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Labour Law's Theory of Justice

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Many papers written about labour law these days, including many chapters in this volume, share much in common. This is because many labour lawyers agree with Harry Arthurs that labour lawyers and labour law face an identity crisis.¹ Whether or not we agree with Alan Hyde that 'this time . . . it is really over'² many of us do agree that the idea of labour law is under a lot of stress. The crisis confronting labour law has three dimensions: (1) empirical (has the real world changed so much as to leave traditional labour law beside the point, inoperable, fading from view?); (2) conceptual (are our basic concepts of 'employee', 'employer', employment contracts, and so on, still viable and capable of organizing our thinking in a useful way?); and (3) normative (are the moral ideas which motivate our enterprise still salient, robust, and capable of rallying us to the continued defence of our subject?). We do not all agree, it seems, that we need to be in a state of real crisis. But, as I see it, we agree that that is the state we are in.

As a result labour lawyers face the questions of whether we should, can, and will re-think our discipline. To these questions we find a range of responses. While there is widespread agreement that there have been large changes in the empirical world of work there is no agreement on what this portends for the discipline of labour law and we can identify a number of positions: (1) there is no resulting normative crisis, and thus no need for a normative re-evaluation. Rather, we simply face the problem of developing new techniques (means) for applying old values (ends) to new empirical realities; (2) the problems are, again, not essentially normative but, rather, ones requiring conceptual innovation to ensure that labour law is not held hostage to old categories, old ways of thinking, and old ways of doing business, which may stand now as barriers to the achieving of labour law's normative goals; (3) the real problem is that we actually do need normative renovation and renewal. But among those taking this position there is no consensus

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¹ Arthurs, this volume.

² Hyde, this volume, 97.

about how that might be undertaken or achieved; (4) this sort of normative renewal is not so much required as thrust upon us and comes with a hefty price – at the expense of disciplinary coherence; (5) such ‘ideal’ or ‘overarching’ normative accounts of labour law are not possible; (6) we have had in fact many such accounts, but now the normative jig is up.

Cutting across this set of positions are other differences in intellectual approach and level of focus in addressing labour law’s crisis: international, regional, or domestic law? Developed or developing state focus? Public or private institutional frameworks? Doctrinal/institutional or more abstract analysis? Pragmatic policy reform or purely theoretical conclusions? Comparative approach? Historical? Locating labour law within larger and longer time scale empirical, economic, political, and social narratives? Within differing and larger theoretical paradigms? And so on.

Where does that leave us and our discipline? It seems that it leaves us with an admixture of points of view about the nature of our problems, what to do about them, and whether we can, should and will do anything. This is not a terrible state to be in. A state of real disagreement is much better than a state of mere mutual incomprehension.

I have been of the view for some time that labour law requires a re-orientation at the basic empirical, conceptual, but most importantly, the normative level. Also that such a re-orientation is possible. I do not see our problems as ‘merely’ those of means (technique) or ‘simply’ conceptual reconfiguration or enlargement. I believe that labour law needs to expand its justificatory horizons and as a result liberate itself from its traditional empirical domain and conceptual categories. The normative question ‘What is labour law for?’ is basic. It will be answered one way or another, and labour law will have, one way or another, a constituting normative narrative. This narrative will inform and reveal the concepts which are central to labour law and describe the limits of labour law’s empirical domain. The question is, simply, which narrative will it be?

But, is it possible to do more than simply put one’s cards on the table at this stage? Is there something more which we can glean from what we know about our current state of disciplinary affairs, and our individual and varied reactions to it?

It seems to me that we can say something more. This something more will not dissolve all of our problems, nor will it result in a consensus about ‘what is to be done’. But it may permit us to see something of a structural feature in what appears to be merely an unexplained and unhelpful scattering of viewpoints.

B. Labour law has always had, and will always have, a theory of justice

The basic idea is this: labour law faces, as always, two sets of questions: (1) What is labour law’s domain/scope? With what part of the world as we know it is it concerned? How does it carve itself off from the rest of the legal world? How do we know what issues are labour law issues, what materials to read, what subject matters go on the syllabus? (2) Within that domain, what is labour law to do?

What is it for? Why does it exist? These are separate questions – of scope and content. But the issues I wish to confront, and which the chapters in this volume reveal are of concern to many, can be stated as follows: is there a relationship between the two issues of scope and content and, if so, what is it?

It seems to me that there is a profound, necessary and intimate link between these two sets of questions. Even stronger – they are the same questions in the sense that the answer to both turns on the answers to the same deep set of issues. These issues are, and must be, ones of deep normative exploration. On this view we simply cannot avoid normative inquiry. Labour law's jurisdiction is defined, as is its content, by labour law's morality. Labour needs, does have, and will have a 'theory of justice'.

Here one needs to confront the challenge which seems to be presented by Bob Hepple³ who, at the beginning of his chapter, questions the usefulness, and urges us to resist the 'temptation' of, 'an ideal theory of labour rights'.⁴ He writes:

The temptation for labour law scholars is to focus their energies on developing an ideal theory of labour rights or social justice. But any theory is sterile unless we first try to understand why real employers, workers, politicians and judges act as they do in practice. Labour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power relationships. Labour laws are used by people to pursue their own goals, and sometimes they need rights such as to a minimum wage or to freedom of association simply in order to survive.⁵

What are we to make of that? At one level this looks like a perfectly reasonable call for labour lawyers to return to their concrete and pressing agenda and not be tempted to waste their time gassing around in the abstract with normative theory. And although I disagree, in the sense that a division of labour here between those inclined to such theory and those to practice is possible, fair enough. But there is a second claim here about theory itself. It is that any theory 'will be sterile' unless we understand 'why real employers, workers, politicians and judges act as they do in practice'. And in this latter regard we need to keep our eye on the truth that labour law is the 'outcome of struggles between different social actors and ideologies, of power relationships'. That claim appears to be true. And the claim that 'labour laws are used by people to pursue their own goals, and sometimes they need rights such as to a minimum wage or to freedom of association simply in order to survive' sounds more than merely a fair assessment. But the claim that 'any theory will be sterile' unless we remind ourselves of these truths seems to express a preference for a certain type of theorizing – of a sociological, empirical, causal kind which looks for explanations of how things came to be as they are. It does not allow much space for normative theorizing about how things should be. This is not the claim that there is no normative agenda implied here – rather, it is a claim about the role of normative theory. Indeed this is made plain by the blunter assertion that 'labour law is not an exercise in applied ethics'. That is a claim worth pushing on a bit.

