JOURNAL OF LAW AND SOCIETY
VOLUME 0, NUMBER 0, XXXX 2020
ISSN: 0263-323X, pp. 1–27

Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work

RUTH DUKES* AND WOLFGANG STREECK**

This paper considers the interaction of legal norms and social norms in the regulation of work and working relations, observing that, with the contraction of collective bargaining, this is a matter that no longer attracts the attention that it deserves. Drawing upon two concepts from sociology – Max Weber's 'labour constitution' and Seymour Martin Lipset's 'occupational community' – it focuses on possibilities for the emergence, within groups of workers, of shared normative beliefs concerning 'industrial justice' (Selznick); for collective solidarity and agency; for the transformation of shared beliefs into legally binding norms; and for the enforcement of those norms. If labour law is currently in 'crisis', then a promising route out of the crisis, we argue, is for the law to recover its procedural focus, facilitating and encouraging these processes.

I. INTRODUCTION

Labour constitutions include the social organization of both formal and informal relations among workers, and between workers and their employers.

* *School of Law, University of Glasgow, Stair Building, 5–9 The Square, Glasgow, G12 8QQ, Scotland*
ruth.dukes@glasgow.ac.uk
** *Max Planck Institute for the Study of Societies, Paulstr. 3, Cologne, 50676, Germany*
streeck@mpifg.de

This project received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement No 757395). We are grateful to Aude Cefaliello and Rex Pannemann for research assistance and to the following for constructive comments and criticisms: Chris Hann, Miriam Glucksmann, Mark Harvey, Marie-Claire Foblets, Alan Bogg, Marija Bartl, Candida Leone, Michel Coutu, Supriya Routh, Alessio Bertolini, Gregoris Ioannou, Eleanor Kirk, and Ou Lin. We thank Fred Block for posing the question of a labour constitution from below.

By 'labour constitution', we mean the historically determined ensemble of rules, institutions, social statuses, and economic and technological conditions that together shape decision making in respect of the question *who* gets *what* work under *which* terms and conditions.[1] So understood, the concept of the labour constitution can serve as a heuristic to map the various contexts within which working relations are regulated – the particular workplace, company, sector, locality, or jurisdiction – and to analyse the consequences for workers and other actors of institutional change.[2] The social organization of working relations included in this notion of the labour constitution may similarly be co-extensive with a specific workplace or company or it might extend beyond these to encompass entire sectors, occupations, or professions.

Particular forms of social organization are related to particular understandings of a just order, producing social norms and, in some cases, mechanisms for their enforcement. In the social organization of work, these norms and understandings concern questions of how and when work should be done and who should do it. Most importantly for our purposes, they concern the desired, or just, boundaries between work, on the one hand, and social and family life, on the other – between the commodified and non-commodified spheres of workers' lives. Social norms stand in a complex relation with formal law. In some cases, legal rules may have their origins in social norms or practices – for example, where elements of 'custom and practice' are held by the courts to be legally binding, or where the terms of collective agreements are accorded legal force by reason of a court ruling or statutory provision. Where legal rules and social norms are at odds with each other, however, so that the former are perceived by those affected to be unfair or unrealistic, breach of the law may go unchallenged in a manner that undermines, over time, its efficacy and legitimacy. It is also possible that the substance of applicable legal rules may shape workers' perceptions of what is fair in a given situation. The 'knowledgeability' of social and economic action is invested, we might say, with legal notions and concepts, even if these are apprehended by the actors themselves in the guise of practices, routines, or shared understandings that are only dimly reminiscent of the legal rule from which they originally stem.[3]

In recent decades, it has become increasingly clear that existing systems of labour law – devised, at least in their essentials, in the first or middle parts of the twentieth century – are no longer fit for purpose. In the

1 We develop this definition with reference to the work of Max Weber; R. Dukes, 'Economic Sociology of Labour Law' (2019) 46 *J. of Law and Society* 396. For discussion of various uses of the term 'labour constitution' in the literature, see M. Coutu, 'Economic Crises, Crisis of Labour Law? Lessons from Weimar' (2020) 47 *J. of Law and Society* 221.

2 Id.

3 R. Knegt, 'Labour Constitutions and Market Logics: A Socio-Historical Approach' (2018) 27 *Social & Legal Studies* 512; M. Weber, *Economy and Society* (1978) 312.

scholarly literature, there has been talk of a 'crisis' in the discipline.[4] As both the coverage and substance of collective bargaining have contracted, the relative importance of statutory rules has increased, including those that were originally intended to give effect only to generally applicable minimum standards. Especially in a context of increasingly 'fissured' workplaces,[5] however, with attendant novel forms of work organization and contracts for work, these legal rules do not necessarily fit very well, across the board, with the realities of work organization and working relations. Generally applicable minimum wage laws, for example, may be difficult to apply to security guards or care workers who spend large parts of 'on-call' shifts asleep, and working time legislation might cause problems in agriculture, where work is seasonal. In the ever-increasing number of instances in which workers are categorized as self-employed by reason of the terms of their contract or the nature of their working relationship, employment protection legislation might not apply at all. In respect of those workers – 'employees' – to whom it does still apply, legislation may be difficult to enforce because labour inspectorates are underfunded or non-existent, trade unions are weakened or absent, and individual litigation is costly, time consuming, and beset by obstacles and risks. In such circumstances, ostensibly *minimum* legal standards may come to function and to be thought of as a 'ceiling' rather than a 'floor' – the very best that can be expected by a worker of her employer.

How to resolve the crisis in labour law? How to re-connect the law to the changing realties of work and contracting for work in post-industrial societies? In what follows, we revisit the foundational legal concept of the labour constitution, seeking to render it applicable to the analysis of work and working relations today. We begin in Section II by demonstrating that Hugo Sinzheimer's legal version of *Arbeitsverfassung* may be conceived as a special case of Max Weber's earlier sociological one. We then adapt the concept to fit with what we know about post-industrial service work – typically characterized by precarious employment, work on demand, irregular hours, and such like – and about the way in which workers arrange their lives and develop ideas of industrial justice around them. Here, in Section III, we have recourse to a second theoretical concept, drawn from the sociology of work: Seymour Martin Lipset's 'occupational communities' – that is, social groups formed around a common position in work and employment, connecting members to one another as both workers and members of the community at large. On the basis of our observations, we argue in Section IV that for labour law to defend its legitimacy and reclaim its capacity to regulate contracting for work, it must above all return to its procedural core.

4 See, for example, K. Klare, 'Horizons of Transformative Labour Law' in *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities*, eds J. Conaghan et al. (2002).

5 D. Weil, *The Fissured Workplace* (2019).

Labour laws should be tailored to constitute multiple arenas of collective deliberation and bargaining. A primary function of the law should be to facilitate the transformation of social norms concerning needs and rights (especially concerning the relationship between work and non-work) into collective interests and ultimately legal norms, with the capacity to regulate work and working relationships effectively and in a way that can be considered fair by those dependent on selling their labour.

