

Nonwaivability in Labour Law

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Abstract

Nonwaivability is considered a basic principle of labour law. In most cases, it is needed to protect employees against coerced waivers. But what if an employee genuinely wants to waive some labour right, for example in return for a higher salary? This article explains why nonwaivability is generally justified even against the wishes of employees, for reasons of paternalism, harm to others, and second-order justifications. At the same time, in some cases there is room for intermediate solutions, that can be used to better respect the autonomy of employees, and achieve additional benefits, without undermining the goals of labour laws. The article employs this analysis to examine two concrete questions, as examples: waiving of ‘employee’ status and the individual opt-out from maximum weekly hours. In the latter context, while I critique the current law, I argue that some form of conditional waiver could be acceptable.

1. Introduction

Nonwaivability is an important characteristic of labour law. Subject to some rare exceptions, employees’ rights as set in legislation are nonwaivable (sometimes also called mandatory, nondisclaimable, non-derogable, ‘floor of rights’ or *jus cogens*).¹ This is considered a basic principle of labour law.² Why do we impose employment rights on the parties, even when a specific employee supposedly does not want them? For labour law scholars this may seem obvious, which might explain

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¹ See, eg Simon Deakin & Gillian S Morris, *Labour Law: Sixth Edition* (Hart 2012) 4.11.

² Sergio Gamonal C & César F Rosado Marzán, *Principled Labor Law: U.S. Labor Law Through a Latin American Method* (OUP 2019) Ch 4.

the lack of theorizing in this area. Notwithstanding the importance of ‘freedom of contract’ as a principle and an ideal, labour lawyers understand that in the context of employment it is often more of a verbal symbol than a social fact.³ Accordingly, in most cases we assume that if an employee agrees to waive labour rights, this is not a free choice but a decision imposed by an employer enjoying superior bargaining power (or taking advantage of employees’ inherent vulnerabilities, or systematic market failures).⁴

But this is not always the case. It is plausible that *some* employees genuinely want to waive *some* labour rights, for reasons that will be explained below. Why should we prevent such a free choice? The goal of this article is to explore the different reasons for nonwaivability. This can be important for strengthening the justification for the nonwaivable nature of labour laws, while at the same time examining exceptions that have been carved (or could be carved) to this rule. An added bonus of this discussion is understanding the relevance of paternalism to labour law theory; as I will argue below, paternalism is one of the key justifications for nonwaivability, and therefore plays a role (one which is under-explored) in labour law theory.

The practical implications are most obvious, in the UK context, when considering the maximum weekly hours rule. The Working Time Regulations allow an individual opt-out from this rule,⁵ making this crucial labour right outright waivable. Although the opt-out option has been criticized in the literature,⁶ it has not been examined at length at the normative level. The current research can be used to explain the difficulty with such a waiver, and at the same time to examine some options in-between a complete opt-out and strict nonwaivability. There are also contexts in which the possibility

³ Paul Davies and Mark Freedland, *Kahn-Freund’s Labour and the Law* (Stevens & Sons 1983) 25. See also Hugh Collins, ‘Market Power, Bureaucratic Power, and the Contract of Employment’ (1986) 15 ILJ 1; Mark Freedland and Nicola Kountouris, ‘Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe’ (2008) 37 ILJ 49, 57; Simon Deakin and Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (OUP 2005) 37 (explaining that contract and status are intertwined in employment relationships).

⁴ See Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016) Ch 3 for a discussion of these three concepts.
⁵ Working Time Regulations 1998, reg 5, allowing agreements to exclude the maximum of 48 hours per week set in reg 4.

⁶ See, eg, Catherine Barnard, Simon Deakin & Richard Hobbs, ‘Opting Out of the 48-Hour Week: Employer Necessity or Individual Choice? An Empirical Study of the Operation of Article 18(1)(b) of the Working Time Directive in the UK’ (2003) 32 ILJ 223.

to waive a right is not explicit in legislation, but was created in interpretation. Two such examples that have been discussed in the case law concern waivers of the right to join a union in return for higher compensation;⁷ and inclusion of payment for holiday as part of the hourly rate of pay, known as ‘rolled-up holiday pay’, which could effectively mean that employees waive their right to *actual* paid holiday.⁸ In both of these contexts, the nonwaivability principle was arguably under-appreciated by UK courts, but in the end protected by European courts which precluded such waivers.⁹

While the possibility to opt-out from legislated employment rights is relatively rare, such exceptions are becoming more common. Since 2013, UK employees who agree to become ‘employee shareholders’, and receive shares of the employing company with a value of £2000 or more, waive as a result several employment rights, most notably the right not to be unfairly dismissed.¹⁰ In other legal systems as well, recent laws and judgments seem to challenge the nonwaivability principle. In the US, the Supreme court has validated arbitration agreements that prevent employees from taking their labour law claims to court – thus also preventing the possibility of class-action suits – in effect allowing a waiver of access to justice and making it extremely difficult to enforce labour rights.¹¹ In Hungary, a new law dubbed ‘slave law’ by opponents significantly raised the maximum number of overtime hours allowed, subject to individual agreement (thus, in practice, allowing waivers of

⁷ *Associated Newspapers Ltd v Wilson* [1995] 2 AC 454.

⁸ *Clarke v Frank Staddon Ltd* [2004] ICR 1502.

⁹ *Wilson v United Kingdom* [2002] ECHR 552 and *Robinson-Steele v RD Retail Services Ltd* [2006] IRLR 386, respectively. On the latter issue of ‘rolled-up holiday pay’, the Employment Appeal Tribunal later interpreted the judgement of the European Court of Justice narrowly, allowing this practice when it meets criteria of transparency and clarity (*Lyddon v Englefield Brickwork Ltd* [2008] IRLR 198). For further discussion see Deakin & Morris (n 1) 4.84; Alan L Bogg, ‘The Right to Paid Annual Leave in the Court of Justice: The Eclipse of Functionalism’ (2006) 31 *European L Rev* 892.

¹⁰ Employment Rights Act 1996, s 205A (inserted by the Growth and Infrastructure Act 2013). Additional rights that are waived in such circumstances are the right to request flexible work arrangements; the right to request to undertake study or training; the right to redundancy payments; and some rights related to parental leave are reduced. Importantly, an agreement to create this status (by which the employee waives some rights) is valid only if the employee received ‘advice from a relevant independent adviser as to the terms and effect of the proposed agreement’ at least seven days before concluding the agreement (s 205A(6)), and the company has to pay for this adviser (s 205A(7)). This scheme was strongly criticised; see Jeremias Prassl, ‘Employee Shareholder ‘Status’: Dismantling the Contract of Employment’ (2013) 42 *ILJ* 307, and see Mark Freedland and Nicola Kountouris, ‘The Legal Construction of Personal Work Relations as a Continuing Pursuit’ (2013), 7 *Jerusalem Rev Legal Stud* 145, 155.

¹¹ *Epic Systems Corp. v Lewis*, 584 US ___ (2018). For recent reviews of this and other relevant cases and critiques, see Gamonal & Rosado Marzán (n 2); Samuel R Bagenstos, ‘Consent, Coercion, and Employment Law’, <https://ssrn.com/abstract=3431330>.

maximum hour rules, to some extent).¹² Similarly, in Brazil, recent reforms allow some employees (those with a college degree and over some threshold of salary) to waive rights concerning overtime as well as rest periods.¹³ More generally, the new Brazilian labour law gives effect to an ‘annual labour release agreement’ by which an employee releases the employer from the possibility of future claims regarding payments made in the past year. Although such a release has to be signed before the worker’s union, local experts see it as easily allowing waiver and potentially unconstitutional.¹⁴ In Israel, the Supreme Court has ruled that the national working time law does not apply to migrant domestic workers, because it does not fit their ‘live-in’ arrangement, thereby stripping them of various nonwaivable rights (even though Israeli legislation does not exclude domestic workers from its scope).¹⁵ Also in Israel, the National Labour Court has allowed employers who misclassified employees as independent contractors to retroactively re-calculate the payments owed to them.¹⁶ Such employers were forced to make payments for labour rights, after it was decided that a plaintiff was in fact an employee; but at the same time, the Court allowed the deduction of extra payments made on the assumption that the plaintiff was an independent contractor. In effect, this has eliminated any disincentive for misclassification, as long as the employer is willing to pay a bit more, i.e. to ‘buy off’ the status-related rights of the employee.¹⁷ All of these current attacks on the nonwaivability principle can be examined – and critiqued – in light of the theoretical analysis concerning the justifications for this principle, offered below.

The article is structured as follows. Part 2 explains why in some cases, a nonwaivability principle appears to infringe the right to autonomy. It then explores several meanings of autonomy, based on the philosophical literature, and asks to what extent they are affected when an employee is denied the

¹² Gábor Kertész, ‘Slavery Act: Modification of the Hungarian Labour Code – Legal Analysis’ (2019) 7 *Management Studies* 338.

¹³ João Renda Leal Fernandes, ‘Labor Law, CLT and the 2017 Brazilian Labor Reform’ (2018) 5 *Panorama of Brazilian Law* 210, 223-4.

¹⁴ *Ibid.* 231-4.

¹⁵ *Yolanda Gluten v. National Labour Court*, judgment of Mar. 18, 2013.

¹⁶ *Anat Amir v. The Israeli News Company*, judgment of Jan. 21, 2015; *Michael Gutman v. Shikun Ubinuy*, judgment of Sep. 5, 2017.

