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Labour Law after Labour

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Labour Law After Labour

Harry Arthurs

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Comparative Research in
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PART I

THE IDEA OF LABOUR LAW IN
HISTORICAL CONTEXT

1

Labour Law After Labour

*Harry Arthurs**

A. Introduction

‘What is labour law for?’ is a question with a past. I therefore begin by sketching out its history. It has a present too, whose most striking feature – I argue – may well be the end of ‘labour’. And of course it has a future: what will labour law look like ‘after labour’? I address all three questions largely from a North American perspective, but with reference to experience in the United Kingdom and Europe.

B. What is labour law for? A brief history of the question

In Anglo-American countries, at various times, labour law has aspired to make it possible for workers to conform to the tenets of Christian morality,¹ to confer on them a sense of membership in ‘one nation’,² to prevent them from destroying ‘that property which is the source of their own support and comfort in life’,³ to wean them from materialism⁴ or radical ideologies,⁵ to give them a stake in the success of the enterprise and/or the capitalist system,⁶ to restore their capacity to consume and hence their incentives and opportunities to produce,⁷ to enable

* Osgoode Hall Law School, York University, Toronto. I am grateful for the research assistance of Ian Medcalf and for the helpful critique of participants in the workshop on *What Is Labour Law For?* (Cambridge, April 2010) and in several seminars at which earlier versions of this essay were presented.

¹ See DC Somervell, *English thought in the nineteenth century* (Methuen & Co Ltd, 1947) 82–3.

² ‘One nation’ conservatism – the antecedent of today’s Red Toryism – takes its name and inspiration from Benjamin Disraeli’s 1845 novel *Sybil, or the Two Nations* (Oxford University Press, 1981).

³ *Springhead Spinning Co v Riley*, LR 6 Eq 551 (1868) 562–3.

⁴ Pope Leo XVIII, ‘*Rerum Novarum*’ (Encyclical of Pope Leo XII on Capital and Labour 1891) <http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html>.

⁵ Karl E Klare, ‘Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941’ (1977–1978) 62 *Minn L Rev* 265, 267.

⁶ See, eg, KE Klare, ‘Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law’ (1980–1981) 4 *Indus Rel LJ* 450, 458–9.

⁷ The National Labor Relations Act, 29 USC §§ 151 (1935) begins with a Congressional finding that: ‘The inequality of bargaining power between employees...and employers...substantially

them to claim in the workplace the constitutional guarantees provided by liberal democracies to all citizens in the larger polity,⁸ to enlist their support for the national war effort⁹ and ongoing projects of nation building,¹⁰ to legitimate and reinforce the ‘web of rule’ they help to spin in every workplace,¹¹ to create a system of countervailing power which facilitates the operation of labour markets and improves their outcomes,¹² and to incorporate workers into enterprise-level structures designed to manage their discontent,¹³ broker compromise amongst them,¹⁴ and implement workplace practices that contribute to productivity and profitability.¹⁵

Understandably, therefore, the substantive content of labour law has changed over time. In the early years of the industrial revolution, it sought to protect the most vulnerable workers against physical and moral brutality,¹⁶ then to ensure that they worked in safe and salubrious conditions¹⁷ and ultimately to require that they be paid enough to meet ‘the normal needs of the average employee regarded as a human being living in a civilized community’.¹⁸ However, from the end of the 19th century, and through much of the 20th, labour law was largely focussed on collective issues. In one version, labour laws permitted, protected or promoted concerted worker action;¹⁹ in another they sought to regulate, and if possible resolve, union–management conflict;²⁰ and in a third, they ideally operated by way of ‘abstention’ so that employer and worker representatives could institute a regime of ‘collective laissez faire’.²¹

burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners.’

⁸ See, eg, WM Leiserson, ‘Constitutional Government in American Industries’ (1922) 12 *Amer Econ Rev* 56, 61 ff; H Shulman, ‘Reason, Contract, and Law in Labor Relations’ (1955) 68 *Harv LR* 999, 1002 ff; Milton Derber, *The American Idea of Industrial Democracy, 1865–1965* (University of Illinois Press, 1970). For extensive critiques see K Stone, ‘The Post-War Paradigm in American Labor Law’ (1981) 90 *Yale LJ* 1509, 1514–15; J Fudge, ‘After Industrial Citizenship: Market Citizenship or Citizenship at Work?’ (2005) 60 *Indus Rel / Rel Indus* 631.

⁹ See J Fudge and E Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900–1948* (Oxford University Press Canada, 2001) 251–2.

¹⁰ D Beland and A Lecours, ‘Nationalism and social policy in Canada and Quebec’ in N McEwen and L Moreno (eds), *The Territorial Politics of Welfare* (Routledge, 2005) 189, 196–7.

¹¹ J Dunlop, *The Industrial Relations System* (Southern Illinois University Press, 1958) 7–18.

¹² JK Galbraith, *American Capitalism: The Concept of Countervailing Power* (Houghton Mifflin, 1952) 137–8.

¹³ C Wright Mills, *The new men of power: America’s labor leaders* (Harcourt, Brace, 1948) 9.

¹⁴ A Cox, ‘Rights under a Labor Agreement’ (1956) 19 *Harv LR* 601, 626–7; G Mundlak, ‘The Third Function of Labour Law: Distributing Labour Market Opportunities Among Workers’ (this volume).

¹⁵ R Freeman and J Medoff, ‘The Two Faces of Unionism’ (1979) 57 *The Public Interest* 69, 79–80; and for a less positive view see R Freeman, ‘What Do Unions Do?’ (2005) 26 *J Lab Res* 641, 657.

¹⁶ EP Thompson, *The Making of the English Working Class* (Pelican Books, 1977) ch 10.

¹⁷ H Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985) ch 4.

¹⁸ *Ex Parte H v McKay* (1907) 2 *CAR* 1 per Higgins CJ (Commonwealth Court of Conciliation and Arbitration).

¹⁹ Trade Disputes Act 1906 (UK) XLIV 246 f 6 Edward VII c 47 (permitted); *Norris Laguardia Act* 29 *USCA* § 101 et seq (1932) (protected); *National Labor Relations Act* 29 *USC* §§ 151–69, §151 (1935) (promoted).

²⁰ *Industrial Disputes Investigation Act*, SC 1907, ch 20.

