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## “Labour Law is a Subset of Employment Law” Revisited

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Alan Bogg\*

“Labour Law is a Subset of Employment Law”  
Revisited

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*This article revisits the arguments in Brian Langille’s seminal law review article, “Labour Law is a Subset of Employment Law.” Langille’s article was based upon two main claims: (a) that (individual) employment law should be understood as the “set” and (collective) labour law the “subset” of employment law (the primacy of employment law); (b) that “public values” have priority over “private values” in the regulation of work (the primacy of public values). These two claims were presented as mutually reinforcing in “Subset.” Drawing on specific examples from UK and Canadian law, this article endorses the first claim but rejects the second. Public and private values intersect in a multiplicity of ways. It is too reductive to accord primacy to the “public” or the “private.” Employment law has always been a hybrid discipline shaped by public and private law.*

*Dans le présent article, nous reprenons les arguments avancés dans le fameux article de Brian Langille, « Labour Law is a Subset of Employment Law .» Cet article présentait deux arguments principaux : a) que le droit de l’emploi (individuel) doit être compris comme « l’ensemble » et le droit du travail (collectif) comme le « sous-ensemble » du droit de l’emploi (la primauté étant accordée au droit de l’emploi); b) que les « valeurs publiques » ont la priorité sur les « valeurs privées » dans la réglementation du travail (la primauté étant accordée aux valeurs publiques). Ces deux revendications ont été présentées comme se renforçant mutuellement dans le « sous-ensemble .» En s’appuyant sur des exemples spécifiques du droit britannique et canadien, nous appuyons dans le présent article le premier argument mais rejetons le second. Les valeurs publiques et privées se croisent de multiples façons. Il est trop réducteur d’accorder la primauté au « public » ou au « privé .» Le droit de l’emploi travail a toujours été une discipline hybride façonnée par le droit public et le droit privé.*

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\* Professor of Labour Law, University of Bristol. I am very grateful to Bruce Archibald for organizing this special issue, to two anonymous referees for helpful comments, and to Brian Langille for having been such an interesting, supportive and generous interlocutor over many years. We have often disagreed, but the disagreements have always been a friendly source of pleasure and illumination. All errors are my own responsibility.

*Introduction*

- I. *“Labour Law is a Subset of Employment Law”*
  - II. *The “Individual” and “Collective” in employment law: Employment law as a basic foundation of labour law*
  - III. *The public and private in employment law: Enforcement architectures*
- Conclusion: Employment law as a hybrid of private and public law*

*Introduction*

When I was eight years old, the year that one of Brian Langille’s debut pieces “Labour Law is a Subset of Employment Law” (“Subset”) was published,<sup>1</sup> I watched the horror film *Salem’s Lot* furtively through the crack in a door left ajar by my mother. The film was terrifying. It was an experience that stayed with me. Some decades later, I mustered the courage to watch it again. Revisiting the film was a mistake. What had seemed scary now appeared silly. In the intervening years, the terror had dissipated. That is always the danger with revisiting treasured things. Creative works sometimes make best sense in a particular time and place. They may not age well.

Since 1981, there have been tectonic shifts in the world of work. This has had a significant impact on our ways of understanding the discipline of labour law itself, its normative goals and its regulatory instruments, and its relationship with other compartments of the law. Have the arguments in “Subset” endured so that they remain relevant and important today?

There are two basic claims in “Subset.” First, that (individual) employment law should be understood as the “set” and (collective) labour law the “subset” of employment law. This ordering gives employment law structural priority over labour law. Second, that “public values” have priority over “private values” in the regulation of work. Let us call these arguments “the primacy of employment law” and “the primacy of public values” respectively.

There is a great deal that needs unpacking here, and that will be undertaken in section I. This section elucidates some of the arguments

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1. Brian Langille, “Labour Law is a Subset of Employment Law” (1981) 31 UTLJ 200.

used by Langille to give structural priority to employment law as the “set,” with labour law its “subset.” Some of those arguments are “pedagogical,” based in the idea that there is an expositional virtue in according structural priority to employment law. I suggest that these “pedagogical” arguments are in fact rather weak and bound up with the concerns of a particular time and place. They need to be supplemented by normative arguments.

Once we shift from the “pedagogical” to more normative ground, some of the main arguments of “Subset” have certainly endured. In particular, the normative arguments associated with “the primacy of employment law” have endured well (though at the time they were made, these arguments would have been regarded as provocative, heretical even). Section II investigates these arguments. What I have called “the primacy of employment law” highlights the indispensable role of individual rights in supporting collective structures and institutions. These individual entitlements have become increasingly important in new forms of work such as gig work, where established trade union organization may not yet have taken root. “Subset” is also attentive to the significance of enforcement regimes in understanding the conceptual structure of employment law. I build upon Langille’s discussion of enforcement in section III. Today, enforcement in employment law is one of the most important regulatory issues, at the heart of our disciplinary reflections, and “Subset” analysed employment standards enforcement powerfully and presciently.

I am less persuaded by Langille’s argument for “the primacy of public values,” though I imagine this claim would have been regarded as rather less controversial than “the primacy of employment law” at the time it was made. The distinction and comparison between public and private values is far too complex to be reducible to a single metric, not least because there are likely to be many public and private values at stake. By relegating “private values,” we run the risk of overlooking the contributions that private law doctrines and private law theory can make in improving the lives of workers. Employment lawyers have tended to be sceptical about private law as a technique for regulating work. Indeed, the private law of contract was regarded as part of the regulatory problem. Historically, contract law was an object of criticism. It was widely regarded as incapable of regulating the personal work relation to protect the worker’s dignity in circumstances of unequal bargaining power. This scepticism about private law provided the justification for a special autonomous regime of regulation—“labour law” or “industrial law” as it was first known—to counteract the inequality of power that was otherwise obscured by the doctrines of general private law. Recent developments in the enforcement of labour rights suggest that “the primacy of public values” perspective

has now outlived its usefulness. I conclude by suggesting that the spirit of “Subset” would be better served by a rapprochement of the “public” and the “private,” which reflects the deep character of employment law as a hybrid discipline of both public and private law.

I. *“Labour Law is a Subset of Employment Law”*

“Subset” provides a basic enquiry into the coherence of a legal discipline: how should we decide “whether a useful chunk of reality has been carved out for examination?”<sup>2</sup> “Subset” was one of Brian Langille’s debut pieces, but it is a question that has recurred in his impressive body of work across four decades of scholarly reflection. The problem of disciplinary coherence is rarely treated as such a pressing problem in the domains of contract, tort, unjust enrichment and the other basic compartments of private law. Certainly, there are deep disagreements about the best theoretical account of these domains. There is usually less controversy over whether “contract law” or “law of torts” is an appropriate legal domain in the first place. Or indeed whether a legal norm is properly described as a contract norm, or a tort norm, and so forth.<sup>3</sup> These matters are usually taken as relatively uncontroversial, enabling the scholar to proceed to more interesting questions about whether private law disciplines have an internal structure, or if private law is intelligible in the light of instrumental or external goals, or whether we should understand the basic structure of private law in terms of rights (or some other fundamental legal category). Of course, appearances can sometimes be misleading. Critical perspectives on the basic domains of private law often interrogate their parameters more vigorously, identifying the ways in which supposedly neutral private law principles obscure the role of contract law in constituting, distributing, enabling, or impeding the exercise of power in ostensibly “private” relations. This deconstructive turn in scholarship may be effective in debunking the idea that private law categories are reducible to a small set of explanatory norms or principles. Yet these critical reflections rarely penetrate the basic coherence assumption that envelops the compartments of private law in doctrinally-oriented scholarship and legal practice.

By contrast, the coherence problem is more visible in “contextual” legal disciplines such as labour law, or medical law, or family law. This is because scholars in these domains face a different organizational problem to the

2. *Ibid* at 200.

3. Though compare discrimination law, and Khaitan’s enquiry into the identity of discrimination norms: see Tarunabh Khaitan, “Prelude to a Theory of Discrimination Law” in Deborah Hellman & Sophia Moreau, eds, *Philosophical Foundations of Discrimination Law* (Oxford: Oxford University Press, 2014).

private lawyers. They must identify the relevant spheres of social life that are sufficiently important to warrant the systemization of different norms drawn from (say) contract, tort, property law, or public law. In this respect, these contextual disciplines are second-order disciplines, constructing new norm-systems out of more basic first-order disciplinary building-blocks. Families, work, and medicine are now well-settled contextual domains. Perhaps this reflects the importance of these contexts to human flourishing (and, more importantly, the *damage* to human flourishing that results when things go wrong in families, work, and medicine).<sup>4</sup> Even if we take “work” as our relevant context as a “useful chunk of reality,” there are many different ways of carving it up. Are we concerned with labour as an activity or employment as a relation? Should we expand our focus and examine the “law of the labour market” or “work law?”<sup>5</sup> Perhaps we should integrate an examination of anti-discrimination law and labour law to expose the deeper gendered and racialized connections between these two spheres?<sup>6</sup> Or maybe “work” itself is too limiting so that we should organize our norms in a new discipline of the “law of private resistance,” which examines multiple sites of private domination in modern life such as employment and housing?<sup>7</sup>

Of course, the scholar has the luxury of eclecticism. As Kit Barker has emphasized, the demarcation of legal phenomena “depends entirely upon how legislators, adjudicators, legal scholars and other participants in legal systems think about these categories and, in particular, upon whether or not they regard the distinction in question as useful in illuminating the system’s practices.”<sup>8</sup> The friction between these different contextual demarcations—work, employment, labour market, productive and reproductive labour, private domination—might be intellectually productive in exposing phenomena that might otherwise remain hidden. The work of the world (and litigating that in the courts) will continue to be done however scholars decide to formulate contesting visions of legal

4. For a discussion of “contextual” legal disciplines in these terms, see Alan L Bogg, “Labour, Love and Futility: Philosophical Perspectives on Labour Law” (2017) 33:1 Intl J Comp Lab L & Ind Rel 7.