¹⁷ The law on this issue is not yet settled, there are also contradictory decisions of the same Court (by other judges). See especially *Rafi Roffe v. Mirkam Insurance Agency*, judgment of Dec. 22, 2011.

freedom to waive (or sell) some labour right. Part 3 considers possible justifications for paternalistic intervention that are applicable to the labour law context; that is, reasons to intervene to protect the employee when she *mistakenly* believes that the deal is beneficial to her. Part 4 moves to discuss some additional (non-paternalistic) justifications for ignoring the choice of the employee in such cases: preventing harm to others, in particular unfair competition for other employees. This part as well as the previous one conclude with a supporting ‘second-order’ argument for nonwaivability. Part 5 points to the possibility of conditional waivers, as an intermediate solution, that could be appropriate when the justifications are weaker. Parts 6 and 7 give a glimpse into the usefulness of this analysis by applying it in two contexts, respectively: first, waivers of ‘employee’ status, and secondly, opt-outs from maximum hours regulations. The same framework can be applied in the future in other contexts as well. Part 8 concludes.

2. The Possible Harm to Autonomy

Absent intimidation from the employer, we assume that most employees will want their employment rights. If this assumption is correct, then by insisting on nonwaivability we impose employment standards only on the employer, not on the employee; we simply intervene, as a society, to ensure minimum standards – to protect the employee by forcing the employer to adhere to some standards of behaviour. This view is supported by the fact that the different labour laws, while having their own various goals/justifications, are generally assumed to be in line with what workers want. For example, a law prohibiting unfair dismissals is designed to ensure procedural justice (due process),¹⁸ to protect the dignity of employees,¹⁹ and to provide security in the face of economic dependency and against the submission to subordination.²⁰ Legislatures reasonably assume that most workers want and need this protection, and to make it effective, it must be nonwaivable. Otherwise, the weakest employees – those who need this protection the most – would be easy prey for employers demanding that they

¹⁸ On the importance of procedural justice for employees see Katherine VW Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge UP 2004).

¹⁹ Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon 1992) ch 1.

²⁰ Davidov (n 4) Ch 5.

waive this right. In such cases, nonwaivability does not lead to any harm to autonomy; on the contrary, it *protects* the autonomy of the employee to freely make choices in the face of coercion attempts.²¹

Although in most cases waivers are probably a result of coercion, and are therefore easy to justify, we have to assume that there are also at least *some* employees who would freely choose to waive at least *some* labour rights, if allowed. Perhaps this opens more job opportunities for them (because they agree to work for less than the minimum wage, for example).²² Perhaps they prioritize short-term interests over long-term ones (for example by preferring a higher salary now over employer contributions to a pension fund). Maybe their unique personal circumstances do not fit the paradigmatic employee that the legislation was built for (say, a workaholic with no family, no friends and no hobbies, who prefers to forgo vacation rights and work more to maximize her chances for promotion, or to get some extra cash). And maybe they are simply making bad, irrational decisions. What is the justification for ignoring employees' wishes in such cases? This is the focus of the current article. Note that this is not the same question as whether labour law, as an exception to the 'free market' and regular laws of contract, is at all justified. Rather, taking the existence and justification of labour law as a starting point, the question raised here is whether we should insist on it being nonwaivable, even for employees who *genuinely* prefer otherwise.

How do we know if a choice is truly free? Otherwise put, how can we be sure that the employee consented voluntarily to the waiver? Conceptualising and identifying 'free will' is a problem that philosophers and contract theorists have been grappling with for centuries.²³ For current purposes it

²¹ Kahn-Freund (n 3) 24.

²² This is the standard argument of economic analysis critiquing the minimum wage (eg George J Stigler, 'The Economics of Minimum Wage Legislation' (1946) 36 Am Econ Rev 358). Although it is highly contested at both the theoretical and the empirical levels, it is surely a possibility in individual cases. For critiques of the general argument see, eg, Simon Deakin and Frank Wilkinson, 'The Law and Economics of the Minimum Wage' (1992) 19 J of Law and Society 379; David Card and Alan B Krueger, *Myth and Measurement: The New Economics of the Minimum Wage* (Princeton UP 1995); Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer 2000) 3; Alan Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets* (Princeton UP 2003).

²³ For an entry point into the philosophical literature, see Timothy O'Connor and Christopher Franklin, 'Free Will', *The Stanford Encyclopedia of Philosophy* (Edward N Zalta ed, Summer 2019 Edition), <https://plato.stanford.edu/archives/sum2019/entries/freewill/>. For the contract implications see, eg, Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (6th ed, Clarendon 2006) Ch 11; Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard UP 1993) Ch 4. For recent critiques of the assumption of voluntariness, see, eg, Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton UP

is not necessary to address the *general* question. At this stage, we can simply assume that in some cases the choice is free (without identifying *which* cases), and continue to examine whether such a choice should be legally valid – which is the focus of the current contribution. Later on, I will discuss several concrete aspects of the ‘free will’ question. In Part 3, as part of the discussion of paternalistic justifications for nonwaivability, the question is raised whether a decision is truly voluntary in the sense of being based on full information etc. Then in Part 5, when discussing the possibility of conditional waivers, I will propose some legal methods to assure that the choice is sufficiently voluntary/free. It is important to realize that free choice is not dichotomous; consent ‘is not binary: there are degrees of consent, both across and within individuals and transactions.’²⁴ Moreover, the inquiry combines some subjective elements (understanding the state of mind of the employee making the choice) with objective elements (societal views about what kind of circumstances allow for a free choice).²⁵ Otherwise put, it is not merely a question of fact, but a question of law as well.²⁶ As a result, the level of consent required in relations of unequal bargaining power can be different than what we see as sufficient between two corporations; and the threshold expected when the weaker party is asked to waive legislated rights is likely to be higher compared to a ‘regular’ market transaction. This is why the current article does not have to come up with a general test for free choice; rather, my focus (in part 5) will be on proposing ways to assure a degree of consent that is sufficient for the specific purpose of waiving a labour right (if and when such waivers could at all be allowed).

The difficulty of ascertaining whether a choice is truly free can explain why labour law theorists have mostly avoided dealing with the justifications for nonwaivability. The law is based on generalizations and reasonable assumptions. If we cannot know whether a choice is truly free in a specific case, but we have good reason to believe that in most cases it is not – it makes sense to create

2013) Ch 4-6; Aditi Bagchi, ‘Voluntary Obligation and Contract’ 20 *Theoretical Inquiries in Law* 433 (2019); Bagenstos (n 11).

²⁴ Peter A Alces, ‘The Death of Consent?’ in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (OUP 2015) 30, 57. See also Hila Keren, ‘Consenting Under Stress’ (2013) 64 *Hastings LJ* 679, 722.

²⁵ See generally Randy E Barnett, ‘A Consent Theory of Contract’ (1986) 86 *Columbia L Rev* 269.

²⁶ See HG Beale (ed), *Chitty On Contracts – Vol I: General Principles* (32nd ed, Sweet & Maxwell 2015) 8-006 (referring to duress, a doctrine further discussed in part 5 below).

a legal rule based on the common occurrence. This can be seen as a ‘second order’ justification for nonwaivability. But difficulties of distinguishing between free and unfree choice can be overcome, at least to some extent, as noted above. In any case, practical difficulties do not negate the apparent infringement of autonomy, in those cases (that surely exist) where a free choice to waive labour rights was frustrated. It is therefore necessary to move beyond the assumption of unfree choice – even if it is true in most cases – and ask whether imposing labour law protections on employees against their will can be justified (and when). The current part begins this inquiry by asking what makes autonomy an important value and what aspects of it are harmed in the current case.

There are three main views in the philosophical literature concerning the right to personal autonomy. According to Joel Feinberg’s influential account, autonomy is akin to sovereignty, or self-rule (which is the literal translation of the original Greek term).²⁷ Others refer to this idea as self-determination, or self-direction, or self-ownership.²⁸ Some treat freedom (or liberty) as separate from autonomy,²⁹ or one possible meaning of autonomy,³⁰ but this distinction is not important for current purposes. On this view (or group of views), autonomy includes freedom of choice, which is considered to be ‘an important good in human life’.³¹ Feinberg only considers choices that are *truly* voluntary as worthy of protection, shifting a lot of the burden to the definition of voluntariness.³² In any case, the main point is that people should have a right to govern themselves, and that includes the freedom to make their own decisions/choices.³³ It has been argued that the ability to choose between several options is intrinsically good, because of the ideal of agency: being able ‘to make a causal impact on the world’.³⁴ The ability to choose ‘is critical to the growth of our diverse

²⁷ Joel Feinberg, *The Moral Limits of the Criminal Law (Vol 3): Harm to Self* (OUP 1986) Ch 18-19.

²⁸ See Steven Wall, ‘Self-Ownership and Paternalism’ (2009) 17 *Journal of Political Philosophy* 399.

²⁹ See, eg, Feinberg (n 27) 62-8; Richard J. Arneson, ‘Mill versus Paternalism’ (1980) 90 *Ethics* 470; John Christman, ‘Autonomy in Moral and Political Philosophy’, *The Stanford Encyclopedia of Philosophy* (2018) at 1.1.

³⁰ Alan Fuchs, ‘Autonomy, Slavery, and Mill’s Critique of Paternalism’ (2001) 4 *Ethical Theory and Moral Practice* 231, 246.

³¹ Feinberg (n 27) 65.

³² *Ibid.* Ch 20.