³ Hepple, this volume.

⁴ *Ibid* 1.

⁵ *Ibid*.

This is so because this claim simply seems to me to be wrong. Labour law has to be an exercise in ethics, applied and otherwise. Otherwise we have no way of knowing who the labour lawyers, as opposed to other sorts of lawyers, are, and what their concrete and pressing agenda would consist in. Without an account of our normative purposes we have no way of seeing our reality as divisible into and constituted by subject matters such as labour law. This is a point which is conceded in the paragraph quoted above – which depends implicitly upon, and appeals to, what must be an account of what labour law is, what rights are labour rights, and so on. This point Hepple also concedes, a little more explicitly, when he⁶ returns to Sinzheimer to whom ‘we owe the conception of labour law as a unified and independent legal discipline’.⁷ At the core of Sinzheimer’s contribution in this regard lies the ‘unity of the goal’ which is stated as ‘the guardian of the human being in an age of almost unrestrained materialism’.⁸ This is a very important point, to which I return below. The point here can be stated as follows: it is true that ‘labour law is not an exercise in applied ethics’ if we take this to mean that normative theorizing does not and cannot explain how labour law turns out at the level of legal and institutional detail in various places at various times. To do that we need more – as Hepple explains. Here it is true that there is ‘no grand single theory’.⁹ But the claim is false when we turn not to how things turned out in various historical circumstances, but what the thing called labour law, that turned out in those various ways, actually is. Here it is precisely and necessarily true that ‘labour law is an exercise in applied ethics’. Without such an ethical account there is no conceptual coherence, nor even an identifiable empirical reality to agree with, dispute, or study – that is, no ‘labour law’.

C. Labour law’s traditional theory of justice

We have known instinctually, and since the beginning, that the question of the *content* of labour law is profoundly normative. We know the answer to the normative questions ‘What is labour law for?’ ‘What is its mission?’ Manfred Weiss has articulated this accepted and basic informing normative instinct of labour law, rightly drawing together the whole of what is variously called employment and labour law, writing as follows:

The history of labour law has been told very often. In the 19th century it became evident that the competition between individual employees at the labour market was a race to the bottom and that only collectivization of employees combined with protective legislation could prevent this destiny. Therefore, the interplay between collective self-regulation and

⁶ Along with most others who think about this issue – see, eg, Dukes, this volume.

⁷ Hepple, above n 3, 3.

⁸ *Ibid.*

⁹ *Ibid.* 2. Also B Langille, ‘Imagining Post Geneva Consensus Labour Law for Post Washington Consensus Development’ (2010) 31 *Comparative Labor Law and Policy Journal* 523.

legislative intervention from the very beginning characterized labour law. The main goal always has been to compensate the inequality of the bargaining power.¹⁰

Weiss's citation is to Kahn-Freund. In Paul Davies and Mark Freedland's *Kahn-Freund's Labour and the Law* the point is forcefully expressed as follows:

The relationship between an employer and an isolated employee is typically a relationship between a bearer of power and one who is not a bearer of power . . . The main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.¹¹

I believe this idea to be basic to the received wisdom about our labour law. This idea of labour law coming to the aid of employees who do 'and must'¹² lack bargaining power is the moral foundation of the constituting narrative of labour law.¹³ We do not have too many theories – we have one. (And in my view, the problem is that it is out of date.)

As Weiss rightly points out, there are other basic normative 'insights' which have long been associated with labour law's self-understanding. He identifies others including 'labour is not a commodity' and 'human dignity'.¹⁴ The slogan 'labour is not a commodity' is basic to the articulation of the ILO's normative vision in particular and labour law's in general.¹⁵ But like 'inequality of bargaining power' it stands in need of explication. They both make for good slogans, but need to be elaborated upon.¹⁶ And we do have an accepted way of elaborating upon them and in concert. We see them both hitting a particular nerve and, this is a critical point, in a particular way. We have glued these two notions to one another.

It is vitally important to see the particular nerve which 'inequality of bargaining power' and 'labour is not a commodity' hit and how they are thus linked in our thinking. The nerve we see them both impinging upon is the nerve of market ordering. From a pro-market perspective the claim that 'labour is not a commodity' is simply empirically false.¹⁷ And the deployment of the idea of 'inequality of bargaining power' is taken as an indicator of economic illiteracy.¹⁸ But, as I have tried to explain elsewhere,¹⁹ claims about 'inequality of bargaining power' or that

¹⁰ Weiss, this volume, 1–2.

¹¹ 3rd edn (Stevens, 1983) 18. Cited by the Supreme Court of Canada in *Slaight Communications v Davidson* (1989) 59 DLR (4th) 416, per Dickson CJC at 424.

¹² *Ibid.*

¹³ See B Langille, 'Labour Law's Back Pages' in G Davidov and B Langille (eds), *The Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) 13.

¹⁴ Above n 10, 2.

¹⁵ D Beatty, 'Labour is not a Commodity' in J Swan and BJ Reiter (eds), *Studies in Canadian Contract Law* (Butterworths, 1980) 313–55; and B Langille, 'Labour Law is not a Commodity' (1998) 19 *The Industrial Law Journal* (South Africa) 1002.

¹⁶ The question of whether and in what way the addition of references to 'human dignity' aid in this elaboration is one which is of much current interest – this is why.

¹⁷ 'Whatever its emotional appeal the assertion is misleading. Labor service is bought and sold daily.' A Alchain and W Allen, *University Economics*, 3rd edn (Wadsworth, 1972) 407 ff.

¹⁸ *Ibid.*

¹⁹ B Langille, 'Fair Trade is Free Trade's Destiny' in J Bhagwati and R Hudec (eds), *Fair Trade and Harmonization* (vol 2) (MIT, 1996) 231, 244–5.