²¹ Otto Kahn-Freund, *Labour and the Law* (Hamlyn Lectures, Stevens for the Hamlyn Trust, London 1972).

However, this focus on collective bargaining and economic conflict left many questions unresolved. First: how to integrate collective bargaining outcomes with macro-economic policies? In the early postwar period, most advanced economies relied on Keynesian measures to promote economic expansion and full employment, thereby creating a positive environment for collective bargaining; latterly, they adopted monetarist policies often in tandem with the deregulation of labour markets and restrictions on union power. Second: how to address labour market issues that collective bargaining could not resolve because they affected workers before or after entering employment? States either left such problems unresolved, or intervened to train workers, deploy them across the economy, and insure them – more or less – against illness, redundancy, and retirement. And third: how to protect workers in non-union workplaces? Again the answers varied: the extension of collective agreements to cover non-union workers; the adoption of employment standards and anti-discrimination legislation; enhanced protection of job tenure and against arbitrary dismissal; the establishment of arrangements designed to ensure worker participation in corporate governance. But neither the questions nor the answers much interested labour law scholars and practitioners whose focus, as noted, was on collective relations, primarily at the workplace level.

This impressionistic sketch of two centuries of labour law development might suggest that ‘labour law’ is a legal field with arbitrary but variable boundaries and no inherent content or purpose. However, many of us who teach, practice, and administer labour law want to believe in its distinctiveness, coherence, and even (here opinions differ) its functional and conceptual autonomy.²² Hence the question posed in the next section of this chapter: ‘What is labour law?’

C. What is labour law?

1. Is labour law *law*?

Law is usually understood to emanate from legislatures, to be administered by state officials, interpreted by state judges, and enforced by the state’s coercive power. However, in many accounts of the origins and operation of labour law, labour and management are said to play a significant role in its enactment and administration.²³ Indeed, this role has sometimes been described as ‘constitutional’.²⁴ Moreover, even when labour laws are enacted by the state, they are often interpreted and applied by specialized public, private or hybrid agencies and tribunals,

²² See, eg, Lord Wedderburn, ‘Labour Law: From Here to Autonomy’ (1987) 16 *Indus Law J* 1; Lord Wedderburn, ‘Labour Law: Autonomy from the Common Law’ (1987–1988) 9 *Comp Lab LJ* 219; D Howarth, ‘The Autonomy of Labour Law: A Response to Prof Wedderburn’ (1988) 17 *Ind LJ* 1.

²³ H Arthurs, ‘Landscape and Memory: Labour Law, Legal Pluralism and Globalization’ in T Wiltshagen (ed), *Advancing Theory in Labour Law in a Global Context* (North Holland Press, 1997) 21; H Arthurs, ‘Who’s Afraid of Globalization? The Transformation of Canadian Labour Law’ in J Craig and M Lynk (eds), *Globalization and the Future of Labour Law* (Cambridge University Press, 2005) 51.

²⁴ Ruth Dukes, ‘Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law’ (2008) 35 *J L Soc* 341.

staffed by non-legal experts including labour and management representatives. These bodies do not simply adjudicate; they use other strategies – rule-making, education, inspection, mediation, negotiation – to secure compliance and reinforce relationships. And when they do adjudicate, they typically employ evidentiary and interpretative rules, modes of reasoning, and remedial powers that diverge from the curial model.²⁵ Finally, the labour law that actually regulates workplace relations often differs from state law partly because the state concedes the parties considerable latitude in defining their relationship, partly because it lacks the capacity to enforce its law in countless workplaces, and partly because of the irrepressible tendency of workplaces to generate their own indigenous law that is sometimes explicit (contracts, collective agreements, standard operating procedures), sometimes implicit (customs, usages, and patterns of behaviour imbricated in routines of work)²⁶ – but always powerful. Hence the apparent paradox of ‘labour law without the state’.²⁷

To sum up, labour law is different from other legal fields because it is so often promulgated through non-legal (ie political, social, and cultural) processes, expressed in the form of ‘non-legal’ (ie non-state) norms and administered through ‘non-legal’ (ie non-curial) forums operating with ‘non-legal’ processes (ie those not normally employed by conventional courts). Indeed, labour law – as it functions in actual workplaces – has often been used by legal scholars not only to challenge the hegemonic claims of state law and legal institutions, but also to initiate alternative approaches to law such as legal pluralism, reflexive law, and critical theory.²⁸ Seen from this perspective, labour law is neither non-law nor a mutant form of law, but law incarnate, an experiment in social ordering that reveals the true nature of the legal system in general.

2. What makes law *labour* law?

Labour law is labour law because within a particular configuration of historical circumstances we choose to apply that particular taxonomic label to a body of rules, a cluster of professional practices, and a field of scholarship.²⁹ In postwar North America, labour law, as noted, was generally understood to refer to the law of collective labour relations. It was distinguished from ‘employment law’ (individual employment contracts and statutory labour standards) and from other legal sub-fields (such as workers’ compensation, health and safety, and pension law) that

²⁵ H Arthurs, ‘Developing Industrial Citizenship: A Challenge for Canada’s Second Century’ (1967) 45 Can Bar Rev 786.

²⁶ H Arthurs, ‘Understanding Labour Law: The Debate Over ‘Industrial Pluralism’ (1985) 38 Current Legal Problems 83.

²⁷ H Arthurs, ‘Labour Law without the State?’ (1996) 46 U Tor LJ 1.

²⁸ Arthurs (n 23); R Rogowski, ‘The Concept of Reflexive Labour Law: Its Theoretical Background and Possible Applications’ in J Priban and D Nelken (eds), *Law’s New Boundaries: The Consequences of Legal Autopoiesis* (Ashgate, 2001); K Klare, ‘Critical Theory and Labor Relations Law’ in David Kairys (ed), *The Politics of Law* (Pantheon Books, 1982).

²⁹ The taxonomic task, begun in the 1930s, has been long and difficult. J Goldberg, *Development of a Universal Law Classification: A Retrospective on Library of Congress Class K* (2003) 35 Cataloguing and Classification Quarterly 355.

affected workers' rights, wealth, power, and dignity no less than collective labour law. This narrow definition of labour law owed much, I suspect, to its emergence in leading law schools and law firms during the period when the Wagner Act seemed to be ushering in a new era of protections for American workers.³⁰ However, it had unfortunate consequences.