5. On the “law of the labour market,” see Simon Deakin & Frank Wilkinson, *The Law of the Labour Market* (Oxford: Oxford University Press, 2005). On “work law,” see Noah D Zatz, “Does Work Law have a Future if the Labor Market Does Not?” (2016) 91:3 Chicago-Kent L Rev 1081.

6. Richard Michael Fischl, “Rethinking the Tripartite Division of American Work Law” (2007) 28:1 BJELL 163.

7. For a thought-provoking discussion in these terms, see Harry Arthurs, “Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment” (2013) 34:3 Comp Lab L & Pol’y J 585.

8. Kit Barker, “Private law: Key encounters with public law” in Kit Barker & Darryn Jensen, eds, *Private Law: Key Encounters with Public Law* (Cambridge: Cambridge University Press, 2013) 3 at 19.

reality. We aren't required to sign up to a specific disciplinary vision on an exclusive or permanent basis, and some experimentation and flexibility could well be interesting and productive.

In "Subset," Langille is not so concerned with this problem of context. The relevant bit of the world is described as the "employment relationship" (and Langille seems fairly relaxed about how to identify it). Were he to write this piece today, he might be less relaxed about this. The last thirty years have been marked by a growing sense of disenchantment that many work relations are falling outside the "employment relationship" but represent forms of self-employment that are highly precarious. Be that as it may, in 1981 his dominant focus was on how to organize and systemize the legal norms that regulate the employment relationship so that they form a coherent whole. As the title of the article suggests, Langille's enquiry is directed at the relationship between two bodies of law, "employment law" and "labour law," and the extent to which these two bodies of law can be treated as an integrated and coherent set of norms. For Langille, "employment law" describes the "law for the unorganized."<sup>9</sup> It encompasses a wide range of statutory entitlements that regulate the working conditions of individual employees: minimum wage, restrictions on hours of work, overtime rates, paid holidays, and "just cause" dismissal protections. This is what Lord Wedderburn once famously described in the UK context as the "floor of rights."<sup>10</sup> It is focused upon individual statutory entitlements, allocated to individual employees, and enforceable in courts or specialist tribunals regardless of union membership or collective bargaining. "Labour law," by contrast, is the "law for the organized." This encompasses the norms and institutions of collective labour relations, administered by specialist labour boards and labour arbitrators, interpreting autonomous legal concepts such as "bargaining units" and "good faith bargaining." While Langille is anxious to avoid the charge that his argument is "a cry for individual over collective rights,"<sup>11</sup> it is easy to see how the elevation of "employment law" as the general category (and "labour law" its "subset") creates the impression.

This analytical enquiry into a *reconciliation* between two discrete bodies of norms has greater juridical resonance in the North American context. In contrast to the UK, both the US and Canada were (and remain) highly juridified legal systems, especially at the collective level. Consequently, there was a distinctive, extensive and relatively autonomous

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9. Langille, *supra* note 1 at 200.

10. Lord Wedderburn, *The Worker and the Law*, 2nd ed (Harmondsworth: Pelican, 1971) at 39.

11. Langille, *supra* note 1 at 230.

body of legal norms and adjudicative institutions, regulating trade union organization, certification for collective bargaining, the administration of collective agreements, and the right to strike. In the UK, by contrast, collective bargaining law was lightly juridified and “individual employment law” emerged as a substantial body of norms only in the mid-1970s.<sup>12</sup> In modern UK treatises in the post-war period, it was conventional to organize all norms within a single discipline called “labour law.”<sup>13</sup> Labour law encompassed both collective and individual norms, but with priority accorded to collective topics such as collective bargaining, collective agreements, and the right to strike. The choice of nomenclature, favouring “labour law” over “employment law,” was generally understood as a code signalling an ideological disposition favouring worker-protective purposes. The pragmatist orientation of UK labour law might well have regarded structural questions about the organization of legal norms as an irritating scholastic distraction from the serious business of making the world of work a better place. Let the focus be on organizing workers, not legal norms. In certain respects, therefore, Langille’s preoccupation in “Subset” could be viewed as a relatively parochial enterprise that was relevant to North American labour lawyers and rather peripheral in the UK context.

Langille’s claim that labour law is a “subset” of employment law would also have been regarded as a highly provocative one, certainly to UK lawyers. To modern eyes, the provocation is even more acute. For to describe (collective) “labour law” as a “subset” of the more fundamental juridical category of (individual) “employment law” brings with it the suspicion that values of solidarity are being undermined by more individualistic values. In short, does the descriptor “subset” denote a political judgement that downgrades the collective dimensions of working life? In an era of declining unionization, it is easy to see how this might be a neuralgic point for labour lawyers.

Before we leap to condemnation, we should note Langille’s characterization of employment law as the law for the unorganized “have-nots.” In other words, these statutory norms were particularly important for the most marginalized and precarious workers left outside the system of collective bargaining coverage. For this reason, Langille’s proposed shift in methodological priorities could be understood as a way of extending

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12. This, of course, is the central point of “collective laissez-faire” as a juridical description of British labour law, a term coined by Otto Kahn-Freund and developed by Wedderburn. For a discussion of the trials and tribulations of collective laissez-faire, see Alan Bogg, “The Hero’s Journey: Lord Wedderburn and the ‘Political Constitution’ of Labour Law” (2015) 44:3 *Indus LJ* 299.

13. See eg Simon Deakin & Gillian Morris, *Labour Law*, 6th ed (Oxford: Hart, 2012).



the locus of solidarity to encompass the most disadvantaged workers in the labour market who might otherwise disappear as subjects of protective labour law. On this view, the “subset” argument might be the fulfilment of labour law’s egalitarian mission, not its abnegation.

The devaluation of the collective dimension in work relations has come to pass in recent decades in many countries, although that decline can hardly be attributed to the activities of labour law scholars postulating relations between norm-types.<sup>14</sup> The “Subset” thesis, according priority to norms for individuals, also seems to subvert the conventional view of historical legal development. On this view, the emergence of *collective* organization and political voice generated democratic pressures to introduce worker-protective legislation for *individual* employees. The enactment of individual entitlements by legislators is rarely an intellectual response to a good philosophical argument about the theory of justice. It is a response to collective mobilization by trade unions operating as political pressure groups in the legislative process. By the same token, the decline in collective strength has opened the way for a politics of deregulation. In short, the stability of individual employment law has always depended upon robust collective organization in the workplace and polity.<sup>15</sup> By presenting employment law as the “set,” there is a danger that we obscure this vital aspect of the collective-individual interaction: the *political dependence* of individual rights on collective worker strength in the legislative process. This is an important reminder that intellectual enquiries into disciplinary coherence are no substitute for empirically-grounded enquiries into the political and industrial dynamics of labour power in workplaces and legislatures. These reservations about downgrading the “collective” at an intellectual level should not be dismissed lightly. This downgrading would be music to the ears of many powerful corporate actors.

How relevant is Langille’s structural claim to labour lawyers today? We can distinguish between “pedagogic” and “normative” arguments. I would suggest that the “normative” arguments have endured better than the “pedagogic” ones.<sup>16</sup> Let us begin by considering the “pedagogic” arguments. By “pedagogic,” Langille is suggesting that the dominance of “labour law” in the Canadian legal academy had led to the marginalization of employment law as a worthy object of legal study. This distorted the

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14. It is a fact that has often been at the centre of “crisis” literature on the extinction of labour law as a discipline. See eg Cynthia L Estlund, “The Death of Labor Law?” (2006) 2 Annual Rev Soc Science 105 [“The Death of Labour Law”].

15. Alan Bogg & Ruth Dukes, “The Contract of Employment and Collective Labour Law” in Mark Freedland, ed, *The Contract of Employment* (Oxford: Oxford University Press, 2016) 96.

16. Langille, *supra* note 1 at 201.

practical importance of employment law for a growing number of Canadian employees, given that the many of those employees fell outside collective bargaining at the time the piece was written. Restoring the scholarly prestige of “employment law” prevented the neglect of a practically important body of law, and one that was important to the most precarious workers in the labour market. This restoration also enabled scholars to examine the intersections between individual and collective legal norms. This binocular vision could be important where, for example, an arbitrator was required to interpret a collective agreement in the light of employment statutes relevant to the individual dispute. As such, there is an expositional virtue in centring the core of the discipline on “employment law” and its individual rights.

These “pedagogic” arguments were undoubtedly important in retrieving the “floor of rights” from intellectual obscurity in the UK too. In a similarly “pedagogic” vein, Hugh Collins famously criticized the dangers of “closure” in the disciplinary framing of UK labour law.<sup>17</sup> The intellectual dominance of “collective laissez-faire,” rooted in a sociological orientation focused on the institutions and practices of collective labour relations, inevitably generated criteria of importance and significance in organizing the legal materials.<sup>18</sup> These criteria marginalized alternative perspectives on legal developments, for example theories of individual political and social rights in the workplace.<sup>19</sup> Collins’ intervention was an important reminder that value judgements always underlie the selection and organization of legal materials. Judgements of importance are normative, and those judgements are inescapable once we are organizing legal norms into a coherent and intelligible structure. Our duty as scholars is to be methodologically explicit in making those evaluative choices.<sup>20</sup> We should be particularly sensitive to what is positioned on the periphery of the discipline, and the social and political consequences of that marginality.