'labour is not a commodity' are not empirically false because they are not empirical claims at all. They are normative claims. Talk of 'inequality of bargaining power' is a form of economic nonsense *if* intended to be a claim *within* market theory. But it is not intended as a claim within market theory, but is a remark external to, and about, market theory, which makes an important point about the limitations of market theory given its scant normative resources. (The assertion 'property is theft' works in the same way.)

These two claims have been joined in our minds. We see them as necessarily linked and in a compelling way. Their explications are in parallel and sound in the same critique.

Thus, seemingly instinctually, we have understood our rallying cries as urging a contrast between labour (not a commodity) and all things that are commodities (physical goods, raw materials, finished products) not in general, but when it comes to contracting about them. The urge has been to establish a set of constraints upon the market in labour just because labour is not a commodity. The logic here is: the set of rules we establish to regulate and structure contracting in markets for various commodities is taken as a given, as the default position, as the baseline. But we see that this set of 'normal' contract rules needs to be limited/regulated/constrained in various ways when the subject matter of the transaction is labour. When human bodies encounter the wheels of commerce some precautions are in order. This set of ideas and way of thinking is at least partially so easy to grasp because it fits with a number of familiar views about 'rights' in general and not just labour rights. This is sometimes expressed in the idea that rights are a sort of 'side constraint'²⁰ upon the actions of others and also in the idea of rights as 'trumps' whose very identifying marker is that they rule even in the teeth of the consequentialist conclusion that we would all be better off if they did not.²¹ This is how the idea that 'labour is not a commodity' is bound up with, and limited to, the other of labour law's basic normative planks – the idea of 'inequality of bargaining power'. Labour markets, and our concerns for their impact upon human beings, would be another matter if we were all Premier League football players. But we are not. Our ideas of exploitation, subordination, dependence, and so on are fundamental to our understandings here. The normative engine of our rallying cry is fuelled by the reality of the labour market position of most workers. And the logic of labour law so fuelled is, again, the idea of a set of constraints on otherwise available market power. Both the logic of collective bargaining as a procedural device structuring a countervailing power in the process of bargaining, and the logic of employment legislation as simply removing certain issues from the bargaining process, are driven by this logic. This is why Weiss is right to see direct statutory intervention in the substance of the employment bargain as well as the procedure of collective bargaining as parts of a larger whole.²² Taken as a whole they construct a body of 'consumer protection' for the vulnerable in the labour market. This body of law stands and speaks fairness, or

²⁰ R Nozick, *Anarchy State and Utopia* (Basic Books, 1974).

²¹ R Dworkin, *Taking Rights Seriously* (Duckworth, 1978).

²² Above n 10.

'decency',²³ to the superior bargaining power of capital. There is a compromise, a deal, a trade-off here which we need to make in the name of decency, in the name of our ideal that 'labour is not a commodity'.

These normative foundations of the content of labour law are intuitively and it seems attractively available. The problem is that this normative picture 'holds us captive'.²⁴ But the result is not simply that we are wedded to and driven to see the content of labour law in these terms – but that we are also driven to answer questions about the scope of labour law in a certain way. The two issues of scope and content are, as we have seen, bound together and when we lock onto this particular account of labour law's normativity we get a particular account not only of its content but its scope, that is, its 'jurisdiction' or 'domain'. It is a package deal. If this is our moral concern then these actors and events (people negotiating contracts regarding work) are, in the nature of things, the centre of our attention. And our central categories and concepts (employee, employer, contracts of employment, and so on) are thus thrust upon us.

The picture painted by this specific morality tale provides its own frame.

D. Anxiety

If this is so then there will be a real struggle for the soul of labour law if we either (1) attempt to expand beyond the traditional domain of regulating contract power in the negotiation of contracts for labour, whether individual or collective, or (2) suggest a new normative foundation for the enterprise. This cuts both ways. Efforts to find a broader normative basis for labour law will put stress upon our traditional understanding of the domain of labour law. So too, explicit efforts to expand the domain of labour law will put stress upon our basic normative account of why we do what we do.

It is this anxiety-inducing struggle which now describes the current state of play in our thinking about labour law. This is precisely the 'anxiety' which Mark Freedland has so acutely commented upon:

The anxiety . . . is one which has attended, in some degree, much of the recent debate about the personal scope of employment law. It is a fear that, as one extends the frontiers of labour law to include contracts or relationships formerly regarded as outside the territory, because they are more in the nature of business contracts or relationships with independent contractors, so one risks foregoing the normative claim for labour law to constitute an autonomous legal domain within which inequality of bargaining power between worker and employer may be taken for granted, and where protection of the worker against unfair exploitation is therefore a paramount and systemic rationale for law-making and for adjudication. This fear has, however, generally been a rather muted one, if only because the discussion has mainly concentrated upon modest or intermediate extensions of the personal scope of employment law, which can be envisaged as reaching out to working

²³ To use a word currently in vogue at the ILO and elsewhere.

²⁴ L. Wittgenstein, *Philosophical Investigations* (Blackwell, 1958) para 115.

people who, although deemed independent, are, in reality, at least semi-dependent upon employing enterprises, and as vulnerable to exploitation as workers in the ‘employee’ category.

This muted anxiety becomes the more strident as we further extend the personal scope of employment law . . . It becomes hard to see how the normative edge of labour law can fail to be blunted . . . Two alternative particular dangers present themselves, Scylla and Charybdis or a rock and a hard place, between which it is hard to discern a path which can be steered. Either the worker-protective envelope of labour law will fail to ‘stick’ at the entrepreneurial margins . . . or, on the other hand, the inclusionary category will prevail but at the cost of a normatively crippling compromise with the economic and social neutrality of general private contract and commercial law.²⁵

As usual in labour law matters, Freedland has hit the nail on the head and there are important questions which flow from his observations. But before the questions, note the structure of Freedland’s remarks – their way of revealing our instinctive and shared pattern of thinking about labour law. Labour law has a ‘paramount and systemic rationale’ in the very idea of the ‘protection of the worker against unfair exploitation’. Correct. If we think of, or are driven to by changes in the real work of work, expanding the scope of labour law beyond its traditional (employer/employee/contract negotiation, and so on) setting we encounter a dilemma – either the paramount rationale will lose its grip (‘will not stick’) or will be ‘compromise[d]’ by the norms of ‘general private contract and commercial law’. When the rationale of constraining market power in the name of the inequality of its distribution is exhausted we are left with the only other logic in town – the idea of simply unconstrained market power. These are, on our received view, two sides of the same normative coin. Freedland’s is a very important intervention. It sounds in our basic, classic, understanding of labour law. On this view our particular normative account scope and content are tied up in just this particular way. A particular morality gives a particular content, a particular jurisdictional boundary, a particular dilemma, and a particular anxiety for labour law.

