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The Voices at Work North American Workshop
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Article 1

Voices at Work in North America: Introduction

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Introduction

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Introduction

VOICES AT WORK IN NORTH AMERICA

SARA SLINN * & ERIC TUCKER **

THIS SPECIALLY EDITED VOLUME of the Osgoode Hall Law Journal contains a selection of the papers originally presented at the Voices at Work North American Workshop held at Osgoode Hall Law School, York University on 16-17 March 2012. That workshop was organized by the editors of this volume and Professor Cynthia Estlund and was part of a larger project, *Voices at Work*, led by Professors Alan Bogg and Tonia Novitz. The *Voices at Work* project created a network of researchers in Australia, Canada, New Zealand, the United States, and the United Kingdom engaged in comparative reflection on the ways in which law contributes to changes in industrial relations in these countries, focussing on how well workers' voices are represented, whether through traditional forms of trade unionism or alternative mechanisms such as worker centers.

The inaugural meeting of this network of researchers was held in Oxford during the summer of 2011. A selection of the papers from that meeting was published in the *Comparative Labor Law and Policy Journal* in 2012.¹ The themes of the North American workshop were shaped by the particular challenges that limit the ability of workers in Canada and the United States to have their voices heard at their workplaces or in government departments and agencies responsible for the enforcement of minimum employment standards. Thus, we had sessions organized around: The Crisis of the Wagner Act Model, Alternative Forms of Representation, Worker Voice in Employment Regulation, Worker Voice and Social Dialogue, Worker Voice in the Public Sector, Worker Voice and the Regulation of Multinationals, and Theorizing Worker Voice. We will return shortly to talk more about these topics in the context of discussing the papers

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1. (2012) 33:3 *Comp Lab L & Pol'y J.*

in this edited collection. But first we thought it might be helpful to reflect on recurring themes that ran through the discussions that occurred over the two-day workshop, as it will help put the papers in this collection in the context in which they were originally presented.

It would be fair to say that the participants in this workshop agreed on two basic points. The first is that collective worker voice is important. While this might seem trivial, in the North American context, at this time, it is not. Union density in both the United States and Canada has been dropping, particularly in the private sector, and politically there is little will to enact laws that might facilitate union organizing by, for example, providing—or in Canada—restoring card check certification or giving union organizers better access to employees. Indeed, political toleration for collective bargaining, particularly in the public and para-public sectors is declining. Thus, the decision to bring together a group of researchers concerned to promote worker voice is neither a natural nor a neutral position.

Yet while participants broadly agreed that worker voice is important, there was less unanimity on the reasons why that is so. There are many justifications on offer for worker voice, but three seemed to predominate in the workshop discussions. First, there is the traditional economic justification, which sees collective voice principally as a mechanism that allows workers to raise their living standards by gaining a larger share of socially produced wealth. Collective voice is necessary because on an individual level, workers suffer from a deficit of bargaining power that leaves them unable to share in the benefits of increased productivity and economic growth. Second, there is the dignitary justification, which envisions collective voice as means of ensuring that workers are not treated simply as commodities or production inputs, like steel, but as human beings with their own needs and aspirations and who, therefore, must be treated with dignity and respect. As in the economic justification, collective voice is necessary for instrumental reasons. In its absence, workers are more likely simply to be treated as a means to an end (profit maximization) by their employers. Third is the democratic justification, which emphasizes the ideal of workers as engaged citizens and views democracy at the workplace both as good in itself and as necessary for the realization of political democracy.

These are well-known positions and it is not the goal of this brief introduction to the collection to elaborate on them more fully. Rather, the point we want to emphasize here is that in the workshop discussions, differences between speakers' views of the rationale for workers' voice shaped their view of the ways worker voice could or should be institutionalized. This will be addressed further when we turn to the papers in this collection.

The second point on which there was broad agreement is the well-worn but nevertheless apt statement by Marx to the effect that people make their own history but not under conditions of their own choosing.² Workshop participants all recognized that there was scope for worker agency, but that it is limited by the social and economic structures that shape the world in which they live. As a result, there is no point devising idealized models or institutional arrangements for the realization of workers' voice without taking into account the actual conditions in which those arrangements must be implemented.

