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If Labour Law is a Subset of Employment Law, What is Employment Law a Subset of?

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An academic life lived over decades can provide real rewards. One is thinking about a subject, such as labour law, over a significant period. Such longer-term speculation can lead to interesting questions—such as, what makes labour law a subject anyway? A second advantage of academic seniority is the opportunity to sustain longer-term relationships with other scholars. Both the temporal and personal advantages are joined here because four leading labour law scholars whom I have known for a (sometimes very long) while, have written about an essay that I wrote forty years ago. This essay is my effort to join them in trying to understand what I was really up to all those years ago. The result, borrowing from T.S. Elliot, is "to arrive at the place I began, and see it for the first time."

Une vie universitaire vécue pendant des décennies peut apporter de réelles récompenses. On réfléchit à un sujet, tel que le droit du travail, pendant une période de temps significative. Une telle réflexion à long terme peut conduire à des questions intéressantes, par exemple : qu'est-ce qui fait du droit du travail un sujet de réflexion de toute façon? Un deuxième avantage d'une longue expérience universitaire est la possibilité d'entretenir des relations à plus long terme avec d'autres universitaires. Les avantages temporels et personnels sont réunis ici parce que quatre éminents spécialistes du droit du travail que je connais depuis un certain temps (parfois très longtemps) ont écrit sur un essai que j'ai rédigé il y a quarante ans. Le présent article représente mon effort pour me joindre à eux afin d'essayer de comprendre ce que je faisais vraiment il y a toutes ces années. Le résultat, pour emprunter à T.S. Elliot, est « d'arriver à l'endroit où j'ai commencé, et de le voir pour la première fois .»

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"Every subject studied in the university, or elsewhere, is a structure to be entered into."
Northrup Frye, On Education

Introduction: "It was ~~Twenty~~ Forty Years Ago Today"[1]

Bruce Archibald, Alan Bogg, Mark Freedland, and Claire Mummé constitute a formidable labour law foursome. I deeply appreciate their taking time to reflect upon "Labour Law is a Subset of Employment Law" ("Subset")[2] forty years after its publication. Mark Freedland is widely and justly regarded and respected as our discipline's leading thinker on the very idea of employment.[3] He also taught me labour law at Oxford many years ago. Alan Bogg is one of our discipline's most philosophically sophisticated scholars, dedicated to the highest academic standards, and someone with whom I have enjoyed spirited exchanges over the past decade or so.[4] Claire Mummé is a rising star in labour law's constellation, and it was my privilege to have been, a few years ago, a member of her

1. With apologies and thanks to Sgt Pepper.
2. Brian Langille, "Labour Law is a Subset of Employment Law" (1981) 31 UTLJ 200 ["Subset"].
3. See Mark Freedland, *The Contact of Employment* (Oxford: Clarendon Press, 1976); Mark Freedland, *The Personal Employment Contract* (Oxford: Oxford University Press, 2003); Mark Freedland & Nicola Kountouris, *The Legal Construction of Personal Work Relations* (Oxford: Oxford University Press, 2011).
4. See Alan Bogg, "Labour Law and Trade Unions: Autonomy and Betrayal" in Alan Bogg, Cathryn Costello, ACL Davies, & Jeremias Prassl, eds, *The Autonomy of Labour Law* (Oxford: Hart Publishing, 2015); Alan Bogg "The Constitution of Capabilities: The Case of Freedom of Association" in Brian Langille, ed, *The Capability Approach to Labour Law*, 1st ed (Oxford: Oxford University Press, 2019); Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 [Langille & Oliphant, "The Legal Structure of Freedom of Association"]; Brian Langille "What is Labour Law? Implications of the Capability Approach" in Brian Langille, ed, *The Capability Approach to Labour Law*, 1st ed (Oxford: Oxford University Press, 2019) ["What is Labour Law?"].

Doctoral Defence committee.[5] Bruce Archibald came before all of that—we were both at Dalhousie Law School as students where he was a year ahead of me and where he was, a few years later, my colleague. He has been a sterling friend and supporter from the beginning and like our mentor, Innis Christie, he has combined academic labour law with public service, for example, at the Labour Relations Board and as an Arbitrator. I am humbled and thrilled that this powerful quartet has read, reflected upon, responded to, and best of all, enlarged our, or at least my, understanding of "Subset."

I also owe thanks to two others—Harry Arthurs and the late Innis Christie. Let me explain why. Alan Bogg begins his paper by noting that he was 8 years old when "Subset" was written. I was 28. I was also a third-year Assistant Professor teaching labour law at Dalhousie Law School. That I was a labour lawyer, an academic, and at Dalhousie, I owe to Innis Christie[6] who was my teacher, mentor, colleague, and friend. It was typical of Innis to suggest to the Labour Law Casebook Group[7] (of which Innis was a member and which was headed by Harry Arthurs) that I should be invited to their academic conference to be held at Queen's University in the fall of 1980. I wrote "Subset" for that conference. I can still recall, vividly, the great relief, and sense of deep satisfaction, when I got a call from Innis several days before the conference to say he had read the draft and liked it a lot. That meant a great deal to me. Not simply because he was my "maestro," as Italian colleagues would put it, but because "Subset" was trying to say something about how we should understand the discipline that Innis had almost single-headedly created in Canada—Employment Law.

When I presented the paper to the Labour Law Casebook Group at the meeting in 1980, the positive, if searching, reactions of others—Paul Weiler, Bernie Adell, David Beatty, Rob Prichard, and Harry Arthurs among them—also meant a lot. Especially Harry. Harry was then, and still is, the Dean of Canadian labour law. You can draw a line under Harry's name and then debate, if you are so inclined, who comes second.

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5. Claire Mummé, *That Indispensable Figment of the Legal Mind: The Contract of Employment at Common Law in Ontario, 1890-1979* (PhD Dissertation, Osgoode Hall Law School, 2013).

6. My labour law Professor at Dalhousie, later Dean of Law. Also Chair of the NS Labour Relations Board, respected labour arbitrator, public servant, and much more, including being the "founding father" of Employment Law in Canada. Innis was salt of the earth, tough as they come, competitive as hell, smart as all get out, and a demanding scholar who asked a lot of himself and others. He also loved a good time. Innis died in 2009. I will always be in his debt. I know that many others feel the same.

7. A group of labour law teachers from across Canada who (still) publish the "casebook" used to teach in Canadian law schools—now in its 9th edition; Labour Law Casebook Group, *Labour and Employment Law: Cases, Materials and Commentaries*, 9th ed (Toronto: Irwin Law, 2018).

