transcript A8.
[56] See section 4 below on the regime for temp-to-perm fees under the Conduct Regulations 2003, and section 5 on the qualifying period and pay between assignment (or 'Swedish derogation') contracts under the Agency Workers Regulations 2010.

supplied by agencies and the spread of indemnity clauses relating to employment claims are key examples in this regard.

The key innovations that agencies and their legal advisors developed during this early period are the stable sub-categories of temps and contractors on the one hand and formal contractual arrangements with end users on the other. While the sub-categories of temps and contractors gave legal shape to the respective profit streams of avoiding employment rights claims and employment-related tax payments, formal agreements with end users relating to the quantity and quality of temporary labour supplied allowed agencies to derive economic benefits from companies' changing attitudes towards agency-mediated labour. This dual focus illustrates the recruitment industry's constitutive challenge. Its economic success depends on its ability continuously to look both ways, and to keep both capital and labour – as the buyers and sellers of mediated labour – sufficiently engaged.

3. Short-term adjustments to re-regulation under New Labour: entrenchment of supply agreements and growing end user expectations

The early phase of the New Labour government had a significant impact on the UK recruitment industry – arguably more so than it had on work relations more generally.[57] The labour-related policies contained in the election manifesto of 1997 and in the incoming government's White Paper 'Fairness at Work' of the following year signalled a 'partnership' approach to work relations while at the same time acknowledging the growth of precarious work.[58] Two manifesto pledges that were implemented in the first years of the new government, namely the introduction of workers' rights to the national minimum wage and paid annual leave, had a disproportionate impact on the recruitment sector, as did changes to the tax rules for contractors operating through service companies. Employment agencies initially reacted to these legislative changes by adapting their existing contractual relations with end users, in an overall climate of intensified competition within the recruitment market.

The introduction of the national minimum wage and paid annual leave impeded the ways in which agencies placing temps had traditionally competed with one another and with direct

[57] See Davies and Freedland (2007), pp. 42-60.
[58] DTI (1998), p. 2.

employers. While wage levels had previously been 'subject only to the pressures of local labour markets',[59] the owner of a small agency introduced above considered the National Minimum Wage Act a turning point for the recruitment industry: 'When there was that floor … of a minimum wage, everyone had to pay that minimum wage. That I think triggered a lot of agencies into looking for ways that they could supply cheaper, because they couldn't reduce wages'[60] — at least not in the straightforward manner in which they had previously done so. A similar effect was felt in relation to the Working Time Regulations, as HR management scholars Stanworth and Druker found, with one large UK agency calculating 'increases of 10 percent in costs to client firms … to cover the implementation of four weeks annual holiday pay'.[61] As a consequence, '[b]ona fide agencies … tended to discuss these increases with clients' with a view to factoring them into the payments made to the agency, while other agencies considered avoidance strategies and 'cuts in temps' pay to cover the costs'.[62] I will discuss the resulting avoidance strategies, all of which involved adjustments to the hiring relation, in the following sections.

Two further relevant areas reviewed by the incoming Labour government were the existing employment agency legislation — which was amended by the Conduct Regulations of 2003, as I will discuss in the following section — and the tax rules relating to personal service companies. To the dismay of agencies and individual workers in the IT sector in particular, reforms to the latter rules were proposed not in the form of primary legislation but in an inconspicuous press release that constituted 'the very last Inland Revenue press release issued with the 1999 Budget papers'.[63] Now known as the intermediaries legislation or IR35, these reforms were intended to curtail tax avoidance through the use of personal service companies (PSCs),[64] and indeed briefly 'closed the lid' on the growth of what the Inland Revenue regarded as disguised employment.[65] Payments to the director of a limited liability company who 'would

[59] Stanworth and Druker (2000), p. 9.
[60] Interview transcript A6; Enright (2013), p. 162.
[61] Stanworth and Druker (2000), p. 10.
[62] ibid.
[63] Redston (2002), p. 3; see Ross (2012), p. 47.
[64] The initial legislation comprised s 60 of the Finance Act 2000, ss 75-76 of the Welfare Reform and Pensions Act 1999, and the Social Security Contributions (Intermediaries) Regulations 2000; see Busby (2002). It was later consolidated in Part 2, Chapter 8 of the Income Tax (Earnings and Pensions) Act 2003. Although partnerships also fall within the scope of these rules, intermediary companies
[65] Interview transcript S6. Although HM Revenue & Customs was only formed in 2005 as a merger between the Inland Revenue and HM Customs & Excise, in the following I will be using the term HMRC regardless of the exact time period to avoid confusion.

be regarded for income tax purposes as an employee of the [end] client' were it not for the intermediary company came to be taxed as if they were income from employment.[66] The risk of such intermediary companies being investigated by the Inland Revenue left most agencies, end users and workers who had contracted through PSCs searching for other ways of obtaining similar tax advantages.[67] The perception that the proposed intermediaries legislation was an existential threat to the recruitment market gave rise to a number of lobbying initiatives involving agencies, accounting firms and contractors themselves.[68]

The initial outcome of these statutory interventions was to exacerbate the structural 'downward pressure on costs',[69] and the need for agencies to distinguish themselves, that had characterised large parts of the burgeoning recruitment market since the late 1990s. This pressure continued to materialise in the contractual devices that I have already discussed by which agencies and end users regulated the quantity and quality of agency labour: framework agreements, second-tier arrangements, the provision of repeat workers and temp-to-perm schemes.

A variation of national framework agreements that became more widespread and remains in use today were 'preferred supplier lists' (PSLs), which were introduced by companies using significant numbers of agency-supplied workers so as to manage and review agency performance. While for agencies, 'the holy grail' has been 'getting onto a PSL because then you get guaranteed roles',[70] client companies have used them to 'create competition amongst agencies to get on the list, even before they enter into negotiations' over price and volume.[71] In such a setting, client companies have tended to prioritise the short-term economic performance of agencies above all else while at the same time taking the qualifications of workers and legal certainty for granted. In the words of a recruitment manager recruiting into the financial sector, 'what companies want is people to start quickly and for it to be cheap, that's the two things they're bothered about'.[72] One consequence of the interventions of the New Labour government into the recruitment market was thus for end users to articulate more explicitly what they expected from the temporary labour supplied.

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66 Finance Act 2000, Sched 12 para 1.
67 E.g. Redston et al. (2002); Redston (2002), pp. 501-530.
68 Interview transcript S9; Ross (2012), pp. 33-34, 40-42.
69 Ward (2003), p. 901.
70 Interview transcript A3.
71 Ward (2003), p. 900.
72 Interview transcript A3.

A more agency-led strategy was for large agencies to continue venturing into 'higher end' segments of the labour market, often termed 'professional services' (such as accountancy, finance or legal services) as opposed to industrial or clerical recruitment,[73] that had barely been penetrated by private labour market intermediaries and therefore promised higher returns. Such ongoing diversification had the effect of blurring the traditional 'boundaries that [had] existed between the segments of the industry, such as "generalist staffing" and "executive search", or "management selection"'.[74] To illustrate this blurring of market segments by reference to my two hypothetical agencies Superstaff and Excelligence, both would at least explore the possibility of expanding into higher-yield segments of the labour market at that time. Superstaff might enter the contractor market in the particular sectors into which it already places temps, while Excelligence would consider adding executive search – that is, the recruitment of senior-level managers into permanent positions – to the services it offers to end users. In both cases, some agencies would actively seek to transform individuals' attitudes towards working through an employment agency and free up directly employed workers for the recruitment market. In tight specialist labour markets such as urban planning or architecture, agencies reportedly wooed directly employed professionals with regular calls to convince them of the financial benefits and autonomy of 'contracting'.[75]

This strategy of agencies' expansion into new labour market segments not only had the potential benefits of increasing their income and diversifying their economic risk, but it could also make agencies more attractive to end users looking to source different parts of their atypical workforce from the same intermediary. It is therefore another example of the 'service-based competition' that may be less visible, but is nonetheless existent, in the UK recruitment industry.[76] From the vantage point of individual agencies, though, their efforts to generate higher profits further up the value chain have at times been short-lived given that margins could easily be pushed down by the 'mimicry of other agencies' entering the same market segment.[77]

While agencies' initial reactions to the measures enacted and proposed by the incoming New Labour government concerned the make-up of the marketing relation – and thus the distribution of economic value among intermediaries and end users – two further innovations

[73] Ward (2004), p. 266; interview transcript S4.
[74] Ward (2003), p. 903.
[75] Interview transcript E1.
[76] See once again Theodore and Peck (2014), p. 44.
[77] Ward (2002), p. 3; see Theodore and Peck (2002), p. 480.

during this period rendered apparent how agencies function as a hinge between the marketing relation and the hiring relation. One was the presence of agency employees on site who would supervise the temporary workers supplied to large clients. This HR service became known as the '*vendor on premises*' model or simply as 'on-site'.[78] The exercise of supervisory functions by the on-site agency manager, which clients quickly came to expect at large worksites, reduced the burden on clients' HR managers of responding to individual workers' grievances or of taking disciplinary measures. At the same time, it arguably further limited a client's legal liability in relation to a temporary worker by reinforcing the worker's subjection – as viewed under a technical approach – to the agency as opposed to the end client.[79] 'Vendor on premises' was the clearest manifestation yet of the strategy of separating the technical legal authority over work done (which is placed with the agency, or an entity further down the labour supply chain) from the appropriation of economic value, which is largely the end user's privilege.[80] The agency thereby functions as a hinge between the circulation of technical legal authority over the work done in the hiring relation and the circulation of the economic value extracted from the labour involved in the marketing relation.

On a related, albeit more discomforting note, agencies recruiting into warehouse and other industrial work or into agriculture would often seek to distinguish themselves by providing transportation and/or accommodation for workers as an additional service to end clients.[81] Agencies would thereby at once exercise greater legal and factual control over the workers they place and integrate themselves more closely into the end user's production processes. The provision of accommodation in particular raises acute questions regarding workers' dependency and vulnerability to exploitation.

In short, in reaction to the early reforms introduced by New Labour employment agencies made various initial adjustments to their business models, seeking to compete on the basis of further expanding their service offerings, improving companies' and workers' attitudes

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[78] See the factual picture in *Astbury v Gist Ltd* [2007] UKEAT/0619/06/DA. On the former term, Ward (2003), pp. 902-903; on the international spread of the practice, see Ward (2004), pp. 268-269. On the latter, Forde (2001), pp. 635-636; Hogarth (2016); interview transcript A6; see Peck and Theodore (1998), pp. 664-665; Vosko (2000), pp. 150-151, 177.

[79] See Vosko (2000), pp. 151, 177.

[80] As has been appreciated by labour lawyers and industrial relations scholars studying employment agencies alike [references], agencies fulfil a range of functions, from match-making and the promotion of their services to the (direct or indirect) payment of workers and their disciplining. I am interested in developing this insight further by analytically separating out the two kinds of processes – legal and economic – that are involved.

[81] On the former, interview transcript A4; interview transcript A6. On the latter, interview transcript A5.

towards mediated work throughout the economy and also, within limits, reducing their profit margins. The exponential growth that the UK's recruitment industry had undergone during the middle of the 1990s was thus stalled around the turn of the millennium, but its continuing, US-inspired move beyond the selection and supply of temporary workers paved the way for the industry's more systemic, 'infrastructural' role in the UK economy.[82]

4. Crafting avenues towards continued growth: divisions of labour among intermediaries, 'false employment' and entrenched end user expectations

When the steps initially adopted by agencies in response to the incoming legislation failed to re-establish the dynamic growth that the market had seen during the mid-1990s,[83] the industry focus increasingly shifted from business strategy to legal engineering, a process later referred to as its 'professionalisation'. Deliberate adjustments to the legal structure of labour supply chains, which I call legal engineering, allowed agencies and their legal advisers to develop 'false employment' as a further sub-category of liminal employment and to reinforce end users' economic benefits and legal security. Judging by the flatlining numbers of agency workers in the UK labour market around 2000[84] and the sluggish growth of industry turnover,[85] the UK recruitment industry was struggling to expand further at the time. Moving beyond initial innovations as to how agencies contracted with client firms or which HR functions they might perform, agencies and other private LMIs explored more creative approaches to the legislation governing the pay and taxation of temporary labour that had been introduced by the early New Labour government. In a highly competitive recruitment market, any cost savings that did not pose immediate legal risks were desirable – which a specialist employment solicitor euphemistically called a growing 'need [within the recruitment market] to be more lean in the model'.[86]

The introduction of workers' rights to the national minimum wage and paid annual leave, and the contemplated tax rules on personal service companies, certainly disrupted the

[82] See Theodore and Peck (2014), p. 29.
[83] From the perspective of Marx's conception of surplus value, this is not surprising. An 'individual advantage' based on an innovation in the organisation of the production process, 'which accrues to the individual capitalist, only lasts as long as he or she has a superior technology in relationship to everybody else. … "This extra surplus-value vanishes as soon as the new method of production is generalized …"'. Harvey (2018), p. 170.
[84] Judge and Tomlinson (2016), p. 13; Watts (2013), p. 153.
[85] Watts (2013), p. 154.
[86] Interview transcript S6.

neat division of labour between temp agencies like Superstaff that pushed down wages and more upmarket agencies like Excelligence that were avoiding taxes. Thus, the underlying choice that agencies wanting to run a successful or at least a sustainable business increasingly saw themselves confronted with is still the same as it is today: namely, to what extent can they source their profit margin from government revenue and from workers' own resources, respectively. The outspoken director of a small agency comes close to making this point explicitly. He estimates that 'about 15 percent of the recruitment industry's turnover is probably [derived from] either tax avoidance or depriving workers of what they should be earning',[87] an estimated percentage that would constitute a good profit margin for an agency in today's market.[88] This approach assumes, of course, that both the client and the intermediaries involved retain a profit margin, which is the default mode of the recruitment industry.[89]

As said agency director and other interviewees have explained to me, and as I will elaborate in the remainder of this Chapter, agencies and other intermediaries have since the early 2000s used different approaches and legal devices to transfer money held or anticipated by the Treasury and by individual workers to private labour market intermediaries.[90] In parallel to these changes in the hiring relation, agencies developed new ways of selling their workers' labour power on to their end clients so as to maintain their profit margins at the expense of competitors or other intermediaries further down the supply chain. The new types of private labour market intermediaries that resulted from both kinds of innovations and that spread over the course of the 2000s fulfilled a narrower set of functions than traditional employment agencies. Such intermediaries as composite companies, umbrella companies and managed service companies specialised in mediating the hiring relation between agencies and workers, while other intermediaries – master vendors, recruitment process outsourcing providers and others – inserted themselves into the marketing relation that links agencies with end users. In this and the remaining section, I will consider the hiring and marketing relations separately with

[87] Interview transcript A6.

[88] I am basing this assessment on the range of profit margins that I have come across. For instance, a very large industrial recruitment agency has been operating on an 8 percent margin, one of the largest UK recruitment firms has been operating on an 8 percent margin when managing a complex downward supply chain and on an average 20 percent margin when recruiting for temporary or permanent roles themselves, and a margin of 20 percent was reportedly considered particularly 'good' in clerical recruitment in 2015. Hogarth (2016); Robertson (2015); interview transcript A8.

[89] Interview transcript A13; interview transcript S6.

[90] I discussed how such practices have been encouraged and challenged by enforcement agencies in Chapter 4.

a view to the phases of New Labour re-regulation until 2007 and the prioritisation of economic recovery during the post-crisis years.

Engineering the hiring relation I: generating tax savings out of legal form

At its core, a first set of strategies aimed at overcoming the legislative restrictions imposed on the recruitment industry by the New Labour government sought to re-align hiring structures with the substantial tax savings available to the technically self-employed on higher incomes and, subsequently, to maximise savings based on the innovative use of travel and subsistence allowances for low-paid workers who were – unlike temps – constructed as technically being employed. In both cases, 'the institution that was suffering was the government, or we as a society', as a specialist employment lawyer frankly acknowledged.[91] Moreover, potential employment rights claims made by individual workers were systematically discouraged and the associated costs saved in both models.

Since the IR35 legislation was aimed mainly at individuals owning all or most shares in a limited company and since it contained a detailed definition of the intermediaries to which it would apply, intermediaries that arguably fall outside the definition could quickly be designed. These feats of legal engineering helped agencies and other intermediaries to continue placing incorporated contractors without endangering their status as technically self-employed for tax purposes. The first avoidance mechanism was to take advantage of the exclusion of individuals who do not have a 'material interest in the intermediary', which seemed to exclude those holding less than 5 percent of the shares of an intermediary company from the scope of the legislation.[92] A hiring structure known as a 'composite company' that had already existed in the late 1990s hence became increasingly common, albeit in a modified form. It involved lumping together a small number of unrelated workers – 'typically 10 to 20' working in a similar profession – in a company controlled by an individual or incorporated service provider which would heavily market this structure to both workers and agencies.[93] The workers involved were usually paid a

[91] Interview transcript S6.

[92] Finance Act 2000, Sched 12 para 3.

[93] HMT and HMRC (2006), pp. 8-9, 12-13; Axe (2001b); Redston (2002), p. 6. Somewhat confusingly, such companies were also known as 'umbrella companies', despite the more recent, narrower usage of the term which I will discuss further below. Redston (2002), pp. 510-515; LITRG (2014b), pp. 52-53; interview transcript S6; but see Axe (2001a) for a different usage.

wage 'at or slightly above' the national minimum wage, which was then supplemented by payments in dividends taxed at a significantly lower rate.[94] More unscrupulous providers could supplement such tax avoidance with clearly illegal savings such as the retention of corporation tax by the scheme providers[95] or irregular wage deductions.[96]

The savings obtained would be split between the agency, the scheme provider – which charged a fee for their services – and in many cases also the worker. End clients, meanwhile, could continue to hire IT specialists and engineers, and increasingly also teachers, health professionals and construction workers,[97] at a lower aggregated cost than direct employment would involve. Their cost savings resulted from passing the general management of such workers and the immediate risk of employment rights claims to the composite company, and potentially creating a downward pressure on wages in particular sectors.[98]

The prevalence of this type of intermediary company in the contractor segment of the recruitment market grew disproportionately during the year after the IR35 legislation came into force,[99] and continued to flourish for several years.[100] This was despite the fact that the underlying hiring model took a very selective view of the intermediaries legislation. The legislation applied not only to companies in which individual workers held a larger than 5 percent stake, but alternatively also to those making indirect payments that 'can reasonably be taken to represent remuneration for services provided by the worker to the client'.[101] However, enforcing the new tax regime on this alternative basis required a particularly fact-specific analysis of relevant work arrangements and therefore proved highly ineffective.[102] What re-emerged in the difference between these two statutory approaches to attributing liability for employment-related tax payments is the split between legal technicality and social context that characterises both contractors and temps. Although an individual might under a contextual assessment 'reasonably be taken' to be paid for work performed and thus be considered an employee, she

[94] Redston (2002), p. 510.
[95] Miller (2006).
[96] HMT and HMRC (2006), p. 14.
[97] Miller (2006); HMT and HMRC (2006), p. 13.
[98] HMT and HMRC (2006), p. 14.
[99] Crawford and Freedman (2010), p. 1058.
[100] HMT and HMRC (2006), p. 13; Miller (2006).
[101] Finance Act 2000, Sched 12 para 3(b); Axe (2001b).
[102] HMT and HMRC (2006), p. 15; LITRG (2014b), p. 53.

would be characterised as self-employed under the more easily applied technical threshold of a 5 percent stake in the intermediary company.

