

The Goals of Regulating Work: Between Universalism and Selectivity

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Abstract

What are the goals of labour and employment laws? For purposes of reforming, interpreting and defending such laws, it is important to articulate their goals. This article is concerned with the *general* goals of regulating work relations (i.e. goals shared by different regulations in this field), at the level of normative justifications. The various goals mentioned in the literature are reviewed and discussed. It is argued that these goals can be classified on a continuum between selective (in the sense of intending to help a specific group – employees) and universal (goals which are seen as advancing the interests of society at large and employers as well). It is argued that a trend can be identified, in recent years, from selective to universal articulations of goals. The difficulties with this trend are then exposed.

Key words: labour law, employment law, normative justifications, purposive interpretation, universalism

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1. Introduction

A major labour law debate in recent years concerns the goals of regulation in this field.¹ There is increasing interest in articulating the goals of labour law, and heated debates about what these goals are.² Why now? One reason is the sense of crisis among labour law scholars, which brings about a rethinking of basic principles. I have argued elsewhere that the crisis is actually not with our goals – there is no reason to think that they have changed or should change – but results from a mismatch between those goals and the actual application of labour laws.³ Others believe that we need new guiding principles (i.e. goals) for this field.⁴ Either way – crisis or not – it is certainly useful to rethink basic principles and assumptions every once in a while; so the debate should be welcomed. Moreover, an explicit articulation of goals is important for three reasons: proposing reforms (or evaluating proposed reforms); interpreting labour laws (and filling gaps in legislation); and examining the constitutionality of labour laws when they are being challenged.⁵ All of these important tasks require that we know what exactly we are trying to do with labour law.⁶

The current article has two aims. First, to put forward a comprehensive list (as much as possible) of the goals of labour law, and to review (sometimes critically) some new proposals made in this regard. I should note upfront that there is some overlap

¹ The term "labour law" is used in this article as shorthand for labour law, employment law and workplace discrimination law.

² See generally various chapters in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011); Christopher Arup et al, eds, *Labour Law and Labour Market Regulation* (Annandale, Australia: Federation Press, 2006); Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006). And see Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011) at 371-382; Simon Deakin & Frank Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005) at chapter 6; Guy Davidov, 'The (Changing?) Idea of Labour Law' (2007) 146 Int'l Lab Rev 311; Richard Mitchell, 'Where are we Going in Labour Law? Some Thoughts on a Field of Scholarship and Policy in Process of Change' (2011) 24 Austl J Lab L 45.

³ See Guy Davidov, 'Re-Matching Labour Law With Their Purpose' in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 179. For the view that our goals have not changed see also Manfred Weiss, "Re-Inventing Labour Law?", in *The Idea of Labour Law*, *ibid.*, at 43, 46; Ruth Dukes, 'Hugo Sinzheimer and the Constitutional Function of Labour Law', in *The Idea of Labour Law*, *ibid.*, at 57.

⁴ Brian Langille is the most enthusiastic proponent of this view and has argued it explicitly and strongly in a series of articles; see mainly Brian Langille, 'Labour Law's Back Pages' in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006) 13; Brian Langille, 'Labour Law's Theory of Justice', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 101 at 111. Others have also expressed similar views; see, e.g., Mitchell, *supra* note 2; Freedland & Kountouris, *supra* note 2.

⁵ Guy Davidov, 'Articulating Labour Law's Goals: Why and How' (2012) 3 Eur Lab LJ 130.

⁶ There are of course also *specific* goals to specific pieces of labour legislation. However my focus in the current article is only on the *general* goals that are unified for the entire body of labour law, or at least some significant part of it.

between different articulations listed below; I do not intend to claim that they are entirely separable. However the articulations discussed separately below are different at least to *some* extent (and not only by name), which justifies separate treatment. It should also be made clear that, for the most part, the different articulations have no claim for exclusivity, i.e. in most cases different goals can live side by side with each other.⁷ Another clarifying note concerns the level of abstraction: goals can be articulated at different levels. Some distinguish between "foundations" and "functions" of labour law (the former more general, the latter more concrete)⁸. For current purposes I consider possible articulations of goals at different levels of abstractions together.

Is it possible to articulate goals without regard to a specific context of time and place? That depends on whether the inquiry is normative or descriptive, and on the degree of generalization in which it is performed. It is certainly possible, and worthwhile, to look for (descriptive) explanations of the law;⁹ at the same time, however, it is important to think about the idea behind the law at a normative level. And at this level, the basic problems which labour laws are designed to confront are very similar across time and place. Consider, for example, the minimum wage. Obviously a lot has changed between the time it was first adopted more than a century ago and the present, but it still exists throughout the world.¹⁰ Notwithstanding the dramatic shift from an industrial economy to a service economy, from Fordism to post-Fordism, the feminization of the workforce, the increasing precariousness of employment, the impact of globalization and so on – the minimum wage is still here, and it is needed for very similar reasons as before. The same is true for other major components of the body of labour laws. There is also, undeniably, a political aspect. Franklin D. Roosevelt, Ronald Reagan, Pierre Trudeau, Tony Blair and Nicolas Sarkozy – to take just a few examples – surely had different views about labour law, why it is needed and how much of it is warranted. And indeed the details of labour law were different in their respective countries under their leadership, and they generally vary across

⁷ As rightly noted by Matt Finkin, labour law "is too all-encompassing for its purpose to be captured by a single catchphrase." (Matthew W. Finkin, 'The Death and Transfiguration of Labor Law' (2011) 33 Comp Lab L & Pol'y J 171 at 183).

⁸ Frank Hendrickx, 'Foundations and Functions of Contemporary Labour Law' (2012) 3 Eur Lab LJ 108.

⁹ For examples of descriptive-positive analyses of labour law's goals, see, James B. Atleson, *Values and Assumptions in American Labor Law* (Amherst: University of Massachusetts Press, 1983); Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University press, 2011) 88; Michael Quinlan, 'Contextual Factors Shaping the Purpose of Labour Law: A Comparative Historical Perspective', in Christopher Arup et al, eds, *Labour Law and Labour Market Regulation* (Annandale, Australia: Federation Press, 2006) 22.

¹⁰ On the first minimum wage laws, enacted in the late 19th Century in New Zealand and Australia, see International Labour Office, *Minimum Wage-Fixing Machinery: An International Study of Legislation and Practice* (Geneva: ILO, 1927) 9. For a discussion of the goals of the most recent major minimum wage legislation – in the UK – see *The National Minimum Wage: First Report by the Low Pay Commission* (1998), at <http://www.berr.gov.uk/files/file37987.pdf>.

time and place.¹¹ But at a more general level, the basic idea is quite the same.¹² The level of the minimum wage (for example), and its scope, are different under different regimes, and this has crucial implications for workers and employers. But the normative justifications for enacting a minimum wage law are similar. For the purposes mentioned above (thinking about reforms, interpreting legislation, filling gaps, examining constitutionality) some reference to local and contemporary goals is probably needed, but even more important, in my view, would be an understanding of why the law is needed (can be justified) more generally. I will therefore look for goals in the sense of *normative justifications*, and assume that some (general) degree of "fit" with current labour law systems around the world is required.¹³ This is not to downplay the importance of studying goals at a descriptive level, studying the changes in labour markets and labour relations and their impact on labour law, and studying the goals at a more contextual level (specific legislation, specific time and place). All this is highly important, but out of the scope of this article. My focus is only on goals of labour law *at a normative and general level*.

The second aim of this article is to offer a new framework that could help in comparing and analyzing proposals in this area: a distinction borrowed from the welfare state literature between universalism and selectivity. I will argue that this distinction captures an important difference between goals: do they aim to benefit *everyone*, or only the group of workers? Or perhaps something in between? I will discuss the different goals found in the literature through this prism, and argue that in recent years labour law scholars are trying to shift the focus from selective to universal goals. I will explain why this is happening but caution against retreat from the traditional (and more selective) labour law goals.

Part 2 below explains the concepts of universalism and selectivity. Part 3 considers previous attempts to categorize goals. I then turn to consider the goals themselves – all the possible articulations I could find. Part 4 discusses goals on the selectivity pole of the spectrum; part 5 discusses "mid-spectrum" goals; and part 6 considers goals that are closest to the universalism pole. Part 7 makes the argument about the shift

¹¹ For discussions in the UK concerning changes in the goals of labour law as a result of changes in government, see Sandra Fredman, 'The New Rights: Labour Law and Ideology in the Thatcher Years' (1992) 12 Oxford J Leg Stud 244; Hugh Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 31 Indust LJ 17; Hugh Collins, 'Is There a Third Way in Labour Law?', in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) 449; Sandra Fredman, 'The Ideology of New Labour Law', in Catherine Barnard, Simon Deakin & Gillian S. Morris, eds, *The Future of Labour Law: Liber Amicorum Bob Hepple* (Oxford: Hart, 2004) 9.

¹² And see Simon Deakin, 'Conceptions of the Market in Labour Law', in Ann Numhauser-Henning & Mia Rönnmar, eds, *Normative Patterns and Legal Developments in the Social Dimension of the EU* (Oxford: Hart, forthcoming 2013) (discussing aspects of labour law that vary across national contexts, and in some cases result from local political and industrial factors, but adding that labour law systems also have "universal features").

¹³ In line with the well-known methodology of Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986). For a discussion of this and other methodological questions concerning the articulation of goals, see Davidov, *supra* note 5.

from selectivity to universalism, and briefly examines whether the two poles can somehow be connected. Part 8 concludes.

2. Universalism vs. Selectivity – Explaining the Concepts

In discourse (and literature) concerning the welfare state, universalism and selectivity are key concepts. Universalism generally means that benefits are given to all. Selectivity, on the other hand, is a model that prefers the targeting of benefits to specific groups (or people) that really need them. A child benefit paid by the State for every child, or an old-age benefit paid to every citizen over a certain age, are paradigmatic examples of universal benefits. An income security payment given by the State to people who have no employment and no resources, based on tests aimed to ensure their need, is an example of a selective scheme.

