Voices at Work

Continuity and Change in the Common Law World

Edited By
ALAN BOGG
and
TONIA NOVITZ

Preview - Copyrighted Material
http://www.pbookshop.com

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford, OX2 6DP,
United Kingdom

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide. Oxford is a registered trade mark of
Oxford University Press in the UK and in certain other countries

© The several contributors 2014

The moral rights of the authors have been asserted

First Edition published in 2014
Impression: 1

All rights reserved. No part of this publication may be reproduced, stored in
a retrieval system, or transmitted, in any form or by any means, without the
prior permission in writing of Oxford University Press, or as expressly permitted
by law, by licence or under terms agreed with the appropriate reprographics
rights organization. Enquiries concerning reproduction outside the scope of the
above should be sent to the Rights Department, Oxford University Press, at the
address above

You must not circulate this work in any other form
and you must impose this same condition on any acquirer

Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Published in the United States of America by Oxford University Press
198 Madison Avenue, New York, NY 10016, United States of America

British Library Cataloguing in Publication Data
Data available

Library of Congress Control Number: 2013955753

ISBN 978–0–19–968313–0

Printed and bound by
CPI Group (UK) Ltd, Croydon, CR0 4YY

Links to third party websites are provided by Oxford in good faith and
for information only. Oxford disclaims any responsibility for the materials
contained in any third party website referenced in this work.

Preview - Copyrighted Material
http://www.pbookshop.com

1

The Purposes and Techniques of Voice

Prospects for Continuity and Change

Alan Bogg and Tonia Novitz

Introduction

Trust me, this will take time but there is order here, very faint, very human.[1]

This is a line which Michael Ondaatje advocates should be the first sentence of any novel, but perhaps is more apt as the starting point of an edited collection such as this one which tackles an enormous volume of material. In his 'poem to workers', *In the Skin of a Lion*, Ondaatje drew a picture of workers' lives in Canada at the beginning of the twentieth century. The central character, Patrick, is a silent man who experiences work as a logger, as a dyer in a tannery, and in construction (or rather destruction, as an expert in laying dynamite). He spends time self-employed as a 'searcher', looking for a missing businessman so as to seek the advertised reward, and he spends time in prison. He lives a precarious life, on the margins of the workforce. The novel begins with the tale he is finally prepared to tell to his adopted child, the daughter of a murdered trade unionist, as they travel towards her mother's friend. His is a story surrounded by immigrant workers, Finns, Italians, Greeks, Lithuanians, Macedonians, and Poles, finding commonality in poverty. Ondaatje evokes for us the conditions which necessitated the drive towards legal recognition of voice through legislative provision for trade unions and collective bargaining which offered a way to counter the indignity and dehumanization inherent in the process of industrialization. Of course, the models of state support for independent trade unions varied across our target jurisdictions, from the compulsory arbitration model of Australia and New Zealand, to the statutory certification model of the US and Canada, and finally, where the legal imprint was at its lightest, the 'voluntarist' alignment of British 'collective-laissez-faire'. Yet there was a golden thread that was woven through these very different models, namely that workers' *collective* agency through independent trade unions should be regarded as the fundamental unit of industrial relations policy.

In the twenty-first century, we face different circumstances, which render workers vulnerable but in other ways. Immigration remains a feature of Canadian and other labour markets, but its effects are compounded by globalization of production, such that we now witness interesting forms of outsourcing of supply chains between states, including deployment of 'agency' and sham 'self-employment' in a myriad of forms.[2]

[1] Michael Ondaatje, *In the Skin of a Lion* (Picador, 1987) 146.

[2] See Anne C. L. Davies, this volume. On sham self-employment, see her comment, 'Sensible Thinking about Sham Transactions' (2009) 38 Industrial Law Journal (ILJ) 318; also Alan Bogg, 'Sham

Preview - Copyrighted Material
http://www.pbookshop.com

The feminization of the workforce (Ondaatje's key female characters are actresses and wives) poses challenges for the commercialization of care work and its accommodation within working life. The social realities of women's continuing care responsibilities while engaged in paid work leads to disparities of income and status, further facilitated by the contractual arrangements under which they are hired.[3] Technological innovation has not necessarily led to greater leisure or safety in the workplace, but rather dangers for workers caught inadvertently by surveillance systems or even criticizing their employer online.[4] Trade union membership is in decline, and yet labour markets are typified by a 'representation gap', such that many workers say they would prefer collective support and representation but are (for a variety of reasons) unable to access their apparent legal entitlements.[5] The ability of the vast majority of workers to articulate opposition seems progressively less effectual, judging by growing divides in income between the wealthy and the poorer workers;[6] in this sense, the legal props for traditional forms of collective bargaining and industrial action offer inadequate support. This is being reinforced by the muting of workers' political voice, especially as expressed through organized labour in the sphere of democratic politics. This muting leads to a significant loss of democratic control over the legal norms that go to constitute the regulatory framework for paid employment, and indeed the capabilities for effective voice within labour market institutions. We are moving towards a culture of silence.

It is in this setting that we conceived of the 'Voices at Work' network, funded by the Leverhulme Trust. This edited collection of essays is the culmination of our three-year project, which has sought to go beyond the scope of pre-existing excellent European comparative scholarship,[7] so as to investigate contemporary common law legal systems and labour markets in Australia, Canada, New Zealand, the United Kingdom of Great Britain and Northern Ireland (UK), and the United States of America (US)—our target countries. We began by seeking to examine the role of law in securing voice in terms of 'organization', 'representation', and 'negotiation' drawing on terms familiar to us as labour lawyers. Moreover, these analytical categories were crystallized against

Preview - Copyrighted Material
http://www.pbookshop.com

Self-Employment in the Supreme Court' (2012) 41 ILJ 328. On supply chain regulation, see for example Stephanie Ware Barrientos, '"Labour Chains": Analysing the Role of Labour Contractors in Global Production Networks' (2013) 49(8) The Journal of Development Studies 1058. On palpable effects on UK immigrant workers, see Alan Bogg and Tonia Novitz, 'Links between Individual Employment Law and Collective Labour Law: Their Implications for Migrant Workers' in Cathryn Costello and Mark Freedland (eds), *Migrants at Work* (CUP, 2014).

[3] See Judy Fudge, 'Women Workers: Is Equality Enough?' (2013) 2(2) feminists@law—available at <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/63> accessed 27 September 2013; see also Nicole Busby, *A Right to Care? Unpaid Work in European Employment Law* (OUP, 2011).

[4] See Novitz, this volume.

[5] Richard Freeman and Joel Rogers, *What Workers Want* (ILR Press, 1999); Edmund Heery, 'The Representation Gap and the Future of Worker Representation' (2009) 40(4) Industrial Relations Journal (IRJ) 324.

[6] John Hills, Jack Cunliffe, Ludovica Gambaro, and Polina Obolenskaya (2013) *Winners and Losers in the Crisis: The changing anatomy of economic inequality in the UK 2007–2010*. CASE report, Reports 2. Centre for Analysis of Social Exclusion, London School of Economics and Political Science, London, UK; Elizabeth McNichol, Douglas Hall, David Cooper, and Vincent Palacios, *Pulling Apart: A State-by-State Analysis of Income Trends* 15 November 2012, Center on Budget and Policy Priorities available at <http://www.cbpp.org/cms/?fa=view&id=3860> accessed 27 September 2013.

[7] Perhaps most notably, Bob Hepple and Bruno Veneziano, *The Transformation of Labour Law in Europe: A Comparative Study of Fifteen Countries* (Hart, 2009).

a backdrop of values and assumptions that aligned worker voice with the collective activities of independent trade unions. Yet we found, as our interdisciplinary and cross-comparative discussions progressed, that we needed to consider how 'voice' was being translated beyond these traditional typographies so as to capture the dynamism of developments in this field. We also wanted to find the human element obscured by these legal terms of art.

In this project, we rapidly realized that this common law family did not possess the similarities we might imagine. We could not simply compare like with like; when even in the standard terrain of legislation regulating collective bargaining, the term 'good faith bargaining' had a meaning different in Australia to that in the UK.[8] While all states experienced the exigencies of global markets, with external market pressures to engage in chains of subcontracting, enhance agency work, and draw in access to cheaper migrant labour, again stark differences arose in terms of the political value systems and industrial histories that moulded their responses. The egalitarian frame we identified in an Australian context[9] had little relevance to the ostensibly politically neutral, liberal choice-oriented systems in the UK,[10] and attempts to superimpose this liberal value orientation had led to tensions and 'irritations' in the more egalitarian Australian system.[11] Further, the different countries in our study faced different issues associated with voice; for example, the UK alone did not have to address voices of indigenous workers; while oil and mineral rich Australia did not have to contend with a financial crisis on the same scale as the UK or the US, resulting in different policy prescriptions around public spending and a different profile and trajectory for the conduct of public sector collective labour relations.[12]

Accordingly, it became clear to us that very detailed systematic comparative study of 'representation', 'organization', and 'negotiation' (or indeed any particular feature of the industrial relation systems) in our target countries was not going to provide us with the kinds of data which would be usable, or even recognizable to participants in the project. This has led us down a different path in the study of comparative law; one which is more normatively oriented, seeking first to reflect on the legitimate purposes of worker voice and then offering an evaluation of the variety of legal mechanisms that assist and constrain voice in the light of these purposes. Such an approach has also led us to offer greater latitude to the contributors to this volume than might be found in other more methodical and structured comparative accounts; we wanted to instigate a festival of ideas, which could provoke debate and potentially set agendas, even if our

[8] Compare Forsyth and Slinn with Anderson and Nuttall, this volume. Compare again with Alan Bogg, 'Good Faith in the Contract of Employment: A Case of the English Reserve?' (2011) 32 CLLPJ 729 and Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38(4) ILJ 390.

[9] Alan Bogg, Anthony Forsyth and Tonia Novitz, 'Worker Voice in Australia and New Zealand: The Role of the State Reconfigured?' (2013) 34 Adelaide Law Review (Adelaide LR) 1.

[10] Alan Bogg and Tonia Novitz, 'Recognition in Respect of Bargaining in the United Kingdom: Collective Autonomy and Political Neutrality in Context' in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012).

[11] Gunther Teubner, 'Legal Irritants: Good faith in British law, or how unifying law ends up in new differences' in Francis Snyder, (ed.), *The Europeanisation of Law: The legal effects of European integration* (Hart, 2000) 243.

[12] Cameron Roles, and Michael O'Donnell, 'The *Fair Work* Act and Worker Voice in the Public Sector' (2013) Adelaide LR 93.

