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# Employee Self-Representation and the Law in the United States

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# Employee Self-Representation and the Law in the United States

## **Abstract**

Collective representation has been a legal focal point in the United States for nearly a century. Little attention has been paid to the law in the obverse situation: individual self-representation. This essay explores how, on some issues, the law supports a regime of individual bargaining while, on others, is antithetical to it. In other words, US law is incoherent on the matter. By reference to law in Australia and New Zealand, this paper argues that more legal space can be created for employees to represent themselves.

## **Keywords**

Collective bargaining; United States; Employee rights

## Employee Self-Representation and the Law in the United States

MATTHEW W. FINKIN \*

Collective representation has been a legal focal point in the United States for nearly a century. Little attention has been paid to the law in the obverse situation: individual self-representation. This essay explores how, on some issues, the law supports a regime of individual bargaining while, on others, is antithetical to it. In other words, US law is incoherent on the matter. By reference to law in Australia and New Zealand, this paper argues that more legal space can be created for employees to represent themselves.

La représentation collective fait depuis près d'un siècle l'objet de beaucoup de commentaires juridiques aux États-Unis. On fait toutefois peu de cas de l'attitude des tribunaux dans la situation où les travailleurs se représentent eux-mêmes. Cet article examine la manière dont la justice, dans certains cas, favorise un régime de négociation individuelle alors que, dans d'autres circonstances, elle y est opposée. Autrement dit, la justice américaine affiche une certaine incohérence en la matière. En comparaison du système judiciaire australien et néo-zélandais, cet article prétend que les travailleurs devraient jouir de meilleures conditions juridiques pour se représenter eux-mêmes.

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## I. INTRODUCTION: THE DEMAND FOR SELF-REPRESENTATION

RICHARD FREEMAN AND JOEL ROGERS' survey of what American workers want revealed not only a yawning representation gap, but also the presence of rather nuanced desires in terms of the forms in which employee voice would be expressed.<sup>1</sup> Significantly, Freeman and Rogers learned that although a majority felt more comfortable raising workplace issues through an employee association, a significant cohort preferred to deal with their employers individually or with the help of a co-worker. The sorts of issues with respect to which this preference was expressed are set out below in Table 1.

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1. Richard B Freeman & Joel Rogers, *What Workers Want* (New York: Cornell University Press, 1999). The desire for representation and for forms of representation other than collective bargaining was further explored by Freeman. See Richard B Freeman, "Can the United States Clear the Market for Representation and Participation?" in Richard B Freeman, Peter F Boxall & Peter Haynes, eds, *What Workers Say: Employee Voice in the Anglo-American Workplace* (New York: Cornell University Press, 2007) ch 1.

TABLE 1: EMPLOYEE VOICE PREFERENCE DEPENDING ON THE PROBLEM

	Benefits	Health/Safety	Training at Job	Unfair Treatment	Sexual Harassment
Percentage who prefer to solve problems with the help of fellow employees	66	53	44	39	34
By Self	33	36	54	59	65
Don't Know	1	1	2	3	1

SOURCE: Richard B Freeman & Joel Rogers, *What Workers Want* (New York: Cornell University Press, 1999) at 55.

Freeman and Rogers declined to pursue this aspect of what their survey revealed, but others have become intrigued by the subject of individual voice. This subject was never abandoned by those of neo-liberal or libertarian persuasion,<sup>2</sup> but it is now beginning to draw more mainstream legal academic interest,<sup>3</sup> stimulated by the decline of American unionism and the concomitant claim of replacement by “an individual system of employee representation.”<sup>4</sup>

Yuval Feldman, Amir Falk, and Miri Katy have surveyed employees in Israel. They found that, along with other variables, younger and better-educated workers prefer individual to collective bargaining.<sup>5</sup> Kenneth Dau-Schmidt and Timothy Haley surveyed the content of individual and collective agreements in the United States.<sup>6</sup> They confirmed that “in the world of individual bargaining,” the terms

2. For a survey of this literature, see Kenneth G Dau-Schmidt, “Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform” (2011) 94:3 Marq L Rev 765 at 773-84.
3. See e.g. Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010); Mordehai Mironi, “Reframing the Representation Debate: Going Beyond Union and Non-Union Options” (2010) 63:3 Indus & Lab Rel Rev 367; Anne Marie Lofaso, “Talking is Worthwhile: The Role of Employee Voice in Protecting, Enhancing, and Encouraging Individual Rights to Job Security in a Collective System” (2010) 14 Employee Rts & Employment Pol’y J 55.
4. Leo Troy as cited by Hoyt N Wheeler, *The Future of the American Labor Movement* (Cambridge, UK: Cambridge University Press, 2002) at 4.
5. Yuval Feldman, Amir Falk & Miri Katz, “What Workers Really Want: Voice, Unions, and Personal Contracts” (2011) 15 Employee Rts & Employment Pol’y J 237.
6. Kenneth G Dau-Schmidt & Timothy A Haley, “Governance of the Workplace: The Contemporary Regime of Individual Contract” (2007) 28 Comp Lab L & Pol’y J 131.

of the contract focussed on the situation of the “marginal worker” (one who is young and likely to leave, in contrast to the collective agreements’ focus on the “median worker,” one who is older and less likely to leave), and tended to favour the employers’ interests.<sup>7</sup>

Cynthia Estlund has made a compelling case for greater informational transparency in the labour market on the assumption that this will “improve the efficiency of employment contracts.”<sup>8</sup> In turn, this assumes an individual bargaining process in which informational asymmetry is an obstruction to efficient bargaining. Estlund’s argument is directed to initial hire: The applicant, unlike an incumbent, is not likely to know much about the employer or the workplace, and so, informational asymmetry will be a salient aspect of the bargaining process, if there is one. As James Brudney has observed, the law in the United States does take some small steps to address this situation:

Courts reviewing disputes at the hiring stage are prepared to impose upon knowledgeable and powerful employers an affirmative duty to provide truthful or at least non-distortive information to vulnerable employees regarding their prospective employment. But once these unequally endowed employers and employees have formed a contract, the great majority of jurisdictions regard it as unjustified and unwise to insist on a similar affirmative duty of honest dealing.<sup>9</sup>

In contrast to initial hire, the issue of self-representation in the workplace assumes an ongoing employment relationship; it is concerned with how the law deals with employees who wish to affect their terms or conditions of employment going forward, not through a collective, but as individuals.

On this, the law in the United States is a “dog’s breakfast”: the right to speak for oneself is accorded only parsimoniously and on a piecemeal basis, and where not accorded, an effort to speak is fair game for employer sanction. To be sure, most employees are not sanctioned for seeking to deal individually with their employers, nor could a non-totalitarian employment relations system function were that not the case. But, to the extent such courses of dealing are conducted under the shadow of the law, there is a disconnect between reality and the law, with the latter casting a pall over the former and over the idea of individual agency.

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7. Their review could suggest that the terms they surveyed, governing benefits and post-employment competition, were either adhesive or, if there really was a bargaining process, that employers had superior bargaining power.
  8. Cynthia Estlund, “Just the Facts: The Case for Workplace Transparency” (2011) 63:2 *Stan L Rev* 351 at 357.
  9. James J Brudney, “Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law” (2011) 32 *Comp Lab L & Pol’y J* 773 at 807-08 [citation omitted] [Brudney, “Reluctance”].

The following discussion explores and explains this disconnect. Towards the close, sidelong glances will be taken at two members of the common law legal family that, by legislation, have sought to accommodate the desire for self-representation more generally. These are merely instructive of the range of the possible; they broaden the legal horizon. But from what appears, the United States will continue to muddle through, professing a belief in individual liberty that the law largely belies.