Further, given the legal expertise of scheme providers, none of the parties had much to fear from Inland Revenue or, after 2005, HMRC investigations in any case. As an employment tax adviser described the enforcement dilemma at the time, '[f]requently, by the time the problems are identified the composite company may have been wound up or, if still operating, rarely has more than a week's worth of profits in reserves'.[103] A similar dynamic prevented workers from bringing effective employment rights claims against composite companies. Many of these companies 'operate[d] a "gentleman's agreement" under which [such] benefits [as maternity pay, statutory sick pay or holiday pay] are not claimed' and, in the absence of assets, would have likely had to 'close down' if sued by the workers employed through them.[104]

A second device to avoid the impact of the IR35 legislation was a variation of composite companies that emerged within a year or two, under which the shell corporation would only harbour one single worker. Under the name 'managed service companies' or 'managed personal service companies' (MPSCs), scheme providers marketed and administered this second type of intermediary in much the same way as composite companies.[105] As compared to ordinary composite companies, MPSCs reduced workers' financial risks because they did not lump together 'complete strangers' who may be liable for their co-shareholders' debts.[106] The one-person company structure offered advantages for contractors in higher income bands in particular since it ensured that the reduced rate of corporation tax for small companies still applied. It is conceivable that MPSCs came about when they did because of concerns that composite companies may be subject to draft legislation setting minimum standards for suppliers of temporary labour that was enacted as the Conduct Regulations in 2003.[107]

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[103] Miller (2006); see Redston (2002), p. 515; HMT and HMRC (2006), p. 15.

[104] Redston (2002), p. 514.

[105] HMT and HMRC (2006), pp. 9-10, 13. Unless otherwise specified, all further references to composite companies similarly include MPSCs for the sake of simplicity.

[106] Hewes (1999).

[107] See Ross (2012), pp. 440-443. Whether workers were supplied to agencies and on to end clients through composite companies or MPSCs, a tax adviser at the time stressed that the 'only real protection' for such arrangements not to be taxed like employment lay in 'meet[ing] the case law tests of what is a contract for services [and thus] self-employment' for tax purposes, upon which the cost savings achieved by both types of intermediaries were founded. Powell (2002). HMRC estimated in 2006 that an agency is contractually interposed between either of the two shell companies and the end client in 90 percent of cases. HMT and HMRC (2006), p. 30.

A distinct hiring model that began to spread in the temp segment of the recruitment market in the early 2000s, under which end clients 'would change [their] temporary [self-employed] workforce into an employment workforce',[108] were travel and subsistence schemes. These schemes brought about a third sub-category of liminal employment, besides temps and contractors, which may be called 'quasi-employment'[109] or '*false employment*'.[110] The guiding idea was to reduce – at times drastically – agency workers' taxable income by replacing a certain amount of workers' net pay with non-taxable payments for travel and subsistence expenses. The resulting savings on an agency's income tax payments and national insurance contributions allowed it to 'supply cheaper into the engager [i.e., the client]' than its competition, which 'caused a lot of angst' among agencies.[111] The ability to create such far-reaching tax savings shaped the tight market for agency workers on or around the national minimum wage until the revocation of travel and subsistence relief for temporary workers in 2016, to which I will turn at the end of this Chapter.

In response to the loosening of procedural requirements in 1998, tax deductions for travel and subsistence expenses had been applied both by composite companies and, more extensively, by one of the largest agencies in the UK.[112] Reed, the agency in question, was first granted a dispensation that authorised in advance the payment of expenses to agency workers who were engaged on contracts of employment and who, rather than having a permanent workplace, 'attend[ed] at various locations for the purpose of performing tasks of limited duration'.[113] Other very large agencies obtained similar dispensations, creating 'a bit of a two-tier recruitment world' in which only some agencies had the expertise and software to administer these complex deductions to HMRC's satisfaction; these agencies 'would be very attractive because they had a big brand name, and they're able to do it cheaper than the smaller independent recruiter'.[114] From the perspective of small and medium-sized businesses, such as my hypothetical industrial agency Superstaff, these schemes were an existential threat because

[108] Interview transcript S6.
[109] This is the term that Nicole Busby has used in the context of the intermediaries legislation. Busby (2002), p. 176.
[110] Interview transcript U6.
[111] Interview transcript S6.
[112] *Reed* v *HMRC* [2012] UKFTT 28 (TC), para 44. The use of travel and subsistence schemes by composite companies indicates the growing overlap between the 1980s categories of contractors and temps.
[113] ibid, para 60.
[114] Interview transcript S6.

'the prices that could be offered if you're operating [them] were so low that it was very hard for [smaller agencies] to sit in front of customers and justify our prices'.[115]

While these schemes were presented to workers as a considerable benefit, their actual effect on pay rates was often negligible as compared to ordinary PAYE and national insurance deductions, since the savings made ultimately accrued to the agencies themselves.[116] As they only came to realise belatedly, however, the workers technically employed under travel and subsistence schemes 'actually lost out because … a lot of temporary workers don't work all year, and when it came to the end of the year and they wanted to have tax rebates they couldn't get them because they haven't paid any tax'.[117] The same problem arose in relation to statutory rights such as statutory sick pay and statutory maternity pay, enjoyment of which require national insurance contributions above the lower earnings threshold.[118] Workers knowingly – or more often unknowingly – forfeiting these entitlements equated to further savings for the agencies that operated such contracts.

When the requirements for HMRC dispensations and the use of travel and subsistence expenses became more routinised, umbrella companies began to offer similar savings to smaller recruitment agencies.[119] Umbrella companies technically exercise some of the legal authority of an employer over agency workers, much as agencies had traditionally done. At the time of the IR35 tax legislation, they had emerged as an alternative to composite companies,[120] but they came to be more widely known in conjunction with travel and subsistence schemes. On the one hand, umbrella companies thus evened out the previous competitive advantage of those agencies that had access to the 'subsidy from the government' of 'about 75p an hour on a national minimum wage worker', as one respondent candidly described travel and subsistence schemes.[121] On the other hand, as with composite companies, the separate legal personality and limited liability of umbrella companies allowed them to push the boundaries of tax avoidance further than established businesses were prepared to do, to the point of claiming 'the maximum

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115 Interview transcript A6.

116 Interview transcript A6; *Reed*, para 49; Interview transcript R1; see ALP (2010), p. 5. The exact share of tax savings that workers benefitted from would depend on the need for agencies to attract and retain workers in a particular local labour market at the relevant time. See *Reed*, para 44.

117 Interview transcript A6; *Reed*, paras 122-123, 129-130.

118 *Reed*, paras 97, 122.

119 Some agencies 'have set up their own [umbrella companies] in-house' too. Groom and Haslam (2015), p. 8. I have no data on the extent of this practice and how it came about.

120 Axe (2001a); Ross (2012), p. 78.

121 Interview transcript S6.

amount … regardless of whether these expenses were actually incurred'.[122] Such abuse of dispensations was possible because 'most [umbrella companies did not] even get as far as filing accounts' at the end of the financial year so as to avoid investigation,[123] before they would 'phoenix' as a new company that inherited no tax liabilities.[124] In such a case, an agency like Superstaff contracting with an umbrella company to obtain travel and subsistence savings could simply say 'fine, we'll use another umbrella, and then move on to the next one' without incurring any legal risk itself.[125] Umbrella companies continue to play a significant role in large parts of the UK recruitment market to this day, and I will outline the hiring models that these intermediaries have constructed more recently, in reaction to tighter legal rules, in section 5 below.

Although the contracts under which travel and subsistence schemes could be operated ('T&S contracts') were required from the beginning to be contracts of employment from a technical standpoint,[126] they were in fact 'not too dissimilar' from contracts for services and 'differed in many respects' from traditional contracts of employment.[127] The few certainties and benefits that umbrella companies have provided to workers – namely, continuity of employment across assignments, the legal rights extended to employees and workers, and consolidated payslips – have frequently been invoked in an exaggerated manner by agencies, umbrella companies and their advisers, especially in the context of government consultations on curtailing travel and subsistence deductions for agency workers.[128] In reality, large agencies and later umbrella companies sought to minimise the employment-related rights nominally extended to this category of workers. For the sub-category that may be called the falsely employed, employment rights have tended to exist only on paper, which is why trade union researchers have called them 'worthless': 'Since the umbrella's only source of income is the employee's own earnings' and the earnings of its other employees, 'the employee ends up with statutory rights against him or herself' and him or her co-employees.[129] It is for this reason, and because umbrella companies 'get away with it … because no one represents' their employees,

[122] Redston (2008).
[123] Interview transcript A6.
[124] HMRC (2018), p. 9; Clark and Herman (2017), p. 41.
[125] Interview transcript A6.
[126] *Reed*, paras 29, 32, 52, 54.
[127] Interview transcript A5; *Reed*, para 31.
[128] Interview transcript A11; interview transcript 16; ALP (2010), pp. 4-5; Orange Genie (2008), pp. 3, 7-8; Institute of Chartered Accountants in England and Wales (2008), p. 9.
[129] Labour Research Department (2014), p. 26.

that one of my respondents aptly characterised such a relationship as 'false employment'.[130] Unlike the contractors hired by composite companies, who were technically self-employed for tax purposes but usually did not appear self-employed from a lay observer's contextual vantage point, workers hired by umbrella companies were technically employed for both tax law and labour law purposes but did not contextually appear that way.

	Labour law	**Tax law**
Contextual approach	Self-employed	Self-employed
Technical approach	Employed	Employed

Figure 5.5: The liminal employment status of the 'falsely employed' since the late 1990s

The precise features of T&S contracts changed slightly with each attempt by HMRC to counteract its soaring losses in tax revenue that resulted from the schemes. While there was initially merely an assumption that the relevant contracts of employment should subsist for more than one specific assignment, with each assignment lasting no longer than 24 months so as to remain 'temporary',[131] the substance of T&S contracts became more standardized when HMRC began to require 'overarching' contracts of employment (OACs) with a guaranteed number of at least 336 hours per year – 7 hours per week for most weeks of the year – in the mid-2000s.[132] The agency or umbrella company employing workers under travel and subsistence schemes could thus no longer avoid its ongoing legal obligation to provide work or pay as it had initially done.[133] In return for 336 hours of guaranteed work or pay, however, workers could now be 'required to accept offers of suitable assignment'.[134] A similar dynamic would come to shape the Pay Between Assignments contracts introduced in 2010, which I will cover in section 5, and zero-hours contracts prior to the 2015 ban on exclusivity clauses.

Overall, the contractual innovations of composite service companies, MPSCs and umbrella companies provided agencies that hired workers across the pay scale with sufficient

130 Interview transcript U6.
131 *Reed*, paras 54-55; Inland Revenue (2004); interview transcript S6.
132 *Reed*, para 155; interview transcript A5.
133 *Reed*, para 31.
134 ibid, para 169.

options to continue offering staff to end clients at a lower cost than direct employment would involve. Agencies not only retained their ability to do so despite the reforms implemented by the incoming New Labour government, but effectively strengthened the contractual architecture of their labour supply chains in the face of these reforms. While both umbrella and composite companies would have likely been most attractive to an industrial medium-sized recruitment agency like Superstaff, agencies recruiting into more specialised, technical positions like Excelligence would have preferred the self-employed model of composite companies and MPSCs.

This picture changed rapidly when the government introduced legislation in 2007 specifically requiring both composite companies and MPSCs to tax their payments to workers as employment income,[135] thereby removing the tax advantages of these hiring structures.[136] These changes were buttressed by transfer of debt provisions that threatened scheme providers, agencies and end clients with liability for the tax debts incurred by such intermediaries. To avoid such significant risks, most of the hundreds of thousands of individuals working through composite companies and MSCs at the time were rapidly transferred to travel and subsistence schemes operated by agencies and umbrella companies,[137] while others would have set up their own, independent limited companies. Only a small minority of scheme providers stayed in business, creating a marginal segment of the recruitment market that has largely evaded HMRC's attention.[138]

By contrast, agencies' business models were barely disrupted by the judicial challenges to the post-1980s framework of employment status that I examined in Chapter 3. These developments, which culminated in the Court of Appeal case of *James* v *Greenwich LBC* decided in early 2008, had for some time threatened the product that agencies were selling to their clients, namely workers under the factual managerial control of end clients that came without many of the non-wage costs of employment imposed by employment and tax legislation. They had moreover created a degree of uncertainty for contractors working through personal service companies, since the tests to be applied to determine whether they would be deemed employed

135 Finance Act 2007, s 25 and Sched 3.

136 The legislation and subsequent HMRC documents referred to both composite companies and one-person MSCs as 'managed service companies' (MSCs).

137 Institute of Chartered Accountants in England and Wales (2008), p. 10; see HMRC (2007), p. 3; Redston (2008); LITRG (2014b), p. 53.

138 See Kendrick (2018); ALP (2018), p. 4.

earners were grounded precisely in this area of case law.[139] But these potential risks evaporated when the contestation among judges, litigants and doctrinal commentators that I analysed in the third section of Chapter 3 was resolved in favour of a high threshold for an implied contract of employment between an end user and an agency worker.

A further important event of this period was the establishment of the Gangmasters Licensing Authority (GLA) in 2005, pursuant to the Gangmasters (Licensing) Act 2004, which reintroduced licensing requirements for employment agencies operating in the agricultural and horticultural sector. The most tangible impact that this legislation had for the recruitment industry was that intermediaries in the hiring relation – such as umbrella companies – were prohibited from operating in these sectors, which the GLA efficiently enforced.

Marketing flexible labour I: greater reliability, reduced fees and margins

In response to changing legal rules over the course of the 2000s, the UK recruitment industry innovated the contractual structure not only of the hiring relation, but also of the marketing relation. The legal engineering work through which agencies, other intermediaries and their legal advisers constructed 'false employment' and further innovations was focused on maintaining the industry's profit margins in the face of legal change and economic pressures. A key development that thus affected the structure of the marketing relation was the entry into force of updated regulations governing the conduct of employment agencies (Conduct Regulations) in 2004. The Conduct Regulations posed a particular threat to the transfer fees that had routinely been charged by agencies since the late 1990s so as to protect their 'revenue-generating asset[s]' – that is, workers on assignment – from being hired by another agency or by an end client without the payment of 'compensation'.[140] The former situation is known as a temp-to-temp transfer, the latter as temp-to-perm. The government's aim was not to 'discourag[e] or deter[]' such transfers, in particular as regards transitions to direct employment,[141] which seemed to be in the interest of both workers and end clients. The conditions under which the new regulations sanctioned transfer fees were a compromise formulation and as such 'seen by [non-specialist] employment lawyers as a bit of a minefield'.[142] In practice, this resulted in many

[139] See Freedman (2001), p. 100; Crawford and Freedman (2010), pp. 1044, 1051; Ross (2012), p. 91.
[140] Interview transcript A8.
[141] DTI (2004), pp. 7-8; Ross (2012), p. 441.
[142] Interview transcript S1; interview transcript S7.

smaller agencies that would recruit into 'relatively low-skilled' positions such as Superstaff only charging transfer fees in very restricted circumstances or even not at all, either at the request of large end clients or in an attempt to stand out from the competition in a tight market.[143]

Moreover, new procedural requirements contained in the Conduct Regulations were similarly a 'big massive change' for this group of agencies, while many of their larger competitors and those in better-paid segments of the labour market like Excelligence 'would have … operated like that anyway' already.[144] These requirements formalised identity and reference checking procedures regarding work-seekers, which 'from a client or reputational perspective' may be more critical to the success of individual agencies than compliance with other legal obligations,[145] including under employment law. This element of the regulations hence contributed to an early process of 'professionalisation' within the UK recruitment industry, which would become a buzzword among trade associations and recruiters after the 2007/2008 financial crisis. From a legal perspective, agencies operating in higher-income segments of the recruitment market such as Excelligence benefited from the option for incorporated workers to opt out of key parts of the regulations, which was brought about by agency and contractor lobbying despite the government's misgivings.[146] The right to opt out caused almost all workers with their own limited company to do so in the interest of continuing to receive work.[147] However, the legislation and developing business practices led to end clients raising their expectations towards agencies.[148] In effect, the Conduct Regulations contributed to a consolidation among small and medium-sized agencies such as Superstaff operating in the industrial and agricultural sectors, exerting additional downward pressure on agency margins. The regulations could in the main be avoided by agencies of a larger size or with a workforce hired predominantly through single-person or other limited companies.

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143 Interview transcript A8.

144 Interview transcript S6; interview transcript S9.

145 Interview transcript A11; interview transcript A3

146 Interview transcript S9; Ross (2012), pp. 443, 445-448. The right for incorporated workers to opt out derives from reg 32(9) of the Conduct of Employment Agencies and Employment Businesses Regulations 2003, SI 2003/3319.

147 Onrec (2004); interview transcript R1. Initially envisaged to cover personal service companies, workers employed by umbrella companies have frequently been asked or found to opt out of the Conduct Regulations too. Interview transcript S7; interview transcript S9. When the relevant government department considered revoking the right to opt out in 2009, the trade association representing agencies in higher-income segments of the recruitment market moved the department to abandon these plans for lack of evidence that 'vulnerable workers were being exploited' and given the climate of particular labour market uncertainty at that time. Freelancesupermarket (2009).

148 Interview transcript A11.

A parallel shift affecting most recruitment agencies – though disproportionately impacting smaller agencies that recruit into low-paid positions – was the growth of more complex business relationships between agencies of different sizes. Over the course of the 2000s, the master vendor model was increasingly marketed by very large agencies, which can be seen as a continuation of the economies of scale created by large agencies' national agreements in the 1990s and their reliance on second-tier agencies as a reserve pool of labour.[149] Under a master vendor arrangement, end users engaging a high volume of agency-mediated workers through a variety of hiring models could 'regain control of the recruitment process'[150] by outsourcing all interaction with individual labour providers to one large employment agency that would fill most positions itself and would source the remaining workers from dozens of second-tier agencies. The formalised nature of these relationships entailed advantages for both the master agency and its suppliers. Less constrained by the make-up and size of its own temporary workforce, the master agency can expand its client base in a more flexible manner thanks to the 'failsafe supply' of second-tier agencies while having exclusive rights to fill the user firm's demand for temporary labour; the latter, meanwhile, trade the regularity and security of supplying to a large, established business against the lower margins and contractual restrictions on direct contact with the end client that are implicit in lower-tier supply.[151]

Unsurprisingly, the benefits of the master vendor model have been greatest for end clients. Key advantages for client firms consisted in uniform charge rates and standards and the availability of a single point of contact for all 'administration and compliance' relating to the use of temporary labour, for which the master vendor assumes full responsibility[152]. A further advantage were lower overall costs given that master vendors were in a position to 'squeeze [their] suppliers down' while knowing 'how much' – or rather, how little – they were likely to 'get away with'.[153] Master vendors are thus an exemplary case of the split between technical legal authority over the work performed and the appropriation of economic value that has guided the UK recruitment industry's construction of agency-mediated work. On the one hand, master vendors insert a further safety valve into the labour supply chain that distances the end user from any technical legal authority over the work performed, which otherwise might entail the

[149] Hoque et al. (2008), p. 391; Enright (2013), p. 179; Forde and Slater (2011), p. 26.
[150] Enright (2013), p. 175.
[151] ibid, pp. 177-179; interview transcript 5.
[152] Hoque et al. (2008), p. 399; Forde and Slater (2011), p. 27; Enright (2013), p. 175.
[153] Interview transcript A5; Hoque et al. (2008), pp. 400-401.

risk of employment rights claims. At the same time, master vendors ensure that a significant share of the economic value extracted flows to the top of the labour supply chain, that is, to the end user but also to the master vendor itself.

The emergence of master vendor arrangements coincided with end clients' procurement departments – rather than the workers' line managers – more frequently taking decisions about the use of agency-mediated labour. Procurement departments thereby tended to prioritise price and legal risk over the quality of staff.[154] That end clients have increasingly treated the use of agency-mediated labour as a matter of procurement – distinct from matters of traditional human resource management – is a crucial step in the ongoing transformation of organisational attitudes towards agency labour. Moreover, the manner in which master vendor arrangements came about, which amplified the polarisation of the UK recruitment market, mirrors the origins of travel and subsistence schemes. While the ability to maintain such complex pyramidal webs of supply agencies was initially the preserve of the biggest players in the market,[155] a similar model under the name 'neutral vendor' has emerged over the past decade and was subsequently made available also to medium-sized agencies. Both master/neutral vendor arrangements and travel and subsistence schemes illustrate how contractual innovations initially designed by large agencies soon reached smaller agencies and other intermediaries too, which put them in a position to mimic the associated economic advantages.