³³ There is an obvious connection between these concepts and Kant’s idea of autonomy, although it is less straightforward than it might seem; see on this point Feinberg (n 27) 94-7; Paul Guyer, ‘Kant on the Theory and Practice of Autonomy’ (2003) 20 *Social Philosophy and Policy* 70; Thomas E Hill, Jr., ‘The Kantian Conception of Autonomy’ in John Christman (ed), *The Inner Citadel: Essays in Individual Autonomy* (OUP 1989) 91. Note that Kant was not concerned with defining the elements of a *right* to autonomy.

³⁴ Thomas Hurka, ‘Why Value Autonomy?’ (1987) 13 *Social Theory and Practice* 361, 366.

intellectual, emotional, and volitional capacities'.³⁵ As Gerald Dworkin puts it, '[t]he autonomous person gives meaning to his life'.³⁶

Other accounts of autonomy put more emphasis on the ability to pursue one's long-term goals, or preferences, or act according to one's ideals.³⁷ On this view, specific choices related to *means* are less important – the crucial value that should be protected is the ability to 'write your own life story according to your deep commitments'.³⁸ This has been described as non-alienation (between a person and her goals/values/commitments)³⁹ or a *preference*-based account of the right to autonomy (as opposed to choice-based).⁴⁰ Applying the distinction is not always easy. For example, riding a motorcycle without wearing a helmet does not seem to be a 'goal' of anyone, but rather a choice about means that conflicts with a deeper goal of continued living. At the same time, by making helmets mandatory, in effect we are telling drivers that risking their lives for the joy of helmet-free riding is not worth it – and some of them could argue that this interferes with their values/preferences.⁴¹ In any case, notwithstanding the difficulty of making sharp distinctions, it is clear that this view allows much more room for intervention into people's specific decisions, to invalidate 'choices that do not reflect underlying preferences'.⁴²

The third and final view characterizes the problem of the interference with one's decisions as being insulting (or demeaning or judgmental or disrespectful).⁴³ This may be significant in some

³⁵ David L Shapiro, 'Courts, Legislatures, and Paternalism' (1988) 74 Virginia L Rev 519, 546.

³⁶ Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge UP 1988) 31. Moreover: "Our notion of who we are, of self-identity, of being *this* person is linked to our capacity to find and re-fine ourselves" (at 32). Although, as he notes later in the same book, having more choice is not always better (at Ch 5).

³⁷ Fuchs (n 30) 244.

³⁸ David Enoch, 'Hypothetical Consent and the Value(s) of Autonomy' (2017) 128 Ethics 6, 31. On the means/ends distinction in this context see Sarah Conly, *Against Autonomy: Justifying Coercive Paternalism* (Cambridge UP, 2013); Julian Le Grand and Bill New, *Government Paternalism: Nanny State or Helpful Friend?* (Princeton UP 2015) Ch 5.

³⁹ Gerald Dworkin, 'The Concept of Autonomy', in Christman (n 33) 54, 61; Enoch (n 38).

⁴⁰ Danny Scoccia, 'The Right to Autonomy and the Justification of Hard Paternalism, in Christian Coons & Michael Weber (eds), *Paternalism: Theory and Practice* (Cambridge UP 2013) 74, 78 ff.

⁴¹ Christian Coons and Michael Weber, 'Introduction: Paternalism – Issues and Trends', in Coons & Weber, *ibid*, 1, 9-10; Jessica Begon, 'Paternalism' (2016) 76 Analysis Reviews 355, 358.

⁴² Trebilcock (n 23) 151.

⁴³ Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation' (2000) 29 Philosophy & Public Affairs 205, 218; Jonathan Quong, *Liberalism Without Perfection* (OUP 2010) 80; Nicolas Cornell, 'A Third Theory of Paternalism' (2015) 113 Mich L Rev 1295. For critiques and discussion see Chris Mills, 'The Problem of Paternal Motives' (2013) 25 Utilitas 446; Begon (n 41). An early expression of this view is found in the American Lochner-era cases; see Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Tort

types of cases, but often there is little reason to get insulted⁴⁴ – especially so if the interference is done in general legislation and not on a personal basis.

Ultimately, there is no need, in my view, to choose between the different approaches. They all represent useful understandings of autonomy, and explain why it should be protected. All three views can be taken into consideration. Situations that can be seen as infringements of only one of these kinds of autonomy, are less objectionable because of that; but the infringement must still be taken into account. A right to autonomy, like other rights, is not absolute, but has to be balanced against other rights and interests.⁴⁵ Such balancing requires us to consider the severity of the infringement, which will depend, among other things, on the aspects of autonomy involved. Alternatively, if you believe that the different approaches are mutually exclusive – and probably the philosophers who have developed the different approaches see them this way – then adopting the first approach means that the infringement of autonomy is much more severe in the current context, requiring a stronger justification, while the other two approaches would require a very minimal justification (if at all).

3. Paternalistic Justifications

Assume that a worker is freely making a decision that diminishes her own welfare, or well-being – which is quite possible when waiving labour rights. Imagine also, for the sake of simplicity, that the decision does not affect others (an issue I will discuss separately in the next part). An intervention overruling this decision would improve the welfare of this individual, but infringe her autonomy. Could it be justified?

Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41 Maryland L Rev 563, 633.

⁴⁴ Peter De Marneffe, 'Avoiding Paternalism' (2006) 34 Philosophy & Public Affairs 68, 76 ff; Cornell (n 43).

⁴⁵ See, eg Dan W. Brock, 'Paternalism and Autonomy' (1988) 98 Ethics 550, 551; Eyal Zamir, 'The Efficiency of Paternalism' (1998) 84 Virginia L Rev 229; Russ Shafer-Landau, 'Liberalism and Paternalism' (2005) 11 Legal Theory 169, 187; Danny Scoccia, 'In Defense of Hard Paternalism' (2008) 27 Law and Philosophy 351; Conly (n 38); Le Grand and New (n 38) Ch 8. On such balancing in German law, see Bijan Fateh-Moghadam and Thomas Gutmann, 'Governing [through] Autonomy: The Moral and Legal Limits of "Soft Paternalism"' (2014) 17 Ethical Theory and Moral Practice 383, 385. As Brock, *ibid* at 561-2 rightly notes, those who argue that autonomy should trump – objecting to balancing – always add exceptions to this rule, making their approach in practice very similar to balancing.

John Stuart Mill famously argued that ‘the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’⁴⁶ This has been the standard, and highly influential, anti-paternalism view. But even Mill himself recognized some exceptions. Today, although the term paternalism retains a negative connotation for many people, more exceptions are arguably necessary – whether we see them as cases of justified paternalism or exclude them from the definition of paternalism. There are four main reasons for paternalistic intervention, which I discuss briefly in turn.

First, it has been argued that legal regulation can be justified to protect the freedom (or autonomy) of a person who is agreeing to limit his own freedom. In such cases intervention is needed to protect ‘his capacity to make autonomous choices’.⁴⁷ Mill made this point with regard to slavery,⁴⁸ but the same logic can be extended to less extreme cases.⁴⁹ Relatedly, it has been argued by Simon Deakin that the law should ‘protect private autonomy in the sense of the capacity (or ‘capability’) of individuals to participate in market-based exchange,’ even though ‘this is not the same thing as the right to conduct an exchange free of legal regulation’.⁵⁰ On this view, labour law can be seen as enhancing ‘the capacity of an individual agent to realise a range of desired goals through participation in the labour market,’⁵¹ and by waiving labour rights, one is arguably agreeing to diminish her own capabilities, and therefore her own freedom.

Indeed, there is a strong connection between the first justification and the wealth of recent scholarship on the idea of labour law that puts the emphasis on the concept of *freedom*. It has been argued that a main goal of labour law is to enhance the freedom of workers – whether freedom as

⁴⁶ John Stuart Mill, *Principles of Political Economy* (first published 1848, Longmans Green 1920) 13.

⁴⁷ Quong (n 43) 98.

⁴⁸ John Stuart Mill, *On Liberty* (first published 1859, Batoche Books 2001) 94.

⁴⁹ See Donald H. Regan, ‘Justifications for Paternalism’, in JR Pennock and JW Chapman (eds), *Nomos XV: The Limits of Law* (Lieber-Atherton 1974) 189, 193, for a discussion of whether cigarette smoking should also be seen as limiting one’s freedom – by shortening his/her life.

⁵⁰ Simon Deakin, ‘Contracts and Capabilities: An Evolutionary Perspective on the Autonomy-Paternalism Debate’ (2010) 3 *Erasmus L Rev* 141, 142.

⁵¹ *Ibid* 151.

non-domination⁵² or freedom as having a threshold level of capabilities.⁵³ These theories put aside *formal* freedom and focus instead on *substantive* freedom, which labour rights can enhance. The focus is usually on building the capacity that allows one to make choices and on opening possibilities. In most cases, these goals do not conflict with what the employee actually wants. When there is conflict, one can argue that enhancing the substantive freedom of employees is justified even if they fail to understand its importance and prefer to limit this freedom. Substantive freedom, on this view, trumps autonomy in the sense of freedom of choice. Arguably, the idea of self-rule, or self-government, is advanced when we have more capabilities (or less domination), even if freedom of choice is frustrated. Admittedly this is controversial.⁵⁴ But if most people would likely agree, that we should not respect the choice of a person to become another's slave, the question is merely one of degree: where do we put the line in terms of giving people the freedom to diminish their own capabilities and submitting themselves to domination by others? Perhaps, for example, a deal in which a worker agrees to submit herself to the possibility of arbitrary or discriminatory dismissals, in legal systems that prohibit such dismissals, justifies paternalistic intervention.