It led to the dismissal of other aspects of labour law as suboptimal alternatives to collective bargaining; deprived them of the academic critique and professional attention they deserved; disadvantaged important worker populations they were meant to protect;³¹ discouraged international comparisons amongst models of collective bargaining³² and between collective bargaining and other regimes of labour market regulation; and delayed the development of integrated theorizing in the field.³³ But most seriously, given the long – arguably terminal – decline of North American trade unionism, it exposed labour law in Canada, and especially the United States, to the charge that 'after labour' it has become dysfunctional, politically irrelevant and intellectually ossified.³⁴

The collective bargaining focus of labour law, however, is encoded in what Brian Langille calls its 'constituting narrative'.³⁵ Here is how, at some level, we understand labour law: Wealth and power are asymmetrically distributed in our society; since workers possess less of both than employers, they are inherently disadvantaged; disadvantage generates injustice, injustice resistance, and resistance social unrest. Hence, states must intervene in the employment relation. This they may do in various ways: by redistributing wealth through taxation and transfer payments, by detaching power from wealth by mandating workers' participation in enterprise and workplace governance, or by nullifying the advantages enjoyed by employers by encouraging countervailing worker power in the form of unions. Or they may leave asymmetries of wealth and power undisturbed but place outer limits on their use by enforcing minimum labour standards, or palliate inevitable injustices through social programs, or forbid worker resistance and suppress unrest. Any of these forms of state intervention might be called 'labour law', but all stem from the same 'constituting narrative'.

A slightly different constituting narrative might have produced a different understanding of the field. If we were to look beyond the workplace to asymmetries of wealth and power in other economic relationships (lenders/borrowers, landlords/tenants, agribusiness/farmers)³⁶ and beyond conventional union strategies (strikes and picketing) to other modes of resistance (voting, demonstrations, boycotts,

³⁰ See generally L Cooper, *Teaching ADR in the Workplace Once and Again: A Pedagogic History* (2003) 53 J Legal Ed 1; D Beatty, *Labour Law in a Nutshell: The Influence of a Casebook* (1996) 75 Can B Rev 35.

³¹ J Fudge, *Labour Law's Little Sister* (Canadian Centre for Policy Alternatives, 1991).

³² See, eg, B Aaron and K VW Stone (eds), *Rethinking Comparative Labor Law: Bridging the Past and the Future* (Vandeplas Publishing, 2007).

³³ For an early effort at integration see B Langille, 'Labour Law is a Subset of Employment Law' (1981) 31 U Toronto LJ 200.

³⁴ C Estlund, 'The Ossification of American Labor Law' (2002) 102 Col L Rev 1537.

³⁵ B Langille, 'Labour Law's Back Pages' in G Davidov and B Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006) 13.

³⁶ A Hyde, 'What is Labor Law?' in Davidov and Langille (n 35) at 37.

petitions, cultural representation, consumer cooperatives) ‘labour law’ might have been subsumed into ‘the law of unequal economic relations’ or ‘social law’, a term widely used in Europe. However, this did not happen because it seemed neither natural to scholars nor useful to practitioners to shape the boundaries of a legal field around the meta-structures of social ordering such as state, markets, class or culture.

This choice has impaired the vision of labour law by obscuring important facts: that market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation; that states shape labour markets and the relations of market actors as effectively by trade, fiscal, monetary, immigration, social welfare, and education policies as by labour laws; and that enterprise-specific, ethnic, and popular cultures can reinforce or undermine indigenous systems of workplace normativity no less powerfully than legislation. Instead, labour law has focussed on one site of interaction (the workplace), one set of actors (unions, workers, and employers), and one set of responses (conflict and negotiation). This has simplified the organization of materials for research and teaching (legal rules and decisions about workplace relations), determined the shape of professional practice (union-side or employer-side law firms), and encouraged the growth of sub-specialisms (wrongful dismissal, sexual harassment, disability law). But it has curtailed the explanatory power, practical efficacy and moral force of labour law.

3. Who is labour law for?

Whatever its substantive content, we can at least be sure that labour law is about ‘labour’, that it operates in the context of ‘employment’, that it is designed to protect ‘workers’. As Richard Mitchell concludes in his insightful review of labour law’s travails – a review hardly less lugubrious than my own – ‘[o]ur loyalty is surely to *labour* as a class, not to “labour law”’.³⁷ However, members of that class themselves exhibit diminishing loyalty to it. In recent decades in most affluent democracies, unions have steadily lost members, economic power, political influence, and cultural salience³⁸ – except ironically those that represent privileged workers who need protection least.³⁹ Labour-friendly political parties have experienced similar reversals, and have had to reinvent themselves by abandoning their historic links to unions, disavowing their traditional aim of eliminating inequality, and appealing to a broader cross-section of the electorate.⁴⁰

Some studies suggest that these setbacks for labour’s industrial and political wings are cyclical or context-specific,⁴¹ or attributable to bad laws or unfortunate

³⁷ R Mitchell, ‘Where are we going in labour law? Some thoughts on a field of scholarship and policy in process of change’ Workplace and Corporate Law Research Group, Working Paper No. 16 Monash University (March 2010); online: <<http://ssrn.com/abstract=1615196>> accessed 12 June 2010.

³⁸ See, eg, M Hechter, ‘From Class to Culture’ (2004) 110 *Am J of Soc* 400.

³⁹ Eg athletes, professionals, academics and public servants.

⁴⁰ Perhaps the most dramatic example was the re-branding of the UK Labour Party as ‘New Labour’ under Tony Blair in 1996.

⁴¹ J Godard, ‘The Exceptional Decline of the American Labor Movement’ (2009–2010) 63 *Indus and Lab Rel Rev* 82.

organizational arrangements.⁴² However, a significant body of literature ascribes them to the disappearance of labour as a social class⁴³ and of class as a prime determinant of political and social affairs.⁴⁴ Social status, some propose, has displaced class as a prime determinant of workers' attitudes and actions.⁴⁵ When they self-identify, Americans in particular state their family status, occupation, religion, domicile, gender, and age in priority to their class.⁴⁶ Similar trends appear to prevail even in the UK where until fairly recently labour's industrial and political wings had deep roots in a robust proletarian culture.⁴⁷

Explanations of the cause of labour's 'disappearance' vary, as do estimates of its extent and consequences. The American working class (or at least its white component) has supposedly been transmogrified into a new mass upper middle class – better educated, more affluent, increasingly distanced from manual work – with new interests, values, and voting habits.⁴⁸ (Ironically, some argue, these improvements in workers' lives owe much to unions⁴⁹ and to labour-backed parties that built the welfare state.)⁵⁰ By contrast, many studies suggest that by any objective standard, in the Anglo-American democracies, class distinctions have persisted, and indeed grown,⁵¹ and that they continue to influence workers' political alignment⁵² and propensity for collective action.⁵³ However, as even these studies acknowledge, the traditional agendas of both labour parties and unions no longer fully encompass the interests or express the concerns of their members, who now have their own 'second agenda' that includes such issues as religion, taxation, and lifestyle.