## II. INDIVIDUAL BARGAINING AND THE LAW

From the last quarter of the nineteenth century and into the second quarter of the twentieth, combat raged between two competing conceptions of the ordering of industrial society and of the status of the employee in it.<sup>10</sup> The war was waged in the lofty heights of academic theory, in the less refined pages of polemical pamphlets and the popular press, and in the trenches of industrial conflict, sometimes with lethal effect. On one side stood Capital, supported by the theoretical scaffolding provided by laissez-faire economists. They argued that the American employee was an autonomous actor possessed of agency, free to sell his or her labour to an employer on mutually agreeable terms. Necessarily, individual bargaining was conducted in the context of the law of obligations, of contract and tort. The latter protected the parties against deceit or other socially unacceptable sharp practice; the former assured the parties' performance. But that was as far as the law should go. Labour-protective law not only defeated the market, denying the public the benefits of market mediation, it stripped the individual of agency. Such laws were exercises in naked paternalism that negated the ability of the person to be an autonomous bargainer in the market acting upon his or her freely chosen preferences. In this light, unions were nothing more than

10. Montgomery captured the times thusly:

The contest so pervaded social life that the ideology of acquisitive individualism, which explained and justified a society regulated by market mechanisms and propelled by the accumulation of capital, was challenged by an ideology of mutualism, rooted in working-class bondings and struggles. Chief Justice Paxson had charged the Homestead strikers with 'insurrection and rebellion against the Commonwealth of Pennsylvania,' and painter Theodore Rhodie accused the Pullman Company of depriving him not only of income but also of his 'right as an American citizen' to espouse and live by union principles.

See David Montgomery, *The Fall of the House of Labor* (Cambridge, UK: Cambridge University Press, 1987) at 171 [footnote omitted]. On how this contest played out after the century's turn, see Irving Bernstein, *The Lean Years: A History of the American Worker 1920-1933* (Cambridge, Mass: The Riverside Press, 1960).

rent-seeking cartels that distorted the market, with negative consequences for consumers and the unrepresented.

On the other side stood Labour, supported by Progressive reformers and institutional economists. They argued that the lone employee's actual capacity to exercise agency was chimerical for the simple and obvious reason that the individual had little or no bargaining power. Actual agency—meaningful voice—was achieved by collective, not individual bargaining. To them, the law should step in to aid the weaker party by allowing the individual to collectivize.

At and beyond the century's turn, laissez-faire largely prevailed: the Thirteenth Amendment had freed the employee of wage bondage; substantive due process constrained the states from interfering in freedom of contract; and the at-will rule conduced towards the free play of individual bargaining, as both employer and employee could at any time demand a change in wages or employment conditions on pain of terminating the relationship summarily. Even where the state was sustained in its capacity to enact labour-protective truck (wage payment) laws as an exception to the Constitution's protection of freedom of contract, it was licensed to do so in the name of achieving better equality in individual bargaining, the result of which prevented labour hoarding and so further contributed to labour mobility, towards a freer labour market.<sup>11</sup>

By the late 1930s, the *National Labor Relations Act (NLRA)*<sup>12</sup> marked a sea change in constitutional doctrine. Not only did it open the door for more labour-protective legislation, it enshrined the conception of the employee as a lone—perhaps even timid and inarticulate—actor whose capacity to exercise real agency is effected by group, not individual voice.<sup>13</sup> Under this scheme, employers have to bargain with the employee's collective representative in good faith. In this way, the exercise of voice in the workplace is made meaningful.<sup>14</sup>

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11. *Harbison v Knoxville Iron Co*, 103 Tenn 421, 53 SW 955 (1899) [*Harbison*], aff'd *Knoxville Iron Company v Harbison*, 183 US 13, 22 S Ct 1 (1901). The law places the employee and the employer "more nearly upon an equality. This alone commends the *Act* and entitles it to a place on the statute book..." (*Harbison, ibid* at 443). By requiring full payment of wages in US currency on a set pay period basis, these laws prevented withholding and forfeiture that, in effect, bound the employee to the job.

12. 29 USC §§ 151-169 (1935) [*NLRA*].

13. The US Supreme Court was to give vivid expression to this perception. See *National Labor Relations Board v J Weingarten Inc*, 420 US 251 at 262-63, 95 S Ct 959 (1975).

14. See Ardit Bagchi, "Who Should Talk? What Counts as Employee Voice and Who Stands to Gain" (2011) 94 Marq L Rev 869 at 871. Bagchi deploys a different taxonomy, distinguishing between "hard" and "soft" voice:

First, "hard" voice refers to the ability to exercise power and shape the direction of the firm and its treatment of employees in particular. Second, "soft" voice refers to the ability to engage in

But under this scheme, the individual loses all power to bargain directly with the employer because a collective representative is in place.<sup>15</sup>

The question presented here concerns the status of the 93.4 per cent of American workers in the private sector today who are not collectively represented.<sup>16</sup> When the *NLRA* was enacted, the assumption was that individual employees had few rights that an employer was compelled to respect. Over the past half century much has changed, and to that extent, space has been created for the exercise of individual voice. Let us turn to that first.

## A. FEDERAL LAW

### 1. INVOKING A SPECIFIC STATUTORY EMPLOYMENT RIGHT

When an employee invokes a statutory right—to be free of sexual harassment, to take family or medical leave—the courts require a serious engagement on the employer’s part and can require a course of dealing with the employee, bolstered by a statutory prohibition on retaliation for having made the complaint or demand. In some instances, the required course of dealing is framed in terms of individual bargaining. Under the *Americans with Disabilities Act* and Title VII’s prohibition of discrimination on grounds of religion, for example, an employer has a legal duty to accommodate an employee with a statutory disability or with a religious objection to a working condition.<sup>17</sup> In a term crafted to define the obligation in the former, but which is equally applicable to the latter, the law expects the employer to engage in a

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dialogue with or provide feedback to the relevant decision-makers.

The ability to exercise power to shape the direction of the firm isn’t voice; it is just what Bagchi says it is, managerial power. Voice is not the ability to engage in dialogue, it is the power to compel the other party to engage in dialogue. That is how the *Labor Act* conceives it: The duty to bargain requires the employer to meet and confer in good faith over the subject of the bargain in an effort to reach an agreement. “Soft” voice in this context would be the employee’s ability to protest; it does not require the employer to engage in dialogue, or even to listen.

15. See generally, Robert A Gorman & Matthew Finkin, *Labor Law Analysis and Advocacy* [forthcoming in 2013] ch 19. The *Labor Act* contains a provision giving represented employees a “right” to present grievances individually subject to certain conditions. See 29 USC § 159(a) (2012). However, the US Supreme Court opined that the provision does not accord a “right” in the sense that it triggers an obligation on the employer’s part to entertain the grievance. See *Emporium Capwell Co v Western Addition Community Organization*, 420 US 50 at 61, 95 S Ct 977 (1975).
16. See Bureau of Labor Statistics, News Release, USDL-13-0105, “Union Members — 2012” (23 January 2013) online: <<http://www.bls.gov/news.release/pdf/union2.pdf>> (reporting 6.6% private sector union density in 2012).
17. See 42 USC § 12112 (1990); 42 USC § 2000e-2 (1964).

“meaningful interactive process”<sup>18</sup> with the employee in a joint effort to see whether an accommodation can be reached without undue hardship on the conduct of the business. The phrase captures the concept of interest-based bargaining—where each party is expected to understand the other’s needs and seek to achieve a specific result accommodating both—and subjects that process to judicial scrutiny of its bona fides.<sup>19</sup>

Echoes of statutory support for meaningful self-representation can be found in other measures. The *Older Workers Benefit Protection Act* of 1990<sup>20</sup> regulates employee waiver of rights or claims asserted under age discrimination law. It imposes even more exacting standards when such a waiver is made in conjunction with an exit incentive or termination program, all to assure that such waivers are “knowing and voluntary.”<sup>21</sup>

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18. See 29 CFR § 1630.2(o)(3) (2012). This regulation outlines the steps for a “flexible, interactive process.” The federal courts routinely apply it. *Cf. US Airways Inc v Barnett*, 535 US 391 at 407, 122 S Ct 1516 (2002), Stevens J.
19. See *e.g. US Equal Employment Opportunity Commission v UPS Supply Chain Solutions*, 620 F (3d) 1103, US App LEXIS 17918 (9th Cir 2010); *Tobin v Liberty Mutual Insurance Company*, 433 F (3d) 100 at 108-109, US App LEXIS 28902 (1st Cir 2005). I am indebted to Rebecca White for bringing the latter to my attention. She has pointed out that where no accommodation would have been achieved, no process of meaningful interaction is required. See *McBride v BIC Consumer Products Manufacturing Company Inc*, 583 F (3d) 92, US App LEXIS 21771 (2d Cir 2009). But as much is true under certain circumstances of collective bargaining. See *United Food and Commercial Workers International Union AFL-CIO, Local No 150-A v National Labor Relations Board*, 1 F (3d) 24, 303 US App DC 65 (DC Cir 1993) (collective bargaining over plant relocation not required if it would have been futile).
20. 29 USC §§ 621-634 (2012).
21. 29 USC § 626(f)(1) (2012). The effectiveness of a waiver of age-based claims turns upon whether:
- (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
  - (B) the waiver specifically refers to rights or claims arising under this Act;
  - (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
  - (D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;
  - (E) the individual is advised in writing to consult with an attorney prior to executing the agreement;
  - (F) (i) the individual is given a period of at least 21 days within which to consider the agreement ...
  - (G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired...
- But, under subsection (F)(ii):  
if a waiver is requested in connection with an exit incentive or other employment termination