Few would deny that individual employment law should be taken seriously as a compartment of the law regulating work relations. Yet its marginalization could be countered by treating “labour law” and “employment law” as co-equal elements of a law of work relations or “work

17. Hugh Collins, “The Productive Disintegration of Labour Law” (1997) 26:4 *Indus LJ* 295.

18. *Ibid* at 301.

19. *Ibid* at 304-306.

20. Must those guiding values be moral? Or is it possible for theory-construction to be guided only by “epistemic” values such as simplicity or charity? Both involve “normative” considerations. For further discussion, see Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), especially chapters 1, 6.

law.” Or even by treating “employment law” as a “subset” of “labour law.” That would retrieve employment law from relative obscurity by locating it within the scholarly perimeter, and this would counter the tendency toward “overly compartmentalized thinking” that Langille rightly criticizes.<sup>21</sup> In short, pedagogic values are agnostic on whether we should treat labour law as a “subset” of “employment law” or vice versa. They simply advocate taking employment law seriously as a body of norms, without specifying *how* it should be related structurally to labour law.

Nor have these pedagogic considerations remained stable over time. In 2020, we are now facing the opposite of the pedagogic problems that Langille was grappling with in 1981. In an era of dwindling trade union membership and collective bargaining in precipitous decline, it is now the collective side of the discipline that faces the existential threat to its viability as an area of scholarly enquiry. For example, Cynthia Estlund has observed that “the health and vitality of labor law, both as a body of law and as a field of scholarly enquiry, hinges on the vitality of the institutions that define labor law: labor unions and collective bargaining. Therein lies the problem.”<sup>22</sup> Nor is the threat of intellectual extinction confined to US scholarship, with the Australian labour lawyer Richard Mitchell asking in a similar vein, “Does one continue to focus on the details of collective bargaining, trade unions, strike law and so on when these do not reflect the reality of how labour markets are operating?”<sup>23</sup> In leading textbooks in the UK, it is now common for chapters on collective topics to be published “online” and separately from the printed text covering more familiar topics such as the contract of employment, employment status, and dismissal. This would have been unthinkable a generation ago. There is also a dearth of up-to-date specialist textbooks on collective labour law. In this way, the problem of intellectual marginalization has flipped in the decades that followed the publication of “Subset.” Labour law is now the endangered species in the legal academy. Few students may have ever encountered a trade union or a collective agreement, and fewer judges handling labour cases in the appellate courts have a deep understanding of the distinctive logic of collective action. By treating (collective) labour law as a “subset” at the margins, are we being complicit in its demise? And why should we care?

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21. Langille, *supra* note 1 at 201.

22. Estlund, “The Death of Labour Law,” *supra* note 14 at 105.

23. Richard Mitchell, “Where are We Going in Labour Law? Some Thoughts on a Field of Scholarship and policy in process of change” (2011) 24 *Austl J Lab L* 45 at 59.

One answer is provided by John Gardner, who has recently praised the “precarious equilibrium” that existed between “labour law” and “employment law” in the early post-war period, particularly as represented in the work of Otto Kahn-Freund.<sup>24</sup> According to Gardner, “the shift marked by the re-branding of ‘labour law’ as ‘employment law’” may symbolize a process of tragic proportions, whereby work has been so degraded through its hyper-contractualization that it is no longer capable of being an integral part of a flourishing life.<sup>25</sup> Nomenclature and the disciplinary organization of legal norms matter because they reflexively shape how we view work, how we demarcate it from non-work, and how we regulate it through law. This indicates a role for “beneficial moral consequences” as a criterion for determining how to organize legal norms into a coherent grouping.<sup>26</sup> It has already been suggested that there are a range of ways in which the legal norms regulating work might be organized into a coherent set. The “beneficial moral consequences” thesis would direct us to favour models that have beneficial moral consequences. For example, by choosing a disciplinary model that continues to emphasize collective norms despite the fact that trade union membership is in decline, this could give the value of solidarity appropriate recognition in public discourse about work. This value might otherwise be marginalized or eclipsed. Or by formulating the discipline around the “law of work” rather than the “law of employment” this might lead judges and legislators to treat non-standard work arrangements as more readily within the scope of protective statutes. A world in which solidarity is taken more seriously, or a world in which more workers are protected from exploitation, is a better world. To the extent that some models of legal reality can lead to better moral outcomes, we have a normative reason for preferring those models.

By now, we have left the pedagogic arguments long behind. Without the support of normative arguments, such as the “beneficial moral consequences” thesis, pedagogic arguments provide only weak support for the “subset” approach. Indeed, Langille himself pursues more normative arguments in his own work, and it is here that we find the main intellectual justification for his “subset” approach. According to Langille, employment law must be understood as based upon a moral foundation. As

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24. John Gardner, “The Contractualization of Labour Law” in Hugh Collins, Gillian Lester, & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 33.

25. *Ibid* at 34.

26. For an outline and critique of the “beneficial moral consequences” methodological thesis, see Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart, 2001).

he later argued, employment law depends upon a “theory of justice.”<sup>27</sup> In “Subset,” this theory of justice was closely based upon Ronald Dworkin’s account of liberal equality in *Taking Rights Seriously*, a book that had been published only a few years before in 1977.<sup>28</sup> Building on Dworkin’s theory, Langille argues that citizens have a right to equal concern and respect. This requires that “modern democratic states...provide and protect the liberties of its citizens while at the same time providing a minimum set of social conditions.”<sup>29</sup> Given the importance of employment to the identity, worth and self-esteem of citizens, employment law is a fundamental legal mechanism for securing liberal equality for citizens. “Respect” norms ensure that citizens enjoy the capacity to formulate and pursue a conception of the good; this would include the protection of basic rights and liberties in the workplace. “Concern” norms ensure that citizens are provided with a social and economic minimum enabling them to live a dignified life, such as a decent wage and decent working time. For Langille, this right to equal concern and respect positions “employment law” as the set and “labour law” as the “subset.” On his argument, this also means that “public values” have priority over “private values” in the regulation of employment.

This claim that “public values” have priority over “private values” raises many questions. How do we distinguish public and private values? Are there multiple values in both domains? Is it the case that *any* public value has decisive weight whenever it runs up against *any* private value? Do we identify values as “public” whenever they are implemented in a statute or might statutes sometimes implement “private” values too? Langille argues that the prioritization of “public values” supports the rejection of “freedom of contract” for individuals in an employment relationship. This is because “inequality of bargaining power” means that individual employment contracts rarely secure “concern” and “respect” for employees in the workplace. “Public values” also impose limits on the “autonomy” of voluntary collective bargaining. This is because public policies expressed in employment statutes should (sometimes) override “free” collective bargaining.

Here we arrive at the real crux of the “Subset” thesis. Imagine a collective agreement implements a pay structure that is racially or sexually discriminatory. Such an agreement would fail to secure a minimum level

27. Brian Langille, “Labour Law’s Theory of Justice” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) 104.

28. Ronald Dworkin, *Taking Rights Seriously* (London and New York: Bloomsbury Academic, 1997).

29. Langille, *supra* note 1 at 201.

of “respect” for employees. The right to equal concern and respect would justify the vindication of the public values of the liberal community as reflected in human rights or anti-discrimination legislation.<sup>30</sup> The public values, as expressed in this legislation, should override the discriminatory terms in the collective agreement. Or the collective agreement deviates from the minimum level of “concern” as enacted in the statutory floor of rights by specifying a level of pay below the statutory minimum. Liberal equality demands that the contracting out of statutory protections should be restricted.<sup>31</sup> At the very least, Langille argues that employees covered by collective agreements should not be exempted from the coverage of statutory minimum entitlements.<sup>32</sup> He also argues that arbitrators should consider the effects of employment statutes in the interpretation and enforcement of collective agreements.<sup>33</sup> Since the minimum threshold of concern and respect was set by the “floor of rights,” collective bargaining should not depart from that threshold. This is why labour law is the subset, and employment law the set.<sup>34</sup> Employment law sets the basic minimum of a dignified working life for all employees, and labour law provides procedural structures that empower employees to bargain collectively and secure advantages beyond the statutory floor.

Are these concerns still relevant? The problem of integrating employment statutes into the private arbitration of collective agreements seems a rather quaint distraction from the rise of Gig work, algorithmic management, the displacement of human work by robots, the collapse of collective bargaining in the private sector, and a growing “precariat.” In an era where collective bargaining is dwindling to vanishing point in the private sector, and neoliberal governments are dismantling the statutory floor of rights, do the problems animating “Subset” in 1981 still resonate?

There are two aspects of “Subset” that speak powerfully to our current challenges. The first aspect is Langille’s identification of certain fundamental non-derogable entitlements for individuals, such as a right to refuse work in situations of risk to health and safety. Such “refusal of work” provisions have become important in the context of COVID-19 and the hasty implementation of “return to work” policies of national

30. *Ibid* at 214-215.

31. *Ibid* at 215-217.

32. *Ibid* at 217.