5. The relief of benign regulation during the recession: entrenchment of 'false employment' and bifurcating end user attitudes

Following the industry's particular engagement with tax law during the early and mid-2000s, the years around 2010 were marked by a focus on the formal shedding of employment rights obligations. This shift in focus seems connected to a series of reforms to the landscape of employment rights and standards. Taken together, the legislation reconfiguring the recruitment industry that was enacted by the New Labour government until 2007 – comprising the national minimum wage, the Working Time Regulations, the intermediaries tax legislation, the Conduct Regulations, the creation of the GLA and the effective abolition of managed service companies – had created a challenging, albeit far from hostile, environment for private labour market

[154] Enright (2013), pp. 160-167; interview transcript A3.
[155] Hoque et al. (2008), p. 395; Forde and Slater (2011), p. 26.

intermediaries. Further assertive measures against travel and subsistence schemes, partly modelled on the successful managed service company legislation,[156] were underway when the global financial crisis caused the recruitment market and the UK economy as a whole to contract abruptly in 2008. The following years were marked by even greater reluctance to damage businesses, including recruitment intermediaries, than that exhibited by New Labour prior to the financial crisis. Ambitious pre-crisis plans to restrict the expansive use of travel and subsistence deductions were abandoned, and the British government eventually gave its consent to the Temporary Agency Work Directive that had been debated and negotiated at EU level for over two decades, paving the way for the only major legislative project impacting on the recruitment market during the post-crisis years.[157]

As negotiated under the Blair and Brown governments and implemented after the change of government in 2010, the resulting Agency Workers Regulations left plenty of room for creativity in the drafting and administration of agency worker contracts by which the equal treatment provisions at the heart of the EU directive might be avoided. Cuts in both public spending and private investment caused increasing numbers of firms and public sector employers to engage staff through agencies. As for relations between recruitment agencies and end clients, this phase was dominated by the spread of new variations of master vendor models that further reduced costs, provided closer integration with client firms and further scaled up agency supply networks.

Engineering the hiring relation II: discharging employment rights obligations

Having haunted agencies and trade associations in the UK for many years, the Temporary Agency Work Directive was finally agreed in 2008 in a form that was intended to accommodate the concerns of British businesses. Its transposition into UK law was far from the 'gold-plating' that industry officials had publicly warned against,[158] and instead allowed for a number of paths towards avoiding the core obligation of treating agency workers in the same way as their directly employed colleagues in comparable positions. This obligation crucially included agency workers' pay and basic benefits. Problems for agencies such as Superstaff arose from the

[156] Redston (2008).
[157] Arguably, the government's changing stance was motivated by a desire to keep unemployment low.
[158] HRreview (2009).

conflict between this equal pay obligation and the fundamental economic logic that has buoyed up the low-pay segment of the recruitment market, which is to supply staff to clients at a cheaper price than direct employment.[159] It is almost unavoidable for agencies operating in this market segment to undercut the wages, non-wage payments or benefits of directly employed staff,[160] all the more so if one considers the need to cover agencies' operating costs and ultimately yield a profit. This tension generated four main sites of contractual experimentation on the part of agencies and their advisers.

The most obvious exception to the equal pay obligation is the 12-week qualifying period laid down in the Agency Workers Regulations. Notwithstanding the far-reaching anti-avoidance provisions dedicated to this aspect,[161] agencies are rumoured to have systematically interrupted assignments or rotated individuals between agencies before the end of the qualifying period.[162] Such strategies had antecedents in employers' deliberate breaking up of assignments after the introduction of the Working Time Regulations so as to forestall workers' rights to holiday pay.[163] Conversely, other agencies took the view that workers who stayed on the same assignment for several years were technically no longer 'temporarily supplied' as defined in the regulations[164] and hence also out of scope.[165] An equally straightforward engineering of agencies' hiring relations in response to the regulations was a focus on who constituted a 'comparable' employee whose pay had to be matched. This strategy led some agencies and clients to construct comparatively less experienced or less well-paid directly employed staff as comparable to a given group of agency workers,[166] with the effect that the latter would be placed in an unduly low pay bracket. In other cases, it led to a tendency for clients not to reveal the salary data of permanent staff and for agencies to assume, in the absence of such data, unduly low pay rates.[167] A more elaborate engagement with the question of who is an appropriate comparator was the deliberate creation of a new pay grade that would apply to all 'unskilled' temporary labour, which is an approach that has even been approved by an employment tribunal when challenged.[168]

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159 Importantly, agency workers contracting through a limited company who would be considered self-employed under the intermediaries tax regime were outside the scope of the UK regulations.

160 As I outlined in the context of composite companies and travel and subsistence schemes above, tax arbitrage or rebates could be channelled to similar effect.

161 Agency Workers Regulations, reg 9.

162 Interview transcript S1; interview transcript U1; Countouris et al. (2016), p. 45; see Eversheds (2010), p. 10.

163 Gray (2002), p. 660.

164 reg 2.

165 Interview summary B3.

166 Interview transcript U5.

167 Interview transcript A8.

168 Interview summary B3.

The avoidance model that would prove most popular among end clients in particular grew out of an optional exception included into the EU directive as a concession to the particularities of Swedish labour relations, which found its way into the UK's implementing regulations. Interview respondents familiar with the drafting process of the Agency Workers Regulations suggested that its significant benefits to agencies and clients only became apparent when the regulations entered into force in 2011.[169] This 'Swedish derogation' from agency workers' rights to equal pay and conditions required agencies to employ workers and to pay them a minimum rate when not on assignment.

Technically, the Pay Between Assignments (PBA) contracts that agencies drafted to exclude workers from the scope of the regulations in this way were contracts of employment. However, like the contracts offered by agencies and umbrella companies to create travel and subsistence savings, PBA contracts provided as little employment protection to workers as was practically possible. In light of the similarity, travel and subsistence savings and the avoidance of the equal pay provision were often seen as compatible with one another.[170] The supposed advantage to workers of being paid when no work was available, moreover, almost never materialised. As an agency director explains,

> 'Well, we've never yet heard of anyone being paid when you're out of work, and there are so many contractual little tweaks that could be made that … if you want to, you can dodge your obligation to pay between assignments very, very easily, and everyone does!'[171]

Such tweaks have usually taken the form of offering each worker 'at least a day in a week' such that 'there are never [periods] between assignments'.[172] The kind of work that is offered and the circumstances in which these offers are made already tend to reveal an agency's intention for the offer to be declined. Thus, if an agency has not allocated any work to particular workers at a given time, it can either offer work at such a distance that accepting it would cost the worker 'more in time and travel than [they] would be earning', or it can inform workers of feigned vacancies at short notice at any time of the day or night, allowing agencies to argue 'ah, you're

[169] Interview transcript U1; interview summary S4; see Eversheds (2010), p. 11; Forde and Slater (2014), pp. 23-24.
[170] Forde and Slater (2014), p. 28; see ALP (2016), p. 6.
[171] Interview transcript A6.
[172] Interview transcript A5.

unavailable for work!'[173] This systematic practice would regularly be backed up by such contractual provisions as the following: 'you will undertake to travel inside and outside the United Kingdom, as the company or the client may reasonably require in the performance of your duties'.[174] If one considers the 'explosion' in the numbers of agency workers on PBA contracts after 2011,[175] this engineered solution to the cost implications of the new regulations appears to have been the model most frequently relied on. Like T&S contracts, PBA contracts create work relations that technically, though not contextually, constitute employment and may thus be regarded as 'false employment'.

Lastly, the fourth, rather muted reaction to the obligations contained in the Agency Workers Regulations was the establishment by large organisations of in-house banks of temporary staff and banks shared between organisations. The former had been in use for many years already within the NHS and were also being explored by companies with very large workforces such as Royal Mail.[176] Joint banks supplying temporary staff to several organisations have been used by local authorities in sectors such as social care, teaching and urban planning,[177] while similar arrangements that purported to provide services rather than workers have been implemented by NHS organisations more recently.[178] Strong concerns voiced by the main trade body representing agencies in the UK that end clients might systematically turn to bank models in the wake of the Agency Workers Regulations, which would have endangered many recruitment businesses,[179] did not materialise. Likely reasons include the employment-related risks that bank workers may pose to end clients and joint bank providers,[180] and the availability of agency models that both circumvented the Agency Workers Regulations and were grounded in the expertise of existing intermediaries in cost-efficiently 'sourcing, vetting and placing workers [and] administering a payroll'.[181]

Beyond adjustments to these new regulations, the recession also led agencies to consider new ways of manipulating the nominal working time of agency workers that would allow for

[173] Interview transcript A6; Forde and Slater (2014), p. 28.
[174] Interview transcript A6.
[175] Interview transcript U3; interview transcript U1; see Judge and Tomlinson (2016), p. 14; interview transcript S6.
[176] Interview transcript S8; Enright (2013), p. 1; see Eversheds (2010), p. 11.
[177] Interview transcript S6; interview transcript U5; interview transcript E1.
[178] Interview transcript S8.
[179] Recruitment International (2011).
[180] Interview transcript S8; Recruitment International (2011).
[181] Recruitment International (2011).

lower wage costs, often effectively below the minimum wage. A seasoned employment barrister related his astonishment that 'you get asked [by agency clients] about things that others wouldn't ask or care about', such as the practicalities of meal breaks.[182] Obscure provisions in employment contracts and handbooks have been deployed by some agencies to deduct for instance one hour from agency workers' daily working time under the pretence of an 'additional unpaid informal rest break' of that duration.[183] Holiday pay has been a similar area of focus, with most agencies and umbrella companies 'rolling it up' – that is, deducting the relevant percentage of workers' pay on an ongoing basis and paying out these withheld sums when holidays are taken.[184] Following the same logic, it has become customary for umbrella companies to deduct the national insurance contributions that are in fact payable by the employer from the workers' own pay.[185]

Two particular models through which umbrella companies offered further cost savings to agencies and their clients some years after the financial crisis exemplified the impasse of government regulation of the recruitment industry, insofar as intermediaries had become so habituated to piecemeal legislative action that they could exploit their inconsistencies more and more forcefully. The first model was devised in response to changes to the National Minimum Wage Regulations in 2011 that were meant to protect low-paid workers from aggressive travel and subsistence schemes. The scope of these reforms was deemed flawed by a High Court judge sitting over a judicial review,[186] which encouraged umbrella companies to set up a more flexible 'pay day by pay day' (PDPD) scheme that effectively maintained travel and subsistence deductions for workers paid the minimum wage.[187] HMRC particularly struggled to enforce the minimum wage reforms against PDPD models not only because of its fact-specific approach to status determination and umbrella companies' ability to phoenix, but also because these models confronted HMRC with long-standing concerns about the consistency and adequacy of existing expenses legislation.[188] Like PBA contracts, PDPD is a reinforced variant of false employment.

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182 Interview summary B3.
183 Interview transcript A6.
184 Interview transcript S7; interview transcript A6; interview transcript U6.
185 Interview transcript U6; interview transcript A6.
186 *R (Cordant Group Plc)* v *Secretary of State for Business, Innovation & Skills* [2010] EWHC 3442 (Admin), para 28 n 2.
187 LITRG (2014b), pp. 20-21; see Groom and Haslam (2015), p. 8.
188 LITRG (2014b), pp. 6, 18.

The second umbrella scheme, dubbed 'elective deduction model' (EDM), mushroomed when the Labour government's abandoned plans were taken up again by the Coalition government and tax relief for travel expenses were proposed to be removed for all workers under the supervision, direction or control of anybody else in 2014.[189] In response to the planned legislation, many umbrella companies moved their previously (falsely) employed workers onto contracts for services, with the proviso that they would voluntarily be treated as employed for tax purposes.[190] EDM is the clearest expression to date of the disparate enforcement interests in the fields of taxation and employment standards, which have been heavily skewed in the direction of the former. The successful withdrawal from statutory employment obligations appeared to yield such immense cost savings and client attraction that ordinary employment taxes could be paid and umbrella companies operating EDM could still act as a market 'disruptor' about which established umbrella companies and agencies were 'incredibly concerned'.[191] As for the avoidance of enforcement risks, the EDM model constitutes an advance over the traditional 'temp' category since tax payments in line with employed status are explicitly agreed.

Overall, neither of the tentative legislative reforms that helped generate PDPD and EDM schemes alleviated the low pay and insecurity of many agency workers who were engaged, through umbrella companies, by agencies like Superstaff. Extracting cost savings in a way that was unlikely to be decisively obstructed remained the guiding motivation of umbrella companies. The collection of tax revenue, moreover, has continued to be a clear enforcement priority over the protection of employment rights.

Marketing flexible labour II: knock-down prices, outsourcing light and customised supply

Like the hiring relation, the marketing relation between intermediaries and end clients was similarly marked by the pressure exerted on both public and private budgets during the recession. My interview respondents cited public spending cuts as a key reason why the presence of agencies expanded in education, in the NHS and in social care after 2010 in particular.[192] A desire to cut costs equally affected the spending decisions of private companies after the crisis,

[189] HMRC (2015).
[190] LITRG (2017), pp. 2-5; ALP (2017), p. 4.
[191] Interview transcript A16; Contractor UK (2014).
[192] Interview transcript U5; interview transcript A8; interview transcript S8; interview transcript U3.

with a consequent rise in companies' use of workers supplied through an agency at the expense of direct hires.[193] These trends reinforced the distinction drawn by end clients' procurement departments between agency-mediated labour as a variable cost on which companies can easily 'turn the tap off' and, on the other hand, the fixed overhead costs of direct employment.[194] To add to these pressures, the Agency Workers Regulations posed a further threat to end clients' potential profits until the avoidance strategies that I have just discussed were firmly established.[195]

In this economic climate, not all agencies chose the path of aggressively undercutting their competitors by selling below cost or risking legal sanctions as they had done in the mid-2000s. Encouraged by the REC – today the main trade body representing recruitment agencies – and its emphasis on 'professionalisation', many agencies and other intermediaries sought to compete more deliberately with direct employment models rather than with one another, and to expand their services accordingly. As the chair of the REC at the time recalled, 'there were lots of just sales-driven [recruitment] organisations [in 2008] that thought that other recruiters were their competitors, and it was quite an immature world of trying to do whatever it was to make some money'. Ten years later, by contrast, 'people are much clearer about how they compete'.[196]

The ensuing diversification in how mediated labour has been offered to end clients built on previously existing models to suppress costs further or generate greater advantages for end clients. Most significantly, the master vendor model whereby one large agency controlled an end client's supply of agency workers was adapted in such a way that all that remained of the vendor as an end client's point of contact was 'a software in the middle' that 'captures all the invoices, makes sure everyone is paid' and undertakes compliance checks.[197] Rather than supplying most workers itself as a master vendor does, a neutral vendor merely selects and manages the 'panel' of a small number of agencies offering the lowest rates to the end client. These agencies are thus guaranteed exclusive access to high volumes of vacancies and are given

[193] Interview transcript A3; Enright (2013), pp. 160-167; interview summary S4; interview transcript S6.
[194] Interview transcript S6; interview transcript A3; interview summary S4.
[195] Interview transcript S1.
[196] Green (2018); see Özbilgin and Tatli (2007), p. 11.
[197] Interview transcript S6; Forde and Slater (2014), pp. 31-32.

an 'equal opportunity to fill each order' of mediated labour,[198] which results in fierce competition among panel agencies as to who can first place a suitable and available work-seeker.

Even more so than in a master vendor arrangement, the reliable demand for an agency's workers and the option of geographical expansion are said to 'compensate for [panel agencies'] reduced margins', which end up being 'very, very slight'.[199] Agency margins are curtailed even 'more dramatically' than in a master vendor relationship since neutral vendors 'know they're gonna push it [i.e., low rates and disadvantageous contract terms] down the supply chain' and will therefore 'agree to whatever the engager wants'.[200] This effect has been compounded by 'gainsharing' agreements under which neutral vendors receive part of the savings generated by the neutral vendor structure, further incentivising them to push down agency margins.[201] Neutral vendors have in recent years come to dominate many segments of the UK recruitment market,[202] but their strengths are best suited to the market for low-paid and mid-range positions in industrial and manufacturing sectors. Even medium-sized agencies are beginning to act as neutral vendors because they 'can make more money doing that than … actually supplying workers' in light of the persistent pressure on margins in this market segment.[203]

An alternative client-facing arrangement that relies on 'quality- and service-based competition' rather than 'price-based competition'[204] has been the integration of a team of 'ex-agency' recruiters into the HR departments of large end clients who cover all of those clients' mediated, 'temporary hiring' needs. While the providers of such recruitment process outsourcing (RPO) services do charge less than traditional agencies would, the main benefits for clients lie in the 'cultural fit' between RPO recruiters and the client company – and consequently a greater understanding of a client's staffing needs – in contractual guarantees as to how quickly temporary vacancies will be filled, and in a better 'candidate experience' during the recruitment process.[205] RPO providers tend to recruit well-paid workers with specialist skills

198 Enright (2013), p. 182; Forde and Slater (2011), p. 30.
199 Enright (2013), pp. 184, 186.
200 Enright (2013), p. 182; interview transcript S6.
201 Forde and Slater (2011), p. 35; Enright (2013), p. 182.
202 Interview transcript S6; interview transcript A8; interview transcript A3.
203 Interview transcript S6.
204 Theodore and Peck (2014), p. 44.
205 Interview transcript A3; Long (2019).

for instance into the financial sector and into government agencies.[206] In these more specialised sectors, RPO providers have grown into serious competitors for traditional agencies such as Excelligence,[207] though to a lesser degree than neutral vendors in sectors in which agencies like Superstaff would operate. They are usually part of a large recruitment agency, but like neutral vendors they will source workers from a range of agencies on an equal footing.[208] While still achieving cost savings and relieving end clients of most legal risks and HR burden as other capital-facing intermediaries do, RPO providers make these benefits available to large companies in a 'seamless' manner, that is, without creating the same affective distance between end client and intermediary as most other formalised arrangements do.[209]

The strengths of the master vendor, neutral vendor and RPO models have in turn been combined to form the category of managed service provider (MSP) which spans all of these business relationships and involves tailoring them to individual client companies. MSPs market their services to both large and medium-sized users of mediated labour,[210] in both 'low-skilled' and professional sectors. In doing so, they seem more determined to bridge the divide between different market segments than intermediaries that had previously sought to diversify their businesses. Like RPO providers and early master vendors, MSPs tend to be part of very large agencies. MSPs combine the powerful recruitment and payroll software of neutral vendors with the close affective engagement with individual clients that is inherent in the RPO model.[211] Their extensive responsibility for a client company's mediated workforce decisions goes beyond the 'transaction management' provided by master vendors and may include 'strategic' or 'holistic' oversight of hiring models, risks, staff quality and mediated labour costs.[212] MSPs routinely emphasise their tailored approach and – in light of their global reach – their ability to adapt to client companies' needs to expand their mediated workforce in a particular country or to shrink it elsewhere.[213] The goal of integrating MSP services and the world of traditional, direct employment has been referred to as 'total talent acquisition',[214] which is seen as the 'holy grail'

[206] Interview transcript A3. RPO providers may also select candidates for direct employment with the end client for an indefinite length of time, though they do so less frequently in the UK than in the US. Interview transcript A3; see Pena et al. (2016), p. 29; Nurthen (2015), p. 16.
[207] Interview transcript A3
[208] Interview transcript A3; Brown and Swain (2009), pp. 20-21.
[209] Long (2019); interview transcript A3.
[210] Long (2019); Garbett (2016).
[211] See WEC (2018), p. 57; Nurthen (2015), p. 16.
[212] Volt (2015); Long (2019).
[213] Long (2019); Stoffer and Dougherty (2017). Outside the United States, the UK is the largest market for MSP services in the world. WEC (2018), p. 16; Nurthen and Norton (2013), p. 22.
[214] Nurthen (2015), p. 22; Long (2019).

of recruitment since it eventually seeks to transcend the difference between the standard employment relationship and temporary or atypical work that has underpinned Western labour markets since the middle of the 20th century.[215]

For agencies that supply temporary labour to end clients in a wide range of ways and that are nearing global reach, MSP and RPO constitute the most integrated business relationships. As the then UK and Ireland director at the world's largest recruitment agency recently summarised the hierarchy of his company's business relationships,

> '… at the bottom end, we have [our] retail business that gains and generates the relationships [with end users]. And then we move into the PSLs [i.e., supplying medium and larger size companies via preferred supplier lists] where the relationship develops further, and then we move into our [MSP and] RPO business. So the aim for us is to take our customers up our value chain. Some say a *devalue* chain because margins go down, but of course volume goes up and efficiency goes up.'[216]

The trend that can thus be observed in the structure of the marketing relation over the course of the 2010s is towards a renewed divergence between the low-paid segment and the better-paid segment of the recruitment market. Managed Service Providers have turned the former market into a highly automated procurement network in which cost-cutting to the detriment of both workers and state revenue is paramount while space for affective, understanding relationships is only created in relation to end users. In the latter, better-paid segment of the recruitment market, by contrast, providers of Recruitment Process Outsourcing ensure that the labour supply chain is experienced as a pleasant affective 'fit' by both end users and workers themselves.