II. LABOUR CONSTITUTIONS

The term *Arbeitsverfassung* or 'labour constitution' is often associated with the work of the legal scholar and practitioner Hugo Sinzheimer. Writing in the 1920s, Sinzheimer used it to describe the body of collective labour law then in force in Germany: the law relating to collective bargaining and industrial action, works councils, workplace agreements, worker representation on company boards, and industrial arbitration.[6] Use of the word 'constitution' in this context emphasized the democratizing function that Sinzheimer understood the law to fulfil: securing the rights of labour to participate, together with management, in the regulation of work and working relations. At the end of the nineteenth century, Sidney and Beatrice Webb had similarly spoken of freedom of association and factory legislation as a constitution, or Magna Carta, for British workmen in the industrial realm.[7]

In his analysis of the German labour constitution, Sinzheimer distinguished 'state' law – the relevant terms of the Weimar Constitution, labour statutes, and so forth – from 'autonomously created' norms, meaning those negotiated (and applied and enforced) by the collective representatives of labour and capital. State labour law was first and foremost procedural law; it established the 'rules of the game' according to which unions and employers' associations, employers, and works councils could act together autonomously to create the substantive rules regulating the organization of work and the terms and conditions of employment of the workers in question.[8] Procedural rules were found in statute, substantive rules in collective agreements and workplace agreements. Where the government chose to legislate to create substantive employment rights – for example, the right not to be unfairly dismissed – workers' and employers' organizations remained free to agree alternative rules, provided that these were more generous to the workers in question.[9]

6 H. Sinzheimer, *Grundzüge des Arbeitsrechts* (1927, 2nd edn). For discussion, see R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (2014).
7 S. Webb and B. Webb, *Industrial Democracy: Vol. 2* (1897) 841.
8 P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (1983, 3rd edn).
9 Sinzheimer, op. cit., n. 6, pp. 198–206.

For Sinzheimer, this division of labour between state law and autonomously created law was appropriate as a matter of both principle and practicality. In the economic sphere, he wrote, only autonomous norms had sufficient flexibility and 'immediacy' to guarantee their effectiveness.[10] As the labour constitution remained subordinate to the (new, democratic) state in the last instance, however, the state retained the authority to intervene in rule setting where it judged this to be necessary – to ensure furtherance of the common good, for example, or to protect the rights of individuals. Autonomous law remained dependent on the state and on state law insofar as social norms could only rightly be judged 'law' where a democratic state had allowed for them – where their creation proceeded within the boundaries and according to the forms that had been prescribed by the state.[11] By reason of the state's role as the 'architect' or 'guarantor' of the Weimar labour constitution, in other words, autonomy in labour law was of fundamental importance but was not unlimited. In line with the economic orthodoxies of the day, and with the ambition to constitute the Republic as a social democracy, a third way was to be charted by labour law between direct state control of the economy and laissez-faire liberalism.

Though Sinzheimer may have been influenced in his usage of the term 'labour constitution' by the Webbs – or by a sense similar to theirs, according to which the function fulfilled by labour law was analogous to that of political constitutions, limiting the power of the sovereign/employer and establishing democratic decision-making procedures instead – it is also true that the concept of *Arbeitsverfassung* had an older heritage in German-language scholarship. Among political economists of the nineteenth century, especially those of the Historical School, it was used in a non-technical way to denote the complex of conditions – social, economic, political, and legal – governing the relations of workers to their employers and to other parties.[12] It was also used by Max Weber, in early work on employment relations in agriculture east of the River Elbe.[13] Using the term with frequency, Weber sometimes intended it in the generally accepted sense, and sometimes to describe more specifically the 'relations of stratification within the larger socio-economic system' – what we might otherwise refer to as the social relations of production.[14]

10 Id., p. 46.
11 Id.
12 L. Scaff, 'Weber before Weberian Sociology' (1984) 35 *Brit. J. of Sociology* 190, at 200.
13 See especially M. Weber, *Verhältnisse der Landarbeiter im ostelbischen Deutschland* (1892); M. Weber, 'Entwickelungstendenzen in der Lage der ostelbischen Landarbeiter' (1894) 77 *Preussische Jahrbücher* reprinted in M. Weber, *Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte* (1924) 498.
14 Scaff, op. cit., n. 12, p. 200. In Keith Tribe's translation of Weber's 'Entwickelungstendenzen', *Arbeitsverfassung* is translated variously as 'labour organization', 'system of labour relations', 'relations and organization of labour', and so forth, but never as 'labour constitution'. The decision to use a variety of English

In Weber's hands, the labour constitution became an ideal type: a logically coherent statement of the characteristic properties of a particular regime of labour relations or 'system of social stratification'.[15] His aim, in these agricultural studies, was to identify the real consequences for workers, and society at large, of the capitalist rationalization of the sector then underway. His method was to specify and compare two successive labour constitutions, the 'patriarchal' and the 'capitalist'. The former was characterized by the personal domination of numerous strata of dependent labour by a master who was 'not a simple employer, but rather a political autocrat', by wage forms based on share rights – use of plots of land, threshing shares, and grazing rights – and, consequently, by a marked degree of shared interests between masters and labourers.[16] The latter emerged as a result of the 'proletarianization' of agrarian labour, and the polarization of what was now class conflict between the owners of the land and their workers. Considering such matters as how the workers were recompensed and whether they were engaged permanently or seasonally, Weber emphasized the importance of convention and tradition over law and, with that, the significant degree of local variation, as well as variation over time.[17]

Though they each stood, in essence, for the complex of rules and institutions regulating working relations, there were significant differences, then, between Weber's and Sinzheimer's conceptions of the labour constitution. As a practising lawyer and sometime politician, a member in 1919 of the Weimar constitutional convention, Sinzheimer used the term with the intention of explaining the legal framework and, at the same time, to encourage a particular reading of the law. He wrote in the aftermath of German defeat in the First World War and the revolution that followed, at a time of ongoing political and sometimes violent struggle to establish a new social democratic state. His labour constitution was conditional on historical circumstances that included the existence of a united national trade union movement willing to engage in 'conflictual cooperation' with a nationally organized capitalist class.[18] In that world, a unitary labour constitution could be envisaged which encompassed the whole nation in pyramidal form, the centralized class organizations of each side of industry charged with overseeing more decentralized industrial relations at the sectoral, regional, and workplace levels.[19] By contrast, when Weber used the concept of the labour constitution, he was concerned with smaller subnational and local differences in the regulation of work, as well

terms instead of one term consistently has the adverse effect of concealing the existence of the concept entirely; K. Tribe, translation of Weber's 'Entwickelungstendenzen' in *Reading Weber*, ed. K. Tribe (1989); and see the 'Translator's Note', id., p. 185.

15 Scaff, op. cit., n. 12, p. 201.

16 Weber, op. cit. (1894), n. 13.

17 Id.

18 W. Müller-Jentsch (ed.) *Konfliktpartnerschaft: Akteure und Institutionen der industriellen Beziehungen* (1999) 3.

19 Dukes, op. cit., n. 6, pp. 33–42, pp. 158–159.

as with change over time.[20] Arrangements and rules were more informal and less politicized than in Sinzheimer's day, the class structure more fragmented. Working relations were governed – albeit to a diminishing extent – by tradition and status relations rather than by economically rational, market-driven, 'capitalist' contractual modes of exchange.

Today, the once (more or less) unitary labour constitutions of the twentieth century are fracturing in a multitude of ways. The membership of unions and employers' associations has fallen, in some cases dramatically, and national umbrella organizations have largely lost the positions of authority that they once had within industry and within government. Previously comprehensive systems of social welfare have been transformed into a combination of labour market activation devices and, increasingly, only the barest of provision for the otherwise destitute. When it comes to the regulation of work and working relations, there is now much greater variety – and inequality – between and within sectors, companies, and workplaces. With the appearance of novel forms of contracting for work, such as zero-hours contracts and self-employed 'gigging', large holes have opened up in national or sectoral floors of minimum standards, which unions appear powerless and governments disinclined to close up. In this world, it is Weber's and not Sinzheimer's labour constitution that holds the promise of being able to help us to characterize and make sense of what is going on. Weber's conception of *Arbeitsverfassung* fits well with the more fragmented, less centralized and less politicized, more market-driven society and class structure of this post-industrial era, recognizing the more differentiated social structure and the difficulties of imposing upon it a comprehensive class organization. In addition to the applicable legal rules and the broader political economy of sectors and regions, it focuses our attention on the social organization of working relations at the level of the workplace or occupation, on the generation within groups of workers of particular understandings of what is expected and what is fair, and on social norms and conventions.