And this particular dilemma is only available to us (if I can put it that way), only makes sense, only seems compelling, only induces the ‘anxiety’ Freedland describes, because of the way we have been brought up to think about labour law. Freedland is again correct because he knows what labour lawyers know. This is that, as described above, the essence of the normativity of labour law is that, in the name of its ‘paramount and systemic rationale’ of ‘protection if the worker against unfair exploitation’, constraints are placed upon the default position which is ‘general contract and commercial law’. This is the normative box or, as Freedland has it, our rock and our hard place. It is labour law’s normative ‘Scylla and Charybdis’.²⁶

²⁵ M Freedland, ‘From the Contract of Employment to the Personal Work Nexus’ (2006) 35 *Ind LJ* 1, 28–9.

²⁶ In the struggle structured by this dilemma we can identify a number of positions:

1. We can expand the domain without a normative recalibration. (Rejection of the dilemma.) (Manfred Weiss.)
2. You cannot expand the domain without giving up on the traditional normative goals for the traditional domain. (Noah Zatz.)

Labour law's normative account of itself also limits its world. When we venture beyond this world we have lost our bearings. Worse, we dilute and put at risk the power of our normative wellspring. Better to keep everything in its place and stay at home in labour law's familiar terrain. But for many that terrain is looking like a coastline under threat from climate change. Labour law may be going the way of the Maldives. This is an anxious time. We cannot stay at home but we cannot be at home anywhere else.

E. Therapy

Now let us turn to the questions posed by Freedland's account. The most important of these questions can be asked as follows: is it possible that a therapy exists for this normative 'anxiety' thrust upon us by changes in our familiar world (of long-term contracts of employment between employers and vulnerable workers which need to be regulated to avoid exploitation)? As we draw back our camera from its close-up on our familiar protagonists (employee–employer) performing their familiar drama (negotiating and living with contracts of employment) in order to take account of other and perhaps new actors playing different roles on our stage of the world of work, is it true that we are stuck between a normative rock and a normative hard place? Is it possible to draw back our normative lens as well and in a way which will permit us to see the illusion of a dilemma rather than its inevitability? Is it possible that labour law can find a new normative home? Or is Alan Hyde right in claiming that the theoretical pantry is now empty?²⁷

The answer to that question depends, first, upon whether we can first *see* how this anxiety is visited upon us by our traditional approach. This requires being explicit about the picture which has 'held us captive'.²⁸ That picture is the one which we outlined above and which Freedland condenses into the obvious truths which we have just reviewed. But, if we see it, how is that picture not inevitable? How could we break free from it? That is the question. Here is one way of answering it.

The view of the world which drives us to the anxiety Freedland describes can be captured in the large with the following observation. We have reduced the power of

3. Any effort to expand beyond labour law's traditional domain also threatens, or weakens the traditional normative account with which it coheres. This causes anxiety. (Mark Freedland.)
4. Any effort to broaden the normative account of the content of labour law undermines, or threatens, the existing normative account and therefore should not be undertaken. (Guy Davidov.)
5. Agreement on the need for a new normative account – but disagreement about what it might be. (Judy Fudge, Adelle Blackette.)

²⁷ The most obvious answer must be 'no'. One way of getting at this is to observe that Hyde could have been writing 50 years ago as a professor of master and servant law, lamenting its passing and the termination of its normative line of credit. Ideas do come and go. So, too, the world changes. But there will always be productive activity and some set of rules governing it.

²⁸ Wittgenstein, above n 24.

the idea that ‘labour is not a commodity’ by tying it to, and seeing it intimately connected with, our other rallying cry of ‘inequality of bargaining power’. The critical issue now is whether our understanding of our rallying cries, especially ‘labour is not a commodity’ can, should, and will, continue to be so understood. Can we liberate them from this point of view? That, in my view, is the question. And it is the question which many are struggling with. We have had a particular understanding of ‘labour is not a commodity’. We need a new one.

At bottom, the idea is that ‘inequality of bargaining power’ has incarcerated our thinking about labour law and has held us hostage to a thin normative ideal. The rock and the hard place made inevitable by that thin ideal are part of a package deal we can and should decline. More positively, we can restart or normative engines by revisiting the idea that ‘labour is not a commodity’.

Labour law’s current understanding of the claim that ‘labour is not a commodity’ is too narrow. It places this claim in harness with the claim that labour law seeks to protect human beings who suffer from lack of bargaining power in the negotiation of terms and conditions of employment. As a result the project of labour law is to place constraints, both substantive and procedural, upon this process. This is our standard empirical, conceptual, and normative set-up.

It is true that collective bargaining is, by at least some, understood to give workers power so that they may negotiate better terms of their contract. In this sense, the current understanding of labour law approaches and touches a deeper idea. This is the idea of employees as agents or participants, and not merely recipients of the law’s largesse. But this idea is both generated by, and limited to, the idea of a need for countervailing bargaining power against employers in the market for labour. It is true that the idea of ‘inequality of bargaining power’ leads to the idea of equalizing bargaining power with the result that workers become co-authors of contracts rather than recipients of them as written. This does introduce an important idea, but it is an idea for which the standard account has no defence or account, other than that just outlined. There is no normativity here other than the idea of equality in bargaining. But to the obvious question – ‘why are we interested in that?’ we have no response. In fact, once we get beyond inequality, labour law has exhausted its normative resources, has lost contact with ‘its paramount and systemic rationale’,²⁹ and as a result we encounter the ‘anxiety’ described by Freedland. If we run out of the fuel of inequality in bargaining power we have nothing left to say and thus have established real limits not only to our moral reasoning underpinning the content of labour law but to labour law itself.