Preview - Copyrighted Material
http://www.pbookshop.com

findings were not reducible to neatly tried and tested verifiable comparisons calibrated scientifically against 'functional equivalents' across systems.[13] Our ambition has been to challenge assumptions of straightforward continuity and face directly various possibilities of change, considering meanwhile the directions in which we might like to see change proceed. We also see this festival of ideas approach as being a fecund source of new research questions for comparative scholars interested in furthering and deepening the work that has been started here. For all its ambition, the *Voices* project has only really begun to scratch the surface of comparative enquiry in this particular domain of scholarship focused upon common law jurisdictions.

Reframing the ambitions of the project in this spirit of liberation has led us to engage with a wider variety of themes than those we had originally envisaged; with a range of approaches and methodologies that are eclectic; and we hope with beneficial results. The essays offered here have been developed from papers presented at different events throughout the life of 'Voices at Work' (2011–2013), whether in Oxford, Toronto, Melbourne, Barcelona, or London. They are by no means the only outputs of these events, which have given rise to a separate special issue on theories of voice (edited by Bogg and Novitz) in the Comparative Labor Law and Policy Journal (CLLPJ), another focusing on North-American issues (edited by Slinn and Tucker) in the Osgoode Hall Law Journal, and a collection of essays considering Australian and New Zealand concerns (edited by Bogg, Forsyth, and Novitz) in the Adelaide Law Journal. In this book we seek to offer a fuller and more holistic sample of the scholarship that has emerged through our dialogue, legal but also interdisciplinary.

In this book, some contributors have focused on a single national study (such as Davies on atypical work in the UK, Hardy on labour inspection in Australia, and Logan on US legislative attempts to prevent trade union engagement with political funding); they offer the reader the opportunity to extrapolate from their preliminary thematic findings and investigate other jurisdictions with an eye to broadly comparable issues. Others offer more detailed comparative pictures, such as Forsyth and Slinn on treatment of good faith bargaining in Australia and Canada or Fine's treatment of union engagement with migrant workers in the UK and the US. There are also essays which rehearse treatment of particular legal questions in a range of jurisdictions (such as Roth's exploration of indigenous work and Tucker on strikes). This variation of approach has, however, its own order, as we seek to probe and destabilize old assumptions and consider them afresh.

The volume is organized into four parts. The first considers 'Identities of Voice' in the workplace. Who is it who might wish to speak and how are they able to do so, if at all? The second part considers the 'institutions of voice' created for this purpose, which leads us to probe the role of trade unions, statutory entitlements, corporate governance mechanisms, courts, and even labour inspectorates. The observations here connect

[13] See Ralf Michaels, 'The Functional Method of Comparative Law' in *The Oxford Handbook of Comparative Law* (OUP, 2006); Günter Frankenberg, 'Critical Comparisons: Re-thinking Comparative Law' (1985) 26 Harvard International Law Journal 411 and the critique offered by Manfred Weiss, 'The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool' (2003) 25 CLLPJ 169.

Preview - Copyrighted Material
http://www.pbookshop.com

to the third part on 'locations of voice', offering fresh perspectives on the ostensible divides between the private and the public, the individual and the collective, as well as the national and international. The fourth part addresses the specific role that law (and institutions beyond law) can play in obstructing or facilitating voice. Following an exploration of regulatory techniques by Howe, this section then considers the scope for various legal regimes to promote and obstruct various forms of voice in the contemporary labour markets that have been the subject of our study.

Workplace Voice and its Putative Objectives

In an earlier essay in the CLLPJ,[14] we identified what we understood as the key contours of 'voice', drawing on the work of Albert O. Hirschman who distinguished voice from 'exit' of an organization.[15] His writing offered a definition of voice of considerable breadth, which as we have noted, 'can be graduated, all the way from faint grumbling to violent process'[16] and can even encompass silence.[17] This variation is likewise a feature of this edited collection; for we have observed that voice does not just fit onto a scale from silence (assumed non-objection but also potentially passive resistance) to outright protest;[18] it may have a myriad of forms. Voice may take place within a workplace, such as a direct comment to a manager or an email sent to a colleague. Voice may operate through the organizational constraints and facilitation of a trade union structure; or it may take the form of open spontaneous resistance to certain managerial practices. Voice may not occur within the enterprise at all, but may be exercised externally in terms of complaints to an inspectorate, a tribunal, or a court;[19] and it may also be exercised in the broader political sphere in an attempt to influence not merely one workplace but many.[20]

Hirschman's work remains foundational in terms of the normative base he offers to understanding the role of 'voice' in organizations. Hirschman's central idea is that voice can promote improvement of and loyalty to an organization, thereby circumventing exit. He gives the example of the ever-present threat of potential exit of a member or customer of a firm, which he suggests can be deterred by voice.[21] Arguably, if we see the employer as an investor in a firm, we can identify this as a rationale for the common law assumption that capital must be pacified through 'voice'. The employer, having invested in a commercial enterprise, must have the ability to control the terms of the investment, and hence the workforce hired, or they will exit the enterprise. More familiar, however, is the usage that Richard Freeman is renowned for; namely that unionization is negatively correlated to workers' quit rates, such that voice enhances workers' loyalty to the

[14] Alan Bogg and Tonia Novitz, 'Investigating "Voice" at Work' (2012) 33 CLLPJ 324.

[15] Albert O. Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations and States* (Harvard University Press, 1970).

[16] Hirschman 16 (n 15).

[17] Linn van Dyne et al., 'Conceptualizing Employee Silence and Employee Voice as Multidimensional Constructs' (2003) 40 Journal of Management Studies 1359 at 1362.

[18] For comment on the silence of care workers, see Cooper, this volume. For more direct forms of action, see Tucker, also this volume.

[19] See Creighton, Hardy, and Mantouvalou, this volume.

[20] See Ewing and Logan, this volume.

[21] Hirschman (n 15) for e.g. ch. 3.

Preview - Copyrighted Material
http://www.pbookshop.com

organization in which they work and, thereby, profitability.[22] In the CLLPJ, we recognized that alongside this economic narrative lay another, in which the material welfare of workers (rather than their employers) and their income relative to that of those who hired them (egalitarian in nature) also constituted key objectives of their voice through collective bargaining and industrial action. Herein lies the older labour law tradition. The legislative measures that workers secured during the twentieth century (in order to utilize these industrial tools) have been thought to be grounded in universal suffrage and access to political representation; but subsequent capture of government by key financial interests seems to be undermining that political accommodation.[23] This highlights the pressing need for labour lawyers to be as attuned to the values and doctrines of constitutional law as they are familiar with classical 'labour law' concepts such as bargaining units, trade union membership, and the contract of employment.

For today, this story is further complicated by broader objectives of democracy and the protection of human rights—claimed both by workers and their employers—which might be seen to shape the scope of individual and collective claims to voice (and assertions by governments and employers as to their appropriate limits). While we might, as Eric Tucker did so eloquently in this first collection of essays on 'Voices at Work' identify conflicts between constitutions respectively of capital and of labour,[24] we find that tensions arise in broader terms between economic and between the various social justifications which could serve the interests of either or both workers and their employers. What emerges from our study of this selection of common law countries is that the objectives of workplace 'voice' are the subject of considerable normative contestation, with the entry of democratic and human rights arguments into the justificatory framing of 'voice' posing challenges for traditional economic and social understandings of collective bargaining and industrial action (egalitarian, materialist, and efficiency based). As we shall see, this shift in normative grounding has the potential to close down certain arguments (for workers and their employers) while opening other vistas of opportunity.

We explored the role of a range of democratic justifications for voice in our essay in the CLLPJ[25] and they are considered again here by other contributors to this volume.[26] In particular, for workers (and their organizations) a deliberative democratic approach offers a justificatory basis for on-going engagement by workers' organizations (as 'civil society actors') in workplace level, national, and even international decision-making.[27]

Preview - Copyrighted Material
http://www.pbookshop.com

[22] Richard B. Freeman, 'Individual Mobility and Union Voice in the Labor Market' (1976) 66 American Economic Association 361; Richard B. Freeman, 'The Exit Voice Trade-off in the Labor Market: Unionism, Job Tenure, Quits and Separations' (1980) 94 Quarterly Journal of Economics 643; although this claim has been viewed more sceptically in the UK. See Stephen Procter and Michael Rowlinson, 'From the British Worker Question to the Impact of HRM: Understanding the relationship between employment relations and economic performance' (2011) 43(1) IRJ 5. For a more recent analysis of the productivity benefits brought by worker voice in the corporate field, see Johnston and Njoya, this volume.

[23] Chris Howell, 'The Changing Relationship between Labor and the State in Contemporary Capitalism' (2012) *Law, Culture and the Humanities* published online 12 June 2012 available at <http://lch.sagepub.com/content/early/2012/05/10/1743872112448362> accessed 27 September 2013; see also Eric Tucker, 'Labor's Many Constitutions (and Capital's Too)' (2012) 33(3) CLLPJ 355.

[24] Tucker (n 23). [25] Bogg and Novitz 332–6 (n 14).

[26] See, in particular, Mantouvalou, this volume.

[27] Here we draw on the writing of Jürgen Habermas, *Between Facts and Norms: Contributions to a discourse theory of law and democracy*, W. Rehg (trans.) (Boston: MIT, 1997); but also the development of the

It might also be regarded as a technique of empowerment for marginalized or weakened voices by precipitating a shift *away* from the legitimacy of coercive pressure in the political process and *towards* the exchange of reasons in a civil dialogue. The sovereignty of public reason also holds out the promise of transcending the skewed power dynamics of interest-group pluralism, especially in situations of deep inequality.[28] More ambitiously, some theorists have argued that the realization of a deliberative politics raises a radical challenge to entrenched inequalities constituted by the rules of contract and property: there can be no deliberation worthy of its name without manifest political equality in the public sphere which leads to a bold political project of redistribution and the guarantee of social rights.[29]

Yet, a deliberative approach could also restrict the content and manner of speech. It is thus both empowering *and* constraining as a democratic ideology. As participants in deliberation, unions are to give due weight to the perspectives of others, including the interests of capital, and to respond constructively within that debate. For employers (and their organizations), a deliberative frame leads to accountability as key social actors, demanding 'public reasons' for their actions and avoidance of discriminatory treatment impinging on the rights of others.[30] In both instances this democratic perspective offers opportunities but more constraint than perhaps was contemplated previously under an economic-oriented model. Often, deliberative theorists emphasize the importance of citizens deliberating in politics for the sake of the common good of a political community by exchanging reasons that differently situated citizens could reasonably accept in a process of dialogue. In republican thought, the contours and constituents of the common good are to be determined through democratic decision.[31] Obviously, claims based on the 'common good' as a source of democratic constraint should attract careful scrutiny in the realm of real (rather than ideal) political institutions. Where constitutional structures effectively privilege the access of capital to governmental processes, there is a danger that the 'common good' can provide a cover for repressive political projects that are deeply antithetical to workers' interests. The current landscape of workers' political voice in the UK and the US indicates that such concerns are not fanciful.[32]

The influence of deliberative democratic theory on our understanding of the respective role of labour market actors, although profound, is also not the only justificatory game in town. In this volume, Bogg and Estlund draw on Philip Pettit's elaboration of a

fundamental precepts that he espouses so as to ensure equal access to deliberative fora and their utilization, despite systematic power imbalances, such as that explored by Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) and Iris Marion Young, *Inclusion and Democracy* (OUP, 2000).