III. OCCUPATIONAL COMMUNITIES

The crisis in labour law is experienced and characterized differently across different jurisdictions. For some, especially if writing in the United States (US) or the United Kingdom (UK), it is of existential proportions. Where governments accept the neoliberal logic that laws that aim to protect workers constitute market rigidities that inhibit profitability – and thereby presumably economic growth – action will follow to weaken, sideline, or outright abolish existing labour standards. In such circumstances, scholars may come to fear that the very field of law that they seek to analyse is disappearing as they

20 Weber draws comparisons between different regions within East Elbia as well as between East Elbia and the rest of Germany; Weber, op. cit. (1894), n. 13.

write, to be replaced by the general rules and principles of contract law and competition law.[21] For others, the crisis is best understood as a crisis of concepts. A key example here is the distinction, fundamental to all systems of labour law, between employees (to whom labour laws apply) and other, self-employed workers (who fall outside the scope of application). The problem with this distinction is that it no longer maps satisfactorily onto the underlying categories of those workers who are in need of protective labour laws and collective representation, and those who are not. If the solution lies with drawing the line elsewhere, then precisely where it ought to be drawn remains far from clear.[22] Further examples abound of a lack of fit between old concepts, rules, and principles and novel forms of work organization and working relations. In platform-mediated work, for example, is the platform the employer or an employment agency? If Uber customers consistently rate female and racialized drivers lower than their white, male counterparts, is equality law breached? When a Deliveroo courier waits for the next order to appear on her phone, is she working? If a group of self-employed care workers form a trade union and demand better terms, are their actions anti-competitive and, as such, unlawful?[23]

To restore the capacity of labour law to conceptualize and regulate ongoing changes in work and employment, a return to the Weberian perspective on labour constitutions and contracting for work seems promising. Its advantage is that it allows normative legal reasoning to be informed by empirical research on the diverse local experiences of workers in different occupations and sectors. While informing judges and legislators about the objective conditions of work and employment, especially in new sectors and occupations, a Weberian sociology of labour law would also acquaint them with the normative standards of economic and industrial justice emerging in a changing world of work. For law making as well as social science, an important object of observation in this context is the 'occupational community': a collectivity of workers sharing a common position in work

21 See, for example, A. Hyde, 'The Idea of the Idea of Labour Law: A Parable' in *The Idea of Labour Law*, eds G. Davidov and B. Langille (2011) 88.

22 M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (2011).

23 Note that the distinction between employed and self-employed labour is rather recent. Craft unions in the nineteenth century, acting on strong sentiments of occupational solidarity, posted prices for work performed, instead of negotiating wages. This is why they were originally perceived by the law as combinations, or criminal conspiracies, in restraint of trade, and prosecuted accordingly. It was only with the transition to an industrial work organization that employment became waged employment, for the regulation of which competition law was increasingly deemed inappropriate. See further S. Deakin and F. Wilkinson, *The Law of the Labour Market* (2005). Recent developments in working arrangements, the structure of demand for labour, and the lifeways of workers raise the question of a possible return of trade unionism or some functional equivalent to sectors and workplaces where the 'standard' employment of the industrial age no longer exists or has never existed.

and employment that gives rise to shared social norms and relations of solidarity. An occupational community encompasses not only work but also non-work social relations, embedding work in a social life that is shaped but not determined by the work embedded within it.[24] Occupational communities form around the requirements of the sort of work demanded by occupation and employer, while also setting limits to them – or attempting to do so – so that members may establish a satisfactory balance between work life and social life. By focusing on both the boundary and the interaction between social life and work life, the concept of the occupational community implicitly highlights the fact that human work is not only a commodity exchanged for wages under the terms of a contract for work but also part of social life. For this reason, it cannot be fully subsumed under contract or competition law, since social life is also cooperative, not for sale, and dependent on social norms that provide essential pre-contractual conditions of contract.[25] Empirical study of occupational communities reinforces the micro-perspective inherent in Weber's sociology and economic sociology, making it particularly useful when it comes to understanding workers' collective interests and to ascertaining their political capacity in the more fragmented and diverse structure of work and workplaces today – a perspective set aside by Sinzheimer in the highly politicized moment of constitution making in Germany in 1918.[26]

Occupational communities of the past were often mainsprings of trade unionism. The *locus classicus* is a book by Seymour Martin Lipset and co-authors, *Union Democracy: The Internal Politics of the International Typographical Union*.[27] Undertaking to explain the unique structure and industrial power of the union under study, known as the ITU, the authors point to the labour process in printing, which at the time required printers to work at night. This isolated them from people with more conventional time schedules and made them dependent for their social life outside of work on other printers, which in turn made for a pattern of deep social integration in a collective culture formed around printing as an occupation. The book recounts how New York printers lived in the 1950s in a close-knit community, which sustained not only a powerful trade union that negotiated work rules with employers, but also book clubs, choirs, and chess tournaments. Later

24 G. Salaman, *Community and Occupation: An Exploration of Work/Leisure Relationships* (1974) 19. For a well-informed theoretical discussion of occupational community and related discussion, drawing upon sociological theory to good effect, see J. Van Maanen and S. R. Barley, 'Occupational Communities: Culture and Control in Organisations' (1984) 6 *Research in Organizational Behavior* 287.

25 E. Durkheim, *The Division of Labor in Society* (1964 [1893]).

26 'Micro' means face-to-face social structures, not individual dispositions or attitudes. On the latter, see S. Lambert and K. Hopkins, 'Occupational Conditions and Workers' Sense of Community: Variations by Gender and Race' (1995) 23 *Am. J. of Community Psychology* 151.

27 S. M. Lipset et al., *Union Democracy: The Internal Politics of the International Typographical Union* (1956).

Lipset, and others following his lead, would identify further examples of occupational communities formed around, and at the same time shaping through collective action, the requirements of work in a particular occupation – of social integration around work but extending beyond it and producing a collective culture that, in turn, sustained effective trade organization.[28]

The ITU was an extreme case, as Lipset et al. knew well. Like other extreme cases, however, their study threw into relief general phenomena present but less easily detectable elsewhere. The printers of *Union Democracy* identified deeply with their occupation; they were proud of their skills and eager to demonstrate them by delivering work of high quality. They also insisted on having a say in the training of new printers, as a way of safeguarding both high skills among their future co-workers and the culture and social life of printers as a community. Solidarity among printers included helping one another on the job, with the job itself and with fending off management intrusion. Above all, the printers developed collective ideas of what they owed to their employer and what their employer in turn owed them – a sense of occupational-industrial justice, of a good day's wage for a good day's work, and of how work should be organized to respect a worker's dignity and his right to a life outside of work, together with friends and family.

