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The Role of the State towards the Grey Zone of Employment: Eyes on Canada and the United States

Le rôle de l'État face à la zone grise de l'emploi : regards sur le Canada et les États-Unis

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- 1 Recent court battles in the United States over whether Uber drivers and other “sharing economy” or “on-demand” workers are employees or independent contractors are evidence of significant change in the labor market. Such misclassification litigation is a response to profound transformations in global business models and the organization of work. Our article begins with an irrefutable fact: the standard employment relationship (SER) is declining in many countries (Stone and Arthurs, 2013). Consequently, in the developed world and in some places in the developing world, precarious working is on the rise and nonstandard forms of work are proliferating. Many of those who labor for a living, no matter how legally classified, experience an acute sense of job insecurity^{1 2}.
- 2 Law and systems of social protection have failed to keep pace with this destabilizing change in the sense that many rights, benefits, and protections continue to be tied to the SER. Many studies of the phenomena that contribute to precarious work focus on key catalysts such as globalization, technological innovation, and employers’ quest for flexibility and economic efficiency (Weil, 2014). Our interest is in legal and policy regulation, and more importantly, on the role of the state. We address two main questions. First, in what way do government efforts contribute to or, on the other hand, forestall the decline of the SER? Second, how does the state destabilize or, on the other hand, shore up labor standards and status distinctions among working people?
- 3 We frame our analysis of the state’s responsibility within the notion of the “grey zone,” a theoretical construct which means “an expression of the social relations between actors and institutions.” The grey zone is generated by transformations at and with

respect to work. We use this concept of changing social relations in and around work and put the focus on the state. Of course we do not assume that the state is the sole actor able to address the asymmetrical distribution of wealth, power, and the social consequences that result. Other forces can close these gaps or mitigate the consequences (Arthurs 2014). These forces are well described by the theory of legal pluralism, a theory that recognizes the extra-state reality of the law and the distinction between the social and the right (Coutu, 2007).

- 4 We are interested in understanding the role of the state in the creation and perception of the grey zone. To that end, our analysis endeavors to avoid two pitfalls. The first would be to fail to separate legal regulation from social regulation, namely not to distinguish between what falls into the category of law and other forms of social normativity, which partly explains why we are not referring to the theories of regulation or industrial relations. The second would be to conceptualize the state in monolithic terms. Not only do we recognize that there are multiple manifestations of the rights within the state (Arthurs 1996 and 1998, Coutu, 2007), but we reject the idea that only the state plays a role in the development of law.
- 5 More specifically, our contribution explains the way the government acts or fails to act, and the consequences of that action or inaction on the SER. Our thesis is that the state plays a paradoxical role in the growth of nonstandard work and increasing precariousness (Bisom-Rapp and Sargeant, 2016). Through action and inaction, the government often functions in contradictory ways. In doing so, the state creates contested territory, complicates its role as a promulgator and enforcer of labor standards, and generates inequalities among workers in terms of rights, benefits, and protections they are or should be entitled to. This is paradoxical because the state does indeed in some cases take steps to lessen precariousness, as when it prosecutes employee misclassification or bogus self-employment in order to recover lost wages for workers. When the government acts in this fashion, it aims to restore the SER for those wrongfully denied status. In this sense, the state is responsive to change in a proactive/protective sense; the government is acting to forestall the undermining of the SER.
- 6 In other cases, however, through action, inaction or even neglect, the government obscures the extent to which work has become more insecure and unstable, or the government withdraws from the field entirely leaving vulnerable working populations without protection. Here, the state is complicit in maintaining or even increasing vulnerability and inequality among those who work for a living. Or to put it another way, the state is complicit in the transformations we see taking place insofar as it contributes to the growth of the grey zone. These conflicting impulses – grey zone resistance coexisting with grey zone complicity – result in a fissured, disaggregated regulatory apparatus that in part mirrors the fissuring and disaggregation of employing enterprises (Bisom-Rapp, 2016).
- 7 In this article, we examine and juxtapose conditions in our countries, Canada and the United States³, and construct a matrix for understanding the actions or inactions on the part of the government. We conclude that there are seven ways in which to understand the role played by the government vis-à-vis the grey zone. As we will demonstrate, the matrix is descriptive in the sense that it explains the state's role in the changes observed in and around work in the 21st century. Yet the matrix is potentially normative in that it aims to hold the government accountable for acting and refusing to act. To the extent we wed particular outcomes – such as an increase in

precariousness – to a demand that the state owes its people conditions of decent work or the ability to be resilient in the face of vulnerability – the matrix is a normative tool. By drawing attention to government action or inaction that might otherwise go unnoticed, the matrix provides information that might be used to indict, applaud, or call for change in the state’s role in creating, maintaining, or forestalling the grey zone.

- 8 Below we elaborate on our matrix factors by grouping them into sections corresponding to three pivotal government functions: 1) describer and definer of change; 2) protector of substantive rights; and 3) insurer against social risk and inequality. Our articulation of these functions is clearly normative in that we believe they are necessary to maintain conditions in which decent work and human resiliency can flourish.

The state as the describer and definer of change		The state as the protector of substantive rights			The state as the insurer against social risk and inequality	
State can carefully define terms, keep track of trends or fail to do so.	State can create alternative forms of work to SER or fail to do so.	State can promote collective worker voice or fail to do so.	State can effectively enforce the law or fail to do so.	State can prohibit certain forms of alternative work or their limit duration or fail to do so.	State can mandate equal treatment between the SER and non-standard work or fail to do so.	State can extend social protection to alternative forms of work.