He was intimidating. He spoke in whole paragraphs. All of the time. He still does. It was Harry who developed the line, discussed in the papers collected here, that I was playing with individual rights in a way that might be seen as dangerous for the enterprise of collective labour law. I fought back as best I could—and the final line of the published paper—"I do not regard this as a cry for individual over collective rights, but rather for a consideration of the proper impact of our publicly expressed values upon private arrangements"[8]—is, as I recall, word for word, the final sentence in my verbal response to Harry's critique.

As it turned out Harry, and the Group, invited me to join them.[9] More than that—they came around to my way of thinking. They did so in a remarkable manner—by deciding to move from a labour law casebook (the casebook I had studied as Innis' student)—meaning a casebook solely about collective labour law—to a comprehensive casebook about all of our labour law, that is, both employment and labour law.[10] "Subset" was, with the support of David Beatty and Rob Prichard, published in the University of Toronto Law Journal in 1980. That publishing event was not un-instrumental in my being offered a Visiting Professorship at the University of Toronto the next year. I have been there ever since. The paper was important in my career. But here is an important point—perhaps my most important point in this essay—it was not until many years later that I came to understand, and then only gradually, what I had written in 1981. In fact, it was 25 years later that I was first able to write an extended essay about what was going on in "Subset"—at least as far as I could tell at that point.[11] I return to this truth below.

I would like to address all the thoughtful, critical, and creative points made by my four colleagues in their essays. But I have not been able to do that—their papers are simply too rich and full of interesting ideas, all carefully and generously presented. I have had to be selective. The central idea that I have chosen to pursue is to respond to a way of reading "Subset" shared by Alan and Mark. It is a reading they "see," but I explain why that reading was and is not apparent to me—and why I agree with Mark's

8. I was also citing Harry's own words to him, see Harry Arthurs "Free collective bargaining in a regulated society" in Frances Bairstow, *The Direction of Labour Policy in Canada* (Montreal: McGill University Industrial Relations Centre, 1977).

9. And I have been there ever since—now, I think, as the most senior member.

10. I remember Harry going to the blackboard, drawing two grids, and saying something like "OK, if we are going to do this, here is our first big editorial decision—do we go regime by regime (common law, collective bargaining, labour standards legislation) or issue by issue (dismissal, discrimination, managerial authority, etc)?" Great stuff. (We decided on regime by regime).

11. Brian Langille, "Labour Law's Back Pages" in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006) [Langille, "Labour Law's Back Pages"].

suggestion of another reading that is much closer to my intentions as the writer of "Subset." There are lessons for me—about the need for clarity of expression and careful use of language (on my part), especially if there is risk of a paper being read abroad. But perhaps we can learn something by thinking a bit about why Mark and Alan, from the UK, see and share so easily that possible interpretation while Bruce, Claire and I, Canadians all, do not. This is, I hope, in line with Mark's and Alan's careful and deeply informed accounts of the distinct evolutions of our discipline in our two countries.

I. *The view from "There"*

Both Mark and Alan say that "Subset" can be read as adopting the following, potentially unsettling, line of thought. In Canada there was and still is an important distinction between "labour law," which is law about and for unionized workers, and employment law, which is all of the rest of the law relevant to employers and employees—and thus all the law that unorganized employees have.[12] They read "Subset" as saying that this gives us one law for the "haves" (organized workers) and one for the "have-nots" (the unorganized). All of this is correct in my view. Mark then suggests that it is the burden of "Subset" to invert this relationship so that what we know as "labour law" should be "subordinated to" what we know as "employment law."[13] This would be indeed a "deeply provocative suggestion."[14] Alan uses similar language, also speaking of an "elevation"[15] of "individualistic" employment law and the "undermining"[16] of "collective" labour law, suggesting that this is "highly provocative… To modern eyes…even more acute."[17] This is because such a normative stance at least potentially "downgrades [or represents a "devaluation" of[18]] the collective dimensions of working life."[19] It also "subverts" the standard view of history that unions were instrumental in the development

12. Please note, as I was at pains to make clear in "Subset" (see *supra* note 2 at 220-221)—this is NOT saying that employment law is for the unorganized and not for the organized. Employment law generally applies to both groups. It is simply saying that employment law is all that the unorganized have by way of law. Here is how I put it at 220:

> "[…] the overwhelming fact is that by and large employment standards legislation applies to employees under collective agreements. The arguments for mutual exclusion are rejected. The legislation is paternalistic even were equality of bargaining power is assured by the procedural device of collective bargaining."

13. Mark Freedland, "Employment Law Revisited" in this volume at 2.
14. *Ibid* at 2.
15. Alan Bogg, "'Labour Law is a Subset of Employment Law' Revisited" in this volume at 6.
16. *Ibid*.
17. *Ibid*.
18. *Ibid* at 7.
19. *Ibid* at 6.

of legislated work standards.[20] All of this is, it is said, generously, undertaken with what might be good motives and normative ambition[21]—a desire to improve the lot of the have-nots in the name of the liberal values of equal "concern and respect,"[22] and the need to let "public values" trump "private" ones. In addition, despite its shortcomings, "Subset" was "prescient"[23] in foreshadowing, at a point when it was not as clear as it is today, the real-world decline of collective labour relations and the rise of individual employment law. I thank Alan and Mark for their persistent kindness in spite of what appears to be a piercing critique.

II. *The view from "Here"*

But my defence is, I am afraid, a complete one. In "Subset" I did not promote these ideas. I have not promoted them in the interim. And I don't promote them now. The point of "Subset" is *not* to take our existing understanding of the two fields of labour and employment law and then to propose what Mark wonderfully calls a "hostile takeover"[24] of one by the other. Rather, the point of "Subset" was to offer a new way of seeing the two existing parts of our law as part of a newly perceived and greater whole. That greater whole I called, for good reason, but with some obvious resulting confusion, "Employment Law." This move required us, in order to have a coherent view of the new and unified field, to start to work through the old bifurcated views, bit by bit, to see how, at both a substantive and procedural level, coherence within the new broader frame, could and should be achieved. That was the burden of "Subset."