However, as was the case with the importance of workers' voice, underlying this agreement were very different views about the scope for agency and the constraints of structure. For the more pessimistic among us, the structural constraints on agency were overwhelming at this particular juncture. The combination of globalization, economic restructuring, and neo-liberalism leave little scope for strengthening worker voice, especially if its goal is redistributive. Institutionalizing enhanced worker voice has been the product of struggle, but under current conditions the prospects for successful worker mobilizations are dim. In their absence, there is little reason to think that states or employers will be willing to facilitate strong workers' voice at the enterprise level or within the state. According to one metaphor that was used, we are living in a desert where the odd flower may bloom but in which the landscape will largely remain desolate.

It would be fair to say that there were no optimists—or at least no cockeyed ones—who did not take seriously the difficult structural constraints facing those seeking to strengthen workers' voice. Nevertheless, many were convinced that spaces exist to counter the diminution of worker voice and, indeed, to enhance it notwithstanding the challenging conditions under which this project is to be pursued. There were several reasons for this difference in outlook. In part, it reflected differences in the goals of voice. Those who emphasized the dignitary or the democratic goals of voice saw more space for its realization than those who emphasized its redistributive aspirations, perhaps because increasing workplace democracy did not necessarily involve a zero-sum game where workers' gains came at the expense of employers' self interest. A second reason for higher levels of optimism was the view that even when a goal of collective worker voice was redistributive, but especially when it was primarily dignity- and democracy-enhancing, the gains to the firm's

2. The precise quote is, "Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly encountered, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living." Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (New York: International Publishers Co, 1963) at 15.

efficiency would outweigh or at least nearly match any of its costs. Thus, the level of employer resistance could be lowered.

Once people entered onto a terrain in which there was space for something to be done, the focus then shifted to the question of strategy and tactics. For some, the traditional institution of the trade union still played a central role, but needed to find new ways forward. For example, some argued that trade unions needed to focus on strengthening the right to strike, rather than on improving organizing rights. To return to the metaphor we used earlier, we are living in a dry climate but the old plants can be adapted to thrive. For others, the focus was on alternatives to conventional unions, whether it be through strengthening individual rights to voice complaints or through worker centres that did not bargain collectively on behalf of certified bargaining units but rather acted for groups of workers who shared common conditions, whether by virtue of their occupation, their immigration status (or lack thereof) or some other characteristic. The metaphoric expression of this position was perhaps that although we live in a dry climate, new plants can take root and thrive if we find ways to nurture them.

It is against this very general background that we now turn our attention to the particular papers in this collection. The papers published here are not drawn equally from all of the sessions. This is not the result of a decision by the editors that some topics were more important than others or that some papers were more suitable for publication than others but rather, for the most part, is an artifact of the workshop participants' other commitments.

The first set of papers in this collection focusses on worker voice in employment regulation. The first, by Wayne Lewchuk, examines worker voice in occupational health and safety regulation. As Lewchuk notes, since the 1970s governments in most advanced capitalist countries (although less so in the United States) have required employers to provide workers with opportunities to participate in the firm's health and safety management system, typically through worker health and safety representatives and joint health and safety committees. These institutional arrangements were built on the assumption that most workers had stable and reasonably secure employment, and that union representation, although by no means universal, was common. When these conditions prevailed and employers were committed to participatory arrangements, the evidence suggested that worker voice contributed to improved health and safety outcomes. These conditions, however, have become less common, raising a serious question about the effectiveness of worker voice.

Lewchuk's article, "The Limits of Voice: Are Workers Afraid to Express Their Health and Safety Rights?" is based on a large-scale survey of workers

in southern Ontario that he and his colleagues conducted in 2005.³ About half the respondents were permanent full-time workers and half were in more insecure situations because they were self-employed or their employment was temporary, fixed-term, or part-time. His study provides strong evidence that a significant percentage of workers fear that raising a health and safety concern will have negative employment consequences and those who are most precarious are most likely to express this concern. Surprisingly, Lewchuk's study also found that unionized men were more likely to express concern about raising health and safety concerns, suggesting that even those workers who we assumed in the past would use voice mechanisms are now reluctant to do so.

If job fear inhibits workers from using participatory rights in their employer's management systems, notwithstanding that the law prohibits retaliation against workers for exercising their rights, then perhaps we should be putting more emphasis on direct state regulation and enforcement of minimum standards laws. This is the approach that has predominated in the area of minimum wages, maximum hours, and other employment standards, where the idea of employment participation in the management of these issues has never had any traction. But as we know, this is hardly a panacea, particularly in a world in which enforcement resources are thin and, in some jurisdictions, becoming thinner. Can voice mechanisms play a role in strengthening public regulation?

