Democracy at Work

Contract, Status and Post-Industrial Justice

Ruth Dukes
Wolfgang Streeck

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First published in 2023 by Polity Press

Polity Press
65 Bridge Street
Cambridge CB2 1UR, UK

Polity Press
111 River Street
Hoboken, NJ 07030, USA

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ISBN-13: 978-1-5095-4898-9
ISBN-13: 978-1-5095-4899-6 (pb)

A catalogue record for this book is available from the British Library.

Library of Congress Control Number: 2022936516

Typeset in 11 on 13 pt Sabon
by Fakenham Prepress Solutions, Fakenham, Norfolk NR21 8NL
Printed and bound in Great Britain by CPI Group (UK) Ltd, Croydon

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Preface

What happened to work and workers as the state-managed capitalism of the postwar era – the postwar settlement, as it is sometimes called – was replaced by neoliberal capitalism? What were the losses, the gains if any, and how, if at all, can the losses be recovered? Are growing inequality, widespread precarity, stepped-up market pressure on wages and employment conditions, the intensification of work, declining social protection and mounting tensions between work and family life inevitable or incurable, or can they, do they need to, be mitigated? In short: can remedies be found for the ailments of a neoliberal labour regime, and how exactly should they be conceived and applied?

If this book is centrally concerned with these questions, and with work and workers before, during and after the neoliberal era, it is categorically not another book about 'the future of work', as that topic has come to be defined (Srnicek and Williams 2015; Mason 2016; Benanav 2020). Nor is it an inventory of new kinds of jobs and forms of contracting for work, or a collection of recipes, a catalogue from which to pick 'solutions' to 'problems', such as how to set up an effective collective bargaining regime for a

restaurant chain or the domestic care sector.[1] Our concern, instead, lies with the more fundamental matter of building the capacities needed to devise and apply such solutions and the ends we would wish to pursue with them. In both respects, our focus is on labour law, on the role it could and would have to play in regulating, or re-regulating, the world of work after the neoliberal revolution. At the same time, however, our central message, and the guiding idea of the book, is that labour law, if it is to survive as a discipline related to but separate from private law, must be analysed and conceived in the context of political economy and the dynamic process of capitalist development: of economic constraints and opportunities, of politics and power, of government policy and political democracy. It is from this perspective that we attempt to reconstruct the mission and the substance, the function and the structure of labour law as a regulatory institution in a capitalist economy and society, existing recently but surely not forever in a neoliberal form.

By contextualizing labour law in this way, we are in essence treating it as an historical phenomenon, by which we mean more than simply that it changes over time. Putting labour law in an historical perspective means conceiving of it as embedded in the development and the changing forms of modern industrial capitalism. This reveals its specific normativity, its foundational mission to distinguish contracting for work from contracting for any other commodity, to devise a special contracting regime for that special, imperfect, fictitious commodity that is labour (Polanyi, 2001 [1944]). It is not so long ago that labour law as a matter of course used concepts such as industrial justice and industrial democracy; that it distinguished between fair and unfair contracts for work and sought remedies to balance what it considered an asymmetrical relationship of power between employers and workers. In this book we ask if these concepts and the ideas they house are still applicable today, even if in light of present conditions they can appear out of time.

Indeed, our main concern in the book is with concepts, and not with statistics, values or prices, and with examples of new work and work relations rather than comprehensive theories of contemporary working life. Our aim is to understand law as an institution, as an instrument of social regulation, rather than to devise a theory of, say, new technology changing old or new work settings, or of the labour process in a post-industrial era.

Law is a highly complex, methodically and logically disciplined engagement of concepts – concepts that aim to capture both what the world *is* and what it *ought to be*, and to do so coherently, free of contradictions. Insofar as concepts meet that aim, they enable the legal system to adjudicate disputes on what is and what ought to be in such a way that those involved, and those looking on, can at least for the time being accept or approve what has been ruled as an objective condition of life as it continues. The part of the world where the conceptual abstractions of labour law meet reality used to be called industrial relations: the tripartite encounter of business, labour and government in organizing the intertwined processes in a capitalist society of production and capital accumulation, and provisionally settling the conflicts of interest that arise there, for the purpose of facilitating cooperation on terms acceptable to all three sides. Following the partial de-industrialization of our economies and disorganization of labour and business, the term 'industrial relations' may no longer be appropriate, but the confrontation of labour law's conceptual abstractions with reality remains a matter of great importance.