[28] Gutmann and Thompson 50 (n 27).

[29] Joshua Cohen, 'Procedure and Substance in Deliberative Democracy' in James Bohman and William Rehg (eds), *Deliberative Democracy* (MIT, 1997) 407.

[30] See Hayes, this volume, for the ways in which employers but also trade unions are held accountable for the content of collective agreements—and the latter even for the methods by which they engage with their membership before the agreement is reached; also see Mantouvalou, this volume, on how the views taken by the European Court of Human Rights relating to democracy can constrain trade union conduct.

[31] For the classic work in this vein, see Michael Sandel, *Democracy's Discontent* (Harvard, 1996).

[32] See the chapters by Ewing and Logan in this volume.

Preview - Copyrighted Material http://www.pbookshop.com

'republican' theory of justice, which offers up a vision of 'freedom of non-domination',[33] which has tremendous resonance in the sphere of the labour market, where the essence of the relationship between employer and employee has been recognized as one of subordination and thus the demeaning vulnerability of the employee to arbitrary treatment by the employer.[34] This vision of freedom is not at odds, but rather complements a deliberative approach, insofar as it explicates the preconditions for life within a civic community of free citizens.[35] The 'ideal speech situation', posited by Habermas, entails, as a minimum, the establishment of a framework of basic rights and liberties upon the basis of which persons are enabled to exchange their views freely. These private rights rely on public government for their existence, but also give legitimacy to that government. The two are described as co-original.[36]

Personal freedom, not only from external constraint, but to take action (such as contestation against powerful agents) is also a feature of Amartya Sen's theoretical framework based on recognition of human capabilities. The notion of 'development as freedom'[37] may be thought, at first glance, to have little relevance to Western industrialized countries, such as those which were the target of the 'Voices at Work' study, but others have realized that his work has the potential to offer significant insight to the normative grounding of law (and indeed labour laws) in all states.[38]

So, deliberative, republican, and capabilities theory seems to steer the normative foundations of voice at work more closely to a basis of human rights protections, though the content and form of particular rights is likely to be sensitive to these differences in normative basis. Of these, freedom of speech, freedom of association, a right to privacy, and even the right to property have particular pertinence to voice. Freedom of speech (or expression) is perhaps the most obvious basis of any claim by workers to speak out, not only in their workplace to their employer (who determines the terms and conditions of their employment), but in a wider political sphere to their government (which regulates the employment relationship, other facets of their social and civic life, and the proprietary, contractual, and corporate rules that determine the scope of capital freedom).[39] Freedom of association has offered workers the freedom to combine in protest (thereby complementing individual freedom of speech by creating spaces for collective contestation) but also to join organizations in their collective interest, such as trade unions, and to engage in collective activity (such as industrial action) whether

[33] Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (CUP, 2012); see also by the same author *Republicanism: A Theory of Freedom and Government* (OUP, 1997). See discussion by Bogg and Estlund, this volume.

[34] Otto Kahn Freund, *Labour and the Law*, 2nd edn (Stevens and Sons, 1977) 7.

[35] For further elaboration, see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) ch. 4.

[36] Habermas 104 (n 27). For further analysis of this relationship, see Joshua Cohen, 'Reflections on Habermas on Democracy' 12 Ratio Juris (1999) 385 at 391 ff.

[37] Amartya Sen, *Development as Freedom* (OUP, 1999).

[38] See already under the auspices of the 'Voices at Work' project, Simon Deakin and Aristea Koukiadaki, 'Capability Theory, Employee Voice and Corporate Restructuring: Evidence from UK Case Studies' (2012) 33(3) CLLPJ 427. See also Novitz, this volume.

[39] E.g. regarding public employee entitlements in the US, Toni M. Massaro, 'Significant Silences: Freedom of Speech in the Public Sector Workplace' (1978–88) 61 Southern California Law Review 1; Helen Norton, 'Constraining Public Employee Speech (2009) 59 Duke Law Journal 1.

Preview - Copyrighted Material
http://www.pbookshop.com

within or outside those structures.[40] Appreciation of the significance of social context for effective exercise of freedom of association has led to recognition of those groups as independent bearers of collective rights with their own distinct interests requiring rights-based protection. A right to privacy allows scope to restrict employer access to workers' communications with each other, giving space for speech and association.[41] The right to property has the capacity to shut down voice where claimed by employers, seeking exclusive control over the spaces that they own or protection of their economic freedoms; but these claims can be juxtaposed with arguments that workers also possess 'property' in their wage and benefit entitlements, perhaps even in the very jobs themselves (or at least what they have invested in them through their labour), the dimensions of which can then be deliberated in the courts.[42]

These rights have different permutations—scope, limitations, and significance—in the different jurisdictions under review in our project. In the Australian system, where legislation and statutory procedures offer more wide-ranging protection of workers' interests than that in Canada, the UK, and the US, rights discourse seems something of an irrelevance.[43] Others have more forcibly argued that there are dangers for workers and their organizations in pursuit of rights-based claims. Kevin Kolben offers a picture of reversion to individualistic agendas and capture by elite NGOs, in which decisions are put to courts where judges presiding have little or no sympathy for the workers' experience rather than legislatures with a democratic mandate.[44] Guy Mundlak, in a sensitive discussion of a dispute over usage of information technology, highlights that collective bargaining offered both employers and workers a more nuanced outcome to a dispute, which could be beneficial to both sides, whereas the litigation allowed those external to the workplace (NGOs, judges, politicians) problematic forms of control.[45] Bogg and Ewing have defended a normative preference for ordinary democratic channels for vindicating workers' rights where those channels are not blocked to political influence by organized labour, but they have also pointed to the vital residual role for constitutional litigation where democratic politics has failed workers.[46] The desirability of these trends may be fiercely disputed, but what we do observe is that the extension of a human rights discourse as a normative reference point has, in many countries, substantially shifted the terms of debates over worker voice, particularly those relating to identity, institutions, and locations of voice.

[40] For a recent exploration of the dimensions of 'freedom of association' as a universal entitlement, see Alan Bogg and Keith Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 CLLPJ 379; also John Hendy and Keith Ewing, 'The Dramatic Implications of Demir and Baykara' (2010) 39 ILJ 2.

[41] See Novitz, this volume.

[42] Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate Publishing, 2007); and Tonia Novitz, 'Labour Rights and Property Rights: Implications for (and beyond) redundancy payments and pensions?' (2012) 41(2) ILJ 136.

[43] See Colin Fenwick, 'Workers' Human Rights in Australia' in Colin Fenwick and Tonia Novitz, *Human Rights at Work: Perspectives on Law and Regulation* (Hart, 2010).

[44] Kevin Kolben, 'Labour Rights as Human Rights?' (2009–10) 50 Virginia Journal of International Law 449; a perspective akin to that of Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart, 2010).

[45] Guy Mundlak, 'Human Rights and Labour Rights: Why the Two Tracks Don't Meet' (2012–13) 34 CLLPJ 217.

[46] Bogg and Ewing (n 40).

Preview - Copyrighted Material
http://www.pbookshop.com

Identities of Voice

Trade union membership oriented towards collective bargaining has been traditionally identified with the white working class male breadwinner.[47] In her contribution to our volume, Lydia Hayes points to the ways in which UK courts can be seen, in the implementation of equal pay law, to bolster this assumption, which may in various respects be flawed;[48] while Rae Cooper investigates an Australian attempt to institute a 'low pay bargaining mechanism' which could facilitate more effective representation of predominantly female care workers through trade union engagement in multi-level bargaining, but that has not yet been achieved. Janice Fine (in the context of migrant workers) and Paul Roth (in relation to indigenous work) also point to historic failings of trade unions in our target countries in embracing a broader membership and representing them effectively. They further identify significant instances of outreach, which are motivated by a variety of factors from economic self-interest to more altruistic engagement reflected in a broader concern for social justice objectives.[49] Anne C.L. Davies highlights the significant legal obstacles to achievement of representation of a wide variety of marginalized 'non-standard' workers. She also demonstrates very effectively how workers' identities can be legally constructed in important ways, and how legal norms can even be constituted of fractured solidarities within worker constituencies. In turn, this creates the hope that appropriately designed legal norms might be used to support worker solidarity across difference. However, the foundational question remains why we should we care about the identities of voice. The answer would seem to lie in the views taken of various alternative normative justifications for enabling voice at work.

If we approach voice at work in terms of an employer's economic rationale, drawing on the conversion of Hirschman's theory into Human Resource Management (HRM) as a discipline,[50] then voice is merely a device to ensure profitability. We have argued that this has two dimensions, namely, what we have described as 'HRM1': voice as a means to keep workers from quitting and 'HRM2': voice as a means to perfect the employer's organization by means of incorporation of useful feedback.[51]

The HRM1 rationale offers a very limited basis for inclusivity of voice in the workplace, since only the most valued workers need be given voice; if their departure will not affect the employer, then they do not need a voice. There will be times of low unemployment or where there is a skills shortage in a particular industry, which, logically may lead to a voice strategy aimed at retention, but in low-skilled work, in times of recession, we might expect voice to be minimal. In one recent study, it emerged

[47] For comment, see Peter Ackers and Adrian Wilkinson, 'British Industrial Relations Paradigm: A Critical Outline, History and Prognosis' (2005) 47 Journal of Industrial Relations (JIR) 443 at 447.

[48] In *Coventry City Council v Nicholls* [2009] EWCA Civ 1449 at [45] the Court of Appeal observed 'a tendency for men to be more likely to resort to industrial action than women', without empirical support for this gendered stereotype.

[49] See Fine and Roth, both in this volume.

[50] See, for example, Rosemary Blatt et al., 'Employee Voice, Human Resource Practices and Quit Rates: Evidence from the Telecommunications Industry' (2002) 55 Industrial and Labour Relations Review 573; and Adrian Wilkinson and Charles Fay, 'New Times for Employee Voice?' (2011) 50(1) Human Resource Management (HRM) 65.