1. The state as the describer and definer of change

1.1 State can carefully define terms, keep track of trends or fail to do so

- 9 Sound regulation and policy must be based on accurate data. Hence, the first factor in the matrix highlights the state’s role as the collector, analyzer, and disseminator of labor market data. In the United States, the government obscures the extent to which work has become more insecure and unstable. Through the action and indeed refusal to act, the state has undermined the public’s ability to perceive transformations in and around work. This failure in the state’s role as monitor also hobbles the work of law- and policymakers, who, if they had proper data, might act to fortify the SER or labor standards. Obfuscation takes place in two ways.
- 10 First, the state uses contested definitions of nonstandard work, employing the terms “contingent work” and “alternative employment arrangements” in differing ways. The Bureau of Labor Statistics (BLS), an independent government agency tasked with research and fact-finding for the US Department of Labor (DOL), uses “contingent work” to define work that deviates from the SER. This work is “any job in which an individual does not have an explicit or implicit contract for long-term employment” (Polivka, 1996). Using that definition, the BLS developed three separate measures of contingent employment, each resulting in a different estimate. The last time BLS reported on the issue of contingent work was over a decade ago in 2005, and it estimated contingent workers comprise 1.8 to 4.1 percent of total US employment (US

Bureau of Labor Statistics, 2005). BLS, however, has another definition of nonstandard work called “alternative employment arrangements”. These forms of work may or may not be contingent, and cover independent contractors, on-call workers, temporary help agency workers, and workers provided by contract firms.

- 11 Adding to the complexity is the work of the US Government Accountability Office (GAO), an independent government agency responsible for supporting the Congress. GAO uses a different definition of contingent work from that of BLS. GAO’s definition covers eight categories of workers: agency temporary workers (temps), direct hire temps, on-call workers, day laborers, contract company workers, independent contractors, self-employed workers, and standard part-time workers (US Government Accountability Office, 2006). Using more recent data from a range of sources, GAO’s 2015 estimate is that contingent workers make up 40.4 percent of workers (US Government Accountability Office, 2015). Thus, according to the government, contingent workers comprise anywhere from 1.8 percent of US employment to over 40 percent of workers.
- 12 A second way transformation in the labor market is obscured and growth of the grey zone is facilitated has been the over 10 years' refusal to collect new data on contingent work. While the government does regularly and separately keep track of the numbers of part-time workers, independent contractors, and temporary workers, the BLS’s vital datasets on contingent workers are out of date. The BLS Contingent Work Supplement, a biennial survey, was halted in 2005 (Bernhardt, 2014). Beginning in 2012, President Obama requested funding every fiscal year but Congress refused to grant the request. This disinterest not only obscures the nature of nonstandard work, it has also allowed the covert deregulation of a portion of the labor market since many legal protections are tied to the SER. In January 2016, the Secretary of Labor announced that BLS will finally rerun the CWS in 2017. What this signals is unclear. No commitment beyond 2017 was made. Even if the survey is reintroduced, the lag in data collection has inflicted damage not easily reversed.
- 13 Canada initially stands in contrast in that the government has clearer definitions of nonstandard work. A typology comprised of mutually exclusive forms of employment can reveal the heterogeneity of nonstandard work (Vosko, Zukewitich, and Cranford, 2003; Vosko, 2006). The Canadian government distinguishes between five forms of nonstandard working: 1) own-account self-employment, which is a self-employment without paid employees; 2) self-employment with paid employees; 3) permanent part-time employment; 4) temporary part-time employment; and 5) temporary full-time employment. The statistics differentiate between self-employed persons who do and do not have employees. Those in the latter category may be entitled to some forms of employment insurance benefits and parental insurance. The differentiation also recognizes that those self-employed individuals without paid employees tend in general to experience a higher degree of precarious working.
- 14 The trend in Canada follows that seen in many developed countries. The nonstandard work has been increasing. Currently, almost 40 percent of the Canadian labor force is engaged in nonstandard work. Looking at Québec, nonstandard workers comprise 37.5 percent of the labor force in 2013. Despite distinct conceptual categories of atypical workers, which illustrate how difficult it is to compare from one country to another (Pires de Sou, 2014; Ulysse, 2014), the percentage of atypical workers is similar. These measures characterize distinct populations from a micro perspective, but they

illustrate aggregate populations which blur distinctions and do not capture the differences. Yet as in the US, the categorization is flawed. First, the category of temporary employment is very general, encompassing a number of different contractual relationships, some of which may be more insecure than others. These include temporary seasonal work, casual work, temporary agency work, and on-call work. Each of these relationships might call for special legal or policy treatment, but the extent to which people occupy these categories is not known.

- 15 Second, the statistics do not account for multiple job-holding (Krahn, 1995), which itself could be classified as standard or nonstandard work (Cloutier, 2014) or both. Moreover, the distinction made between standard and nonstandard work is unable to capture the deterioration of employment that resembles the SER. Nor is the full panoply of nonstandard working relationships accounted for. Cynthia Cranford and Leah Vosko also argue that statistics should be collected to “reveal the relationship between the form of employment and other dimensions of precarious employment – income level and social wage, regulatory protection, and control and contingency – with attention to...gender and race” (Cranford and Vosko, 2006). They advocate developing an additional dimension or measure of precarious employment to account for the intersection of gender, race, ethnicity, and occupation.
- 16 Unfortunately, the state does not collect and analyze such finely calibrated data. That said, it is known that in Québec nonstandard work disproportionately affects women, immigrant workers, and workers who are racial minorities. The precariousness does not strike randomly but the government is complicit in the growth of the grey zone to the extent that it fails to collect and disseminate statistics that might more fully illuminate policymakers and the public.