33. *Ibid* at 221-226.

34. The limits of the “autonomy” of collective bargaining, and the extent to which pluralist bargaining should be restricted in favour of the common good, was an acute concern in debates around collective laissez-faire in the 1960s and 1970s. See, further, Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Oxford: Hart, 2009), chapter 2.

governments. As collective structures and institutions have degraded over time, might there be other fundamental *individual* entitlements? And could such entitlements provide opportunities for collective renewal? If so, could these fundamental entitlements constitute an (individual) “employment law” foundation for a revitalized (collective) “labour law?”

The second aspect is in Langille’s emphasis on public enforcement, effective remedies, and institutional structures in employment law. The involvement of public agencies in supporting the enforcement of individual rights disrupts conventional understandings of the “private” and “public” in employment law. In both Canadian and UK law, the issue of effective enforcement is now at the top of the scholarly and public policy agenda. The crisis of enforcement has played out differently across jurisdictions. In North America, the focus has been on the use of private arbitration clauses to circumvent public adjudication in public courts. In the UK, concern has centred on economic impediments to claimants’ access to courts, for example through the imposition of excessive court fees. There has also been a renewed interest in enforcement through public agencies, with individual remedies often ill-suited to tackling systemic problems such as “wage theft” and under-payment of national minimum wage entitlements. Let us examine each aspect in turn.

## II. *The “Individual” and “Collective” in employment law: Employment law as a basic foundation of labour law*

In “Subset,” Langille discusses the Canada Labour Code provision that provides that an individual employee has a right to refuse work where there is reasonable cause to believe that: “(a) the use or operation of a machine, device or thing would constitute an imminent danger to the safety or health of himself or another employee, or (b) a condition exists in any place that would constitute an imminent danger to his own safety or health.”<sup>35</sup> This “right to refuse” is operative until a safety officer has determined that there is no “imminent danger.” The employee cannot be disciplined by the employer for exercising the “right to refuse,” and the Canada Labour Relations Board has the power to reinstate an employee who is dismissed for exercising the right.<sup>36</sup>

The fundamental nature of this right is reflected in its enforcement regime. It is separated from the general provisions on grievance arbitration. Consequently, a trade union cannot waive the right on the employee’s

35. Langille, *supra* note 1 at 209, referring to the *Canada Labour Code*, RSC 1985, c L-2, s 82. 1 (1) (now s 128).

36. Langille, *supra* note 1 at 209.



behalf.<sup>37</sup> This means that “this very basic right” cannot be “lost in the shuffle of the duty of fair representation.”<sup>38</sup> In the terminology of modern private law theory, the primary right (to refuse work) is supported by a legal power vested in the primary right-holder (the refusing employee) to pursue a remedy in a public forum. Her legal power to seek redress cannot be overridden by an intervening third party, such as a trade union. Interestingly, this “right to refuse work” is also specified in the recent International Labour Organisation (ILO) Convention 190 concerning the Elimination of Violence and Harassment in the World of Work.<sup>39</sup> Article 10 (g) provides that “workers have the right to remove themselves from a work situation which they have reasonable justification to believe presents an imminent and serious danger to life, health or safety due to violence and harassment, without suffering retaliation or other undue consequences.”<sup>40</sup>

Langille argues that the “right to refuse” provides security of employment to an employee who acts upon what is perhaps one of the most fundamental of all an employee’s concerns—his or her own health and safety as well as that of others. This is one of the most fundamental rights in employment law, connected to the basic right to life and bodily integrity. Should the labour code’s “right to refuse” be understood as a “job security” right? Or as an “occupational health and safety” right? Let me make another suggestion. The true significance of the “right to refuse” is that it can be understood as a protean right to strike, with strong individual protections against employer retaliation. Are there imminent risks to other fundamental interests that would justify an extension of this “right to refuse?” The ILO Convention on violence and harassment at work suggests a broad conceptualization of health and safety. Should the “right to refuse” extend to other “basic liberties” such as non-discrimination or freedom of expression in the workplace?<sup>41</sup> And where individual employees are engaged in a “basic liberties” strike of this kind, should this be treated as a non-waivable core that is not subject to collectively agreed peace obligations?<sup>42</sup> Beyond the “right to strike,” we can enquire more generally into the scope for individual rights to provide the basic building

37. *Ibid* at 229.

38. *Ibid*.

39. International Labour Organization, *Violence and Harassment Convention, 2019* (No 190); International Labour Organization, *Violence and Harassment Recommendation, 2019* (No 206).

40. *Ibid*.

41. For a discussion and defense of a “basic liberties strike” based in a republican theory of non-domination, see Alan Bogg & Cynthia Estlund, “The Right to Strike and Contestatory Citizenship” in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford: Oxford University Press, 2018) 229.

42. *Ibid* at 247-249.



blocks for “collective” rights such as the right to collective bargaining.<sup>43</sup> “Labour law is a subset of employment law” is a formula that highlights how *individual* entitlements provide building blocks for *collective* norms and institutions. In an era of persistent decline for collective bargaining, and with it the atrophy of “labour law” itself, the role of individual entitlements in supporting collective action in new forms of precarious work is of fundamental practical importance.

At the most basic level some individual employment rights, such as general protection from unjust dismissal, support a culture of contestation in the workplace so that individual employees will feel less inhibited in their expressive activities.<sup>44</sup> This culture of contestation may lead to more developed forms of collective organization. Even within the collective domain of labour law, individual rights such as the right not to be victimized for trade union membership or activities provide a crucial underpinning to the collective “right to organize.”<sup>45</sup> Elements of the “individual” and “collective” are blended differently in different labour law systems. The most basic enquiry is the identity of the right-holder: is it an individual right for employees, a group right vested in the trade union itself, or a composite right for individuals and their trade unions? Once the primary right has been allocated, we must then decide whether legal rules should give standing to third parties, such as trade unions or public officials, to enforce individual rights on behalf of the right-holder. In certain circumstances, the third party might even enjoy a normative power to waive those primary rights. Where there are wide standing rules, giving normative powers to trade unions or public officials to enforce the primary right on the individual’s behalf, this gives a strong public dimension to the enforcement of rights. Careful attention to these different axes in the architecture of rights highlights the rich variety of models in the “right to organize” in different legal systems. A brief examination of the UK, the US and Canada demonstrates this variety.

The UK model is strongly individualistic. Its freedom of association rights are “bipolar” in form, and they resemble the basic structure of a private law right.<sup>46</sup> This is because the right contemplates a single relation between an individual right-holder (the employee or worker) and an

43. On the notion of individual rights as “building blocks” for a collective right to organize, see Lord Wedderburn, “Employment Protection Act 1975: Collective Aspects” (1976) 39:2 Mod L Rev 169.

44. Alan Bogg & Cynthia Estlund, “Freedom of Association and the Right to Contest: Getting Back to Basics” in Alan Bogg & Tonia Novitz, eds, *Voices at Work* (Oxford: Oxford University Press, 2014) 141.

45. *Supra* note 43.

46. Ernest Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) at 4.

individual wrongdoer (the employer), and the remedy aims to restore the position of the right-holder by repairing the wrong. This is marked by private law-style “correlativity,” namely that “the liability of the defendant is always a liability to the plaintiff. Liability consists in a legal relationship between two parties each of whose position is intelligible only in light of the other’s.”<sup>47</sup> The UK statute posits rights for individual workers and employees not to be subjected to a detriment, dismissed or to have offers made to them on a range of protected grounds including trade union membership, participation in trade union activities at an appropriate time, and use of union services. This legal structure is highly individualistic. The right-holder is an individual worker or employee.<sup>48</sup> The trade union is not a separate right-holder with legally protected interests. It can only benefit derivatively from the enforcement of individual rights. Secondly, the trade union does not have standing to enforce the individual’s statutory right not to be victimized. Nor is there a public agency that assists in the enforcement of these fundamental rights. The claim must be brought by the individual worker or employee, and she has the exclusive normative power to determine whether to pursue it. The UK legal structure is highly convergent with a private law model.

By contrast, the US model is based upon an “unfair labor practice” regime, the broad structure of which was introduced in sections 7 and 8 of the *National Labor Relations Act* of 1935. Section 7 specifies the fundamental associative rights of employees in the following terms:

“employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>49</sup>

These fundamental associative rights are protected by a set of “unfair labor practices” set out in section 8. These provisions are administered by an administrative agency, the National Labor Relations Board (NLRB), which adjudicates “unfair labor practice” complaints and determines the remedies for violations under section 8.

The right-holder under this labour relations regime is the individual employee. The legal procedure is initiated by the filing of an “unfair labor practice” charge, and this charge may be filed by “any person, even a

47. *Ibid* at 18.

48. “Workers” are protected from “detriment” and “offers” under the Trade Union and Labour Relations Consolidation Act (TULRCA) 1992, ss 145A, 145B and 146. “Employees” are protected from refusal of access to employment and dismissal under TULRCA 1992, ss 137 and 152.