[51] Bogg and Novitz 346 (n 14).

Preview - Copyrighted Material http://www.pbookshop.com

unsurprisingly that those workers who viewed themselves as more employable tended to engage more with organizational voice mechanisms when their organization was going through 'turbulent times', but the authors do not seem to consider the possibility that they (rather than other workers) were encouraged to do so.[52]

Even the HRM2 strategy does not offer much in terms of widening the identity of worker voice, for it depends on the extent to which the identity of particular workers indicates to management that they can provide valuable input. The current emphasis on 'high performance management' and alternative voice mechanisms such as 'quality circles' seems driven by allowing individual highly skilled employees forms of discretion over how they perform tasks, leading to greater personal motivation and responsibility; but not to broader based worker involvement through collective bargaining (which would encompass a broader base of activism and engagement).[53] HRM studies currently propose that investment in training, appraisal, reward, and team-building could be a viable strategy for preventing exit, seeking to reject the desirability of trade union membership or activity.[54]

From the simple point of view of material gain and economic instrumentalism, the constitution of its membership should not matter to the trade union or its members. Simply, the aim is to get the greatest gain for its membership as a whole and the broader that membership the more collective might it can exert, hence the attraction of a closed shop and single channel representation which means that wages (and other terms and conditions) cannot be undercut. Ideally, everyone in an occupation (whether in a given enterprise or indeed industry) should be a trade union member. Societal prejudices will be carried into trade unions as they are into any other manifestation of civil society,[55] but so too the contemporary constitution of the labour market will force changes in governance. The rapid feminization of the labour market (including the fact that the majority of women are employed in the public sector and that the public sector is where trade unionism is concentrated) does now lead us to a situation where increasingly the majority of trade union members are women, although trade union governance may be struggling to catch up with this new reality.[56] Economic imperatives in a time of trade union decline may also be significant as Roth observes, noting that:

> As union density declines, it is in the interest of unions to make themselves more relevant to more workers, particularly those belonging to minority groups who may have

[52] Erik Berntson, Katharina Naswall, and Magnus Sverke, 'The Moderating Role of Employability in the Association between Job Insecurity and Exit, Voice, Loyalty and Neglect' (2010) 31(2) Economic and Industrial Democracy 215.

[53] Stephen J. Wood and Toby D. Wall, 'Work Enrichment and Employee Voice in Human Resource Management-Performance Studies' (2007) 18 International Journal of Human Resource Management (IJHRM) 1335 at 1340.

[54] Steven Si and Yi Li, 'Human Resource Management Practices on Exit, Voice, Loyalty, and Neglect: Organizational commitment as a mediator' (2012) 23(8) IJHRM 1705; also Kamel Mellahi, Pawan S. Budhwar and Baibing Li, 'A Study of the Relationship between Exit, Voice, Loyalty and Neglect and Commitment in India' (2010) Human Relations 349.

[55] Gordon W. Allport, *The Nature of Prejudice* (Addison-Wesley Publishing Company, 1979); Rupert Brown, *Prejudice: its Social Psychology*, 2nd edn (Blackwell, 2010).

[56] Catherine Le Capitaine, Gregor Murray, and Christian Lévesque, 'Empowerment and Union Workplace Delegates: A gendered analysis' (2013) 44(4) IRJ 389 at 391; Sue Ledwith, 'Gender Politics in Trade Unions' (2012) 18(2) Transfer: European Review of Labour and Research 185.

Preview - Copyrighted Material
http://www.pbookshop.com

been ignored in the past. In North America, the recent interest of unions in organising workers on tribal lands has followed hot on the trail of the lucrative Indian gaming industry.[57]

Yet, he also recognizes that there is something more afoot here, namely that union engagement with its minority members is consistent with their role as 'social progressive organisations'.[58] There is the issue not only of efficacy of action, but of social legitimacy which comes into play here.

Trade union representation of the widest possible constituency is an objective which fits fairly neatly with notions of universal democratic citizenship, and this political ideal permeates the deliberative, republican, and capabilities approaches that we distinguished earlier. Yet it remains clear that it is an objective still to be fully realized.

If our aim is to widen the base of trade union membership, then we need to address species of exclusion in the workplace which go beyond those addressed here, for example in respect of lesbian, gay, bisexual, and transgender workers.[59] Further, we may need to revisit modes of regulation which hinder access to, and incentive to join, trade unions. Davies has described the barriers which operate at a legislative level in terms of allowing 'non-standard' workers protection from trade union discrimination (as neither 'employee' nor 'worker') and also legislative provisions which regard the part-time worker as only 'half a person' when meeting thresholds for statutory information and consultation or recognition thresholds.[60] It is difficult to join a trade union if you will receive no protection from employer retaliation when you do so and you are not given full status as a legal person requiring voice.

Further, Harcourt and Lam have found data which suggest that majority union representation, institutionalized in the US (which has spill over influence in Canada, Australia, and UK systems of statutory recognition), reduces capacity for trade union membership.[61] Non-exclusive representation by minority unions might achieve an increase in worker representation by trade unions, but there might also be a trade-off with effective bargaining. How this trade-off is to be made is a question to which we will return in respect of institutions of voice. Perhaps it is also true that in 'regulatory' systems of collective bargaining operating at sectoral and national levels, where collective bargaining is conceptualized as a form of governance generating public binding norms, the dilemmas posed by majoritarianism can be transcended somewhat, just as they are in a parliamentary democracy which adopts legislation led by the will of the majority.[62]

The other imperative is non-discrimination in terms of access to freedom of speech and freedom of association. This is familiar to UK lawyers, by virtue of the entitlement to non-discrimination under Article 14 of the European Convention on Human Rights

[57] Roth, this volume at 96. [58] Roth, this volume at 97.

[59] Myrtle P. Bell, Mustafa F. Özbilgin, T. Alexandra Beauregard, and Olca Sürgevil, 'Voice, Silence, and Diversity in 21st Century Organizations: Strategies for inclusion of gay, lesbian, bisexual, and transgender employees' (2011) 50(1) HRM 131.

[60] Davies, this volume.

[61] Mark Harcourt and Helen Lam, 'How Much would US Union Membership Increase under a Policy of Non-exclusive Representation?' (2010) 32(1) Employee Relations 89.

[62] See Keith Ewing, 'The Function of Trade Unions' (2005) 34 ILJ 1.

Preview - Copyrighted Material http://www.pbookshop.com

1950 (ECHR), which is linked to the exercise of other human rights, such as those set out in Article 10 (freedom of expression) and Article 11 (freedom of association, including the right to form and join trade unions). This may be regarded as an added push to ensure that trade unions operate in as inclusive a fashion as possible for ethical as well as pragmatic reasons. Yet, the application of human rights law also has a restrictive element, having the capacity to impede the free choice of trade unions and their members as to whom they may wish to associate with; as well as augmenting the associational rights of employers and in particular their claim to *negative* freedom of association. On this basis, despite their desire for inclusiveness, trade unions cannot coerce workers to join; this is to be a voluntary freedom exercised by the worker.[63]

Further, it has been established before the European Court of Human Rights that exclusion from a trade union or dismissal from a job on grounds of political beliefs constitutes, prima facie, a breach of Article 11 ECHR, but is capable of justification where there is no abuse of a dominant position.[64] Such a finding is inherently controversial, bearing in mind the potential impact of such responsibilities on trade union autonomy and associative freedoms. Indeed, it could be argued that placing this additional burden on already fragile and vulnerable trade union structures undermines their capability to voice concerns about certain intolerant beliefs.[65] Hayes' chapter also exemplifies how equality norms, enforced bluntly by judicial institutions insensitive to the delicate ecology of workplace communities, might have the effect of stifling or even extinguishing collective voice. These regulatory effects then entrench the historic silencing of disempowered groups in the labour market.

An alternative argument is that the Court's position merely recognized the significance of the civic role played by unions, such that as social actors they have additional responsibilities to act in ways that are seen to be fair and appropriate according to general standards of 'public reason'.[66] This argument is likely to be especially powerful where trade unions operate as public regulatory actors, for example where the formulation of collectively agreed norms is akin to a public legislative act.[67] While there are relatively few examples of this 'regulatory' conception of collective bargaining in the Voices' jurisdictions, the Australian experiment with the low paid bargaining stream as evaluated in Rae Cooper's chapter might be regarded as an exemplar in this regard.

Preview - Copyrighted Material http://www.bookshop.com

[63] This entitlement of the individual employee stated by the European Court of Human Rights in App Nos 7601/76, 7806/77 *Young, James and Webster v UK*, Judgment of 13 August 1981 has been recognized in other human rights systems. See, for example, *Baena Ricardo (270 Workers v Panama)*, Judgment of the Inter-American Court of Human Rights, Judgment of 2 February 2001, paras 162–165.

[64] See App No 110002/05 *ASLEF v UK*, Judgment of 27 February 2007, discussed in this volume by Mantouvalou. See re dismissal App No 47335/06 *Redfearn v UK*, Judgment of 6 November 2012, considered in Hugh Collins and Virginia Mantouvalou, '*Redfearn v UK*: Political Association and Dismissal' (2013) 76(5) Modern Law Review 909.

[65] Note re UK implementation of the same which placed considerable restrictions on trade union autonomy, Keith D. Ewing, 'Employment Act 2008: Implementing the *ASLEF* decision—A victory for the BNP?' (2009) 38 ILJ 50.

[66] See Mantouvalou this volume.

[67] For discussion, see Alan Bogg, 'The Death of Statutory Union Recognition in the United Kingdom' (2012) 54 JIR 409.

Institutions of Voice

A reconsideration of 'voice' from a normative perspective also challenges entrenched assumptions regarding appropriate institutional bases for workplace voice. The convention is to recognize, for very good reasons, that trade unions are the most useful channel for voice, as they offer through collective bargaining an effective means by which to realize workers' aspirations (in relation to terms and conditions of employment)[68] and employers' maximization of profitability (through enhancement of loyalty and minimizing exit).[69] Hence we find that International Labour Organisation (ILO) Convention No 87 does not only address freedom of association but the ability to organize and Article 11 of the European Convention on Human Rights mentions explicitly 'the right to form and join trade unions', as indeed does Article 22 of the International Covenant on Civil and Political Rights 1966. Trade union organization is the 'gold standard' of freedom of association in terms of its capacity to redress imbalances of power which lead to poor economic outputs for workers and, from an employer's perspective, low morale leading to low productivity.