Labour's diminished capacity for electoral and social mobilization augurs ill for workers' interests. Right-wing parties tend to pursue economic policies harmful to

⁴² RB Freeman and J Rodgers, *What Workers Want* (Russell Sage, 1999); RB Freeman, 'Do Workers Still Want Unions? More Than Ever' (2007) 23 Economic Policy Institute Briefing Paper, 9–10; online: <<http://www.sharedprosperity.org/bp182.html>> viewed 12 June 2010.

⁴³ M Crain and K Matheny, 'Labor's Identity Crisis' (2001) 89 Cal L Rev 1767.

⁴⁴ M Hechter, 'From Class to Culture' (2004) 110 Am J Soc 400; P Achterberg, 'Class Voting in the New Political Culture: Economic, Cultural and Environmental Voting in 20 Western Countries' (2006) 21 Intl Soc 237.

⁴⁵ J Scott, 'Social Class and Stratification in Late Modernity' (2002) 45 Social Class & Stratification in Late Modernity (2002) 23.

⁴⁶ TW Smith, 'Social Identity and Socio-Demographic Structure' (2007) 19 Int J Public Opinion Res 380.

⁴⁷ E Hobsbawm, *Workers* (Pantheon Books, 1984).

⁴⁸ R Teixeira and A Abramowitz, 'The Decline of the White Working Class and the Rise of a Mass Upper Middle Class' in R Teixeira (ed), *Red, Blue & Purple America: The Future of Election Demographics* (The Brookings Institution, 2008).

⁴⁹ M Hechter, 'From Class to Culture' (2004) 110 Am J Soc 400.

⁵⁰ W Korpi and J Palme, 'New Politics and Class Politics in the Context of Austerity and Globalization: Welfare State Regress in 18 Countries 1975–1995' (2003) 97 Am Pol Sci Rev 425.

⁵¹ P Gottschalk and T Smeeding, 'Empirical Evidence on Income Inequality in Industrialized Countries' 154 (Luxembourg Income Study Working Paper Series, Luxembourg 1999); online: <<http://www.lisproject.org/publications/liswps/154.pdf>> viewed 12 June 2010.

⁵² JVD Waal, P Achterberg and D Houtman, 'Class is Not Dead – It has Been Buried Alive: Class Voting and Cultural Voting in Postwar Western Societies' (2007) 35 Politics & Society 403.

⁵³ D Brady, 'Institutional, Economic, or Solidaristic? Assessing Explanations for Unionization Across Affluent Democracies' (2007) 34 Work and Occupations 67.

workers: they reduce the redistributive effects of the tax system, retrench the welfare state, weaken protective labour laws, and restrict the activities and influence of unions.⁵⁴ Nonetheless workers vote for them in significant numbers not so much because of false consciousness as because these parties support their 'second agenda'.⁵⁵

The disappearance of labour as a movement and class, and the disinclination of workers to identify themselves as such, seem to have been widely recognized and, indeed, to have become self-reinforcing. Three examples: Governments in many countries have dissolved their labour ministries and redistributed their functions to economic ministries or ministries concerned with social protection to whose primary mandates labour issues become subordinate.⁵⁶ Large Wall Street law firms which formerly provided labour law representation to corporate clients no longer find it profitable to do so.⁵⁷ Consequently, labour issues figure even less prominently in the calculus of corporate obligation and self-interest than they once did. And media organizations that used to employ a specialist labour reporter no longer do,⁵⁸ with unfortunate consequences for the quantity and quality of reportage and ultimately, the extent of public understanding of labour issues.⁵⁹ Labour, then, has become marginalized as a subject of public policy making, as a concern of corporate advisors and decision makers, and as a topic familiar to ordinary citizens.

If labour's identity is dissolving, if class generally matters less, if workers' issues have fallen off the public policy agenda, the familiar 'constituting narrative' of labour law ceases to constitute. Without labour solidarity, collective bargaining legislation becomes inoperable; without public support and government engagement, labour standards legislation becomes more difficult to implement; and without effective class mobilization, the prospects for worker-friendly labour market policies, legislation and administration diminish considerably.

But a new, optimistic narrative may be emerging – notably (and oddly) in the domain of legal discourse. To cite one example, Canada's Supreme Court has affirmed that employment provides workers not only with 'a means of financial support and, as importantly, a contributory role in society' but also with a sense of 'identity, self-worth and emotional well-being'.⁶⁰ Countless legal-scholarly and

⁵⁴ D Brady and KT Leicht, 'Party to inequality: Right party power and income inequality in affluent Western democracies' (2008) 26 *Research in Social Stratification and Mobility* 77.

⁵⁵ M Trotman, 'AFL-CIO Poll Shows Union Households Boosted Brown' *The Wall Street Journal* (22 January 2010) <<http://online.wsj.com/article/SB10001424052748704423204575017690900226982.html>>.

⁵⁶ H Arthurs, 'What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?' in Davidov and Langille, above n 35, 373.

⁵⁷ H Arthurs, 'The Role of Global Law Firms in Constructing or Obstructing a Transnational Regime of Labour Law' in R Appelbaum, W Felstiner, and V Gessner (eds), *Rules and Networks: The Legal Culture of Global Business Transactions* (Hart Publishing, 2001) 273.

⁵⁸ D Meister, 'Labor and the Media' <<http://www.dickmeister.com/id65.html>>; P Wilby, 'Why labour reporters aren't working' *The Guardian* (5 March 2007) <<http://www.guardian.co.uk/media/2007/mar/05/mondaymediasection.politicsandthedia>>.