49. *National Labor Relations Act*, 29 USCA § 7 (1935).

stranger to the dispute” and so “need *not* be filed by the person actually aggrieved or adversely affected by the alleged misconduct.”<sup>50</sup> As such, the standing rules for enforcement of “unfair labor practices” are very wide. In this respect, it departs from the tight private law structure of the UK right to organize, based on correlativity between claimant and defendant. It is for the regional directors of the Board, acting under the authority of the General Counsel, to determine whether an “unfair labor practice” complaint should be issued against the party alleged to have breached the legal provisions. At this stage, the General Counsel “has plenary authority to determine whether an unfair labor practice complaint should be issued.”<sup>51</sup> If the complaint is issued, the prosecutorial wing of the Board (consisting of lawyers for the General Counsel) will represent the charging party in proceedings before a separate adjudicative wing of the Board, although a charging party may also participate in those proceedings and be represented by its own lawyers.<sup>52</sup>

This approach reflects the distinctive historical origins of the US statutory structure, where the *Wagner Act* was “enacted in an era of swelling confidence in the administrative state” hence “it contains no private right of action.”<sup>53</sup> The decision to avoid private law enforcement perhaps also reflected ambivalence on the part of workers and trade unions about judicial involvement in the adjudication of labour relations disputes.<sup>54</sup> According to Godard, 31 per cent of filings were made by individuals, compared with 69 percent by trade unions.<sup>55</sup> In this way, the enforcement of freedom of association rights under US law is both highly statist (reflected in the General Counsel’s pivotal role) and, in practice, highly collectivist (reflected in the *de facto* enforcement role of trade unions in “unfair labor practice” proceedings).

In Canada, there is a wider variation in legal structure, reflecting the fact that labour relations are regulated at the provincial as well as the federal level. The Ontario model of “unfair labour practices” provides a typical example of the Canadian statutory model. Section 70 of the *Ontario Labour Relations Act* 1995 provides that “[n]o employer or

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50. Robert Gorman & Matthew Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining*, 2nd ed (St Paul MN: West Publishing, 2004) at 10.

51. William B Gould, *A Primer on American Labor Law*, 4th ed (Cambridge: MIT Press, 2004) at 60.

52. *Ibid* at 61.

53. Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010) at 39 [*Regoverning the Workplace*].

54. *Ibid*.

55. John Godard, *Trade Union Recognition: Statutory Unfair Labour Practice Regimes in the USA and Canada* (London: Department for Trade and Industry, 2004) at 18.

employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union.”<sup>56</sup> This has been interpreted as positing an “institutional” right for trade unions, rather than any “personal” right of an individual employee.<sup>57</sup> Section 72, by contrast, is concerned with the protection of employees’ rights. It provides inter alia that no employer “shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.” This envisages a complementary structure of individual *and* collective rights, recognizing the artificiality of severing those elements in many disputes involving trade union victimization.<sup>58</sup>

Individuals do not have standing to enforce the section 70 unfair labour practice provision. Since this is an “institutional” right of trade unions, enforcement of that right is confined to trade unions rather than individual employees. While employees have standing to enforce their own rights under section 72, the trade union also has standing to pursue complaints on behalf of affected employees. In situations of anti-union victimization against individual employees, in practice the trade union will usually seek enforcement of “institutional” rights under section 70 and “personal” rights under section 72. In this way, the Ontario legislation operates rules of standing that are both collective and individual. While individuals have no standing to enforce “institutional” rights, the legislation recognizes the vital role of trade unions performing an enforcement role on behalf of affected employees. This offers a pragmatic response to the practical difficulties of individuals being required to enforce their own “personal” rights in situations where the employer is hostile towards unionization.

This brief overview indicates the complexity of the individual-collective distinction. For example, the well-documented failings of the US system are significantly attributable to the weak *individual* remedies and legal enforcement regime where employees are dismissed with impunity. In this vein, Cynthia Estlund has posed the following question of US law: “What if labor law had kept up with the times and added a private right of action for anti-union discrimination that the law already condemns? We might have had a ‘common law’ of anti-union discrimination, with cross-

56. *Labour Relations Act, 1995*, SO 1995, c 1, Schedule A.

57. *James Mically Clock #2216 v Board of Governors*, [1991] OLRB Rep 734.

58. *Canadian Paperworkers Union (CPU) v International Wallcoverings*, [1983] OLRB Rep 1316.

fertilization from other wrongful discharge doctrines.”<sup>59</sup> On this approach, a strongly enforced *private* right of action for anti-union discrimination, with effective remedies for victimized individuals, should be viewed as integral to a well-functioning labour relations regime. This provides a strong example of how employment law could be a precondition of an effective system of labour law. This is not inconsistent with also recognizing a strong *public* dimension to the enforcement of private rights of action. This could consist in giving trade unions or public agencies opportunities to provide material support to the individual right-holder or even to pursue the rights-violation on her behalf.<sup>60</sup> It is a strength of the Canadian model that it blends the individual and the collective in some of its labour codes.

We also begin to see the complexity of “public” and “private” in different legal approaches to the “personal scope” of labour rights. One of the fundamental contemporary issues in freedom of association is the exclusion of certain forms of personal work relations, sectors or occupations from the scope of legal protection. In English law, legal responses to unjustified exclusion focused predominantly on the refinement of private law tests as a basis for characterizing the “true agreement” between the parties.<sup>61</sup> The gateway into legal protection in UK law is that X works as an “employee” or a “worker” under a contract with the employer. This has caused difficulties in situations where the employer uses comprehensive written documentation to present the working arrangements as self-employment, which may be incompatible with employee or worker status necessary to qualify for legal protection. The English courts have deployed a “purposive” sham doctrine, which has allowed them to disregard written terms where these are inconsistent with the “true agreement” between the parties.<sup>62</sup> Although the sham doctrine can be unpredictable in difficult cases, it marks the emergence of a worker-protective *private law approach* that is properly located within employment law, and upon which (collective) labour law protections depend.<sup>63</sup> In Canada, by contrast, legal challenges to the formal exclusion of certain categories such as agricultural workers have been pursued through constitutional litigation using the Canadian

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59. Estlund, *Regoverning the Workplace*, *supra* note 53 at 40.

60. It does not follow that a trade union or public agency should enjoy an unfettered normative power to waive or extinguish an individual claim against the wishes of that individual.

61. See eg *Autoclenz Ltd v Belcher*, [2011] UKSC 41.

62. *Ibid.*

63. It should be noted that “employment status” cases in the UK are now being influenced by equality-type arguments, building upon fundamental rights jurisprudence under the European Convention on Human Rights and Article 14. For a recent example, see *Gilham v Ministry of Justice (Protect intervening)*, [2019] UKSC 44, which extended whistleblowing protections to District Judges using equality arguments.

*Charter*’s protection of general freedom of association.<sup>64</sup> Both “private” (in the UK) and “public” (in Canada) legal strategies have enjoyed some moderate success in securing inclusion for excluded workers. The choice of legal strategy reflects the constitutional differences between these two countries, and the extent to which fundamental labour rights are constitutionally protected (as in Canada) or are matters of statutory interpretation (as in the UK).

In sum, the arguments in “Subset” emphasize an important dimension of collective action that may have been underappreciated at the time the piece was written. This is the indispensability of basic individual rights as a foundation for more developed collective structures and institutions. Or, to use Langille’s terminology, employment law is the “set” and labour law the “subset.” This basic substrate has grown in significance as new forms of work, such as “gig work,” have propagated. This has exposed the important intersection between employment law and labour law, particularly in the fundamental issue of the identity of the work contract and the exclusion of certain groups (ie the self-employed or agricultural workers) from the scope of collective bargaining statutes.

These issues also highlight a difficulty with Langille’s general claim that “public” values should have priority over “private” values. This brief discussion reveals the difficulty, which is that the “public” and “private” interact in myriad complex ways. Kit Barker has emphasized that there are “many (not one) private/public distinctions at stake.”<sup>65</sup> It is important to be sensitive to these distinctions when the concepts are being invoked. We should be skeptical about assigning a global normative priority to the “public,” without understanding the sense in which “public” is being used, and how it is being contrasted with “private.” In developing his framework, Barker refers to a helpful typology set out in the work of Michaels and Jansen.<sup>66</sup> Drawing upon this framework, a key argument in “Subset,” what might be described as the “primacy of employment law,” does not straightforwardly correspond to the “primacy of public values.” Employment law is “private” in the sense that it often allocates rights to individual right-holders, and the infringement of those rights by the employer duty-bearer is treated as a matter of corrective justice. It is also “private” in that it does not generally regulate relations between the citizen and the state, but citizens in their private capacities. Many of the doctrines

64. See, eg, *Ontario (Attorney General) v Fraser*, 2011 SCC 20.

65. Barker, *supra* note 8 at 20.

66. Ralf Michaels & Nils Jansen, “Private Law Beyond the State? Europeanization, Globalization, Privatization” (2006) 54:4 Am J Comp L 843, discussed in Barker, *supra* note 8 at 20-21.

being developed, such as the English “sham” doctrine or the recent use of unconscionability in the employment context in Canada,<sup>67</sup> have their roots in private law doctrines and categories.

Employment law also has important “public” aspects. Many individual employment rights are justified in part by their contribution to public goods, as well as the interest of the individual right-holder. For example, the right to a decent wage could be understood as being justified in part by its contribution to a public good, the maintenance of a public culture of decent work. Employment law is also “public” in the sense that the rights are usually implemented through statute, administered by special tribunals rather than ordinary courts, with those rights sometimes enforced at the initiative of public officials. Also, as private law doctrines are developed and applied in their encounter with statutory employment rights, there is a “constitutionalization” of private law as issues such as employment status determination are infused with public constitutional values. To understand employment law, and its relationship with labour law, we would do better to keep both the private and public dimensions in view, rather than assigning blanket priority to one or the other.