Under capitalism, labour law regulates society's paramount conflict line, its breaking zone, its most critical cleavage, where peaceful exchange and cooperation are forged, or fail to be forged, under conditions of distributional conflict among unequally powerful class interests. As a social and economic institution, labour law must serve two purposes at once: *social integration* through legally enforced conformity with collectively held values

of social justice, giving rise to a legitimate social order providing for social peace, and *capital accumulation*, demanding a social order that must first be profitable before it can be just. Using the language of Karl Polanyi, this locates labour law at the crossroads of movement and countermovement as driving forces in capitalist development (Polanyi, 2001 [1944]). There, it is under pressure simultaneously to reflect, interfere with and provisionally settle the conflictual-cum-cooperative relationship, the main site of social reproduction in a capitalist society, between capital and labour – indeed, between capitalism and society.

As a field of law, labour law draws its legitimacy from its capacity to impose a stable and predictable order on a conflictual relationship of power and exploitation, to institutionalize such order as one of justice, of right, not only between individuals but also between classes. Due to the nature of contracting for work, which at the individual level typically proceeds between parties of unequal power, this has historically required labour law to differentiate itself from private law, turning itself into something like public and indeed democratic law: the law of 'industrial citizenship', designed to create, with institutional means, something like a level playing field between workers and employers. This was most pronounced in the postwar political economy, when the holders of state power felt unable to pacify the conflict between capital and labour by turning it over to either a 'free play of market forces' or the criminal law and the police. More so even than other fields of law, this made labour law more than just a superstructure reproducing an underlying power structure while dressing it up as a normative rather than merely a factual order. Because of the conflictual and tendentially explosive nature of the social field that it is to regulate, labour law is and must be open to contestation and change by those affected by it, responsive at least in part to pressures not just for internal dogmatic consistency or external economic efficiency but also for human interests and

demands for non-commercial social justice. Potentially, that is to say, labour law must be capable of performing a progressive function under capitalism where capitalism is at its most capitalist, in the selling and buying of labour as a commodity.

This book, then, is the outcome of a meeting between two disciplines, labour law and political economy, and is intended to be productive for both. But what does it mean for one scholarly discipline to learn from another? Theories always come with hidden, unrecognized assumptions or with premises believed to be self-evident, not or no longer in need of examination. Theoretical progress can be made when for whatever reason such assumptions and premises are forced into the open, making them visible and debatable. Brought to the surface, they can be clarified, corrected, confirmed or thrown out; the theory can thereby be improved, narrowing or, to the contrary, widening its scope. An encounter with a related discipline and its conceptual reconstruction of the world can be helpful in this respect; for example, when the second theory treats as a variable what the first treats as a constant. It is true that 'interdisciplinarity' all too often serves as an excuse for, as it were, a lack of discipline. But this is not the case if the disciplines in question happen to complement each other, enabling them to detect and fill with substance gaps in the other's account. Then external conditions hitherto submerged in a *ceteris paribus* clause may be incorporated in the theory, or unproductive simplifications may have to give way to a more complex conceptualization of reality.

What is gained from placing labour law in the context of a theory of capitalist political economy? First, the fundamental distinction between labour law and contract law is thrown into stark relief – the inability of contract law to recognize or address the unequal power of the parties to a contract for work and the limited freedom of contract on the part of the weaker of the two (Weber, 1978 [1922], pp. 730–1). Likewise, the uniquely political nature of labour law is brought to light, as well as its partly

contrarian position in a political economy and mode of production that reproduces itself through treating human labour power as a commodity, if an imperfect one.[2] One is also reminded that collective labour law and the collective rather than individual negotiation of contracts for work – amounting to something like publicly empowered private law-making for the workplace or sector in question – are neither historical curiosities nor an ephemeral sideshow of what might be mistaken for 'labour law proper'. Here again, labour law's profoundly political character comes to the fore; its contribution in democratic capitalism to the functioning of a 'second tier of government'[3] bears primary responsibility for effecting a redistribution of incomes and other elements of class compromise, in the process providing the first, parliamentary tier with legitimacy and stability. Trade unions figure here as political as well as industrial bodies, serving – together with churches, political parties and other bodies – a vital intermediary function between society and politics, not only giving necessary substance to the powerful but abstract concept of 'the people' (Rosanvallon, 1998) but also functioning as collective political actors capable of effectively demanding social justice.