⁵² Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912, 925; Samuel R. Bagenstos, 'Employment Law and Social Equality' (2013) 112 Mich L Rev 225; Alan Bogg & Cynthia Estlund, 'Freedom of Association and the Right to Contest: Getting Back to Basics', in Alan Bogg & Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 141; Brishen Rogers, 'Employment Rights in the Platform Economy: Getting Back to Basics' (2016) 10 Harv L. & Pol'y Rev 479; David Cabrelli & Rebecca Zahn, 'Theories of Domination and Labour Law: An Alternative Conception for Intervention?' (2017) 33 Int J Comp Labour L & Ind Rel 399; Alan Bogg, 'Republican Non-Domination and Labour Law: New Normativity or Trojan Horse' (2017) 33 Int J Comp Labour L & Ind Rel 391. For my own analysis of this view see Guy Davidov, 'Subordination vs Domination: Exploring the Differences' (2017) 33 Int J Comp Labour L & Ind Rel 365.

⁵³ Deakin and Wilkinson (n 3) 290-303; Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29 Comp Lab Law & Pol'y J 29; Brian Langille, 'Labour Law's Theory of Justice', in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 190; Kevin Kolben, 'Labour Regulation, Capabilities, and Democracy', in Colin Fenwick & Shelley Marshall (eds), *Labour Law and Development* (Edward Elgar 2016) 60; Ricardo Del Punta, 'Labour Law and the Capability Approach' (2017) 32 Int J Comp Labour L & Ind Rel 383. For my own analysis of this view see Guy Davidov, 'The Capability Approach and Labour Law: Identifying the Areas of Fit', in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 42.

⁵⁴ The leading theorist of non-domination, Philip Pettit, has even stated that paternalism is 'an exemplar of domination' (Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge UP 2012) 59). On the complex relations between the capability approach and paternalism, see Deakin (n 50); Ian Carter, 'Is the Capability Approach Paternalist?' (2014) 30 Economics and Philosophy 75; Riccardo Del Punta, 'Is the Capability Theory an Adequate Normative Theory for Labour Law?', in Brian Langille (ed), *The Capability Approach to Labour Law* (OUP 2019) 82, 99-102. I have noted myself in previous writings that the capability approach is anti-paternalistic (Davidov (n 53) 53), without getting into the details of this potential exception.

It is possible to extend the same logic even further, by allowing infringements of one's autonomy not only to protect her own autonomy, but also to protect her human dignity. One of the goals of labour law is to protect dignity.⁵⁵ It is considered invaluable not only because people want it; we deserve to be treated with dignity by virtue of being humans. Arguably, we should prohibit voluntary slavery not only to protect one's freedom, but also – perhaps even more – to protect her dignity. Similarly, at least for some labour laws, nonwaivability can be justified because a waiver would lead to an infringement of the right to human dignity, which is not less important than the right to autonomy that is infringed by the nonwaivability rule.

Second, paternalistic intervention could be justified if a choice is based on incomplete information. Some see it as not truly voluntary, and call such intervention 'soft' paternalism.⁵⁶ Mill gave the example of stopping a person who is about to cross a broken bridge and there is no time to warn her.⁵⁷ Labour rights do not have this element of urgency, so it could be argued that the solution for information problems is to correct the failure by providing the necessary information (either directly by the State or by requiring employers to do so).⁵⁸ In some cases, this can be sufficient, but when the information needed is vast and complex, it would be unrealistic to expect a fully informed decision.⁵⁹ Consider, for example, a decision to waive 'employee' status: it is highly unlikely that a worker will be able to obtain the full information needed to understand all the implications of such a deal. Or a decision to waive pension rights, which to be fully informed requires information about complex financial institutions and alternatives as well as actuarial calculations. It is fair to assume that with the complexities of a modern society, and the over-load of information due to new technologies, there are increasingly more cases in which people lack the necessary information to make an informed decision and it is sometimes not possible to convey this information to them.

⁵⁵ See Davidov (n 4) 59-62 and references therein.

⁵⁶ Joel Feinberg, 'Legal Paternalism' (1971) 1 *Canadian J of Philosophy* 105, 111.

⁵⁷ Mill (n 48) 88.

⁵⁸ Cass R Sunstein, 'Human Behavior and the Law of Work' (2001) 87 *Virginia L Rev* 205, for example, generally prefers this solution over a nonwaivable rule.

⁵⁹ See Eyal Zamir and Ian Ayres, 'Mandatory Rules', <https://ssrn.com/abstract=3420179> at 14 ('there is growing recognition – including by some lawyer-economists – that disclosure rules are often ineffective... To avoid *information overload*... people adaptively ignore most of the information available to them').

Third, research in psychology/ behavioural economics conducted over the last decades exposed that people are not entirely rational; there are various cognitive limitations/biases leading to suboptimal decisions. It may be too harsh to say that ‘people are idiots’,⁶⁰ but we certainly all suffer from bounded rationality. Among the main known failures, we suffer from being overly optimistic (under-estimating future risks); from myopia (giving too much weight to the present and too little to the future); from over-confidence (in our ability to foresee and/or understand things, including misperception regarding social norms and beliefs that what is fair is also legally binding); from lack of self-control (difficulty in following our own decisions, for example regarding savings); and from the availability heuristic (causing us to rely on information that is easily available in memory, for example due to memorable events, while ignoring ‘boring’ but more important information).⁶¹ Based on this body of evidence, it is fairly easy to justify ‘soft’ regulations that change the default or otherwise ‘nudge’ people towards the rational decision.⁶² Although supporters of this ‘choice architecture’ – most notably Cass Sunstein and Richard Thaler – often stop short of proposing mandatory, nonwaivable rules,⁶³ the same arguments can sometimes be used to support this further step as well.⁶⁴ Sunstein himself made this point in an early contribution.⁶⁵ In the context of unfair dismissals, for example, there is evidence to suggest that even after being exposed to information about the state of the law, American workers failed to understand it and continued to believe that they are protected against arbitrary dismissals.⁶⁶ Further empirical evidence shows that changing the default is not enough, because most workers will waive a default right.⁶⁷

⁶⁰ Kennedy (n 43) 633.

⁶¹ For a review of this literature, see, eg Zamir (n 45); Jeffrey J. Rachlinski, ‘The Uncertain Psychological Case for Paternalism’ (2002) 97 *Nw U L Rev* 1165; Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale UP 2008) Ch 1; Eyal Zamir and Doron Teichman, *Behavioral Law and Economics* (OUP 2018) Ch 2. For applications to labour law see eg Sunstein (n 58).

⁶² Cass R Sunstein and Richard H Thaler, ‘Libertarian Paternalism is not an Oxymoron’ (2003) 70 *U Chicago L Rev* 1159; Thaler and Sunstein (n 61).

⁶³ Retaining the ability to choose is an important part of what they term ‘libertarian’ paternalism (*ibid.*).

⁶⁴ See Zamir and Teichman (n 61) 318-320.

⁶⁵ Sunstein (n 58) 240ff, where he supports at least some level of nonwaivable labour rights, alongside rights that can be sold. And see Zamir and Ayres (n 59): ‘nudges... tend to be ineffective with regard to market transactions whenever suppliers are able and motivated to contract around defaults, and to counteract other nudges’ (at 16).

⁶⁶ Pauline T Kim, ‘Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World’ (1997) 83 *Cornell L Rev* 105.

⁶⁷ Houtt Verkerke, ‘An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate’ (1995) *Wisconsin L Rev* 837, 867.

A related argument is that the nature of the employment contract – a relational, long-term contract which requires a degree of trust and confidence – leads the employee to ignore or downplay the possibility that the employer is acting *against* the expectation of trust and confidence. This can be seen as a form of bounded rationality, or alternatively as resulting from ‘the social processes of contracting’.⁶⁸

Fourth, it has been argued that people have second-order preferences (about their own preferences), and as a result they may approve of paternalism, i.e. agree to bind themselves.⁶⁹ Given the reality of bounded rationality mentioned above, it certainly makes sense for people to accept some degree of State intervention that protects their own interests. This is also known as hypothetical consent⁷⁰ or ‘regret theory’ (suggesting that in retrospect people will regret the original decision and approve of the intervention).⁷¹ Relatedly, preferences are often adaptive – shaped by social and legal norms – and can sometimes even be seen as based on false consciousness.⁷² This is yet another (albeit controversial) reason to overrule a choice that appears to diminish the chooser’s own well-being.

Alongside these four justifications for paternalistic intervention, we should add a supporting ‘second order’ justification. For all of these justifications to become relevant, we assumed that the waiver was freely agreed upon, and that the deal is not beneficial to the worker – that there is a need to intervene in order to protect the worker from her own mistakes. But what if we do not know whether the deal was truly a voluntary choice, and whether it is beneficial to the worker or not? Arguably, in cases of doubt we should adopt a presumption that labour laws are needed and wanted, and waiving them is detrimental to the worker – at least unless proven otherwise. This relies on the reasonable assumption that most workers want and need these laws. Otherwise put, in case of doubt, to be on the safe side, there is further reason to be paternalistic.

⁶⁸ John C Coffee Jr, ‘The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role’ (1989) 89 *Columbia L Rev* 1618, 1677.

⁶⁹ Zamir (n 45).

⁷⁰ Dworkin (n 36) 124; Horacio Spector, ‘Philosophical Foundations of Labour law’ (2006) 33 *Florida State U L Rev* 1119, 1140; Scoccia (n 45) 358-9.

⁷¹ Shapiro (n 35) 549; Anthony T Kronman, ‘Paternalism and the Law of Contracts’ (1983) 92 *Yale LJ* 763, 780 ff. For a useful discussion of this point see also Trebilcock (n 23) 154-8.