6. Conclusion

In this Chapter, I have continued the shift in perspective that is at the core of my research design by reconstructing the recruitment industry's perspective on agency-mediated work over the past four decades. In doing so, I have explored the second research question of my thesis,

[215] Gregoire (2015), p. 4.
[216] Searle (2015).

which is how employment agencies, other private labour market intermediaries and their legal advisers have engineered and assembled different forms of liminal employment. More specifically, my focus has been on how these actors have combined different elements of atypical work that have been constructed, by way of doctrine and regulation, as falling outside of employment and labour protections. This question shines a light onto the counterpart of the processes that I have described as the doctrinal and regulatory insulation of agency-mediated work. In Chapters 3 and 4 I discussed, in response to my first research question, how agency work relations have been preserved by doctrinal and regulatory actors as a liminal space outside labour and employment protections that is primarily defined by what it is not – neither straightforward employment nor self-employment. In this Chapter, I have conversely explored how this doctrinal and regulatory vacuum has been occupied, expanded and rearranged by employment agencies and other private labour market intermediaries.

Rather than seeking to render agency work invisible as the doctrinal and regulatory perspectives have tended to do, the active boundary drawing (or legal engineering) carried out by the emerging recruitment industry has taken up elements of the categories of traditional employment and self-employment and constructed new sub-categories of liminal employment out of them. Deliberately shaping the boundaries of employment and self-employment, at once for tax law and labour law purposes, these practices of legal engineering have given rise to the intermediate categories of temps, contractors and false employment. Each of these forms of agency-mediated labour has been successfully marketed to end users in an increasing range of economic sectors.

Recruitment agencies have thus been at the heart of a complex project of market construction which has involved separating out the 'recruitment market' of agency-mediated work from the traditional labour market in which workers contract directly with employers. The emerging recruitment market initially tended to be split into a segment of low-paid temps that saved end users the costs of employment protection and a segment of better-paid contractors in which end users incurred cost savings as compared to employment-related tax liabilities. Since the late 1990s, the temp segment was increasingly overrun by a third sub-category that I have labelled, following one of my interview respondents, as false employment. Both for the recruitment industry and for end users of agency-mediated work, this third category is an advancement over the earlier temp category since it combines the effective avoidance of

employment protection with tax advantages in notoriously low-margin segments of the recruitment market.

Throughout the period since the early 1980s, and across the distinct segments of the recruitment market, employment agencies and other intermediaries have tended to uphold a boundary-drawing protocol that splits the legal dimension of work from its economic dimension. The contractual models that have been developed and refined by the recruitment industry consistently follow the pattern whereby the technical legal authority over the work performed is concentrated in the hiring relation while the appropriation of economic value occurs in the marketing relation. In accordance with this underlying protocol, the recruitment industry has configured labour supply chains in such a way that the legal risks derived from having control over the work performed tend to be shifted away from end clients, towards hiring intermediaries and on to individual workers. The rents and profits, at the same time, that are generated from a combination of government revenue and workers' own resources are mainly distributed among marketing intermediaries and the end client.

Specialist legal advice has played an important role in this process, since it has regularly provided plausible new ways of achieving these two goals. Such advice has taken the form of legal interpretations that inform the decision-making of end clients and workers in the face of legislative change. Potentially, it has also influenced the boundary-drawing practices of the doctrinal and regulatory communities, for instance in the case of the travel and subsistence rules that the industry's repeated engineering has largely rendered unenforceable. Such 'compliance solutions' have been an integral part of the product that agencies and other intermediaries sell to end clients.

Today, recruitment intermediaries have set their sights on a convergence between the industry's offering with the market for employed labour. With the expansion of the UK recruitment industry and the labour market segment on which it has been built, agency-mediated work has thus turned from an analytically impenetrable backwater of the 'mainstream of labour law'[217] into a phenomenon that threatens fundamentally to rearrange the traditional labour market. Ultimately, the recruitment industry's legal engineering activities have tied in with, and have at times furthered, changes in end clients' and better-paid workers' attitudes towards agency-mediated work. This adaptation to ongoing social transformations seems to

[217] Leighton (1986), p. 503.

have contributed decisively to the recruitment industry's resilience to legal change and economic success. Given my focus on the legal and economic aspects of legal engineering in the present study, I have not collected sufficient evidence to develop this argument further; more targeted research is needed to explore links between the promotional activities of industry representatives and those practices of legal engineering that I have traced in this Chapter.

Chapter 6

The crisis of labour law revisited: Navigating distinct perspectives on liminal employment

At the end of my conversation with a senior employment solicitor who had tended to respond warily to my questions throughout the interview, my turning off the recorder finally encouraged him to speak more freely. 'Moving money around, that's all it is', he noted in a disinterested tone in reference to the agencies, umbrella companies and other types of intermediaries in the recruitment market that we had just spoken about.[1] But are the relations between end users, intermediaries and workers that I have examined in the previous three Chapters really just that – a matter of moving economic risks and benefits around between workers and employing entities? Are agency-mediated work relations really based on the same concepts, regulatory frameworks and negotiation dynamics that are a staple of traditional employment law practice, as my interview respondent suggested? The argument I have developed in Chapters 3 to 5 is, on the contrary, that the emergence of the recruitment market exemplifies a novel trend in the form that atypical work relations in the UK labour market take, which I have in Chapter 1 called the *asymmetrical formalisation of liminal employment*.

I will join the different elements of this argument more explicitly in the first section of this Chapter, in which I restate my research questions and findings. I will also reflect on the utility of the concept of liminal employment for answering my research questions. As I will elaborate in this context, all three epistemic communities share the same use of the binary categories of traditional employment and self-employment, while each differs radically in the positive categories used, if any, to refer to different elements of liminal employment. In the second section of this Chapter, I will consider my use of the concept of *epistemological perspectives* and how the three epistemic communities whose perspectives I have explored in Chapters 3 to 5 have constructed the interplay of legal, economic and social phenomena. These distinct constructions of the econo-socio-legal seem to account at least in part for the apparent asymmetries in perception between the doctrinal, the regulatory and the recruitment industry's approaches to agency-mediated work relations.

[1] Interview transcript S2 (emphasis added).

What remains to be addressed in more depth in this Chapter is what the formalisation of liminal employment can tell us about the state of UK labour law more broadly, and how my study illuminates the analysis of law, the economy and society in their interrelation. These questions allow me to sharpen the broader contributions that my answers to my research questions make to the crisis of labour law debate on the one hand and to scholarship in the economic sociology of law on the other. I turn to these points in the third and fourth sections, respectively. I will do so in a way that complicates another remarkable assertion that said employment solicitor had made earlier on in the interview: 'Employers will always do what works best for them. Can't be stopped, realistically. *And if it didn't work, they wouldn't do it.*'[2] This logical short circuit illustrates at once the complexity of relations between courts, regulators and businesses, and points towards the interplay of insulation and innovation that has caused agency-mediated work relations to mushroom into a distinct, delimited segment of the UK labour market.

1. Agency work and the formalisation of liminal employment: restating my questions and findings

It seems as if agency work has been falling between the cracks of UK labour law for decades. Its legal status, and the entitlements available to agency workers, are notoriously unclear. Accounts of atypical work are incomplete without a reference to this particular manifestation. How can the enduring scholarly and judicial puzzlement that surrounds this form of work be squared with its steady expansion and the fact that it has been come to permeate most jobs and economic sectors in the UK? In brief, how is it possible that this form of work has been in conceptual free fall since the 1970s and has nonetheless grown into a major segment – not to say industry – within the UK labour market? I have chosen to approach this puzzle by denaturalising the doctrinal labour law perspective on it. Rather than subscribe to traditional legal methods myself, I wanted to drill deeper into the long-standing conclusion that agency work relations simply 'do not fit the traditional characterisation of employment contracts as bilateral relationships'.[3]

[2] ibid (emphasis added).

[3] Wynn and Leighton (2009), p. 91. For another example among many, see Freedland (2003), pp. 41-44.

The idea that legal categories play a significant role in structuring labour relations, which I have drawn from scholarship on the legal segmentation of labour markets, has led me to centre precisely on the role of labour law and labour market institutions in creating and sustaining the apparent entrapment of agency work in an unabating 'legal vacuum'[4] or 'state of flux'.[5] I have therefore posed the question how doctrinal labour lawyers and labour market institutions – that is, trade unions and state regulators – have insulated agency work in the UK since the mid-1970s. In other words, how have they constructed agency work as liminal employment falling outside of employment and labour protections and, to a considerable extent, employment-related taxation? I have addressed this *first research question* in relation to judges, litigants and doctrinal commentators in Chapter 3, and in relation to trade unions and state regulators in Chapter 4. My *second research question* has centred on employment agencies, other private labour market intermediaries and their legal advisers. How these actors have constructed different forms of agency work, and how they have engaged with the categories of employment and self-employment in doing so, has received even less scholarly attention than the role of doctrinal and regulatory actors. In this regard, I have asked how employment agencies and other private labour market intermediaries have engineered and assembled different forms of liminal employment. How have they constructed their business models in relation to the binary of employment and self-employment, and how have they combined different elements of atypical work that have been constructed – through doctrine and regulation – as falling outside of employment and labour protections? I have sought to answer my second research question in Chapter 5.

The argument that I have developed by engaging with my research questions is that the interplay of doctrinal, regulatory and business practices relating to agency-mediated work has over the past four decades constructed a distinct segment of the UK labour market in which liminal employment – the elusive, heterogenous grey area of work relations beyond traditional employment and self-employment – could paradoxically be two things at the same time. Addressing my first research question on the processes of doctrinal and regulatory insulation, I explored in Chapters 3 and 4 how agency-mediated work has *remained liminal* – that is, how it appears as a mere remainder of the binary distinction that cannot be grasped as a stable, independent category – from the perspective of labour law doctrine and labour market regulation. At the same time, agency-mediated work could acquire *its own, distinct* legal shape

[4] Wynn and Leighton (2006), p. 303.
[5] Freedland (2003), p. 44.

from the perspective of employment agencies and other intermediaries, but also as seen by end-users and individual workers. I analysed this process in Chapter 5 by probing, guided by my second research question, the recruitment industry's practices of legal engineering. In this section, I will elaborate this two-fold argument by attending to the centrality of the concept of liminal employment to my study before turning to my specific findings in relation to my two research questions.

Liminal employment is the concept that has guided my analysis of agency-mediated work as it has been encountered by judges, legal practitioners, trade unions and state regulators – and as it has been designed by employment agencies and other intermediaries – since the late 1970s. In Chapter 1, I developed the concept of liminal employment on the basis of two insights. The actors on which I focus, first, use a wide range of terms to refer to different aspects of the mediated working arrangements I have studied: not only 'agency work' and 'agency worker', but also, for instance, 'agency recruitment', 'temporary recruitment', the 'supply of temporary workers', 'associates', 'candidates', 'temps', 'contractors' and the 'recruitment market'. Rather than privileging one existing term and thereby adopting elements of the particular perspective from which it derives, or using different terms for different contexts without choosing any one term of general reference, I have sought analytically to capture this unstable terminology. The term agency-mediated work has been helpful as a neutral reference to the concrete work relations that have come to populate the UK's recruitment market. It fails, however, to signal the inherent instability and heterogeneity of these work relations – which leads me to my second reason for using the concept of liminal employment.

I recognised the same instability and heterogeneity of concepts and working arrangements in the wider sphere of what might neutrally be called 'atypical work', namely in a series of overlapping terms such as 'non-standard work', 'gig work', 'on-demand work', the 'shadow economy' or 'informal work'. Like the different inflections of agency-mediated work, these terms emphasise distinct aspects of the same phenomenon: atypical work relations that in different ways elude the traditional categories of employment and self-employment. The concept of liminal employment is my attempt to fold this grey area between and beyond the traditional categories – which has so far exceeded any positive intermediate categories that have come into use, including the 'worker' category – into my analysis. Drawing on the concept of negativity as the inherent inconsistency of any conceptual universe, I described liminal

employment in chapter 1 as the nameless placeholder that 'frames the endless set' of those positive intermediate categories that may be deployed to capture this in-between space.[6]

The two research questions that I have sought to answer in this thesis – how has agency-mediated work been insulated from doctrine and regulation, and how has the recruitment industry engineered and assembled this form of work – probe two distinct attitudes towards agency-mediated work as a form of liminal employment. There seemed to be a fundamental disjuncture between the attitudes usually taken by doctrinal and regulatory actors – namely, judges, litigants, doctrinal commentators, trade unions and state regulators – on the one hand and the attitudes usually taken by employment agencies, other private labour market intermediaries and their legal advisers on the other.

Regarding judges, litigants, trade unions and state regulators, my *first research question* centred on the dual process that I have described as doctrinal and regulatory insulation. I began section 2 of Chapter 2 and sections 2 and 3 of Chapter 4 by sketching how, during the 1970s, the attitudes of courts, litigants, trade unions and state regulators towards agency work and other atypical work were an open question. At the time, judges and legal practitioners were beginning to identify employees on the basis of how economic risks and benefits were distributed, which benefitted the putative employee; trade unions were taking a cautiously supportive stance towards atypical workers such as the mostly female workers of colour striking at Grunwick; and both the Employment Agencies Licensing Office and the Inland Revenue had been granted powers that could bring all types of agency workers closer to the treatment afforded to employee status.

The consensus that was soon formed, however, within both the doctrinal and regulatory communities favoured a highly selective engagement with agency-mediated work which constructed most work relations of this kind as invisible to both epistemic communities. Labour law doctrine was refashioned during the late 1970s and early 1980s, on which the second section of Chapter 3 centres, in such a way that casual and agency workers would usually be classified as not working under an employment contract, or even as not working under any contract at all. They were therefore outside the scope of most labour law rules,[7] including the rules on

[6] Žižek (2012), p. 650.

[7] At the time, key elements of anti-discrimination law were still extended to agency workers. As I recounted in the third section of Chapter 3, courts and Parliament have redrawn these boundaries, to the detriment of agency workers, since the late 2000s.

dismissal protection that were the focus of most litigation. What had served to insulate these groups of workers from access to most employment rights were the technical approaches taken to mutuality of obligation and employer intention, which judges and litigants came to regard as crucial to analysing the employment status of atypical workers over the course of the 1980s. Four waves sought to destabilise this doctrinal framework and render employment-related rights available to large numbers of agency workers. In the third section of Chapter 3 I thus discussed the statutory concept of 'worker' as an attempt to develop a wide intermediate category, but also the judicial construction of the concepts 'specific engagement', 'implied contract' and 'sham' which constituted attempts to include certain groups of agency and other atypical workers within the category of employment.

By being attentive to the logic that underpinned individual instances in which members of the doctrinal labour law community have categorised agency work, I could show how the perpetual vacuum or state of flux that seems to have befallen this body of law has in fact been actively constructed and preserved. The conventional manner of characterising agency-mediated work – which I have called a boundary-drawing protocol – that emerged around 1980 and was reinforced during the decade that followed introduced the notion that atypical work usually lacked the requirements of a contractual relationship, which relegated it beyond the categories of both a contract of service and a contract for services. Such work relations thus became practically invisible to labour law doctrine. Each of the challenges to this exclusionary boundary-drawing protocol that were brought by litigants and sympathetic judges was in principle rejected.

Each of these challenges did, however, leave two types of residues that I have sought to document. On the one hand, these challenges did bring material benefits to certain pockets of workers whom they successfully included within the remit of employment-related rights. These are particularly those individuals who have found themselves in an extremely unequal bargaining position towards their putative employer and who can therefore claim that their contract, or certain terms within it, constitute a sham and are invalid. They also include those gig workers and other individuals in atypical work relations who have increasingly, in recent years, been found to qualify for such rights as the national minimum wage and working time protections that are tied to the 'worker' category.

On the other hand, each challenge prompted judges, employer representatives and doctrinal commentators slightly to adjust the existing boundary-drawing protocol. As I detail in the third section of Chapter 3, these undercurrents of the struggle for agency workers' access to employment rights have led me to confront the core of the doctrinal boundary-drawing protocol that has been upheld throughout the past four decades. It consists in a technical approach to the concepts of the worker's open-ended duty to submit herself beyond the specific contract terms on the one hand, and the beneficiary's intention to subordinate the worker in the form of an employment relationship on the other. Most agency-mediated and other atypical work relations fail to exhibit either of these characteristics as a matter of legal technicality, which deprives them of access to employment-related rights; as a matter of social intelligibility, by contrast, both characteristics are certainly present in the large majority of atypical work relations. The doctrinal labour law community has thus insulated most agency work from the employment rights regime by locking it into a paradoxical coincidence of resembling employment (for practical, contextual purposes) and not qualifying as employment from a technical legal standpoint.

The approach to agency-mediated work that labour market institutions have taken since the mid-1970s charted a parallel course. In the second section of Chapter 4 I discussed how trade unions developed a strong preference for excluding agency workers from their representation and bargaining remit. Engaging with agency workers was felt to give undue legitimacy to this form of work and to run counter to the economic interests of trade unions' core, directly employed members. The latter interests remained dominant drivers of trade union strategies towards agency workers, even during active efforts to recruit and organise agency workers who worked in close proximity to, and closely resembled, direct employees. The economic interests of core workers have thus guided trade unions – particularly those of a managerial rather than participative type – in their engagement with agency-mediated work.

State regulators, whose strategies I examined in the third section of Chapter 4, pursued two distinct strategies. The light-touch enforcement of the Employment Agencies Licensing Office stabilised an inconspicuous regulatory remit beyond both employment and self-employment, while the Inland Revenue was invested in the idea of safeguarding state revenues by seeking to tax agency-mediated work like traditional employment. However, better-paid agency workers were more likely to escape the Inland Revenue's enforcement efforts. This dynamic was briefly disrupted in the late 2000s when HMRC was granted powers to close down

aggressive tax avoidance under the managed service company model and the Gangmasters Licensing Authority began to take action against low-scale violations of employment standards in addition to the severe breaches that the EALO had to some extent pursued. The conventional boundary-drawing protocol, however, was soon re-established, which meant that employment standards were only enforced in severe cases of abuse while HMRC pursued the tax liabilities of low-paid agency workers in particular.

In line with their mandates, labour market regulators thus pragmatically classified agency work in entirely different ways: as beyond traditional employment in the case of trade unions, as distinct from both employment and self-employment in the case of the EALO and eventually the GLAA, and as generally constituting employment in the case of tax authorities. As with doctrinal developments, these regulatory practices placed agency-mediated workers at a severe disadvantage as compared to traditional employees. Agency workers would tend to fall outside collective bargaining and other forms of trade union support while procedural and substantive standards pertaining to employment agencies that had been devised in their interest were only leniently enforced. Unless they could incorporate, however, which has largely been the preserve of better-paid workers, they tended to be taxed at the higher rates of employees.