Alignment with political economy helps labour law rediscover its particular nature: its twofold role as a contracting regime between individual buyers and sellers of labour power on the one hand and as a core element of the institutional endowment of capitalist – that is, of specifically class-conflictual – modern societies on the other. Seen this way labour law appears as decidedly more than a handbook for contract adjudication by legally trained experts applying complex conceptual techniques to derive specific rulings from general principles. Nor does it consist only of a monitoring of legal developments in contracting for work to ensure that the body of law regulating it remains consistent, without internal contradictions. That objective in particular has always been difficult to achieve in labour law because the law

governing contracts for work is not only the result of court decisions and legislation. Another, often unpredictable source of labour law is the politics of the workplace, driven in part by the collective democratic participation of workers in law-making and law enforcement, rooted in the last instance in workers' capacity to withhold their cooperation collectively if their sense of industrial and social justice is too severely violated. In the field of work relations, as a House of Lords judge put it in 1941, 'the rights of the employer are conditioned by the rights of the men to give or withhold their services' (Lord Wright, *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1941] UKHL 2 (15 December 1941)). As a main pillar of Rokkan's second tier of democratic government, we argue, labour law as a legal system must be open at the bottom where it meets the realities of industrial life, including the possibility for those subject to it to make themselves heard, if need be, through industrial action. Labour law thus doesn't only regulate class conflict, it evolves with it and through it – in the struggle over legal change as social progress, driven by the countervailing power of the sellers of that imperfect commodity, labour.[4]

Similar considerations apply to political economy. Nothing is better suited than the study of labour law to draw attention to the fact that political economy concerns not only efficiency – meaning, in a capitalist society, profitability – but also, necessarily, justice, perceived or sought, as a precondition of predictable, stable cooperation, if only for the time being until work and industry will, again, have changed. Much in the study of political economy focuses on conflict and power, less on the institutions, set up or certified by the state, within which conflicts are fought out and mediated or settled under agreed or imposed rules of engagement. Some of those rules are informal; others, and in a modern society often the more important ones, are formalized in law. This means that conflicts and their outcomes are shaped not only by the expectations and power resources of those directly

involved but also by the logic of law, of legal systems and how they generate, apply and update the formal rules created and administered through and within the law. Historical-institutionalist political economy has yet a long way to go to understand exactly what difference it makes if institutions are enshrined in formal law – how they emerge, are laid down, enforced and, importantly, changed in response to changing conditions surrounding them. In a capitalist society, that is to say, political-economic theory is inevitably also a theory of institutional change, which in turn must, to an important extent, be a theory of law and legal change.

Law is easily the most sophisticated institution in a modern society and political economy. If only for this reason, the study of law needs to be integrated in the study of political economy, with law taken seriously as formal law, distinguished from but related to the informal rules and norms emerging in social life. As an institution in political economy, labour law in particular offers itself as an ideal subject for exploring the interaction between legal systems and emerging norms of social justice, as they grow out of practical experience and are translated, or not, into binding regulations enforced by state power. With its broad interstitial zone with social life and collective action for social justice, labour law in particular would appear to be an ideal subject for theoretical and empirical research, both on the sources and limits of social stability amidst social conflict and on the dynamics and directions of institutional change in capitalism, historical and contemporary.

Before turning in chapter 1 to the task of developing the main themes and arguments of the book, we would like to acknowledge the generous support of colleagues, including researchers and members of the advisory board of the Work on Demand research project (workondemand.co.uk) and at the Max Planck Institute for the Study of Societies in Cologne. As is reflected in the following pages, we have learned a great deal over the years from discussions with

colleagues in different disciplines and from reading their work. Emily Grabham, Richard Hyman and Karl Klare are owed particular thanks for providing helpful comments on a draft of the manuscript, as are George Owers and four anonymous readers at Polity. Special thanks are also due to our research assistant, Rex Panneman, who with his customary painstaking diligence formatted our references and put together our bibliography. The book is dedicated to Paul Dukes (1934–2021), who would have been its first reader.[5]

1
Introduction

While this book is ultimately concerned with the future of work relations and labour law, it largely comprises a considered look back to the postwar era of industrial democracy and to developments since that time. Viewed from this perspective, work relations today may be characterized by their impermanence and precariousness, by the weakened state of organized labour and by the ability of many employing organizations to offer terms and conditions on a 'take it or leave it' basis. Labour law may be understood to be in crisis: no longer fit for its original and defining purpose of protecting workers from unfair and unequal treatment at the hands of employers, ensuring decent work and a decent standard of living (Klare, 2004).[1] In the midst of the current decline of neoliberalism, there has been much talk of a necessary reconstruction of more sustainable and equitable forms of work and work relations.[2] While we certainly support these views, we wish at the same time to make clear how daunting the task is, involving nothing less than a reorganization of the relationship between capital and labour in line with norms of what we call social and industrial justice, to the extent that and in the way this is

possible in a capitalist political economy. Just as today's labour regime has evolved in an historical process away from regulated to neoliberal capitalism, we argue that fixing it requires institutional reconstruction on a major scale and over an extended period of time, not just of work regimes but also of capitalism as a socio-economic order.