⁷² Kennedy (n 43) 572; Shapiro (n 35) 548-9.

4. Harm to Others

Paternalism is concerned with preventing ‘harm to self’, but there are also possible justifications for nonwaivability due to ‘harm to others’. We can divide such ‘others’ into three groups. The *first*, closest to the worker, are his/her family members, who may suffer from a decision to work more hours than the maximum set by law, or a decision not to save for pension, etc. Obviously, there could be different opinions about whether a choice to make more money but spend less time with one’s family members is detrimental to them or not. There are good reasons to allow the worker a large degree of autonomy to make such personal choices. But let us assume that in a given situation the case is clear that family members are harmed. One likely option, in such cases, is that the worker was wrong to believe that he and his family are better off. In such cases, the analysis of paternalism in the previous part applies. What if the worker understood that the family will be harmed, and still decided to waive his labour rights? Should we intervene to protect the family? This would be quite difficult to justify. The worker is an independent individual, not a means to an end of supporting his family members. We cannot force him to spend more time with his family if he does not want to. We can force him to have a pension plan if he acts irrationally and wants to waive rights to such a plan, i.e. for paternalistic reasons, but if it is a rational decision in terms of his own interests, the interests of family members are probably too indirect to provide a separate justification for nonwaivability of labour rights.

The *second* group that could be affected are other employees, who work (or are considering to work) for the same employer, and possibly also for other employers in the sector. If one individual agrees to work for less than the minimum wage, or work more hours than the maximum set by law, for example, this has a direct impact on other employees – on the expectations of employers in the labour market. In principle, others do not have to follow suit; they can refuse to waive their rights. It

has been noted above, as a starting point for the discussion, that only free choices can be considered valid (if we decide to allow waivers at all). But in practice this is very difficult to enforce. And the fact that workers will face strong pressure to waive rights, even if they are somehow able to sustain this pressure, is itself detrimental to their well-being.⁷³

The pressure that is created on peers to waive rights can be described as a ‘race to the bottom’, creating unfair competition (unfair in the sense that it brings the standard down below the level that society deems acceptable). It can also be seen as a collective action problem: people sometimes have incentives to make individual choices (to accept less than the minimum wage, or avoid paying union fees, etc.) that are detrimental to everyone else and also, in the long run, to themselves, leading to suboptimal results.⁷⁴ This can be prevented by legal intervention, if we deem the interests of the collective more important than the autonomy of any single individual.⁷⁵

The *third* circle of ‘others’ is society at large. There are two kinds of individual waiver decisions that could affect all of us. There are decisions that put the health or economic security of the worker in peril, meaning a possible burden on taxpayers, who might have to pay for such irrational, short-sighted decisions through social security or health/welfare system contributions. In such cases, paternalistic justifications also apply, and the impact on taxpayers offers yet another support for nonwaivability. Secondly, individual waiver decisions could be detrimental to a social goal. For example, equality in employment is not only an individual right, it is also a value of importance to society at large. If a worker agrees to waive her rights to equality, and potentially suffer discrimination, this harms the societal goal of eradicating discrimination.⁷⁶ More generally, if we as

⁷³ A related issue which received much attention in the U.S. in recent years is whether employees should be free to choose not to pay agency fees to a union chosen by a majority of their peers, even when they enjoy the benefits secured by this union. Such ‘free-riding’ is detrimental to other employees and their ability to unionize effectively, but it was recently allowed by the U.S. Supreme Court with regard to public sector employees; see *Janus v. AFSCME*, 585 U.S. ____ (2018).

⁷⁴ Mill (n 46) 934.

⁷⁵ On the idea of ‘collective justice’ in this context, see Hani Ofek-Ghendler, ‘Fundamental Rights, Protective Laws and Good Faith: Constitutional Reflections on Labour Law’ (2007) 37 *Mishpatim* 63, 80 [Hebrew].

⁷⁶ Bagenstos (n 52) 242.

a society are interested in changing norms through labour rights, individual waivers will undermine this goal.⁷⁷

Here as well, there is also one additional, ‘second order’ justification, which can support the other justifications when the factual conditions they rely upon are hard to prove. For the ‘unfair competition’ justification to become relevant, we have to show that the individual waiver will have an impact on the market. Whether this is true in a given case or not is often difficult to know and difficult to prove. In case of doubt – of uncertainty about the facts – should we favour autonomy or the minimal level of protection secured by labour laws? We should favour the latter if it is important for us to prevent many cases of unwarranted waivers of basic labour rights. The cost – preventing also some acceptable waivers at a price to autonomy and efficiency – is arguably not as high, because such cases can be expected to be much less common, and because the harm to autonomy is usually not severe. But the conclusion could be different in concrete contexts that involve a significant infringement of autonomy.

5. Conditional Waivers

At this point, readers will hopefully be convinced that there are strong justifications for nonwaivability in labour law. At the same time, the analysis suggests that not all labour laws are the same, and context matters. Depending on the harm to autonomy and the strength of the justifications in a particular context, there should be room for intermediate solutions in some cases.⁷⁸ Proposals along these lines have been put forward by Cass Sunstein, who proposed a floor of nonwaivable rights alongside some additional labour rights that can be ‘sold’ by an employee to the employer,⁷⁹ and by Cynthia Estlund, who proposed the use of ‘conditional waivability’ to regulate some terms of

⁷⁷ Sunstein (n 58) 263.

⁷⁸ For a useful methodology to balance between the conflicting considerations (welfare and autonomy), see Eyal Zamir and Barak Medina, *Law, Economics, and Morality* (2010) Ch 10. As they summarize: ‘It is... important to set a threshold that has to be met for the paternalistic intervention to be deontologically permissible... and to resolve what types of costs and benefits should be deemed relevant in calculating the net benefit of the intervention... Finally, even if a certain paternalistic measure, standing on its own, is permissible, it may be judged impermissible if one can implement alternative measures with a less adverse effect on people’s autonomy and freedom’ (at 339).

⁷⁹ Sunstein (n 58).

employment.⁸⁰ Such intermediate solutions are already used in some (relatively rare) contexts in labour law,⁸¹ and are more common in the regulation of other contracts.⁸² The conditions for waivers could focus on ensuring that the choice is truly free, that it is fully informed and rational, and that the harm to others is minimal – depending on the specific context. These conditions for acceptable waivers can be procedural or substantive (or both).

What level of free choice should we require for waivers, assuming that we are willing to accept them in specific circumstances? Imagine the following two scenarios: (a) an employer is asking an employee, who earns 50% more than the minimum wage, to accept a 10% wage cut or face dismissals; (b) an employer is asking an employee to waive some legislated labour right (say, vacation rights) or face dismissals. In the first scenario, although the employee may not have much choice (depending on her other employment alternatives), a consent will likely be seen as valid. In contrast, the second scenario should be treated differently, because the employee is asked to give away a right conferred by the law. Waivers of *rights* under the threat of dismissals are clearly coerced and should not be allowed. But what about less extreme/less obvious cases? The fact that a worker is under economic pressure to work should not, in itself, be construed as preventing freedom of choice. We are not seeking an impossible standard of freedom from all external pressures/constraints, but rather freedom from employer coercion. Otherwise put, the general subordination of labour to capital⁸³ – also dubbed

⁸⁰ Cynthia L Estlund, ‘Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law’ (2006) 155 U Penn L Rev 379.

⁸¹ See, eg, the regulations concerning maximum weekly hours, which alongside the possibility of individual waivers – which I discuss separately below – allow some derogations in collective agreements (Working Time Regulations 1998, reg 23), and the legislation concerning employee shareholders, which allows waiver after advice from an independent adviser (n 10). The latter condition was inserted due to opposition in the House of Lords for the idea of allowing ‘basic employment rights to become a commodity to be traded’ (Lord Pannick, ‘Respect for Law and Sausages’: How Parliament Made Section 31 of the Growth and Infrastructure Act 2013 on the Sale of Employment Rights’ (2014) 85(1) Political Quarterly 43, 44). It was believed by the Lords who objected to this new scheme that the added condition would help to mitigate the damage, and prevent many employers from using it (ibid 47).

⁸² Zamir and Ayres (n 59), reviewing mandatory rules in the U.S., conclude that ‘many mandatory rules actually contain built-in leeway that makes it possible to contract around them, subject to various substantive or procedural requirements... default rules are often quasi-mandatory, and mandatory rules are sometimes quasi-default’ (at 34–5).

⁸³ Karl Marx, *Capital: Vol I* (Penguin 1976, first published 1867) 1019–38. See also Michael Burawoy, *Manufacturing Consent: Changes in Labor Process under Monopoly Capitalism* (U Chicago Press 1979) 81 (‘The very activity of playing a game generates consent with respect to its rules’); GA Cohen, ‘The Structure of Proletarian Unfreedom’ (1983) 12 Philosophy & Public Affairs 3.