We have constructed our normative world as a response to market ordering. But we have no account of the virtues or limits of market ordering – only about ‘inequality’ of the distribution of bargaining power within that account. Labour law is conceived of as a resistance movement inside that normative system. As a result we have no deeper account of why, if the resistance movement were successful, more equal labour markets, and their outcomes, are a good thing.

²⁹ Freedland, above n 25.

What this suggests is that labour law needs a more substantive normative ideal than the resources made available by the idea of equality operating in the bargaining context can provide. This morality cannot be merely an adjunct to market ordering's normativity, one insisting upon equality in the working of that normative ideal. It must be something more. 'Dignity' will not provide the required moral ammunition if it is understood as merely providing a set of reasons as to why humans must be protected when they meet the wheels of commerce. It will have to go deeper than that. It too will have to tell us something more about 'labour is not a commodity' than simply underwriting the sentiment behind our intuitive desire for more equality of bargaining power or outcomes in the labour market. It, or any other normative ideal, must tell us more – it must cut loose from a shallow and insecure mooring in inequality of power in the negotiation of contracts and tell us something positive about why that is a matter of concern. Only such a set of normative resources will reduce our 'anxiety' and enable us to enter the new world we see, structure the new concepts we need to engage it, and tell us why it is important to do so. It is true that labour law's jurisdiction and content are bound together by labour law's morality. Adjusting one alone is not possible. But that means that rethinking labour law is not a piecemeal empirical or conceptual enterprise. Labour law does not simply exist and exist waiting to be found, it must be normatively imagined.

F. A new normativity

In my view there is a broader, deeper morality which can be understood as underwriting in a more powerful and morally salient manner what we have known as labour law, but also allow/force us to see that labour law's remit/jurisdiction/scope/domain is much broader. A key to this new normativity lies in the distinction between workers as objects and workers as subjects. While some traditional defences of collective bargaining rights glimpse this distinction, they do so through the limiting lens of 'inequality of bargaining power'. 'Labour is not a commodity' does not limit itself, and should not be limited, to providing a rationale for limiting the market power of others – it gives us a broader and more positive reminder and rationale for labour law.

Here is a sketch of how we can make progress in this regard. As I have argued elsewhere, the best way to get at such a new normativity is through the work of Sen.³⁰ Sen's work is very rich and radical in its approach, starting with very basic

³⁰ B Langille, 'Seeking Post-Seattle Clarity – And Inspiration' in J Conaghan, M Fischl, and K Klare (eds), *Labour Law in An Era of Globalization* (Oxford University Press, 2002) 137–57; B Langille, 'Labour Policy in Canada – New Platform, New Paradigm' (2002) 28 *Canadian Public Policy* 133–42; B Langille, 'Re-Reading the 1919 ILO Constitution in Light of Recent Evidence on Foreign Direct Investment and Workers' Rights' (2003) 42 *Columbia Journal of Transnational Law* 101–13; B Langille, 'Core Labour Rights – The True Story' (2005) 16 *European Journal of International Law* 1–29; B Langille, 'Globalization and the Just Society: Core Labour Rights, the FTAA, and Development' in J Craig and M Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge

questions about our true ends as opposed to our means for achieving them. His work has large implications for much of what labour lawyers, both domestic and international, have to worry about in these times.

If we could think clearly and from first principles then I take it that our starting point would be that the purpose of labour regulation is to improve the lives of the inhabitants of the world, insofar as work has something to do with it. And work has a lot to do with it. This is because, in Sen's formulation, our goal is real, substantive, human freedom – the real capacity to lead a life we have reason to value. Development, in Sen's terms, consists in the removal of barriers to human freedom so conceived. The reason that labour law has a lot to do with this enterprise is that there is an intimate connection and fundamental overlap of human freedom, on the one hand, and human capital, on the other. Human capital is here not thought of, as is common, solely in economic or instrumental terms (indirectly contributing to productivity and GDP growth) but also as an end in itself (directly contributing to a more fulfilling and freer life).³¹ Labour law can be seen as that part of our law which structures the mobilization and deployment of human capital. Human capital is at the core of human freedom. Labour law is at its root no longer best conceived as law aimed at protecting employees against superior employer bargaining power in the negotiation of contracts of employment. That is a now an empirically limited and normatively thin account of the discipline. Rather, we can say that labour law is now best conceived of as that part of our law which structures (and thus either constrains or liberates) human capital creation and deployment. Education ('Education is the key to all the human capabilities'³²) and, especially, early childhood development strategies, are critical to human capital creation. But so is the set of policies which govern the lives of human beings when they enter the workforce – whether as employees, independent producers, or under any other legal rubric or economic arrangement or relation of production. Human capital must not only be created, it must be utilized, effectively deployed: that is, in the best sense of the word, exploited. In the modern world of the 'knowledge-based economy' human capital will be as physical capital was to the industrial revolution. Getting human capital policy right will be critical to nations such as Canada and any other state attempting to structure a just and durable economy and society in the modern, and

University Press, 2006) 274–303; B Langille, 'Labour Law's Back Pages' in G Davidov and B Langille (eds), *The Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) 13–36; B Langille, 'The ILO Is Not a State, Its Members Are Not Firms' in G Politakis (ed), *Protecting Labour Rights as Humans Rights: Present and Future Of International Supervision* (ILO, 2007) 247–57; B Langille, 'The Future of ILO Law, and the ILO' in *The Future of International Law* (Proceedings of the American Association of International Law 101st Annual Meeting) (2007) 394–6; B Langille, 'What is International Labour Law For?' (2009) 3 *Law and Ethics of Human Rights* 47–82; B Langille, 'Putting International Labour Law on the (Right) Map' in A Blackett and C Levesque (eds), *Social Regionalism in a Global Economy* (Routledge, 2011) 290; and B Langille, 'Imagining Post Geneva Consensus Labour Law for Post Washington Consensus' (2010) 31 *Comparative Labour Law and Policy Journal* 523.