In a 1967 study of compositors, Isidore Cyril Cannon observed the creation and enforcement of rules and 'moral values' within communities of workers in workplaces and, more formally, within their 'chapels': the compositors' works councils, or workplace organizations, which existed in parallel with the trade union, organizationally distinct from it.[29] In the case of the compositors, the formation of occupational communities was again facilitated by the nature of the work, which allowed for easy contact between the workers and frequently required them to seek and provide each other with assistance. The compositors' rules regulated working practices within the firm, and relations between the workers, including especially relations of solidarity. If someone got married, had a baby, or retired, for example, all co-workers were expected

28 Other classical examples of occupational communities supported by spatial, temporal, or social isolation include miners, sailors, and dock workers; S. M. Lipset, 'The Political Process in Trade Unions: A Theoretical Statement' in *Labor and Trade Unionism: An Interdisciplinary Reader*, eds W. Galenson and S. M. Lipset (1960) 216. More examples include policemen, fishermen, jazz musicians and railwaymen; Salaman, op. cit., n. 24; W. Horobin, 'Community and Occupation in the Hull Fishing Industry' (1957) 8 *Brit. J. of Sociology* 343. Isolation seems to play an important part in the formation of occupational communities among hotel workers; see D. Lee-Ross, 'A Preliminary Cross-Cultural Study of Occupational Community Dimensions and Hotel Work' (2004) 11 *Cross-Cultural Management* 77. See also J. Van Maanen, 'Identity Work and Control in Occupational Communities' in *Organizational Control*, eds S. B. Sitkin (2010) 112 on urban policemen in Los Angeles and B. Apitzsch, *Flexible Beschäftigung, neue Abhängigkeiten* (2010) on film industry workers, where isolation is social rather than spatial.

29 I. C. Cannon, 'Ideology and Occupational Community: A Study of Compositors' (1967) 1 *Sociology* 165.

to contribute to a 'pass-round'. In addition to the trade union, workers were expected to join various friendly societies and to make periodic contributions to funds out of which pensions might eventually be paid, or assistance in case of injury or illness. Pensions for which eligibility was decided by popular vote provided a particularly strong incentive to win and maintain the approval of the community as a whole. As Cannon observed, transgressions from accepted behaviour were routinely discouraged informally by teasing, practical jokes, or less gentle forms of group admonition or censure. Pressures to conform might extend to manners of dress and speaking, and even to leisure activities and choice of reading matter.[30]

Today, in the aftermath of the decline of industrial work and of male labour aristocracies, occupational communities might be expected to have disappeared. As a literature survey reveals, however, the concept of occupational community remains useful for the study of labour relations and the regulation of work, even in the new service sector with its small firms, ostensibly low-skilled work, precarious and on-demand employment, and ambiguous work relations between contracting parties. Of course, not all work environments give rise to occupational communities. Where, for example, there is little contact and much competition between workers, due either to the nature of the work or the way in which it is organized by the employer, community building is greatly hindered. Nonetheless, there are still, perhaps surprisingly, many more occupational communities around than meet the uneducated eye.

Our aim in this part of the paper is to explore how and in what sense today's occupational communities may generate normative claims regarding work and the relationship between work and non-work, in fields of employment that pose critical questions for labour law as we know it. Thinning out the thick description offered by Lipset et al., Van Maanen and Barley offer an influential definition of a contemporary occupational community:

> a group of people who consider themselves to be engaged in the same sort of work; whose social and personal identity is drawn from such work; and who, to varying degrees, recognize and share with one another job specific (but, to

30 Cannon emphasizes the leftist, class-political ideology of the compositors, rooted in their community and continuously reinforced by it. The ITU studied by Lipset et al. was, in contrast, as conservative politically as any US craft union. This suggests, first, that there is no reason why occupational communities should, by nature, be either conservative or radical; and second, that attempts to integrate occupational communities into a class-oriented politics need not, in principle, be futile. 'The explanation offered here is that certain functional factors involved in the work situation, such as the need for mutual aid assisted by the ease of communication in the working group, have fostered the development of a feeling of community in the occupation; this community influences its members to conform to an ideological ethos (an ethos of Labour voting and working-class identification) which itself developed under certain ideological circumstances.' Id., p. 182.

various degrees, contentious) values, norms and perspectives that apply to but extend beyond work related matters.[31]

For an initial overview, we selected a number of ethnographic studies of occupational communities that together illustrate important characteristics with respect to both their interrelations and their range of variation. Since our interest lies with relations of solidarity rather than with cognitive understandings or latent skill formation, studies of so-called 'communities of practice' or 'epistemic communities' were excluded, even though these are sometimes given the label 'occupational communities'.[32] Given the absence of a quantifiable universe of cases, we found it helpful to rely mostly on ethnographic research, which makes it possible to observe and understand local idiosyncrasies in their specific local contexts. Our collection of cases for the present exposition comprises 16 occupational communities as described and analysed in 12 research reports published between 1956 and 2012.[33] Obviously, the selection is not representative and, bearing that in mind, we assembled a second collection of studies, less central to our topic, to be drawn upon where useful.[34]

31 Van Maanen and Barley, op. cit., n. 24. Like Salaman, op. cit., n. 24, Van Maanen and Barley play down the importance of social isolation and instead emphasize the extent of involvement in and identification with an occupation.

32 On communities of practice, see E. Wenger, *Communities of Practice: Learning, Meaning and Identity* (1998). For relevant case studies, see B. A. Bechky, 'Sharing Meaning across Occupational Communities: The Transformation of Understanding on a Production Floor' (2003) 14 *Organization Science* 312; M. Elliott and W. Schacchi, 'Free Software Developers as an Occupational Community: Resolving Conflicts and Fostering Collaboration' (2003) Konferenzbeitrag, GROUP '03 Conference, 9–12 November; K. Winroth, 'Professionals in Investment Banks: Sharing an Epistemic Practice or an Occupational Community?' (2003) GRI Report No 1. School of Economics and Commercial Law, Gothenburg Research Institute.

33 These reports were as follows: M. Adams et al., '"Catching Up": The Significance of Occupational Communities for the Delivery of High Quality Home Care by Community Nurses' (2012) 14 *Health* 422; P. A Adler and P. Adler, 'Transience and the Postmodern Self: The Geographic Mobility of Resort Workers' (1999) 40 *The Sociological Q*. 31; Apitzsch, op. cit., n. 28; Cannon, op. cit., n. 29; M. Korczynski, 'Communities of Coping: Collective Emotional Labour in Service Work' (2003) 10 *Organization* 55; Lee-Ross, op. cit., n. 28; D. Lee-Ross, 'Occupational Communities and Cruise Tourism: Testing a Theory' (2008) 27 *J. of Management Development* 467; Lipset et al., op. cit., n. 27; Salaman, op. cit., n. 24; P. Sandiford and D. Seymour, 'The Concept of Occupational Community Revisited: Analytical and Managerial Implications in Face-to-Face Service Occupations' (2007) 21 *Work, Employment and Society* 209; B. Shamir, 'The Workplace as a Community: The Case of British Hotels' (1981) 12 *Industrial Relations J*. 45; Van Maanen, op. cit., n. 28. The Appendix specifies the occupations studied and indicates some of their collective properties.

34 Our investigation reveals that more systematic research is needed, and we hope that this paper might encourage it. A particularly important question for our purposes is how competition between workers and isolation on the job may hinder or prevent the formation of occupational communities.