1.2 State can create alternative forms of work to the SER or fail to do so

- 17 Where the government takes steps to create nonstandard forms of work or lends support for such jobs through its tax or social protection policy, it may be complicit in grey zone growth. In Canada, because a lot of employment law is promulgated at the provincial level, one may see different approaches in different provinces (Blanpain, *et al.*, 2012). Although the Canadian law-making system predates the rise of many new forms of work, we associate this multiplicity of legal approaches with grey zone expansion.
- 18 Looking at law in a single province often yields examples of the government acting in paradoxical fashion. Focusing on Québec, the articulation and attempted clarification of alternative forms of work to the SER is evident when one examines *An Act Respecting Labour Standards* (the RLS), the provincial law setting forth minimum labor standards regarding the minimum wage, work week length, breaks, vacation, sick days, public holidays, absences for family reasons, notice of termination or collective dismissal, rights of workers who have been terminated, conditions under which children may work, and psychological harassment.
- 19 The RLS defines an “employee” broadly, indeed far more broadly than the definition of “employee” in Québec’s Labour Code, which covers collective bargaining and labor relations matters. Under the RLS, an employee is “a person who works for an employer and who is entitled to a wage,” and “also includes a worker who is party to a contract”

where the work evidences elements of autonomy characteristic of a dependent contractor. This latter type of work differs from that of a classic employee yet still is so closely associated with an employer that the contractor is economically dependent on that employer. If, however, the worker faces financial loss or profit under the contract, the worker is a self-employed person who is not covered by the *RLS*.

- 20 These principles, which attempt to clarify, have not and therein one finds the paradox. But the *RLS* and its interpretations do make clear that there are a number of different alternative work forms including, dependent contractors (covered by the law), and self-employed persons (not covered by the law). Other categories of workers may be subject to exceptions in the law, including construction workers and senior managerial personnel (excluded from some standards). This slicing and dicing of the workforce creates uncertainty, which enhances the grey zone and undermines the SER.
- 21 In the US, there are many forms of nonstandard work. These include part-time work, temporary work, independent contracting, leased work, and work provided to clients through professional employer organizations (Cappelli and Keller, 2013). The government generally has not created or supported the growth of these forms.
- 22 One recent exception can be found in a ruling of the US Supreme Court in a case called *Harris v. Quinn*. The case involved home care aides within the State of Illinois Home Services Program, who were compensated by Medicaid, a federal government program. The workers, however, took direction not from the state but from the individuals they cared for in those individuals' homes. Illinois law allowed the Service Employees International Union to represent the workers, known as personal assistants. The union was also allowed to collect dues from those workers who were members and "fair share fees" from those who declined to join the union. A small group of the latter objected to paying the fees and sued claiming that their constitutional right to free speech also protects their right to abstain from financially supporting collective bargaining.
- 23 The Supreme Court, in a 5-4 decision, held that unlike most public sector workers, the personal assistants could not be compelled to pay the fees. This was because, among other things, they were not working directly under the supervision of the state; instead they worked directly for the Medicaid recipients. Hence, the personal assistants were not "full-fledged public employees" but were "partial" or "quasi-public" employees and therefore not covered by a prior Court precedent permitting assessment of fees. Thus, the Court created a degraded form of public employment – one where it is more difficult for unions to organize and maintain effective collective bargaining for a vulnerable group of workers.

2. The state as the protector of substantive rights

2.1 State can promote collective worker voice or fail to do so

- 24 The government can maintain or improve labor standards for all workers by protecting their right to join together to engage in collective action. Indeed, in the US, a central aim of the National Labor Relations Act (NLRA), the first part of which was passed in 1935, was to encourage workers to band together, organize unions, and ultimately bargain with employers to improve their wages and other terms and conditions of employment. In this way, working people would increase their earning power, and boost an economy reeling from the Great Depression (Atleson, 1983). Effective

protection for collective worker voice can fortify labor standards and forestall the job insecurity that is a hallmark of the grey zone.