It contemplates and is in aid of a “course of negotiation” between the employer and the individual employee.<sup>22</sup>

Other measures assume that bargaining will occur, and strive to assure fairness. The *Fair Labor Standards Act (FLSA)*, for example, which requires a minimum wage and overtime pay, allows those statutory claims to be settled or compromised by the affected employees.<sup>23</sup> However, it has been held that such a negotiated settlement requires either the supervision of the Department of Labor, or approval by a court after suit has been brought.<sup>24</sup> In the latter scenario, the employees are represented by counsel and “the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer’s overreaching.”<sup>25</sup>

These discrete pockets of protection have a larger dimension. In a world in which more employment rights are accorded—where, for example, employers might be required to give notice that they are considering a change in federally regulated benefits (such as pension benefits<sup>26</sup> or stock options in closely held corporations<sup>27</sup>)—and employers might wish to seek waivers or agreed-upon

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program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement... .

And:

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

- i. any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
- ii. the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

22. *Oubre v Entergy Operations Inc*, 522 US 422 at 426, 118 S Ct 838 (1998).

23. 29 USC § 216(c) (2012).

24. *Lynn’s Food Stores Inc v US Department of Labor, Employment Standards Administration, Wage and Hour Division*, 679 F (2d) 1350, 65 ALR Fed 691 (11th Cir 1982) [*Lynn’s Food Stores*]; *Bouzzi v F&J Pine Restaurant, LLC*, 841 F Supp (2d) 635, US Dist LEXIS 3489 (EDNY 2012) (reviewing authority). Cf *Martin v Spring Break ’83 Productions, LLC*, 688 F (3d) 247, US App LEXIS 15285 (5th Cir 2012) (union may settle *FLSA* claim where complaining employees were represented by counsel and accepted the sums paid, distinguishing *Lynn’s Food Stores* on its facts).

25. *Lynn’s Food Stores*, *supra* note 24 at 1345.

26. See e.g. *Ballone v Eastman Kodak Co*, 109 F (3d) 117, US App LEXIS 5430 (2d Cir 1997); *Hockett v Sun Company Inc*, 109 F (3d) 1515, US App LEXIS 5827 (10th Cir 1997). I am indebted to Steven Willborn for bringing these to my attention.

27. *Jordan v Duff and Phelps Inc*, 815 F (2d) 429, US App LEXIS 4036 (7th Cir 1987).

modifications of those rights, a process of individual bargaining might well result. (Much the same might be true when it is the employee who seeks the change, but doing so may not be protected; in fact, the courts are divided on whether an individual's inquiry about the status of his or her pension benefits is protected by federal law from employer sanction.<sup>28</sup>) The fairness of the ensuing process might be subject to scrutiny under common law standards and, to that extent, would afford scope, albeit limited, for self-representation. As we will see, this scenario is echoed in the common law of some states.

## 2. INDIVIDUAL BARGAINING AT LARGE

The *Labor Act* establishes a legal regime for collective, not individual bargaining. Accordingly, the National Labor Relations Board held rather early on that it would not certify a representative for a bargaining unit that consisted of only a single person.<sup>29</sup> The *Labor Act* does protect the single employee when he or she engages in concerted activity for mutual protection other than collective bargaining—when he or she acts on behalf of a group or as a preliminary to group action. But under the current state of the law, a single employee acting on his or her own behalf in seeking better pay, benefits, working conditions, or simple fairness, would be unprotected for want of concert or mutuality, and could be dismissed for having so sought. Were employee Oliver Twist to say to his employer today, “Please, sir, *I* want some more,” he could be dismissed.<sup>30</sup> An at-will employee can be discharged for any reason—even an arbitrary or morally repugnant reason—so long as it is not an unlawful reason, and seeking to bargain individually with an employer for better terms is not legally protected activity under federal law.<sup>31</sup> If,

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28. For a review of authority, see *George v Junior Achievement of Central Indiana Inc*, 694 F (3d) 812, US App LEXIS 18571 (7th Cir 2012) [*Junior Achievement*]. In this case, the court held that the inquiry was statutorily insulated from employer sanction.
29. *Luckenbach Steamship Company Inc v Gatemen, Watchmen and Miscellaneous Waterfront Workers Union, Local 38-124*, 2 NLRB 181 (1936) [*Luckenbach Steamship*]. Whether collective agreements negotiated for single person bargaining units are enforceable under the *Labor Act* is a separate question. See the discussion in *Local 377, RWDSU, UFCW v 1864 Tenants Association*, 181 LRRM 2817, US Dist LEXIS 14766 (SDNY 2007), *aff'd* 533 F (3d) 98, 184 LRRM 2596 (2d Cir 2008).
30. Matthew W Finkin, “Labor Law by Boz—A Theory of *Meyers Industries Inc, Sears, Roebuck and Co*, and *Bird Engineering*” (1985) 71 Iowa L Rev 155 at 157. The trope has become a bit shopworn.
31. See *Litton Systems Inc v Provost*, 173 NLRB No 153, 173 NLRB 1024 (1968) [*Litton Systems*]. In *Litton Systems*, an employee who was dismissed for asking for a raise of \$2.80 per week was held to be unprotected. (In today's dollars, the requests would be for a raise of \$18.71 per week. See Bureau of Labor Statistics, *CPI Inflation Calculator*, online: United

instead, employee Twist had used the first person plural: “Please, sir, *we* want some more,” he could not be dismissed.<sup>32</sup> More on this later.

## B. STATE LAW

### 1. INVOKING A SPECIFIC STATUTORY EMPLOYMENT RIGHT

Insofar as state law might replicate or expand upon federally legislated workplace rights, the law would echo the ensuing individual bargaining scenario the claim or demand would entail, sometimes explicitly.<sup>33</sup> So too, where an employer

States Department of Labor <[http://www.bls.gov/data/inflation\\_calculator.htm](http://www.bls.gov/data/inflation_calculator.htm)>.) There are further cases where discharge for the individual request of a wage increase was held to be unprotected. See *National Wax Company v Stephany*, 251 NLRB No 147, 251 NLRB 1064 (1980); *Parker Laboratories Inc v Jensen*, 267 NLRB No 162, 267 NLRB 1174 (1983); *Allied Erecting and Dismantling Company Inc v Collins Jr*, 270 NLRB No 48, 270 NLRB 277 (1984). The Iowa Supreme Court has held that a public employer may discharge an employee for demanding a pay increase from a private sector employer, for whom he worked part-time, with the knowledge and consent of the public employer. See *Clay County, Iowa v Public Employment Relations Board*, 784 NW (2d) 1, 188 LRRM 2857 (2010).

32. Employee said “we,” referring to himself and one other. See *Approved Electric Corp v Local 25, International Brotherhood of Electrical Workers*, 356 NLRB No 45, 189 LRRM (BNA) 1433 (2010). See also *Wyndham Resort Development Corp v Foley*, 356 NLRB No 104 at 2, 190 LRRM (BNA) 1121 (2011) (“The concerted nature of an employee’s protest may... be revealed by evidence that the employee used terms like ‘us’ or ‘we’...”). Nevertheless, a small corner of federal law, devised to respond to the repression of collective protest, may actually provide some limited breathing space for individual bargaining, albeit in unusual circumstances. The *Norris-LaGuardia Act* (29 USC ch 6) prohibits the federal courts from enjoining any person from giving publicity to the existence of or the facts in any labour dispute not involving fraud. See 29 USC § 104(e) (2012). However, a fraudulent representation could be subject to injunction. A labour dispute is defined as any controversy concerning terms or conditions of employment, even if it involves only a single person. *Ibid*, § 113(c). One of the preconditions for a lawful injunction—for example, where the claims are fraudulent—is that the complainant seeking it must first have made “every reasonable effort to settle such dispute ... by negotiation.” *Ibid*, § 108. For example, consider an employer who claims it is being falsely accused by an employee of wrongful workplace action in a “labor dispute” by emails to the incumbent workforce. If that employer seeks to acquire an injunction to prevent circulation of the emails from a federal or state court, in a jurisdiction that has legislatively echoed the *Norris-LaGuardia Act*, the *Act* would require that the employer show it has made a reasonable effort to negotiate a resolution of the underlying dispute. *Cf Pulte Homes Inc v Laborers’ International Union of North America*, 648 F (3d) 295, 191 LRRM 2161 (7th Cir 2011).
33. See *e.g.* Cal Gov’t Code § 12940(n) (2012). This makes it an unlawful employment practice: For an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee

wishes its employees to waive their right to invoke protective law judicially and, instead, to submit their legal claims to an employer-adopted arbitration system, some courts have applied the doctrine of unconscionability to determine the effectiveness of the employee's agreement.<sup>34</sup> As the US Supreme Court made plain, the fact that the arbitration agreement is one of adhesion does not render the agreement unconscionable per se;<sup>35</sup> but insofar as the states remain free to decide on a case-by-case basis whether, under specific circumstances, the employee had some meaningful choice,<sup>36</sup> possibly including an opportunity to negotiate,<sup>37</sup> the law would give breathing space for self-representation.