I think all of this is clear on the face of "Subset." Alan gets this right straight off the bat by stating that "'Subset' provides a basic enquiry into the coherence of a legal discipline."[25] I can see more clearly now than then that this is indeed the case. At times Alan seems at home with this type of academic, or structural, or "pedagogic"[26] exercise. At other times he seems to lose patience with it.[27] But this is the key to "Subset." Alan is surely right

20. *Ibid* at 7.
21. Freedland, *supra* note 13 at 15.
22. The Dworkinian language of the time, which I adopted in "Subset," *supra* note 2.
23. Bogg, *supra* note 15 at 2.
24. Freedland, *supra* note 13 at 25.
25. Bogg, *supra* note 15 at 3.
26. *Ibid* at 8.
27. *Ibid* at 6:

> 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.

in saying that this sort of inquiry is not a judgement-free one. And I think it is clear on the face of "Subset" that I put my normative commitments on the table. But even though Alan is right about what "Subset" was about when I was writing it, I did not have the intellectual resources at the time to know that was what I was doing. I was, as I hope to make clear below, playing within established categories, without much of a clue about what made for a legal category in the first place. All of that came much later. Now I can read Alan's claim in a richer way—and he and I have had many exchanges about these matters. But this also means that looking back 40 years, I must be careful not to read too much into "Subset" of what I now can see it to be about.

Alan's accurate claim about "Subset's" mission is also the key to seeing the limitations and problem with "Subset." I simply start "Subset" by taking, as a given, the bifurcated state of Canadian law. I do then propose a unified view. But it was a unified view of "employment law." That is, the law of the employer-employee relationship. Bruce is right—I "bought into," took for granted, accepted without thought, the standard, often unarticulated, view of the time (what I now call "The Received Wisdom"—more on this later).[28] What I did was organize all of that into a unified account. And Alan is right that I was "not so concerned with this problem of context"[29]—ie with delimiting the field in other available ways ("work," or "productive labour," etc). But here is the key idea: Alan's point is more profound than it appears—it was not so much that I was not "concerned with," as I was not aware of the possibility of doing that. It is true that these days, 40 years later, thinking about how to delimit the field in a new way is basically all I do.[30] But back then I simply took the existing legal practices, sets of understandings, bodies of law—which constituted both employment law and labour law and offered a standard way of seeing them—and provided a new and "unified" interpretation. And I did so for reasons I set out in the paper—a better understanding of the discipline. To put it another way—I think Alan simply has the advantage of having been eight years old at the time of "Subset." He did not have to live with the limitations of the time. All I can say is that I did my best with the

28. Bruce Archibald, "Labour Law as a Subset of Employment Law? Up-dating Langille's Insights with a Capabilities Approach" in this volume at 44:

> [I]n the end, Langille in 1981 adopted the orthodox protective rational for employment/labour law (redressing inequality of bargaining power as between employers and employees), while hedging it about with qualifications, such as the need for human rights protections against irrational considerations, eg discrimination on the grounds of sex or race.

29. Bogg, *supra* note 15 at 5.
30. See discussion at 16 *below*.

intellectual resources I had at my disposal. "The past is a foreign country—they do things differently there."[31] I know this is true—I used to live there.

I hope readers today can excuse this limitation on my thinking. I have now come to see that my ignorance, and my way of proceeding then, are both revealing and important. But at the time, what I was saying literally went without saying. It was what everyone, who knew anything about employment law or labour law, knew. "Employment" was, for those of us who lived in that foreign country of the past, a "natural" category. It was the central "platform"[32] upon which labour rights, in both employment law and labour law, were constructed because it was the central legal platform for work. Employment was important both intrinsically and instrumentally. Employers and employees were the dramatis personae central to the two leading legal productions then running. The legal category of contract was the legal stage upon which they both performed. The reality of "inequality of bargaining power" was the menacing threat that animated the action in both scripts. What was threatened in both settings? What was the moral core of the story? It was the liberal instinct and demand for a requirement of justice in employment (having returned from Oxford and attending Dworkin's lectures and reading his work I used the language of "equal concern and respect" in "Subset"[33]). This was the deep morality on display on both legal stages. That is what made the show "important" and not merely a display of technical legal tinkering.

At least, that was my view. That is what "Subset" says. I think it was right. And my basic point was that once you see this, you see that all that separated employment law and labour law was a lack of imagination, a failure to draw back our lens (just) far enough to see a single stage with a larger, and more interesting, and complex legal production. A lot of the benefit of the new view would be to see common cause for our two isolated legal stories. But also, to grasp that while sharing common fears and desired ends, they adopted different means, one procedural, one substantive, for overcoming the former and securing the latter. This required seeing those different means as resting on different judgements about how best to proceed—strong paternalism on the one hand and (possible) collective voice/enhanced power at the bargaining table on the other. Seeing all this

31. LP Hartley, *The Go-Between* (London: Hamish Hamilton, 1953).
32. "Subset," *supra* note 2 at 202: "The employment relationship is a central organizational mechanism in our society, and it is through the employment relationship that the state has in large measure attempted to ensure that a social minimum is attained through a 'floor' of basic standards." It was not until much later that I began to use the word "platform": see Brian Langille, "Labour Policy in Canada—New Platform, New Paradigm" (2002) 28:1 Canadian Public Policy 133 ["Labour Policy"].
33. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977).

does not solve our problems. It just makes some of them, which existed all along, explicit, and tractable. And in "Subset" I took a limited stab at how our ultimate normative goals could help reconcile some of the tensions made plain when we tell one legal story, not two, where the different means of action now unfold on the same stage. I think most of these efforts were and are uncontroversial—for example, that human rights will still be a problem in majoritarian collective bargaining regimes.

All of that I think was worthwhile. It also had a real impact on how we taught our subject in Canada. And in teaching that unified course over the years I learned more about just how important the unified view of "Subset" was. I came to see that if you studied just the common law, or simply the substantive employment law statutes, or only collective bargaining law, you would not see that many of our important cases, the sort of case that makes it to the Supreme Court of Canada, are interesting just because they involve an overlap, either substantively, or procedurally, or both, between more than one of our "three regimes." If you study only one regime you will not even be aware of the intersections you are crossing, you will cause accidents you do not even know you participated in, and do damage to our law and to workers. The job of a good labour lawyer is to be aware of all of this, be equipped with the detailed knowledge of the procedural complexities this visits upon us (can/must this client go to arbitration, to court, or to an administrative tribunal (for example, The Human Rights Tribunal)?) Only one? More than one? If they can go to any of those, what law will be applied? And most important, how do we achieve just and substantive results within each of our labour law regimes without doing violence to the others?[34] Indeed, that idea of "three regimes"—not employment and labour, but common law, substantive statutes, and collective bargaining law—came gradually to me through years of teaching. And that idea led me to my first insight into a deeper understanding of what "Subset" was all about. As promised above, more on this below.