Those phases in which some trade unions and state regulators broke with the boundary-drawing protocol established since the 1980s generated – as in the case of doctrinal challenges to the post-1980 framework of employment status – two types of remainders. They materially benefitted low-paid agency workers across the UK labour market whose concerns were temporarily taken up by trade unions and the GLA or whose potential deception has been prevented by HMRC's enforcement measures against composite companies and other MSCs. At the same time, other regulatory actors responded to these initiatives in a manner that buttressed the consensus that had previously existed. The precise contours of the regulatory insulation of the recruitment market were thus thrown into sharper relief. The regulatory consensus as to how agency work should be approached, namely, combines the lack of enforcement of labour and employment protections – except in circumstances of extreme exploitation – with the application of tax rates that are equivalent to employment, except for well-paid, incorporated agency workers and particularly aggressive forms of tax avoidance.

What may be appreciated more clearly from the perspective of labour market regulation than labour law doctrine is how the exceptional engagement of either epistemic community

with agency work has played a similarly crucial role for the recruitment market as its withdrawal. These exceptions demarcate the outer limits of the space in which recruitment intermediaries are the sole regulators of work relations. They indicate the limit at which employment rights will attach to agency-mediated work after all (that is, in cases of extreme inequality of bargaining power, and increasingly subject to the case law on 'worker' status). They similarly indicate the limits at which labour standards will be effectively enforced (where agency workers come to resemble core workers and where they are subject to severe exploitation), and at which tax avoidance will be curtailed (that is, at the lower end of the pay scale).

The doctrinal and regulatory communities' attitude towards agency-mediated work and liminal employment more widely contrasts sharply with the attitude of agencies, other intermediaries and their legal advisers. While doctrinal and regulatory actors have predominantly constructed agency-mediated work as outside their remit, or have fit narrow sets of agency-mediated work either into the traditional conception of employment or into legislated intermediate categories, the recruitment industry has been much less attached to the idea of a stable framework of classifications. In fact, I have described its approach as legal engineering because it poses deliberate challenges to any stable classification of work relations by continuously modifying and repurposing existing positive categories.

Against this backdrop, my *second research question* probed the practices of employment agencies, other private labour market intermediaries and their legal advisers, which I have traced in Chapter 5. It asked how these actors have since the late 1970s engineered and assembled different forms of liminal employment, in the sense of constructing their business models in relation to the binary categories of employment and self-employment and combining different forms of liminal employment. The provision of agency workers to end users was recorded in two reported cases from the early 1970s, which already provided an indication of the two profit streams available to employment agencies and other intermediaries: namely, to avoid the tax liabilities on the one hand, and the labour standards on the other, that are ordinarily imposed on employment.[8]

[8] The first case was set in the construction sector and revolved around the payment of the industrial training levy, while the second arose from a work accident in agriculture: *Construction Industry Training Board* v *Labour Force Ltd* [1970] 3 All ER 220; *O'Sullivan* v *Thompson-Coon* (1973) 14 KIR 108. See my introduction to Chapter 3 and section 2 of Chapter 5.

Since the late 1970s, agencies have capitalised on gaps in the applicability of employment-related tax rules and of the growing employment rights regime by offering work relations – both to businesses and to individuals – in the grey area of liminal employment. Agencies' systematic avoidance of employment rights (and concurrent payment of employment-related taxes) in low-income occupations stabilised the intermediate category of temps, while their systematic avoidance of employment-related taxes (and concurrent acceptance of potential employment rights claims) in higher income brackets gave rise to the intermediate category of contractors. The significance of this accomplishment, which is the focus of the second section of Chapter 5, can barely be overstated. A glance in the direction of labour law doctrine and labour market regulation reveals that attempts to establish intermediate categories in these fields consistently fell short of covering considerable numbers of atypical work relations.

Beyond the intermediate categories of temps and contractors, which have been in common use since the 1980s, the recruitment industry began to develop a cluster of hiring models in the late 1990s that may be called 'false employment'. Under these hiring models, workers are technically employed for both labour and tax law purposes but are de facto unable to access the associated benefits of employment rights protection, access to statutory sick pay and tax rebates. This constellation was introduced with the travel and subsistence contracts that I discussed in the fourth section of Chapter 5. It was again successfully deployed in the form of the Pay Between Assignment contracts that have allowed agencies to avoid the equal treatment provisions of the Agency Workers Regulations, as I explain in more detail in section 5 of the same Chapter.

The successful construction of these three positive categories of *workers* engaged in liminal employment was accompanied by the gradual development of a distinct model of engagement with the users or *beneficiaries* of liminal employment. This latter process initially involved agency efforts to create more regular ties with end users than the spot contracts that they initially concluded. The contractual innovations developed by the burgeoning recruitment industry during the 1990s and 2000s rendered the quantity of workers supplied, the quality of their labour and – to some extent – the lack of legal liabilities more reliable for end users. The second, third and fourth sections of Chapter 5 contain my analysis of these developments. Since the abolition of licensing requirements in 1994, shifts in the marketing relation were increasingly driven by pressures on price, which translated into further pressures on both agency margins

and wages, particularly in low-wage sectors. As I went on to dissect in the fifth section of Chapter 5, intermediaries in higher-wage sectors such as RPO providers have instead focused on cultivating a close affective engagement both between lead intermediary and end user and between lead intermediary and candidate. Moreover, across different segments of the recruitment market end users have adopted an operative distinction between employed labour, dealt with by HR departments, and agency-mediated labour which is often treated as a matter of procurement. In designing the marketing relation, the recruitment industry has thus also succeeded at creating a stable intermediate category, distinct from traditional employment and self-employment, for end users.

The manner in which agencies and other intermediaries have designed their hiring and marketing relation has usually drawn on, and modified, elements of traditional employment and self-employment. With the marketing relation moving away from spot contracts towards framework agreements, capital has benefitted from the stability and ongoing skill-building inherent in employment contracts while also taking advantage of workers' disposability and the effective lack of labour law obligations that characterises spot contracts. Moreover, travel and subsistence schemes combine specific tax benefits that accrue to employment with the de facto absence of employment rights. Finally, RPO providers have successfully restored the affective link that is an element of employment in the traditional sense as between contractors and the end users of their labour.

As for elements of agency-mediated labour supply chains that are modelled on other forms of liminal employment, agency work in the agricultural sector for instance mirrors the less formalised seasonal work of earlier historical phases and makes the supply of labour more predictable and straightforward from the end-user perspective. Casual work practices have similarly been incorporated into agency-mediated working models (such as the provision of repeat workers and later PBA contracts) and thus streamlined to the benefit of end users, which can cede any human resource management Incorporated workers with skills that are in short supply have often contracted directly with the users of their labour prior to the emergence of the recruitment industry, but pose much lower legal risks and are easier to manage for end users if mediated through an agency and/or further intermediaries.

Agencies, other recruitment intermediaries and their advisers have thus creatively appropriated and assembled various elements of employment, self-employment and existing

forms of liminal employment. The protocol that has persistently guided their practices of (re)drawing the boundaries between these categories centres on the split between the legal dimension and the economic dimension of work. As I noted in the fourth section of Chapter 5, a particularly helpful illustration of this split is provided by the master vendor model. Like other intermediaries, it shelters end users from any technical legal authority over the work performed by agency workers and seeks to push this authority even further in the direction of the individual worker, so as to avoid even the most futile employment rights claims. The economic value generated by the work performed, by contrast, is pushed as far as possible in the direction of the end user. Master vendors are one of a number of efficient models for reducing the profit, if any, of intermediaries further down the contractual chain. These pressures on price ultimately tend to accrue to the individual worker at the end of that chain.

Linking my findings in relation to both research questions, the processes of insulation and legal engineering suggest that agency-mediated work is about much more than simply 'moving money around'. Insulation and legal engineering are two sides of the same process of market-making, which involves innovations on both sides. On the one hand, the doctrinal and regulatory communities have developed new concepts and strategies that allow them to disengage from agency-mediated and other atypical work. Their insulation of these forms of work has delimited the outer limits of the emerging recruitment market and may thus be considered a process of external boundary-drawing. Agencies and other intermediaries, on the other hand, have developed new intermediate categories that have structured the inside of the emerging market into distinct commodity segments, thereby constituting a process of internal boundary-drawing.

When I claim on that basis that liminal employment has, with the emergence of the UK recruitment market, been formalised, I am referring to the paradoxical effect that the effects of insulation and legal engineering appear radically different to the different epistemic communities which were the subjects of the three substantive chapters. For the agencies and other intermediaries that make up the recruitment industry whose perspective I explored in chapter 5, many of those groups of work relations that fall beyond traditional employment and self-employment have a stable shape and identity. Agency managers, other industry representatives and their legal advisers speak in a self-evident manner not only of temps and contractors, but also for instance of 'umbrella workers', 'limited company workers' and PBA contracts. To a certain extent, the same is true for end users and individual workers, for whom

the intermediate terms and distinctions pioneered by the recruitment industry – at times differing as between the hiring relation and the marketing relation – are intelligible and familiar. Seen from the perspectives of labour law doctrine and labour market regulation, however, the recruitment market appears not as segmented into an identifiable range of sub-categories but as internally incoherent. As I traced in chapters 3 and 4, narrow sets of agency-mediated work relations have been treated like traditional employment – such as 'sham' arrangements with extreme inequalities of bargaining power, or agency work relations that directly threaten the pay and conditions of core union members – while others have been assigned such intermediate treatment as the rights attached to the 'worker' category or the minimal labour standards effectively enforced by the EALO or the GLAA licensing schemes. What has framed the perspective of doctrinal and regulatory actors, therefore, is the idea that most agency-mediated work deviates from traditional employment and self-employment. In practice, capturing this form of work with intermediate categories (such as 'worker') or strategies (such as strategic integration or licensing) has had a much less significant impact than what those initiatives had been explicitly aimed at. The recruitment market thus disintegrates before the eyes of judges, litigants, trade unions and state regulators into countless pockets of work relations that are subject to different treatment, and that in large part remain impenetrable by positive categories.

These contrasting perceptions seem directly linked with the fundamental attitudes that the three perspectives I have examined take to liminal employment. Doctrinal and regulatory actors have almost exclusively applied existing categories, which I take to include both legislatively created intermediary categories and the option of treating liminal employment as inexistent. The recruitment industry, by contrast, has harnessed the productive potential of liminal employment by moulding new categories – both for end users and for workers – from the elements of the traditional binary ones, always with a view to avoiding costly categorisations by courts and regulators. Through these practices of legal engineering, agencies and other intermediaries have occupied and reinforced the grey areas between existing concepts and approaches, which also include such tax law concepts as a 'temporary' or 'permanent workplace'. In a wider sense, however, the success of these practices has also depended on the relative stability of the grey areas themselves, which has been guaranteed by the persistent doctrinal and regulatory attachment for instance to the distinction between employment and self-employment and to the prioritisation of core union members.

As we saw in Chapters 3 and 4, the dominant attitude towards agency-mediated work – and towards liminal employment more widely – within the doctrinal community and among trade unions over the past four decades has thus been to *keep these forms of work out of sight*. This attitude seems to validate my conception of liminal employment as a 'negative', nameless category that accompanies the positive categories of employment and self-employment. In their effort to sort agency-mediated work relations into existing categories, courts and trade unions have regularly presented such work relations as unnecessary to engage with (given the lack of a contract and their illegitimacy, respectively), and thereby placed them in the negative category of liminal employment.

Alternative doctrinal and regulatory attitudes have sought to *incorporate agency-mediated work into the existing category of employment*, namely through the Inland Revenue's 'reclassification' drive; the employment rights litigation on 'specific engagement', implied agency worker contracts and 'sham'; trade unions' strategic integration of agency workers; and HMRC's near-eradication of MSC schemes. Yet another alternative path has been to include agency workers within *intermediate categories created by legislation*, namely through litigation based on 'worker' status and through the licensing schemes operated by the EALO and the GLA. The first alternative attitude – incorporation into employment – has only succeeded at covering narrow sets of work relations. This has been a consequence of adverse judicial decisions, restrictions on the financial resources or legal powers of the Inland Revenue/HMRC which had to resort to inefficient case-by-case distinctions, and the interests of core trade union members during the post-2008 economic recession. The second alternative attitude – incorporation into legislated intermediate categories – has so far similarly run into judicial decisions and legislation that have restricted the applicability of the respective intermediate category to a narrow set of agency-mediated work relations. These obstacles include the restrictive judicial understanding of 'worker' that prevailed during the 2000s and 2010s, the restricted resources and powers of EALO and the abolition of its licensing scheme in 1994, and the fundamental reorientation of the GLA's remit during the 2010s.

Interestingly, in the second and third sections of Chapter 4, my study identified two regulatory actors whose attitudes mirror the orientation of the recruitment industry. The GLA and trade unions with participative tendencies have sought to take, by their own initiative, an approach to atypical work relations including agency-mediated work that does not fit them into existing categories of work relations. This marginal approach relied neither on the categories of

employment and self-employment, nor on intermediate categories that had been created by legislation or even on the option of relegating atypical work to the invisibility that is at the heart of liminal employment. Instead, the GLA and participative trade unions developed *singular regulatory formats in response to specific needs*. The GLA's attempt to enforce labour standards regardless of the legal nature of work relations or of the severity of violations was brought to an end, however, through the upgrading and reorientation of its remit in 2014 and 2016 which were not accompanied by adequately increased resources. The two participative trade unions that have trialled targeted support for agency workers and bold approaches to relevant casework since the mid-2010s, on the other hand, have so far been unable to expand these strategies for lack of adequate resources.

How can the widely diverging attitudes of doctrinal and regulatory actors on the one hand and the recruitment industry on the other hand be accounted for? I address this point in the following section by elaborating how each of the three epistemic communities has located itself in relation to the dimensions of the economic, the legal and the social.

2. Epistemological perspectives on the econo-socio-legal: setting my concepts and methodology in motion

It is not entirely surprising that my interview respondent whose comments I quoted at the outset of this Chapter did not take an interest in what the emergence of the recruitment market might mean for the development of the wider UK labour market. His most frequent exposure to issues of agency-mediated labour has been from the perspective of end users, who rarely seem to engage with the legal make-up of the labour supply chain or its economic benefits in detail. After all, this is a large part of what end users pay agencies or more specialised lead intermediaries (such as neutral vendors or RPO providers) to take care of. I have sought to acknowledge the particular focal points and gaps of the three perspectives I have adopted in this study in my research design. This is precisely why I have used the concept of epistemological perspectives, which I defined in the third section of Chapter 2 as a particular way of seeing the world that is shared – and reproduced – by a community such as one composed of a particular profession

As I indicated while discussing my methodology in chapter 2, the process of collating and surveying my empirical material – case reports, doctrinal textbooks and articles, semi-

structured interviews, and government, trade union and industry reports – made me appreciate the distinct focal points of each of the three epistemic communities whose perspectives on agency-mediated work I have analysed in this study. Labour law doctrine has centred on technical legal concepts; labour market institutions have foregrounded the socio-political context of their activities; and the recruitment industry has been focused on economic profitability. While none of these priorities may come as a surprise, slightly exaggerating each perspective in turn in Chapters 3 to 5 has allowed me to recognise that these are distinct views of the world of work, and even distinct (conceptual and epistemological) universes, whose similarities should not be overestimated. I have done so by orienting my own discussion throughout each of these chapters towards the respective focal points of the doctrinal, regulatory and legal engineering communities, while mirroring the explicit and implicit neglect for other considerations that similarly characterise each perspective. During the process of writing from within each perspective, I registered these distinct prioritisations and the stark contrasts between the conceptual and epistemological universes of each community in a very tangible way. Narrating the evolution, for instance, of employment status determinations relating to atypical work, I was confronted with the overarching view within labour law doctrine that the social context of a work relation is irrelevant. Narrating this evolution from within the doctrinal perspective has meant that this view – and the priority accorded to technical legal validity – permeates my own account.

By locating my analytical position in chapters 3 to 5 within each perspective, I have sought to avoid imposing any normative standard that is external to the perspective at hand. I described this method in chapter 2 as opening up the possibility of an *immanent* critique, that is, of a normative assessment of a social field that derives its standards from within the social field in question. My primary goal in chapter 3 has therefore been to recount the conflict within the epistemic community between the dominant technical approach to characterising agency-mediated work and the contextual approach that has repeatedly challenged it. In chapter 3 itself, in which I intended to trace and analyse the doctrinal perspective on agency-mediated work, I have withheld normative judgment and refrained from considering possible political interventions. The same method has guided my analysis in chapters 4 and 5.

Now that I have laid out how each epistemic community constructed its distinct perspective on agency-mediated work, I can place these perspectives in relation to one another and draw more detailed links between them. These links relate to the chronology and key events

of the past four decades that the three perspectives generate, the specific manner in which the boundary between employment and self-employment has been drawn, and the logic through which each of these perspectives has been stabilised in the face of alternative epistemological perspectives on agency work.

On the one hand, the three perspectives differ in their temporal dimension. Both from a doctrinal and from a regulatory perspective, the 1980s were a period in which a new segment of the labour market was carved out through the active disengagement of doctrinal lawyers, trade unions and state regulators. The mid-2000s stand out from both perspectives as a period of strong advocacy for a reversal of this ongoing disengaged stance towards what had become known as the recruitment market, the potential momentum of which is rarely appreciated. But by the early 2010s, such advocacy became significantly more muted within both the doctrinal and the regulatory communities. By contrast, from the perspective of legal engineering the past four decades have all comprised boom phases of unrestrained employment agency activities in particular market sectors or contractual forms, which one employment solicitor described to me as recurrent phases of the 'Wild West'.[9] From this perspective, most shifts in doctrinal and regulatory attitudes towards agency work have resonated surprisingly little.

On the other hand, I can derive detailed insights on the manner in which the boundary between employment and self-employment has been drawn and re-drawn from these three perspectives. As I excavated in chapter 3 to 5, each perspective has since the early 1980s revolved around – and been stabilised by – a characteristic consensus among its constituent communities that I have called a boundary-drawing protocol. This protocol has guided the concrete assessments of agency work relations by members of the doctrinal, regulatory or business community, but also the thrust of challenges to the dominant approach to assessing agency-mediated work relations.

From the doctrinal perspective that I adopted in chapter 3, the boundary between employment and self-employment has been remarkably stable within labour law since the early 1980s: only where individuals were under a formal duty to go beyond what they had explicitly contracted to do, and where a putative employer had exercised its power to create an employment relation, would courts and the wider doctrinal community include a work relation in the category of employment. Situations of very obvious labour exploitation are the main

[9] Interview transcript S6.

exception. Tax law doctrine, which provides a point of comparison, has consistently imposed a much lower threshold: an agency-mediated work relation would thus be classed as employment if a direct contract exists between the worker and the agency, or if the overall factual picture indicates a similarity to traditional employment. The boundary-drawing work undertaken by the doctrinal community has thus produced and maintained a stark split. It has characterised only a very small group of atypical work relations, if any at all, as employment under labour law, and treated most agency-mediated work – with the exception of some individuals working through a one-person company – as employment under tax law. In both fields of doctrine, the boundary drawn between employment and self-employment has barely changed since the early 1980s. As I further traced in chapter 3, attempts to establish intermediary labour law categories (such as 'worker' status or employment for discrimination law purposes) led to their virtual collapse into the much narrower category of employment.