So too, state wage payment laws commonly deal with the question of deductions from wages. Often written consent is required, but at least two states, Illinois and Michigan, subject consent to a test of voluntariness.<sup>38</sup> In this, state law bolsters a regime of free agency by assuring the agent's freedom.

Less strongly, state unemployment compensation benefits law may speak to individual representation by requiring an employee who quits due to allegedly unacceptable working conditions to have made a reasonable attempt to have the situation rectified prior to quitting.<sup>39</sup> This places the burden on the employee to seek to negotiate with his or her employer on pain of losing the benefit. The employer is not required to negotiate, but the employer's failure to respond reasonably would expose it to liability for the benefit. In other words, although the law here does not mandate a meaningful interactive process, it certainly encourages it.

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or applicant with a known physical or mental disability or known medical condition.

See also, *Russell v Cooley Dickinson Hospital Inc*, 772 NE (2d) 1054 at 1065, 437 Mass 443 (Sup Jud Ct 2002). *Contra Kezer v Central Maine Medical Center*, 40 A (3d) 955 at 963, 2012 ME 54 (Sup Jud Ct) (Maine law makes an employer's engagement in a "good faith interactive process" an affirmative defence to a disability claim; it does not directly require an employer to "engage in such a consultation").

34. See *e.g. Adler v Fred Lind Manor*, 103 P (3d) 773 at 783, 153 Wn (2d) 331 (Wash Sup Ct 2004) [*Adler*]; *Seawright v American General Financial Services, Inc*, 507 F (3d) 967, 2007 US App LEXIS 26328 (Tenn 6th Cir).
35. *AT&T Mobility LLC v Vincent Concepcion*, 131 S Ct 1740, 179 L Ed (2d) 742 (2010).
36. *Adler*, *supra* note 34 at 783.
37. *Stirlen v Supercuts, Inc*, 60 Cal Rptr (2d) 138 at 154, 51 Cal App 4th 1519 (Ct App 1997). *Cf Franco v Arakelian Enterprises Inc*, 211 Cal App (4th) 314, 149 Cal Rptr (3d) 530 (Ct App 2012).
38. *Illinois Wage Payment and Collection Act*, 820 ILCS 115/9 (agreement must be "given freely" at the time); Mich Comp L § 408.477(1) (1978) (consent must be obtained "without intimidation or fear of discharge for refusal to permit the deduction").
39. See *e.g. Bombard v Department of Labor (Fisher Auto Parts Inc)*, 2010 VT 100, 12 A (3d) 533.

## 2. INDIVIDUAL BARGAINING AT LARGE

The law of employment falls primarily to the states, and a state might address employee voice in more generally protective terms. As Brudney notes, some courts do require good faith leading up to acceptance of employment in the sense that active deception, or, more importantly, a failure to disclose material facts, might be actionable.<sup>40</sup> In this, the law corrects for informational asymmetry and so facilitates a bargaining process. But, as Brudney points out, in most jurisdictions this obligation does not apply once an at-will employment has been entered into. In most jurisdictions, an employer can lie or fail to inform the employee of material facts in order to induce—or lull—the employee into remaining in employment.<sup>41</sup> The stated ground is that because the employment was held at will, there could be no damage done; the employee could have been terminated at any time for any reason. This blinks at the fact that the employee was *not* terminated for no reason; he or she was kept on in ignorance, allowing the employer to benefit from the employee's performance, all while it sought greater benefit by considering and later taking job-destructive action. To the extent the courts are driven by the lack of any demonstrable damage in an employee remaining in an at-will job, they have ignored the employee's opportunity cost.<sup>42</sup>

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40. Brudney, "Reluctance," *supra* note 9.

41. This doctrine was adopted in *Mackenzie v Miller Brewing Company*, 2001 WI 23, 623 NW (2d) 739 (Sup Ct). See also *Cocchiara v Lithia Motors Inc*, 270 P (3d) 350, 247 Ore App 545 (2011) (attending, however, only the loss of the promised position and not the one foregone). Cf. *Sawyer v EI Dupont de Nemours & Co*, 689 F (3d) 463, 193 LRRM 3148 (5th Cir 2012) (certifying question to the Texas Supreme Court). Delaware is one of very few jurisdictions to extend the covenant of good faith and fair dealing to forbid active misrepresentation to an at-will employee to remain in a current position. As the exception to the at-will rule is to be "narrowly defined," it is not clear that it would extend to a withholding of unrequested information. See *Owens v Connections Community Support Programs Inc*, 840 F Supp (2d) 791 at 798, US Dist LEXIS 1590 (D Del 2012).

42. Another explanation may be in the difficulties of deciding just when job destructive business plans need be disclosed *i.e.* plans that may ripen but may never reach full fruition. Disclosure may cause valued employees to look, and leave for a greener, or more secure, pasture. This practical problem is no different, however, for employees who work under contracts of stated term to which the at-will exemption to deception does not apply. This rationale, which appears nowhere in the case law, only highlights how the employer benefits by keeping the employee in ignorance. Interestingly, some courts have placed a duty on *employees* to inform their *employers* of their interest in, or plans for leaving the employment to engage in competitive activity. See Kenneth G Dau-Schmidt, Robert N Covington & Matthew W Finkin, *Legal Protection for the Individual Employee*, 4th ed (St Paul, Minn: West Group, 2010) at 238-40. Apparently, the obligation of good faith runs in only one direction.

These decisions are also vexing doctrinally. The law conceives of an at-will relationship as a continuous series of offers and acceptance, where both parties keep a weather eye, so to speak, on economic, technological, and demographic change, and are free to renegotiate the terms from moment to moment. If the law's role is to correct for informational asymmetry in the bargaining process leading up to an at-will relationship, in aid of efficient bargaining, one is hard-pressed to see why that information-correcting, bargaining-enhancing role would not be equally applicable during the course of an at-will relationship. The refusal to apply an obligation of good faith during the course of an at-will employment relationship is inconsistent with a legal regime supportive of individual bargaining.

However, a number of states have held that employer policies setting out terms and conditions of employment can rise to the level of contractual commitment—for example, in affording some form of job security.<sup>43</sup> In a few such jurisdictions, an employer would not be free to unilaterally to alter or abrogate such a policy: The employer must offer and secure acceptance of the modification with requisite consideration.<sup>44</sup> In these jurisdictions, the law would support a process of individual bargaining potentially bolstered by doctrines of unconscionability or economic duress.<sup>45</sup> Here the law echoes what it requires for the knowing and voluntary waiver of a statutory right.

To shift gears, the states are also free to fashion employment relations policy for those enterprises not governed by federal law, most often because they fall short of the Labor Board's jurisdictional limits. Though small in size, these enterprises are not small in number. In the past, New York and Pennsylvania applied their labour relations laws to allow for single person bargaining units where single employees work in enterprises engaged in a common industry, *e.g.* as building superintendents or motion picture operators.<sup>46</sup> The New York court stressed the statutory concern: “to encourage collective bargaining throughout

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43. See *e.g.* *Duldulao v Saint Mary of Nazareth Hospital Center*, 505 NE (2d) 314, 115 Ill (2d) 482 (1987).

44. See *e.g.* *Doyle v Holy Cross Hospital*, 708 NE (2d) 1140, 186 Ill (2d) 104 (1999).

45. Howard A Specter & Matthew W Finkin, *Individual Employment Law and Litigation* (Charlottesville, Va: The Michie Company, 1989) at § 3.11.