Most democratic countries have both universal and selective programs. But the combination varies. It is common to classify welfare states into three models: liberal, conservative and social-democratic.¹⁴ The liberal model, exemplified by the US, relies mostly on the market. For the most part people are expected to achieve income and security through the market, so intervention by the State is minimal. The conservative model, exemplified by Continental European countries, relies to a large extent on the family. People are expected (more than in other models) to rely on their family members for support, so again intervention by the State is relatively limited.¹⁵ In contrast, the social-democratic model, exemplified by Scandinavian countries, relies much less on both market and family. The State assumes a central role in creating broad societal reciprocal insurance – most risks are transformed from private to public through massive redistribution programs. Obviously the social-democratic model is based on higher taxes alongside a higher level of public services. And one of its main features is the emphasis given to universal programs. Liberal countries, on the other hand, prefer selective programs, targeted only to the very poor.

The difference between programs is often a matter of degree, so it is useful to conceive of the distinction between universalism and selectivity as a continuum rather than a dichotomy.¹⁶ I argue that this continuum is also useful for understanding the debate over the goals of labour law. I am not making here a *direct* application of these concepts in the labour law field, in the sense of viewing rights included in labour legislation as benefits and asking to what extent these rights are applied to all or targeted at specific groups. This is also possible, and I plan to pursue this line of

¹⁴ Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Princeton, NJ: Princeton University Press, 1990); Gøsta Esping-Andersen, *Social Foundations of Postindustrial Economies* (New York: Oxford University Press, 1999), chapter 5.

¹⁵ Alongside the family, the European model relies to a large extent on the "social partners", and specifically collective bargaining.

¹⁶ For example, child benefits, even if paid irrespective of need, are not paid to every citizen or resident but only to those with children. There are other benefits which are conditional on specified circumstances, although not limited to those who show economic need.

research elsewhere.¹⁷ But my aim in the current contribution is different: I am using the universalism-selectivity spectrum only indirectly, as a heuristic – drawing inspiration from it to show how various proposals recently made concerning the goals of labour law can be usefully understood in universalism-selectivity terms. I argue that different articulations of goals – including recent proposals – differ in the degree to which they aim to benefit *everyone* (and in this sense can be seen as *universal* goals) or, alternatively, aim to benefit specific groups (and accordingly can be described as *selective* goals).

There is voluminous literature on the pros and cons of universalism vs. selectivity in the welfare state. For the most part it is not relevant for the current article, which uses these concepts very loosely – as inspiration, transplanted into another context. There is, however, one important advantage associated with universal programs which should be mentioned here: the political support they enjoy. Programs targeted at the poor often lack broad political support. In tough economic times, even though such programs are needed the most, they are likely to suffer cuts – much more than programs that cost more but benefit a larger share of the population.¹⁸ This was traditionally explained by self-interest: members of the middle class are more likely to support social or welfare programs which they directly enjoy. Recently another explanation was added: universal programs fit the psychological tendency for reciprocity.¹⁹ I will return to this aspect of universalism when assessing the shift from selective to universal goals, in part 7.

I realize that it is somewhat risky to take inspiration from another field by giving known concepts a new connotation. Supporters of labour law are likely to be supporters of a universal welfare state, and so might be predisposed to view "universal" as positive and "selective" as negative. In the current context, I will argue that the shift from selectivity to universalism is problematic. But this does not imply anything about the welfare state context; I do not mean to argue against universal welfare state programs. I hope such confusion can be avoided, because I do believe there is benefit to be gained from thinking about labour law's goals in universalism-selectivity terms.

¹⁷ The current article is part of a larger project, a book tentatively entitled "Regulating Employment: Goals, Scope, Methods" which uses the universalism-selectivity spectrum as a connecting framework. In the part dealing with scope, a more direct application of this spectrum is possible and useful.

¹⁸ William Julius Wilson, *The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy* (Chicago: University of Chicago, 1987); Theda Skocpol, 'Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States', in Christopher Jencks & Paul E. Peterson, eds, *The Urban Underclass* (Washington DC: Brookings Institution, 1991) 437; Amartya Sen, 'The Political Economy of Targeting', in Dominique van de Walle & Kimberly Nead, eds, *Public Spending and the Poor: Theory and Evidence* (Baltimore: Johns Hopkins University, 1995) 11 at 14; Thandika Mkandawire, *Targeting and Universalism in Poverty Reduction* (UN Research Institute for Social Development, Social Policy and Development Programme Paper No. 23, 2005).

¹⁹ Gillian Lester, 'Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design' (2011) 64 Tax L Rev 313.

3. Previous Attempts to Categorize Goals

As part of the increasing interest, in recent years, in identifying and explicitly articulating the goals of labour law, one can also find several useful categorizations (or classifications) of goals in this field. Hugh Collins offers a distinction rooted in regulatory theory between market failure justifications and distributive justifications for labour law.²⁰ In a later contribution he relies on what he sees as "an emerging European model" to divide the goals of labour law into three groups: social inclusion, competitiveness and citizenship.²¹ Anne Davies makes a distinction between economic perspectives on labour law (which, to the extent they offer a rationale for labour law, focus on correcting market failures) and human rights perspectives.²² Keith Ewing has argued that labour law has two goals: a social justice purpose and democratic purpose.²³ In my review of possible goals below I treat democracy as a separate goal of labour law but "social justice" seems to be a family of various goals. Stephen Befort and John Budd identify three objectives of labour law: efficiency, equity and voice.²⁴ The goal of labour law, they argue, is to balance these three objectives. It appears, though, that each of those objectives (and in particular equity) includes a number of more specific objectives and is based on various rationales, so they are best seen as categories of goals as well.²⁵ All of these are useful categorizations, helpful in pointing out differences between different goals of labour market regulations. My own proposal adding a universalism-selectivity spectrum attempts to add another dimension and point attention to an important difference between goals that is not captured by existing classifications.

²⁰ Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Hugh Collins, Paul Davies & Roger Rideout, eds, *Legal Regulation of the Employment Relation* (The Hague: Kluwer, 2000) 3.

²¹ Hugh Collins, *Employment Law*, 2nd ed (Oxford: Oxford University Press, 2010) at 20-25. It could be argued that these are not groups of goals but rather the goals themselves. Below I refer to social inclusion as a separate goal as well. To the extent "competitiveness" is seen as an independent goal, it is closely associated with efficiency, which is discussed as a separate goal too. It is more difficult to conceive of citizenship as a "goal" of labour law; on the use of this idea in the labour context see Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theor Inq L* 531.

²² A.C.L. Davies, *Perspectives on Labour Law*, 2nd ed (Cambridge: Cambridge University Press, 2009), Chapters 2-3.

²³ K.D. Ewing, 'Democratic Socialism and Labour Law' (1995) 24 *Indust LJ* 103 at 111. See also Hendrickx, *supra* note 8, who lists social justice as one of the "foundations" of labour law.

²⁴ Stephen F. Befort & John W. Budd, *Invisible Hands, Invisible Objectives: Bringing Workplace Law & Public Policy Into Focus* (Stanford: Stanford University Press, 2009). See also John W. Budd, *Employment With A Human Face: Balancing Efficiency, Equity and Voice* (Ithaca: Cornell University Press, 2004).

²⁵ Befort and Budd see mostly a clash between efficiency considerations (which they see as favouring the employer) and equity/voice considerations (favouring the employee). They argue that in the US, labour and employment laws give too much weight to efficiency, and this should be better balanced. They note that "the fundamental justification for equity and voice" is "the fulfilment of human dignity and citizenship" (*supra* note 24, at 123).

Outside of legal literature, industrial relations theorists are using a classification which seems at first sight similar to the universalism/selectivity one. Alan Fox was the first to distinguish between "unitarist" and "pluralist" approaches to industrial relations, in the 1960s.²⁶ And these terms are still being used today.²⁷ A Unitarist approach assumes that there is no conflict of interests between an employer (or its managers) and its employees, or at least there should not be. Accordingly all decisions can be taken unilaterally by the employer/managers. A pluralist approach, on the other hand, recognizes that there are different (and conflicting) interests at stake, and they are resolved through a process of collective bargaining. So there is obviously some similarity to the terms I wish to propose here. Indeed, one could argue that the current debate around the goals of labour law can be usefully understood (or reframed) in light of the unitarist/pluralist distinction. However, this distinction has two major problems, as far as current purposes are concerned. First, the focus is on the perspective of the employer, or (in the case of pluralism) the perspectives of the employer and the representative union. Industrial relations scholars using these concepts are focusing on the interests (or "goals") of the parties, not the goals of regulation in this area (i.e. the goals of society at large). Second, the unitarist/pluralist distinction is a dichotomy which cannot easily capture the spectrum of complex possibilities. One can either believe that there are only unified interested (and be considered unitarist) or acknowledge the multitude of interests (and be considered pluralist). There is nothing in between. But life is more complex than that.²⁸

4. Goals at the Selectivity Pole

²⁶ The original contribution is Alan Fox, *Industrial Sociology and Industrial Relations*, Research Paper No. 3, Royal Commission on Trade Unions and Employers' Associations (London: HMSO, 1966). He summarizes and further develops the argument (including a critique of *both* approaches) in Alan Fox, 'Industrial Relations: A Social Critique of Pluralist Ideology', in John Child, ed, *Man and Organization* (London: George Allen & Unwin, 1973) 185.

²⁷ See, e.g. Befort & Budd, *supra* note 24, chapter 6 (arguing in favour of "a pluralist manifesto for workplace law and public policy"). It should be mentioned that there is criticism on the almost-exclusive focus of industrial relations scholars on management-union relations (Bruce E. Kaufman, 'Paradigms in Industrial Relations: Original, Modern and Versions In-Between' (2008) 46 *Brit J Ind Rel* 314), an aspect which is closely associated with pluralism. However a shift to a broader engagement with employment relations (as advocated by Kaufman) does not affect the two basic views as far as goals are concerned.