One final word about my use of the idea of "public values," something about which Alan in particular has much useful to say. "Subset" deploys the idea of public "values." It does not so much argue for as point out that the old categories of employment and labour law are best seen as sharing those values (seeking to provide some concern and respect in an important part

34. There are many great teachable "disaster" cases demonstrating this truth. See, for one "grade A large" example, *Central Okanagan School District No 23 v Renaud*, [1992] 2 SCR 970, 95 DLR (4th) 577. By the end of a unified course in labour law—when all three regimes are "on the table"—we spend most of our time reading recent, almost always SCC cases, in just this way.

of our lives where it would otherwise not be manifested: employment), and that they see a common obstacle to securing them: inequality of bargaining power. But this is a matter of public values, not public or private law, nor collective or individual law. Our public values do not map directly or exclusively onto public law or private law, or collective or individual law. I think this is Alan's point in part. But I also think he may miss a rather simple, perhaps too simple, point I was trying to make. Collective bargaining is bargaining. It may be more than that, but it is, legally, just that. Agency, freedom of contract, voice, are important. But bargaining outcomes are distinct from public, statutory, democratically mandated, law and are justified in different ways. Further, it must be recalled that democracy is more than majoritarianism and equal representation for all. It is also about equal liberty for all. It is about basic freedoms, now *Charter* freedoms, as well as democratic participatory rights. And thinking about the concrete relationship of the mechanism of collective voice/power (the old labour law) to basic legislative pronouncements (the old employment law) is a matter of considering when basic judgements about pretty bare social "minimums" (minimum wage for example), or fundamental rights (against discrimination, for example), should or should not give way to a (possibly) enhanced bargaining power and voice. That is the job of good modern labour lawyers—to work this out. In "Subset" I outlined some concrete elements of this task and took a view on some of them. My own views on some of the details of this—for example, on the application by arbitrators of employment standards legislation—have evolved over time (as I decided concrete cases as an arbitrator, for example).[35] But the basic idea of "Subset" is that a unified approach is a much better, and required, way of proceeding than the then intellectual/academic apartheid that dominated at the time. And there is no systematic bias here for or against any way of pursuing our goals, ie in favour of the old employment law. There is a bias in favour only of our goals, our ends. But not our means. And the issues I raised in "Subset" seemed and seem amenable to rational reflection in reconciling our means in a coherent way—both procedurally and substantively.

III. *What accounts for the differing views from "There" and "Here?"*

Mark and Alan are surely right. I did, it seems, make a mistake, and evidently did cause confusion for some, in selecting the label "employment

35. See *Curtis Products Corp v Industrial Wood and Allied Workers of Canada*, Local 500 (Layoff Grievance) (2002), 110 LAC (4th) 193 (Langille).

law" to identify the new unified account. They are right that I would have expressed myself more clearly if I had followed Mark's advice:

> I think that [Brian] saw the need to merge both 'labour law' and 'employment law' into a single over-arching discipline with a new and composite identity. If so, it was I think a misstep to use the terminology of 'employment law' to denote this new composite discipline. There are signs in the article that he was experimenting with '*the Law of the Employment Relationship'* as a new composite terminology, and we should read the article as if he had boldly gone right down that terminological path. So the slogan 'labour law is a subset of employment law' would expand out into the more elaborate proposition that '*Labour Law, as also Employment Law itself, is a sub-set of The Law of the Employment Relationship.'* That would have been far too cumbersome to form an arresting title for his article, but I like to think that it would more accurately have expressed its real intention.[36]

I take this point. Claire makes it as well.[37] However, I still understand my choice of terminology. This is for the following reason—once you see, as I was suggesting, that the new overall category I was describing comprehended the various ways of bringing justice to the *employment* relationship, "employment law" seems the most economical and accurate label. This was and is the logic of my title. (But, as I have already mentioned, this fixation on the category of employment is also the intellectual limitation of "Subset.")

Let me return to the question I mentioned earlier—why do Mark and Alan see what they see and read "Subset" they way they do, while Bruce, Claire and I do not? Is there something going on here, as perhaps there always is when comparative (labour in this case) law is the project? As Mark and Alan make clear in their nuanced accounts of the history of, and struggle for, the rhetorical high ground ("employment" versus "labour" as proxies for "individual' versus "collective") during the evolution of our discipline in the UK, some of it is just that—rhetorical maneuvering and positioning, often with an explicit agenda of making your true values clear. But I wonder if there is something not political or rhetorical, but rather juridical, at the base of the different attitudes of Mark and Alan, as opposed to Bruce, Claire and me. They read "Subset" as plausibly proposing a legal hierarchy of the two existing legal categories with employment law on top. But this is very hard for Canadians to understand. First, employment law, understood as the old category, could never have effected a "hostile

36. Freedland, *supra* note 13 at 26 [emphasis in original].
37. Claire Mummé, "Unifying the Field: Mapping the Relationship Between Work Law Regimes in Ontario, then and now" in this volume at 2, n 9.

takeover" of the old legal category of labour law because in Canada there was and is no legal vehicle for such a coup.[38] This is a basic juridical point, one which is fundamental to Canadian collective labour law. Second, beyond the juridical point there lie deep and unbridgeable normative waters denying the possibility of such a takeover. Let me deal with these two points in turn.[39]

In Canada, unionized employees under a collective agreement do not have a contract of employment. The only contract in existence is the collective agreement between the union and the employer. Employees are not party to that contract. It binds employees, who would be "third party beneficiaries" at common law, because the legislation says it does.[40] So, for example, unionized employees cannot sue their employer in court for wrongful dismissal. This is not because there is no term in their contract protecting them in this way—but because there is no contract at all. (Then, on top of that point of substantive law, there is the procedural point that no one can go to court to enforce a collective agreement—they must proceed to arbitration.) Collective agreement terms are not "incorporated" into individual contracts of employment. (Nor, directly, are employment standards.) That is not how it works in Canada. In Canada there is no unitary basis for our subject. So, thinking in terms of individual contracts in the collective sphere is an attempt, as Bora Laskin famously put it, to "re-enter a world which has ceased to exist."[41] Or, as Harry Arthurs put it wonderfully, describing the relationship between the common law of contract and the collective bargaining regime, "the umbilical cord has been severed."[42] This lack of an individual, or collective, contract to which individual workers under a collective agreement are a party explains why the "duty of fair representation" is so important and is discussed at some length in "Subset." Bruce makes this general point well and expresses it by saying labour law had an "autonomy"[43] that was well established in 1981. And he points out that this autonomy is now even more secure in light of the subsequent "constitutionalization" of our collective, but

38. *McGavin Toastmaster Ltd v Ainscough,* [1976] 1 SCR 718 at 725, 54 DLR (3d) 1: "The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement."
39. Today, I would call the first of these points a point of legal grammar, and the second a point of legal narrative.
40. See eg s 56 of the Ontario *Labour Relations Act*, *1995*, SO 1995, c 1, Schedule A: "A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement."
41. *Peterboro Lock Manufacturing Co Ltd,* [1953] OLAA No 2 at para 8, [1954] 4 LAC 1499.
42. *Port Arthur Shipbuilding* (1966), [1967] 1 OR 272 at 276, 60 DLR (2d) 214.
43. Archibald, *supra* note 28 at 8.

not individual, labour law. For Canadians it has always been difficult to conceive of employment law dominating labour law for this basic reason. Just as the old category of employment law, tied to the contract of employment, has difficulty claiming dominion over new "fissured" or "fracked"[44] work arrangements (where the tactic "de-contractualization" has been deployed[45]) so too it could never, in our law, assume a dominion over collective labour law. The limitations of the old employment law were profound, and so was its juridical separation from the old labour law. That is the juridical—or as I prefer to call it now, "grammatical" legal point.