46. See *New York State Labor Relations Board v Metropolitan Life Insurance Company et al*, 52 NYS (2d) 590, 15 LRRM 650 (Sup Ct 1944) [*Metropolitan Life Insurance*], *aff'd* 269 AD 934, 58 NYS (2d) 343 (App Div 1945), *aff'd* 295 NY 839, 66 NE (2d) 853 (1946). See also *International Alliance of Theatrical Stage Employees et al v P A Magazzu*, Commerce Clearing House's Labor Relations Report (LRR), Report No. 148, ¶ 65, 022 (Penn Ct Com Pleas 1943) [*Magazzu*].

a trade,”<sup>47</sup> but the Pennsylvania court proceeded on a broader basis: that “the rights of an individual citizen under the terms of the [state’s Labor Relations] Act should not be different as a single employee of an employer, than as one of three or more employees of the same employer.”<sup>48</sup> Interestingly, Pennsylvania’s *Labor Relations Act* defines a “representative” for the purpose of bargaining as “any individual” as well as an organization.<sup>49</sup> Theoretically, an individual could designate herself as her own bargaining representative for a single person bargaining unit, *i.e.* in those instances, no doubt rare, where the position the employee occupies is not submerged in a wider community of interest with other employees.

### III. A REFLECTION ON ACTUAL AGENCY: INDIVIDUAL BARGAINING IN AN AT-WILL WORLD

A century ago, advocates of laissez-faire pitted individual bargaining as an alternative to collective bargaining;<sup>50</sup> one hears the echo of this today.<sup>51</sup> The necessary assumption is that the individual employee is clothed with power to deal at arms-length with the employer. As we have seen, a portion of American employment law today does clothe the employee with a right to interact meaningfully with the employer over some terms and conditions of employment—effectively, to represent oneself. But, for the most part, not only does the law not do that, it allows the employer to treat the employee not as a bargaining partner possessed of agency but as a being in a state of near tutelage, akin to a child, who can be punished for speaking out of turn for the temerity of asking for a better term or condition of employment. It would be expected that in the ordinary course such power would be used sparingly, if at all, to eliminate

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47. See *Metropolitan Life Insurance*, *supra* note 46 at 593.

48. See *Magazzu*, *supra* note 46.

49. Pa Stat Ann tit 43 § 211.3(e) (2009).

50. See *e.g.* US, National Industrial Conference Board, *Individual and Collective Bargaining Under the NIRA: A Statistical Study of Present Practice* (New York: National Industrial Conference Board, 1933). Note how Richard T Ely saw the future at the century’s turn:

The era of individual bargaining has passed away... . We must adjust ourselves to collective bargains between organized labor on the one hand, and organized capital on the other. Not suppression of organization, but regulation of organization, must be our watchword.

See Richard T Ely, *Studies in the Evolution of Industrial Society* (New York: The Macmillan Company, 1903) at 390.

51. See Leo Troy’s quoted observation in Wheeler, *supra* note 4.

the disgruntled,<sup>52</sup> or, possibly, where collectivization is a prospect, as a signal to others. But the mere possession of that power in reserve, as well as its occasional exercise, negates any legal notion of actual agency.

The disconnect between the liberal conception of free labour and its legal actualization reflects an ambiguity in usage. The neo-classical model speaks in transactional terms of the labour market,<sup>53</sup> which would seem to import the notion of individual bargaining. The word “market” incites an image of the Greek *agora*, the Middle Eastern *souk*, the medieval mercantile fair, or a street scene on the lower east side of Manhattan at the turn of the twentieth century lined with push carts before which sellers and buyers haggle face-to-face over price and quality. But the neo-classical labour market model is decidedly not one of face-to-face bargaining.<sup>54</sup> In the neo-classical world, employers set wages and working conditions unilaterally against the backdrop of the impersonal forces of supply and demand. The “standard model,” though not hostile to a bargaining scenario, is indifferent to it. Nevertheless, studies of the economics of contractual transactions do attend to face-to-face bargaining; they are concerned with bargaining power.<sup>55</sup>

In legal terms, an employee who is hired for an indefinite period, and so serves at will, is a player in a near instantaneous series of contractual transactions: At every instant the principal (the employer) offers employment to the agent (the employee) on an “as is” or “take it or leave it” basis. The agent accepts these terms merely by continuing in employment. At any instant the employer is free to demand a change by making it, and the employee accepts by staying on.<sup>56</sup> So too is the employee free at any moment to demand a change and to quit if

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52. See *e.g.* *Litton Systems*, *supra* note 31.

53. See Henry N Butler & Keith W Chauvin, “Economic Analysis of Labor Markets: A Framework for Analyzing Employment Law Issues” (1998) 8:1 Kan JL & Pub Pol’y 1 at 1 (“Labor markets, like all markets that are based on voluntary transactions, are created by employees and employers agreeing to participate in a mutually-beneficial transaction”).

54. Ian Ayres & Stewart Schwab, “The Employment Contract” (1999) 8:3 Kan JL & Pub Pol’y 71 at 78. “[W]e are not assuming face to face negotiations in this standard model.”

55. The literature is surveyed by Nick van der Beck, as well as Mireia Artigot i Golobardes and Fernando Gómez Pomar. See Nick van der Beck, “Long-term contracts in the law and economics literature” in Gerrit De Geest, ed, *Contract Law and Economics*, 2d ed (Cheltenham, UK: Edward Elgar, 2011) 281; Mireia Artigot i Golobardes & Fernando Gómez Pomar, “Long-term contracts in the law and economics literature” in *ibid*, 314.

56. Some courts are troubled by the harshness of this model and attempt, however awkwardly, to ameliorate the asperity by requiring some undefined breathing space before continuance becomes assent. See *Kauffman v International Brotherhood of Teamsters*, 950 A (2d) 44 at 47-48, 2008 DC App LEXIS 265.

the employer does not agree. Economic theory confirms the common sense of the situation: The party who possesses superior information, who has a better alternative to accepting the term, who can hold out longer,<sup>57</sup> or who is able to impose a higher cost of disagreement on the other, has the superior bargaining power. Under some circumstances the agent's bargaining power can be zero.<sup>58</sup>

There are surely employees so strategically situated, possessed of such unique knowledge or skill, or whose replacement would be attended by such heavy transaction costs, that they have the upper hand in the relationship: high executives, leading sales representatives, key scientific staff, popular actors, and athletes. But, in the absence of these factors—where the employee can easily and cheaply be replaced by another in the job queue, where the employee would have to endure lost income and the cost of a possibly extended job search—the reverse would be the case. For most employments, the employer would be expected to be in a superior bargaining position.

Even so, it would seem to be one thing for an employer to flatly reject an employee's request for a raise, telling the employee that he was already being "adequately compensated,"<sup>59</sup> but quite another to be able to impose the severe punishment of discharge for having asked.<sup>60</sup> In other words, the at-will rule bids fair to reduce the employee's legal capacity to exercise agency to somewhere below zero.

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57. This is dwelt on elegantly by EH Phelps Brown. See EH Phelps Brown, *The Economics of Labor* (New Haven: Yale University Press, 1962) at 159-63. Not surprisingly, his subsequent discussion, "Analysis of Bargaining Power," concerns collective, not individual bargaining. (*Ibid*) at 163-69.
58. Patrick Rey & Bernard Salanie, "Long-term, Short-term and Renegotiation: On the Value of Commitment in Contracting" (1990) 58:3 *Econometrica* 597 at 606.
59. *Litton Systems*, *supra* note 31.
60. Various analogies to commercial transactions may present themselves where one party to a long series of market transactions with another chooses to stop doing business. If that decision were based on the price or quality of the product or service that was being supplied, the decision would be analogous to a rejection of the offer, not a punishment for having made it. If the decision was based on grounds without such commercial justification, it is possible that a duty of good faith and fair dealing—adopted, for example, in the Uniform Commercial Code for transactions between merchants—would come into play. See Melvin Eisenberg, "Relational Contracts" in Jack Beatson & Daniel Friedman, eds, *Good Faith and Fault in Contract Law* (Oxford: Clarendon Press, 1995) at ch 11. However, the prevailing view in the United States is that there is no duty of good faith in the termination of an at-will employment relationship. See Matthew W Finkin et al, "Working Group on Chapter 2 of the Proposed Restatement of Employment Law" (2009) 13 *Employee Rts & Employment Pol'y J* 93 at 133-42.