As trade union membership declines and employers become more resistant to collective bargaining, an emergent institution for voice (in Australasia) has been the legislative requirement of 'good faith bargaining'. This could be seen as a mechanism merely to enhance effective collective bargaining on economic grounds, but also can be justified in broader democratic terms, insofar as it indicates that some of the precepts of deliberative engagement be followed, namely that the parties deal with each other with an open and fair mind in the mutual search for reconciliation of opposing perspectives.[70] This potential is explored by Forsyth and Slinn comparing Australia's new experimentation with such a requirement under the Fair Work Act 2009 with a longer-standing Canadian experience, followed by a more devastating critique (from Anderson and Nuttall) of what an obligation cannot repair in a New Zealand setting. This can be compared again to the negligible use made of 'unfair practices' in a UK statutory recognition context.[71]

Thus far, whether by accident or design, the measures taken in our target countries do not appear wholly successful, but the potential to return to industrial relations legislation without such provision is far from enticing. This touches the nerve of a long-standing debate in the UK context of collective laissez-faire, whether the law (however well-intentioned or well-designed) is necessarily a secondary force in labour relations.[72] Some elements of this viewpoint recur in a modern idiom in discourse on reflexive law and governance.[73] In a retreat from this strongly sceptical thesis, all four authors look towards

[68] For which see Sidney Webb and Beatrice Webb, *A History of Trade Unionism* (Longmans, 1897), as discussed in Richard Hyman, *The Political Economy of Industrial Relations* (1989) at 63; see also Bogg and Novitz 327–30 (n 14).

[69] See n 22. [70] See Bogg 257–8 (n 35).

[71] Alan Bogg, 'The Mouse that Never Roared: Unfair Practices and Union Recognition' (2009) 38(4) ILJ 390.

[72] Otto Kahn-Freund, 'Legal Framework' in Allan Flanders and Hugh Clegg, *The System of Industrial Relations in Great Britain* (Basil Blackwell, 1954) 44; see also Otto Kahn-Freund, 'Labour Law' in Otto Kahn-Freund, *Selected Writings* (Stevens, 1978) 8.

[73] For discussion, see Bogg and Novitz 337 (n 14).

Preview - Copyrighted Material http://www.pbookshop.com

the improvement, rather than the abandonment, of such provisions. And indeed there are examples in this collection of certain legal developments having tangible voice-enhancing effects, such as Brodie's analysis and evaluation of recent common law developments in some of our target jurisdictions. Nevertheless, the utility of, say, highly developed legal good faith norms, can only be evaluated in the total regulatory context. Where capital freedoms are accorded wide latitude in the web of contract, property, tort, and corporate legal rules, piecemeal statutory interventions, however well-designed and enforced, are unlikely to advance worker voice in any significant way. It is therefore important to contextualize the trials and tribulations of core labour law techniques such as 'good faith' bargaining.

Mantouvalou considers how interventions by the European Court of Human Rights (ECtHR), which she contends betray an appreciation of trade unions' democratic role, have the potential to shape justifications for voice at work. What emerges is an acute sensitivity of the Court to the significance of pluralism, namely the expression of different political views within a healthy democratic society, entailing recognition of the key role played by trade unions in this regard. Arguably, this appreciation of the context in which Article 11 is to be applied has thereby led the Court to state explicitly that the guarantee of freedom of association under Article 11 encompasses both a right to collective bargaining (including the right to enforce a public sector collective agreement)[74] and a right to strike.[75] However, the ECtHR's jurisprudence, again following a pluralist doctrine, seeks to ensure that neither employers nor trade unions abuse a dominant position, in their role as key civic actors.[76] In this way, its jurisprudence also limits trade union autonomy in ways not previously contemplated. Her study illustrates the ways in which institutional protection of human rights (and their democratic framing) can mould afresh the entitlements and obligations of trade unions. While these insights are especially pertinent for UK labour lawyers, the wider relevance of Mantouvalou's analysis should not be underplayed. The ECtHR's approach gains normative traction from its engagement with a wide range of international sources, not least the instruments and constitution of the International Labour Organisation. In this respect, the dynamics of adjudication in relation to freedom of association provides interesting parallels in other jurisdictions where labour rights are highly constitutionalized, such as Canada.[77]

Yet, what do we do where trade union activity is not an option for workers under current statutory frameworks? One example is the UK system, where there may be insufficient numbers of workers (or trade union support amongst those workers) to achieve a very high statutory threshold.[78] Given the experiential deficit amongst many workers and employers who may have had no experience of the representational activities of trade unions, the mustering of positive support as a prelude to trade union

[74] App No 34503/97, *Demir and Baykara v Turkey*, Grand Chamber Judgment of 12 November 2008.

[75] App No 68959/01, *Enerji Yapi-Yol Sen v Turkey*, Judgment of 21 April 2009.

[76] See Virginia Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member' in Fenwick and Novitz (n 43) and Mantouvalou in this volume in discussion of App No 11002/05 *ASLEF v UK*, Judgment of 27 February 2007.

[77] See Bogg and Ewing (n 40).

[78] See the UK Trade Union and Labour Relations (Consolidation) Act 1992, Sch. A1, as discussed in Bogg (n 35) and the critique of the legislation offered in Tonia Novitz and Paul Skidmore, *Fairness at Work: A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights* (Hart, 2001).

Preview - Copyrighted Material
http://www.bookshop.com

representation is likely to be very difficult.[79] These majoritarian methods have long been regarded as being in breach of ILO principles, which clearly advocate that where a 50 per cent threshold is not met, then more than one union should be recognized for bargaining purposes in respect of their members, rather than denying representation rights to all.[80] Another is the now notorious exclusion of agricultural workers from Canada's 'Wagner' model.[81] David Doorey has, in this respect, offered an appeal for 'graduated freedom of association', which envisages legislative structures allowing scope for workers to combine in employee associations (of probably less influence than a trade union might have), where the option to form a union remains (for the time being) unavailable. Perhaps a more attractive option for those who retain a vision of trade union engagement as the preferred route to voice is the 'bargaining agent' system utilized under New Zealand legislation, which would offer at least trade union representation, although arguably in a weak and attenuated form requiring coalitions between unions to be at all effective.[82]

On an entirely pragmatic level, in whatever shape, the edifice of trade unionism cannot stand alone. As Matt Finkin has observed, without basic general protections for an individual from unjustified dismissal (or we might add discrimination) the ability to join a trade union, let alone participate in collective bargaining mechanisms or take industrial action, becomes difficult to realize in practice.[83] Indeed, this is implicit in Davies' analysis of non-standard employment identified earlier.[84] For trade union action and even consultative engagement within workers' associations rest on a fundamental premise, which Bogg and Estlund in this volume identify as a 'right to contest'. This is a richer and more meaningful concept than the bare right to do collectively what one can do as an individual, as some commentators have so narrowly defined freedom of association (as a bare liberty).[85] It begs the critical normative question of which things, precisely, one ought to be protected in doing as an individual. This formal conception of freedom of association, then, is necessarily parasitic upon a deeper normative account of fundamental labour rights.

Pre-view - Copyrighted Material http://www.pbookshop.com

[79] Bogg ch. 6 (n 35).

[80] ILO, *Digest of Decisions of the Governing Body Committee on Freedom of Association*, 5th edn (ILO, 2006) para. 977; see Tonia Novitz, 'Freedom of Association and "Fairness at Work"—An Assessment of the Impact and Relevance of ILO Convention No. 87 on its Fiftieth Anniversary' (1998) 27 ILJ 169 at 181; and Ruth Dukes, 'The Statutory Recognition Procedure: No Bias in Favour of Recognition?' (2008) 37 ILJ 236 at 142. For criticism of the Wagner model on this basis, see Mark Harcourt and Helen Lam, 'Non-Majority Union Representation Conforms to ILO Freedom of Association Principles and (Potentially) Promotes Inter-Union Collaboration: New Zealand Lessons from Canada' (2011) 34 Dalhousie Law Journal 115; also Roy J. Adams, 'Fraser v Ontario and International Human Rights: A Comment' (2009) 14 Canadian Labour and Employment Law Journal 377.

[81] See the Agricultural Employees Protection Act 2002 and *Ontario (AG) v Fraser* [2011] 2 SCR 3 as discussed by Bogg and Ewing (n 40).

[82] See Harcourt and Lam (n 80); but for a more critical approach, see Anderson and Nuttall, this volume.

[83] Matthew Finkin, 'Employee Self-Representation and the Law in the United States' (2013) Osgoode Hall Law Journal (forthcoming).

[84] See Davies, this volume.

[85] Sheldon Leader, *Freedom of Association: A Study in Labour Law and Political Theory* (Yale University Press, 1992) 23 and 200; an approach applied by Brian Langille, 'The Freedom of Association Mess: How we got into it and how we can get out of it' (2009) 54 McGill Law Journal 177. For a critique, see Tonia Novitz, 'Workers' Freedom of Association' in James A. Gross and Lance Compa, *Human Rights in Labor and Employment Relations: International and Domestic Perspectives* (LERA, 2009) 126–8.

That formalistic treatment of freedom of association simply cannot work when analysed from a 'democratic' perspective, which focuses our attention on the role of trade unions as responsible civic actors in their own right. Coordinated collective action, by virtue of its scale, has much greater effect than that undertaken on a solo basis; so we have to appeal to a broader justificatory basis for such action. Similarly, we have to interrogate *why* it is vital to allow workers to act collectively, or, from a freedom of speech perspective, to allow even a single worker (as an individual) to voice concerns within the workplace. If we separate out too far our human rights tradition from the societal values and norms that they are intended to encapsulate, we stray into an abstract formalism that lacks any kind of sense for the actual people involved. It is for this reason that we are unpersuaded by Hugh Collins' attempt to derive a limited 'right to form and join trade unions' from a Rawlsian position;[86] but more by the notion offered by Sen that it is for societies to seek to deliberate on the values to which they aspire and thereby the content of the freedoms whose exercise becomes the foundation for communal understandings of human capabilities.[87] In so doing, we expect that attention will be paid to the 'actual living that people manage to achieve (or going beyond that, on the *freedom* to achieve actual livings that one can have reason to value)'.[88] Hence, Bogg and Estlund applaud the contextual virtue of Petti's 'eyeball test' approach to the derivation of fundamental rights which attends to the corrosive realities of power and subordination on weaker parties in civil society. An abstracted, formalistic approach to freedom of association cannot assist us in this respect, but more topical examples can, so it is not so hard to place the value of a 'right to contestation' in the frame of the non-unionized low paid workers, whom Anna Pollert describes as acting spontaneously to address their terms and conditions of employment; whether one speaks or a number join voices, they would seek that entitlement.[89]

It then becomes important, in terms of voice, to think about the entitlements to voice of the individual worker. In this respect, Breen Creighton offers an explanation of 'workplace rights', which go beyond the scope of trade union protections. While questions have been raised as to the extent to which such statutory entitlements (arguably prioritizing the individual over the collective) detract from the primary role of trade unions within the Australian labour relations system,[90] he indicates their tremendous potential for the enablement of worker voice. While this part of the Fair Work Act 2009 is very much concerned with the rights of the individual rather than those of the collectivity it does provide a measure of indirect protection for collectivities by protecting the rights of individuals who join or participate in their activities.[91] As such, it offers a new and promising institution of voice.