Seen through the lens of labour market regulation of chapter 4, there is no such stark split in how the boundary has been drawn in the fields of employment protection and taxation, and there have been more notable shifts over the past four decades than there have been from a doctrinal perspective. While the Inland Revenue had classified specific groups of incorporated agency workers as employees since the late 1970s, they only did so in a relatively small number of cases given the fact-specific investigations involved. Since the 2000s, labour market regulators have treated three further, similarly narrow groups of agency work relations like traditional employment. The first are those agency workers that threaten to replace or undercut directly employed workers, for whom trade unions have sought to achieve direct employment with end users or pay equality with direct employees. Secondly, agency workers who are subjected to extreme exploitation – namely, forms of slavery and forced labour – have since 2004 come under the protective remit of the GLA (and later the GLAA) even if they would not otherwise be entitled to employment protection. Thirdly, a closely circumscribed form of severe tax avoidance under the name of managed personal service companies was heavily targeted by HMRC in the late 2000s, and the corresponding agency work relations were as a whole classified as employment. From a regulatory perspective, thus, agency work relations have only been treated like employment in selective circumstances, usually as a pragmatic response to the institutional needs of state regulators or trade unions. Innovative trade unions and the GLA have at times extended their protective reach further, and adjusted it to the specific needs of agency workers; however, this was a short-lived approach in the case of the GLA, and the effectiveness of such approaches remains to be seen in the case of innovative trade unions.

The legal engineering community whose boundary-drawing work I traced in Chapter 5 has engaged in the most complex form of drawing the boundary between employment and self-employment. Seeking to take advantage of the lower tax rates for the self-employed and avoid the costs and risks of labour law obligations, employment agencies and their legal advisers initially tended to expand the category of self-employment as assertively as they could in light of perceived doctrinal, regulatory and sectoral restrictions. The resulting categories of workers were initially temps and contractors: temps were constructed as self-employed for labour law purposes but retained their employee status under tax law, while contractors were constructed as self-employed under tax law though they might be entitled to claim employment rights. Both types of cost savings have been combined since the late 1990s in the form of composite companies, which were clusters of low-paid or better-paid individuals on work arrangements that would constitute self-employment under both labour law and tax law. Since the early 2000s, agencies and their legal advisers increasingly designed work relations that would acquire the inverse appearance, which a trade union officer aptly described as 'false employment'.[10] Immense tax savings could be obtained through travel and subsistence (T&S) allowances if individuals fell into the category of employees. Large agencies could obtain such savings by placing their temps and in some cases contractors on employment contracts; the resulting risk of employment rights claims was effectively removed through the use of umbrella companies that would formally act as the employer without being in a financial position for employment rights claims to be enforced. Further variations of work relations designed to produce cost savings to agencies are Pay Between Assignment (PBA) contracts under the Agency Workers Regulations of 2010 – under which workers' employment rights are severely curtailed and travel and subsistence savings may still be available – and the Elective Deduction Model (EDM) contracts operated by umbrella companies, which combine self-employed status under labour law with workers' supposedly voluntary assumption of tax rates at the level of employees. Overall, it is remarkable that the boundary-drawing practices of employment agencies and their advisers have yielded more stable intermediary categories, which do not correspond with either traditional employment or self-employment, than labour law doctrine or labour market regulators have. These are not only the long-standing sub-categories of temps and contractors. More recently, the intermediate category preferred by agencies seem to be those contracts that construct individuals as employed under tax law and effectively self-employed under labour law (T&S contracts, PBA contracts and EDM contracts).

[10] Interview transcript U6.

A further set of links that I can draw between the doctrinal, regulatory and legal engineering perspective – beyond the timeline they imply and the substantial boundaries between employment and self-employment the doctrinal, regulatory and legal engineering community have erected – relates to the stability of each of the three perspectives. Given how the timelines and substantial assessments generated by all three perspectives compete with one another, how has each perspective retained its own distinct identity rather than merging with or collapsing into another? If we do not assume that legal doctrine, regulation and legal engineering, but also economics, sociology or marketing are naturally occurring genres of reading social reality rather than being created by social actors themselves, this is an important concern. This is not a question that contemporary ESL scholars have addressed explicitly. Juxtaposing the three perspectives on agency work in the UK that I adopted in chapters 3 to 5 – over the course of the past four decades – offers a glimpse of how the respective epistemic community cultivating each perspective has done so, and how competing ways of looking at social reality have been fended off. The three relevant types of considerations are technical legal considerations, a contextual understanding of legal concepts, and economic considerations.

The perspective of labour law doctrine has thus, since the early 1980s, given precedence to a technical understanding of legal concepts, which the doctrinal community has repeatedly asserted over against a contextual understanding. This technical understanding initially consisted in the tests for atypical workers' employee status that were established in the 1980s, namely mutuality of obligation and employer's intention. It found further expression in the strong judicial reactions to litigants who argued that contextual factors – in the form of traditional labour law tests and principal/agent relations – should be considered when assessing employment status. With a view to ESL scholarship, to which I will return in the fourth section of this chapter, what is worth noting is how throughout the past decades judges, litigants and doctrinal commentators (1) maintained an overall consensus in favour of a narrow technical understanding of the concept of employee, and (2) reacted, in their defence and modification of that technical understanding, to an alternative contextual approach.

The regulatory perspective of labour market institutions – trade unions and state regulators – has instead pragmatically foregrounded a contextual approach to assessing which work relations were within their organisational remit. Their contextual approach was reasserted and modified in reaction to economic considerations. In the case of trade unions, this pragmatism is rendered most visible by the increased efforts to organise and bargain on behalf

of agency workers when the presence of Eastern European workers grew in this segment of the UK labour market. The growing presence of these workers constituted an economic risk to the pay and conditions of existing workers – whether on agency contracts or directly employed – which trade unions such as Unite sought to avoid. Similarly, trade union campaigns against the use of PBA or 'Swedish derogation' contracts during the mid-2010s responded to such economic risks to directly employed union members by pragmatically redrawing the boundaries of which groups of workers to bargain for. State regulators equally took a contextual approach that usually responded to economic pressures, which have mainly taken the forms of threats to state revenue since the late 1970s and threats to economic growth in the 1980s, 1990s and early 2010s.

The legal engineering perspective, thirdly, has prioritised the economic category of profitability and responded to technical legal challenges to its contractual innovations. The relational work of employment agencies, other intermediaries and their legal advisers has throughout the past decades been oriented towards maintaining existing sources of profit and generating new sources – particularly when existing business models were threatened by shifts in how a work relation is defined from a technical legal perspective and what rights attach to it. When the incoming New Labour government enacted the rights to a national minimum wage and holiday pay, for instance, agencies engineered more complex models of pushing down agency workers' wages in low-paid sectors than they previously had. Recurrent legislative attempts to bring most contractors within the tax rules for employed workers were similarly met by agencies' restructuring of their labour supply chains in the interest of maintaining the profits generated by lower tax rates for self-employment.

In their engagement with the phenomenon of agency work, each of the three perspectives resasserted a particular type of considerations – technical, contextual and economic – in response to a specific alternative approach – contextual, economic and technical, respectively. As I examined in my empirical chapters 3 to 5, these distinct antagonisms have permeated the doctrinal, regulatory and business perspectives on agency work over the past four decades to such an extent that they seem part of their functioning. In this sense, a key aspect of relational work is not only how substantial boundaries (between the economic and the social, or between employment and self-employment) are drawn, but also against which alternative way of boundary-drawing it positions itself.

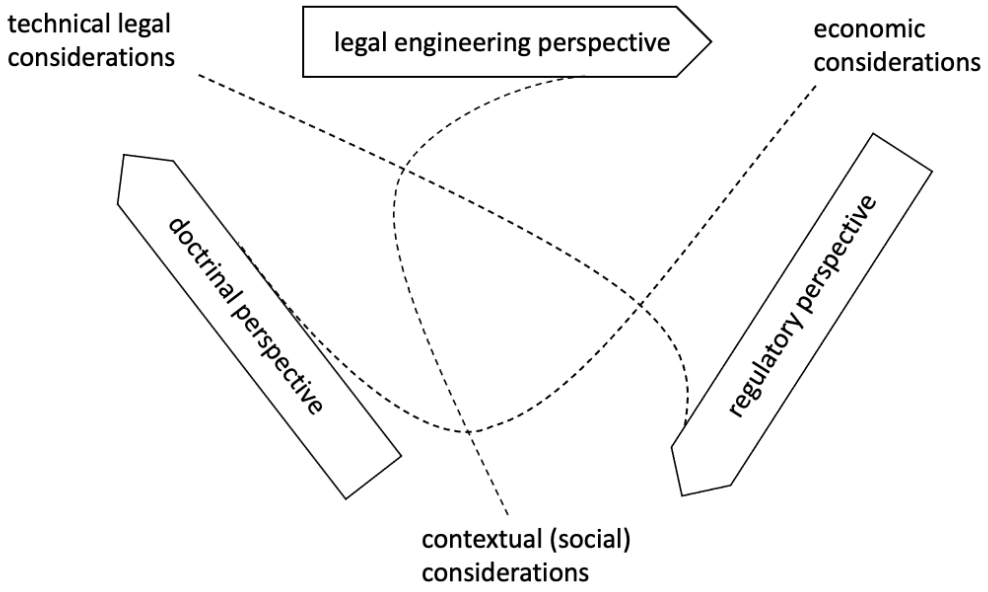

Figure 6.1: The stabilisation of each perspective through external considerations

Regarding the stability of epistemological perspectives, what is curious about juxtaposing all three perspectives on agency work – labour law doctrine, labour market regulation and agencies' legal engineering – over the course of the past four decades is a shared impasse since the late 2000s. Each perspective has since that time seemed in need of *external stabilisation*.[11] In other words, the interplay of the considerations prioritised and antagonised by each perspective have seemed to approach an impasse since the late 2000s, and a third, external type of considerations became prominent in each perspective. The doctrinal labour law community, for instance, increasingly struggled to uphold the priority of technical approaches to employee status over contextual approaches during the late 2000s, and eventually turned to the economic categories of business necessity and bargaining power to maintain the coherence of the post-1980s framework. The economic aspects of whether to grant agency workers employment rights had

[11] I am thereby following Gunther Teubner's idea that one social system – such as law or the economy, in his account – regularly externalises its fundamental contradiction to another system, which provides temporary solutions. See Teubner (2015) ['Exogenous Self-Binding']. For instance, whenever the economic system cannot determine whether a commodity is profitable or not, the legal system might make this determination instead, as in the case of public service provision. In such situations, the economic system would import legal categories (such as non-discrimination and equality of opportunity) to prop up its own functioning. In light of my study, I would add that such externalisation of a system's (or rather, epistemological perspective's) fundamental contradiction to another system or perspective may indicate a brewing crisis.

not been explicitly discussed at all from a doctrinal perspective.[12] This has changed drastically since 2008, when labour law doctrine centred on whether implying a contract between an agency worker and an end user was necessary from a commercial standpoint ('business necessity'). The significance of economic considerations to the doctrinal perspective continued to grow after a 2011 Supreme Court ruling that hinged on the economic position of a worker vis-à-vis a putative employer (exceptional 'inequality of bargaining power'). Senior judges' reliance on these economic categories prevented the contextual approach from superseding the technical approach, which was an imminent threat in the mid-2000s.

A similar dynamic has affected the regulatory perspective on agency work. After trade unions and state regulators had been reacting pragmatically to economic pressures since the 1980s, adjusting their approaches to agency workers based on the particular context, the technical legal limits on their activities have become more evident over the last decade. Trade unions have become more concerned about the type of support they are legally entitled to provide to agency workers and how such workers fit within their internal bureaucratic structures. The GLA, meanwhile, faced accusations that it had been overstepping its institutional competences by addressing both extreme and more low-scale breaches of employment law and was in 2016 provided with new powers that rendered its previously wide-ranging enforcement activities entirely impossible to sustain. HMRC's efforts to combat systematic tax avoidance, lastly, have been restricted by particularly piecemeal changes to the legal rules on income taxation since 2010. As in the case of the labour law doctrine, labour market regulation has thus seemed to retain its stability through the explicit use of a third type of considerations. Technical legal limits, namely, seemed to prevent regulators from prioritising economic rather than pragmatic, contextual factors in performing their mandates. Such a shift might have been in the economic interests of agency workers and sustained government revenues, but it would have upended the general withdrawal from the recruitment market that had characterised the regulatory perspective since the 1980s.

The ordinary functioning of the legal engineering perspective, in turn, was fundamentally threatened in the late 2000s by imminent shifts in the technical characterisation of agency workers and such tax avoidance models as Managed Personal Service Companies.

[12] Rather than being absent from doctrinal reasoning, however, it is arguable that economic preferences for a segmented labour market had already motivated the jurisprudence on mutuality of obligation and employer's intention since the early 1980s. I touch on this issue in the following chapter.

These shifts would have made it incomparably more difficult for agencies to retain or rechannel the sources of profit on which they relied, namely tax savings and the avoidance of employment rights. In an effort to safeguard their economic interests, agencies embarked on a collective process of 'professionalisation', which has involved improving the public image of the recruitment industry, reducing competition amongst agencies and marketing their services more proactively to end users and individual workers than they had done before. Even earlier than in the late 2000s, employment agencies had already transformed end users' expectations for instance regarding the availability and reliability of agency-mediated labour, and they continued to do so during the 2010s by improving the affective 'experience' that agencies provide to end user companies and to well-paid workers. Employment agencies and other intermediaries have thus been increasingly recognised as essential to the functioning of the UK labour market, which has so far helped the industry push back against any serious judicial or legislative attempts to curtail their sources of profit. Moreover, the underlying orientation of the industry's legal engineering has been towards social conceptions of work. Even though the continuous practices of legal engineering – which produced numerous contractual innovations in response to legal change – were initially aimed at maintaining profitability, the industry's expansion was only possible because it assumed and at times actively induced changes in social attitudes towards work.

3. The crisis of labour law revisited: the centrality of labour law's distributive function

One of two fields of scholarship that has particularly inspired the orientation and design of the present study is the debate over the crisis of labour law. This debate has assessed, arguably in an increasingly repetitive way, a series of absences: the absent 'fit' between labour law's coverage and the entirety of work relations in need of social protection, the absence of labour law's enforceability where it would de jure apply, and the waning legitimacy of labour law in light of its limited or counter-productive social effects.[13] While the debate has been brewing for two decades, recent years have seen a 'thickening' of the strand of those interventions that 'look[] to methodological innovation as offering a possible way forward'.[14] The 'crisis in the field of labour law' might thus be regarded 'as having at its heart a *crisis of methodology*'.[15] As I discussed

[13] Dukes (2020b).
[14] Dukes (2019), p. 397.
[15] Dukes (2018), p. 408.

in Chapter 1, my study is driven by the same discontent with the current ordering of work relations that has fuelled this debate, which is why I have found it impossible to sidestep the notion of a crisis of labour law. At the same time, I have sought to channel my reservations about the overall trajectory of this debate itself by turning to recent work in the economic sociology of law and taking up some of its guiding questions and proposed answers. This work has encouraged me to explore how economic, legal and social logics are interwoven in the regulation of agency work, leading me to develop my notion of distinct epistemological perspectives on agency work that cohere around particular constructions of the interplay of the econo-socio-legal.

In this section and the following, I situate my research findings within the broader debate on the crisis of labour law and within the emerging literature in the economic sociology of law, respectively. To do so, I engage with two recent contributions to either field of scholarship that have a shared ambition: both explicitly take stock of established approaches and strive to lay the foundations for an alternative, more nuanced orientation. The first is Zoe Adams' assessment of a particular orientation in labour law scholarship, critical of 'socio-economic outcomes' rather than 'the structures that … explain those outcomes', which has been prominent in the crisis of labour law debate.[16] As I will elaborate, my study provides further support for Adams' critique. The second contribution, to which I turn in the following section, is Ruth Dukes' proposal of an 'economic sociology of labour law' that could remedy the theoretical weaknesses of the classical socio-legal approach to labour law in the tradition of Hugo Sinzheimer and Otto Kahn-Freund.[17] In both cases, the findings of my study corroborate the general critique while complicating the proposed alternative approach. In relation to Adams' proposal, my foregrounding of **liminal employment** points to the importance of the distributive function of labour law, while my notion of **epistemological perspectives** leads me to assert the transformative potential of Dukes' Weberian, initially 'expository' understanding of labour constitutions.[18]

In her recent article 'Labour Law, Capitalism and the Juridical Form: Taking a Critical Approach to Questions of Labour Law Reform', Zoe Adams contrasts two strands of explanations for the ongoing crisis of labour law. She draws a sharp line under an approach to

[16] Adams (2020), p. 1.
[17] Dukes (2019).
[18] Dukes (2019), p. 420.

labour law that is 'critical in the narrow sense—critical of various observed socio-economic outcomes, seeing labour law as a, or the principal, mechanism via which to change or improve those outcomes'. Adams is politely ambiguous as to which scholarly contributions she considers overly concerned with the 'short-term', 'distributive' issues of 'improving workers' terms and conditions of work'.[19] She identifies at least two specific characteristics of this approach. One is the overarching short-term goal of merely 'improving the effectiveness of labour law' itself.[20] This line of critique seems to target an exclusive focus on tinkering with individual sub-categories of labour law (such as the scope of whistleblowing protection for purported defamation or the proportionality of indirectly discriminatory measures),[21] but perhaps also specific reflections on which other legal fields (such as procurement law or commercial law) could yield advantages for workers in particular situations,[22] or even visions of narrowly refashioning labour law as a set of techniques designed to 'overcome specific market failures'.[23]

A second characteristic of the object of Adams' critique is 'the idea', in relation to labour law's scope, 'that there is a true, *legal* definition of employment that is being "illegitimately" subverted'.[24] This line of critique highlights a different set of contributions to the crisis of labour law debate, which includes attempts to expose 'abusive' statements of (self-) employment status[25] and efforts to render a 'purposive' approach to employment status analysis – focused not only on the written contract terms but also on contextual factors – more widespread.[26] In the context of my analysis of employment status doctrine, almost all of the challenges to the exclusionary post-1980s framework that individual litigants and a minority of judges pursued were grounded in contextual legal arguments, that is, in references to the 'true agreement' or the 'social reality' of a particular work relation. The fact that these challenges failed to make employment rights available to more than a narrow set of atypical workers in the period under consideration seems to reinforce Adams' point that legal arguments based on what is 'truly' employment have not in themselves been able to address the problem of atypical work relations largely being excluded from labour law's protective scope.

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[19] Adams (2020), pp. 1-2.
[20] ibid, p. 15.
[21] Lewis (2018); Lane and Ingleby (2018).
[22] Barnard (2011); Riley (2016).
[23] Hyde (2006), p. 59.
[24] Adams (2020), p. 21.
[25] ibid; see e.g. McGaughey (2019).
[26] Adams (2020), p. 21; see Davidov (2016).