### III. *The public and private in employment law: Enforcement architectures*

The second dimension of “Subset” focuses on legal procedures, and modes of enforcement and adjudication. Langille observes that “the most overlooked aspect of the effort to bring a minimum of concern and respect to the employment relationship is the substantial institutional structure and powerful enforcement mechanisms established under the various pieces of legislation.”<sup>68</sup> This structure provides for powerful public support for the enforcement of employment rights. In Nova Scotia, for example, Langille set out the main features of that legislation, which

“compels employers to keep records, gives broad powers to public officials to investigate and attempt to settle complaints (or on their own motion) and to make binding orders, subject to the right of the employer to appeal to a higher tribunal. If the employer does contest the order the employee is represented by a public official.”<sup>69</sup>

In this way, the enforcement mechanisms of employment law reveal an interesting hybridity of private law and public law. Protective employment statutes allocate primary rights to employees, and infringements of those

67. *Heller v Uber Technologies Inc*, 2019 ONCA 1 [*Heller*]. And see now *Uber Technologies Inc v Heller*, 2020 SCC 16.

68. Langille, *supra* note 1 at 211.

69. *Ibid.*



primary rights generate reparative obligations on the employer duty-bearer, enforceable through a public institution such as a court or tribunal. Unlike ordinary private law rights, however, public officials also have a central role in enforcing employment rights. They might initiate investigations of breaches, pursue enforcement actions against recalcitrant employers, and even provide representation to the employee where the employer contests the binding order made against it. It is common to see labour inspectorates charged with the public task of promoting compliance with labour standards. It would be more surprising to see “torts inspectorates” charged with the public responsibility to promote compliance with the private rights protected through the law of torts. Therein lies a most interesting puzzle.

Langille also provides important reflections on the role of arbitration and the “duty of fair representation” in Canadian labour law. Langille is broadly supportive of the central role of arbitration in the interpretation and enforcement of collective agreements. He also supports the proposition that arbitrators should integrate relevant statutory material into the interpretation of collective agreements. This would seem to follow from his commitment to vindicating public values against private interests. Here, the public values are represented in general legislation, and private values are represented by the autonomy of the collective bargaining parties to pursue their own interests in a private contractual process.

The overlap between statutory standards and collectively agreed norms is particularly problematic where the labour code defers to the remedies provided in the collective agreement. This is because the employee may be deprived of the normative power to pursue the grievance. The trade union may elect not to pursue the employee’s grievance, though this election is subject to a “duty of fair representation.” In this situation, Langille asks several questions:

If it is impossible to contract out of these acts, how is it possible to deny the employee the right to pursue his remedy by the side wind of the application of the duty of fair representation? Is it possible for a trade union not to pursue a statutory right and yet not be in breach of that duty? Can the statutory right be traded or balanced off, as we recognize individual claims to collective agreement rights properly may be?<sup>70</sup>

Langille argues persuasively that the union’s duty of fair representation should be shaped by statutory policies in the relevant legislation. This would mean that where fundamental rights were protected through statute,

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70. *Ibid* at 227.



such as equal pay or the right to refuse work in the face of imminent danger, the employee (rather than a third party such as a trade union) should possess the normative power to seek redress through adjudication. This reveals the shifting nature of public and private values. For the repositioning of the normative power so that it rests with the primary right-holder, the employee herself, is strongly characteristic of the architecture of private law and the values of corrective justice.

Enforcement is now one of the most difficult and controversial areas in contemporary labour law. We will consider two such examples drawn from UK and Canadian law. The first example is the growing significance of arbitration clauses in individual employment contracts. These clauses provide a mechanism for contracting out of public courts, channeling disputes about public statutory rights into private arbitration. In more extreme forms, they also provide a substitute for capital mobility so that transnational firms can escape the regulatory requirements within particular jurisdictions through “choice of law” clauses determining the applicable law. We might describe this as the phenomenon of juridical mobility, which is more frictionless than capital mobility. The second example is the political attack on *substantive* labour rights through the tightening of *procedural* law. This enables a *de facto* deregulation of employment rights, while the substantive law on the statute books remains untouched. An example of this is provided by the UK’s recent experience with tribunal fees for claimants, the effect of which was to decimate the individual enforcement of employment law in the UK.

Enforcement identifies a fundamental way in which the private and public are inseparably linked: “Public institutions such as courts are required for private rights to be determined, declared and coercively enforced as a system. The basic function of these institutions is, nonetheless, to systematize and make those rights omnilateral.”<sup>71</sup> This linkage between private rights and public adjudication has been a central topic in some recent work in private law theory. Here I focus on the work of Arthur Ripstein<sup>72</sup> and John Gardner,<sup>73</sup> and their reflections on the role of public courts in private law.

In *Private Wrongs*, Ripstein explains the role of public courts in the light of his basic commitment to private rights as a scheme of equal freedom. The plaintiff enjoys an unfettered normative power to decide whether to seek redress in court in situations where a wrong has been

71. Barker, *supra* note 8 at 13.

72. Arthur Ripstein, *Private Wrongs* (Oxford: Oxford University Press, 2016).

73. John Gardner, *From Personal Life to Private Law* (Oxford: Oxford University Press, 2018).

perpetrated against her. Why does the state take no stand on whether her rights should be vindicated and corrective justice restored? After all, a world in which fewer private wrongs are committed would be a better world, would it not? The answer, for Ripstein, lies in a feature of private rights in general. The wronged party’s power to see reparation in a court of law is a corollary of the position that “the state takes no position on whether you should exercise your power.”<sup>74</sup> As with the exercise of primary rights, so it is with the power to vindicate those rights if they are infringed. The state stands ready to protect those rights if called upon to do so, but enforcement must be at the plaintiff’s initiative. The injured party is left free “to decide whether to stand” on her infringed rights.<sup>75</sup> She might decide to accept an apology. Or she might decide that litigation isn’t worth the hassle. Or she might agree through contract to submit to a cheap and expeditious form of private dispute resolution, such as private arbitration. All of this is left to the plaintiff to decide. To return to our earlier example, that is why there is no “torts inspectorate” to encourage victims to seek legal redress against tortfeasors.

Ripstein also explains how a scheme of *private* rights is dependent upon a system of *public* courts. The plaintiff and defendant are each in charge of themselves. Where the plaintiff alleges that she has been wronged by the defendant, that remains an allegation “until a third party with authority over both the plaintiff and the defendant has resolved the dispute on its merits.”<sup>76</sup> This means that the state has an “obligation and entitlement to set up institutions for making, applying, and enforcing law.”<sup>77</sup> Not only do courts provide an authoritative resolution of the dispute between plaintiff and defendant. They also provide authoritative determinations of the relevant law, the provision of which is a public good for all citizens.<sup>78</sup> In this way, a comprehensive system of private arbitration could not provide a satisfactory substitute for a system of authoritative public courts. Ripstein also recognizes that there may sometimes be good reasons to replace private rights with alternative mechanisms of public protection (for example, workplace safety insurance).<sup>79</sup> Nevertheless, where X’s entitlement is a private right, the ability for an individual plaintiff to opt into private arbitration is a corollary of Ripstein’s general approach to private rights and normative powers. Furthermore, where X’s

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74. Ripstein, *supra* note 72 at 271.

75. *Ibid* at 272.

76. *Ibid* at 273.

77. *Ibid* at 289.

78. *Ibid* at 14.

79. *Ibid* at 292.

entitlement is a private right, it would be wrong to give a third party any power over the enforcement of that entitlement.

In *From Personal Life to Private Law*, John Gardner recognizes the “radically discretionary” character of the plaintiff’s power to decide whether to pursue the defendant through law.<sup>80</sup> Indeed, Gardner regards this aspect of private law as something of a puzzle. The plaintiff can decide to sue the defendant on the most spurious of grounds. If she decides to do so, she can bring the awesome machinery of the state to bear on the defendant, through the medium of public courts. Gardner rejects the idea that this feature can be explained and justified through an appeal to personal freedom. Indeed, he characterizes it as “a typically illiberal arrangement” for “however stupid, she can dignify her stupidity with the authority of the court and foist it thereby on the defendant” in legal proceedings.<sup>81</sup> Can this special position of the plaintiff, the legal system’s chosen “enforcer” of her own primary rights, be justified other than through the plaintiff’s own freedom?

According to Gardner, the “tertiary right” of a plaintiff against others “that they not usurp her in asserting or enforcing” her primary right (and secondary right to reparation following its infringement) is structurally very different to her primary and secondary rights.<sup>82</sup> That is because the duties corresponding to the tertiary right are not, like the primary and secondary rights, duties imposed on the defendant. These “tertiary duties” are duties on the rest of us either to not obstruct or even to positively support the plaintiff in vindicating her own rights against the defendant. According to Gardner, the special role of the plaintiff as an “enforcer” of her own rights in the legal system is justified on the basis of a range of public good arguments: (i) the coercive character of the public judicial system incentivizes defendants to engage with claims of wrongdoing, and this could promote alternative (cheaper, less stressful) processes for the defendant to repair the wrong against the plaintiff; (ii) prosecuting officials “may be more expensive, more erratic, less nimble, and/or less sensitive to the niceties of the situation than the plaintiff... Sometimes (eg when intimidation of the plaintiff is likely) the pursuit of a wrongdoer by a prosecutor may serve the person wronged, as well as the rest of us, better”; (iii) third-party intervention might exacerbate the dispute, although in certain situations skilled intervention could defuse the situation; (iv) the distribution of enforcement powers to private individuals militates against

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80. Gardner, *supra* note 73 at 201.