²⁸ Over the years some other perspectives have been added to the unitarist/pluralist ones in industrial relations discourse. However these do not seem to depart from the basic dichotomy as far as the basic approach to goals is concerned. The radical/critical approach shares the pluralist position about conflict of interests, it is just more sceptical about the ability of collective bargaining to provide solutions (for an overview of these perspectives see Befort & Budd, *supra* note 24, at 8-14). There is also an approach that some consider "hybrid" because it recognizes that alongside conflict there are also areas of shared interests (see David E. Guest & Riccardo Peccei, 'Partnership at Work: Mutuality and the Balance of Advantage' (2001) 39 *Brit J Ind Rel* 207, 210, referring to Thomas A. Kochan & Paul Osterman, *The Mutual Gains Enterprise* (Cambridge: Harvard Business School, 1994) as an example of the "hybrid" approach). However it appears that this approach as well is based on a pluralist viewpoint, which to a large extent is defined as a negation of the unitary "one common goal" perspective.

Let us turn, then, to consider possible goals. The traditional approach to labour law focuses on the interests of employees – in the most general terms, the aim of labour law is to protect employees. On this view, goals are articulated in a way that can be described as selective – advancing the interests of a specific group rather than general values or societal goals. To be sure, by legislating to advance the interests of the specific group, a society shows support for those interests – in some broad way they are aligned with the interests of society. In this sense, every law can be seen as advancing societal interests. However, there is still a difference between a law designed to help a specific group of people (who of course are seen by society at large as worthy of such help) and a law which aims to be directly beneficial to others as well. This difference is the one I attempt to capture here with the selectivity-universalism continuum. Selective goals are those justifying labour law as protecting/assisting workers.

The classic articulation of the purpose of labour law is based on the concept of unequal bargaining power. It is also common to refer to redistribution as a major goal of labour law. My own articulation which I have advanced elsewhere is based on employees' vulnerabilities, specifically democratic deficits and dependency. There are also some newer ideas to justify and explain labour law on the basis of emancipation or the pursuit of happiness. I will discuss each of these goals in turn.

Inequality of Bargaining Power

In a well-known and influential articulation, Kahn-Freund maintained that "[t]he main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship."²⁹ This has been the accepted wisdom among labour lawyers for many years. The current attempt by some labour law scholars to distance themselves from selective goals (such as this), described below, does not usually include any explicit objection to the idea of inequality of bargaining power. However, this development should perhaps be understood, at least in part, in light of more direct objections to this concept. Neo-classical economists have challenged the view now associated with Kahn-Freund because they refuse to accept the relevance of "power" in market transactions. It is therefore worth trying to explain what inequality of bargaining power means, and ask whether it is useful to consider counteracting this inequality as a (or perhaps even "the") goal of labour law.

Inequality of bargaining power can be understood to exist at two different levels (or stages): setting the terms of the employment contract (or changing those terms); and the existence of control/subordination as an inseparable part of the relationship.

Consider the terms of the contract first. For the sake of simplicity, I refer to setting the wage, but the same analysis applies to any other term of the contract, explicit or

²⁹ Paul Davies & Mark Freedland, *Kahn-Freund's Labour and the Law*, 3rd ed. (London: Stevens & Sons, 1983) 18.

implied. Standard economic analysis relies on the "invisible hand" of the market to ensure that the wage will be set based on supply and demand. Thanks to competition from other employers, an employee is expected to get a wage equal to his marginal productive output. So, if his worth to the employer is 10\$ per hour, this is what he is getting (and should be getting) according to neo-classical economists. In real life, however, he could be getting less, due to market failures: for example, perhaps the employee is not aware of the fact that he can get 10\$ elsewhere, so he accepts an 8\$ offer (information asymmetries). Or perhaps there are no other employment opportunities in his area, so in order to get 10\$ he has to move to another area, which means high moving costs for him and his family – again prompting him to accept a lower offer (moving costs, or more generally transaction costs). Or maybe employers in his area have all agreed to offer a wage below the market rate, thus giving him no other option (a cartel). And so on; market failures are common in labour markets.³⁰ So one possible meaning of "inequality of bargaining power" is the existence and prevalence of market failures (which are usually tilted in favour of the employer) in the employment relationship.³¹

There are also two other reasons that might cause our employee to accept the 8\$ wage. One is that, due to the previous allocation of resources in society, he has to accept the first offer made to him – unlike the employer, he does not have the ability to wait (or "hold out" of the market) for any significant period. Another is that his worth to the employer is only 8\$ – this is indeed the competitive wage – but only because the employer does not invest in equipment or training, which could raise productivity. In both cases, one has to accept a low wage – assume that the level is below what we find acceptable as a society – even though it is entirely possible for the employer to pay more. Both of these reasons can be seen as additional market failures, if this concept is given a broad understanding, or they can be seen as another meaning of unequal bargaining power, outside of economic theory.³²

An entirely different meaning does not concern bargaining over the terms of the contract, but rather refers to the existence of subordination – the agreement of the

³⁰ See, e.g., Bruce E. Kaufman, 'Labor's Inequality of Bargaining Power: Changes over Time and Implications for Public Policy' (1989) 10 J Lab Res 285; Bruce E. Kaufman, 'Labor's Inequality of Bargaining Power: Myth or Reality?' (1991) 12 J Lab Res 151; William M. Boal and Michael R. Ransom, 'Monopsony in the Labor Market' (1997) 35 J Econ Lit 86; Alan Manning, *Monopsony in Motion: Imperfect Competition in Labor Markets* (Oxford: Princeton University Press, 2003); Bruce E. Kaufman, 'The Impossibility of a Perfectly Competitive Labour Market' (2007) 31 Camb J Econ 775.

³¹ See Fritz Machlup, *The Political Economy of Monopoly: Business, Labor and Government Policies* 369-370 (Baltimore: John Hopkins Press, 1952); Brian A. Langille, 'General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)', in Jagdish Bhagwati & Robert E. Hudec, eds, *Fair Trade and Harmonization (Vol. 2): Legal Analysis* 231, 243 (Cambridge: MIT Press, 1996); Guy Davidov, 'The Reports of My Death are Greatly Exaggerated: 'Employee' as a Viable (Though Overly-Used) Legal Concept', in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006) 133.

³² Langille, *supra* note 31; Davidov, *supra* note 31.

employee to submit herself (to some degree) to the control of the employer. This is actually what Kahn-Freund himself meant when he talked about inequality of bargaining power.³³ A few years later Hugh Collins termed this "bureaucratic power".³⁴ Here as well, neo-classical economists object, arguing that there is no inequality: the employee agrees to submit herself to the control of the employer just as the employer agrees to pay her wages. This is an agreement like any other.³⁵ This, however, is misleading. The employer agrees to pay a sum known in advance; the employee has no power to change the wage later as she sees fit. The employee, on the other hand, agrees to an open-ended clause, giving the employer the right to issue commands which will change from time to time – as he sees fit. This part is unequal.

Like Kahn-Freund I believe that this submission is necessary; there is nothing inherently unjust about it. It is impossible to conduct any business or organization without giving someone the power to coordinate the work and make decisions that are binding for others.³⁶ However this also means that inequality of power is inherent in the employment relationship – which explains the need to regulate this relationship and prevent abuse of power by employers.

To sum up: "inequality of bargaining power" is a powerful catch-phrase, which labour lawyers have found useful for many years. Critiques coming from economists push us to better clarify what this concept means. It seems that, for the most part, it points attention to market failures in the stage of setting the terms of the employment contract, and to the existence of subordination as an inherent part of that contract. Without detracting from the important role played by this concept historically, it is perhaps better to refer to market failures and subordination *directly* when considering the goals of labour law.

Redistribution

Another objective often mentioned as a major goal of labour law is redistribution – of resources, power and risks.³⁷ The call for redistribution assumes that the ultimate goal is to achieve distributive justice, which is in the interest of society at large and not just

³³ "Except in a one man undertaking, economic purposes cannot be achieved without a hierarchical order within the economic unit. There can be no employment relationship without a power to command and a duty to obey, that is without this element of subordination..." (Davies & Freedland, *supra* note 29 at 18).

³⁴ Hugh Collins, 'Market Power, Bureaucratic Power, and the Contract of Employment' (1986) 15 *Indus LJ* 1. See also Hugh Collins, 'Labour Law as a Vocation' (1989) 105 *Law Q Rev* 468 at 479-481 (arguing that subordination is inherent in the way work relations are organized).

³⁵ Armen A. Alchian & Harold Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62 *Amer Econ Rev.* 777; W.H. Hutt, *The Strike-Threat System: The Economic Consequences of Collective Bargaining* 67 (New Rochelle, NY: Arlington House, 1973); Mayer G. Freed & Daniel D. Polsby, 'Just Cause For Termination Rules and Economic Efficiency' (1989) 38 *Emory LJ* 1097, 1100.

³⁶ I explain this in more detail in Guy Davidov, 'The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection' (2002) 52 *UTLJ* 357.

³⁷ On risks, see recently Freedland & Kountouris, *supra* note 2 at 439-446 (arguing that the "mutualization of risks" is one of the goals of labour law).

employees. However, there is a strong focus on protecting and helping employees by shifting power and resources from the employer to them. So it seems most appropriate to classify this goal as being in the selective pole.³⁸

In terms of "fit" with existing labour laws, redistribution seems like a good way to describe and explain what at least some laws are doing. Consider minimum wage laws for example. Politicians often describe them as designed to fight poverty, but this is a very imprecise description. Although they can certainly help in reducing poverty among working people, minimum wage laws are irrelevant for the poorest members of society, who are unemployed. Other measures are designed more directly to fight poverty. The minimum wage is better explained as designed to take resources from employers (who are presumed to be better off) and shift them to the lowest-paid employees.³⁹ Legislatures probably realize that to some extent employers will shift the extra cost to consumers, but this would still lead to progressive redistribution (spreading the cost of the raise to the lowest-paid workers among many consumers). Another example of redistribution in labour law is found in collective bargaining laws, that encourage collective bargaining (by, at the very least, creating an exemption from anti-trust laws), on the assumption that employees need to join forces in order to reach fair (or reasonable) results. Such laws create a mechanism that is clearly designed to lead to redistribution.⁴⁰ Many other labour laws can similarly be understood as redistributing resources or power.