³¹ On these points see A Sen, 'Human Capital and Human Capability' (1997) 25 *World Development* 1959; and A Sen, *Development as Freedom* (Knopf, 1999) 292–7.

³² M Nussbaum, *Frontiers of Justice* (Belknap, 2006) 322.

'globalized', world. As a recent Canadian study put it: '... for the first time in human history, the logic of economic development and prosperity requires that we harness and develop our full human potential.'³³ Or as Alain Supiot recently restated what he called a 'simple idea' – 'there is no wealth other than human beings, and that an economy which ill-treats them has no future'.³⁴

The law which governs these critical dimensions of our common life is labour law. That is a large category. It would include much that we now exclude. But although we have burst the bounds and the comforts of the old way of thinking, we also have the answer to, or perhaps relief from, Freedland's 'anxiety': we have not cast off and become adrift from our normative moorings for we have found deeper ones in the positive idea of human freedom.

The link between this conception of labour law and development, understood in Sen's terms as removing obstacles to human freedom, is deep and has yet to be fully explored. The agenda for labour law is not the complete agenda of human development – there will still be laws and agencies and agendas concerning health, trade, the environment, macroeconomic stability, and so on, at domestic, regional, international, and supranational levels. There will be overlap, as now, but also more powerful centres of gravity. Sen has addressed the issue of the connection between human capital and his foundational idea of human freedom which he views as 'closely related but distinct'.³⁵ His insight is that in recent times economic theory and public policy discussions have shifted from seeing capital accumulation in primarily physical terms and come to recognize 'human capital' as integrally involved.³⁶ He notes that there is no necessity to limit the idea of human capital to instrumental justifications, in practice that is how it is discussed. As a result, that idea has to be supplemented by the idea of human freedom which brings to bear intrinsic justifications. So, as Sen writes: '... if education makes a person more efficient in commodity production then this is clearly an enhancement of human capital. This can add to the value of production in the economy and also to the income of the person who has been educated. But even at the same level of income a person may benefit from education, in reading, communicating, arguing, in being able to choose in a more informed way, in being taken seriously by other, and so on.'³⁷ Thus the two concepts are closely related. As Sen puts it in *Development as Freedom*: 'If a person can become more productive through better education, better health, and so on, it is not unnatural to think expect that she can, through these means, also directly achieve more – and have the freedom to achieve more – in leading her life.'³⁸ The relationship between the two ideas is not, however, simply cumulative but integrative. This is because even though human capital is important

³³ R Florida and R Martin, *Ontario in the Creative Age* (Martin Prosperity Institute, 2009) 31.

³⁴ In an interview entitled 'Possible Europes', 57 *New Left Review* (May–June 2009).

³⁵ A Sen, 'Human Capital and Human Capability', above n 31. See also Sen, *Development as Freedom*, above n 31.

³⁶ In large and good company.

³⁷ Sen, 'Human Capital and Human Capability', above n 31.

³⁸ Sen, *Development as Freedom*, above n 31, 294.

for productivity and economic growth we need to know ‘why economic growth is sought in the first place’.³⁹

This is what must lie at the centre of a more robust account of what it means when we say ‘labour is not a commodity’. We need the idea of ‘human freedom to lead lives that people have reason to value and to enhance the choices they have’ to do that. Or, more simply, ‘human beings are not merely the means of production, but also the end of the exercise’.⁴⁰ So, to supplement our new thinking about the category of labour law we can say: its subject matter is the regulation of human capital deployment; its motivation is both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom.⁴¹

The law which governs these critical dimensions of our common life is labour law.

This is an account which is much deeper and broader than the old received wisdom about the scope and purpose of labour law. Both the empirical/conceptual and the normative dimensions of labour law are radically altered on this view. If we see labour law as underwritten by the idea of human freedom we not only have a set of reasons for traditional labour law – but also for non-contractual approaches to work relations (informality, for example) and for other non-traditional labour law subjects (unpaid work, education, child care, and so on). That is, we have a way of thinking about a re-conceptualization of the field of labour law, a task which is forced upon us by changes in the organization of work, family, and other realities. It is not confined, as was the old account, to a story about employees, employers, and contracts of employment. It is about all dimensions of law which bear upon human capital deployment. We need new categories going beyond ‘employee and employer’. We will need new ‘platforms’ going beyond contract, whether individual or collective, for the delivery of labour law. We will need new systems of representation for workers. And so on.

But even more fundamental is the change in our normative underpinning of labour law. Its morality is much more compelling and positive – not confined to preventing unfairness in negotiation of contracts. It covers all productive activity and places labour law, conceived as the law which regulates the deployment of human capital, at the centre of our policy agenda and central to achieving both our instrumental and intrinsic values.⁴²

³⁹ Ibid 295.

⁴⁰ Ibid 296.

⁴¹ Labour law has long been dogged, as has development theory, with the confusion caused by debates at cross purposes because sometimes based on means and instrumental outcomes, on the one hand, and sometimes on discussions of intrinsic ends on the other. On this account they go hand in hand with human freedom being both the end and the way there. Without the idea of human freedom development techniques will be inadequate and we will have no account of the worth of any outcomes of reform in any event.

⁴² Such a view has the added bonus of letting us re-imagine international labour law – see Langille, ‘What Is International Labour Law For?’ above n 30.

G. New ideas, but old anxieties

But, if Freedland is right, the introduction of these ideas will be anxiety-inducing for labour lawyers, and doubly so. This is because this package of ideas accepts as true what Freedland has revealed – the necessary normative link between scope and content – and yet is prepared to face the challenge presented in confronting that truth.