There is another, more important, reason that Canadian labour lawyers in 1980 would find it difficult to interpret the title "Labour Law is a Subset of Employment Law" as proposing a hierarchy of the two familiar parts of our law with employment law on top. This is not a point of legal grammar but of normative narrative. Labour lawyers at the time of "Subset" had been raised on the "mother's milk" of the moral superiority of labour law. The thinking was and is straightforward: a generous employer might graciously "negotiate" decent terms of employment. Or a paternalistic state might intervene to provide the same terms via legislation. But only labour law opened the door for employees "doing it for themselves." This idea was present from the beginning—in the views of the founder of Canadian Labor Law—Bora Laskin. And as I tell my students, Bora begat Harry, and Harry begat Paul—Paul Weiler that is. And it is in the words of Paul Weiler that we can find the best articulation of this idea. In 1980, Weiler, in one of Canadian labour law's most famous passages, argued that collective bargaining is indeed important because it can deliver economic gains and because it introduces the rule of law (as opposed to managerial discretion) in the workplace. But, Weiler rightly insisted that these two features are not the identifying virtues of collective bargaining and that the true defence of collective bargaining does not reside in these two "deliverables," important as they are. This, he explains, is because "collective bargaining is not simply an *instrument* for pursuing external ends, whether these be mundane monetary gains or the erection of a private rule of law to protect the dignity of the worker in the face of managerial authority."[46] Indeed, these external ends can, after all, be provided by benign management or the state (via employment standards). "Rather, collective bargaining is

44. I owe this, as with much else, to Harry Arthurs.
45. Langille, "The Political Economy of Decency" in *ILO 100: Law for Social Justice* (Geneva: ILO, 2019) 503 at 525 [Langille, "The Political Economy of Decency"].
46. Paul C Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Carswell, 1980) at 33 [*Reconcilable Differences*].

intrinsically valuable as an experiment in self-government."[47] This basic idea was also expressed in wonderful words by the Supreme Court of Canada which has contrasted the "self-advancement of working people" with "legislative protectionism."[48] This morality, which we now see as constitutionally guaranteed and constituted as "freedom of association,"[49] is basic to the Canadian way of thinking.

"Subset" in no way challenges these truths, nor would it have been read by Canadian labour lawyers as doing so at the time. What "Subset" does do is show us that as part of a new and greater whole of the law aimed at justice in employment, these preeminent virtues of collective bargaining must be seen as part of that larger whole. In this new light the evident virtues of "the self-advancement of working people" and "self-government" have, as in our democracy in general, to be read as subject to protection of fundamental rights, and other basic public values. "Subset" also reminds us that we should not romanticize about the achievement of Weiler's three goals in the real world. "Subset" insists that we keep in mind that the virtues Weiler describes, all three of them, are in no way guaranteed by collective bargaining, which is, after all, simply bargaining. Those in many sectors of the economy with few skills, who are easily replaceable, in a time of high unemployment, may gain nothing by acting together. It also assumes, as Claire explores, a certain labour market reality of the standard employment relationship. And defenders of collective voice also had to make room for protection of fundamental rights and avoidance of abuse of majoritarian power.[50] But "Subset" agrees that the freedom of association is valuable for just the reasons Weiler sets out.[51] It simply reminds us of other truths we hold dear and of our need, as lawyers, to work through their integration in a coherent and justified unified field.

These ideas may or may not help explain the difference in interpretation of "Subset" on offer in the other papers. But I do know that in my thinking then and now, it did not occur to me that my proposal would be read as Mark and Alan were inclined, at least initially. And I do know that the legal vehicle for a "hostile takeover," which may be available in the UK, is not available in Canada. Finally, I do now know that Mark and Alan see what

47. *Ibid* at 33.
48. *Lavigne v OPSEU,* [1991] 2 SCR 211 at 296, 81 DLR (4th) 545, Justice Wilson [emphasis added].
49. There was no Canadian *Charter of Rights and Freedoms* in 1981.
50. See *Steele v Louisville & Nashville Railway Co*, 323 US 192 (1944) for an example of collective bargaining being used to pursue discriminatory aims.
51. Words that I have continued to rely on, down the years—see Langille, "Labour Law's Back Pages," *supra* note 11.

it is I was trying to say, but I also take their point that I was also putting an unseen (at least "from here") terminological obstacle in my own path.

Conclusion: Looking back with hindsight (and still finding unanswered questions)—What is employment law a subset of?

I cannot remember exactly how or even when I came upon the idea or title "Labour Law is a Subset of Employment Law."[52] A deeper thought—I cannot recall why I became interested in the basic idea that animated the writing of "Subset" and that Alan has accurately identified—the idea of "the coherence of a legal discipline."[53] But I do know that the instinct, primitive though it was at the time,[54] that this was a fundamental project, is one that has stayed with me. Teaching at the University of Toronto, where many leading private and public law theorists take the idea of the internal morality and coherence of law seriously, certainly has not hurt. But what surprises me most is that my ideas of what universities are for, what academic freedom demands by way of independent thought, what it is Professors can and should try to do in teaching a subject, and what important scholarship consists of,[55] have all evolved over a lifetime in a way that is traceable back to the basic approach to what is important and on display in "Subset."

But seeing this took a long time. It took me decades to get to the intellectual terroir that Alan, Bruce, Claire and Mark now casually command, and to the ability to ask the large questions they ask about how legal fields are delimited. And this "seeing" turned out to be a complex phenomenon—perhaps it is a form of "reflective equilibrium"—where my prior thinking not only informed my subsequent thoughts but my prior thoughts also are placed in a new light as reflection carries on. This is dramatically the case with "Subset." It is simply true that it took me decades to see the real meaning and value, and limitations, of that early piece. And it was only 25 years later that I could begin to write out at length what I had really put my finger on—something larger and more significant than I could comprehend at the time.[56]

Bruce has generously traced important developments in my thinking—for example the shift in my normative sources away from Dworkin and towards Sen and the ideas of human freedom and the Capability Approach.