My focus so far has been on redistribution from employers to employees. But arguably, labour laws also strive towards a fair distribution between different groups of workers.⁴¹ This purpose is most obvious in workplace equality laws, but in fact it is a relevant consideration (and *should* be a relevant consideration) in many other parts of labour law. This somewhat neglected function has recently started to receive increased attention,⁴² and rightly so, given the growing inequality between different groups of workers, which labour laws themselves

³⁸ It is also sometimes argued that redistribution is needed to allow the market to work (see Deakin & Wilkinson, *supra* note 2 at 284), which is an attempt to present this goal as being more universal. However this seems rather artificial. We usually understand redistribution as correcting the market or otherwise being outside of the market, and not as a necessary precondition for it. Certainly it would be difficult to justify *all* labour laws on this view.

³⁹ Minimum wage laws have additional goals, which complement (and do not contradict) redistribution. They can be said to protect the human dignity of employees (Guy Davidov, 'A Purposive Interpretation of the National Minimum Wage Act' (2009) 72 Mod L Rev 581) and also to correct market failures (Simon Deakin and Frank Wilkinson, 'Minimum Wage Legislation', in Kenneth Dau-Schmidt, Seth Harris & Orly Lobel, eds, *Encyclopedia of Labor and Employment Law and Economics* (Northampton, MA: Edward Elgar, 2009) 150).

⁴⁰ Collective bargaining laws have additional goals as well, notably to maximize efficiency (e.g. by limiting strikes) and to promote workplace democracy. See Guy Davidov, 'Collective Bargaining Law: Purpose and Scope' (2004) 20 Int'l J Comp Lab L & Ind Rel 81.

⁴¹ See Guy Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 315; A.C.L. Davies, 'Identifying 'Exploitative Compromises': The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 Cur Leg Prob 269.

⁴² Mundlak, *supra* note 41; Davies, *supra* note 41.

are sometimes blamed for. The goal of labour law can thus be understood as redistributing resources, power and risks to achieve a fairer distribution between employers and workers (in the first instance) but also among workers.

Is this justified? Let me put aside two preliminary objections first. One is the extreme libertarian position that governments should never engage in redistribution (i.e. not even by using taxation).⁴³ This would mean absolute protection for the existing distribution of resources, which is often arbitrary and unjust.⁴⁴ The second objection is that redistribution should be done only through the tax and welfare systems, which are presumably more efficient because they take only from those who really have more and give only to those who really need it.⁴⁵ However, the tax and welfare administrations are themselves very costly, and not always successful in extracting taxes from the rich and preventing false welfare claims by those who are not really poor.⁴⁶ Legal rules such as the minimum wage are admittedly less precise, but are very cheap to administer (because transfers are direct rather than through the State). They also have other advantages, such as avoiding the stigma associated with being a welfare recipient.⁴⁷

So let's assume that redistribution through labour law is a possible, legitimate goal. But why should we pursue it? In the most general terms, we redistribute in order to achieve distributive justice. There are different theories about what distribution is just. John Rawls' "difference principle" supports redistribution in favour of the least-advantaged members of society.⁴⁸ Ronald Dworkin's resource-based theory would attempt to put people in the same starting point (equal resources), then giving them freedom to make their own choices.⁴⁹ Others advocate equality of opportunities.⁵⁰ Yet others argue that a just distribution must be based on desert – people should get the

⁴³ R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

⁴⁴ For critiques of Nozick see, e.g., G.A. Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge: Cambridge UP, 1995); Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (New York: Oxford University Press, 1990) Ch. 4.

⁴⁵ Louis Kaplow & Steven Shavell, 'Why the Legal System is Less Efficient than the Income Tax in Redistributing Income' (1994) 23 J Leg Stud 667.

⁴⁶ See, e.g., Anthony B. Atkinson, 'On Targeting Social Security: Theory and Western Experience with Family Benefits', in Dominique van de Walle & Kimberly Nead, eds, *Public Spending and the Poor: Theory and Evidence* (Baltimore: Johns Hopkins University, 1995) 25.

⁴⁷ For arguments supporting the use of law (other than tax and welfare law) to achieve redistributive goals see Anthony T. Kronman, 'Contract Law and Distributive Justice' (1980) 89 Yale LJ 472 (and see specifically p. 499 for a labour law example); Chris W. Sanchirico, 'Taxes versus Legal Rules as Instruments for Equity: A More Equitable View' (2000) 29 J Leg Stud 797; Daphna Lewinson-Zamir, 'In Defense of Redistribution Through Private Law' (2006) 91 Minn L Rev 326.

⁴⁸ John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

⁴⁹ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000).

⁵⁰ See, e.g., Richard J. Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical Studies 77.

share of the pie that they deserve.⁵¹ This is obviously not the place to choose among those competing theories, although this might be required in the context of specific regulations. For current purposes I think it is sufficient to rely on the (reasonable) assumption that private law rules (which constitute the "free market") have unfair distributional outcomes, without explaining in what sense exactly these outcomes are not fair. We can say that the reasons for such unfair distribution are the same as discussed in the previous section: market failures or the previous unequal allocation of resources. This could present itself in low wages – below the level that society finds acceptable – or in other detrimental terms (long hours of work, etc.), which can be seen as resulting from an unfair distribution of power.

Another way to explain this is by pointing attention to the inherent conflict of interests in employment relationships. This is not to ignore the importance of trust and cooperation between the parties, and the existence of joint interests within the relationship as well. But there are also some significant areas of conflict, which cannot be avoided – in terms of the wage and benefits package; the degree of effort or work load; and sometimes also the content of the work (the level of interest, responsibility, repetition etc).⁵² In most cases, the employer can "win" this conflict thanks to superior bargaining power, and impose the terms that he sees fit. It is here that regulation is required, to give employees more power in this conflict (via collective bargaining) and to put limits on what an employer can impose (minimum rights). So redistribution is strongly connected with the idea of inequality of bargaining power; we redistribute in order to offset this inequality.

Inherent Vulnerabilities

Another way to articulate the goal of labour laws – still focusing on the point of view of employees – is by highlighting their inherent vulnerabilities in the employment relationship. This is a view I have advanced in detail elsewhere.⁵³ It is entirely consistent with the previous articulations; however, taking a more functional approach – thinking about an articulation that can be useful in interpretive questions and particularly in setting the scope of labour law – it focuses on a lower level of abstraction.⁵⁴

The starting point for this approach is the understanding that the default position in capitalistic societies is to apply private law rules on contractual relations, including ones that involve the performance of work. So the question is why do we take *some* of those contractual relations and regulate them heavily (with labour law). In other words, what makes employment relations different from other market transactions,

⁵¹ For a discussion see, e.g., Julian Lamont, 'The Concept of Desert in Distributive Justice' (1994) 44 *The Philosophical Quarterly* 45.

⁵² See generally Karl Marx, *Capital: A Critique of Political Economy, vol. I* (Middlesex: Penguin, 1976 [1867]). For a description of inherent conflicts as questions of distribution see also Deakin and Wilkinson, *supra* note 2 at 349.

⁵³ Davidov, *supra* note 36.

⁵⁴ I give examples for the usefulness of this approach in Davidov, *supra* note 3.

including (most importantly) the hiring of independent contractors? The attempt to articulate the goals of labour law thus becomes, on this approach, an attempt to articulate the unique characteristics of employment relationships.⁵⁵

In my own research exploring this issue I concluded that employment relationships have three axes: organizational, economic and social-psychological.⁵⁶ It is easy to show that any organization must have someone "in command" – it is not possible to have a democratic vote on every little decision during the work day. So most people within the organization have to be – to one extent or another – under the control of others. It is also not possible to leave them "outside" the organization and contract with everyone for every little task. That would create unbearable transaction costs.⁵⁷ On the first axis, therefore, employment is characterized by *democratic deficits* (subordination, in a broad sense).⁵⁸ With regard to the other two axes, it is important to point attention to the importance of work for most of us, both economically (to make a living) and for the fulfilment of social and psychological needs (the importance of work for our self-realization, self-esteem, social relationships, social status and so on).⁵⁹ I have argued that employment is characterized by the *dependency* of an employee on the relationship with a specific employer – for his income as well as the fulfilment of social and psychological needs – in the sense of inability to spread risks.

Each of the three axes represents a continuum between different degrees – democratic deficits and dependency exist to some extent in other relationships as well, and they do not exist to the same degree in *all* employment relationships. However, when these characteristics are present to a significant degree (sometimes one more than the other, so it is the overall picture that counts) – we call it an employment relationship and the application of labour laws is warranted. This is because democratic deficits and dependency are *vulnerabilities* – inherent in the employment relationship – that

⁵⁵ I realize that this approach does not make sense for those calling to abolish the distinction between employees and "independent contractors" altogether (as opposed to changing the tests setting the boundaries, or the way the tests are being applied). My answer to these calls appears in Davidov, *supra* note 31. I will just add here that beyond general statements in this direction, I have never seen anyone actually trying to work out the details of how labour law will work – and indeed how it can survive at all – if it applies to all the small businesses providing services to numerous clients, as if they were simply employees of those clients.

⁵⁶ Davidov, *supra* note 36.

⁵⁷ See Ronald H. Coase, 'The Nature of the Firm' (1937) 4 *Economica* 386; Oliver E. Williamson, *The Economic Institutions of Capitalism* (New York: Free Press, 1985); Kaufman, *supra* note 30.

⁵⁸ For another useful attempt to offer a justification for labour law based on a what can be seen as a broad understanding of subordination see Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Mod L Rev* 912 at 925 (relying on the concept of "non-domination" as a justification for privacy in the workplace). On domination see generally Ian Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003) (arguing that democracy is best conceived as "a means of managing power relations so as to minimize domination" (at p. 3) and defining domination as "resulting from the illegitimate exercise of power" (at p. 4)).

⁵⁹ See also Vicky Schultz, 'Life's Work' (2000) 100 *Colum L Rev* 1881 at part I.

necessitate regulatory intervention. On this view, the general goals of labour law would be minimizing these vulnerabilities and preventing unwanted outcomes resulting from them.