‘structural dependency’⁸⁴ – as well as the concrete subordination of a specific employee to a specific employer,⁸⁵ are important in the background, but do not *necessarily* prevent free choice in any specific instance.⁸⁶

We can take some inspiration from the contract law doctrine of economic duress; according to this doctrine, a contract is voidable when caused by illegitimate pressure,⁸⁷ and among the factors courts consider are whether the party had any practical (or reasonable) alternatives, and whether the terms of the contract are disadvantageous to the weaker side.⁸⁸ As a result, when a party succumbs to a threat and agrees to give away some right for nothing in return, courts invalidate this agreement if the threat is seen as illegitimate. Although courts only rarely conclude that a demand is a threat, that it is illegitimate, and that the duress has *caused* the contract,⁸⁹ this should be more easily possible in the context of employment; the inherent power imbalance makes any demand to forgo a right especially problematic and suspicious of being illegitimate.⁹⁰ The related (and somewhat overlapping) equitable doctrine of undue influence can provide further inspiration; it prevents abuse of power in contractual relations based on trust and confidence.⁹¹ Although for purposes of this doctrine, courts do not consider an employment relationship as one automatically creating a *presumption* that a contract favourable to the employer is invalid,⁹² the existence of trust and

⁸⁴ Guy Davidov, ‘Subordination vs Domination: Exploring the Differences’ (2017) 33 Int J Comp Labour L & Ind Rel 365.

⁸⁵ See Kahn-Fruend (n 3) Ch 1; Davidov (n 4) Ch 3; Hugh Collins, ‘Is the Contract of Employment Illiberal?’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (OUP 2018) 48.

⁸⁶ For a somewhat similar argument see Horacio Spector, ‘Philosophical Foundations of Labor Law’ (2006) 33 Florida State U L Rev 1119, 1125-8.

⁸⁷ For a review and discussion of the relevant cases, see Chitty (n 26) Ch 8; Jack Beatson, Andrew Burrows and John Cartwright, *Anson’s Law of Contracts* (30th ed, OUP 2016) Ch 10; Edwin Peel, *Treitel on The Law of Contract* (14th ed, 2015) Ch 10. For a critical review see Séverine Saintier, ‘Defects of Consent in English Law: Protecting the Bargain?’, in Larry DiMatteo and Martin Hogg (eds), *Comparative Contract Law: British and American Perspectives* (OUP 2015) 120.

⁸⁸ Chitty (n 26) 8-032; Treitel (n 87) 10-008; Saintier (n 87) 128.

⁸⁹ See the sources in note 87 above. For a recent example, which appears to narrow the potential of the doctrine by concluding that threats to do something lawful can only be illegitimate if done in bad faith, see *Times Travel (UK) Limited v Pakistan International Airlines Corporation* [2019] EWCA Civ 838. For a critique see Jodi Gardner, ‘Does Lawful Act Duress Still Exist?’ (2019) 78 Cambridge LJ 496.

⁹⁰ On the need to consider power imbalances when assessing consent, see, eg, Keren (n 24); Orit Gan, ‘Contractual Duress and Relations of Power’ (2013) 36 Harv J of Law & Gender 171.

⁹¹ *Royal Bank of Scotland v Etridge (AP)* [2001] UKHL 44, [2001] 4 All ER 449.

⁹² Treitel (n 87) 10-023

confidence (in sufficient degree for this doctrine) can be proved in particular cases.⁹³ The doctrines of duress, undue influence and also unconscionable bargain are clearly related, and there have been several attempts to explain the unifying theme behind them. Lord Denning suggested that the single thread is the accumulation of three parameters: the terms of the contract are ‘very unfair’; bargaining power is ‘grievously impaired’; and the existence of ‘undue influences or pressures’.⁹⁴ A recent contribution proposes a unified principle that prohibits ‘exploitation of constrained decisional autonomy’.⁹⁵ The proposed test, based to a large extent on the existing doctrines, would ask whether a party was ‘seriously constrained from exercising its autonomy to decide whether to consent’ as a result of pressure (or other factors), and this was exploited by the other party; these elements can be established by a legal presumption in relations ‘where typically a party’s autonomy would be constrained and vulnerable to exploitation by the other party’.⁹⁶

In light of the forgoing discussion, and given the reality of unequal bargaining power – or more specifically, structural dependency and subordination⁹⁷ – it seems advisable to create a presumption that any waiver of labour rights was *imposed* on the worker. The burden to show otherwise – to prove free choice – should rest on the employer. Moreover, to meet this burden, the employer should not be allowed to rely on the wording of the contract, assuming that the contract was drafted by the employer or its lawyers. There has to be other evidence. The law can also add procedural conditions of expert advice, a union approval, an approval from a governmental agency, or any combination of those. Substantively, to prove that a waiver was freely chosen, we can require an employer to show, at the

⁹³ See *Credit Lyonnais Bank Nederland NV v Burch* [1996] EWCA Civ 1292, [1997] 1 All ER 144 (invalidating a contract by which an employee mortgaged her home at the request of her employer to help his business). The case-law separates between ‘actual’ (with direct proof) and ‘presumed’ undue influence, and the presumed cases are further separated into relations that are by definition presumed to create this risk – because of the high degree of trust, confidence or dependency – and relations in which one can prove a similar situation justifying the presumption. See the sources in note 87 above.

⁹⁴ *Lloyds Bank Ltd v Bundy* [1974] EWCA Civ 8, [1975] QB 326, 339. The House of Lords later rejected this view (*National Westminster Bank Plc v Morgan* [1985] UKHL 2, [1985] 1 AC 686), though not because it considered it normatively unattractive, but rather because it was ruled not to be an accurate statement of the law (pointing out that it is ‘essentially a legislative task’ to provide relief against inequality of bargaining power).

⁹⁵ Marcus Moore, ‘Why Does Lord Denning’s Lead Balloon Intrigue Us Still? The Prospects of Finding a Unifying Principle for Duress, Undue Influence and Unconscionability’ (2018) 134 LQR 257. The article also includes a helpful review of previous proposals for a unifying principle.

⁹⁶ *Ibid.* 273-4.

⁹⁷ See notes 83-85 above.

very least, that the worker received compensation which on its face, at least potentially, could be as valuable for her as the right that was waived.⁹⁸ And perhaps most importantly, we can place some substantive boundaries for accepted waivers, i.e. create a certain minimum that *cannot* be waived.

There are several advantages to opening up such room for intermediate solutions. In recent years there is increased interest in crafting nuanced regulatory solutions instead of an ‘all or nothing’ approach. Many legal systems are still based on a sharp division between ‘employees’ and independent contractors, with the former getting *all* labour rights and the latter none at all. But with the proliferation of new work arrangements, and the move towards more individual (as opposed to collective) labour relations, this ‘one size fits all’ system is increasingly being replaced by more nuanced, tailored solutions.⁹⁹ Elsewhere I described this as a new balance between universalism and selectivity.¹⁰⁰ It includes, for example, the creation of intermediate categories between employees and independent contractors.¹⁰¹ Part of this new balance can be making some labour laws waivable.¹⁰²

⁹⁸ This is easy to apply if the worker is waiving a right with a known monetary value in exchange for cash; no worker will freely choose to waive a right to £1000 in exchange for £900. There is room for potentially beneficial deals when the value of a right is not easily quantifiable or not known in advance, and when it has a different value for each of the parties. For example, what is the value of an ‘unfair dismissal’ protection? According to a recent study conducted in Israel, the value put by employees on relatively strong job security (in the public sector) was equal to 20% of their salary (Eitan Hourie, Miki Malul and Raphael Bar-El, ‘The Value of Job Security: Does Having It Matter?’ (2018) 139 *Social Indicators Research* 1131). This may be so on average, but it could be more or less for specific employees, depending on their personal circumstances and the ease in which they expect to find alternative employment; and it also has a very different cost to the employer. These discrepancies open possibilities for a deal that *potentially* could be beneficial to both parties.

⁹⁹ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011); Einat Albin, ‘From Domestic Servant to Domestic Worker’ in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 231; Guy Davidov, ‘Special Protection for Cleaners: A Case of Justified Selectivity?’ (2015) 36 *Comp Labor L & Pol’y J* 217; Guy Davidov, Mark Freedland & Nicola Kountouris, ‘The Subjects of Labor law: “Employees” and Other Workers’ in Matthew Finkin & Guy Mundlak (eds), *Research Handbook in Comparative Labor Law* (Edward Elgar 2015) 115. For a discussion of recent developments along these lines in Italy and in Germany, see Maurizio Del Conte and Elena Gramano, ‘Looking to the Other Side of the Bench: The New Legal Status of Independent Contractors Under the Italian Legal System’ (2018) 39 *Comp Lab L & Pol’y J* 579; Bernd Wass, ‘The New Legal Status of Independent Contractors: Some Comments from a German Perspective’ (2018) 39 *Comp Lab L & Pol’y J* 627; Simon Deakin, ‘Assessing the Italian Jobs Act: A Comment on Del Conte and Gramano’ (2018) 39 *Comp Lab L & Pol’y J* 607.

¹⁰⁰ Guy Davidov, ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *OJLS* 543.

¹⁰¹ In the UK, the ‘worker’ category. And see the proposal to rename it ‘dependent contractor’ and further develop it in *Good Work: The Taylor Review of Modern Working Practices* (July 2017), <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>.

¹⁰² For an example along these lines see Bogg (n 9), who discusses ‘rolled-up holiday pay’ and suggests a functionalist, flexible approach, as opposed to a flat ban on this practice. This is proposed as a way to prevent the problematic instances of this practice while at the same time allowing those instances in which the practice is advantageous to both parties.