⁵⁹ J Lloyd, 'A gap in the picket line', *The Guardian* (16 February 2009) <<http://www.guardian.co.uk/media/2009/Feb/16/newspaper-reporting-labour-news>>.

⁶⁰ *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 91, Dickson CJ dissenting; affirmed *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 39.

judicial pronouncements, in Canada, in other countries and at the international level, make the same point; indeed, it seems self-evident. If, then, ‘employment’ is invested with such social and economic significance, surely the continued importance of labour law ought to be assured.

However, the future of ‘employment’ as a descriptor of work relations may itself be in question. A recent study suggests that fewer and fewer workers, barely 60 percent of Canada’s workforce, are now party to a relatively long-lasting full-time standard employment relationship.⁶¹ Moreover, some standard ‘employees’ do not receive a full measure of employment rights because they do not meet statutory criteria of entitlement,⁶² others because they work in remote workplaces beyond the reach of labour inspectors or union organizers, and still others because their employers are small and struggling or powerful and aggressively hostile to unionization and regulation. As for the 40 percent of the workers in non-standard employment – those who work part-time (20 percent), on short-term contracts, casually or through labour market intermediaries (10 percent) or are self-employed (10 percent) – a significant number are partially or entirely denied coverage under labour legislation or, if covered, face practical obstacles to claiming their rights. Clearly the Supreme Court’s views have neither influenced recent labour market trends nor improved statutory coverage nor softened the hearts of recalcitrant employers.

Moreover, the rise of non-standard employment has not only cost millions of workers their rights, benefits, and sense of ‘identity and self-worth’. By widening the gulf and shifting the numerical balance between workers still protected by labour law and those who are not, it may also have contributed to a new political dynamic in which have-not workers acquiesce in or support efforts to strip the haves of their advantages.

Finally, it is important to note a radical shift in the spatial relations of labour law’s intended beneficiaries. Labour law used to be for people who worked in close physical proximity to each other in a mine, mill, shop or office or at least had periodic contact at a union hiring hall or company despatch office. Even in large, complex enterprises, where workers no longer inhabited the same physical space, they at least shared psychic proximity based on their membership in the same organization. Proximity fostered solidarity; it enabled workers to develop personal ties, identify potential leaders, reflect on their common fate, and respond collectively to a shared sense of grievance. In North America, workers with a ‘community of interest’ were included in a ‘unit appropriate for collective bargaining’,⁶³ often

⁶¹ L Vosko, N Zukewich and C Copeland, ‘Precarious Jobs: A new typology of employment’ (October 2003) 4 Perspectives 16, 19.

⁶² For example, in Ontario, managerial and professional employees are denied coverage altogether under labour statutes; see, eg, Ontario Labour Relations Act (OLRA) SO 1995, ch 1, s 1(2). Civil servants, hospital employees, teachers, police and firefighters are subject to special legislation that limits or denies their right to strike; see, eg, *OLRA*, s 3(d) (e) (g); Hospital Labour Disputes Arbitration Act RSO 1990, ch H14 (as amended); Crown Employees Collective Bargaining Act, 1993 SO 1993, ch 38 (as amended); Education Act, RSO 1990, ch E2, Part X1 (as amended).

⁶³ See OLRA s 1(1) for definition of ‘bargaining unit’; the ‘community of interest’ requirement is commonly read into the legislation by labour relations boards in both Canada and the United States.

defined by its physical location. And collective agreements – won through industrial action undertaken ‘in combination or in concert or in accordance with a common understanding’⁶⁴ – gave workers the experience of working under rules they had collectively negotiated⁶⁵ and could enforce through grievance procedures they collectively controlled.⁶⁶

To be sure, proximity and solidarity had their dark side: ‘others’ who were not physically or psychologically proximate, and therefore not perceived to share a community of interest, did not qualify for solidarity, and risked being marginalized and having their interests ignored.⁶⁷ But today labour law is often ‘for’ people with little or no proximity, whose interests are (rightly or wrongly) perceived to conflict, and whose solidarity therefore cannot be sustained. This loss of proximity is attributable to many factors including the outsourcing and relocation of work to remote locations, the re-engineering of workplaces and processes but, above all, to globalization.

Globalization has expanded the world supply of labour, created a transnational labour market, and facilitated the development of global supply chains whose links to the core enterprise are often obscure and sometimes covert. Consequently even workers who in fact work for the same ultimate employer often do not even know of each other’s existence, let alone share common experiences, cultures, customs, languages, or legal frameworks. Worse: they frequently perceive each other not as co-workers, but rather as competitors for available work. In these ways, globalization not only abolishes proximity in employment but radically undermines labour solidarity.

To sum up: who can labour law possibly be for ‘after labour’: in a world in which ‘labour’ as a sociological descriptor and political force has become anachronistic, in which ‘workers’ no longer answer to that name, and in which ‘employment’ has become so conceptually indeterminate and functionally attenuated that it no longer constitutes a stable platform for the protection of rights or the projection of entitlements?

4. What is labour law for ‘after labour’?

If the ultimate underlying rationale for labour law has been so inconstant; if it is directed to an increasingly heterogeneous and widely dispersed labour force populated by individuals who seem no longer to share a common working class identity or occupational affinity; if it depends on a labour movement that has become incapable of effective industrial or political action; if it is designed to regulate an obsolete paradigm of employment; if its substantive content is in question, its boundaries contested and its intellectual coherence given up for dead – if in all these

⁶⁴ See OLRA s 1(1) for definition of ‘strike’.

⁶⁵ See OLRA ss 1(1), 55, 56 for definition of ‘collective agreement’.

⁶⁶ See OLRA s 48.

⁶⁷ D Bernstein and T Leonard, ‘Excluding Unfit Workers: Social Control versus Social Justice in the Age of Economic Reform’ (2009) 72 *Law & Contemp Prob* 177.

respects we are living in an era ‘after labour’ – is it still worth asking ‘what is labour law for?’