Happiness

The importance of work for individuals – which assumed an important part of my analysis under the heading of the social-psychological axis – is also the background for a new and interesting attempt by Glenn Patmore to establish "happiness" as a major goal of labour law.⁶⁰ By "happiness" he refers to workers' enjoyment at work, and more specifically, job satisfaction, less stress, more participation in decision making (and thus control over the work environment), a good work-life balance, and so on. This contribution is useful in showing the connection – supported by empirical research – between various workers' rights and job satisfaction (or happiness). And because of the focus on the point-of-view of employees, I include this as a possible goal on the selectivity pole. I am doubtful, however, about the usefulness of this articulation given its obvious breadth.

Emancipation

In a recent provocative contribution, Adelle Blackett takes a broad view of labour law, challenging us to think beyond familiar borders (particularly, North/South and market/non-market) and to consider the idea of labour law from a global historical perspective.⁶¹ She concludes that "[l]abour law resists the commoditization of the factor of production that is labour; the resistance entails both a protective role for the state but also an enabling role for actors."⁶² Focusing on this enabling role, she argues that the concept of *emancipation* best explains the story of labour law. It captures the ideas of workers' agency, capabilities, empowerment and ultimately resistance to commoditization. This view emphasizes the transformative and redistributive role of labour law. It is an inspiring narrative, however I am not sure it can be useful (or that it was meant to be useful) for more mundane tasks such as interpreting labour laws or suggesting specific improvements.

5. Mid-Spectrum Goals

Another set of goals can be described as being in the middle of the spectrum in between universalism and selectivity. Here one can find goals that are good not only for employees, but for society at large as well. Included in this list are workplace democracy, human rights (and especially, the right to dignity), social inclusion/solidarity, and stability/security. Unlike the goals to be discussed in the next part –

⁶⁰ Glenn Patmore, 'Happiness as an Objective of Labour Law', CELRL working paper 48 (2010), available at www.celrl.law.unimelb.edu.au/files/Working_PaperNo_48_-_final_version.pdf.

⁶¹ Adelle Blackett, 'Emancipation in the Idea of Labour Law', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 420.

⁶² *Ibid* at 435.

those on the universalism pole – these do not purport to be good for the direct employer. On the contrary, under the articulations considered in the current section, the employee is posited *against* the employer; some conflict of interests between an employer and his employees is assumed and acknowledged. However, unlike the goals considered in the previous part – those on the selectivity pole – here emphasis is put on protecting interests that are more societal.

Democracy

I have already noted that employment relationships can be seen as characterized by democratic deficits, and one of the goals of labour law can accordingly be to minimize such deficits. While this articulation takes the point of view of employees – the problem they experience and their need of protection/intervention as a result – another approach is to focus on workplace democracy itself as a goal. This is quite common when describing collective labour law: without relying on (or referring to) any claimed vulnerability of employees, we can say that labour law (at least its collective part) is designed to create a degree of democracy in the workplace.

General theories of democracy support the idea that, given the importance of work to our lives, people should have the right to participate in the government of the workplace (in one way or another).⁶³ There is obviously a big difference between government of a private company and the government of a city or a State, and I do not mean to suggest that democratic ideals apply in the exact same way. At the same time, however, it is important to acknowledge that daily decisions taken at the workplace level are often much more important to us than decisions taken at higher levels. Such decisions affect important aspects of our lives and they do so directly. So it is not surprising that we see a value (as a society) in injecting some degree of democracy into the workplace. Of course, this will have to be balanced with conflicting values (such as the autonomy of controlling private property).

Workplace democracy can be understood at two different ways. One places emphasis on *voice* – the meaningful ability of workers to present their views and opinions regarding the governance of the workplace. This is important because the individual employee is often afraid of voicing concerns, or otherwise feels powerless to do so. This could lead to exit (as an alternative to voice)⁶⁴ – resulting in an unnecessary loss for both parties in terms of their investment in the relationship. Or, when leaving is not an option due to lack of comparable alternatives, the employee is prevented from both exit and voice. This explains the importance of creating safe mechanisms for

⁶³ Robert Allan Dahl, *After the Revolution? Authority in a Good Society* (New Haven: Yale, 1970), 64; Karl E. Klare, 'Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform' (1988) 38 *Cath U L Rev* 1 at 7.

⁶⁴ The well-known exit-voice distinction from Albert O. Hirschman, *Exit, Voice, and Loyalty* (Cambridge: Harvard University Press, 1971) has been applied to this context by R.B. Freeman and J.L. Medoff, *What Do Unions Do?* (New York: Basic Books, 1984) at chapter 1. See also Paul C. Weiler, *Governing the Workplace: The Future of Labour and Employment Law* (Cambridge: Harvard University Press, 1990) 181.

voice, both directly and through representatives.⁶⁵ Moreover, voice is important not only for airing concerns and letting the employer know your views, but also because of an expectation for better (and more democratic) decisions after all the views have been heard. These ideas are supported by theories of deliberative democracy.⁶⁶

A related view highlights the fact that participating in self-government (to some extent) at work can be instrumental in educating people to the value of democracy and improving their participation in the larger-sphere democratic process.⁶⁷ The workplace can be seen as a site of civil society, and one of the goals of labour law, on this view, is to encourage and support civic engagement through worksites.⁶⁸

A second and different understanding of workplace democracy focuses on the *results* that collective bargaining (for example) produces. Instead of the *process* which gives employees voice, this view puts emphasis on the power that they have to negotiate with the employer on equal grounds – and make joint decisions concerning the workplace (and the distribution of profits).⁶⁹ The fact that decisions are based on a compromise between competing interests, rather than made unilaterally by the employer, is seen as crucial for ensuring the fairness of such decisions. I referred to these issues more fully when discussing inequality of bargaining power and redistribution. But some also frame this as a democratic goal.

Human Rights/ Dignity

Recent years have seen an increased interest in conceptualizing labour rights as *human rights*.⁷⁰ The very attempt to make this connection – an attempt to "re-brand"

⁶⁵ This understanding of voice is closely related to the idea of procedural justice. It has been shown empirically that procedural justice is highly important to employees (for a review of the relevant literature see Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (New York: Cambridge University Press, 2004) at chapter 5). Having an effective mechanism to voice your concerns – especially before the employer takes decisions that affect you – is an important aspect of procedural justice.

⁶⁶ Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart, 2009). Bogg refers to the importance of democratic deliberations as part of the idea of collective self-government, which he puts forward together with community and non-domination as three values of civic republicanism (at chapter 4). He argues in favour of this view as a basis for collective labour law. I refer to community in the next section, as part of the goal of social inclusion. On non-domination see *supra* note 58.

⁶⁷ Klare, *supra* note 63 at 4; Marion Crain, 'Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment' (1990) 74 Minn L Rev 953 at 968.

⁶⁸ Cynthia Estlund, *Working Together: How Workplace Bonds Strengthen A Diverse Democracy* (New York: Oxford University Press, 2003); Peter Levine, 'The Legitimacy of Labor Unions' (2001) 18 Hofstra Lab & Empl LJ 529 at 567-8.

⁶⁹ See Befort & Budd, *supra* note 24 at 106.

⁷⁰ See, e.g., Colin Fenwick and Tonia Novitz, *Human Rights at Work: Perspectives on Work and Regulation* (Oxford: Hart, 2010); Guy Mundlak, 'Human Rights and the Employment Relationship: A Look through the Prism of Juridification', in Daniel Friedmann & Daphne Barak-Erez, eds, *Human Rights In Private Law* (Oxford: Hart, 2001) 297; Philip Alston, ed, *Labor Rights as Human Rights* (Oxford: Oxford University Press, 2005); Judy Fudge, 'The New Discourse of Labor Rights: From Social to Fundamental Rights?' (2007) 29 Comp Lab L & Pol'y J 29; Kevin Kolben, 'Labor Rights as Human Rights?' (2010) 50 Va J Int'l L 449.

labour rights – is a good example of the trend away from selective goals/justifications towards more universal ones. Labour rights are seen as serving the interests of a specific group (employees), and the attempt to "sell" them as human rights is based on the assumption that this will bring broader support.

For current purposes, we can leave aside the strategic question of whether resorting to constitutional litigation (or otherwise human rights' litigation) would help labour's cause or not.⁷¹ What interests us here is whether a human rights discourse can offer a normative ground for labour law – i.e. whether some human rights can be seen as *justifying* labour law, thus providing assistance in thinking about labour law reforms, interpreting labour laws and so on.

This is obviously so with regard to *specific* labour laws. A law supporting labour unions, for example, is justified by freedom of association. A law prohibiting workplace discrimination is justified by the right to equal treatment. A law limiting the power of employers to spy on their employees is justified by the right to privacy.⁷² But is there some *broader* justification emanating from the idea of human rights? In a recent contribution, Hugh Collins takes up the challenge and examines the question directly. He argues that labour rights cannot be conceived as human rights in the traditional (strong) sense of this term, which would require them to be "universal, natural, inalienable, and possessed by human beings simply by virtue of their humanity or 'personhood'".⁷³ He nonetheless examines whether there is normative basis to consider them "fundamental" rights, still with some power to override other considerations. He argues that behind a "veil of ignorance" (following Rawls⁷⁴) people are likely to agree on some social and economic rights, and ideas of autonomy and dignity which include (and *should* include) some positive obligation on the State lead to similar conclusions. He concludes, however, that this can only support limited parts of labour law, given the fact the governments might sometimes prefer to satisfy basic needs by other welfare state mechanisms.⁷⁵

⁷¹ Which is the focus of many of the above-mentioned contributions. On the different issues discussed under the "labour rights as human rights" heading, see Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 Eur Lab LJ 151.

⁷² In some legal systems, human rights apply (to some extent at least) in private relations as well, in the sense that employers have to respect this human right. In other systems one might be able to demand that the State actively protect employees' right to privacy by introducing a law limiting employers' powers. For current purposes neither route is necessary, it is sufficient that society recognizes privacy as an interest of paramount importance for it to provide justification for relevant labour laws.