There are some basic and predictable responses to this way of proceeding. Two of the most important are: first, there will be, Freedland predicts, a resistance to the new normative ideas and a defence of the old normative order. Second, there will be an attack on the adequacy of the new normative ideas. On this latter score, one of the most interesting lines of thinking can be best understood as the mapping of our old anxieties onto new ideas.⁴³

1. Defending the received wisdom – ‘They say that breaking up is hard to do’⁴⁴

Defences of labour law’s existing normative underpinning – that the idea is to protect workers in the negotiation of contracts against abuses caused by inequality of bargaining power and all in the name of decency, redistribution, avoidance of subjugation, etc – have a number of themes. Large among them is the idea of throwing the baby out with the bath water. That is, the new normative theory threatens the existing moral basis of labour law, with the result that the project of labour law will be undermined, and is therefore to be resisted.

This is a criticism made most forcefully by Guy Davidov. In his essay ‘The (Changing?) Idea of Labour Law’,⁴⁵ Davidov expresses disapproval of efforts to rethink labour law’s normative underpinnings. He does not see them as an effort to revive what he himself calls our ‘battered enterprise’.⁴⁶ Rather, Davidov accuses me, along with Alan Hyde, of treachery against our shared discipline of labour law. He alleges that we are involved in an ‘attack’ on labour law.⁴⁷ Moreover, in his view it is an insidious attack ‘from within’ the ‘international community of labour lawyers’.⁴⁸ Even more provocatively, he accuses us of deception in our methods of attack, stating that although this attack is ‘ostensibly from a supportive position’⁴⁹ it is not simply one that is ‘likely to end up weakening’⁵⁰ labour law but that it is actually an ‘attempt to undermine it’.⁵¹ The basic idea is that any normative re-thinking by

⁴³ There are other responses as well – eg, the strategy of going down with the good ship labour law as we knew and loved her, abandoning all hope. See Hyde, this volume.

⁴⁴ Neil Sedaka.

⁴⁵ (2007) 146 *International Labour Review* 311.

⁴⁶ *Ibid* 319.

⁴⁷ *Ibid* 311.

⁴⁸ *Ibid*.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*.

⁵¹ *Ibid* 318.

labour lawyers is actually an ‘inside job’, in parallel with more familiar attacks upon labour law from outside by its enemies (such as conservative economists) and that all those who wish to remain true to labour law should be on guard against such insidious efforts.

There is much that could be said about this point of view but I think the most important point is as follows. The view Davidov attacks is not an attack on labour law but something quite different. It is that labour law’s traditional account of itself rests on a normative foundation which is too narrow, too thin, and as a result, inadequate to labour law’s destiny. Davidov insists that the argument is one which is against labour law’s traditional view of workers as lacking power vis-à-vis employers and against the idea of ‘redistribution’ as labour law’s concern. This is wrong. The real problem, in my view, is that Davidov believes that redistribution is the purpose, the ‘end’ of labour law. (He believes, as most labour lawyers do, that sometimes this comes at a price and sometimes not.) But redistribution is not a purpose, not a goal, not an ‘end in itself’. The issue for labour law is, on the view Davidov resists, that it needs an answer to the question ‘why is redistribution important?’ There is no argument against redistribution. It is also not a position advocated by ‘inequality of bargaining power’ deniers. It is not a view which says that employers’ and employees’ interests always align and that ‘the lion will lie down with the lamb’.⁵² The idea is that the vital question is ‘why is it important to care about such inequality?’ And, unlike some labour lawyers, I not only believe that we have to ask that question, I believe there is a good answer to it. My only claim is that there is a set of larger and better reasons for having labour rights and labour standards. A labour law theory which contents itself with the idea that labour law’s purpose is ‘redistribution’ is a labour law theory which does not have an adequate normative foundation at all because it stops short of an appeal to a compelling account of why these alleged purposes are important. This is what I take to be so radical about Sen’s ideas. He really does take us back to a re-evaluation of our true ends – as opposed to our means for achieving them. Increasing efficiency, increasing GDP per capita, creating a labour code domestically or internationally, or ‘redistribution’, are not ends in themselves. We can, following Sen, see that they are means to our true ends which I find to be best expressed in Sen’s notion of human freedom. The point of labour law’s redistributive and other efforts is to advance the cause of ‘human beings leading lives we have reason to value’, to use one of Sen’s formulations. It is this normative ideal which lets us know what labour law (at least smart and useful labour law) is for, and what a smart and useful labour law would look like. And why, to use Davidov’s key word for expressing labour law’s traditional normative self-understanding, ‘redistribution’ is important. Discussions of redressing imbalances of power in employment relations need real and better normative grounding. What I argue against is a view of labour law that believes it has, and needs, no good reason for thinking it is important. I think it is

⁵² I am reminded of a remark by a senior American military officer, whose name I cannot recall: ‘When the lion lies down with the lamb, I still want to be the lion.’

possible and necessary to have such a set of reasons. This is not a threat to labour law as we know it but a precondition to any decent future for the subject.

Redistributing power in the negotiation of employment contracts (procedurally and substantively), as important as that might have been and might be, is not an idea adequate to this task. Nor does an account of labour law which takes that as its purpose have the best available account of its own normative salience.

2. Mapping the old anxieties onto the new ideas

There is a second and very interesting package of related critiques which has a different focus than that of the first reaction. The focus here is not upon defending the status quo, but upon attacking the new idea. This critique is mounted in a number of specific ways, such as: 'The new normativity privileges procedural (civil and political) rights over substantive (economic and social) rights', 'freedom over capabilities', 'process over substance', 'the individual over the collective', and so on.⁵³ This is a critique which deserves a longer and more careful reply because some of the difficulty flows, it seems to me, simply from differing usages of words such as 'labour standards' and 'labour rights',⁵⁴ conflicting views on other issues, such as whether there are differences in the structure of political/civil as opposed to social/economic rights, from conceptual confusions and disagreements regarding the nature of freedoms, on the one hand, and rights on the other, and regarding how best to understand 'collective rights', and so on. Here I wish to discuss what I see as an important feature of these objections taken as a set.