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52. I do recall Innis liked it and started to use it regularly.
53. Bogg, *supra* note 15 at 3.
54. See *supra* note 28, where Bruce points out that I took for granted what I now call the "Received Wisdom" of labour law.
55. For very real inspiration on these points see Northrop Frye, *On Education* (Toronto: Fitzhenry & Whiteside, 1988).
56. See Langille, "Labour Law's Back Pages," *supra* note 11.

He has also, along with Alan, Mark, and Claire, recounted the fundamental changes in the real world of work. And Bruce has further explained how those real-world changes are linked to and dealt with in developments in my thinking about our subject, and to my widening of my set of normative concerns, to meet our new realities. He sees that I am a long way from the Langille of "Subset." All of this is generously recounted. I do not wish to repeat, in any detail, what I have said elsewhere about those issues.

But, I can see now some even more basic continuities in the evolution of my thinking—continuities which the reflections of my colleagues have made even more evident to me. At the most basic level, there is the core idea that ideas matter. That the world of the legal imagination matters. That the basic structure of our thinking about our subject is of great importance. In some sense that is where all the action is. The rest is just details. The key questions, always, are: "the details of *what*?" "Why *these* details?".

In "Subset" I was clearly under the unarticulated influence of that basic idea—that the fundamental structure of our discipline matters. At the same time, this basic idea was underdeveloped. I was prepared to simply take the legal world as I found it. I simply accepted that my subject was, as everyone seemed to agree, about "justice in employment." My insight was that what everyone saw as two subjects addressing this issue were best viewed as one—forcing us to openly seek a new level of coherence adequate to the task. We were of course addressing all the issues at stake anyway, in cases of the sort I discuss in "Subset," but blindly, without seeing the true task at hand. In my view taking a "unified view" of our subject was an important advance in our thinking.

But 25 years later I was able to articulate something I had gradually come to over years of teaching, writing and thinking about our new "unified" subject. I came to what I regard as a deeper understanding of how the coherence of legal subjects such as labour law is "made available," or "works." That is, I came to see the real role played by my proposed new view, which I now call the "Received Wisdom," which I had merely described in "Subset." In my later work this is expressed in the idea that subject matters such as labour law (but also, for example, family law, environmental law, trade law)[57] must have what I came to call a "constituting narrative."[58] This is an account of the discipline which

57. Brian Langille, "What is International Labour Law for?" (2009) 3:1 Law and Ethics of Human Rights 48 at 50 [Langille, "What is International Labour Law for?"]; Brian Langille, "Labour Law's Theory of Justice" in Brian Langille & Guy Davidov, eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011) [Langille, "Labour Law's Theory of Justice"].

58. See eg Langille, "Labour Law's Back Pages," *supra* note 11 and Langille, "Labour Law's Theory of Justice," *supra* note 57.

must accomplish three missions—*describe* the part of the *empirical world* being carved out for examination, *provide* the legal *concepts and categories* required to frame that part of reality in a way that reasonably satisfies the demands of the rule of law, and *explain* to us why it is an important area of study—ie provide a *normative justification* for this legal project (ie tell us why it is important to worry about).[59] All labour lawyers know, even if implicitly, some such story. It tells them what issues are their issues, what cases and statutes to read, provides them with a set of legal concepts that frame the world they know is their world, and provides a moral explanation of why we need and have the part of our law (regarding which individual lawyers may take the "internal point of view," or not). It explains how it is possible to have specialized labour law firms, Ministries of Labour, the International Labour Organization (ILO).[60]

I came to this view of the central role of constituting narratives gradually, and via a long diversion into the "trade and labour" debates,[61] then international labor standards,[62] ILO law,[63] and what is sometimes called "labour law and development.[64] It was along that long and winding road that I encountered the work of Amartya Sen, after reading his 1999 book *Development as Freedom*.[65] It was also my thinking about international law that led me to see more clearly how domestic labour law "worked." This occurred because I came to see that there was a dominant understanding of ILO law—a view which I came to believe was unhelpful.[66] But I also came to see that this view of international law was "driven" by our standard account of domestic law.[67] It was only then, after my encounter with international law that I could begin to understand the power, and limitations, of such "constituting narratives." Almost immediately, another legal dimension opened, unexpectedly, for me, and many others—when the Supreme Court of Canada liberated section 2(d) of

59. See eg Langille & Oliphant, "The Legal Structure of Freedom of Association," *supra* note 4 at 251.
60. Langille, "Labour Law's Back Pages," *supra* note 11 & Langille, "Labour Law's Theory of Justice," *supra* note 57.
61. Brian Langille, "'Labour Standards in the Globalized Economy' and The Free Trade/Fair Trade Debate" in Werner Sengenberger & Duncan Campbell, eds, *International Labour Standards and Economic Interdependence* (Geneva: International Institute for Labour Studies, 1994) 229.
62. Brian Langille, "Eight Ways to Think About International Labour Standards" (1997) 31 Journal of World Trade 27.
63. Langille, "What is International Labour Law for?," *supra* note 57.
64. Langille, "What is Labour Law?," *supra* note 4.
65. Amartya Sen, *Development as Freedom* (New York: Oxford Press, 1999).
66. Langille, "What is International Labour Law for?," *supra* note 57; Brian Langille "Core Labour Rights—The True Story (A Reply to Alston)" (2005) 16:3 Eur J Intl L 409.
67. Langille, "What is International Labour Law for?," *supra* note 57.

the Canadian *Charter of Rights and Freedoms*—guaranteeing "freedom of association" to all Canadians—from the fetters it had earlier imposed. This made the seemingly abstract and academic concern with basic narratives, and international labour law, very, very, legally real. And it was the Court's misunderstanding of international labour law that first fired my interest in, and offered a door through which to enter, the constitutional debate.[68]

At the time of writing "Subset" I was a long way from this mode of understanding—but I was on my way to it. I was playing the game of constructing, or at least describing, what I would now, but could not then, see and call a "constituting narrative," with the required three-part structure. In "Subset" the *empirical* slice of the world was employment. The key *conceptual* tools were the contract of employment, the employee (or independent contractor), and employer. The *normative* demand—redressing inequality of bargaining power in the name of justice for employees. When writing "Subset" I knew what the slice of reality, and the conceptual apparatus were, instinctually it seems. It was what everyone knew. It went without saying. I added a bit of Dworkinian language but really, I was just along for the normative ride as well—it was all about justice for employees who suffered inequality of bargaining power. Everyone knew that. My insight was simply that we could unify two distinct subject matters with one story. But at no point at or near the time of writing of "Subset" was I aware of the game I was playing, or the road that was opening in front of me, invisibly.