This, I would argue, is indeed the right moment for such a question precisely because we are confronting what Daniel Rodgers calls ‘the intellectual economy of catastrophe’:

Crises [he says, speaking of the Great Depression] . . . sustained long enough . . . can bring the established structure of responses into deep discredit . . . By eroding the conventional wisdom, extended crises may create room into which innovations may flow. [However] . . . the paradox of crisis politics is that at the moment when the conventional wisdom unravels, just when new programmatic ideas are most urgently needed, novel ones are hardest to find . . . One of the most important consequences of crises, in consequence, is that they ratchet up the value of policy ideas that are waiting in the wings, already formed though not yet politically enactable.⁶⁸

At a time when we are confronting the worst economic crisis since the 1930s, what innovative ‘policy ideas’ about labour law are ‘waiting in the wings’? What ‘new programmatic ideas’ about labour law are available to replace the ‘established structure’ which has, indeed, fallen into ‘deep discredit’? Three broad approaches have emerged, each offering a different answer to the question: ‘What is labour law for?’

a. Labour law should be embedded in, and help to advance, a regime of fundamental and universal human rights

As is well known, labour rights and human rights have historically developed in parallel, because of their different (though related) intellectual and ideological origins and because states, international bodies, social actors and scholars have been unable or unwilling to integrate them into a single discourse.⁶⁹ However, integration is attracting increasing support.⁷⁰ Workers might benefit considerably if labour law were embedded in a framework of rights that is fundamental, not merely statutory or contractual; universal, not merely class-based and parochial; and principled, not merely pecuniary. Having shed their old class affiliations and identities, workers would be able to form new alliances with other rights-seekers, to assert new identities as ‘citizens’ and to initiate new discursive and legal strategies. Finally, couching labour rights as human rights would enable its architects to avoid national exceptionalism and to construct transnational regimes of labour law. Conversely, human rights regimes and advocacy groups would profit from closer integration with labour law and its clientele. Integration would redirect human rights analysis

⁶⁸ D Rodgers, *Atlantic Crossing: Social Politics in a Progressive Age* (Belknap Press of Harvard University Press, 1998) 413–16.

⁶⁹ The roots of the debate are nicely exposed by Hugh Collins in ‘Theories of Rights as Justifications for Labour Law’ (this volume).

⁷⁰ RJ Adams, ‘From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining’ (2008) 12 *Just Labour: A Canadian Journal of Work & Society* 48; V Leary, ‘The Paradox of Workers’ Rights as Human Rights’ in LA Compa and SF Diamond (eds), *Human Rights, Labor Rights, and International Trade* (University of Pennsylvania Press, 1996); J Gross (ed), *Workers Rights and Human Rights* (Cornell University Press, 2003).

towards collective or social rights and away from what is often de-politicized individualism, force liberal legalism to address substantive as well as adjectival rights, and facilitate the mobilization of a mass movement for human rights.

But for all the attractions of labour law reconceptualized, and hopefully reinforced, as a branch of human rights law, it would be a very different kind of labour law. It would be de-coupled from employment, de-emphasize worker agency, delegitimize extra-legal self-help initiatives and, increasingly, direct disputing parties to courts that lack historical legitimacy in the labour field as well as institutional capacity to deal with its quotidian tasks. In short it would lack the historical, contextual and functional specificity of labour law as we now know it. Conceivably these concerns might be overcome if human rights law were to function according to Teubnerian logic, reflexively, by influencing the decision-making processes of workplaces, enterprises, labour markets and other semi-autonomous legal fields.⁷¹ But this would be a very different kind of human rights law from the one now dispensed by constitutional courts and their transnational counterparts.

If labour law were to develop along these lines, then, it would be 'for' the transcendent purpose of erasing the line between the rights we enjoy as citizens of a democratic polity and those we are effectively denied as citizens employed in workplaces characterized by asymmetries of wealth and power. But there are strong reasons to be sceptical about the capacity of constitutions to deliver on their promises in general,⁷² and in particular about the prospects for a rights-based, litigation-led regime of labour law.⁷³

b. Labour law should empower workers by facilitating their accumulation of human capital and the realization of their human capacities

When the current crisis passes (some say it already has, others that it will linger and recur) we will still be left with some version of capitalism. Indeed, it seems to be widely accepted that while there are many varieties of capitalism,⁷⁴ there are presently no credible alternatives to it. Labour law should therefore ensure that workers accumulate the human capital that will enable them both to fully realize their individual capacities and to contribute to and share in the success of capitalism. To oversimplify, labour law should abandon its traditional mission of protecting workers in favour of enhancing their capacities and endowing them with human capital.⁷⁵ Naturally, there will be disagreement over how to do this, and

⁷¹ G Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, IJ Sand, and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004).

⁷² H Arthurs and B Arnold, 'Does the Charter Matter?' (2005) 11 *Rev Constit Stud* 37.

⁷³ H Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) *Soc & Leg Stud* [forthcoming].

⁷⁴ PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* Oxford University Press, 2001).

⁷⁵ See, eg, B Langille, 'Labour Policy in Canada – New Platform, New Paradigm' (2002) 28 *Can Pub Pol* 134; and for a more critical view AD Frazer, 'Reconceiving Labour Law: The Labour Market Regulation Project' (2008) 8 *Macquarie LJ* 21.

whether such an approach should complement, rather than displace, traditional protective labour laws. But all versions of the human capital and capacities approach envisage that workers and employers will co-exist in a collaborative, rather than an adversarial, relationship.

Collaboration between workers and employers may be a necessary condition for the success of a human capital- or capacity-based labour law system; but it is not sufficient. As some proponents acknowledge, collaboration between the social partners and the state is essential, but difficult to achieve in liberal market economies. Consider recent developments in North America. The ‘psychological contract’ that once underpinned unionized industrial employment has been unilaterally rewritten by employers;⁷⁶ job tenure has been truncated;⁷⁷ there are fewer standard jobs and more non-standard jobs;⁷⁸ labour’s share of GDP has shrunk and income inequality grown;⁷⁹ employer-provided pensions and benefits are available to fewer workers, while the universal state-provided social safety net has shrunk significantly.⁸⁰ These developments reveal structural, not merely cyclical, impediments to a human capital strategy. North American capitalism rejoices in ‘creative destruction’, is driven by next-quarter results and is disinclined to long-term investment, in human capital or otherwise. Moreover, its industrial relations systems are atomistic. Their primary sites are the workplace and enterprise; sectoral, bilateral or tripartite institutions are rare, *ad hoc* and often unstable; and employer unilateralism is the default position.