⁷³ Hugh Collins, 'Theories of Rights as Justifications for Labour Law', in Guy Davidov & Brian Langille (eds.), *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 137 at 144. For a different view see Mantouvalou, *supra* note 71. For additional discussion see Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice', in Colin Fenwick & Tonia Novitz, eds, *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart, 2010) 1 at 5-19.

⁷⁴ Rawls, *supra* note 48.

⁷⁵ Collins, *supra* note 73, at 144-153.

Note however that there is no clear-cut line between rights that always trump other considerations and rights that never do. There are no absolute rights; strong justifications can always justify infringements. So if we recognize a right to a minimum wage (for example), the fact that a legislature might be justified in infringing this right by ensuring minimum income through alternative social policies does not negate the possibility of seeing this as a fundamental right. "Traditional" rights can (legally) be infringed in very similar ways. Moreover, whether or not we accept labour rights as "fundamental" to the same extent as other rights or not, the important part for current purposes is their normative foundations. And the idea of *dignity* certainly seems to offer a strong foundation. Given the importance of work for the individual, not only in economic terms but also in social and psychological terms, respect for one's dignity supports a right to earn a minimum wage through work, rather than by being dependent on social assistance.⁷⁶ The idea of respect for workers' dignity can similarly support laws preventing unfair dismissals,⁷⁷ laws prohibiting workplace discrimination,⁷⁸ laws limiting the number of work hours, and more.⁷⁹

Strong support for this view is found in the *Charter of Fundamental Rights of the European Union*, which states explicitly that "every worker has the right to working conditions which respect his or her health, safety and *dignity*."⁸⁰ The connection that EU members have made between labour rights and dignity is reinforced by the exceptional importance they have placed on the value of dignity: the very first Article of the Charter exclaims that "[h]uman dignity is inviolable. It must be respected and protected."⁸¹ Also, there appears to be a strong connection between dignity and the idea that "labour is not a commodity" (or, as more correctly phrased, that "labour should not be regarded merely as a commodity").⁸² The call to minimize the

⁷⁶ See Davidov, *supra* note 39.

⁷⁷ See Hugh Collins, *Justice in Dismissal* (Oxford: Clarendon Press, 1992) at 16-18.

⁷⁸ See Sandra Fredman, 'Equality: A New Generation?' (2001) 30 *Indus LJ* 145 at 155-156.

⁷⁹ For an argument that employment law should be based (and to some extent, *is* based) on the idea of dignity, see David C. Yamada, 'Human Dignity and American Employment Law' (2009) 43 *U Richmond L Rev* 523. Yamada argues that, among other things, the concept of dignity should be linked to psychological theories – specifically, the importance of relationships, and how relationships can become a "good" or "bad" experience.

⁸⁰ Article 31 (my emphasis).

⁸¹ Article 1. This echoes the earlier Universal Declaration of Human Rights, in which Article 1 ("All human beings are born free and equal in dignity and rights..."), is followed by work-related rights in Article 23, including: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity." See also the Declaration of Philadelphia (1944), annexed to the International Labour Organisation (ILO) Constitution, Article II(a). The concept of dignity is also considered to be the most fundamental and central idea in various national constitutions (e.g. in Germany, Israel, South Africa).

⁸² See generally David M. Beatty, 'Labour is Not a Commodity', in Barry J. Reiter & John Swan, eds, *Studies in Contract Law* 313 (Toronto: Butterworths, 1980); Paul O'Higgins, 'Labour is Not a Commodity – An Irish Contribution to International Labour Law' (1997) 26 *Indus LJ* 225. The first articulation appears in the (US) Calyton Antitrust Act (1914), and in the Declaration of Philadelphia (1944), annexed to the ILO Constitution, Article I(a). The second (more correct,

commodification of labour seems to be directly related to protecting the dignity of labourers.⁸³ A justification for labour law based on Kantian principles can also be seen as relying on the concept of dignity.⁸⁴

Protecting human dignity was one of main goals of labour law articulated by Hugo Sinzheimer, widely considered to be among the founding fathers of the field.⁸⁵ Dignity was also recently picked up by Mark Freedland and Nicola Kountouris as one of the three values underpinning labour law (together with capability and stability, discussed separately below). They espouse a broad understanding of dignity, by their own admission "ultimately amounting to a conceptual amalgam of the concepts of personal autonomy and equality."⁸⁶ This vision encompasses the ability of the person (here, the worker) to take decisions about the life to pursue (here, working life), in the absence of "undue constraints" on this ability; as well as the idea of correcting "all unchosen disadvantages" to ensure equality of opportunities.⁸⁷ Such a broad view obviously cannot lead directly to concrete solutions. But it does help to explain, and justify, labour laws with the same ultimate ideas behind fundamental rights.

Social Inclusion

Hugh Collins argues that one of the main goals of labour law is "to reduce or minimize social exclusion".⁸⁸ He points attention, in this context, to the importance of work for individuals, especially in terms of being part of the community. Various other laws and policies are designed to counter the social exclusion that results from not having a job, but labour law also plays an important part – by preventing discrimination, limiting dismissals, requiring hours of work (and other aspects of work organization) to be compatible with family obligations, improving employability (by requiring training for example), and also by indirectly controlling the size of the

albeit less catchy) articulation appears in Article 427 of the Treaty of Versailles (1919), in which the ILO was established.

⁸³ On non-commodification as one of the goals of labour law, see Collins, *supra* note 21 at chapter 1. And see Margaret Jane Radin, *Contested Commodities* (Cambridge: Harvard University Press, 1996), at chapter 7. Radin describes work relations as "incomplete commodification" created by regulations. She does not refer to dignity, but justifies such regulations because of their connection to "human flourishing", referring to the importance of work to the individual, control over one's own work etc.

⁸⁴ Horacio Spector, 'Philosophical Foundations of Labor Law' (2006) 33 Fla St UL Rev 1119, argues that labour law can be justified based on the idea of equal autonomy, which "endorses Kant's ideal of an unconditional duty to respect one's own and others' autonomy and dignity" (at 1145). See also Hendrickx, *supra* note 8. It has also been noted that dignity is an important element of the ILO's "decent work" ideal; see Adelle Blackett, 'Situated Reflections on International Labour Law, Capabilities, and Decent Work' (2007) hors série RQDI 223 at 242; Freedland & Kountouris, *supra* note 2 at 373.

⁸⁵ Weiss, *supra* note 3 at 44; Ruth Dukes, 'Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law' (2008) 35 J L & Soc'y 341 at 345.

⁸⁶ Freedland & Kountouris, *supra* note 2 at 373.

⁸⁷ *Ibid* at 374-5.

⁸⁸ Collins, *supra* note 21 at 22.

labour market. This is a strong and useful articulation, especially given the prevalence of this concept in political discourse, at least in Europe.⁸⁹ It can also be used to support various reforms. Although not referring specifically to social inclusion, Vicky Schultz has argued in a very similar vein that "paid work has the potential to become the universal platform for equal citizenship"⁹⁰ – and has made various proposals to better achieve this ideal.

A related articulation focuses on *solidarity*. Catharine Barnard argues that although the concepts of solidarity and social inclusion overlap significantly, the former is preferable because it is more positive.⁹¹ She puts emphasis on social ties as a justification for regulations: "Underpinning the idea of solidarity is the notion that the ties which exist between the individuals of a relevant group justify decision-makers taking steps, both negative and positive, to ensure that all individuals are integrated into the community, thereby enabling them to have the chance to participate and contribute fully."⁹² And she shows how the concept of solidarity plays an important part in Europe, lying at the heart of the idea of citizenship.⁹³

Cynthia Estlund has added that the workplace is a major forum of civil society.⁹⁴ It is at work – more than anywhere else – that we talk to people, creating bonds, including with people that are different from us. Work is an important site of integration – people from different backgrounds, races and genders work side by side and interact with each other. Estlund sees here great potential for civic engagement and renewal, and she argues that labour law plays (and should play, even more) a role in supporting this aspect of work. The role of law is most obvious with regard to laws ensuring diversity in the workplace, not only by preventing discrimination but also by actively promoting diversity, and by preventing harassment of any kind. Workplace bonds are also supported by freedom of association and the laws regulating collective bargaining. Estlund has argued that minimum employment standards are also necessary for this goal, because without them, some workplaces are occupied mostly with non-white and migrant workers (i.e. they are highly segregated). Detrimental work conditions also leave little time and space for informal interactions and make "working together" in the way she envisions impossible. This view supports the idea that one of the main goals of labour law is to achieve social inclusion, but adds a broader societal aspect. It is not only social inclusion within the workplace that we are

⁸⁹ Collins himself shows that the idea of social inclusion, as well as the ideas of competitiveness and citizenship, are found in the Treaty on the Functioning of the European Union (Article 151).

⁹⁰ Schultz, *supra* note 59 at 1885.

⁹¹ Catherine Barnard, 'The Future of Equality Law: Equality and Beyond', in Catherine Barnard, Simon Deakin & Gillian S. Morris, eds, *The Future of Labour Law: Liber Amicorum Bob Hepple* (Oxford: Hart, 2004) 213 at 214.

⁹² *Ibid.*

⁹³ *Ibid.* See also Sandra Fredman, 'The Ideology of New Labour Law', in Catherine Barnard, Simon Deakin & Gillian S. Morris, eds, *The Future of Labour Law: Liber Amicorum Bob Hepple* (Oxford: Hart, 2004) 9 at 29.

⁹⁴ Estlund, *supra* note 68.

after, but also making the workplace a site of civil society that can support integration and civic engagement *beyond* the workplace.

Stability/Security

In a recent important contribution, Mark Freedland and Nicola Kountouris list "stability" as one of the values underpinning labour law.⁹⁵ They describe the dramatic loss of stability in recent years to explain why they see this as a "policy compass for labour law reform."⁹⁶ They argue that stability has economic benefits, in the sense of the ability of the economic system to weather downturns; but also, and more importantly, stability should be promoted because of its importance to workers as individuals. This is most obviously fitting in the context of regulations limiting dismissals; in my own research concerning the goals of such regulations, I refer to the concept of "security" which is very similar in its intended meaning (and perhaps better captures the needs of workers in this respect.)⁹⁷ But Freedland and Kountouris rightly note that this idea is not limited to justifying job security laws; it is also directly related to the regulation of fixed-term and personal task contracts, as well as various other arrangements that render the life of workers unstable (or insecure).