This is the subject of the next two papers, Janice Fine's "Solving the Problem from Hell: Tripartism as a Strategy for Addressing Labour Standards Non-Compliance in the United States" and Leah F. Vosko's "Rights without Remedies: Enforcing Employment Standards in Ontario by Maximizing Voice among Workers in Precarious Jobs." Traditionally, worker voice in enforcement has been limited to making individual complaints about violations. Typically, a complaint triggers an inspection, which results in an order if the worker's complaint is upheld. However, as both Fine and Vosko demonstrate, building an enforcement regime around individual complaints is a poor strategy in a world in which the workers who depend most on employment legislation are often the workers most afraid to complain about employment law violations while they are still employed. Moreover, it is also an inefficient use of scarce enforcement resources both because the distribution of complaints may not reflect the distribution of violations and because the resolution of individual complaints is resource intensive.⁴

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3. Wayne Lewchuk, Marlea Clarke & Alice de Wolff, *Working Without Commitments: The Health Effects of Precarious Employment* (Montreal: McGill-Queen's University Press, 2011).
 4. David Weil & Amanda Pyles, "Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace" (2005) 27:1 Comp Lab L & Pol'y J 59.

What then is to be done? Fine's article explores the role of tripartism, which involves the government regulator, the employer, and a body representing workers' interests in the enforcement process. Drawing on earlier work with Jennifer Gordon,⁵ Fine explores the conditions for tripartist regulation in which unions or community-based workers' organizations provide effective channels for worker voice in enforcement. She also provides historical examples of collaborative efforts between the United States Federal Department of Labor and worker organizations and examines initiatives under the Obama administration to work with community-based organizations to disseminate and gather information in an effort to enhance enforcement and compliance. Not surprisingly, these efforts face significant political opposition and there are numerous hurdles to their success, but Fine provides valuable insights on how to maximize the likelihood of successfully implementing them.

Leah F. Vosko's jurisdictional focus is Ontario, but she too is engaged with the question of how to provide workers with a more effective voice in employment standards enforcement. Drawing on international literature, Vosko considers ways to amplify both individual and collective worker voice. Among the individual voice-enhancing innovations Vosko considers are anonymous, confidential, and third-party complaints, as well as outreach campaigns, while collective voice initiatives include community-based and partnership enforcement arrangements that partially overlap with the tripartist approach discussed by Fine. Again, there is no easy optimism that worker voice enhancement, individual or collective, will be achieved without mobilization and political pressure but, as is the case with Fine, Vosko presents a compelling case that there is a severe mismatch between current regulatory practice and the realities of contemporary work arrangements, and that stronger worker voice in enforcement has the potential to produce better protection for those who need it most.

A second set of papers focusses on a more traditional arena of worker voice—collective bargaining—and particularly on the challenges faced in the public sector, where collective bargaining has retained its strongest foothold. These papers provide a succinct and illuminating review of the amendments to public sector collective bargaining legislation in a multitude of states between 2011 and mid-2012, substantially limiting the rights of public sector unions and employees. While these papers primarily deal with state-level events in the United States, the authors' analyses are broadly applicable to other Wagner model jurisdictions.

Joseph Slater's contribution, "Attacks on Public-Sector Bargaining as Attacks on

5. Janice Fine & Jennifer Gordon, "Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations" (2010) 38:4 *Pol & Soc'y* 552.

Employee Voice: A (Partial) Defence of the Wagner Act Model,” urges caution about alternatives to the Wagner model of worker representation, employing examples of recent developments in American state-level public sector collective bargaining systems. Slater makes a number of key points at the outset of this paper. First, persistently high union density in the US public sector indicates that the Wagner model is not inconsistent with thriving unions. Further, given the very limited scope for bargaining of most public sector unions and their limited political power, high union density in this sector also suggests that workers value voice in day-to-day workplace relations.