- 25 While there are many problems with the NLRA, one of the greatest is its incomplete coverage. The NLRA only protects those with the status “employee.” Independent contractors are excluded from coverage. Thus, a large category of nonstandard workers – freelancers and independent contractors – organize and attempt as a group to better their working conditions at their peril. They may be lawfully terminated for doing so and risk being prosecuted for price-fixing under antitrust law (Paul, 2016). Relatedly, agricultural and domestic workers, who labor in sectors traditionally occupied by racial and ethnic minorities, are also excluded from coverage. The original NLRA exclusion of agricultural and domestic workers was aimed at keeping African American workers from exercising collective power; it continues today as a “vestige of New Deal-era racism” (Perea, 2014).
- 26 Even when they hold jobs in sectors covered by the NLRA, some vulnerable employees, such as undocumented workers lacking work authorization, find their remedies if they are discriminated against severely limited. The Supreme Court has held that despite their coverage by the NLRA, undocumented workers illegally terminated for union activity may not receive back pay, a ruling that chills collective action by this vulnerable population and has ripple effects for those they work alongside (Garcia, 2012). Hence, the weaknesses of the NLRA leave many who labor without the protection they need to exercise collective worker voice.
- 27 Paradoxically, the efforts of President Obama’s National Labor Relations Board (NLRB) to extend protection to nonstandard workers have been significant. For example, in July 2016, the NLRB issued a decision making it simpler for temporary workers supplied by an agency to be included in a bargaining unit along with those who are in a SER. The Board will now allow, without employer consent, combined bargaining units of jointly and solely employed individuals if those employees share a community of interest (*Miller and Anderson, Inc. et al.*, 2016). Relatedly, in August 2015, the NLRB issued its ruling on how to determine when two firms are joint employers. Under the *Browning Ferris Industries of California, Inc.* standard, the Board will consider even those firms exercising “indirect” control over employment conditions potentially to be joint employers. This ruling alarms those employers who make use of temporary agency workers and the agencies themselves for it challenges their business model. The fate of these cases, however, remains uncertain. *Browning Ferris* has been appealed to the Federal Court of Appeals for the District of Columbia, a court that has not always ruled favorably on the Board’s decisions. Moreover, the newly elected Republican administration will likely appoint Board members eager to reverse these new precedents. Thus, despite the positive developments flux is in evidence, which is evidence of the grey zone at work.
- 28 Recently, one US city has complicated the legal picture even further, and in doing so provides an example of the regulatory fissuring and disaggregation that we identify with the grey zone. In December 2015, the Seattle City Council passed an ordinance providing ride-hailing company drivers, such as those driving for Uber, Lyft and taxi companies, the right to unionize. Experts opined that the NLRA might preempt the legislation because independent contractors are excluded from coverage under federal law. Not all agree. Agricultural workers are excluded and yet, for example, a few states, such as California, have legislation protecting the right of agricultural workers to

unionize. Additionally, some experts argue that antitrust law would void the legislation because collaboration among the drivers to standardize their terms and conditions of work might be akin to price fixing. Others argue to the contrary, the Seattle law is protected by a state immunity exemption from antitrust law (Greenhouse, 2016). In the meanwhile, the US Chamber of Commerce sued the city to block and invalidate the ordinance. The suit leaves the status of the new law unclear, especially since the ordinance was recently preliminarily enjoined by a federal court. What rights the Seattle drivers may have, if any, are consigned for now to the grey zone. Interestingly, the NLRB itself is considering complaints against Uber, outside of Seattle, alleging that the company prohibited drivers from talking to one another about working conditions, which would violate federal labor law but only if the drivers are employees since the NLRA does not protect independent contractors.

- 29 In sum, in the US, we see the state acting in paradoxical ways with respect to promoting collective worker voice. The government's efforts constitute a tangle of conflicting actions and impulses, yielding uncertainty, and, we would argue, providing a murky picture regarding maintenance of the SER.
- 30 While Canadian labor laws were modeled on the NLRA (Zimmer and Bisom-Rapp, 2012), there are critical differences that make Canada's laws more protective of employees' rights. As in the US, Canadian labor laws at the national and provincial level only protect employees; independent contractors are generally excluded. But the promotion of the worker voice and freedom of association is enshrined in the Canadian Constitution, recognized by Charters in force in Canada and in Québec, and affirmed by the Supreme Court of Canada.
- 31 Provincial law in Québec has, however, greatly undermined the legal framework for one group of workers: home childcare providers (RSGs), clearly an occupation in which women dominate. While childcare centres (CPEs) provide childcare services in a facility using a salaried workforce, the RSGs provide the same service in their private residences. Paradoxically, the province began a process of legal reform for these workers in 1997 in an effort to counter degraded working conditions in the informal economy. Before 2003, some RSGs were able to obtain employee status through a legal process for the purpose of unionizing. Many were successful and were recognized as unionized employees.
- 32 Yet in 2003, the Government of Québec adopted a law which, by legal presumption, imposed on the RSGs the status of entrepreneurs. With the adoption of this law, unionized RSGs lost their employee status, union certification, and the benefit of labor and social protection laws. In response, two complaints were filed with the Committee on Freedom of Association of the International Labour Organization (ILO). The Committee concluded that these actions violated ILO Convention No. 87 (Freedom of Association and Protection of the Right to Organize). Additionally, in 2008, the Superior Court of Québec, declared the law unconstitutional, leaving it up to the legislature to draft a new law (Coiquaud, 2011), which would differentiate the RSGs from CPE workers.
- 33 New legislation defined the RSGs as "self-employed workers" while granting them an ad hoc representation and bargaining regime. This system does not provide the same guarantees as those provided for in the general regime set out in *Quebec's Labour Code*, the latter being the regime enjoyed by CPE workers (Coutu, Fontaine, Marceau, and Coiquaud, 2014). Moreover, since the RSGs are now "self-employed workers," they are

in principle excluded from the benefit of the *RLS*, the law establishing minimum labor standards in Québec. The RSGs will need to negotiate in order to regain the rights that otherwise would be available to them if they were employees.