Six points stand out in our reading of the literature that we feel are highly relevant for contemporary attempts by trade unions and policy- and law-makers to regulate new forms of work in a manner that is inspired by the rich normativity of social life at and around the workplace and that does justice to the special nature of contracting for human labour:

1. The ethnographic material reviewed indicates that even workers in low-status occupations tend to develop positive identifications with their work, typically based upon pride in the performance of work tasks perceived to be difficult.[35] A merely instrumental attitude towards work, including paid work and even underpaid work, is rare.[36] Identification with work and occupation appears to occur even in the absence of stable employment and under what might widely be considered substandard working and employment conditions. In a very general, foundational sense, we attribute this to the nature of work as human *praxis*, meaning that even de-skilled, menial tasks require workers to fill inevitable gaps in their job descriptions, acting, as it were, 'beyond the call of duty' if the result is to be satisfactory to others and themselves.[37] That such satisfaction is sought by workers makes them in principle exploitable; it makes them deliver more to their employer than is required – and paid for – under the terms of the contract. Workers may be understood here to 'pay' themselves, rather than to be paid by the employer – in other words, to subsidize the employer's wage fund. At the same time, working beyond the call of duty may also give rise to more or less tacit expectations of fair treatment and organizational support in exchange. If disappointed, these can serve as a source of conflict and an incentive to organize.
2. Identification with work and occupation is reinforced and becomes collective identification through workers' interactions with co-workers. This seems to hold true particularly where relations established at work and around work extend into private, non-work life, making work and non-work social relations overlap and sometimes fuse. Working, or having to work, odd hours or in spatial isolation from society at large may be as frequent today as it was in the heyday of industrialism. Even where hours are relatively regular, however, socializing after work seems

35 See the hotel workers in Lee-Ross, op. cit., n. 28, where a 'strong sense of worker identity with the job' is found, based on a perceived need for special 'skills and competences', in spite of transient employment. See also Sandiford and Seymour's study of barmen, in which they find that jobs considered low status from the outside, because of no formal training and low pay, may be seen quite differently from inside the respective occupational community; Sandiford and Seymour, op. cit., n. 33, p. 217.

36 See already R. Brown, 'Sources and Objectives in Work and Employment' in *Man and Organization: The Search for Explanation and Social Relevance*, ed. J. Child (1973) 17–38.

37 See Hayes' use of the notion of the extensive 'invisible work' undertaken by care workers; L. Hayes, *Stories of Care: A Labour of Law: Gender and Class at Work* (2017).

to be commonplace, facilitating the creation of communal social ties. Embeddedness of work life in social life, and, vice versa, of social life in work life, not only reinforces workers' identification with work and occupation but also fosters the emergence of work-related social communities, even where employment is only seasonal or otherwise transient.[38] To the extent that in society-at-large social life outside of work tends to be diluted by changing family structures and declining political participation and voluntary associations, leisure time may increasingly be spent with people met in work environments, further raising the significance of work and employment for social integration.

3. In a diverse post-industrial society with less standardized, unconventional life-courses and employment careers, occupational communities may emerge around age-specific lifestyles that resist being considered 'settled'. Work–life balance may vary widely as workers try, individually or collectively, to adjust to or, as the case may be, limit 'flexibility' in their typically highly diverse employment, which is often temporary and transitory. In some cases, life outside of work becomes entirely subordinate to the demands of work (for example, in the film industry[39]); in others, occupation and employment are specifically chosen to fit a preferred lifestyle (for example, workers in exotic resort hotels[40]), with all sorts of, often surprising, permutations in between. Different configurations sustain or derive from different ideas held by workers of what is 'right' for 'people like us' or 'like me'. Perhaps more than ever, occupational communities produce, or come with, idiosyncratic subcultural ideas of a proper relation between work and life, each with a specific occupational ethos and with (often internally contested) concepts of solidarity and, sometimes, demands for legal intervention.[41]
4. Occupational communities perform important functions for the successful discharge of work duties. Supportive cooperation among workers in the same occupation is essential for the transmission of tacit skills to new recruits, indispensable in particular in the many contemporary service occupations where there is little formal training. Co-workers are also a vital source of emotional support in moments of bad luck, either at work or in private life. They help to hide or correct poor performance; to cultivate a professional ethos and a sense of professionalism, including informal norms of good practice; and, as 'communities of coping', to deal with

38 'From their communities', write Adler and Adler on transient resort hotel resort workers, 'they received practical assistance, companionship in their quests, and a reified sense of core values and self'; Adler and Adler, op. cit., n. 33, p. 51.

39 See Apitzsch, op. cit., n. 28, who treats this under the rubric of 'networking'.

40 See Adler and Adler, op. cit., n. 33.

41 Sometimes, such demands are absent. A fascinating case is the re-emergence of elite craft occupations in urban economies, driven by a desire among young people for 'meaningful' (in the sense of holistic and highly skilled) manual work; see R. E. Ocejo, *Masters of Craft: Old Jobs in the New Urban Economy* (2017).

frustrations after unpleasant encounters with dissatisfied customers or clients or aggressive superiors.[42] By maintaining worker morale in ways in which management cannot, they contribute to productivity in a manner that can be compensated monetarily only in part, if at all.

5. Occupational communities may provide a social substructure for the formulation and articulation of collective interests of workers. Under favourable conditions, the social cohesion and workplace solidarity that they foster may be used as a basis for trade union-type representation of workers, or even for formal unionization. As Korczynski observes, what he calls 'communities of coping' may 'spill over to inform acts of direct resistance to management directive'.[43] Suggesting that this may constitute 'a curious mixture of consent and resistance to work', Korczynski sees in them a form of 'tacit collectivism … which could nurture trade union organization'.[44] Comparing today's service sector occupational communities to their industrial predecessors, one striking finding is the high job satisfaction and deep commitment of workers even in low-wage, low-status jobs and precarious and casual employment. A possible explanation is the presence of clients or customers in the work situation, taking the place of material objects in manufacturing and joining the employer as another patron demanding good work. Where this is the case, refusing to do one's best in protest at low wages and poor conditions would hurt not just the employer but also real people asking for help face to face. Often, this means that solidarity among co-workers centres around mutual assistance with the job. This seems to be especially true in occupations and sectors where a lack of formal training turns colleagues into an indispensable source of job-related knowledge, either because client needs are so diverse as to defy standardization or because employers have simply sought to cut their training costs. This may make occupational communities above all *communities of practice*, which may or may not be conducive to their transformation into *communities of adversarial interest formation*. In respect of jobs with customers or clients, there seems to be a high degree of self-selection by workers who are particularly eager to help others and who excel at it, even under adverse conditions. (Self-selection for 'hedonistic', 'lifestyle' reasons, sometimes related to age, may also give rise to tolerance of poor working conditions.) One upshot might be that if something goes wrong, workers will blame themselves rather than

42 Adams et al., op. cit., n. 33; Korczynski, op. cit., n. 33.

43 Korczynski, id., p. 59.

44 Id. On the other hand, high job satisfaction in transient employment, as in the case of workers in exotic resort hotels for whom the job is a lifestyle choice, might make occupational communities impenetrable to organizing efforts; Adler and Adler, op. cit., n. 33. This would be a subject in urgent need of further exploration. For perceptive comments on the prospects of unionization in the service sector, see C. L. Macdonald and C. Sirianni, 'The Service Society and the Changing Experience of Work' in *Working in the Service Society*, eds C. L. Macdonald and C. Sirianni (1996) 1–26.

the demands of the job. It seems that this adds to workers' reliance on occupational communities for mental and motivational 'repair work', even though this may be viewed with suspicion by employers, because informal communication among workers is considered either a waste of time or incipient insurrection. All of these factors may make it difficult to use the occupational communities of the new service sector as springboards of worker interest representation or trade unionism: the personal and social gratifications – the low 'alienation' – and the sense of duty that come with working with people; the individualized nature of job tasks and performance; the experience of solidarity as task-centred support; and the satisfaction that comes with mastering difficult assignments. Identification with clients may, however, result in collective solidarity against cost-cutting employers perceived as preventing workers from doing their job professionally and in the best interests of people in need of help.