After reviewing the many state-level legislative changes targeting public sector collective bargaining rights, Slater makes the more general point that alternatives to the Wagner model are likely to be heavily influenced by actors unsympathetic to unions, such as employers, judges, and politicians. As a result, these alternatives may not preserve or expand employee voice, and may, in fact, be designed to reduce it. Although the Wagner model may be criticized as no longer responsive to the needs of the modern workplace or workers, even in the public sector, it is likely that alternatives developed in a context where unions are relatively weak, and by those unsympathetic to employee voice and collective bargaining, will be worse for workers and unions than the status quo. Slater provides a detailed examination of recent examples of non-Wagner representation systems that have emerged in the public sector in some states, including in the context of the Missouri courts finding a constitutional right to some form of collective bargaining, and likening this development to the current *Charter* collective bargaining cases in Canada. In these cases, state public sector employers have introduced forms of minority union recognition systems that appear designed to undermine effective union voice. Given the American experience, the author is not optimistic about how these issues will play out in Canada.

Martin Malin, in “Collective Representation and Employee Voice in the US Public Sector Workplace: Looking North for Solutions?” offers a more optimistic take on developing alternatives to the Wagner model. This paper considers the post-2010 amendments to US public sector labour legislation from a different perspective than that taken by Joseph Slater: noting that these changes, which shifted the balance of power between employers and public sector employees by simultaneously increasing unilateral employer control and reducing the scope for employee voice, have taken place in the context of legislation substantially resembling the Wagner model. Against this backdrop, Malin looks to recent Canadian *Charter* decisions that are starting to define the minimal scope of protection of collective bargaining as a possible

source for identifying alternative, non-Wagner models, that still protect the core of collective bargaining. The author suggests that these Canadian developments offer important insights for reforming US public sector labour law in a manner protecting and enhancing essential aspects of worker voice.

A third perspective on worker voice, that of the role of individual employee self-representation and its relationship to collective voice, is offered in “Employee Self-Representation and the Law in the United States.” In this paper Matthew W. Finkin reflects on the extent to which US law, common law, and legislation support individual employee voice in the workplace in the form of employee self-representation. However, the author concludes that America’s declared belief in individual liberty is not reflected in workplace law. Where support for worker self-representation does exist, it is limited and “piecemeal” and employees are more likely to be at risk of employer sanction than to be able to access legal protection for speaking out. The author then turns to New Zealand and Australia as examples of systems that have incorporated substantial protection for individual employee self-representation into workplace law that might serve as models for further development of US law. Recognizing that there is little prospect of legislative change in the United States at the federal level, Finkin suggests that state-level changes and policy innovation by the National Labor Relations Board are the most likely options for improving protection for worker self-representation and voice in the United States, noting that the real impediments to realizing greater individual liberty for workers are political, not legal. The paper concludes by querying whether greater individual worker self-representation might even revitalize worker interest in collective representation.

The final perspective on voice addressed in this collection considers worker voice and social dialogue. In “Workplace Voice and Civic Engagement: What Theory and Data Tell Us About Unions and Their Relationship to the Democratic Process,” Alex Bryson, Rafael Gomez, Tobias Kretschmer, and Paul Willman draw on Statistics Canada general social survey data to provide a quantitative, empirical exploration of the relationship between voice in the unionized workplace and civic voice in Canada. The authors find that union members are statistically significantly more likely than non-union members to be politically engaged (e.g., voting, signing public petitions, volunteering with political parties), and this difference persists throughout different levels of government. These differences are explored in greater detail, including examining the influences of the different faces of unionism and key demographic characteristics. The results also suggest that obligations to engage

in political voting may have a positive feedback effect on unionism, and that unionism, voting, and civic engagement are complements rather than substitutes. As the authors point out, this research also gives rise to an outstanding question with social implications beyond workplace law: Are these positive effects products of the statutory Wagner model, or they generalizable to any system of enterprise level workplace voice?

Events such as the Voices at Work North American Workshop provide an opportunity for academics from across the continent and across disciplines to explore an issue of common interest. In this case, legal, industrial relations and labour economics scholars from across the continent—and several from abroad—tackled the question of worker voice in the North American context. The workshop papers and discussion articulated and addressed key questions, empirical evidence, and made important links between individual and collective voice, workers' voice inside and outside of the workplace, scope for agency, and the limits and possibilities of the existing legal structures.

The broader contribution of this workshop is displayed in this set of papers, offering thoughtful reflections on the facets of worker voice and refinement and development of necessary questions about this issue.