- 34 The story of the RSGs illustrates how the government, by legislative tinkering, hybridized and constructed an ad hoc, inferior regime of collective relations with the aim of evading the fiscal impact that recognizing the RSGs as employees would require. The state's actions interfered with the labor and social rights of a vulnerable group, working conditions in the sector have deteriorated, and the potential solidarity between the RSGs and CPE workers has been undermined.
- 35 Inferior bargaining regimes are also evident in the agricultural sectors in Ontario and in Québec. In 2002, the Ontario legislature enacted the *Agricultural Employees Protection Act, 2002* (AEPA), which excluded farmworkers from the *Labour Relations Act* (LRA). This new statute grants farm workers the right to form and join an employee association, participate in its activities, assemble, make representations through their association on terms and conditions of employment, and protects them from interference, coercion and discrimination. A constitutional challenge to the statute was mounted in *Ontario (AG) v. Fraser*, which argued that the farmworkers' rights were abridged because they were not provided with true collective bargaining rights and were excluded from the protections given to workers in other sectors. That challenge was unsuccessful. The Court held that the constitutional right to freedom of association guarantees meaningful negotiations between workers and employers but does not police how those negotiations take place (Faraday, Fudge and Tucker, 2012).
- 36 Farmworkers labor under similarly inferior labor law protections in Québec. The exclusion of farm laborers from the rights and protections of those in a traditional SER are directly traced to the actions of the provincial governments in Canada. These actions undermine labor standards for a vulnerable group of workers typically made up of immigrants. They are actions that facilitate the growth of the grey zone.

2.2 State can effectively enforce the law or fail to do so

- 37 The assertion that the state can enforce the law presupposes that there is some law on the books. Once it is determined that a law exists, one must assess its characteristics. There is a difference between law on the books and law in-action. Certainly there are countries with formal law that appears highly protective of workers yet remains purely aspirational. Allowing a seemingly protective workplace law to lie dormant would be a way in which the government shores up the grey zone. One must also account for the fact that law comes in different forms: hard and soft.
- 38 When it comes to law, the government is not monolithic. Different state entities might play different roles in terms of promulgating and enforcing law, and adjudicating disputes related to it. In Canada, human rights complaints can be determined by specialized tribunals or by common law courts. Labor relations matters are most of the time adjudicated by labor boards, and courts owe deference to these expert decision-making bodies. Labor arbitrators, however, are typically given exclusive jurisdiction over interpreting and applying collective agreements. In Québec, the independent, government body enforcing labor standards is the Commission des normes, de l'équité, de la santé et de la sécurité du travail (the CNESST). The CNESST receives employee complaints concerning violations of the *RLS*. After receiving a complaint, the CNESST

will hold an inquiry, and if the complaint is deemed meritorious, it will bring a claim before a specialized court. Similar structures exist in the other Canadian provinces.

- 39 Law-making too takes place in diverse sites in Canada. While provincial legislators may hesitate to act upon new forms of work, some municipalities legislate quickly to address them. A fractured and inconsistent approach to regulating Uber is an example. Regulation of Uber and its drivers has in general been unfolding on a city-by-city basis, including efforts in Edmonton, Calgary, and Ottawa. Interestingly, Uber officials were pleased with the Edmonton regulations and unhappy about the rules in Calgary. Uber has deemed the rules in Ottawa to be “fair” and the regulations in Toronto to be piecemeal and unworkable. To remedy the patchwork nature of this regulatory approach, Uber has called on the provinces to act (Owram, 2016). Québec in June 2016 adopted regulations applying to drivers but issued a 90-day stay in order “for Uber to propose a pilot project for the regulation of its activities” (Sterie, 2016). In this fashion, the province in essence delegates its law-making power to the entity it aims to regulate.
- 40 New forms of work present difficult problems of interpretation. Traditionally, labor and employment law distinguishes between work time and personal time. The emergence of new models of work organization tends to blur this distinction and contributes to the grey zone. Insecurity increases when employees are obliged to be available outside regular work hours (Vallée, Gesualdi-Fecteau, 2016). Under Québec’s labor standards law, an employee waiting for work is paid only when at the employer’s place of employment. An obligation to be available is a third kind of time when the employee is not working, is not at the place of employment, yet is not fully free to engage in personal activities. So far, no concrete initiative has been taken by the government to address this new form of time.
- 41 In the US, enforcement and adjudication can take place through federal or state courts of general jurisdiction or through administrative courts run by various government agencies, such as the federal NLRB, which enforces national collective labor law, or the State of California’s Labor Commissioner, which hears California employee wage claims. In its role as law creator, adjudicator, or enforcer, the state functions from multiple sites. This creates the possibility for contradictory actions and positions. Thus, in a federal system, the grey zone will vary based on geography. The government’s approach to the grey zone, or concern for maintaining the SER or high labor standards, is much different in the worker-friendly State of California than it is in the considerably less protective State of Mississippi, and different yet again when one looks at government action on the national level or at a particular pro-employee municipality such as San Francisco or Seattle.
- 42 Considering the government in its role as auditor requires anticipating the problem of regulatory capture – a phenomenon whereby those subject to regulation effectively control the regulatory process through the appointment of staunch advocates on their behalf to key government positions. During the eight years of President George W. Bush’s administration, the DOL, with its subdivisions – e.g. the Occupational Safety and Health Administration (OSHA) and the Wage and Hour Division (WHD) – were quintessential examples of capture and very little enforcement took place (Bisom-Rapp, 2010). Efforts to prosecute the misclassification of employees as independent contractors were uncoordinated and declined, and that allowed wage theft, which can be rampant in precarious jobs, to flourish (Government Accountability Office, 2009;

Bernhardt, *et al.*, 2009; National Employment Law Project, 2009). The approach of the Obama administration to enforcement and auditing has been different. For example, the DOL's aggressive Misclassification Initiative, which launched in 2011, seeks to restore the rights and protections of standard employment to those employees misclassified by their employers as independent contractors (Weil 2014). From all appearances, we anticipate a return to regulatory capture under the newly elected Republican administration.