In contrast to this approach, Adams aims to build on a 'strand of critical labour law scholarship' that she presents as 'critical not just of [concrete] socio-economic outcomes, but of the structures that give rise to and explain those outcomes – including the role within those structures of law'.[27] Adams identifies this more ambitious strand of scholarship with the tradition of Hugo Sinzheimer's work in particular,[28] and stresses its orientation towards 'the longer-term goal of structural transformation'.[29] Building on this body of scholarship, Adams develops a 'structural perspective' that foregrounds both the 'socio-economic function' of labour law and the effects and limits of the legal form.[30] With a view to labour law's function, she demonstrates the centrality of labour law to the functioning of capital accumulation. Labour law thus allocates to the employer 'the legal right … to appropriate the *entirety* of the labour product', but it also guarantees the sustainability of the capitalist labour process in the long run by preventing 'workers' living standards [from being] depressed' to such an extent that 'their capacity to produce' would be seriously impaired.[31] Adams places particular emphasis on the fact that, 'in limiting exploitation, labour law is not acting *against* capitalism, but is acting *in support of it*'.[32]

As for labour law's form itself, she argues that it conceals this long-term support for the meta-process of capital accumulation.[33] My study validates Adams' argument regarding the effects and limits of labour law's form. My analysis in Chapter 3 has indicates that the majority of the doctrinal labour law community has effectively blocked any significant extension of employment rights to agency workers and other atypical workers. I have shown how these limits of the doctrinal perspective have been actively constructed, and repeatedly adjusted in response to internal challenges by litigants and a minority of judges. In this process, the doctrinal community has tended to prioritise technical legal arguments regarding 'mutuality of obligation' and employer intention. Only since the late 2000s have judges directly incorporated economic considerations into their boundary-drawing practices, in the form of the notions of business necessity and inequality of bargaining power. This development dovetails with Adams' claim

[27] Adams (2020), p. 1.
[28] ibid, p. 1 fns. 1-2, p. 4 fn. 7.
[29] ibid, p. 1.
[30] ibid, p. 2.
[31] ibid, pp. 5, 9.
[32] ibid, pp. 9-10.
[33] ibid, pp. 14-15.

that 'labour law … cannot completely deny' structural economic processes such as 'inequality and exploitation' – but nor can it 'directly engage' with them.[34]

But the 'fetishistic' operation of the legal form seems to have cast a spell over the Marxist theory of exploitation itself, insofar as one particular set of work relations is often considered 'the distinctly capitalistic form of exploitation' – while 'other working relations that create risks of other forms of exploitation, such as domestic service relations' have traditionally been treated as an afterthought.[35] Instead, my analysis of the particular motivations driving the exclusion of agency work and other forms of atypical work from employment rights and labour protections reinforces Adams' point that there is no 'true, legal definition of employment'.[36] Moreover, a key finding of my analysis of the interplay of doctrine, regulation and business practices is that the formation of the recruitment market has precisely allowed businesses to shift their workforces into a different set of work categories, or labour constitutions: these are the intermediate categories of temps, contractors and the falsely employed brought forth by the recruitment industry. *Both* kinds of work must be considered distinctly capitalist. This view seems consistent with Mundlak's reminder that 'labour law cannot look merely at the relationship between labour and capital, but must also comprehend the groups and individuals on labour's side as a distinct system of distribution'.[37]

Adams urges labour lawyers to draw attention to the limitations of the doctrinal perspective, noting how the 'economic pressures' that generate '*de facto* obligations' to work and to be paid, even where there are none in the written contract, are 'discounted as irrelevant to the *legal* question at hand' (of whether a claimant is an employee and thus entitled to certain employment rights).[38] My analysis of the doctrinal perspective on atypical workers' employment status confirms the effect that Adams diagnoses. But rather than 'simply argue that [a particular

[34] ibid, p. 14. The phase between the early 1980s and the late 2000s also seems to confirm Adams' theoretically derived insight that the authority of judicial decisions on employment rights depends on these decisions appearing 'as separated or autonomous from the market' and its logic or presumed needs (ibid, p. 12).
[35] Adams (2020), p. 17; on the theory of legal fetishism as an extension of Marx's theory of commodity fetishism, see e.g. Kerruish (1991).
[36] ibid, p. 21 (emphasis omitted).
[37] Mundlak (2011), p. 325.
[38] Adams (2020), p. 30.

individual] *is* an employee',[39] which falls prey to the essentialist idea that there is a true (legal) definition of employment which Adams rejects, what might be an alternative?[40]

I will turn to this point through an engagement with Adams' arguments surrounding the function of labour law, which my study complicates with a view to *labour market segmentation* and *long-term historical cycles of capital accumulation*. Regarding the former, key themes of my study have been the large-scale differences in labour market outcomes between different groups of workers and the role that labour law and legal actors have played in creating them. Rather than labour law doctrine and practice exhibiting a high degree of consistency in navigating the tension between depressing working conditions and sustaining social reproduction, my findings on how doctrinal and regulatory actors have insulated agency-mediated work from the employment and labour protection afforded to traditional employees suggest a more complex picture.

Both employment status law, the evolution of which I traced regarding atypical work in Chapter 3, and the enforcement activities of trade unions and state regulators that I discussed in Chapter 4 are crucial for the distribution of employment-related rights and privileges across the labour market. This distributive function, which Guy Mundlak has called the 'third function of labour law', analytically 'downgrad[es] the centrality of the capital-labour cleavage'.[41] While there is no consensus among political economists and feminist Marxist theorists precisely how those forms of work that do not conform to the (post-war, Northern) standard of traditional employment tie into the production of surplus-value, it is uncontroversial that work performed outside of employment and labour protections can generate higher profits for employing entities.

Mundlak's emphasis on the distributive function of labour law among different groups of workers allows me to rephrase what Adams regards as the socio-economic function of labour law. Rather than guaranteeing the sustainability of capital accumulation by limiting exploitation,

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[39] Adams (2020), p. 30

[40] Adams seems to have in mind legal arguments that are rooted in the 'wider circumstances in which the arrangement between the parties [was] concluded' (ibid). But these arguments seem to come dangerously close to the essentialist approaches that Adams critiques. It also seems to neglect that legal doctrine does in fact sometimes recognise these circumstances very well, for instance in defeating rights claims against employment agencies for lack of de facto control over the work performed (*Montgomery v Johnson Underwood Ltd* [2001] ICR 819) or in the determination of employment status for tax purposes.

[41] Mundlak (2011), p. 317.

my study suggests that labour law and labour market regulation serve as levers that determine the respective degrees of exploitation to which different groups of workers may, and likely will, be subjected. In Adams' terms, the fundamental tension inherent in capitalist labour markets is thereby resolved in such a way that the exploitation of some workers is significantly limited while no limits are placed on the erosion of other (atypical) workers' capacity to work. It is arguable that this very tangible function of labour law – and of labour market regulation – needs to be concealed by way of the legal form, perhaps much more so than labour law's more abstract long-term support for the accumulation of capital. I will return to the effects of the legal form, which form the backdrop of Adams' argument, in the following section when addressing the interplay of economic, legal and social dynamics.

In accentuating the cleavage between *traditional employment and liminal employment*, rather than that between capital and labour, my study both responds to and complicates the proposals for transformative intervention which Adams' analysis supports. Adams' proposals seem focused on 'expos[ing] the complex, structural reasons why' structurally disadvantaged workers have rarely been classified as workers or employees, and similarly on 'exposing the inadequacy not only of the legal reasoning *in particular cases*, but in general'.[42] I hope that my account – based on the case of agency-mediated work – of the formalisation of liminal employment and the symptomatic exclusion of economic considerations from the perspective of labour law doctrine can shed some new light on both of these issues. As I dissected in Chapter 3, courts, litigants and doctrinal commentators have actively constructed and refined their technical use of 'mutuality of obligation' and employer intention, which has allowed them to deem a large share of agency-mediated and other atypical work as not falling into any positive category of work relations. That the proportion of these forms of work in the UK labour market could nonetheless grow so persistently since the 1970s has depended, I have suggested in relation to agency-mediated work in Chapter 5 and elaborated in the first section of the present Chapter, on the positive intermediate categories (of temps, contractors and false employment) through which the recruitment industry has captured and marketed a large share of liminal employment.

To return to my interview respondent's musings that 'employers will always do what works best for them … *and if it didn't work, they wouldn't do it*', this comment might be rephrased as 'the economic motive of pursuing profit trumps the legal motives of preventing unacceptable working conditions and tax avoidance – *unless and until the legal motives trump the economic motive*'.

[42] Adams (2020), p. 33.

The recruitment industry's profit motive could trump the protection of workers and tax revenues because the doctrinal and regulatory communities chose to apply positive categories only to a small minority of agency-mediated work relations – according no (positive) place to the rest. The lion's share of such work relations has thus been invisible to doctrinal and regulatory protections while being marketed under such commercially intelligible labels as temps and contractors to end-users of agency-mediated labour. These are the two sides of what I have called the asymmetrical formalisation of liminal employment. On the one hand, agency work has been reinforced as a liminal, often invisible form of work through the processes of doctrinal and regulatory insulation. On the other hand, it has been moulded into positive categories that can effectively guide transactions between buyers and sellers of labour-power, including workers themselves.

Beyond my contrasting account of labour market segmentation, my study also complicates an element of Adams' analysis that relates to the meta-process of capital accumulation and its transformation. Adams concludes her discussion by arguing that, beyond 'exposing and explaining the *failure* of the law to engage with … class, or structural, forces in practice', labour law scholars will 'need to explore how to give *juridical expression* to [such] class, or structural, forces'.[43] I would claim, however, that according to my findings the class structure of UK society is *already* inscribed in labour law doctrine. While the traditional categories of self-employment and employment uncontroversially represent the abstract class cleavage between capital and labour, the doctrines of mutuality of obligation and employer intention (and their readjustments over the past four decades) can precisely be understood as the legal expression of those who do not even fit the abstract class binary. These doctrines have served to categorise a growing share of work relations as neither employment nor self-employment, at times even as non-contractual arrangements.

This divergence between Adams' contribution and my study seems to encapsulate a small but crucial difference between orthodox and heterodox strands of Marxist theory. While the focus on two empirically existing classes (the bourgeoisie and the working class) has been a core tenet of orthodox Marxism, this view has been met with scepticism by Marxist theorists who have emphasised instead – much like Mundlak – the growing tension between an 'aristocracy of tenured workers' and a mass of 'temporary workers' on the other.[44] This view

[43] Adams (2020), p. 33 (emphases original).
[44] Gorz (1980), p. 3; see Cleaver (1972).

ultimately gives rise to a conception of class antagonism that does not merely pit one class against another, but recognises that a heterogenous remainder 'that does not "fit" this opposition' is left over, composed of groups such as the one Marx that described as the *Lumpenproletariat*.[45] Whether one adopts the perspective of labour or of the heterogenous remainder makes all the difference. The first option allows for a traditional 'critique of capitalism from the standpoint of labour',[46] which is exemplified by Prassl's assertion that 'the worker's perspective [is] the appropriate analytical and normative focus for employment law's fundamental concerns'.[47] The latter perspective, by contrast, may provide the ground for 'a critique of labour in capitalism'.[48]

Differences in how Marx's analyses of capitalism might be taken up also have a historiographical component. The tension on which Adams' account of labour law is built may be resolved not only through labour law's distributive function, but also through the see-saw of capitalism's long-term historical development. This tension between the economically created disintegration of the social fabric (particularly through pushing wages 'below subsistence level' and failing to contribute to public infrastructure) and the need to limit such exploitation in the 'interest[] of capital as a class'[49] may thus be described as a 'contradictory unity' that the social formation we live in – capitalism – resolves by oscillating over time between the two priorities.[50] Most recently, the historical phases of neoliberalism and previously the post-war welfare state have accordingly prioritised the production of surplus-value and its realisation, respectively.[51]

The current perception that labour law is in crisis, then, may be seen as a tipping point at which the depression of working conditions in the interest of surplus-value production has become unacceptably severe. As I have emphasised in relation to different hiring models throughout Chapter 5, the UK recruitment market has been built on the avoidance of employment rights and tax liabilities – and thus on a deterioration of social reproduction and infrastructure. That these effects have become increasingly difficult to ignore may from a

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[45] Zizek (2002), p. 74.
[46] Postone (1993), p. 5
[47] Prassl (2015), p. 2.
[48] Postone (1993), p. 5.
[49] Adams (2020), p. 9.
[50] Harvey (2018), p. 351.
[51] These long-term historical trends might in fact mirror the process that I have called the formalisation of liminal employment since the late 1970s. A general structural parallel seems to exist with the development of status distinctions in English law in an earlier phase of financialisation leading up to World War I, specifically regarding the manner in which the intermediary category of 'workman' gave positive form to liminal employment.

Marxist perspective point to an imminent reversal of long-term historical priorities, which may be switching back from the production of surplus-value to its realisation through commodity consumption. From such a perspective, what even the UK Supreme Court may be argued to have recognised in its recent case law on 'worker' status is not that the exclusion of large groups of workers from employment protection has violated such indispensable social values as 'common decency',[52] but rather that the levels of this exclusion currently pose risks to capital accumulation itself.

Moreover, it is crucial to note that some work relations that labour law doctrine has constructed as invisible have caused the discipline a lesser degree of anxiety than others. When Adelle Blackett turns, in an edited collection that contains key contributions to understanding the crisis of labour law in Western societies, to workers 'in "peripheral" geopolitical spaces like Africa and its diaspora' as well as in the household who are excluded from the benefits of labour and employment protection,[53] the awkward position of her account in relation to the overall subject-matter of the collection cannot be overlooked. A clear consensus among progressive labour law scholars and practitioners that the discipline is in crisis seemed to emerge only when workers in the labour markets of the Global North – both male and female – increasingly found themselves in the limbo beyond traditional protections that I have called liminal employment. This enormous lacuna of most contributions to the crisis of labour law debate is also tangible in my own study. I began to grasp only at a late stage, in a conversation with my primary supervisor, that what I describe as the formalisation of liminal employment that has occurred within the UK recruitment market may be understood as the successor of an earlier, functionally related process that had formally excluded racialised and gendered workers from such benefits as social insurance and unionisation through the operation, in particular, of immigration law and family law.[54]

Ultimately, my interview respondent's startling comment – which I rephrased as 'economic motives trump legal ones, unless legal motives trump economic ones' – may be taken to illustrate not only my notion of the doctrinal and regulatory insulation of the recruitment market, but also historical aspects of my second literature of concern, which addresses the

[52] Butler (2021).

[53] Blackett (2011), p. 420.

[54] The social distinctions of race and gender have typically been beyond the express concerns of the liberal welfare state and social welfare and labour law, rather than being understood as integral to their construction. See for instance Shilliam (2018), ch 5.

interrelation of law, the economy and society. In this sense, profit-making would tend to trump the protection of workers and tax revenues within the era of neoliberalism or the 'law of the labour market',[55] while the opposite tendency characterised the previous decades dominated by the welfare state and collective *laissez-faire*.

4. Engineering the econo-socio-legal: 'labour constitutions' as hinges, boundary-drawing protocols as levers

How have the abstract tendencies that Adams, Mundlak and my own study register – such as labour law's long-term contribution to capital accumulation, the differential distribution of employment-related rights and privileges across the labour market, and the formalisation of liminal employment as invisible from some perspectives and tangible from others – been brought about? How have they been adjusted and sustained? I now address these questions that are ancillary to my study, and that allow me to situate my findings more firmly within the existing literature on the economic sociology of law. Exploring how the exclusion of agency workers from employment and labour protections has been operationalised and sustained is precisely one of the contributions that my study has sought to make to my first main literature, which is the English-language debate regarding the crisis of labour law. I have summarised my findings on the formalisation of liminal employment and the stabilisation of the three epistemological perspectives of labour law doctrine, labour market regulation and legal engineering in sections 1 and 2 of this Chapter. The further ambition of my study has been to grasp these phenomena in their empirical concreteness. Here, recent work in the economic sociology of law once again provides insightful guidance. Beyond its attentiveness to distinct logics of social ordering, I have greatly benefited from the sensibility for both the micro-level and the macro-level of social reality that is prevalent in this field of scholarship.

To reflect on the connections between the abstract tendencies diagnosed by the crisis of labour law debate and tangible empirical phenomena, I return to one of those articulations of ESL scholarship on the basis of which I constructed my notion of epistemological perspectives in the third section of Chapter 2. Ruth Dukes' proposal of an 'economic sociology of labour law' stands out by how clearly it draws a line both under competing conceptions of the econo-socio-legal interplay and under the theoretical assumptions of the classical 'socio-

[55] See Dukes (2014), ch 5.

legal tradition in labour law'. Rather than ground her analysis in such macro-level concepts as 'the subordination of the worker to the employer', 'democracy' or 'the labour market', Dukes begins with the notion of 'contracting for work', by which she understands the individual acts 'by which parties can create and give form to … working relationships'.[56] The importance that her Weberian approach accords to individual social action mirrors the attention that I have sought to pay, throughout Chapters 3 to 5, to individual acts of constructing the boundary between traditional employment, self-employment and intermediate categories.

In the context of situating my findings within the economic sociology of law, the particular strength of Dukes' approach is how she links individual acts of contracting for work with the Weberian notion of 'labour constitutions'. In her words, the notion of labour constitutions can 'provide a means of moving beyond the micro level of analysis [focused on individual acts of contracting for work] to the meso- and macrolevels, without defaulting automatically to "the labour market" as that which frames the field'.[57] Dukes understands a labour constitution as both a particular social ordering of work relations and 'the state of [that form of] labour (in the abstract) itself'.[58] Examples of such labour constitutions are successive forms of labour use in agriculture and different 'model[s] of taxi service provision'.[59] The fact that this approach eschews such guiding concepts as 'subordination', 'democracy' or 'the labour market' has a methodological consequence that cannot be underestimated. Unlike both the traditional sociologically-inspired approach to labour law and the market-oriented approach that emerged during the 1980s, Dukes does not employ any notion of normativity that is external to her object of analysis.[60] I have extended this approach to the three epistemological perspectives that I have studied. In Chapters 3 to 5, I have thus sought to explore each perspective on its own terms rather than imposing external standards of critique.

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[56] Dukes (2019), pp. 398-399, 414.

[57] ibid, p. 415.

[58] ibid, p. 411.

[59] ibid, p. 417.

[60] In other words, her approach allows us to withhold normative judgment and the consideration of political interventions until the phenomena we study have been traced and analysed. This appears to be an implicit rejection of the conflation of the normative and the descriptive that has characterised the classical tradition of UK labour law scholarship. It opens up the possibility I introduced in chapter 2 of what might be described as immanent critique: 'a critique which derives the standards it employs from the object criticized, that is, the society [or social field] in question, rather than approaching that society [or field] with independently justified standards'. Stahl (2013), p. 2.

Against the backdrop of my analysis – in Chapters 3 to 5 – of the categories mobilised by the doctrinal, regulatory and business communities to categorise agency-mediated labour, I can now relate Dukes' notion of labour constitutions more clearly to these categories than I did in the third section of Chapter 2. In that earlier discussion, I already suggested that both traditional employment and traditional self-employment are examples of different labour constitutions, in the sense of patterns or clusters of work relations that are conventionally recognised as a coherent category. I also pointed out the conceptual parallel with Zelizer's notion of 'relational packages'. Most significantly, which labour constitutions exist beyond and between these binary categories depends on which epistemic community one asks. Agency-mediated work relations, which are a paradigmatic case of this grey area, have been treated (for instance) as 'sui generis', as a 'worker' relation or as a 'sham' by the doctrinal community; as a distinct enforcement regime, as traditional employment and as severe labour exploitation by labour market regulators; and as temps, as contractors and as employment contracts designed for travel and subsistence relief by the recruitment industry. Beyond these positive categories, it is crucial to note that the doctrinal and regulatory communities have further treated large numbers of agency-mediated work relations as invisible or inexistent. What are the analytical implications of my finding that these intermediate categories do not overlap in the same way that traditional employment and self-employment tend to do as seen from the perspectives of doctrine, regulation and legal engineering?

At first glance, these incongruent categories underline a key characteristic of the binary categories of traditional employment and self-employment, which is that they allow all three epistemic communities to communicate in a straightforward manner. If a work relation falls in the category of traditional employment, judges will grant them access to employment-related rights, trade unions will in principle be willing to bargain for them and represent them, state regulators will enforce relevant labour standards and tax liabilities – and employing entities will largely accept this state of affairs. The inverse is true regarding traditional self-employment. Both of these binary categories can therefore be seen as linkages between the discourses and epistemological perspectives of these distinct communities. They function as hinges that make meaningful communication between these communities possible. At the same time, they function as hinges between economic, legal and social considerations. Employment, for instance, has clear economic implications (which include non-wage labour costs for employers), legal implications (access to rights and privileges) and social implications (which comprise the psychological contract between employer and employee). This conception is consistent with

Dukes' approach, according to which the patterns or clusters that individual acts of contracting for work form at once implicate the dimensions of the legal, the economic and the social.

The intermediate categories that have been the focus of my study, by contrast, might be seen as hinges that are broken or malfunctioning as between the three epistemic communities. One and the same agency-mediated work relation will rarely be categorised in the same way by a judge, a trade union, a state regulator and an employment agency – not least because the intermediate categories deployed by these sets of actors differ. In fact, a large share of such work relations fits a particular intermediate category if seen from the perspective of the recruitment industry, but does not fall into any positive category if seen from the perspective of doctrine or regulation. Communication between the three communities tends to be confounded, then, whenever an agency-mediated or otherwise atypical work relation is concerned.