Some would see this as an unjustified weakening of labour law, but they might consider such ideas favourably if they come alongside *broadening* the reach of labour law, i.e. including more workers within its scope but with more lenient rules (that allow a degree of choice to waive certain rights). This option has not yet been explored at length by labour law scholars.¹⁰³ New research in contract law which stresses the need to offer different types of contracts and a choice between them provides further support for this approach.¹⁰⁴

Moreover, and relatedly, a system that allows conditional waivers can be used, alongside other methods, to encourage unionisation, and especially, to encourage employers to recognize unions and willingly cooperate with them. Despite drastic reductions in union density,¹⁰⁵ workers and labour law scholars alike continue to believe in the importance of unions.¹⁰⁶ One way to promote the revival of unions is by giving them the power to negotiate workplace-specific solutions that depart from the universal legislated standards.¹⁰⁷ This will create an incentive for employers to work with them. Many legal systems already allow derogations from specific labour laws if agreed in collective agreements.¹⁰⁸ Unlike individual waivers, which are the main focus of this article, it is assumed that employees represented by a union have sufficient bargaining power to prevent coercion. A union can

¹⁰³ For a preliminary discussion of variations in the degree of nonwaivability, see Freedland and Kountouris (n 99) 92-4, 362.

¹⁰⁴ Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge UP 2017). For new ideas to replace the ‘one size fits all’ approach in contract law, see also Omri Ben-Shahar and Ariel Porat, ‘Personalizing Mandatory Rules in Contract Law’ (2019) 86 U Chicago L Rev 255 (proposing to use the abundance of data about consumers accumulated in the digital era to tailor the right level of protection for each one).

¹⁰⁵ Although there have been small gains in the last two years, the current union density in the UK (23.4%) represents a sharp decline over the long term. See Department for Business, Energy and Industrial Strategy, *Trade Union Membership: Statistical Bulletin* (30 May 2019), <https://www.gov.uk/government/statistics/trade-union-statistics-2018>. This is a global trend; see OECD Trade Union Statistics, <https://stats.oecd.org/Index.aspx?DataSetCode=TUD>.

¹⁰⁶ On what workers want, see Cameron Tait, *Future Unions: Towards a Membership Renaissance in the Private Sector* (Fabian Society, Nov 2017), https://fabians.org.uk/wp-content/uploads/2017/11/Fabian-Society_Future-Unions-report-1.pdf. For recent scholarly support of unions, see eg, Katie Bales, Alan Bogg and Tonia Novitz, ‘Voice’ and ‘Choice’ in Modern Working Practices: Problems with the Taylor Review’ (2018) 47 *Industrial Law Journal* 46, 70.

¹⁰⁷ For concrete proposals along these lines, see eg Guy Mundlak, ‘Information-Forcing and Cooperation-Inducing Rules: Rethinking the Building Blocks of Labor Law’, in Gerrit De Geest, Jacques Siegers and Roger J Van den Bergh (eds), *Law and Economics and the Labour Market* (Edward Elgar 1999) 55; Tammy Katsabian, ‘Employees’ Privacy in the Internet Age: Towards a New Procedural Approach’ (2019) 40 *Berkeley Journal of Employment and Labor Law* 203.

¹⁰⁸ See, eg the Working Time Regulation 1998, reg 23. For a recent discussion of such derogations in the US and Germany, see Matthew W Finkin, ‘Union Dispossession of Labor Protection: A Paradox, in Two Legal Systems’ forthcoming *International Journal of Comparative Labour Law and Industrial Relations*. For further discussion with examples from Norway, see Stein Evju, ‘Imperative Law, Derogation and Collective Agreements’, in Horst Konzen et al (eds), *Festschrift für Rolf Birk* (Mohr Siebeck 2008) 61.

also offer a partial solution to some of the problems with waivers that have been discussed above (such as irrational choices or harm to other employees). To be sure, union derogations raise other challenges, such as waivers that some employees do not want, and the risk of derogations with questionable benefits. Solutions should be crafted with great care. The point here is simply that some form of conditional waivers could arguably be part of the solution for the decline in union power, which is a timely concern.

6. Applications (1): Waiver of ‘Employee’ Status

In the previous parts my goal was to put forward a comprehensive list of possible justifications for nonwaivability of labour laws, and also some parameters for conditional waivers. I now turn to apply this framework in two specific contexts, as examples for the usefulness and further potential of this kind of analysis. The current part is dedicated to waiver of employee status, while the following part will deal with the more concrete context of working time. The choice of these specific examples is meant to allow discussion of one extreme case (in which I will argue that nonwaivability is completely unjustified), alongside a less extreme case (in which some intermediate solution could be considered). Also, it allows an analysis of one context in which waivers are currently not legally allowed, alongside an analysis of a piece of existing legislation that allows waivers.

Assume that a worker waives the status of ‘employee’ with all the labour rights that follow from this status. Imagine that the employer offered a prospective employee 50% more in compensation if she agrees to work as an independent contractor. The offer is not to change the characteristics of the relationship, which will still be based on personal service and on control/subordination and economic dependency. Based on the regular tests, this is an employee. But the employee says she rather get the extra 50% in cash and decides to accept the offer. Should we allow it?

If this scenario does not seem realistic, let me add two clarifications. The offer could be (and perhaps is more likely to be) much smaller, say an extra 5% or 10%, but I prefer to take a more difficult example, to show that even such generous compensation would not change the result. As to

whether such offers exist in practice, it is quite possible that they will become common in the UK following the recent set of judgments which arguably shut the easy no-cost route to evade employer responsibilities. Since *Autoclenz*,¹⁰⁹ a purposive approach was adopted, making it very difficult to evade ‘employee’ or ‘worker’ status simply by drafting the contract in a certain way.¹¹⁰ In Israel, a similar approach by the courts against evasion by contractual stipulations has led some employers to try the different route considered here. Based on the view that it is often beneficial for them to pay higher compensation, even significantly, in order not to be subjected to the multitude of employment laws and liabilities, it has become common for employers to pay more and include a provision that this ‘extra’ pay will be reimbursed if a court rules that the worker is an employee. Israeli courts are still grappling with the question of whether to give effect to such provisions, but so far have allowed them to some extent.¹¹¹

The discussion in the previous parts regarding the justifications for nonwaivability can help us address this issue. I will assume that the choice to waive employee status was made by the employee freely (even though, obviously, this will not always be the case). To what degree is there an infringement of autonomy if we prohibit such a waiver? There is no interference with the freedom of the parties to choose how to structure the relationship in real life. The interference is only with regard to the legal implications of this choice: the law sets the connection between creating a structure of employment and being subject to labour laws. In this respect, a prohibition on waiver does not interfere with the goals/values of the worker, only with means. There is also nothing insulting about it. We do not prevent you from becoming an independent contractor, if that is your wish. We only prevent you from being an employee and calling it an independent contractor. Therefore, while there is clearly interference with the employee’s freedom of choice, there is no infringement of autonomy according to the other two understandings of this concept.

¹⁰⁹ *Autoclenz Ltd v Belcher* [2011] UKSC 41. For a useful discussion of this case see Alan Bogg, ‘Sham Self-Employment in the Supreme Court’ (2012) 41 ILJ 328.

¹¹⁰ Two recent important cases show how this new approach makes a difference in practice – see *Pimlico Plumbers Ltd v Smith* [2018] UKSC 29; *Uber BV v Aslam* [2018] EWCA Civ 2748.

¹¹¹ See notes 16-17 above.

Now we can turn to examine paternalistic justifications for interference. Signing a waiver requires that you know and understand what you are giving up. It is extremely complicated to understand all the implications of ‘employee’ status and assess their value. It seems highly unlikely that the worker has the full information about all the rights that depend on employee status. Even if she does, we can expect cognitive limitations to lead to irrationality. For example, under-estimating the importance of long-term rights (such as pension); over-confidence (‘I will not be dismissed and therefore would not need unfair dismissal protections’); giving too much weight to the present (the current payment of extra cash) and too little to the future (when non-monetary rights might be needed); and mistakenly believing that the employer will still be bound by fairness norms to the same extent. This is not a case in which consultation with an adviser could suffice to ensure full information and rationality.¹¹² Given the complexity of understanding the full implications of such a waiver – which is much more extreme than waiving one specific right – we can also expect many people to regret a waiver decision later on. In such circumstances there is good reason to assume ‘hypothetical consent’.

The ‘harm to others’ arguments similarly support a prohibition on waiving employee status. Employers will be tempted by the flexibility offered by such deals, and are likely to pressure other employees to follow suit. Moreover, because *all* labour rights are waived with the status, the employer will be given freedom to discriminate at will, including (for example) dismissals of pregnant women, and refuse to accommodate other needs – thus frustrating important societal goals and attempts to change norms.

Finally, ‘second order’ justifications suggest that there is inherent uncertainty about key questions: was the deal a result of free choice? Is it detrimental to the well-being of the employee (to make the paternalistic justifications relevant)? Will it have an impact on the labour market (pressure on other employees)? These are questions of fact that are not easily ascertained. We therefore need

¹¹² This form of conditional waiver, which was adopted in the context of employee shareholders (see n 10 above), is problematic first and foremost for creating an illusion of free choice even in cases of coercion. But even putting aside this objection, the ability of such consultation to ensure a rational and fully informed decision is highly questionable when the implications of a waiver are so complex and long-term.

to balance between the risk of over-reaching (and gratuitously infringing the employee's autonomy) and the risk of not interfering enough (and frustrating the various goals of labour law). Given the previous conclusions about the relatively modest harm to autonomy in this scenario, it seems that the risk of over-reaching is less dramatic. Overall, there are strong reasons to support a prohibition on waivers of status, even if employees decide to 'sell' their status for a generous price.