Nonetheless, some employers – whether to forestall unionization or in the spirit of enlightened self-interest – have internalized the premise that workers must be consulted about changes in working conditions or operating procedures; and some have bound themselves to observe codes of conduct or adhere to ISO performance standards.⁸¹ Indeed, some have initiated so-called high-performance work systems (HPWS) under which they pay their employees well; provide them with training and other opportunities to enhance their human capital; set them challenges and entrust them with responsibilities; and accommodate the personal, family and civic dimensions of their lives.⁸² In return these firms expect that employees (‘associates’

⁷⁶ K Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge University Press, 2004).

⁷⁷ Stone (n 76) 74 ff.

⁷⁸ AL Kalleberg, BF Reskin and K Hudson, ‘Bad Jobs in America: Standard and Nonstandard Employment Relations and Job Quality in the United States’ (2000) 61 *Am Sociological Rev* 256.

⁷⁹ SM Jacoby, ‘Finance and Labor: Perspectives on Risk, Inequality, and Democracy’ (2008–2009) 30 *Comp Lab Law & Pol* 17, 28; R Morissette and X Zhang, ‘Revisiting wealth inequality’ (2007) 18 *Perspectives on Labour and Income* 6.

⁸⁰ D Brady and KT Leicht, ‘Party to inequality: Right party power and income inequality in affluent Western democracies’ (2008) 26 *Research in Social Stratification and Mobility* 77. For a recent Canadian example see L Osberg, ‘Canada’s declining social safety net: EI reform and the 2009 Budget’ (John Deutsch Institute – Queen’s University, Ottawa May 2009) online: <<http://myweb.dal.ca/osberg/classification/conference%20papers/Canadas%20declining%20social%20safety%20net%20text%20May%207.pdf>> viewed 12 June 2010.

⁸¹ H Arthurs, ‘Private Ordering and Workers Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation’ in J Conaghan, K Klare, and M Fischl (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford University Press 2004) 471.

⁸² See generally P Kumar, *Rethinking High-Performance Work Systems* (IRC Press, 2000).

or ‘partners’) will devote their loyalty, skill, energy, and imagination to the enterprise with corresponding gains in productivity and profitability. Indeed, even some relatively militant unions have been persuaded to experiment with so-called ‘value added’ or ‘mutual gains’ approaches to bargaining, an approach which should also be congenial to human capital development and capacity building.⁸³ However, neither of these related initiatives seems to be an unequivocal success. On the contrary: studies indicate that HPWS initiatives are often associated with layoffs and downsizing; that once implemented they may generate stress for employees and disempower them;⁸⁴ and that many unions view the human capital approach as a strategy to dissuade workers from organizing – a suspicion fuelled by the use of the HPWS vernacular (words like ‘empowerment’) precisely for that purpose.⁸⁵ Of course, specific initiatives such as HPWS cannot be equated with the profound normative, attitudinal and behavioural shifts contemplated by the human capital and ‘capacities’ approaches. But they do signal that it will not be easy for employers, workers or unions to make the necessary adjustments.

A final difficulty: many elements of a human capital strategy cannot be accomplished within the employment nexus or on the basis of contractual arrangements. They require state action either by way of universal provision (health insurance and pensions), or specific programs to ameliorate labour market risks (unemployment insurance, workers’ compensation, job-finding) or cooperative ventures with employers and unions at the sectoral or enterprise level (skills training, youth employment, redundancy payments).⁸⁶ Hence, such strategies seem less likely to succeed in North America than in the coordinated market economies of Western Europe, where labour markets are managed more purposefully, the quality of working life and the preservation of social solidarity are matters of public policy, and workers are generally assured a voice in workplace governance.

This is hardly a surprising conclusion. Labour law is to a significant extent path-dependent; it takes its purpose, form and content from the larger political economy in which it originates and operates. Predictably, a labour law system that is ‘for’ promoting human capital, reducing conflict, furthering collaboration and achieving an equitable sharing of enterprise gains is more likely to achieve its purposes in a political economy that shares those goals than in one that does not.⁸⁷

⁸³ For a review of the literature see B Nissen, ‘What are Scholars Telling the US Labor Movement to Do?’ (2003) 44 Lab Hist 157.

⁸⁴ Kumar (n 82)); J Godard and J Delaney, ‘Reflections on the ‘High Performance’ Paradigm’s Implications for Industrial Relations as a Field’ (1999–2000) 53 Indus & Lab Rel Rev 482; P Cappelli and D Neumark, ‘Do High Performance Work System Practices Improve Establishment-Level Outcomes?’ (2001) 54 Indus & Lab Rel Rev 737; B Harley, ‘Employee Responses to High Performance Work System Practices’ (2002) 44 J Indus Rel 418.

⁸⁵ Wal-Mart’s use of these terms is notorious. See, eg, N Lichtenstein, ‘How Wal-Mart Fights Unions’ (2007–2008) 92 Minn L Rev 1462.

⁸⁶ See especially Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford University Press, 2001).

⁸⁷ B Langille, ‘What is International Labour Law For?’ (2009) 3 Law & Ethics Hum Rights 46, 53 ff.

c. *The purpose of labour law should remain unchanged: to enable workers to mobilize to seek justice in the workplace and the labour market*

In Rodger's 'intellectual economy of catastrophe', the idea that labour law exists to enable workers to mobilize is hardly 'innovative'; indeed, it has been centre stage for decades, rather than 'waiting in the wings'. However, if justice is not handed down to workers from on high by benevolent judges or enlightened employers, mobilization remains their only recourse. That said, assuming that 'after labour' there will be little political pressure to revise the structures of enterprise governance, the architecture of labour markets or the fundamental assumptions of capitalism, a new approach to mobilization is clearly needed.

This new approach implies greatly enlarged ambitions for labour law. In response to innovative forms of worker mobilization, labour law scholarship will have to extend its reach to all policy domains that influence work relations or labour market outcomes; to all normative regimes whether domestic or transnational, formal or informal, that justify the ends and limit the means of concerted action by workers and other citizens; to all labour market participants whether or not they qualify technically as 'employees' under labour legislation or economically as potential 'clients' of labour lawyers; and ultimately to all non-participants whose activities impinge on the dynamic of labour markets including unemployed workers, workers in the informal sector, and workers engaged in the non-waged tasks of social reproduction.