The idea is that there exists a real risk, and some evidence, of an inappropriate mapping onto Sen's ideas of the anxieties which were naturally visited upon us by labour law's traditional self-understanding. A simple way of capturing this point is that under the old view of what is important in the life of labour law there is a perfectly understandable and intuitive resistance on the part of labour lawyers to the idea of 'freedom'. That word worries labour lawyers because they see it as dangerous for reasons which the history of their discipline, as understood through the lens of the received and standard account of it, makes plain. On that story 'freedom' of contract, which favoured those with the bargaining power, that is, employers, was what labour law was to be a cure for – through procedural and substantive regulation of the labour bargain. Freedom is the problem on this view. Freedom is what labour law seeks to cure, not what it seeks to advance. Freedom is associated with the old common law of the contract of employment, with 'formal', that is, empty freedom, where equal liberty to bargain was sufficient without any inquiry into resource or power imbalances, with a cold, atomistic, neo-conservative or even

⁵³ See A Blacketter, 'Situated Reflections on International Labour Law, Capabilities, and Decent Work: The Case of Centre Maraîcher Eugène Guinois' (2007) *Revue Québécoise de Droit International* 223; and J Fudge, 'The New Discourse of Labor Rights' (2007) 29 *Comparative Labor Law and Policy Journal* 29. See also P Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 457.

⁵⁴ For a discussion on this point see K Kolben, 'Labour Rights as Human Rights?' (2010) 50 *Virginia Journal of International Law* 250.

libertarian view of the virtues of ‘unregulated’ (actually meaning regulated by a certain set of contract rules) labour market, with the very world that modern labour law seeks to escape. Labour law spent much of its early life dismantling that view of freedom. (And much of its recent life defending itself against a neo-conservative attack on its accomplishments in that regard.) It is difficult for labour lawyers to hear the word freedom without images of a ‘free market’ assault upon their discipline coming into their minds.

But this is, in my view, something which labour law needs desperately to straighten out. My view is that this is precisely what Sen is doing – taking us past this way of thinking. This is done in several ways. First, by clearly focusing upon something close to the hearts of labour lawyers – that is, concentrating not on formal freedom but on substantive freedom, which he expresses as the ‘real capacity’ to lead a life we have reason to value. As Sen famously puts it: ‘Individual liberty is a quintessentially a social product.’⁵⁵ But there is more. Labour lawyers are very familiar with the distinction between real and formal freedom. This is basic to the idea of inequality of bargaining power. Sen’s point goes much deeper. It is a point about real human freedom as an end in itself, and as a remarkable means to that end. On this view market ordering and economic opportunities are not understood as operating on some non-normative basis – but as sounding in the same deep set of ideas other sorts of freedoms. The labour market does not exist as an autonomous fact of life justified solely in instrumental terms, which is then resisted in the name of moral ideals of fairness and freedom. The ‘labour market’ and economic opportunities rest on the same normative foundation as ‘labour law’. There is no residual non-normative, non-human-freedom, pro-market default position when the normativity of labour law ‘runs out’. The same normative ideas underlie both our attachment to the labour market as an abstract ideal and our ideas about proper construction and ‘regulation’ of it.

But what we see in the writings of the critics is instead a mapping onto Sen of labour law’s familiar dichotomous way of thinking which results in the argument that you have to choose which side of the great trade-off you are on – freedom or capability. This is seeing in Sen’s ideas a replication of the great trade-off which labour law’s traditional account of itself made inevitable, and upon which labour law made its choice and took its stand. So those relying upon Sen stand accused of privileging freedom. This is a serious, if understandable, error. But it is very disheartening for the future of labour law.

Sen articulates a view which enables us to overcome this unfortunate way of thinking. The key is that if we have a rich enough understanding of human freedom – one that allows us to see that human freedom (conceived of as the real capacity to lead lives we have reason to value) is both our true end, and a critically important dimension of the way there, then we see that capabilities are not at war with freedom and freedom is not the enemy of capabilities. Human freedom is real capability. We also see that human freedom turns out, just empirically and

⁵⁵ Sen, *Development as Freedom*, above n 31.

amazingly, to be the best way to itself. This is something labour law has known for a long time. It is why freedom of association is so basic. It is not only that workers who organize do better at enforcing other (substantive) rights. We must also remember that without such freedom of association of workers we would not have the panoply of either domestic legislation, or international law, to enforce in the first place. My sense is that because so many labour lawyers know in their hearts that the whole point of labour law is to rid us of, or at least constrain to some degree, the world of 'the free market' in labour they cannot quite get used to Sen's resurrection of the idea of human freedom, even though conceived very differently, and even though it is at the core of any understanding of the history of, and any viable future for, their discipline. Markets need to be understood and justified in terms of substantive freedom as well. We need a theory which explains why market activity and economic growth are desirable in the first place. This justification has to be undertaken in terms of advancing the cause of real human freedom. It makes no sense on Sen's view to ask whether political, economic, or social freedoms are conducive to, or hinder, development – they are constitutive of it. Any account, such as labour law's traditional account, which pits justice against markets (and posits a trade-off between the two) is thus missing a big point. It imagines a normative world in which the market stands outside the realm of moral justification and in opposition to our efforts to advance our normative cause. So Sen's is a much more radical view than labour law's traditions can comprehend or allow. It is expressed in the idea that 'individual freedom is a social commitment'. This, I suggest, may be the best way to get beyond our limited content and understanding of 'labour is not a commodity'.

It may actually be closer to Sinzheimer's original idea than we have been able to see. Kahn-Freund's essay about Sinzheimer's writings and ideas about labour law notes his view that the project of labour law was to get beyond mere formal equality of the employer and employee in law to the fact of dependency. But beyond this now familiar and basic labour law idea we find the following: 'Sinzheimer's whole work is dominated by the motif of freedom'. So, '... additional legal obligations in the employment relationship would contribute to the emancipation of the working human being'. Finally: 'His whole work is a call to the emancipation of man.'⁵⁶

The working out of these connections at any level of credible detail remains to be done in the future. But the task of articulating a more robust conception of labour law's animating spirit, its theory of justice, and thus both a better account of both its scope and content, is not avoidable, merely difficult.

⁵⁶ See O Kahn-Freund, 'Hugo Sinzheimer, 1875–1945' in *Labour Law and Politics of the Weimar Republic* (Blackwell Publishing, 1981) 73 at 103–4. See Dukes, this volume.