Relating Dukes' notion of labour constitutions to the intermediate categories that I have explored in this study is also instructive with a view to the question raised by Dukes of which entity holds 'power' in a particular act of contracting for work.[61] Beyond the sectoral and contextual factors that Dukes mentions, such as the existence and strength of collective bargaining mechanisms, my analysis of intermediate categories adds another layer to what it means to hold power over this interaction. Namely, whenever doctrine and regulation do not capture a work relation within any positive category at all, the categories used by the recruitment industry can by default determine the shape that the work relation takes. Conversely, where judges, trade unions or state regulators do categorise an agency-mediated work relation in a positive way that clashes with the perspective of the businesses involved, the businesses may be 'set straight',[62] though usually only in the wake of formal or informal processes – and in relation to the specific work relation at issue.

Whether the intermediate categories that I have just described as broken or malfunctioning hinges can give rise to distinct labour constitutions is a particularly important question, since it provides an entry point into the analysis of the UK recruitment industry as a project of market-making. What my analysis of the marketing of agency-mediated work in Chapter 5 suggests is that, despite the inconsistency of the intermediate categories as between

[61] ibid, pp. 414-418.
[62] Interview transcript U5.

the three perspectives, the recruitment industry and end-users have no difficulty understanding what forms of labour are being bought and sold. In other words, the economic question of what commodity is being traded appears straightforward: temps and contractors have become familiar forms of labour for end-users, and the more sophisticated types of 'false employment' detailed in the fourth and fifth sections of Chapter 5 have similarly come to be recognised by market participants. That the intermediate categories fashioned by the UK recruitment industry have evolved into products familiar to end-users is a key indicator for a successful remaking of the labour market. Agencies' efforts detailed throughout sections 2 to 5 of Chapter 5 to render their offering to end-clients ever-more reliable and consistent, coupled with the continuing tendency of doctrinal and regulatory actors to withdraw from the recruitment sector, have thus demarcated the 'recruitment market' as a market distinct from the traditional labour market, which involves the purchase and sale of the labour-power of temps, contractors and the falsely employed – rather than standard, employed labour-power.

At the same time, the intermediate categories constructed by the recruitment industry have also begun to be accepted as distinct legal relations. That is not yet the case for the community of doctrinal labour lawyers, but it is for those specialist solicitors whose work for recruitment intermediaries and end-users is located between the fields of employment law and commercial law. Paralleling the emergence of the recruitment market, these developments indicate that recruitment intermediaries and their legal advisers have also succeeded at creating a distinct body of law, which specialists call 'recruitment law'. My study is inconclusive, unfortunately, as regards the social dimension of this trend. Whether the categories of temps, contractors and such forms of 'false employment' as travel and subsistence contracts or Pay Between Assignment contracts are meaningful in ordinary social discourse cannot be clearly assessed on the basis of my empirical data. The legal engineering community has, however, already been considerably more successful than the doctrinal and regulatory communities at imposing its own intermediate categories on professional actors outside its own sphere.

Overall, the economic and legal intelligibility of the intermediate categories fashioned by the recruitment industry suggest that temps and contractors (if not the 'falsely employed') have matured into distinct labour constitutions in the sense of a 'logically coherent statement of the characteristic properties of a particular regime of labour relations'.[63] It is therefore insufficient to understand the crisis of labour law as a series of absences – such as the absent

[63] Dukes (2019), p. 412.

'fit' between labour law's coverage and the entirety of work relations in need of social protection – as many contributions to the debate do.[64] The crisis also involves an acutely innovative or productive aspect, which consists particularly in the recruitment industry's construction and spread of its intermediate categories.

This process appears as the flipside of the gradual disintegration of traditional employment and self-employment as distinct, logically coherent regimes of labour relations. It restates the question of labour law's 'fit' with socially meaningful categories in a simple but by no means self-evident way: do social, legal and economic understandings of what is employment and self-employment still coincide? It increasingly seems that they do not. For instance, as a matter of social intelligibility, an agency worker who works regular hours in the same workplace for a number of years will be indistinguishable from any other employee. But as I have traced in Chapters 3 and 5, she will likely be regarded as self-employed or not working under any contract from a technical legal perspective, and as a temp without employment rights but taxed like an employee from the vantage point of the recruitment industry.

Understanding employment and self-employment – but also temps, contractors and false employment – as distinct labour constitutions allows me to answer the first question raised at the beginning of this section, which is how such large-scale processes as the differential distribution of rights and privileges across the labour market and the simultaneous visibility and invisibility of agency-mediated work (to the recruitment industry and to doctrine and regulation, respectively) have been put into practice. I can now turn more briefly to the second question that I raised at the beginning of this section, which is how the differential distribution of rights and privileges across workers and the formalisation of liminal employment have been adjusted and sustained. In this regard, my findings point to the role of the boundary-drawing protocols that each epistemic community developed – and refined in the face of internal challenges. These boundary-drawing protocols are the central innovations that not only the recruitment industry, but also the communities of doctrinal labour lawyers and labour market regulators have produced over the course of the past four decades.

As detailed in the second section of Chapter 3, the key development in the doctrinal perspective on agency-mediated work around 1980 was the construction of 'mutuality of obligation' as a judicial lever that denied employment-related rights to most atypical workers.

[64] Dukes (2020b).

Rather than being categorised as employees, agency-mediated workers and other atypical workers were thus rendered effectively invisible to labour law doctrine. The same effect was created during the 1970s and 1980s by innovations within the regulatory community. The lenience with which the Employment Agencies Licensing Office enforced procedural standards against employment agencies since that time, and the assertion among trade unions that agency work was a breach of worker solidarity, resulted in these labour market institutions disengaging from agency-mediated work. By contrast, the innovations developed by the legal engineering community acted as a lever in the opposite direction. Rather than causing agencies and other intermediaries to withdraw from the market for agency-mediated labour and other forms of liminal employment, the early innovations of stabilising the temp and contractor categories – by avoiding individual employment rights and the tax rules for non-incorporated agency workers, respectively – made this market more accessible to them.

In other words, each of the three epistemic communities developed innovative approaches to the categorisation of agency-mediated work during the 1970s and 1980s. Those epistemic communities that had the power to act in the interest of workers, however, contributed what might be called *negative innovations*, namely boundary-drawing protocols that rendered most agency-mediated work effectively invisible. They actively prevented themselves both from constructing a new labour constitution comprising most agency-mediated work relations and from the alternative option of absorbing such work relations into the existing labour constitution of traditional employment. The mediated hiring relations established by the emerging recruitment industry constitute *positive innovations* instead, in the sense that they created new categories of work relations that have evolved into coherent and recognisable labour constitutions.

The respective consensus in each of the three communities kept this constellation intact throughout the 1980s, 1990s and 2000s. New innovations further tended to lever the recruitment industry's presence within this market as compared to the doctrinal and regulatory communities in the same direction. The abolition of the licensing requirement for employment agencies, for instance, increased the extent to which state regulators had withdrawn from the recruitment market. The tendency for the 'worker' category to be interpreted narrowly by the higher courts cemented the irrelevance of most employment-related rights to agency-mediated work relations. The introduction of the travel and subsistence model, by contrast, allowed agencies and other intermediaries to make further inroads into the sphere of liminal

employment by offering a third intermediary category besides temps and contractors through which the traditional binary of employment and self-employment could be eluded.

What has been striking since the early 2010s is that these levers are no longer reliably expanding the recruitment industry's reach over agency-mediated work while at the same time insulating it from active doctrinal and regulatory intervention. Judicial interpretations of 'sham' contracts and the 'worker' category have not been as clearly restrictive since the Supreme Court decisions in *Autoclenz* and *Bates van Winkelhof* as they had been before. A small number of trade unions have sought a clear break with the conventional, distanced stance towards agency-mediated work, and HMRC has indicated some willingness of a more robust enforcement of tax liabilities in relation to contractors. These incipient doctrinal and regulatory incursions into the recruitment market pose challenges to the precise contours of the labour constitutions of temps and contractors. Temps will become more costly to end-users if they are in principle granted such 'worker' rights as being paid the national minimum wage and statutory sick pay, and if trade unions can scale up innovative strategies for organising them and addressing their specific grievances. The unique advantage that contractors have for end-users may be eroded if HMRC takes a more stringent approach to identifying disguised employment. These developments, which remain in flux today, may be seen as the smouldering of the crisis of labour law: both doctrinal and regulatory actors are more clearly acknowledging the specific nature of agency-mediated work relations, and are thereby destabilising the vacuum within which the recruitment industry had been able to operate since the early 1980s.

My understanding of positive and negative innovations as levers by which atypical work relations may over time be afforded more or less rights once again brings to mind my interviewee's comment that 'employers will always do what works best for them' and that they 'can't be stopped, realistically'. What has prevented courts, trade unions and state regulators to stop the recruitment industry from expanding since the late 1970s – with detrimental effects on wages, working conditions and state revenue – have been the negative innovations by which they could construct this form of work as beyond their view. This vacuum could be filled by the recruitment industry thanks to its continuous positive innovations, particularly in the form of temps, contractors and different types of the 'falsely employed'. 'And if it didn't work', the recruitment industry 'wouldn't do it'.

The three-dimensional conception of the econo-socio-legal that I deduce from my findings goes beyond the view of social goals being pitted against economic goals that is common to the socio-legal tradition in labour law and the Polanyian orientation in ESL scholarship. In the established view, economic thought and practices inherently threaten the social fabric, which gave rise to Sinzheimer's vision of a 'social law' that would counterbalance the subordination built into the existing rules of 'economic law'.[65] Polanyi articulated this relation as a 'double movement' oscillating from one historical phase to the next between the expansion of the market economy and the protection of social bonds.[66] A related account articulated by Rittich revolves around the notion of hegemony, asserting that in the current historical phase 'the rationality of the market' tends to be 'hegemonic as a driver of reform to law and policy', thereby subjecting 'social objectives' to 'economic objectives'.[67]

In this study, I have made two design choices that have paved the way for a different, three-dimensional account of these long-term historical processes. The first was to regard agency-mediated work as a phenomenon that is, drawing on Dukes' Weberian approach, 'at once, economic, social *and* legal'.[68] My second choice was to recognise that epistemic communities differ as to how they construct the specific interplay of these three dimensions. These choices have helped generate my finding, visualised in figure 6.1 above, that each of the epistemological perspectives I have explored has since the early 1980s prioritised one dimension of the econo-socio-legal while positioning itself in opposition to another and being implicitly guided by the third. The third aspect – that respective dimension of the econo-socio-legal that has implicitly guided the three perspectives, which I have described as an external stabilisation in section 2 of this chapter – is crucial for situating my findings and hypotheses within the economic sociology of law.

My analysis in chapter 3 has thus indicated that the doctrinal community has refrained from explicit consideration of economic factors when characterising agency-mediated and other atypical work relations since the early 1980s. Economic factors have, however, surfaced in the boundary-drawing work of the doctrinal community since the late 2000s, when courts and litigants began to focus on what category of work relation was beneficial to an employing entity (under the notion of 'business necessity') and on whether there had been an extreme imbalance

[65] See Dukes (2014); Clark (1983), p. 86.
[66] Polanyi (1975); see Rittich (2014), p. 326.
[67] Rittich (2014), p. 327.
[68] Dukes (2019), p. 406.

in bargaining power between the parties (under the notion of 'sham' terms and contracts). I registered a similar dynamic with a view to the regulatory community, which presented their enforcement activities as pragmatic and largely independent of legal restrictions for decades. Since the mid-2000s, however, trade unions, the Gangmasters Licensing Authority and HMRC all became more concerned about the legal limits imposed on their activities.

While labour law doctrine has seemed invested – usually implicitly, but more explicitly since the late 2000s – in the presumed needs of the labour market, labour market regulation has ultimately seemed to orient itself towards the perceived limits of the legal framework within which it operates. In both cases, this point of orientation has been treated as inherently stable. The recruitment industry, by contrast, has continuously relied on the malleability of its implicit reference point: if the attitudes towards work held by organisations and individuals had remained essentially the same over the past four decades, employment agencies would have never turned into a notable UK 'industry'. Treating this third dimension which has implicitly anchored each of the three perspectives as malleable rather than stable, the recruitment industry could take a fundamentally different approach to liminal employment. Rather than rely on existing legislated categories, it could thus bring forth those intermediate categories that have actively structured and redesigned liminal employment.

What my study suggests is that the problem of agency-mediated work has been created by doctrinal and regulatory lack of epistemological flexibility, coupled with the recruitment industry's willingness to demonstrate precisely such flexibility. That doctrinal and regulatory actors have throughout the past four decades tied their perspectives on agency-mediated work to fixed understandings, respectively, of what the labour market requires and what the legal framework allows them to do, has meant that they have rarely placed their positive categorisations of the grey area between traditional employment and self-employment in competition with the categories developed by the recruitment industry. Economic objectives have thus implicitly been treated as fixed by the doctrinal community, while the regulatory community has treated legal restrictions as given. But crucially, what seems to have powered the expansion of the recruitment market was the deliberately flexible approach that agencies and other intermediaries have taken to social objectives. Unlike strict economic and legal objectives – which follow the logics of generating economic profit and complying with what is legally valid – social objectives in the field of liminal employment are inherently wide-ranging. Should the stability or the flexibility of a work relation be accorded priority? Who should most

benefit from such stability or flexibility – the individual worker or her employer? No explicit consensus over these matters has been reached in the three epistemic community that I have studied, nor have they received much attention.

This lack of consensus over social objectives in relation to the grey area between employment and self-employment has produced the normative vacuum that the recruitment industry has succeeded at occupying. My study therefore cautions against approaches, which might be called essentialist, that treat economic, legal and social considerations as having a life, and agency, of their own. The social forces, 'social law' and social objectives that Polanyi, Sinzheimer and Rittich have pitted against their economic counterparts have always been constructed and mobilised in a particular way by certain sets of actors, whose *perspectives* as such I have sought to highlight as an illuminating object of labour law research.

Emphasising the distinct perspectives of epistemic communities, and their constructions of the econo-socio-legal, has further allowed me to identify surprising parallels between the recruitment industry and marginal approaches within the regulatory community. As I briefly noted in section 2 of this Chapter, agencies and other intermediaries have not been the only actors whose boundary-drawing practices have eschewed a stable, fixed orientation. There have also been exceptional, limited initiatives by relatively participative trade unions and by the GLA to include agency-mediated work within their remit, which disregarded the possible limits of their legal competences. I will consider the potential of these singular types of initiatives for more sustained interventions into the field of liminal employment in the brief concluding section below.

5. Constructive interventions? Constructing new labour constitutions or recalibrating labour law's distributive function

What might be learned from the past conduct of doctrinal lawyers, trade unions, state regulators and the recruitment industry for potential future interventions in the field of liminal employment? I will conclude my study by turning to these questions. My findings regarding the active construction of the boundaries between employment, self-employment and intermediate categories suggest that the categorisations undertaken by doctrinal, regulatory and business actors are to be scrutinised rather than taken at face value. Moreover, even the social understanding of what is employment, self-employment or neither cannot serve as a reliable

anchor of stability for any categorising framework. This second point derives from my observation, in sections 3 to 6 of Chapter 5, that the recruitment industry's successful creation and expansion of such intermediate categories as temps and contractors seem to have relied on a slow but marked transformation in social attitudes towards traditional employment. This point is crucial because it considerably complicates the traditional socio-legal understanding that technical legal discourse distorts a more genuine, *social* universe of meaning.[69]

The binary categories of employment and self-employment and the intermediate categories that have sprung up between them form the conceptual battle ground that underlies the tensions between the three epistemological perspectives on agency work that I have explored in this study. These tensions concern not only how the boundaries between employment, self-employment and the intermediate categories used by the doctrinal, regulatory and business perspectives have been drawn, but also *which* intermediate categories – and even which *foundational* categories – are to be used. The distinction between employment and self-employment has held together the legal regime governing work relations in the UK since the 1940s.[70] The recruitment industry succeeded at establishing the intermediate categories, or new labour constitutions, of temps, contractors and the falsely employed thanks to the particular, negative innovations that allowed the doctrinal and regulatory communities to ignore most agency-mediated work.

Against this background, my study invites thinking about interventions in the field of liminal employment in two ways. The first is to put forward potential new labour constitutions that – mirroring the successful efforts by the recruitment industry – give concrete shape to liminal employment. Scholars of labour law and adjacent fields – but also trade unions and other actors – might explore ways of mirroring the recruitment industry's underlying attitude and construct, without depending on categories existing in legislation, alternative categories to capture certain areas of liminal employment. An advantage that non-commercial actors have in doing so is that they may find it easier to acknowledge the inherent openness of liminal employment. While agencies and other intermediaries that pursue economic profit seem to favour categories of a certain stability so as to plan their business and market their services in a

[69] See Deakin (2013b).

[70] Prior to the formal introduction of this distinction into UK tax and labour law, it appears to have played a more muted role that was eclipsed by the questions of what constituted a 'trade dispute' under collective labour law and whether an individual was a manual or non-manual worker under individual labour law. See Clark and Wedderburn (1983), pp. 155-65; Deakin and Wilkinson (2005), pp. 94-5, 106-7.

consistent manner, civil society actors, social movements or political parties will not face such obstacles. Moreover, unlike terms that at first sight seem to fit this description such as 'gig workers', 'denizens', 'the precariat' or even 'the underemployed', the type of alternative category that I have in mind is not empirically but rather logically delimited. It would comprise the entirety of those work relations that do not correspond with the binary categories of employment or self-employment in a straightforward way – in other words, it would include the entirety of liminal employment.

While trade unionism is usually aimed at challenging capital from the perspective of labour, this type of initiative would signal that capitalist labour markets create even greater discontent for those outside of traditional employment. Attempts to organise underemployed workers and the unemployed, for instance by the National Unemployed Workers' Movement in the UK of the interwar period and the Australian Unemployed Workers' Union, are advances in the direction of building a community of all individuals deemed outside the binary categories of employment and self-employment. Precisely what the political potential of such initiatives has been in the past, and how their shortfalls might be avoided, might be the focus of future research in labour law and neighbouring fields. Formalising atypical workers – and those even further beyond the regime of labour law, particularly the unemployed – into an inclusive category of this kind could give visibility and voice to this group of workers as a whole. Such an approach cannot be desirable in the long run, however, if it further solidifies their differential treatment as compared to traditional employees – as the labour constitutions of temps, contractors and false employment have already done.

The second conceivable type of intervention would be to redesign the foundational categories on which the social ordering of work rests. In particular, rather than drawing a line between different members of society, labour law's distributive function could instead cut horizontally through every individual's working day or adult life. This is not a new approach to the problem of labour law's scope and liminal employment. In fact, one of the first sustained discussions of atypical work in the context of British labour law, which I quoted at the outset of this study, presciently concluded that 'any strategy' for improving the legal position of atypical workers 'would have to be set in the context of new thinking on the relationship between work, home, leisure and retirement'.[71] Existing proposals that point in this direction are models for a flexible distribution of working time, education, care and leisure over the life

[71] Leighton (1986), p. 524.

course,[72] and the idea of 'rotational employment' as 'an equal sharing of necessary time and of free time among all members of the population'.[73] The conceptual grounding of such proposals lie in the related distinctions between work and leisure, between essential and non-essential work, and between necessity and freedom.[74] Pre-empting the emergence of a grey area that eludes the foundational categories, as in the case of the employment/self-employment distinction, each of these conceptual couples contains a clear open-ended, heterogenous alternative. Leisure, non-essential work and free activity may all be constructed as including all *other* activities.

Drawing the boundaries of work along these lines might in time reveal itself to be a transformative innovation. It could imply a reordering of the econo-socio-legal interplay in the field of work by which considerations of economic profit and legal validity would be absent from the time and space that lies beyond necessary or essential work. Rather than treat the social meaning of employment and self-employment as consistent and enduring, such an approach would thus fold the inherent openness of social reality into the foundational distinction itself.

[72] Jurczyk and Mückenberger (2020).
[73] Becker (1977), p. 267.
[74] See Postone (1978); Postone (1993), pp. 373-384.

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