81. *Ibid* at 202.

82. *Ibid* at 207.

concentrations of power in public officials, and this “contributes to the flourishing of the rule of law by ensuring that the law and its institutions do not become a tool only of an oligarchy of officials.”<sup>83</sup> We should note the public and instrumental character of these considerations, all of which go to support an ostensibly “private” power of the plaintiff to seek legal redress.

These engagements from Ripstein and Gardner offer important perspectives on some themes from “Subset.” Take, for instance, the idea that third parties such as trade unions might have standing to enforce (or perhaps even waive) enforcement of the employee’s rights. The idea of third party standing to enforce private rights would be scarcely comprehensible on Ripstein’s account. By contrast, there is more space in Gardner’s account to accommodate such an arrangement. The involvement of a third-party enforcer might incentivize employers to engage with the allegation of wrongdoing without the expense of litigation. Trade union officials are less likely to be intimidated by employers, and the special expertise of trade unions in dispute resolution mean that there are advantages in giving them standing rights. A role for trade union enforcers serves the rule of law by diffusing undue concentrations of power, particularly in public enforcement agencies. There is fertile scope for experimentation with hybrid enforcement models coordinated between public and private actors. For example, where enforcement strategies opt for a “prosecution model” over a “litigation model,”<sup>84</sup> we might prefer to disperse power by giving trade unions and employees opportunities to pursue private prosecutions or to seek judicial review of an enforcement agency’s decision not to prosecute. We might also prefer enforcement models that adopt a “prosecution model” alongside a “litigation model,” rather than to treat the “prosecution model” as a substitute, so that individuals do not feel disempowered in the enforcement process.<sup>85</sup> This provides an extra reason to be wary of elevating the “public” over the “private” at a methodological level, not least because it risks obscuring the vital contribution of recent work in private law theory to advancing our understanding of enforcement issues in employment law.

We will examine two recent examples that illustrate this complex interplay between “public” and “private” in enforcement: the use of

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83. *Ibid* at 210.

84. *Ibid* at 209.

85. In this respect, the UK law on health and safety opted for a “prosecution model” and extinguished the ability of individuals to seek civil reparation, with deregulatory effects. See Michael Ford, “The Criminalization of Health and Safety at Work” in Alan Bogg, Jennifer Collins, Mark Freedland & Jonathan Herring, eds, *Criminality at Work* (Oxford: Oxford University Press, 2020) 409.

arbitration clauses in employment contracts and the approach of the Canadian courts in *Uber v Heller*,<sup>86</sup> and the regime of tribunal fees in the UK, which was struck down as unlawful by the UK Supreme Court.<sup>87</sup>

*Heller* involved a legal challenge to a mandatory arbitration clause in a contract between Uber and an UberEATS driver, and whether there needed to be a mandatory stay of court proceedings under the *Arbitration Act 1991* given the existence of the arbitration clause. The arbitration clause required disputes to be referred to arbitration in Amsterdam, which would be subject to the law of the Netherlands. The clause also required the payment of US \$14,500 as an administrative cost. The appellant earned \$20,800–\$31,200 per year before taxes and expenses were deducted. Nor did the fee include other costs likely to be incurred in an arbitration, such as travel to Amsterdam, accommodation, and legal representation. The Ontario Court of Appeal determined that the arbitration clause was invalid for two reasons. First, it constituted an unlawful “contracting out” of the protective provisions of the *Employment Standards Act 2000*. Second, the arbitration clause was invalid based on the unconscionability doctrine’s necessary conditions:

1. a grossly unfair and improvident transaction;
2. a victim’s lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim’s ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party’s knowingly taking advantage of this vulnerability.<sup>88</sup>

The Ontario Court of Appeal decision in *Heller* represented a powerful countermovement against the use of arbitration clauses in employment contracts. These arbitration clauses have sought to exploit the differences in worker-protection between different labour law systems. Legal norms are configured as an object of consumer choice, like shoes or sofas. In the most extreme versions, employment contracts may provide for compulsory and individualized private arbitration so that employment disputes are channeled out of the system of public courts entirely.<sup>89</sup> In the US, the public courts have themselves been complicit in this privatization

86. *Heller*, *supra* note 67.

87. *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 [UNISON]; Michael Ford, “Employment Tribunal Fees and the Rule of Law: *R (Unison) v Lord Chancellor* in the Supreme Court” (2018) 47: 1 *Indus LJ* 1.

88. *Heller*, *supra* note 67 at para 60.

89. Matthew W Finkin, *American Labor And The Law: Dormant, Resurgent, And Emergent Problems* (The Netherlands: Kluwer Law International BV, 2019) at 54–62.

of public justice.<sup>90</sup> The unconscionability argument in *Heller* can be understood as a private law response to the problem of arbitration, focusing on the exploitative contracting behaviour of powerful corporate actors such as Uber. This bargaining context (the gross substantive unfairness of the contractual term, the extreme imbalance of bargaining power, the absence of legal advice, knowingly taking advantage of the weaker party’s contractual vulnerability) meant that the contract term was invalid.

By contrast, the statutory “contracting out” argument in *Heller* connected with wider public good arguments against a system of private arbitration, independently of private law concerns about the specific bargain itself. For example, Finkin has argued that there are strong policy arguments in favour of an exclusive jurisdiction for public courts: “the vindication of legal rights is best reposed in a public body: one whose competence in the law is assured, whose impartiality is above question, whose process is transparent, whose decisions are accessible and have broader legal and communal impact and which is subject to comprehensive public accountability.”<sup>91</sup> Where private arbitration clauses are utilized so extensively that litigation in public courts disappears, the overall system of public justice and the rule of law is undermined. In this situation, the public good would justify a curtailment of private arbitration clauses even where there is no bargaining unfairness in the individual employment contract.<sup>92</sup> There is perhaps more space in Gardner’s account of private law enforcement than Ripstein’s to accommodate these public good arguments, although Ripstein is of course astute to the distinctive virtues of a system of public justice through courts.

A majority of the SCC upheld the decision of the Ontario Court of Appeal but the justices did so for different reasons. It is possible to identify two broad approaches in the majority, what could be described as a “contractual” approach and a “constitutional” approach. Justices Abella and Rowe (Chief Justice Wagner and Justices Moldaver, Karakatsanis, Martin and Kasirer concurring) exemplified the contractual approach.

90. See *Epic Systems Corp v Lewis*, 138 S Ct 1612 (2018), where a majority of the US Supreme Court upheld the preclusion of group claims by mandatory arbitration clauses in employment contracts.

91. Matthew Finkin, “Privatization of Wrongful Dismissal Protection in Comparative Perspective” (2008) 37:2 *Indus LJ* 149 at 164.

92. This is not just a concern in the employment field. Barker, *supra* note 8 at 18, notes that in the US “civil cases have all but vanished from the courts.” This creates difficulties for a system of public justice and the Rule of Law (*ibid* at 18-19). John Gardner also observes that while “courts do not have an institutional monopoly on doing justice,” private arbitrators might. “[W]hat the courts do have an institutional monopoly on is doing justice *according to law*.” This represents another public good that must be realized through courts and cannot be realized by private arbitration: John Gardner, “Legal Justice and Ludic Fairness,” online (pdf): <<https://johngardnerathome.info/pdfs/justicefairness-madrid.pdf>> [perma.cc/8TED-Y47F].

They did so on the basis that the arbitration clause was unconscionable and hence invalid. Justice Brown favoured a “constitutional” approach. He rejected the unconscionability analysis of Justices Abella and Rowe on the basis that it expanded the doctrine beyond its proper limits, leading to an unacceptable degree of uncertainty for contracting parties. Justice Brown instead decided the case on the narrower ground of public policy. The effect of this arbitration clause was to exclude Mr. Heller’s access to an appropriate forum for a just determination of his legal rights. In impeding access to justice, the clause undermined the rule of law. This invoked an established head of public policy, preventing ouster of the courts in the determination of legal rights, and this was sufficient to impugn the disputed clause in *Heller*. It did so without any wider disruptive effects on the negotiation of contracts, which depend upon a stable and predictable framework of legal rules.

The doctrine of unconscionability favoured by the majority was based upon two elements: an (i) inequality of bargaining power resulting in (ii) an improvident transaction. It should be noted that this represents a wide approach to unconscionability. Since many employment contracts are now based on standard form written documentation, they might engage the “inequality of bargaining power” concern rather easily. The legal analysis would then shift to an enquiry into whether the specific term or overall bargain was “improvident.” By contrast, Justice Brown’s constitutional argument was based on the rule of law, and it connected with public good arguments against a system of private arbitration. This public rule of law argument is wider than concerns about the specific bargain itself.

In focusing on the specific public policy issue at stake in the *Heller* dispute—the rule of law and effective access to a forum that can adjudicate disputes about legal rights justly and fairly—Justice Brown’s judgment provides a more tailored method for scrutinizing the proportionality of such clauses. Private arbitration would be permissible where it did not preclude access to justice. The mischief of the specific clause in *Heller* was that it was designed to make arbitration *inaccessible* to the weaker party—the antithesis of access to justice. Justice Brown’s approach also avoids difficulties with the unconscionability approach where, for example, the relevant clause was accompanied by a transparent explanation available to the party before entering the contract. Here, the deficiencies in the contracting process may be resolved sufficiently to avoid unconscionability. The rule of law objection would still stand. Contractual approaches to the *Heller* mischief are always vulnerable to circumvention because strong, well-advised parties can configure the negotiation process to mitigate the procedural deficiencies just enough to evade the doctrine. The value of the



“constitutional” perspective is that it is better able to vindicate important public values, such as the rule of law, that would be missed by a private law focus on procedural fairness in the individual bargaining process.