## IV. BROADENING THE LEGAL HORIZON

Most developed economies in the democratic world have fair dismissal laws that would prohibit discharge for seeking information or attempting to bargain for something more. But some do more. The law outside the United States often provides mandates for meaningful individual interaction on specific subjects<sup>61</sup> as well as providing for collective information sharing and consultation. Two examples taken from the Antipodes do both, but the strand of interest here is their provision for individual self-representation. These suggest a range of the possible.

### A. NEW ZEALAND

New Zealand's *Employment Relations Act of 2000*, as amended in 2004, enacts a robust scheme of individual representation.<sup>62</sup> The employer and the individual

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61. To cite but one example, the German *Part-Time and Limited Term Employment Act (TzBfG)* allows an employee to request a reduction in working time. The employer must discuss the request with the employee "with the goal of coming to an agreement" and must consent unless operational reasons are prohibitive. The law is discussed by Maximilian Fuchs. See Maximilian Fuchs, "Germany: part-time work – a bone of contention" in Silvana Sciarra, Paul Davies & Mark Freedland, eds, *Employment Policy and the Regulation of Part-Time Work in the European Union: A Comparative Analysis* (Cambridge, UK: Cambridge University Press, 2004) 121. Claims of non-compliance with these obligations may be brought before the labour court. Other examples abound; indeed, the law abroad often contemplates the fact that individual bargains will be struck, and it sets the parameters within which such individual bargains will be allowed. To take only working time, under the English *Working Time Regulations*, SI 1998/1833, an agreement made with a group of employees, its representatives, or an individual employee may derogate from the forty-eight hour work week the law sets out, which entails a process of bargaining, in the latter, on an individual basis. See generally Simon Deakin & Gillian Morris, *Labour Law*, 6th ed (Oxford: Hart, 2012). Italian and Spanish law similarly allows an individual agreement to regulate the amount of overtime the employee may be required to work. See Sciarra, Davies & Freedland, (*ibid*). Canadian law allows employers to modify work schedules in excess of legal limits by vote of 70 per cent of the affected employees. See Federal Labour Standards Review, *Control Over Working Time and Work-Life Balance : A Detailed Analysis of the Canada Labour Code*, Part III by Judy Fudge (Ottawa: Human Resources and Skills Development Canada, 28 February 2006), online: <[http://www.hrsdc.gc.ca/eng/labour/employment\\_standards/fls/pdf/research17.pdf](http://www.hrsdc.gc.ca/eng/labour/employment_standards/fls/pdf/research17.pdf)>. The need in Canada to "create incentives for interaction between employers and employees" on work time was argued for by Harry Arthurs. See Federal Labour Standards Review, *Fairness at Work: Federal Labour Standards for the 21<sup>st</sup> Century* (Gatineau, QC: Human Resources and Skills Development Canada, 2006) at 120 (Commissioner: Harry W Arthurs).

62. *Employment Relations Act 2000 (NZ)*, 2000/24.

employee<sup>63</sup> “must deal with each other in good faith.”<sup>64</sup> Good faith

requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative...<sup>65</sup>

This obligation applies to:

- (ba) bargaining for an individual employment agreement or for a variation of an individual employment agreement:
- (bb) any matter arising under or in relation to an individual employment agreement while the agreement is in force:
- ...
- (d) a proposal by an employer that might impact on the employer’s employees, including a proposal to contract out work otherwise done by the employees or to sell or transfer all or part of the employer’s business:
- (e) making employees redundant ...<sup>66</sup>

The *Act* specifies aspects of the bargaining process<sup>67</sup> and adds a specific illustration:

[A]n employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees [is required] to provide to the employees affected—access to information, relevant to the continuation of the employees’ employment, about the decision; and an opportunity to comment on the information to their employer before the decision is made.<sup>68</sup>

The employer’s obligation to be “active and constructive,” “responsive” to and “communicative” with the individual employee in relation to any matter

63. *Ibid*, s 4(4).

64. *Ibid*, s 4A(c).

65. *Ibid*, s 4A(b).

66. *Ibid*, s 4(4).

67. *Ibid*, s 63A(2). This section provides that:

The employer must do at least the following things:

- (a) Provide to the employee a copy of the intended agreement under discussion; and
- (b) Advise the employee that he or she is entitled to seek independent advice about the intended agreement; and
- (c) Give the employee a reasonable opportunity to seek that advice; and
- (d) Consider any issues that the employee raises and respond to them.

It also sets out conditions that render an agreement “unfair” given the employee’s capacity to contract or an inducement to contract by “oppressive means, undue influence, or duress.” *Ibid*, s 68(2)(c). Additional sections also bear upon the freedom of individual representation, e.g. to select a lawyer as a representative. *Ibid*, s 236.

68. *Ibid*, s 4(1A)(c).

on which an employment agreement may be made seems to come close to the American idea of engaging in a “meaningful interactive process,” save that it applies to all extant and future employment issues, not only to the claim of a specific statutory entitlement. The specific treatment of economic displacement affecting even a single employee, requiring notice and an opportunity to be heard before the decision is made, will be discussed at the close.

Suffice it to say, this law is very much a work in progress. How the scheme of statutorily mandated individual good faith dealing will work in practice remains to be seen,<sup>69</sup> but it does present a model that accommodates the felt need for self-representation, that accords legal recognition of individual agency.

## B. AUSTRALIA

In 2009, Australia enacted the *Fair Work Act (FWA)*,<sup>70</sup> an elaborate and, to an outsider, maddeningly complicated system that resonates against the *Industrial Relations Act of 1988* and ensuing overhauls in 1996 and 2005.<sup>71</sup> The *FWA* provides for the negotiation of an “enterprise” collective agreement (for a non-greenfield enterprise).<sup>72</sup> An employer may choose to bargain with any employee organization if even a single employee of the enterprise is a member of it—so long as it has the capacity to represent the industrial interests of that member—or with any person appointed by an employee,<sup>73</sup> which could be the employee him- or herself.<sup>74</sup> (The employer becomes legally obligated to bargain if there is a majority support determination or a “scope order” in place.<sup>75</sup>) Therefore, it is possible that an employer must bargain, and bargain in good faith, with a diverse group of unions, representatives of individual employees, and the

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69. Gordon Anderson, “Good Faith in the Individual Employment Relationship in New Zealand” (2011) 32:3 *Comp Lab L & Pol’y J* 685.

70. *Fair Work Act 2009* (Cth) [FWA].

71. Andrew Stewart and Anthony Forsyth provide a useful guide to the background. See Andrew Stewart & Anthony Forsyth, “The Journey from Work Choices to Fair Work” in Anthony Forsyth & Andrew Stewart, eds, *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Sydney, Aust: The Federation Press, 2009) ch 1.

72. A greenfield agreement is an agreement setting out the employment conditions between an employer and a union for an enterprise that does not have employees. See “What’s an enterprise agreement,” online: Australian Government Fair Work Ombudsman <<https://www.fairwork.gov.au/employment/agreements/pages/default.aspx>>.

73. *FWA*, *supra* note 70, s 176(1)(b)-(c). Employees must also be given notice of their representational rights. *Ibid*, s 174.

74. *Ibid*, s 176(4).

75. See Breen Creighton & Andrew Stewart, *Labour Law*, 5th ed (Sydney, Aust: The Federation Press, 2010) at 21.48-21.58.

self-represented, all at the same bargaining table.<sup>76</sup> The statute contemplates that an enterprise agreement will provide for future employee consultations and sets out a “model consultation” provision, a default term to be implied in the absence of agreement.<sup>77</sup> The text is set out below. Even as it contemplates a system of plural representation, it would appear quite possible for it to have purchase on an individual self-representational basis.