- 43 Inadequate funding for enforcement must also be considered. In the Congress, members of the Republican Party have long used the appropriations process as a mechanism for attempting to starve the DOL and stymie its work (e.g. Opfer, 2016). A related problem is inadequacy of legal penalties; a number of employment laws, such as the *Occupational Safety and Health Act*, provide for insufficient employer liability, which results in anemic deterrence of employer wrong-doing (Bisom-Rapp, 2009) . Since lower-cost, nonstandard workers in industries such as construction, for example, suffer a high incidence of occupational illness and death (Flynn, *et al.*, 2015) penalty inadequacy increases their vulnerability and may hasten growth of the grey zone.
- 44 Legal venue also matters. While many workplace laws are designed to be enforced in court, in the US, often a worker's chosen venue is barred. This is because the Supreme Court's interpretation of the Federal Arbitration Act permits firms to condition employment on an employee's agreement to submit any future disputes to private, binding arbitration (Zimmer, 2013). The workers give up the right to sue in court, and are often asked to waive their ability to bring class actions, which might otherwise enable them to address systemic harms. Such employees are bound to resolve their individual disputes with employers in often secret, private proceedings that set no legal precedent.
- 45 The same employer strategy – to deny workers a judicial venue – is being deployed by sharing economy employers like Uber (Stone, 2016). In fact, mandatory, pre-dispute arbitration agreements have been an issue in a number of law suits brought against Uber. Uber required many drivers to sign such agreements, and the company has moved dismiss their claims from court and to enforce the arbitration agreements. Some courts have done so. Thus, as Katherine Stone notes, important issues of legal classification and legal rights are decided secretly and lack precedential value. When courts act in this fashion, the grey zone enlarges and transformations are obscured.
- 46 Finally, there is the impact of court-approved law suit settlements. Notably, many sharing economy firms sued by their workers over employment status have chosen to settle rather than litigate those cases. In May 2016, Lyft entered a US \$27 million provisionally court-approved settlement of a case brought by California drivers (Weise, 2016). Uber agreed to a US \$100 million settlement of a suit in April 2016 that was rejected by the judge. For now Uber and Lyft are free to continue to treat drivers as independent contractors, the former at least until the case proceeds further and the latter as a term of the settlement. In this way, the government bolsters the grey zone, and undermines the SER and labor standards. Settlements present similar problems in Canada. For example, in 2014-2015, 70.8 percent of labor standards complaints brought before the CNESST were settled. This success obscures many labor standards problems; they are less visible and they do not set a legal precedent (Coiquaud, 2015).

2.3 State can prohibit certain forms of alternative work or their limit duration or fail to do so

- 47 In an effort to slow the growth of precarious work and job insecurity, governments can prohibit certain forms of alternative work or limit the duration of nonstandard work. Some countries, for example, restrict the number and length of fixed-term contracts of employment. When they do so, governments express a preference for the SER as the dominant form of employment. One sees such efforts at the supranational level as well. The European Union's Fixed-Term Work Directive 99/70/EC, has two aims: to prevent discrimination against those working under fixed-term contracts; and to prevent abuse by employers who might otherwise wish to use successive fixed-term contracts to structure their employment relationships (European Commission Staff, 2008). European Union member countries must transpose this directive into their national law, and thus attempt to put the brakes on the proliferation of at least one form of nonstandard work.
- 48 Alternatively, governments can decide not to promulgate any legal limitations or prohibitions, and may deregulate whole industries. Regarding the latter, the neoliberal movement championed by many countries in the 1980s and 1990s facilitated the significant removal of legal interference in the realm of financial and capital markets and trade (Stieglitz, 2003). Deregulation in some sectors, such as port trucking in the US, had dramatic consequences for workers. David Bensman observes that deregulation allowed new firms to enter the industry and that those new firms operated on a new business model. No longer would the drivers be unionized employees; instead, the vehicles were sold to the drivers and the latter were deemed independent contractors. The resulting degradation in the driver working conditions has been massive (Bensman, 2014).
- 49 When it comes to constraining the growth of nonstandard work, the US is "laissez-faire". Without regulation, employers are free to create and use alternative forms of working. Consequently, the grey zone expands unhindered. One example of one municipality swimming against the tide is San Francisco. In that city, a recent Retail Workers Bill of Rights requires, among other things, that employers limit the use of on-call shifts and promote full-time employment among their existing part-time workforce before hiring new part-time workers.
- 50 Deregulation has undermined working conditions and the SER in some Canadian sectors as well. In 1987, the Canadian interprovincial and international freight transportation industry was deregulated. Since then, corporate structures have become increasingly complex as industry actors have sought legal and financial arrangements to maximize organizational agility and flexibility. In turn, different forms of employment have proliferated. Legislative interventions on labor standards in this industry differ but one commonality is that they create multiple work statuses, which leads to confusion and challenge to the status of a given group of employees. This approach to the industry may facilitate commercial objectives, such as competition and efficiency, but is a poor mechanism for protecting labor standards and trade union input (Coiquaud, 2016).
- 51 The Canadian temporary work industry has also undergone considerable expansion in the last decade. This form of precarious work – agency temporary work – fits poorly with many labor and employment laws, which are designed to fit a traditional binary

employment relationship. A triangular relationship can obscure the employer-employee relationship. While some provinces, such as Ontario, have passed legislation on temporary work, some, such as Québec, have not. Without sound empirical data on the characteristics, number, and working conditions of agency temporary workers, it is difficult to craft effective legislation (Bernstein and Vallée, 2013). The lack of legal and policy interventions, however, further undermines the SER and the labor standards associated with it.