Preview - Copyrighted Material
http://www.pbookshop.com

[86] Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP, 2011).

[87] Sen 158 (n 37). [88] Sen 73 (n 37). For this is Sen's critique of Rawls' work.

[89] Anna Pollert, 'Spheres of Collectivism: Group Action and Perspectives on Trade Unions among the Low-Paid Unorganized with Problems at Work' (2010) 34(1) Capital and Class 115.

[90] See Victoria Lambropoulos, 'The Evolution of Freedom of Association in Australia's Federal Industrial Relations Law: From trade union security to workplace rights' (2013) *Labour History* available at <http://dx.doi.org/10.1080/0023656X.2013.804277> accessed 27 September 2013.

[91] Creighton this volume.

Tess Hardy's analysis of what can be offered by a labour inspectorate which goes beyond reliance on trade union enforcement is of crucial importance given the significant groups of vulnerable workers who are non-unionized.[92] The difficulty, however, is that the onus placed on the individual worker by the Fair Work Ombudsman to raise the issue with an employer, then lodge the complaint and participate actively in proceedings remains a barrier to access, as does the institutional emphasis on timely disposal of disputes. What she exposes is a necessary supplement to trade union intervention, but not one which offers a straightforward alternative, let alone replacement.

Locations of Voice

Drawing on the analysis we have presented here, there are obviously a variety of potential locations for worker voice, which can be challenged when we start to think about voice less in economic and more in normative terms. The essays in this book, for example, challenge the containment of voice within the workplace and consider its more political aspects. In many of the *Voices* countries, political voice through democratic citizenship was traditionally regarded as both the precondition of workplace voice and the source of its normative justification. As Keith Ewing once observed:

> The social democratic agenda for labour law is partly to untangle the contradiction identified by Hugh Collins, namely that while the principles of self-determination and democracy govern the relations between the individual and the State, 'these cherished values . . . appear to be eclipsed as soon as we enter the workplace', where 'we find a system of autocratic power exercised by the management over the work-force.'[93]

Hence models of political democracy often provided a normative inspiration for models of democracy translated into the particular context of economic governance.[94] That said, it was nevertheless one of the dogmas of British labour law that British trade unions achieved industrial empowerment through autonomous action before they achieved political enfranchisement, which accounts for the distinctive voluntarist orientation amongst organized labour in the UK.[95] This is a dangerous dogma insofar as it leads us to take the matter of workers' political voice too lightly.

Keith Ewing's chapter challenges this dogma head on, arguing powerfully that political voice is an essential precondition of industrial voice, even in the UK's voluntarist landscape, for two main reasons. First, political voice gives worker-citizens an opportunity to participate in shaping the intricate web of legal rules that structure and constitute the contexts within which workers undertake paid labour. This is especially important where those rules appear (superficially at least) to be at some distance from the narrow issue of terms and conditions of employment governed by collective agreements, such as the rules governing property, competition law, corporate governance, contract, restitution, and torts. Yet it is precisely those legal rules that are often most critical in determining the scope of entrepreneurial freedoms and the organizational

[92] Such as the care workers identified by Cooper in this volume.
[93] Keith Ewing, 'Democratic Socialism and Labour Law' (1995) 24 ILJ 103, 112.
[94] Mantouvalou, this volume. [95] Bogg, 4 (n 35).

Preview - Copyrighted Material
http://www.pbookshop.com

capacities of workers and trade unions. If collective bargaining takes place within a legal framework that is already dramatically skewed in favour of capital, just outcomes are unlikely to be embodied in autonomous collective agreements. Secondly, political voice enables worker-citizens to secure the enactment and influence the shape of labour legislation designed to neutralize the common law and provide effective auxiliary support to trade unions' collective bargaining activities. It also enables worker-citizens to secure legislation guaranteeing a 'floor of rights' and a social wage as a foundation of decent and civilizing work regardless of trade union membership and collective bargaining coverage.

One of the most striking developments in recent years has been the growth of governmental strategies, led by right-wing neo-liberal political parties, to mute the political voice of worker-citizens as expressed through trade unions. These political attacks have been most vehement in the UK and US, though Ewing's chapter also points to parallel developments in New South Wales which may also indicate a nascent political attack in the Australian context too, that seems only likely to be strengthened by the recent change of government at federal level. These strategies have sought to limit the abilities of trade unions (and, thus, worker-citizens) to participate in the democratic process. The precise form that such strategies take depends upon the particular regulatory and constitutional context. In the UK, for example, recent political attention has been directed at limiting the scope for union expenditure on campaigning activities during the electoral process. In the US, by contrast, unions (like corporations) enjoy a constitutional right to make unlimited expenditures on political campaigning. For this reason, and as set out in John Logan's chapter, the battleground in the US has therefore focused upon attenuating the democratic nexus between individual trade union members and the trade union, by seeking legislation to prevent individual political contributions being raised through payroll deduction. While the union movement was able to repel the enactment of such legislation in California, Logan speculates that this is unlikely to be the end of the story for neoliberal proponents of 'pay check' legislation in the US.

Another facet of this muting of political voice has been the assault on the collective bargaining activities of public sector trade unions, an assault that has intensified in the wake of the economic crisis and the public discourse of austerity in respect of public expenditure. Though the character and pace of this assault has varied across the *Voices* countries, Bach and Gall identify some important general trends in public sector labour relations: 'a return to unilateralism and the erosion of employee voice; the repeal of collective bargaining arrangements; reduced scope of collective bargaining; and direct or indirect attacks on public services unionism'.[96] In this way, the neoliberal state appropriates the historic role of 'model employer' to the private sector by signalling the legitimacy of an anti-union ethos of employment relations.

Bach and Gall move beyond mere diagnosis to a series of constructive prescriptions, which focuses upon the need for mass civic mobilization around an alternative political vision of a more humane political economy. And therein lies the umbilical connection to Ewing's and Logan's chapters. For if the political voice of organized labour

[96] Bach and Gall, this volume at 331.

Preview - Copyrighted Material
http://www.pbookshop.com

is successfully choked off through campaign finance regulation and paycheck legislation, will this lead to an effective entrenchment of the neoliberal paradigm? The significance of this point cannot be over-estimated. It should be recalled that the doyen of neoliberalism, Hayek, was concerned with determining a 'constitution of liberty'.[97] Hayek understood that the entrenchment of a neoliberal order could not occur in an enduring way through industrial relations legislation alone. It could only be entrenched through constitutional and political reform, and it was this that was the main focus of theoretical and practical concern in his later work.[98] In our view, the *Voices* study, which emphasizes the normative preconditions for deliberative and other forms of democratic engagement, demonstrates that there has never been a more pressing need for labour lawyers to attend to the wider constitutional context of trade union activity, especially as expressed through political voice. It is our view that the silencing of trade unions' political voice may prove to be one of the most pressing industrial relations problems of our age.

As the opportunities for worker voice through collective bargaining or the political process come under increasing pressure, litigating the common law in the ordinary courts has emerged as a new sphere of worker voice. This has been an especially challenging development for labour lawyers given the traditional reputation of the common law (and its judges) as antithetical to workers' voice, being oriented instead wholly towards employers' economic objectives, without even any inkling of the ways in which voice could potentially serve those objectives. On that traditional view, the common law consecrates the subordination of the individual employee to the managerial prerogative; it also configures forms of collective action as civil wrongs in the law of tort. This was reflected in a normative commitment to the virtue of judicial abstention where the common law intersected with the employment context; managing the common law was, for labour lawyers, an exercise in damage limitation. It must be doubted whether this traditional view is sustainable, as workers (and trade unions) have increasingly turned to the common law as a way of augmenting worker voice.

Douglas Brodie's careful analysis of what the individual contract of employment offers to an employee in this regard is telling; for across all of our target jurisdictions, the protections which may be claimed remain weak. For Brodie, the strength of the common law, as manifested in good faith and fair dealing legal techniques, is in its promotion of 'due process', such as ensuring rationality in the exercise of contractual powers. Whatever the flaws of contemporary collective bargaining, the indications are that the common law is no more likely to assist the vulnerable (assuming of course, that the worker is covered by a contract of employment). In particular, Brodie is alive to the reluctance of the common law to scrutinize the substantive fairness of the contractual bargain. Even if judges were so inclined, we might also ask whether there are political and institutional concerns with common law judges adopting such an activist role in the regulation of employment contracts, a modern day version of the 'damage limitation' theory of common law adjudication. It is likewise important to scrutinize the ways in which contractual good faith cannot operate a straightforward functional equivalent

[97] Friedrich Hayek, *The Constitution of Liberty* (Routledge, 1960).
[98] Andrew Gamble, *Hayek: The Iron Cage of Liberty* (Polity, 1996) chs 4 and 6.

Preview - Copyrighted Material
http://www.pbookshop.com

to collective bargaining. Bogg and Estlund's paper identifies a right to contest employer decision-making as a fundamental labour right. Contestation is, by its very nature, a form of agonistic expression that may be conflictual in nature. Given the reach of contractual values of good faith, trust and confidence, and fidelity, the contractual paradigm is ill suited to realizing this contestatory vision. Brodie's heavy reliance on Allan Flanders' conceptualization of collective bargaining might lead to a loss of focus on this vital contestatory dimension, since Flanders' work places much less emphasis on collective conflict than other accounts of collective bargaining developed during that historical period.[99]

Mark Freedland and Nicola Kountouris offer for contemplation the possibilities offered by English public common law, namely scope for judicial review of administrative action, but while it seems that trade unions may not be denied standing as litigants,[100] there is some way to go before the judiciary can rid itself (in this context) of prejudices drawn from English private law. Ultimately, theirs is a sobering reflection on the dominance of a private law paradigm in the common law as it relates to the personal employment contract, a paradigm that is 'a firmly individualistic, libertarian, and underlyingly non-democratic judicial approach to employment relations',[101] captured in the illusionary fiction of formal symmetry between two equal contracting parties. It is this illusionary fiction that entrenches 'freedom of contract' as the guiding ideology of English private common law, which fortifies the traditional labour law view that the common law (and its prophets, the common law judges) should continue to be an object of suspicion for workers and organized labour.