**Model consultation term**<sup>78</sup>

- (1) This term applies if:
  - (a) the employer has made a definite decision to introduce a major change to production, program, organization, structure, or technology in relation to its enterprise; and
  - (b) the change is likely to have a significant effect on employees of the enterprise.
- (2) The employer must notify the relevant employees of the decision to introduce the major change.
- (3) The relevant employees may appoint a representative for the purposes of the procedures in this term.
- (4) If:
  - (a) *A relevant employee appoints*, or relevant employees appoint, a representative for the purposes of consultation; and
  - (b) The employee or employees advise the employer of the identity of the representative; the employer must recognize the representative.
- (5) As soon as practicable after making its decision, the employer must:
  - (a) Discuss with the relevant employees:
    - (i) the introduction of the change; and
    - (ii) the effect the change is likely to have on the employees; and
    - (iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and
  - (b) for the purposes of the discussion—provide, in writing, to the relevant employees;

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76. However, the number of bargaining representatives can be rationalized if the bargaining process is not proceeding efficiently because of multiple representation. See *ibid*, ss 229(4)(a)(ii), 230(3)(a)(ii), 231(2)(a)-(b). In order to take effect, an enterprise agreement must be approved by the agency that administers the Act, called Fair Work Australia. In turn, they must be satisfied that the agreement has been “genuinely agreed to by the employees covered by the agreement.” This is shown by a vote of approval by a majority of the employees to be covered by the enterprise agreement, subject to other procedural and substantive requirements. *Ibid*, ss 181, 188.

77. The model clause is based on one rooted in a 1984 decision of the Australian Conciliation and Arbitration Commission.

78. *Fair Work Regulations 2009* (Cth), reg 2.09 [emphasis added].

- (i) all relevant information about the change including the nature of the change proposed; and
  - (ii) information about the expected effects of the change on the employees; and
  - (iii) any other matters likely to affect the employees.
- (6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.
- (7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.
- ...
- (9) In this term, a major change is *likely to have a significant effect on employees* if it results in:
- (a) the termination of the employment of employees; or
  - (b) major change to the composition, operation or size of the employer's workforce or to the skills required of employees; or
  - (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
  - (d) the alteration of hours of work; or
  - (e) the need to retrain employees; or
  - (f) the need to relocate employees to another workplace; or
  - (g) the restructuring of jobs.

This scheme is also a work in progress. That reservation in mind, it imposes a duty of good faith bargaining owed to the individual, albeit not as an individual, but as a self-representative. New Zealand law gives the individual employee legal agency at large, so to speak. Australian law is more closely cabined. But both require an employer to inform an employee of the prospect of a job-terminating decision and to entertain the employee's proposals: in New Zealand, while the decision is under consideration, but before it is made; in Australia, when the decision is made, but before it is implemented. With these experiments in mind, let us return to the scene in the United States.

## V. MAKING SELF-REPRESENTATION MEANINGFUL

American employees seem to want to represent themselves to have a direct voice in some workplace matters of deep concern. Over 50 per cent want to be heard about job training, for example, which is a critical issue in an era of plant closings, downsizing, and outsourcing.<sup>79</sup> Can the law better accommodate this felt need?

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79. Freeman & Rogers, *supra* note 1 at 48.

## A. FEDERAL LAW

Not to put too fine a point on it, the political prospect of general legislative address reforming the system of employee representation at the federal level is nil.<sup>80</sup> Thus, it falls to the National Labor Relations Board to fashion national labour policy within the confines of an increasingly anachronistic statute. Given the history, text, and long-standing construction of the *Act* to preclude bargaining units of one person, it would be extremely difficult for the Board to discover that possibility to have been latent in the *Act* all along, but even more difficult to create a general right of individual self-representation where the individual is not uniquely situated vis-à-vis her co-workers. However, that there is no prospect of a federal right of self-representation does not mean that employees should labour under the threat of discharge for having attempted it.

The statutory and historical basis for the right of the individual employee to present a demand or a work-related grievance without suffering retaliation was explored thirty years ago.<sup>81</sup> The nonsensical distinctions the Board and the courts draw under the current state of the law tests our tolerance for legal perversity. It makes no sense to have the question of whether an employee may ask for a pay increase turn on whether a co-worker joins him or her in making the request. Nor does it make sense to hold the discharge of an employee for making such a request to be unprotected, whilst holding a co-worker's protest about the unfairness of the discharge to be protected, as that employee would be making common cause with her co-worker for mutual protection. Would any nation in the civilized world allow an employee to be discharged for informing his employer that he thought his paycheck was inaccurate?<sup>82</sup>

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80. On why this is, see James J Brudney, "Gathering Moss: The NLR's Resistance to Legislative Change" (2011) 26 ABA J Lab & Emp L 161.

81. Robert A Gorman & Matthew W Finkin, "The Individual and the Requirement of 'Concert' Under the National Labor Relations Act" (1981) 130:2 U Pa L Rev 286 at 331-46.

82. See *Ryder Tank Lines Inc v Reese*, 135 NLRB 936, 49 LRRM (BNA) 1597, enf'd on other grounds *NLRB v Ryder Tank Lines, Inc*, 310 f (2d) 233, 51 LRRM 2512 (4th Cir 1962). The facts were these:

About a week before he was terminated Bough complained to Terminal Manager Morrison that he (Bough) had not received the amount of money that he believed he was entitled to for layover time on a trip which he had recently made. Bough and Morrison did not arrive at a mutually satisfactory disposition of this matter and on or about June 9, 1960, Bough (in accordance with a procedure recommended by Respondent) took the matter up with Respondent's operation manager (Kruggel), who in turn consulted Morrison about the matter. Morrison testified that he resented this appeal to Kruggel even though it was in accord with suggestions made earlier by Kruggel and that when he (Morrison) was given the opportunity to select the third man to be laid off he selected Bough because of his going "over my head."

Nevertheless, even this measure, which meets the demand for individual voice only halfway, would face heavy sledding in the courts given the longevity of the statute's more cribbed reading. And so it would fall to the states, historically the law's experiment stations,<sup>83</sup> to fill the gap.

## B. STATE LAW

Overwhelmingly, individual employment law is state law found in the common law of contract and tort and in hundreds of discrete pieces of legislation, from broad prohibitions to measures dealing with very specific evils. Under the law of federal pre-emption, the state may not regulate that which is arguably prohibited or protected by the *Labor Act*, but the state can enact a floor of workplace protections including, for example, a general prohibition on wrongful dismissal.

Consequently, whereas under current doctrine the state may not afford relief for employees who are dismissed for exercising collective voice per se, unconnected to the vindication of some other public policy<sup>84</sup> (a bizarre state of affairs!), there is

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*Ibid* at 943. The Board agreed with the Trial Examiner that Manard Bough's discharge did not violate the *Act* as his action was "purely personal." *Ibid* at 938. The case remains the law today. As noted earlier, the courts are divided on whether an employee who points out that the employer has not made its contributions to his pension can be discharged under federal pension protection law for having done so. *Junior Achievement*, *supra* note 28. Today, many states allow tort relief for the discharge of an at-will employee for a reason that violates public policy. However, the Supreme Court of South Carolina has held that public policy is not implicated in the discharge of an at-will employee for informing her local manager that she was not being paid according to the terms agreed to. See *Barron v Labor Finders of South Carolina*, 713 SE (2d) 634, 393 SC 609 (2011). Had the employee filed a claim for the wage due under the state's wage payment law, rather than asking her manager for it, it is possible that a retaliatory discharge would be actionable. See *Campbell v Husky Hogs, LLC*, 255 P (3d) 1, 292 Kan 225 (Sup Ct 2011). This is only so where the statute is held to implicate the public good. The Kansas Court thought so, but the Colorado courts have not been so sure. See *Crawford Rehabilitation Services Inc v Weissman*, 938 P (2d) 540, 1997 Colo LEXIS 491 (Sup Ct) (discharge for insisting on taking statutorily guaranteed rest breaks was not actionable). Thus far, demanding an employer's adherence to state wage payment or minimum wage law is not considered protected activity in Illinois. See *Trochuck v Patterson Companies Inc*, 851 F Supp (2d) 1147, 2012 US Dist LEXIS 37056 (SD Ill).

83. Matthew W Finkin, "Gli Stati Come Laboratori Di Diritto Del Lavoro. Stati Uniti E Unione Europea A Confronto." (2011) 30:3 Rivista Italiana Di Diritto Del Lavoro 401.

84. See *Inter-Modal Rail Employees Association v Burlington Northern and Santa Fe Railway Company et al*, 87 Cal Rptr (2d) 60, 73 Cal App (4th) 918 (1999). The state remedy for discharge for group activity over safety was not pre-empted because it was grounded in state public policy. Compare *Luke v Collotype Labels USA Inc*, 72 Cal Rptr (3d) 440, 159 Cal App (4th) 1463 (2008). The state remedy for discharge of employee for assisting

no obstacle to a state extending its public policy to the discharge of an employee who exercises individual voice on his or her own behalf. Such a step would take individual self-representation out of the shadow of employer retribution, but it would not impose a general obligation to engage in a meaningful interactive process with the employee. Could a state take that next step?