Does this matter? Yes. It is progress to see how these constituting narratives are necessary to our thinking. This is so for many reasons. And there are many reasons just because these structures of thought are fundamental. They come before all the details and, indeed, tell us which details are the details. So, for example, our narratives hold the key to seeing how our labour law can go off the rails. Subjects like labour law, because they are made possible by way of a constituting narrative, can and do go off the rails along precisely the three dimensions that our constituting narrative provides—the setting of the empirical metes and bounds of our subject (employment), the concepts needed to legally frame it (contract of employment, employee, employer), and the normative project—redressing power imbalances in contract negotiation in the name of decent terms for employees. This is, as Bruce and Claire show, our current three-part problem. The world of work has moved on empirically, our concepts (employee, employer, etc) are not simply irrelevant but harmful in some

68. Brian Langille "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54:1 McGill LJ 177.

cases,[69] and our normative vision with which they melded is now revealed as providing still valuable but now unsatisfyingly thin gruel.

But beyond illuminating our current failures, the idea of a constituting narrative shows us what we need to do to get out of our current predicament. Simply put—we need a narrative that fits the world as we now find it, is not burdened by an outdated conceptual apparatus, and is driven by a more robust moral account of what we are trying to accomplish. These ideas also offer an important consoling thought—that our current set of problems, and the beginnings of a way forward, are to be found where most important problems are found—in the human mind.[70]

And driving this final point home is a real life "kicker" which "Subset" "proves." That I accepted what everyone knew back in 1980 and did not even see that I was participating in an existing compelling narrative demonstrates that these frameworks of thought can hold us captive. Get in our way without our seeing them. Silently, by intellectual inertial stealth, they become engines undermining our enterprise. This is, for example, my view of how best to explain the legal tragedy on display in many cases, from all corners of the labour market, from *Faskens*[71] to *Lian v J Crew.*[72] Our concepts become not just irrelevant but obstructionist. Further, often empirical changes in the organization of work are motivated by just the insight that the current narrative immunizes the new arrangements from labour laws.[73] Gradually it becomes clear that it is our normative thinking tied to a former reality, and demanding a certain legal framework, which is now the problem. Reading Sen brings this home. All this matters for labour lawyers, for workers, for our pursuit of justice. Both domestically and internationally. What we need is a new constituting narrative—one which is not limited to employment, or contract, or employees or employers, or inequality of bargaining power, or a limited view of the values of concern and respect. But also, more optimistically, there are good decisions that cannot be explained by the old narrative and that compel us lawyers to

69. Brian Langille, "'Take These Chains from My Heart and Set Me Free': How Standard Labour Law Theory Drives Unnecessary Segmentation of Worker Rights" (2015) 36:2 Comp Lab L& Pol'y J ["Take These Chains"]; Brian Langille & Pnina Alon-Shenker "Law Firm Partners and the Scope of Labour Law" (2015) 4:2 Can J Human Rights 211.

70. In Brian Langille "Imagining Post 'Geneva Consensus' Labour Law for Post 'Washington Consensus' Development" (2010) 31:3 Comp Lab L & Pol'y J 523, I rely on the writings of Joseph Stiglitz and Albert Hirschman to develop this idea in the labour law context.

71. *McCormick v Fasken Martineau DuMoulin LLP*, 2014 SCC 39 considered in Langille & Alon-Shenker, *supra* note 69.

72. *Lian v Crew Group Inc*, 2001 CanLII 28063, 54 OR (3d) 239 (ON SC) considered in Langille, "Take These Chains," *supra* note 69.

73. What I now call de-contractualization: see Langille "The Political Economy of Decency," *supra* note 45.

seek not, then, just a new but also a better narrative, which can make sense of these decisions that leave the old story in legal disarray.[74] At the international level the story is the same.[75]

This leads me back to my title, and to two problems going forward. The first is a terminological one—and Mark has addressed this. The second is one of undertaking the task of imagining a new normative view which could underwrite a new constituting narrative that would be adequate to our new empirical realities and a better legal approach to them.

In search for a formulation that addresses the terminological problem, Mark writes:

> The quest for the unificatory formulation…is a difficult one. …I propose 'the Law of Work Relations' as an over-arching terminology and concept to encapsulate our discipline. This may not command widespread favour, but it does sidestep the rift or remaining cracks between 'labour law' and 'employment law'; and it does also, deliberately, break the barrier between 'employment' and 'self-employment' that still in my view manages to cramp and enclose the body of law that is the subject of our study and scholarship. Moreover, and I say this rather sadly, I think it helps to make another more subtle but also necessary transition in the way that we approach that subject. Just as an earlier generation had to lay the ghost of 'master and servant law,' so I believe we have to move past the perception that this body of law is constructed on the basis of the common law of the contract of employment, going towards a fuller and more rounded view of its essential sources. I hope this proposed concept and terminology might be slightly conducive in that direction.[76]

"The law of work relations" is an excellent candidate. I would prefer simply "the law of work"—leaving off the word "relations" for reasons that we cannot explore fully here[77] but I touch on below. I also grant that some of my own current formulations such as "the law governing the deployment of human capital"[78] have clear disadvantages as a slogan. But I do not propose to solve this terminological problem here. There is a deeper question with which I shall finish—but also not here attempt to answer in a comprehensive manner.

When we ask the question "If labour law is a subset of employment law, what is employment law a subset of?" there is a deeper, non-terminological,

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74. See eg *Robichaud v Canada (Treasury Board)*, 1987 CanLII 73, [1987] 2 SCR 84; *United Steelworkers v Tim Hortons and others (No 2),* 2015 BCHRT 168 (CanLII); *British Columbia Human Rights Tribunal v Schrenk,* 2017 SCC 62.
75. Langille, "What is International Labour Law For?," *supra* note 57.
76. Freedland, *supra* note 13 at 24-25.
77. But see Brian Langille, "A Question of Balance in the Legal Construction of Personal Work Relations" (2013) 7 Jerusalem Rev Leg Studies 99.
78. Langille, "Labour Law's Theory of Justice," *supra* note 57 at 112.

problem. This is the problem of escaping labour law's contractual frame. This is I think what Mark is saying in the quote above. But, in order to do that I think we need to drop not only the word "contractual" but also the word "relationship." More profoundly, liberation from the legal frame of contract requires a similarly liberated normative account of what our labour law is for. Once we leave contract behind, we really do have to put aside the idea of protecting the weaker party in the negotiation of such contracts, by redressing "inequality of bargaining power," as a possible normative touchstone. We need something at once broader and deeper. We need to escape the contractual noose of the received wisdom altogether.