6. Employers who suspect the development of bonds of solidarity between workers may organize work so as to make informal communication among workers difficult or impossible, in the hope of precluding socialization into potentially politically assertive occupational communities.[45] A neoliberal work regime of this kind must do without the productivity benefits of occupational communities, which may prove costly with respect to the quality and efficiency of work. From the employer's perspective, a solution might lie in organizing work in a 'neo-Taylorist' fashion – that is, 'dumbed down' so that it can be performed by solitary workers with little to no instruction and without the need for consultation with or assistance from co-workers.[46] It is an open question as to what extent this is possible and what physical and managerial technology would be required for a neo-Taylorist form of work organization in a service sector context.[47] Alternatively, occupational communities may be exploited by employers. Often – perhaps more often than not – workers identify with their employer, grateful for the opportunities offered to display and develop their work skills. Employers, in turn, sometimes try to transform whatever *occupational community* may emerge

45 Where the currently mushrooming 'wealth work' – in, for example, the 'servant economy' of manicure, massage therapy, skincare, caretaking of animals, fitness training, and the like – is no longer organized on a personal client–provider basis but through platforms like Uber, opportunities for workers to communicate with each other may be extremely limited. For an initial exploration of 'wealth work' in the US, see D. Thompson, 'The New Servant Class' *The Atlantic*, 12 August 2019, at <https://www.theatlantic.com/ideas/archive/2019/08/americas-hot-new-job-being-rich-persons-servant/595774/>.

46 See, for example, the organization of work in an Amazon distribution centre; J. Bloodworth, *Hired: Six Months in Low Wage Britain* (2018).

47 See, for example, the call centres studied by Korczynski, op. cit., n. 33. See also the home nurses studied by Adams et al., whose informal interaction outside of specific job tasks is viewed with suspicion by cost-conscious managers; Adams et al., op. cit., n. 33, p. 436.

among their workers into an *enterprise community*, hijacking workers' social relations of solidarity for the fostering, instead, of worker loyalty and deference to the enterprise hierarchy.[48] As employers penetrate occupational communities, they transform horizontal social structures into vertical ones, and worker solidarity into employer hegemony. This has consequences for the substance of the shared culture, as for example in the film industry, where directors use parties and social events as hiring halls, making it de facto obligatory for workers to attend in what would otherwise be their own free time.[49] Moreover, infiltrating their workers' community may provide employers with the productivity benefits of community relations without having to fear that these will be used by workers to advance interests in conflict with those of their employer. Perhaps with the help of a local labour aristocracy, employers may use 'community capture' to foster an occupational-cum-organizational culture that emphasizes an entrepreneurial identity. To the extent that it cultivates pride in individual advancement and celebrates competitiveness, such a culture may be accompanied by hostility to legal regulation of employment and, in particular, to trade unionism. An interesting example here is a recent case of bicycle couriers in Italy who insist on the competitive nature of their trade and therefore reject legal limits, proposed to protect them from overwork, on what an individual rider can earn.[50]

From the perspective of labour law, both obstruction and capture of occupational communities by employers take advantage of the inherent asymmetries of contracting for work. Given the potential of occupational communities to become a potent catalyst for worker solidarity balancing such asymmetry, employer interference with their formation and functioning interferes with workers' freedom of association. Employer interference in occupational communities is, in other words, a matter for labour law, in particular for an industrial *Ordnungspolitik* regulating the structure of labour constitutions in a democratic society. Legal intervention for this purpose should not be dependent on being triggered by the complaints of individual workers; rather, guaranteeing workers opportunities for the formation and articulation of collective interests and collective solidarity, cultivating worker collectivism, and bringing to bear local cultures of reconciling work and non-work and embedding work in social life should instead be considered a basic function of public policy and labour law.

48 A striking historical case of a paternalistic enterprise community is analysed in G. Revill, '"Railway Derby": Occupational Community, Paternalism and Corporate Culture 1850–90' (2001) 28 *Urban History* 378.

49 Apitzsch, op. cit., n. 28.

50 L. Baratta, 'Cinquecento rider contro il governo: "Quel decreto ci impoverisce"' *Linkiesta*, 25 September 2019.

In a useful contribution to a collection on social and economic practices ('conventions') and the law, Simon Deakin focuses on legal concepts and their co-evolution with the social relations that they describe and constitute.[51] For Deakin, legal concepts are at once part of social reality and a kind of lens through which new perspectives on institutional change may be established, contributing to our understanding of that reality. Legal forms do not correspond directly with social practices beyond the legal system, he writes, 'but they do co-exist with and evolve alongside them'.[52] Intrinsic to Deakin's notion of co-evolution is recognition of the (only) semi-autonomous nature of the development of the law. Deakin highlights three ways in which legal concepts operate as distinct elements within the social structure, both responding to and initiating change. First, legal concepts shape the path of the law and so at least partially influence the content of legal rules, meaning that the substance of legal rules cannot be reduced either to economics or politics *alone*. Second, legal concepts play a role in constituting relationships beyond the legal system. Through numerous effects, social relations are constituted and reconstituted by legal norms, so much so that the coercive power of legal sanctions may remain more or less hidden from view. Third:

> In respect of the evolution of social structure, law can be a causal as well as an outcome variable … The success of legal techniques will often depend on how far legal norms can be aligned with or matched to collective practices beyond the legal system.[53]

While Deakin's primary concern is to demonstrate the potential usefulness of an analysis of legal concepts to wider social enquiry, his characterization of legal concepts and social reality as co-evolving – or co-constitutive – also speaks to the importance of sociological enquiry to legal scholarship. To be effective – to effectively adjudicate social conflicts and restore *Rechtsfrieden* – law must be both internally *coherent* and *aligned* to the reality of social relations outside of itself. At the same time, law should not be understood in terms of this function alone; law is not straightforwardly 'summoned' by elementary needs within societies for peace, dispute settlement, and the suppression of deviance.[54] Law is not only a functional necessity, in the terms used by Selznick; it is also a realm of justice.[55] Any peace – or social order – that law institutes must necessarily take a particular form and, as such, may be judged more or less *good*, meaning more or less *just*. When we

51 S. Deakin, 'Juridical Ontology: The Evolution of Legal Form' (2015) 40 *Historical Social Research* 'Special Issue: Law and Conventions from a Historical Perspective' 170.
52 Id., p. 171.
53 Id., p. 182.
54 P. Selznick, *Law, Society, and Industrial Justice* (1969) 8.
55 Id., pp. 8–11.

make value judgments about law, we do not only consider its effectiveness (coherence and alignment) but also its legitimacy – and the question of the law's legitimacy involves considerations not only of formal justice (law's correctness or integrity) but also of substantive justice.[56]

Studying occupational communities and the labour constitutions within which they are nested speaks directly to the effectiveness of labour law: its alignment, or lack thereof, to the working relations that it purports to regulate. Additionally, it can inform our sense of whether a particular rule or system of rules is legitimate: both formally and substantively just. In light of the fracturing, or fissuring, of workplaces that is a prominent feature of the transition from an industrial to a post-industrial economy, and of the unprecedented technological and institutional change that has accompanied it, the need for scholars of labour law to be attentive to the socio-economic realities of contracting for work appears greater than ever. 'One of the chief offices of legal scholarship', wrote Selznick, is the 'monitoring and midwifery of incipient law'.[57] To anticipate what might be shaping up to be a capitalist labour constitution of a new, post-industrial rather than industrial kind, detailed study of the vast variety of occupational communities growing on the ground of the evolving service sector would seem to be indispensable for labour law scholars and practitioners alike.

In the field of labour law, substantive justice has long been understood (with Marx, Weber, Adam Smith, and Karl Polanyi) to lie with the imperative not to treat the worker as a commodity like any other, but to shelter her from exposure to raw market forces – from the barbarism, as it were, of private law as applied to human labour. Such shelter, however, must be provided on a terrain that is riven by conflicts of interest (between capital and labour, workers and their employers, and workers and other workers), and by fundamental collective action problems and conflicts between individual and collective rationality – as, for example, when employers strive to escape the very legal and institutional constraints that are essential to the viability of a capitalist mode of production in the longer term. In such circumstances, common interests or shared understandings of what is fair might not always be immediately apparent. In a dynamic capitalist economy, moreover, constellations of interests can change rapidly. How can the law secure justice and social peace in situations of deep-running conflict? How can it keep pace with change? How can labour law adapt to the evolving realities of working relations, lest these slip from its grasp to be captured by private law?