No legal impediment presents itself. The federal *Labor Act* pre-empts the regulation of collective bargaining for the employments it covers, but affording a right of individual self-representation, akin to New Zealand law and the individual self-representational aspect of Australian law, would not enter that field. As the Board observed when it declined to certify single person bargaining units:

[T]he principle of collective bargaining presupposes that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify where only one employee is involved. This conclusion does not mean that a single employee may not designate a representative to act for him; *he has such a right without the Act, and the Act in no way limits the right*. By the same token, this conclusion in no way limits the protection which the Act otherwise gives such an employee.<sup>85</sup>

As affording the individual the right to bargain for himself or herself does not intrude into the federal scheme, there is no legal reason why, in the absence of a collective representative, a state could not afford such a right even to employees of employers within the Labor Board's jurisdiction.

The obstacle is not legal, but political, grounded in management's foreseeable objection to the transaction costs the law would impose—to be required to deal *and* in good faith with all manner of demands and complaints made by each of its employees in a meaningful interactive process. The claim might have purchase in employments with large numbers of employees, for smaller employers tend to have personal interactions with their employees as a matter of course, and these businesses tend to be excluded from the reach of much labour-protective law in any event. But these larger employments, where the claim of undue burden would be most obvious to make, also maintain human resource departments that are established in part to administer employment policies and to deal with employee complaints. Consequently, it is not the prospect of meaningful interaction that would be objectionable, but rather, the imposition of a legal duty to do so, subject to potential judicial oversight. In other words, the very open-endedness of the obligation would surely be argued to be an impediment to managerial flexibility,

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co-workers in making complaints on working conditions was pre-empted. This anomaly surely calls for the recalibration of pre-emption doctrine, but that is for another day.

85. *Luckenbach Steamship*, *supra* note 29 at 193 [emphasis added].

despite the fact that the prospect of any significant amount of individual litigation on the quality of the interactive process would seem remote in the absence of statutory attorney fees or class certification.

In any event, a more sharply focussed approach commends itself: one that builds on specific interactive duties already extant in US law, presents little of the “floodgate of litigation” argument a general obligation would elicit, and draws sustenance from the more specific provisions in both Australia and New Zealand. These laws are adverted to not because they are unique—they are not<sup>86</sup>—but because they are from kindred common law English-speaking jurisdictions, “in the family,” so to speak.<sup>87</sup> They give a sense of the range of the legally possible, within that zone of comfort.

Such a law would accord a right of meaningful interaction over those specific decisions that will have an adverse effect on the employee’s very employment—outsourcing, downsizing, or major changes in technology, production, or organization. These are not snap decisions; they are, or should be, the product of study and deliberation, to which it cannot be said that the voice

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86. Many European countries have well developed systems of works councils and methods of collective information sharing and consultation. See generally, Ulrich Mückenberger, “Workers’ Representation at the Plant and Enterprise Level” in Bob Hepple & Bruno Veneziani, eds, *The Transformation of Labour Law in Europe: A comparative study of 15 countries 1945-2004* (Oxford: Hart, 2009) ch 8. Such is now required of all member states, including the United Kingdom. See EC, *Commission Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community*, OJ 2002 L 80/29. Pursuant to the Directive on Collective Redundancies, involving plant closing and mass layoff, the consultative process must be carried on “with a view to reaching an agreement” which, as Simon Deakin and Gillian Morris point out, “takes it close to negotiation.” See EC, *Commission Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies*, OJ 1998 L 225/16, s 2, art 3(1); Simon Deakin & Gillian S Morris, *Labour Law*, 5th ed (Oxford: Hart, 2009) at 791. The duty to consult, with a view to reaching an agreement with a representative designated by the affected employees, means that employees who are not represented by a union must be given notice and an opportunity to elect representatives. *Ibid* at 802-06. This creates a framework for the ad hoc formation of collective voice, not of individual voice. So too, would an approach modeled on Australian or New Zealand law, insofar as affected employees pool their representational efforts.
87. The claim that the common law family is better conducting than those systems deriving from the civil law, for economically efficient results, has effectively been debunked. See Simon Deakin & Katharina Pistor, eds, *Legal Origin Theory* (Cheltenham, UK: Edward Elgar, 2012); Nuno Garoupa & Andrew P Morriss, “The Fable of the Codes: The Efficiency of the Common Law, Legal Origins, and Codification Movements” (2012) U Ill L Rev 1443. These laws have been chosen because, to US legislators, they might be seen as somehow less foreign than European jurisdictions.

of those who would be displaced would have nothing to add. These decisions can have devastating consequences for employees, their families, and their communities. The exploration of the bases for, alternatives to, and the consequences of such decisions with affected employees is no impediment to good management, but such interaction may result in a modification of the decision or the amelioration of its worst asperities. Job retraining, for example, is a matter on which employees want to be heard as individuals, as their aptitudes and desires are particular to the individual, and it takes on special salience in situations of reorganization and retrenchment. Federal and cognate state law have taken the first, albeit limited step of requiring notice of plant closing or mass layoff. If the affected employees are collectively represented, the employer is required to bargain about the effects of such decisions with the collective representative, in consequence of which the decision itself might be modified.<sup>88</sup> Is there any good reason why employers should not give non-unionized employees a meaningful opportunity to be heard about such personally and communally devastating decisions while they are under consideration or before they are finally executed? And, if none appears, why should they not be required to do so?

## VI. A RUMINATION ON THE FUTURE OF SELF-REPRESENTATION

As the Introduction pointed out, meaningful employee voice in the United States has been traditionally conceived of almost exclusively in terms of collective bargaining. Critics of individual bargaining thought of it as little more than an ideological fig leaf enhancing managerial power or blunting collectivization, and, in the United States, the law largely abets that skepticism.<sup>89</sup> Nevertheless, here and there the law has edged towards clothing the individual with actual agency. The result is legal dissonance: The common law sometimes corrects for informational asymmetry when entering at-will employment, but, more often than not, not thereafter. Statutes supervene to establish a balance in bargaining power, but only on an ad hoc basis, the statutory ticket being good for that trip only. And absent

88. *First National Maintenance Corp v National Labor Relations Board*, 452 US 666, 101 S Ct 2573 (1981).

89. Whence the tension—or ambivalence—in Australia’s dual track system. See Creighton & Stewart, *supra* note 75. For more on the system of “individualized collectivism” see Breen Creighton, “A Retreat from Individualism? The Fair Work Act 2009 and the Re-collectivisation of Australian Labour Law” (2011) 40:2 *Indus LJ* 116. See also Shae McCrystal, “Fair Work in the International Spotlight: The CEPU Complaint to the ILO’s Committee on Freedom of Association” (2011) 24 *Austl J Lab L* 163.

some special protection, an employee, being at-will, may be dismissed with impunity for seeking to bargain individually with his or her employer, or even to secure information from it.

In other words, the law's conception of the employee is Janus-like: one face sees the employee as an adult who should be clothed with the legal capacity for meaningful interaction with her employer; the other sees the employee as a child who may be punished (or orphaned) for attempting to do so, not because her effort to represent herself is framed in opprobrious terms or is any way disruptive, but because it is made at all.

There is no prospect of change in the current state of conceptual dissonance. However, as private sector unions disappear, it is possible that legal scope will be legislated for individual self-representation on an unfolding agenda of discrete issues. If so, it remains to be seen whether employees so clothed will come to see the limits of effective self-representation;<sup>90</sup> and, if so, whether the exercise of self-representation might stimulate demand for yet more<sup>91</sup> and might drive, however modestly, towards a revitalization of collective action.

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90. There are limits grounded in the inadequacy of individual bargaining to deal with collective goods. Note that only one-third of employees in the Freeman and Rogers survey believe in self-representation over benefits, job safety, and health, whereas a majority believe in self-representation over issues of fairness and harassment. See Freeman & Rogers, *supra* note 1.

91. John Witte's study of one workplace more than a generation ago found that the desire for participation was expressed more by those who already had some involvement. See John F. Witte, *Democracy, Authority, and Alienation in Work: Workers' Participation in an American Corporation* (Chicago: University of Chicago Press, 1980) at 27-28. A subsequent study of another workplace confirmed Witte's finding. See Marc Lendler, *Just the Working Life* (Armonk, NY: ME Sharpe, 1990) at 75. On that, Lendler suggests that the provision for the exercise of voice has "carryover effects." *Ibid* at 80.