3. The state as the insurer against social risk and inequality

3.1 State can mandate equal treatment between the SER and nonstandard work or fail to do so

- 52 Many countries recognize that nonstandard forms of work are often associated with inferior working conditions compared with work performed in a SER. Also, due to occupational segregation, those performing nonstandard works are often members of racial and ethnic minorities and/or women. To combat this, and remove an incentive for the increase of nonstandard work, some governments adopt equal treatment laws, which seek to ensure the same treatment for workers whether they occupy standard or nonstandard relationships. The European Union member states, for example, must maintain laws in harmony with the Part-time Work Directive 97/81/EC, which requires comparable working conditions for full-time and part-time workers unless there is an objective justification for different treatment. The justification is a substantial limitation on the reach of the Directive, and yet as transposed by the member states, it is certainly a catalyst for preventing degraded conditions for part-timers. Even so, reports in the United Kingdom, illustrate that implementation can be problematic (Bell, 2011).
- 53 In the US, there is almost no such legislation. The aforementioned San Francisco Retail Workers Bill of Rights is a notable exception. That legislation prohibits discrimination against part-time workers with respect to wage rates, ability to earn paid or unpaid time off, or access to promotion. But in general, and certainly at the federal level, there is no equal treatment mandate. This undermines the SER and increases the divisions between that form of working and other nonstandard forms.
- 54 Things differ in at least one Canadian Province. In Québec, the province's law specifying labor standards, known as the *RLS*, prohibits employers from paying part-time employees at a wage rates lower than that granted to other employees performing the same tasks, in the same establishment, for the sole reason that the part-time employee works fewer hours. The clause itself, however, contains restrictions which can make enforcing the provision a difficult task. Moreover, the provision does not apply to any employee remunerated at a rate of pay which is more than twice the rate of the minimum wage. This cap greatly restricts the effect of the provision.
- 55 Additionally, a different provision of the *RLS* is addressed to collective bargaining agreements and prohibits differences of treatment based on hire date. Recently, the Québec Court of Appeal ruled that this provision only covers wages and does not apply to other benefits, such as post-retirement benefits. Hence, under collective bargaining

agreements, it is possible for more recently hired employees working at the facility to receive inferior benefits other than pay, and this opens up the possibility for a kind of fissuring of the workforce.

3.2 States can extend social protection to alternative forms of work (e.g. state pensions; unemployment insurance) or fail to do so

- 56 In terms of the final matrix factor, governments that wish to slow the spread of job insecurity and economic vulnerability can extend social protection to those laboring in forms of nonstandard work. Forms of social protection include state pensions, unemployment insurance, health insurance, and the like. In the US, the Affordable Care Act has resulted in progress in making sure most Americans have health insurance (Obama, 2016). Yet critical forms of social protection remain out of reach for many working people in the United States. This is due in part to what Donna Kesselman and David Bensman refer to as a “fragmented institutional edifice, which is characterized by historical compromises and concessions which resulted in multiple laws, each having differing logics and jurisdictions” (Kesselman and Bensman, 2015).
- 57 Turning to part-time work in the United States, for example, one sees the exclusion of this group from a number of important labor and employment laws:
- Those who work less than 1,000 hours annually (about 20 hours per week) may be excluded from employer-provided pension plans. Those who work under 1,250 hours per year (about 24 hours per week) are not covered by the Family and Medical Leave Act. Some states exclude part-time workers from unemployment compensation coverage....The Affordable Care Act will require employers to make health insurance available to their employees; but those working less than 30 hours per week are not covered by the employer mandate (Bisom-Rapp & Sargeant, 2016).
- 58 Independent contractors also find themselves without access to many forms of protective law, including unemployment insurance.
- 59 Similar problems exist in Canada. For example, the *Employment Insurance Act*, a federal statute, provides those involuntarily unemployed with income for support until other employment is found. That the statute is designed with the SER in mind is clear given that eligibility is tied to working a minimum number of insurable hours. However, efforts have been made to extend coverage to self-employed persons so long as those persons make contributions to the unemployment insurance fund in full. In contrast, those with employee status share the contributions to the fund with their employers.
- 60 In Québec, since 2006, paid maternity, paternity leave, and parental leave is available for both parents, and may be taken by employees mentioned in *An Act Respecting Parental Insurance*, which is provincial law. This law covers those working part-time or only occasionally. Self-employed workers are also eligible. In contrast, in the US, there is no federal law requiring *paid* maternity, paternity, or parental leave for private sector workers. Moreover, the Family and Medical Leave Act, which provides 12 weeks of *unpaid* leave, covers fewer than 60 percent of American workers (Institute for Women’s Policy Research, 2013). Only 13 percent of American workers have access to paid family leave through their employers’ voluntary programs (Campbell, 2015).
- 61 While Canada’s various social protection programs are in general more generous than those in the United States, one troubling area involves the coverage of migrant workers. These workers contribute to various public programs yet only a few will

benefit from the programs, either because they are not aware of their eligibility, or because the program implementation for them is constrained due to their status (Carpentier, 2011).