In practical terms, any attempt to reinvigorate worker mobilization 'after labour' – after unions – will require the formation of new workplace collectivities. Such collectivities already exist both in the English-speaking world and on the continent. Works councils (with or without union participation) are widely recognized in Europe.⁸⁸ Workplace committees are mandated by statute in some North American jurisdictions to deal with specific issues such as health and safety and pension fund administration.⁸⁹ Non-union workplace associations may now have memberships that equal or exceed those of unions.⁹⁰ Caucuses, networks and web-based virtual organizations have emerged to give workers 'voice' and economic leverage in certain enterprises and sectors.⁹¹ However, all of these alternative forms of workplace organization have serious shortcomings. To the extent that they proliferate in the absence of unions, they are sometimes rightly suspected of siphoning off support for collective bargaining. To the extent that they do not see themselves

⁸⁸ M Whittall, H Knudsen, and F Huijgen (eds), *Towards a European Labour Identity: The Case of the European Works Council* (Routledge, 2007).

⁸⁹ H Arthurs, 'Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining' (2007) 28 Comp Lab L and Pol'y J 167.

⁹⁰ I extrapolate from a 1996 survey: Seymour Martin Lipset and Noah Meltz, 'Estimates of Non-Union Employee Representation in the United States and Canada: How Different Are the Two Countries?' in B Kaufman and D Taras (eds), *Nonunion Employee Representation* (ME Sharpe, 2000).

⁹¹ See, eg, A Hyde, *Working in Silicon Valley: Economic and Legal Analysis of a High-Velocity Labor Market* (ME Sharpe, 2003) esp ch 9, 'Employee Representation: Networks, Ethnic Organizations, New Unions'.

as engaged in an ongoing power struggle with employers, they are likely to be co-opted. To the extent that they lack formal status, structure, powers or resources, they will probably have a short shelf life.⁹² And most crucially, to the extent that they do not reach beyond the workplace to recruit new supporters, they will likely enjoy no more power or influence that unions once did.

On the other hand, if workers do renew their appetite for more robust forms of collective representation, are unions in a position to respond? In America some unions have been attempting to reinvent themselves and their approach to collective bargaining. They have experimented with new strategies, such as ‘social’ or ‘civic’ unionism, built on broad-based coalitions – workers, the unemployed, members of ethnic, religious, consumer, student, human rights and anti-poverty groups – rather than on traditional craft- or workplace-specific ‘bargaining units’.⁹³ Some have worked with local civic movements to address labour market issues such as racial discrimination, safety hazards or failure to pay a ‘living wage’.⁹⁴ And some have organized consumer and investor boycotts of domestic or offshore employers suspected of egregious workplace practices.⁹⁵ These campaigns have sometimes produced gains: they have helped workers to unionize, or augmented their bargaining power; they have improved working conditions for unorganized, minority, immigrant, women and low-skill workers; they have sensitized the public to labour market issues and reduced hostility to unions; they have introduced unions to the potential advantages of domestic and international alliances; and most importantly, they have inspired some unions to articulate a vision of social justice.⁹⁶ But these gains, impressive as they may be in given circumstances, have been for the most part local and ephemeral. They have – so far – neither fundamentally altered labour market structures, nor reawakened class consciousness, nor reinvigorated the labour movement as a whole, nor laid the foundations for a new party of the centre-left committed to justice for working people.

D. Conclusion: labour law ‘after labour’

All three visions of what labour law might be for ‘after labour’ suggest that it will have to be integrated into a larger project, whether of constitutionalized human rights, of collaborative and productive capitalism or of bottom-up civic democracy and social protest. One way or another, then, ‘labour’ seems destined to be

⁹² See generally D Taras, ‘Reconciling Differences Differently: Employee Voice in Public Policy-making and Workplace Governance’ (2007) 28 *Comp Lab L & Pol J* 167.

⁹³ See, eg, R Milkman and K Voss (eds), *Rebuilding Labor: Organizing and Organizers in the New Union Movement* (Cornell University ILR Press, 2004); D Reynolds (ed), *Partnerships for Change: Union and Community Groups Build Coalitions for Social Justice* (ME Sharpe, 2004).

⁹⁴ See, eg, RB Freeman, ‘Fighting For Other Folks’ Wages: The Logic And Illogic Of Living Wage Campaigns’ (2004) 44 *Indus Rel* 14; K Stone, ‘Labor Activism in Local Politics: From CBAs to ‘CBAs’ and Beyond’ (this volume).

⁹⁵ See, eg, Clean Clothes Campaign <<http://www.cleanclothes.org>>.

⁹⁶ See, eg, G Lester, ‘Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity’ (this volume).

subsumed into larger and more general socio-economic categories, and downtrodden members of the working class to be reincarnated as rights-bearing middle-class citizens. If this is so, labour law itself is likely to evolve into a broader, more inclusive and perhaps more efficacious regime of social ordering, field of intellectual inquiry and domain of professional practice.

But there are dangers.

Workers – its intended beneficiaries – will continue to experience a loss of identity, solidarity and agency but their expectations of justice in the workplace and the labour market may have to be adjusted to accommodate the claims of their new allies and ‘relevant others’. Understandably, too, workers will hesitate to exchange their old, familiar, if tattered, rights for new forms of protection whose efficacy is untested and whose provenance is, frankly, suspect. Important labour market actors – unions and employers – will find it difficult to slough off their old adversarial attitudes and to abandon the legal rules, institutions and processes designed to resolve their differences. Social democratic and labour parties – for so long the ‘natural’ proponents of worker-friendly labour laws – will have to rethink their position in order to retain the confidence of new constellations of supporters. And not least, labour law intellectuals, policy makers and practitioners, having sunk their intellectual and social capital in the existing system, are unlikely to want to liquidate their investment at a loss.

Moreover, in each of these three new, possible instantiations, labour law may well lose some of its unique character. If it does, if labour law ‘after labour’ is so transformed that it no longer advances justice in labour markets, it will lack legitimacy. If its connection to quotidian workplace relations becomes so attenuated that it no longer regulates them closely, it is unlikely to be efficacious. And if it becomes so intellectually diffuse that – after decades of increasingly ambitious, methodologically varied and cosmopolitan scholarship – the discursive community of labour lawyers dissolves, then we will be unable to help much during the current ‘intellectual economy of catastrophe’.

Still, for all their possible shortcomings, these three new approaches represent not only the best approximation of what labour law is likely to look like ‘after labour’ but also a significant advance over what it looks like today.