If the appropriate attitude towards the common law, especially in its English guise, is one of suspicious scepticism or even hostility, there are nevertheless other ways in which courts might operate as a valuable forum for voice. We have already noted the importance of human rights, whether underpinned by a deliberative or a capabilities normative base, as a framework for developing arguments about worker voice. One element in the growing significance of human rights discourse is that the boundaries between national and international spheres are breaking down. Lance Compa's chapter outlines the pressure faced by US courts to admit the relevance of international jurisprudence, particularly but not exclusively that of the International Labour Organisation which has been enhanced in recent years. With this also comes the weight of human rights jurisprudence from the UN Covenants of 1966 and regional human rights institutions, such as the European Convention on Human Rights and the Protocol of San Salvador to the American Convention. Given the prominence of the 'integrated' approach to international human rights adjudication in international judicial forums such as the ECtHR,[102] these various instruments often interact synergistically to offer the potential for a coherent body of human rights norms at the international level. While national industrial relations systems remain embedded in their respective histories, with the

[99] Bogg 39–42 (n 35).
[100] *R (Unison) v NHS Shared Business Services* [2012] EWHC 624 per Eady J at [11].
[101] Freedland and Kountouris, this volume.
[102] See Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 Human Rights Law Review 529.

Preview - Copyrighted Material
http://www.pbookshop.com

degree of penetration modulated by constitutional differences and national legal traditions, these external normative influences have common and compelling themes.

Nevertheless, and as the continuing controversies in Canada in regarding the relevance of ILO norms to domestic constitutional adjudication on the meaning of freedom of association in the Charter attest,[103] the social impact of constitutionalized labour rights remains a delicate matter of controversy. In Tucker's brilliant analysis of constitutionalization projects in our inaugural CLLPJ symposium, he pointed to the ways in which international labour rights, for all their substantive 'thickness' in terms of content, are simultaneously diluted through 'softness' in respect of weak enforcement mechanisms. By contrast, 'capital's constitution' at every geographic level is both thicker and harder than that of labour. Like Bach and Gall, Tucker points to the important role of popular civic mobilization as a counterweight to the neoliberal political project. As Mantouvalou's chapter implies, human rights can play a valuable part in that process of civic mobilization.[104] This shatters any illusion we might have of pristine and timeless legal autonomy, even in relation to the English common law. For lying behind all legal forms are dynamics of economic power and social struggle played out daily in the workshops, call centres, and trading floors of real societies populated by real people.

Being Heard

Voice presupposes an audience, whether that is employers, politicians, courts and judges, government agencies, other workers, or wider civil society. It is therefore important that the intended audience hears workers' voices, and this might be captured in a metric of effective democratic agency. This effectiveness might be manifested in improved terms and conditions in the workplace, more appropriate mechanisms for workplace governance, influence over the legislative or judicial process, or the shaping of public opinion in civic spaces. The fourth and final section of the book explores the various ways in which legal norms might enable (or impede) the effective democratic agency of workers.

In this vein, and drawing upon sophisticated work in regulatory and 'new governance' theories, John Howe introduces a further rationale for voice, which is neither economic nor social in its orientation, but rather that voice itself enhances the regulatory efficacy of substantive norms. This leads him to emphasize the significance not only of regulatory activity that is norm-creating,[105] but also that which is norm-enforcing. This theoretical focus is strategically important given the shifting balance between different sources of labour standards in an era marked by the declining significance of collective bargaining as a norm-creating activity. Even where social-democratic governments have achieved political power in our *Voices* countries, protective interventions in the labour market are now more likely to consist of statutory rights for individual employees rather than auxiliary legislation for trade unions. Howe's chapter is valuable

[103] See Brian Langille and Benjamin Oliphant, 'From the Frying Pan to the Fire: Fraser and the Shift from International Law to International "Thought" in Charter Cases', available at <http://www.labourlawresearch.net/Portals/0/Langille.pdf> accessed 23 October 2013.

[104] Mantouvalou, this volume.

[105] Such as that highlighted by Ewing, this volume.

Preview - Copyrighted Material http://www.pbookshop.com

in exploring the ways in which enforcement regimes can open up (and indeed close down) new opportunities for worker voice in the realm of individual statutory rights, thereby placing further disintegrative pressure on the well-worn distinction between the 'individual' and 'collective' dimensions of worker voice. It also raises afresh some of the difficult questions generated by trade unions' encounters with courts and the judicial process, especially as explored in the chapter by Freedland and Kountouris.

Our argument, in this introductory chapter, is that democratic and human rights-based justifications for worker voice are permeating the sphere of debate over workplace voice; but we have sought to identify the various ways in which the content of democratic and human rights norms have been contested amongst those theorists who are broadly supportive of the general alignment. It may be important, not only to argue for certain modes of regulation if voice is to be heard, but also for attention to be paid to the enabling and constraining effects of particular norms. So, for example, Novitz identifies in the sphere of information technology that much attention is paid to employers' capacity to engage in surveillance of an employee's communications, such that attempts are made to restrict such practices with reference to a rather individualistic notion of privacy.

Drawing upon a rich reading of Sen's and Nussbaum's 'capabilities' approach, Novitz points to the important distinction between, on the one hand, freedom as a constraint on external interference and, on the other hand, freedom as an opportunity to participate in valuable practices and activities. Once again, the tendency to adopt dichotomous thinking should be resisted. Privacy norms in human rights law, even where these inhere in individuals, can be an important technique for shielding 'affiliative' interactions with other citizens. In so doing, these 'individualistic' norms can create protected spaces for social and civic relations to be forged and nurtured. Yet this must also be complemented by the development of human rights protections based on freedom of expression and freedom of association. This might potentially encompass a more communitarian understanding of worker voice through ICT, while simultaneously emphasizing the potential of human rights norms to be engines of social change through positive and programmatic state action. This looks to the importance of positive duties of realization alongside negative duties of restraint placed upon states,[106] which seems to occupy the same conceptual orbit as the 'freedom to' and 'freedom from' distinction in human rights theory.

Novitz's chapter indicates how labour lawyers need to look outside the traditional domain of labour law (in her case, human rights law, but also data protection law) to identify the ways in which legal norms and institutions can enable workers' voices to be audible and to be heard. This is a theme that also emerges strongly in Johnston and Njoya's chapter on the role of worker voice in situations of 'hostile takeover' in corporate governance law. They identify the ways in which corporate law creates a legal structure that reduces the frictions that otherwise impede hostile takeovers. In turn, hostile takeovers shrink the time horizons for strategic decision-making within restructured companies leading to the negation of 'implicit contracts' with employees based upon

[106] For analysis, see Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP, 2008).

Preview - Copyrighted Material
http://www.pbookshop.com

trust, the acquisition of specialized skills, and long-term commitment to the good of the firm. The emphasis on short-term economic gains induces the restructured company to maximize its share price through 'quick wins', by implementing redundancies, increasing the reliance on a growing army of casualized labour, and hacking away at employment conditions. This results in a dismal political economy where wealthy hedge funds make rapid profits while the social costs of their activities are externalized onto employees and the wider economy, thus generating a longer-term drag on national economic performance.

The authors emphasize the importance of worker voice through mixed channels—collective bargaining, information and consultation, board level representation—as a way of introducing necessary friction into this process of restructuring. They also identify the significant economic benefits to be achieved in so doing. This friction is not stultifying. Rather, it creates the conditions for *sustainable* economic growth that looks to the long term, and a humane political economy. Their chapter also highlights the different ways in which the autonomy of labour law as a discipline needs to be carefully considered. Their sophisticated engagement with economic theory indicates the importance of interdisciplinary dialogue. The profound risk of labour lawyers reaching out to only certain disciplines identified as benign, such as fundamental human rights discourse, is the ceding of the economic case for voice rights to a dominant neoliberal ideology. Johnston and Njoya's chapter demonstrates the importance of maintaining that conversation as a way of challenging the dismal economics of neoliberalism and making the economic case for strong worker voice. The chapter also demonstrates in a most striking way that without significant reform of corporate law, voice rights for workers developed *within* the domain of labour law are unlikely to be effective. Never before, in this era of globalized hyper-capitalism, has it been so vital to acknowledge this legal porosity.

McCrystal and Syrpis' chapter explores another disciplinary frontier of importance, focusing specifically upon the UK and Australia: the borderlands between labour law and competition law. Changes in the labour market, and particularly the growth in 'self-employed' actors, mean that the norms of competition law are likely to become relevant where those actors engage in 'collusive' collective activities to augment their market power. It is an especially neuralgic point simply because the domains of labour law and competition law seem so antithetical at the level of normative objectives. While the authors identify a dominant exemption-based approach to collective bargaining in both countries, excluding the operation of competition law from the sphere of collective labour relations, they also suggest that the growth in 'self-employed' actors and other forms of atypical work is placing a disintegrative pressure on the exemption-based approach. The extending reach of discretionary tests to evaluate the 'public benefit' of collective activities, measured against the metric of competition law norms, poses a threat to collective bargaining for the dependent worker designated as 'self-employed'. The institutional dimension to this competition law creep is also important, given the pessimistic assessment in some of the chapters of the adjudicative track record of common law judges. This is additionally a context where fundamental human rights arguments become important. For if freedom of association and collective bargaining are properly characterized as fundamental human rights, such rights arise in virtue of our

Preview - Copyrighted Material
http://www.pbookshop.com

common humanity and should be blind to the differences between different contractual forms for the provision of personal work.

Finally, Eric Tucker's sobering chapter relocates the discussion back within the central terrain of traditional labour law, the regulation of strikes as a form of voice.[107] Once a primary mechanism for workers' voice to 'be heard', Tucker traces the sharp decline in strike frequency across the English-speaking common law world, against a backdrop of restrictive (and ever straitening) strike laws. While Tucker is cautious in ascribing excessive causal significance to the role of restrictive legal regulation to this pattern of declining frequency, it likewise seems implausible that the relentless legal project of decollectivization lacks any causal salience as an explanatory factor. Tucker is rightly dismissive of the unitarist thesis that the atrophy of collective action is a signal of utopian order in our studied countries. Any claim of that nature in the wake of the global financial crisis is difficult to sustain with a straight face. Rather, the disappearance of the strike seems indicative of radical disempowerment of workers, atomism, the erosion of civic values, and growing precarity and insecurity in labour markets in common law countries.