Conclusion

- 62 Looking across our two countries a spectrum of sorts is revealed. At one end, we see the US as the quintessential neoliberal state. Only a thin set of protections exist for workers, market logic prevails and allows firms to engage in a range of aggressive strategies to lower their labor costs, and stasis and gridlock at the national level stymie attempts to legislate reform. Even so, one sees the American state acting through agencies and the courts and some municipal legislation to forestall the decline of the SER and protect workers. Hence, there is a paradox in the actions of the state. In the end, however, the lack of regulation in the US allows nonstandard work to proliferate.
- 63 With a legal system that allows the provinces to produce diverse approaches to common workplace problems, the Canadian state has been more willing than the US to manage, in an active sense, the terms upon which the labor market functions. And yet here too we see insecurity and precariousness increase. We see variance in the rights and protections afforded workers based upon geography, sector, and malleable status definitions. Despite a range of actions that seek to clarify work relations, new forms of work continue to present interpretative difficulties for regulators and the courts.
- 64 We do not believe that the two countries have failed absolutely in their efforts to shore up the SER. The regulatory advances detailed previously no doubt yield some positive results. Yet the mechanisms by which governments transform and destabilize the SER remain worthy of exploration, especially since this employment relationship provides stability and security to millions of workers. The matrix that this article has explored – a matrix that facilitates comparisons across countries – illuminates the state's actions and inactions and potentially holds it normatively accountable for at least some labor market outcomes. Ultimately, legal and policy reform depends on understanding action and inaction on the part of governments. Conflicting impulses within and among government entities result in a fissured, disaggregated regulatory apparatus resembling the fissured, disaggregated condition of many employing enterprises with one crucial difference. While there is a central logic to the fracturing associated with the latter, the goals of the fragmented state remain contradictory and unclear.
- 65 Obviously, the state is limited in its capacity to intervene in the labor market. We do not mean to suggest otherwise. Indeed, Harry Arthurs cautions that labor law is perhaps in great part law that is made by non-state actors. Arthurs challenges us to revisit our assumptions given the new economy's massive changes, which are social, economic, political, and technological. These transformative phenomena alter the state, the nature of employment, and law itself (Arthurs, 1996). New players, including multinational corporations and nongovernmental organizations, vie with the state as regulators. A myriad of rules arises from the state itself. In the face of such legal pluralism, we do not assign to the state the role of ultimately clarifying or obfuscating the grey zone. Nonetheless, our comparative analysis highlights the vitality of a repertoire of actions available to the state, with which it acts like an institutional entrepreneur who does bricolage.

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NOTES

1. Our use of "Eyes on Canada and the United States" as our subtitle is a nod to "Eyes on the Prize," the award-winning, documentary about the American civil rights movement. "Eyes on" is a shortened form of "Keep your eyes on the prize." In other words, when you confront difficulties, keep the goal in mind. This, as we explain in the article, is what the state fails to do with regard to safeguarding the standard employment relationship.

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3. For this project, we look at two countries: Canada and the United States. Close cousins, they can be grouped under the banner "of liberal welfare state" from Esping-Andersen's typology (1999), even if important nuances must be recognized with respect to this classification. However, it is important to note that benchmarking is used here solely to develop a matrix and not to compare the two States in a systematic way. The matrix is a way to understand a menu of devices available to the state rather than a formula for engaging in deep comparative analysis. Our goal is to determine vis-à-vis these devices the actions or inactions operationalized by the state to preserve (or break down) the standard employment relationship, and to preserve (or leave vulnerable) labor standards more generally. It is our hope that the matrix will be of use to researchers from other countries who are studying the responsibility of the State for the global rise of non-standard work and its effect on labor standards.

ABSTRACTS

In most countries, precarious working is on the rise and nonstandard forms of work are proliferating. What we call the “grey zone” of employment is generated by transformations at and with respect to work both in standard and nonstandard forms of working. Focusing on legal and policy regulation, and on the role of the state in the creation and perception of the grey zone, our contribution explains the way the government acts or fails to act, and the consequences of that activity or inactivity on the standard employment relationship. Examining and juxtaposing conditions in our two countries, Canada and the United States, our thesis is that the state plays a paradoxical role in the growth of nonstandard work and increasing precariousness. To assist the analysis, we construct a matrix for understanding the efforts or inertia on the part of the government. We conclude that there are seven ways in which to comprehend the role played by the government vis-à-vis the grey zone.

Dans la plupart des pays, le travail précaire est en hausse et les formes atypiques de travail se multiplient. Ce que nous appelons la « zone grise » de l'emploi résulte tant des transformations du travail typique que du travail atypique. En mettant l'accent sur la réglementation, les politiques publiques et le rôle de l'État dans la création et la perception de la zone grise, notre contribution consiste à relever les agissements ou les défauts d'agissements du gouvernement et les conséquences induites sur la relation d'emploi typique. En examinant et en comparant les conditions dans nos deux pays, le Canada et les États-Unis, nous montrons que l'État joue un rôle paradoxal dans la croissance du travail atypique et du travail précaire. Pour appuyer notre analyse, nous avons développé une matrice pour saisir les efforts ou les inerties du gouvernement. Nous concluons qu'il y a sept façons de comprendre le rôle joué par le gouvernement à l'égard de la zone grise.

INDEX

Mots-clés: État, zone grise, droit du travail, relation typique d'emploi, travail précaire

Keywords: state, grey zone, labour law, nonstandard employment relationship, precarious work

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