These are not new questions and neither are the most convincing answers to them entirely new. As noted above, among Sinzheimer's main arguments in favour of free collective bargaining was that, in modern industrial society, the legal system alone – the legislature and the courts – could not

56 Id., p. 13.
57 Id., p. 33.

possibly keep pace with industrial change, including changes in institutional conditions and opportunities.[58] This was why labour law had to be not merely *substantive* but also *procedural* in nature, opening itself up to the reality of industrial and working life by delegating substantive rule making largely to properly constituted organizations of the 'two sides of industry': the buyers and sellers of labour. With changing circumstances shaping and reshaping the interests, claims, and willingness of the parties to make concessions, collective bargaining could result in rules with a far greater potential than formal law to secure industrial peace – or, rather, an industrial truce until the next round of joint rule setting, in response to the most recent changes in industrial circumstances or political power relations. While conflicts of interest in employment relations were 'inevitable and necessary', as Kahn-Freund put it, there was one interest that the two sides had in common: 'that the inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures'.[59]

A second set of arguments in favour of collective bargaining had to do with the enforcement of norms, whether collectively negotiated, legislatively enacted, or judicially decreed. Here again, it was observed, there was only so much that legal procedures and sanctions could achieve:

> The law has important functions in labour relations but they are secondary if compared … with the spontaneous creation of a social power on the workers' side to balance that of management … Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation they are seeking to enforce.[60]

Where unions are represented in the workplace, they can act as *ever-present* inspectorates, shielding individual workers from any potentially hostile reaction on the part of the employer by speaking with one collective voice. In the case of infringement by the employer, the union can negotiate rectification and/or compensation. Where enforcement of a legal norm relies on individual litigation, the union can provide moral, financial, and practical support to the worker, including legal advice. Since the union's capacity to act in these respects relies largely on its ability to threaten or take industrial action – its 'social power' – a further argument arises here in support of collective norm *setting*; the enforcement of norms is facilitated if it can draw upon a (collective) sense of grievance among workers in their respective occupational communities – if the norms in question are grounded in the workers' sense of justice.

Taking these arguments up in the light of our reading of the occupational communities literature, we posit that legal interventions in work relations today should more than ever before prioritize *procedural concerns*. Formal law should enable workers to take advantage of their social relations in their

58 Sinzheimer, op. cit., n. 6, p. 46; Davies and Freedland, op. cit., n. 8, p. 58.
59 Davies and Freedland, id., p. 26.
60 Id., p. 19.

workplaces to seek improvements in their working conditions and terms of employment without being hindered either by managerial co-optation or by an organization of work that inhibits their free association, and with it the formation of ties of worker solidarity. To prevent occupational communities from becoming exploitative total, or even totalitarian, institutions under employer control, procedural rights for workers to meet and communicate their grievances and discover what they feel is 'right' could constitute a first step towards a more orderly and fairer new regime of work and employment. Generally, national legislation or national collective agreements concerning the procedural rights of workers should allow for a diverse, site-specific application and institutionalization of general principles of fairness. One main function of the national labour constitution should be to provide a procedural foundation for different local labour constitutions generating different, locally adjusted substantive ideas and regimes of industrial – or post-industrial – justice.

What we have in mind here is, in essence, a re-imagined freedom of association with broad application to all workers, including the self-employed. Interpreted widely with reference to the purpose of fostering social bonds and community building, freedom of association might be understood, for example, to encompass a right to free and private communication among co-workers. Where workers rarely meet in person because of the way in which the work is scheduled, they could benefit from a right to privacy in respect of communications among themselves via social media, or employers might be obliged to provide secure digital platforms for workers to discuss their concerns.[61] Similarly, trade unions should have the right to communicate securely and privately with workers, and to enter workplaces for meetings with workers and workgroups.[62] Freedom of association might also be argued to encompass a right to a measure of job security.[63] Contracts for work are increasingly used to render working relationships insecure, or precarious, with the result that workers become willing to act just as the employer wishes for fear that they risk their position if they do otherwise. In the case of zero-hours or other ultra-precarious arrangements, disciplinary or retaliatory action by an employer can take the form of a simple (and in some jurisdictions currently entirely lawful) decision not to offer any future shifts or gigs – in

61 B. Rogers, 'Social Media and Worker Organizing under US Law' (2019) 35 *International J. of Comparative Labour Law & Industrial Relations* 12. For an example of gig workers using WhatsApp groups to 'to share concerns, coordinate and organise meetups, and offer each other support with concrete matters', see A. Tassinari and V. Maccarrone, 'Riders on the Storm: Workplace Solidarity among Gig Economy Couriers in Italy and the UK' (2020) 34 *Work, Employment and Society* 35.

62 ILO, *Compilation of Decisions of the Committee on Freedom of Association* (2018, 6th edn) para. 1590.

63 A. Bogg, 'Non Domination: Trojan Horse or New Normativity?' (2017) 33 *International J. of Comparative Labour Law & Industrial Relations* 391.

the parlance of platform work, to 'deactivate' the worker's account.[64] In such circumstances, a right to free association, including a right not to be disciplined or discriminated against for exercise of that freedom, means little without an ancillary or accessory right to some form, at least, of security of employment.

Given the diversity of occupational communities and the fissuring of workplaces, where workers doing the same job may have different contractual terms and rates of pay, the design of effective procedural rules is not a straightforward matter. Diverse communities may require diverse sets of rights and procedures if they are to be able to endow their social relations with a capacity to turn shared beliefs about work and working relations into concrete demands and bargaining agendas, and thereafter to engage effectively in processes of bargaining, rule making, and rule enforcement. While we anticipate that rights to private communication with co-workers and to employment security might be beneficial across the board, therefore, we would also suggest that the concrete forms that these rights should take in different sectors and occupations might have to be worked out between employers and a procedurally empowered workforce. A variety of legal techniques could be employed here to empower workers without presuming to know in advance precisely the nature of the procedural rights that would achieve the desired end: universally applicable rights stated in broad terms to allow for context-specific interpretation; and 'derogable' rights, or default rules, that can be departed from only in the workers' favour, or only on the basis of a (somehow) collectively negotiated agreement. In any case, the policy priority would be to institute decentralized forms of collective action and collective bargaining, understood here, almost in a Hayekian sense, as *mechanisms of discovery*: the discovery of interests, action potential, and new procedural and substantive rules that are effective on the ground and more easily enforceable for being rooted in the workers' occupation-specific sense of justice. The outcomes of the process would not, and could not, be anticipated in advance. Any necessary adjustments – for example, to address undesirable inequalities arising between the better organized and less well organized workers ('sectionalism') – would be enacted only at a later stage.

We are aware, of course, that in many countries, legislation of the type that we propose here, aimed at strengthening workers' rights to organize, is not currently politically viable. Indeed, for several decades now movement has been mostly in the opposite direction, involving restrictions of the rights of workers to strike and engage in other forms of industrial action and protest that are essential elements of the collective bargaining process.[65] In recent years, however, there have been signs of a potentially significant

64 J. Prassl and M. Risak, 'Uber, TaskRabbit, and Co: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2015) 37 *Comparative Labor Law and Policy J.* 619.