6. Goals at the Universalism Pole

Goals that can be characterized as "universal" attempt to offer a justification that paints labour law as good for everyone: employees, employers and society at large. According to such views, there is no clash between conflicting interests (or at least such a clash is minimized in importance or ignored). Nor is there a need to "protect" employees as the "weaker" party to the relationship. Rather, labour laws are explained and justified as contributing to the general good. The two main examples of such goals are maximizing efficiency and enhancing human freedom and capabilities.

Efficiency

Traditionally, labour law was seen as an intervention in the "free" market, and therefore, almost by definition, as an impediment to efficiency. Of course, this does not mean that labour law cannot be justified. But it had to be justified based on a perceived equity-efficiency trade-off. One had to either ignore efficiency considerations, or claim that the conflicting justifications for some regulation are stronger.

⁹⁵ Freedland & Kountouris, *supra* note 2, at 379-382.

⁹⁶ *Ibid* at 381.

⁹⁷ Guy Davidov, 'In Defence of (Efficiently Administered) 'Just Cause' Dismissal Laws' (2007) 23 Int'l J Comp Lab L & Ind Rel 117. One could ask why security is needed – i.e. why the regular laws of contract are insufficient in this respect. My answer is comprised of two parts. First, the importance of the job for the life of the employee, both in economic and in social/psychological terms, explains this special need. Second, the nature of the exchange between the parties – usually, security for subordination – should be upheld even when the employee is forced to endure insecurity as well as subordination. And indeed, a minimal fair "price" should be imposed on the employer against the employee's submission to the control of others.

This view is still common among neo-classical economists (and they are likely to almost always reject the claim that, despite the inefficiency, labour laws can be justified). However, among labour lawyers it is now common to portray labour laws as – at least in some cases – efficiency-enhancing. This view relies on developments in the economic literature – theoretical as well as empirical – especially over the last couple of decades. Labour Markets are rarely competitive; transaction costs are widespread; and employers often have monopsony powers.⁹⁸ None of this is new, but under the reign of the Chicago school, for a few decades it seems that many economists have chose to ignore these truisms. The regained recognition that labour markets do not follow the rules of supply and demand as the "invisible hand" would predict, obviously has the advantage of rejecting economic arguments on their own turf and avoiding the "trade-off" claim. So there is an increasing tendency to argue that the goal of labour law is to maximize efficiency. Usually it is seen as one goal alongside others, and scholars are careful to note that not *all* labour laws are efficient (thus avoiding the implication that inefficient labour laws should be repealed).⁹⁹ But the view that efficiency (even if broadly conceived) should be the *only* goal of labour law has also been advanced.¹⁰⁰

A somewhat similar articulation is that labour law plays (and should play) a role in improving "the competitiveness of businesses and national economies".¹⁰¹ Here as well the idea is to look beyond the simplistic claim that deregulation is always best for competitiveness; it has been argued that cooperation from the workforce (for example) is necessary to be truly competitive. It appears, though, that the concept of competitiveness is best understood as trying to capture some balance between efficiency and other goals.¹⁰²

⁹⁸ See *supra* note 30.

⁹⁹ Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Hugh Collins, Paul Davies & Roger W. Rideout, eds, *Legal regulation of the employment relation* (London, Kluwer: 2000) 3; Simon Deakin & Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal', in Collins et al, *ibid* at 29.

¹⁰⁰ Alan Hyde, 'What is Labour Law?' in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart, 2006) 37, has argued that the goal of labour law is to correct market failures. Referring to the possibility of other goals, he argues that while this is theoretically possible, it is impractical, because of enforcement problems (at 58-59).

¹⁰¹ Collins, *supra* note 21 at 23; Hugh Collins, 'Regulating the Employment Relationship for Competitiveness' (2001) 31 *Indus LJ* 17.

¹⁰² There are some additional articulations (e.g. partnership, trust) that I am not discussing here because they seem to lead to efficiency or to some combination of efficiency and other goals mentioned throughout this article. On partnership as part of the competitiveness agenda see Hugh Collins, 'Is There a Third Way in Labour Law?', in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2002) 449.

It has also been argued on a somewhat broader scale that labour law contributes to economic development.¹⁰³ Simon Deakin explains that while neo-classical economists view labour law as "limiting" the market, and new institutionalists – recognizing the prevalence of market imperfections – understand labour law as sometimes "correcting" the market, there are also systemic approaches which view labour law as an institution necessary for economic growth and development. On this view, labour law has evolved as a component of advanced economies alongside other economic and political institutions, and has a "market constituting" or "market creating" role.

Justifying labour law in terms of efficiency (or other related articulations) is a good example of universalism in the setting of goals. On this view, labour laws should be non-controversial. All they do is locate instances of market failures and correct them, thus maximizing efficiency which is seen as good for employers (who presumably have not pursued the more efficient solution only because of the market failure), good for employees and good for society as a whole. And perhaps, if the broader view is accepted, they have another role in supporting (or "constituting") the market – again to everyone's advantage.¹⁰⁴

Human Freedom and Capabilities

Another attempt to articulate the goals of labour law at a universal way is based on the work of Amartya Sen,¹⁰⁵ which has served as inspiration for an increasing number of labour law scholars in recent years.¹⁰⁶ Brian Langille has written extensively about the need to come up with a new theory of justice for labour law.¹⁰⁷ Following Sen, he offers to rely on a rich concept of "human freedom." Not freedom in the traditional liberal sense, which can quickly lead to freedom of the employer to impose detrimental work conditions and the "freedom" of the worker to accept such conditions without interference from the State. Rather, Langille refers to what he calls *substantive* human freedom, meaning "the real capacity to lead a life we have reason

¹⁰³ Simon Deakin, 'The Contribution of Labour Law to Economic and Human Development', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 156 at 162.

¹⁰⁴ Admittedly, in some cases, when the market failure leads to monopoly, labour law might prevent the employer from using the monopoly power for his advantage. In this respect, efficiency can be seen as a goal not shared by the direct employer and not in his favour. So in theory, one could describe efficiency as a goal of society at large which *conflicts* with the interests of the employer – if those interests are to secure monopolistic gains. However, the focus of those who emphasize efficiency as the goal of labour law is rather on the common interest (shared by individual employers as well) in maximizing efficiency.

¹⁰⁵ See especially Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999).

¹⁰⁶ Deakin & Wilkinson, *supra* note 2, at 290; Brian Langille, Labour law's Back Pages, *supra* note 4; Langille, Labour Law's Theory of Justice, *supra* note 4 at 111; Fudge, *supra* note 70; Judy Fudge, 'Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law', in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 120 at 132; Freedland & Kountouris, *supra* note 2 at 377.

¹⁰⁷ Langille, *supra* note 4, and see footnote 30 there for a list of his previous contributions on this subject.

to value".¹⁰⁸ He argues that one of the components of this freedom is human capital, which, Langille argues, is not only instrumental, "but also an end in itself (directly contributing to a more fulfilling and freer life)."¹⁰⁹ He then argues that we should understand (or reframe) labour law as the law which "structures... human capital creation and deployment"¹¹⁰ and its goals are "both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom."¹¹¹

The idea of maximizing "substantive" human freedom is inspiring and probably uncontroversial. This is a strength but also an obvious weakness. When goals are articulated at such a high level of abstraction – in a way which would please everyone – they do not lead to any concrete programs. Because they can support everything, in practice they support nothing. Otherwise put, Langille's vision for labour law is both too narrow and too broad at the same time. It fails to take into account the conflicts of interest and imbalance of power between employers and employees, so it includes no recipe for addressing such conflicts and imbalance (and in practice, no justification for existing labour laws that are aimed at addressing them). At the same time, it includes too much. Because the goals are articulated in an extremely abstract and general way, Langille's vision appears to include many areas of law which are currently seen as entirely separate from labour law. Indeed, he is unapologetically imperialistic in the way he conceives of this "new" labour law; although he has not provided much details yet, he makes clear that education, child care and unpaid work are all part of "labour law" under this vision.¹¹² But these are very diverse areas and it is doubtful that they have enough in common to be seen as one coherent area of law.¹¹³ The idea of maximizing human freedom can certainly serve as inspiration for these diverse areas of law – and probably some others – but it can hardly be useful for the more concrete reasons that require the articulation of labour law's goals.

A somewhat more concrete direction is taken by Simon Deakin and Frank Wilkinson, who rely on Sen's concept of "capabilities," which captures the ability of individuals to access "the processes of socialization, education and training which enable them to exploit their resource endowments."¹¹⁴ They use this as justification for social rights (including, but not only, in the labour context).¹¹⁵ They explain that the right to housing, for example, is necessary as part of the need to provide "security in the face

¹⁰⁸ *Ibid* at 112.

¹⁰⁹ *Ibid* at 112.

¹¹⁰ *Ibid* at 112.

¹¹¹ *Ibid* at 114.

¹¹² *Ibid* at 114.

¹¹³ Finkin, *supra* note 7; Weiss, *supra* note 3 at 49.

¹¹⁴ Deakin & Wilkinson, *supra* note 2 at 291.

¹¹⁵ "Social rights should be understood as institutionalized forms of capabilities which provide individuals with the means to realize the potential of their resource endowments and thereby achieve a higher level of economic functioning" (*Ibid* at 347).

of risks" – which in turn is a necessary precondition for people to realize their potential, work flexibly and so on.¹¹⁶ The rules of "social law" thus have a "market-creating" function.¹¹⁷ In another article Deakin has used the same justification to propose a rich concept of "capacity" in contract law – one that will require conditions for *effective participation* in the market before contracts can have legal force.¹¹⁸ These are two ways in which Sen's philosophical ideas are translated into legal language and given legal meaning.