Obviously, it is difficult to imagine that a public policy explicitly promoting growth in strike action is politically credible. Yet the frequency and pattern of strike action does seem like a credible civic barometer for the health and vigour of a country's democratic culture. Legal reform of strike law seems an important element in a strategy of democratization, though it may more effectively be pursued through constitutional litigation rather than legislative change at the current time (with the obvious disadvantages for countries such as Australia where labour rights are not constitutionalized as compared with, for example, the fertile constitutional litigation in Canada). This must be coupled with the creative deployment of new forms of social action and the forging of new solidarities with other social movements and political groupings. Tucker observes with some justification that 'the inhospitable socio-economic climate severely limits what can be achieved'.[108] A first step in that process of civic mobilization must be for the trade union movement to renew its mission as a political movement with universal demands articulated through political voice in the public sphere.

Conclusions Relating to the Techniques of Voice: Continuity and Change

> If we meet again we can say hello, we can say goodbye.[109]

The measurement of continuity and change in comparative labour law is both temporal and geographic.[110] We are interested of course in identifying important shifts in the evolution of labour law systems over time. We are also interested in identifying patterns of convergence and divergence between different legal systems. We cannot claim to have done so systematically here. Our mosaic of perspectives is but a foray into the foothills of that process of comparative enquiry and, we hope, a stimulus to other brave souls who will

[107] Note that Freeman has regarded the strike (involving temporary collective exit) as a form of voice. See Freeman 362 (n 22).

[108] Tucker, this volume at 473.

[109] Ondaatje 153 (n 1).

[110] For discussion, see Bob Hepple, 'Factors Influencing the Making and Transformation of Labour Law in Europe' in Davidov and Langille (n 86).

Preview - Copyrighted Material http://www.pbookshop.com

now go forward with the journey we have started. We hope, however, that the foray has been sufficiently productive in identifying some dominant tendencies in the countries we have studied.

For much of the twentieth century, and in all of the *Voices* countries, it could fairly be said that workers' collective agency through independent trade unions was widely regarded as the fundamental unit of industrial relations policy. Further, this was firmly entrenched in the public policy that shaped industrial relations systems. This public policy was expressed through a varied range of legal and administrative vehicles, ranging from the compulsory arbitration system of Australia through to the voluntarism of British labour law. In 2014 that historical position has altered in a myriad of ways.

As many of our chapters demonstrate, progressive political forces continue to seek legal changes to perfect and enhance existing legislative provisions relating to trade union membership, collective bargaining, and industrial action, concerned to facilitate access to trade union representation for workers. As the chapters in 'identities of voice' attest to, even this rather modest objective of a fair opportunity to access trade union representation is itself a Herculean regulatory task given the diverse and sometimes fragmented worker constituencies we see within the legal categories of personal employment. Furthermore, there is no longer a political consensus that the fundamental unit of industrial relations is collective agency. Over the last four decades, political projects influenced by forms of neoliberal ideology have achieved a significant measure of political success. For this reason, the normative underpinnings of worker voice remain intensely contested in the public sphere. This has no doubt been reflected in declining union membership, collective bargaining coverage, and strike frequency across the entire common law world, though the precipitousness of that decline has undoubtedly displayed some variation too.

In respect of collective bargaining machinery, there seems to have been a deep convergence in all of the countries studied on a particular conception of representational legitimacy, namely that the allocation of decentralized bargaining rights acquires its normative justification through tracking worker consent. Often this is implemented through a system of secret workplace ballots predicated upon a majoritarian model of democracy, variants of which can be seen in Canada, the UK, and the US. The bargaining agent system of New Zealand and the hybrid Australian system may be seen as particular manifestations of this consent-based model. This has intensified the level of comparative dialogue across these countries, though at times it is a discourse on legal reform that has been conducted in ever-decreasing circles. Much intellectual energy has been expended on technical issues about the ballot, its timing, whether and how to substitute card-check mechanisms, and the role of legal good faith once bargaining is underway.[111] It remains an open question whether progressive political movements should simply turn away from this consent-based model and explore other conceptions of representational legitimacy more supportive of 'regulatory' forms of collective bargaining.[112] As Tucker's chapter demonstrates, the other dominant legal convergence has been the alignment of strike laws with restrictive purposes and effects on autonomous collective action. These two convergent tendencies have led to

[111] See for a volume dedicated to this study, Creighton and Forsyth (n 10).

[112] Bogg (n 67).

Preview - Copyrighted Material
http://www.pbookshop.com

a dual compression on mechanisms of collective voice as expressed through collective bargaining.

It is understandable, therefore, that in an era of declining trade union influence attitudes have been profoundly affected by thinking afresh about the sources of legitimacy for developing forms of collective worker voice in ways that can both enhance but also restrict the scope of collective activities across the jurisdictions that have been the subject of our study. We mention just three of these attitudinal shifts.

First, the growing significance of the common law as a doctrinal method for enabling and expanding worker voice, especially through the technique of contractual good faith, has been a ubiquitous tendency. It seems to us too soon to reach any conclusions on the normative appropriateness of this development. Further empirical research is needed on the role of common law courts and judges in developing the common law as it relates to the sphere of employment. While the doctrines and concepts of the common law are surely evolving, the demographic and professional background of common law judges in appellate courts probably differs little from a generation ago.

Secondly, human rights law and theory has continued to colonize many of the areas of 'traditional' labour law, and this development has been particularly prominent in Canada and the UK where labour rights are constitutionalized in particular ways. Disagreement over the desirability of that set of developments remains intense, though on balance we agree with Mantouvalou that rights discourse has latent potential to augment worker voice. Certainly, its dynamic legal potential relative to the common law seems assured. Nevertheless, this alignment generates its own difficult questions. At the level of theory, which is the most defensible methodology for deriving fundamental labour rights? At the level of practice, what are the pragmatic and democratic concerns with the judicialization of economic conflict in the sphere of work, and how might these be mitigated? Different legal orders will undoubtedly resolve these dilemmas in different ways.

Third, the ascendancy of deliberative theories of democracy, the concerns of which are often appropriated by centrist political parties espousing ideals of 'social partnership', has undoubtedly created new sources of legitimacy for trade union voice. It is also true that the demands of public responsibility and public reason constrain the abilities of trade unions to pursue the sectional interests of their members with unrestrained vigour.

We should also note that significant change is manifest in the ways in which academics and policy makers in each jurisdiction are seeking to adjust legal mechanisms to respond to the diverse challenges of contemporary labour market situations. At the theoretical level we would identify two important tendencies that are emblematic of this response to new challenges.

Illustrating this first tendency, many of the chapters in this volume disclose a deepening appreciation of the progressive blurring of the boundaries between individual and collective labour rights. The distinction between individualism and collectivism has been a prominent feature of academic discourse in all of the *Voices* countries. It is moreover a distinction that is as evaluative as much as it is descriptive of legal structures, with 'collectivism' attracting the support of those who envisage a continuing role for collective bargaining and 'individualism' attracting their opprobrium. It is an

Preview - Copyrighted Material
http://www.pbookshop.com

analytical and normative distinction that is as fuzzy and contested as it is widespread. As Creighton's analysis shows, the individualism–collectivism distinction operates at multiple levels. His work is critical of the protection accorded to the worker's negative right to disassociate from the collective, which we might describe as a kind of normative individualism. It is a value orientation that can have damaging consequences for the achievement of collective solidarity amongst groups of workers. Yet the chapter also indicates the important ways in which individual rights, such as the right not to be victimized for asserting statutory rights, can create the conditions for collectivization. In this way, 'individualism' at the level of legal form can have collectivist consequences in its effective support for collective activities. Howe's chapter also explores the ways in which enforcement regimes attached to *individual* labour standards and statutory rights can augment (as well as impede) *collective* forms of voice. This further suggests that the divide between the individual and the collective is highly permeable and, often, a legal construct rather than of a natural kind. And, finally, Bogg and Estlund's defence of an individual right to contestation as a fundamental labour right demonstrates how the basic fundamental building blocks of worker voice, including collective forms of voice, may ultimately rest upon 'individualistic' foundations. To the extent that these different perspectives move us beyond formalism in the task of reimagining labour laws, this should be welcomed.

Finally, the chapters also highlight continuing challenges to the autonomy of 'labour law' as a discrete discipline. In terms of 'techniques' to achieve voice at work, 'labour law' has always been regarded as the primary source of reference. It is, after all, a compound discipline amalgamating other aspects of private and public law, so its hybrid nature could assist in its adaptation to such circumstances. It is also a compound discipline in its integration of perspectives from fields such as economics, sociology, political theory, and ethics. Nevertheless, what is perhaps striking about the essays in this collection is their reach into constitutional or public law, human rights law, immigration law, competition law, company law, and data protection law (to name but a few), all of which profoundly affect worker voice while not being species of labour law. Rather, at best, legislation governing the traditional forms of collective bargaining, agreements, and action operate as narrow and discrete exceptions to the application of these other legal disciplines—and then only partially. So, while labour law still has a role to play, much regulation of workplace voice is now clearly taking place outside the usual territory.

This encourages a panoramic perspective on discrete doctrines and institutions within the traditional apparatus of labour law. For example, there is a danger in an exclusive microanalysis of, say, good faith bargaining or recognition ballots, while losing sight of the exclusion of 'illegal' migrants from the collective labour law regime (migration law), the exclusion of the dependent self-employed (competition law), and the boundless latitude conferred on rapacious corporate entities to restructure enterprises aggressively in hostile takeover situations (company and corporate governance law). Appreciation of the legal relevance of all these disciplines to workplace voice reinforces the vital importance of workers' political voice beyond the workplace. Without the promise of equal democratic citizenship, and the corresponding ability of workers and their trade unions to exert effective political influence over these multiple domains of regulation through legal reform, worker voice 'within' the narrow confines

Preview - Copyrighted Material
http://www.pbookshop.com

of labour law is an endangered category. This gives renewed urgency to an approach to comparative labour law that takes the primacy of politics and the constitution as its necessary point of departure.

So, we can only offer conclusions to this chapter and not a single conclusion. It is not as simple as saying farewell to one set of techniques for legal regulation of worker voice, while welcoming another. Even identification of emergent normative perspectives on the function of voice does not permit such straightforward conclusions; for, as we have sought to explain, these remain highly contested. Rather, we contend that what is unassailable is the need for workers to find access to speak in the current debates taking place around continuity and change within industrial relations, alongside those pertaining to the multifarious legal mechanisms that seek to govern the same. We appreciate that the contours of these debates vary in some significant ways from jurisdiction to jurisdiction. Yet it does seem that the over-arching challenge, in any country, will be for workers to find a way to be heard.

Preview - Copyrighted Material
http://www.pbookshop.com