7. Applications (2): Maximum Hours Laws

Consider now the example of maximum hours laws. In most countries they are nonwaivable, although derogations are usually allowed in collective agreements.¹¹³ This is already a compromise of sorts, a form of 'conditional waiver' (only by a union and not waiving the entire law but rather lowering the standard).¹¹⁴ In addition, some groups of workers (such as managers, workers who control their own schedule, or domestic workers) are usually exempted from working time limitations altogether.¹¹⁵ In the UK, on top of these exemptions, there is also an option of *individual* opt-out from the weekly hours limitation.¹¹⁶ It is hardly surprising that this last option has been widely used, making the working time limitations in the UK virtually meaningless.¹¹⁷

We have every reason to believe that numerous UK employees who decided to waive their right to a 48-hour weekly maximum did so involuntarily, without compensation. If we think that a maximum hours law is needed – and legislatures around the world think so, for reasons of health, safety, work-life balance and preventing abuse of power by employers – then there is little point in having it if employers can secure an opt-out so easily.¹¹⁸ Although in principle there is a 'right not to

¹¹³ See, eg the EC Working Time Directive, Article 18. In the UK, a collective agreement cannot change the maximum weekly hours, but can make other derogations; see Working Time Regulation 1998, reg 23.

¹¹⁴ This has also been called a 'semi-mandatory' rule; see Mundlak (n 107).

¹¹⁵ In the UK and in the US exemptions are especially broad. See, respectively, the Working Time Regulations 1998, Part III, and the Fair Labor Standards Act, s 213.

¹¹⁶ Working Time Regulations 1998, reg 5.

¹¹⁷ Barnard, Deakin & Hobbs (n 6). More recently, it has been rightly suggested that 'it is likely that the use of the opt-out will have increased over recent years, given the fears workers harbour about their job security' (David Cabrelli, *Employment Law in Context: Text and Materials* (3rd ed, OUP 2018) 288).

¹¹⁸ Over the years there have been many attempts to change the Working Time Directive (Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time) in a way that prevents individual opt-out, but without success. See Deakin & Morris (n 1) 4.91; Cabrelli (n 117) 289.

be subjected to any detriment’ for refusing to sign a waiver,¹¹⁹ in practice the reality of unequal bargaining power, and the significant costs involved in enforcing this right, make it rather meaningless in most cases.

What about those employees who *did* get reasonable compensation for an agreement to work more hours than the maximum set by law? If we assume that they chose this deal freely,¹²⁰ we can turn to examine whether the other justifications for nonwaivability apply. In terms of the information that is needed to make this waiver, the implications of less time for family and leisure are easily apparent, but the health implications are perhaps less obvious. This is also where bounded rationality can become relevant: people might under-estimate the health risk (even if the information is conveyed to them), especially if the risk is long-term and uncertain. Moreover, there is a saying, ‘nobody on his deathbed ever said: I wish I had spent more time at the office’.¹²¹ It was once used in Swedish public advertisements (referring to ‘spending more time with my boss’) encouraging fathers to take more parental leave. It is indeed easy to imagine that people who work excessive hours might come to regret later in life the missing opportunity to spend time with family or on other interests. This suggests that the ‘hypothetical consent’ argument can also apply here – although, admittedly, it is controversial and should be used carefully. With regard to ‘harm to others’, there is the general risk of creating pressure on other employees to reach similar waiver deals; and also, a maximum hours law allows a better work-family balance which contributes to gender equality, a societal goal that waivers frustrate.

This quick analysis suggests that individual unconditional waivers of working time limits cannot be justified. Moreover, broad exemptions from working time laws seem highly problematic. However, the paternalistic reasons for intervention are not very strong in this case, justifying an intermediate solution. Also, the infringement of autonomy is far from trivial. Working excessive hours will have its toll, but some will see it as a justified sacrifice in favour of other goals. People

¹¹⁹ Employment Rights Act 1996, s 45A(1)(c).

¹²⁰ The importance of ensuring that waivers are made freely in this particular context was stressed by the European Court of Justice in *Pfeiffer v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* (2005) C-397/01-403/01.

¹²¹ The quote is attributed to US Senator Paul Tsongas (see https://en.wikiquote.org/wiki/Paul_Tsongas).

have their own idiosyncratic preferences, and we should strive to make it possible for them to pursue those preferences. A possible solution is to create a nonwaivable strict standard (say, in the UK context, 50 weekly hours) alongside a more demanding standard (say, 45 weekly hours) that can be waived under certain conditions, including monetary compensation (with a minimum set by law in proportion to the hourly wage of the employee). If we want to minimize the risks of coerced waivers, and also to prevent employers from restructuring the salary to avoid paying more – which is possible for those employees who earn more than the minimum wage – we can add a requirement for union approval. This can have the added positive effect of encouraging employers to recognize unions and cooperate with them. Additional conditions could be a maximum period of time for the waiver (to ensure that it is not permanent), and an alternative compensating rest period.¹²² With an intermediate solution that is not strictly nonwaivable, it is also possible – and more realistic – to include within the scope of the law some of the workers that are currently exempted and excluded altogether.

This analysis can also be used to examine working time issues in new work arrangements, including in particular ‘gig economy’, ‘work on demand’ and ‘online platform work’.¹²³ Such arrangements have made it more common to work for multiple employers, and also for workers to have a relatively high degree of choice (compared to ‘traditional’ employees) over some important aspects of the relationship, such as when and how much to work. If one works for three different employers, 20 hours per week for each, neither of them is violating working time laws if (as is common in the gig economy) they do not know about each other.¹²⁴ The reality of overwork is considered in such cases as self-imposed by the employee. But given the new ubiquity of such arrangements – especially through online platforms – we should ask whether this ‘free choice’ should be respected; perhaps it would be justified to impose labour laws (with working time limits) and adapt

¹²² The latter is required by the EC Working Time Directive, Article 18.

¹²³ There is an explosion of research on these topics. See, eg Jeremias Prassl, *Humans as a Service* (OUP 2018); International Labour Office, *Digital Labour Platforms and the Future of Work* (Geneva 2018).

¹²⁴ The Working time Regulations 1998 require employers to ‘take all reasonable steps... to ensure that the limit [of 48 weekly hours] is complied with’ (reg 4(2)). This may mean inquiring about additional jobs. But this is not specific enough to make the right meaningful for workers in the gig economy.

them to such cases as well.¹²⁵ Although the employee (let us assume that she is an employee and not an independent contractor) did not strictly speaking waive any rights, the analysis offered in this article still applies. As a matter of practice, the employee is working an extreme number of hours, supposedly on her own agreement or even her own initiative – which is very similar to an agreement to waive labour rights. The goals of the working time law are frustrated. Because of the various justifications for nonwaivability, it seems pertinent to apply the protections of the law (at least as a default position) on such cases as well – and amendments should be introduced to support it. Perhaps an app can be used to record the hours of work for each employer, allowing (and explicitly requiring) each of the employers to know when the maximum hours have been reached.¹²⁶ And if we have indications that the worker really wants to work so many hours, an intermediate solution can be acceptable, as discussed above.

8. Conclusions

We have seen that there are several justifications for the nonwaivability of labour laws. First, the realistic possibility that waivers are not agreed upon freely. Second, paternalistic reasons for intervening when a worker makes a decision that diminishes her own welfare. This group of justifications includes an agreement by the worker to limit her own freedom; a decision based on incomplete information; a decision that suffers from bounded rationality/cognitive biases; and a waiver that the worker will later regret and perhaps realizes this possibility. Third, even if the waiver is actually beneficial to the individual worker, we might have good reasons to prevent it because of harm to others. That includes the pressure created on other employees to waive their rights as well, and the impediment to societal goals such as advancing equality. Finally, second-order justifications based on the inherent uncertainty of key factual questions – such as whether there was coercion,

¹²⁵ This problem was recently raised by Arianne Renan Barzilay, ‘Hours of Work and Rest Law in the Age of Decentralized Work’ forthcoming *Labour, Society and Law* [Hebrew].

¹²⁶ For a proposal to use such technology for counting working hours in the internet age, see Tammy Katsabian, ‘It’s the End of Working Time as We Know It – New Challenges to the Concept of Working Time in the Digital reality’ (unpublished draft).

whether the waiver is bad for the employee, etc. – provide further support, if we believe that the harm to autonomy is less severe than the risk of an unjustified exclusion from labour law. A brief overview of the literature on autonomy was provided to help make this assessment.

Why is all this important and relevant for current debates on the future of labour law? For several reasons. *First*, the article offers a justification for nonwaivability for situations in which this idea is being challenged, often implicitly, by courts allowing *de facto* waivers, especially for high-wage workers. Similarly, it helps to explain why far-reaching legislated exceptions to the nonwaivability principle – as in the case of the UK maximum hours regulations – cannot be justified. Such exceptions are becoming increasingly common in other countries as well. *Second*, I have argued that self-exploitation by workers in the gig economy is equivalent to the waiving of labour rights, and the justifications against nonwaivability should lead to expanding the scope of labour laws to cover such cases as well. *Third* and finally, the discussion of nonwaivability opens the door for various intermediate solutions, which can help to support the shift towards nuanced regulatory arrangements instead of traditional ‘all or nothing’, ‘one size fits all’ approaches. Supporters of labour law may find this dangerous, because it opens up opportunities for weakening such laws. I cannot deny this possibility. But it also opens up possibilities for *strengthening* labour laws, because tailored arrangements will minimize the number of cases in which workers are excluded from protection altogether. Moreover, especially in the current individualistic world, we have to respect the autonomy of workers and give them choices, rather than assume that the same labour standards must apply to all of them. Waiving a specific labour right in return for cash compensation could be one such choice. The analysis offered in this article could help to consider whether such choices could be opened in some contexts – subject to conditions that will minimize the risks – and where, in contrast, paternalistic and ‘harm to others’ justifications for nonwaivability should trump.