The arbitration clause in *Heller* imposed exorbitant costs on the Uber driver, which would have had the predictable effect of pricing her out of access to justice. It is bad enough when private employers do this. It is grave when governments do so. In the UK, a tribunal fee regime was implemented by the Coalition Government in 2013. It followed the publication of a Ministry of Justice consultation paper in January 2011 setting out the Government’s intention to implement fees for Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) claims.<sup>93</sup> Tribunal claims dropped off a cliff following its introduction.<sup>94</sup> The pattern of precipitous decline was certainly clear by the time of the second hearing in the Divisional Court.<sup>95</sup> The rapid and drastic real-world impact of tribunal fees was probably beyond even the wildest dreams of its most fervent political supporters. Lord Reed concluded that “there has been a dramatic and persistent fall in the number of claims brought in ETs...of the order of 66-70%.”<sup>96</sup> Furthermore, the remission scheme had not worked as expected, with the “proportion of claimants receiving remission...far lower than had been anticipated.”<sup>97</sup> The Lord Chancellor’s discretionary power to remit fees had been exercised only rarely.<sup>98</sup> The UKSC also referred to an Advisory, conciliation and arbitration service (Acas) survey, published in 2015,<sup>99</sup> which found that a significant number of claimants did not pursue legal claims because of the practical unaffordability of fees.<sup>100</sup>

The fee regime was struck down as unlawful by the UKSC, principally on the basis that it violated the common law fundamental right of access to a court. Prior to the UKSC decision, UNISON had lost three times in the lower courts. In the lower courts, no judge had been prepared to leap the slender evidential gap between the aggregate statistics on tribunal claims to the unaffordability of the fees for individual claimants. Since the behavioural pattern might be explained on the basis that claimants were

93. UK, Ministry of Justice, *Charging Fees in the Employment Tribunals and the Employment Appeal Tribunal* (Consultation Paper) (London: December 2011).

94. For early academic criticism of the fees regime, see KD Ewing & J Hendy QC, “Unfair Dismissal Law Changes: Unfair?” (2012) 41:1 *Indus LJ* 115.

95. *R (Unison) v the Lord Chancellor* [2014] EWHC 4198 (Admin); [2015] 2 CMLR 4.

96. *UNISON*, *supra* note 87 at para 39.

97. *Ibid* at para 43.

98. *Ibid* at para 44.

99. *Ibid* at paras 45-46, discussing Acas, *Evaluation of Acas Early Conciliation 2015*, Research Paper (2015), online (pdf): <<https://www.acas.org.uk/research-and-commentary>> [perma.cc/QSQ6-5ZH2].

100. *UNISON*, *supra* note 87 at para 46.



unwilling, as opposed to unable to pay, the regime was upheld as lawful. The legal focus on an individual's ability to pay is focused on the position of the individual citizen vis-à-vis the public system of justice, and the individual citizen as a paying service-user.

By contrast, the UKSC assessed the legality of the fee regime based on the rule of law as a *common good* for citizens in the polity. As such, access to a court was itself a fundamental right contributing to a public good, not merely a private amenity for individuals to pursue their legal grievances. There are interesting parallels here with Justice Brown's judgment in *Heller*. As Lord Reed put it, "People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations."<sup>101</sup> This reflects an ideal of the rule of law as protecting the liberty of citizens under a system of constitutional government. The law must be "reliably enforced and fairly and consistently applied" so that civic independence is assured.<sup>102</sup> The common law's concern with freedom as independence is especially acute for employees and workers, for ineffective systemic enforcement entails that "the party in the stronger bargaining position will always prevail."<sup>103</sup>

These constitutional principles emboldened the UKSC to approach the available evidence differently to the lower courts. The test for whether the Fees Order was ultra vires was whether there was a "*real risk*" that claimants would "*effectively be prevented*" from having access to the court.<sup>104</sup> This displayed a welcome sensitivity to the real world occupied by workers. As such, the formula of "*real risk*" meant that it was not necessary to adduce "*conclusive evidence*" that people were prevented from bringing claims. The aggregate data was sufficient to establish a fall that was "so sharp, so substantial, and so sustained as to warrant the conclusion that a significant number of people who would otherwise have brought claims have found the fees to be unaffordable."<sup>105</sup> This was reinforced by Lord Reed's observation that affordability must be decided

101. *Ibid* at para 71.

102. TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford: Oxford University Press, 2013) at 89. This has obvious affinities with republican work on freedom as non-domination, on which see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

103. *UNISON*, *supra* note 87 at para 72.

104. *Ibid* at para 87 [emphasis added].

105. *Ibid* at para 91.

“according to the likely impact of the fees on behaviour in the real world.”<sup>106</sup> As such, the fees needed to be “reasonably” affordable, not theoretically affordable.<sup>107</sup> Finally, Lord Reed drew attention to statutory rights where the corresponding remedies were either low monetary awards or even non-pecuniary, such as the right to written statement of terms and conditions. In these circumstances, the costs of seeking justice would render its pursuit “futile or irrational.”<sup>108</sup> Even where claimants were seeking to vindicate statutory rights with higher monetary awards, the difficulties in predicting a successful outcome, compounded by the shocking figures on non-enforcement of ET awards, meant that enforcement was likely “irrational or futile” in many of these cases too.<sup>109</sup> This undermined the public good represented by the effective general enforcement of each individual’s employment rights.

These public systemic considerations were extremely important in justifying the Court’s conclusion that the fees regime was unlawful. Enforcement is a site where the “public” and the “private” intersect. The insight that systemic enforcement is a public good also supports the view that exclusive reliance on individual litigation, even without excessive court fees and supported by generous legal aid, is unlikely to be enough. Effective enforcement must be sensitive to a range of considerations. John Gardner’s recent work identifies the range of considerations relevant to this enquiry. It also identifies the limits of normative argument, for many of the final judgements will be informed by empirical work on the real world effects of specific models such as standing for trade union enforcers, the practical limitations of public agency enforcement in areas such as national minimum wage, blending criminal and civil law measures, and so forth.

*Conclusion: Employment law as a hybrid of private and public law*

The arguments in “Subset” have stood the test of time. They could even be regarded as ahead of their time. Individual employment rights have become increasingly important in providing a basic facilitative structure for collective activities in the workplace, particularly in precarious forms of work that appear to be excluded from standard labour law protections. There has been a greater willingness to use innovative private law arguments in litigation, for example the sham doctrine in the English

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106. *Ibid* at para 93.

107. *Ibid*.

108. *Ibid* at para 96.

109. See further Abi Adams & Jeremias Prassl, “Vexatious Claims: Challenging the Case for Employment Tribunal Fees” (2017) 80:3 Mod L Rev 412.

law on employment status or unconscionability in the Canadian *Uber* litigation. “Subset” also identified enforcement architectures as a central issue in employment and labour law. Over the last decade, issues around enforcement have moved to the centre of public policy discourse, and the arguments in “Subset” speak powerfully to our current challenges.

There is more difficulty in the claim that the “public” should have normative priority over the “private.” In fact, many of the arguments in “Subset” point towards a more nuanced understanding of the “public” and the “private.” It contemplates a richer and more complex vision, whereby public and private values intersect in a multiplicity of ways. Employment law, based upon corrective justice between employee right-holders and employer duty-bearers, partakes of the basic structural elements of private right. There is a dignity in being taken seriously as an individual bearer of rights in a public court.<sup>110</sup> The enforcement of employment law, and particularly the involvement of actors other than the individual right-holder in enforcement, inevitably engages questions that are more public in nature. In the course of reflecting on “Subset,” I have indicated some ways in which recent work in private law theory illuminates some of the most fascinating enforcement puzzles in modern employment law. We need to keep the “public” and the “private” in view, and give full recognition to the internal complexity of these ideas. To do otherwise is to do employment law (and the workers who benefit from its protection) a disservice.

In particular, it is important that labour lawyers reconnect with private lawyers so that scholars in both domains can learn from each other. It is also important that labour law theory is engaged with work in private law theory. In retrospect, it may be that Langille’s strong commitment to the “primacy of public values” was a rhetorical defence anticipating predictable criticisms that the “primacy of employment law” was a betrayal of collective and solidaristic values. While such worries on the author’s part would have been perfectly understandable, the criticism that the “primacy of employment law” is a betrayal would be wide of the mark. The spirit of its arguments should be read as expanding the circle of solidarity so that the “have-nots” sit at the centre of our discipline, exactly where they belong. Private law doctrines, values and theory can contribute to improving the position of the “have-nots,” recognizing their dignity as bearers of rights. As labour lawyers, we overlook those private law resources at our peril, and to the heavy cost of those most in need of protection. Yet this must always be tempered by a recognition that the public institutions of the state, such as courts and labour inspectorates,

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110. Jeremy Waldron, *Dignity, Rank, & Rights* (Oxford: Oxford University Press, 2012).

must perform an important public role in securing the enforcement of workers’ fundamental rights. In employment law, at least, the public and the private stand or fall together. And employment law is best understood as a hybrid of private and public law.