65 T. Müller et al. (eds), *Collective Bargaining in Europe: Towards an Endgame* (2019).

change in the political terrain. During the course of campaigns to become the Democratic nominee in the 2020 US presidential election, several of the candidates published proposals for wide-ranging labour law reforms designed precisely to give legal support, again, to collective bargaining as a key means of combatting inequalities of wealth and low pay.[66] While this is encouraging, we would emphasize that a top-down approach without firm support for decentralized self-organization, self-representation, and, in particular, enforcement of norms is likely to miss the realities of the contemporary workplace.[67] In a number of countries, social movements, campaigns, and strategies have emerged that aim at circumventing political intransigence at the national level by securing policy or legal change within subnational administrative and legal areas.[68] At whichever level they are directed, efforts to get new legislation drafted and passed will rely in large part on the capacity of unions and other worker groups to mobilize political support.

More ethnographic research on the formation of occupationally and workplace-based communities among workers is urgently needed – on the motives that drive such formation and on the social norms, collective aspirations, and perceived needs for institutional and legal support to which it may give rise. Unlike earlier work on occupational communities in traditional industrial sectors, recent studies of service sector occupational communities do not directly explore the potential of occupationally based solidarity to sustain the sort of collective action 'on the ground' that is needed, in interaction with formal legal regulation, to correct the inherent asymmetries of contracting for work under contemporary conditions. If it is true that, as Cannon put it, 'a strong sense of community in an occupation is likely to be an important source of satisfaction with work', is it not also and at the same time an important source of collective action in defence of good employment and working conditions?[69] If there is any social formation at all that could underpin a renewed labour law and a revived trade unionism today, it is one based, we believe, on the collective experience of workers at work and on the social and practical collectivism that may arise from it.

66 N. Scheiber, 'Candidates Grow Bolder on Labor, and Not Just Bernie Sanders' *New York Times*, 11 October 2019, at <https://www.nytimes.com/2019/10/11/business/economy/democratic-candidates-labor-unions.html>.

67 K. D. Ewing et al. (eds), *A Manifesto for Labour Law: Towards a Comprehensive Revision of Workers' Rights* (2016), paras 3.17–3.21.

68 K. Andrias, 'Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law' (2017) *Harvard Law & Policy Review Online*; A. C. L. Davies, 'The Trade Union (Wales) Act 2017/Y Ddeddf Yr Undebau Llafur (Cymru) 2017' (2018) 47 *Industrial Law J*. 135; *Scottish Left Review*, 'A Charter for Workers' Rights in Scotland: Developing Devolution' (2019), at <http://www.scottishleftreview.scot/a-charter-for-workers-rights-in-scotland-developing-devolution/>.

69 Cannon, op. cit., n. 29, p. 183.

V. CONCLUSION

Historically, collective bargaining was a process through which workers' experiences and opinions could come to shape the rules that governed their working lives. In recent decades, unilateral rule setting by management has largely replaced the bilateral negotiation of workplace rules. As a consequence, workers' beliefs about fairness in work organization and working relations have increasingly disappeared from law's gaze and the purview of legal scholars. Correspondingly, the study of industrial relations has been superseded, more or less wholesale, by the study of management.

Without collective bargaining or alternative means of collective norm setting within a particular workplace, sector, or occupation, generally applicable legal norms come under increasing strain. They lack fit, across the board, with the realities of working life and with workers' sense of collective grievance – of justice at work. By reason of novel forms of work organization and contracting for work, legal rules intended to be generally applicable do not apply to all workers; even where they do apply, they are often difficult to enforce. Sets of rules intended as floors of minimum standards, upon which collective bargaining could create tailored and more generous provisions for particular groups, function, increasingly, as ceilings.

The study of occupational communities and the labour constitutions within which they are nested can serve to refocus law's gaze on working life and on relations between co-workers as sources of normativity – as sites of 'incipient law', to recall Selznick's term. Even in the fissured workplaces and under the precarious working conditions in today's post-industrial service sector, social identities and ideas of social justice form around work and employment relations. Social bonds among workers in the same occupation or workplace produce and sustain strong and enduring beliefs regarding fairness and justice at work. Recognizing the existence of occupational communities and the social norms that they engender is indispensable for scholars of labour law as it helps to ground their work in the factual and normative realities for which they have to provide formal rules. It is also essential for intermediary organizations like trade unions, which depend for their revitalization on being able to organize local norms among and claims by workers into a broader collective interest to be brought to bear in negotiations with employers and governments.

While workers' understandings and beliefs no longer routinely shape the rules governing the organization of work and the terms and conditions of employment as directly as they once did, they remain highly relevant for the legitimacy of statutory and contractual rules as well as of management policies, and thus for their efficacy and enforcement. In new sectors and occupations in particular, legal rules made without the participation of workers on the ground may be rejected as impractical or useless not just by employers bent on minimizing the influence and the range of social regulation but also by the providers of labour power themselves. This is why

focusing exclusively on *formal legal norms* (statutory rules, common law rules, and contractual rules) and HRM practices, while neglecting *informal social norms*, cannot deliver a full understanding of the normativity of working life. Procedural law opening up the making of labour law to the participation of workers and employers may be able to correct the tendency of contract law to obscure the class nature of contracting for work, thereby preserving the progressive function of labour law in a capitalist society. This is a matter not only of the efficacy of law but of justice – of democracy at work and for working people.

APPENDIX

Table 1. Studies and selected properties of occupational communities

Period during which research was conducted	Authors and year of publication	Occupation	Employment	Crossing class lines (management involved)	Worker involvement, identification with work	Skills required	Satisfaction with work	Social ties
1950s	Lipset et al. 1956	Printers	Stable	No	High	High	High	+++
Early 1960s	Cannon 1967	Compositors	Stable	No	High	High	High	+++
Late 1960s	Salaman 1974	Architects/ railwaymen	Self-employed/ stable	Yes/no	High/high	Professional/ high	High/high	+ +++
Early 1970s	Shamir 1981	Hotel workers (living-in)	High turnover	No	Medium	??	??	Total institution+++
Late 1990s	Adler and Adler 1999	Resort workers	Seasonal, temporary	No	Medium	Believed to be high; vaguely defined	High; extrinsic	++ Fluid, instant
Late 1990s	Korczynski 2003	Call centre workers	Regular, high turnover	No	Medium to high	Medium	Potentially high	++ 'Communities of coping'
Early 2000s	Lee-Ross 2004	Hotel workers in four countries	Full-time, part-time, high turnover	No	High	Believed to be high; vaguely defined	Potentially high	+++ Fusion of work and non-work life

(*Continued*)

Continued

Period during which research was conducted	Authors and year of publication	Occupation	Employment	Crossing class lines (management involved)	Worker involvement, identification with work	Skills required	Satisfaction with work	Social ties
Mid-2000s	Sandiford and Seymour 2007	Hospitality workers, barmen etc.	Full-time / casual, high turnover	Yes	High	Soft, vaguely defined	High	+++ Fusion of work and non-work life
Mid-2000s	Lee-Ross 2008	Service staff aboard cruise ships	Insecure short-term contracts	No	High, due to social isolation and self-selection	Soft, vaguely defined	High due to 'fun'	+++ Fusion of work and non-work life
Late 2000s	Apitzsch 2010	Architects / film workers	Project work, short-term contracts	Yes	High / high	Professional / semi-professional	High / high	++ / +++ Social isolation; recruitment
Late 2000s	Van Maanen 2010	Urban police officers (US)	Full-time	No	Very high	High, semi-professional	Medium	+++ Fusion of work and non-work life
Late 2000s	Adams et al. 2012	Home nurses (UK)	Regular	No	Very high	High, semi-professional	Potentially high	+++ Social isolation

* Secondary analysis: shipbuilders, policeman, fishermen, jazz musicians.