That is why the work of Sen, Nussbaum, and the Capability Approach is, in my view, of such importance. An account of labour law drawing inspiration from those sources is what is required to underwrite a new and broader account of what labour law is, and why is worthy of our attention.[79] Bruce has summarized the key components of this approach and outlined how I have thus far attempted to deploy them in my efforts to outline a new constituting narrative. On that view what counts is the ability, the capability, to lead a life of real substantive human freedom. Education is increasingly evident as a key to human freedom and the capability to lead a life we have reason to value and worthy of human dignity.[80] Human capability is, in my view, best seen as a better way of understanding the idea of "human capital." My human capital is my set of capabilities. But human capital needs not only to be created via education, but to be deployed. Labour law is the law governing the deployment of human capital—of human productive activity—of, work. Its aim is to remove roadblocks and create pathways in that endeavor. All in the name of substantive human freedom. On this view productive activity is valuable and important in itself, and also as instrumental to other human freedoms. Most, if not all the components of traditional labour law are best seen in this new and larger light. But so much more will be seen to be relevant to our cause.

On this view we do not start with contract. We certainly do not limit ourselves to a certain sort of contract (of employment). We do not require or seek a "relationship." Rather, we focus upon the worker and we start with our various purposes—say of health and safety, or human rights, or freedom of association laws—and see them as part of the enterprise just described of removing obstacles (discrimination, unsafe working conditions) or creating paths at work, as part of advancing the goal of all

79. Langille, "What is Labour Law?," *supra* note 4.
80. See eg Anne Case & Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton: Princeton University Press, 2020).

our society's striving, which is advancing the cause of the real substantive human capability to lead a life we have reason to value. This is not merely about redressing unequal contractual bargaining. It can be and is in part, but only as one means of pursuing our true ends.

Further, on this approach we do not, in order to fix labour law's "scope" of application, go hunting for exotic legal species such as "employees," or "dependent contractors," or "employers," as if they existed in the real world. Rather, we rationally seek out those who are in a position to advance our purposes—those who can prevent the harms, remedy them when they occur, and who can and will respond to incentives and liability. Those are our "employers" if you still wish to use that term. And this is precisely what our new useful cases do, and the bad ones, with their teeth still sunk into the received wisdom, cannot and do not.[81] Moreover, we will be driven to see that while some work law issues may be best regulated at the contractual level, many are not. We will see more attention paid to attaching important structures supporting human freedom as incidents of citizenship, not contract. And, in between contract and citizenship, we will need and build intermediate and new "platforms" at the level of career, or profession, or geographic space, or skill set.[82]

Here is an important point of which labour lawyers should take special note: on Sen's view of human freedom it is not only the destination, but the way there. The Capability Approach is a theory of real human agency. On this view it is not simply substantive results, but also how you get them, that counts. This is the very idea that Paul Weiler was giving voice to in his setting out of the case for freedom of association and collective bargaining.[83] This is a new narrative of advancing the cause of human freedom, which is not biased against collective action. To the contrary—it reveals the true significance of freedom of association.[84]

And a final brief and important alert—the Capability Approach is radically sensitive to all sorts of barriers to the deployment of human capital—child, and elder care for example. And much more.

That is the path I have been trying to clear and understand as a way forward. This is the long-term project upon which I, unknowingly, had launched myself in 1980. Forty years later I still seek clarity as to what this

81. Brian Langille, "Human Freedom: A Way out of Labour Law's Fly Bottle" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford, Oxford University Press, 2019).

82. Langille, "Labour Policy," *supra* note 32.

83. Weiler, *Reconcilable Differences*, *supra* note 46.

84. And reveals the inadequacy of the current SCC's views on display in *Mounted Police Association of Ontario*, 2015 SCC 1; see Brian Langille, "The Condescending Constitution (or, The Purpose of Freedom of Association is Freedom of Association)" (2016) 19:2 CLELJ 335.

means and where it will take us. The world has and will endure change. Unforeseeable change. The task of labour lawyers is, in my view, to see clearly how their discipline works, to liberate themselves from narratives, which have become unhealthy in the world as we now find it, and to seek a new narrative worthy of ourselves and our world. This is a large project. It is a vital project. It is the one in which Mark, Alan, Claire and Bruce, along with other leading thinkers, are actively engaged. I thank them for taking the time to help me see, more clearly, the history of my own experiences in that shared adventure.

A COVID postscript: As I write these words in the summer of 2020, in the blur of what I think of as "COVID Time," it occurs to me that events may be overtaking these sorts of academic discussions. Our labour law is being pushed rapidly in new directions. These are directions that, I am bold enough to think, may help move us to see not just the desirability of the Capability Approach but its emerging reality. Governments, such as the Government of Canada, are responding to the crisis at work caused by the pandemic in required and radical ways. In constructing emergency benefits often no heed is paid to whether you are an employee or a contractor according to the received wisdom. Governments are *directly* topping up wages in underpaid and undervalued, but now revealed as "essential," services. As employment-based health care and drug plan benefits expire we see calls for direct government provision. And so on. The full list of such initiatives internationally is long and provocative.[85] I hope and expect there will be more. For example, how will we fully respond to what is now, in "COVID Time," being revealed to us about our inability, in many parts of Canada, to adequately provide for our elders or secure our food supply? How much will we learn about the need to ensure that work is done—and in conditions fertile for, rather than corrosive of, human capabilities?

We do not know how or when all of this will end—neither the virus, nor the legal responses to it. Will this innovative sort of legal action be temporary? A determining factor will be whether we will be blinded to what is happening before our eyes by the limitations of the received wisdom—by what "everyone knows" about how to think about labour law. What everyone knows has nothing to do with what should, can, and even may, be so. The Capability Approach can enter and assist at this critical time and as follows: first, by removing the limiting lens of the received

85. The Italian Labour Law e-Journal has just published a special issue: "Covid-19 and Labour Law. A Global Review" edited by Beryl ter Haar, Emanuele Menegatti, Elena Sychenko & Iacopo Senatori. It is open access, and available online: <https://illej.unibo.it> [https://perma.cc/67NC-QFDY].

wisdom, and second, by giving us a way of "seeing," and understanding, and embracing, what is going on. Right now.