At the same time, Deakin and Wilkinson also show how labour laws can be understood to enhance capabilities. A prohibition against dismissals of pregnant women, for example, is necessary in order to make it possible, in practice, for women to enter the labour market (i.e. ensures that their freedom to enter the labour market is not merely formal, but substantive).¹¹⁹ And a minimum wage law forces employers to invest in new technologies, training, skill development, and health and safety – all strategies enhancing capabilities, which employers have no incentive to pursue when they have the power to lower wages below their market rate.¹²⁰ Note however that Deakin and Wilkinson do not argue that maximizing capabilities is, or should be, the single all-encompassing idea of labour law.¹²¹

7. A Cautionary Note on the Movement from Selectivity to Universalism

Placing the goals of labour law along a spectrum between selectivity and universalism, we are immediately exposed to the trend among labour law scholars in recent years: the shift from selective to universal justifications for labour law. Although most labour lawyers have not explicitly backed away from the more traditional (selective) justifications – notably the idea of inequality of bargaining power – there is a clear preference to avoid such justifications, resorting instead to more universal goals.

A recent important book is illustrative of this trend. In *The Legal Construction of Personal Work Relations*, Mark Freedland and Nicola Kountouris offer a rich and

¹¹⁶ *Ibid* at 347-8. Deakin and Wilkinson rely on the Supiot Report (Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001)) for this point.

¹¹⁷ *Ibid* at 348. See also Deakin, *supra* note 103.

¹¹⁸ Simon Deakin, 'Capacitas: Contract Law, Capabilities and the Legal Foundations of the Market', in Simon Deakin & Alain Supiot, eds, *Capacitas: Contract Law and the Institutional Preconditions of a Market Economy* (Oxford: Hart, 2009) 1. In practice Deakin uses this justification not to suggest reform of contract doctrines, but to justify legislation (such as in labour law) inserting mandatory and default terms into the contract (*ibid* at 28).

¹¹⁹ Deakin & Wilkinson, *supra* note 2 at 291-2.

¹²⁰ *Ibid* at 293.

¹²¹ For scepticism about the usefulness of the capabilities approach see Novitz & Fenwick, *supra* note 73 (arguing that the concept of capabilities can be used to justify competing claims, and they are not convinced "that a capabilities approach is the normative basis which should determine any prioritization.").

detailed analysis of employment and other "personal work relations".¹²² After offering some new concepts, they note the "need for a reconsideration of the normative basis" of regulation in this field.¹²³ They then briefly reaffirm that redressing the inequality of bargaining power continues to be the central normative idea of labour law, but immediately add that this is now insufficient.¹²⁴ They put most of their emphasis on three new justifications: dignity, capability and stability.¹²⁵ Although at some point they articulate the goal as "positive claims which workers have to certain kinds of qualities of treatment... respect for dignity, capability, and stability"¹²⁶ – which appears to adopt the point of view of the workers – the general movement is away from selective articulations and towards more universal ones. This is consistent with many other examples documented throughout this article. Most labour lawyers – Freedland and Kountouris included – seem to support a shift to mid-spectrum goals. But at least some influential scholars have gone "all the way" to adopt an entirely universalist point of view.

The attempt to provide new justifications for labour law should certainly be welcomed. It helps in defending labour market regulations against neo-liberal attacks. It can also help improving labour laws, and interpreting them, in a way which is more refined and sophisticated – taking into account the broad range of advantages which labour laws can bring. It is, however, important to add a word of caution here.¹²⁷ The appeal of the new justifications is that they are seen as good for society at large – in contrast to goals protecting the interests of employees, which could be seen as the result of interest-based politics. This is consistent with universalism in the context of welfare benefits; as noted, one of the advantages of universal benefits is their resilience (or stability) due to the fact that so many people (i.e. voters) enjoy them.¹²⁸ It appears that labour lawyers are drawn towards more universal goals for the same reason – thinking that it could result in broader societal support. Taken to the extreme, the goals close to the universalism pole are perceived (or argued to be) not only good for society, but even for the direct employer as well. To the extent these articulations can indeed support labour law, they offer an attractive "win-win" story.

There are, however, several problems with this approach. First, and most fundamentally, such views are highly unlikely to support the entire body of labour law

¹²² Freedland & Kountouris, *supra* note 2.

¹²³ *Ibid* at 369.

¹²⁴ *Ibid* at 370. They seem to be even more sceptical of the idea of inequality of bargaining power in the book's conclusion; see pp. 437-8.

¹²⁵ *Ibid* at 371-382.

¹²⁶ *Ibid* at 371.

¹²⁷ See Davidov, *supra* note 2. See also Eric Tucker, 'Renorming Labour Law: Can We Escape Labour Law's Recurring Regulatory Dilemmas?' (2010) 39 *Industrial LJ* 99 (referring to Hyde's approach and the capabilities approach as a failed attempt to escape labour law's recurring regulatory dilemmas).

¹²⁸ See references in *supra* note 18.

or even significant parts of it. By ignoring or downplaying the conflict of interests between employer and employees, and the inequality of power which requires redistribution, such views run the risk of losing support for regulations that are in fact – for various other reasons considered above – justified and important. For the same reasons, universal justifications would not help us when interpreting – or thinking about improving – specific labour laws that cannot be explained by those (limited) justifications.¹²⁹

Second, it is doubtful that replacing selective justifications with universal ones will actually lead to broader support. In the welfare state context, universal benefits enjoy broad support because more people enjoy them, compared with targeted (selective) programs, and also (more broadly) because they are based on ideas of reciprocity.¹³⁰ Universal justifications for labour law aim to enlist support from *employers* (and governments who are attuned to their interests). But employers are not likely to become supporters of labour law. They are likely to argue that advancing human freedom and capabilities should not be done at their expense. And if they are supposed to benefit from these advancements – or otherwise enjoy increased efficiency – they would argue that there is no need for regulations forcing them to do what is good for them. At the end of the day labour laws are bound to limit managerial flexibility, at the very least, and so in all likelihood will continue to attract employers' resistance.

Third, universal articulations of the goals of labour law could further obscure the somewhat neglected issue of intra-worker conflicts. As noted above, this is part of the idea of redistribution through labour law, and is rightly gaining increased attention because conflicts between groups of workers (whether actual or potential) are on the rise. Large numbers of workers are excluded from the scope of labour law, sometimes as a result of excessive protections for the "insiders". Others work through subcontractors or temporary employment agencies, with much less benefits compared to their peers. Yet others find themselves in the bottom tier of a two-tier collective agreement. These are just a few examples of current intra-worker distributive problems which labour law faces. Universal justifications for labour law not only ignore or downplay distributive considerations between employers and employees, but also between workers themselves.

¹²⁹ And see Ron McCallum, 'In Defence of Labour Law', University of Sydney Legal Studies Research Paper 07/20, available at <http://ssrn.com/abstract=985006>, at 8 ("I am concerned that if... scholars lose sight of the imbalance of bargaining power between employees and employers... they may blow labour law off its central vocational course.") See also Horacio Spector, *supra* note 84, at 1125 ("The notion of capabilities is too broad to identify our fundamental concerns in labor law, because it encompasses most economic consequences. What we need is a philosophical approach to labor law capable of showing that, even if a piece of labor legislation is detrimental to welfare or capabilities, it still deserves our allegiance.") See also Collins, *supra* note 102 (arguing that an approach focusing on competitiveness neglects distributive issues in the workplace).

¹³⁰ See *supra* notes 18-19 and the accompanying text.

Notwithstanding these difficulties, it must be admitted that the shift towards universal justifications reflects some real concerns – it responds to a perceived failure of traditional (selective) justifications in some sense. Acknowledging the rationale behind this shift, I suggest a possible solution: making explicit connections between selective articulations and more universal ones. Consider my own preferred articulation, for example:¹³¹ the idea that employment relationships are characterized by two vulnerabilities (democratic deficits and dependency), and labour law is needed to minimize those vulnerabilities and prevent unwanted outcomes resulting from them. It is useful to supplement this articulation by explaining in more detail why these vulnerabilities or their outcomes are problematic, not only for employees but for society more generally. In other words, it is useful to add the more universal justifications *alongside* the selective ones. In my own analysis of labour law, I refer to the more universal goals in my discussion of justifications for *specific* labour laws.¹³² But other ways to connect the two poles are, of course, similarly possible.

8. Conclusion

Discussions on reforming labour law – which have assumed centre-stage due to the widely observed crisis in this field – necessitate an understanding of what labour law is for. Questions about the best judicial interpretation of labour laws similarly require an articulation of their goals. Challenges to the constitutionality of labour laws again must rely on an understanding of the purpose of such laws. The first aim of this article was to assist these important discussions and make them more informed, by providing a review of various possible goals (and limiting myself to *general* goals of labour law, as opposed to justifications for *specific* regulations). Recently labour law scholars have turned their attention to such questions directly, so some sources *explicitly* propose an articulation of the goals of labour law. In other cases, the reference to goals is less explicit. I have made an effort to include both kinds of sources and put forward a comprehensive list of goals.¹³³

Alongside a discussion of various articulations as possible "candidates" for the goals of labour law, I have argued that it is useful to employ concepts from another field and classify these goals on a continuum between universalism and selectivity. The more "traditional" articulations explain labour law in "selective" terms – as designed to protect employees. But more recently there is a shift towards more "universal" articulations, which emphasize the importance of labour laws for society at large, and sometimes even for the direct employers as well. Perspectives that put most emphasis on broad/common interests have an obvious appeal. I have argued, however, that

¹³¹ See the section on "inherent vulnerabilities" above.

¹³² See, e.g., Davidov, *supra* note 39 (referring to the protection of workers' dignity as one of the main goals of minimum wage laws); Davidov, *supra* note 40 (referring to efficiency and democracy as two of the main goals of collective bargaining laws).

¹³³ Obviously with such a broad review there are likely to be some omissions; I apologize in advance for what I have missed.

without the focus on asymmetrical vulnerabilities they explain (and justify) only a small part of labour law. It would therefore be better to introduce the more universal justifications only in ways that do not detract from the centrality of selective ones.