As the reference to postwar industrial democracy already indicates, there is nothing new about arguments in favour of democracy at work. For much of the twentieth century, the many benefits of delegating decision-making in industry to trade unions and employers' associations were routinely recited in schools of industrial relations and law departments, and even by economists for as long as Keynes-the-corporatist ruled the day. The purported benefits included not only an increase in the capacity of workers to fight exploitation and seek a fairer share in the product of their labour but also improvements in production and economic efficiency. Clearly it would not do simply to reprise these old arguments without consideration of their fit with the changed circumstances of the new century, but neither should we assume that it has become necessary to reinvent the wheel. What has changed, and how, in the employment and labour market regimes of the industrialized – or, rather, de-industrializing or post-industrial – countries of democratic capitalism? Only by reaching an understanding of longer-term trends and developments in the field can we begin to address the question of how to secure, or restore, what used to be called industrial justice: dignity for working people and democracy at work.

Already in this introduction we would like to emphasize that our primary interest lies with the benefits of industrial citizenship and industrial democracy to workers, or 'the working class', as distinguished from its contributions, real or not, to economic efficiency and economic growth. Often efficiency is claimed to benefit not only employers but, automatically, workers as well, and

indeed society as a whole, however defined, implying that the most desirable forms of work relations and labour law are those that best promote industrial performance. At a minimum, however, this requires institutions to be in place that provide for an equitable distribution of efficiency gains. Whether industrial rights for workers enhance productivity, rather than productivity allowing for a better treatment of workers, as is sometimes claimed – and certainly was claimed by trade unionists and social democrats in the 1970s and 1980s – we leave for later discussion. In any case, we prefer to recognize that gains for workers may not translate into gains in efficiency; that some may even come at a price in terms of efficiency and, certainly, profitability.

Given our aim to identify what is of enduring relevance in the arguments of those who advocated, several decades ago, industrial citizenship and democracy at work, it follows that we are interested not just in developments 'on the ground' but also in how these were conceived at the time by scholars working in associated fields, especially political economy, industrial or employment relations, and labour law. With regard to geographic scope, the book focuses on the countries of the global North. While there are of course important differences between them, it is also the case that the same broad trends have been and are playing out across borders: varieties of capitalism, perhaps, but also important commonalities in the development of the institutions that govern it or govern it no longer (Thelen, 2014). We are aware of the interconnections between the condition of labour in post-industrial and in industrializing countries, and we also know that there is no neoliberal free trade solution to the issues of industrial justice across borders. The regulation of global value chains and the design of a trade regime that would allow workers in the South as well as the North to improve their situation are topics of great importance, but they are not and cannot be our primary topics here.

Concepts, institutions, ideological frames

As the subtitle of the book suggests, our interest in the kinds of arguments that have been made in favour of democracy at work leads us to consider some of the key concepts that have shaped mainstream thinking in respect of work relations and labour law – contract, status, industrial justice – and their changing meanings over time. In doing so, we are conscious of the need to avoid a potential pitfall, namely the unthinking application today of language developed in the 1960s and 1970s and the consequent narration only of losses, of what is missing. Our objective is, rather, to open up new perspectives from which we can recognize, in addition, what has recently appeared or is in the process of appearing. For this we require a reconstruction of our inherited concepts and a better understanding of how they were connected to the circumstances of their time, so we can develop them further to match the circumstances of today.

Concepts, as Philip Selznick reminds us, are 'open-ended, subject to debate and revision, accessible to empirical judgment' (Selznick, 1969, p. 4); moreover, they are time-bound, carrying different meanings in different historical contexts. It is through concepts that we organize our perception of the world, achieving a more or less satisfactory understanding of reality in theoretical as well as practical terms. Concepts inevitably simplify, emphasizing some aspects of what they seek to represent and de-emphasizing others. In this sense, they are the outcome of choices – choices which put us at risk of misconceiving the world or of falling victim to misconceptions more or less intentionally propagated by others for whatever reason of their own. This is when we speak of ideology, and of concepts as ideological lenses. Empirical research and scientific reasoning can help to clear up such misconceptions, alerting us to elements of the world that are too important to be left out if we want to get it right.

Moreover, the world as conceptualized may evolve away from how we once conceived it, weakening the fit between concept and reality, which is why we should continuously assess that fit and adapt to changed conditions the image of the real world that we have in the past devised. In doing so, we find our attention drawn to history, both of the world and of our way of seeing it, and how these evolve alongside each other.

If in the 1960s work systems were seen, and could meaningfully be seen, as configurations of contract and status, was this always the case? Or did those systems grow out of something else, conceived differently, until such time when conceptualizing the world in terms of contract and status became a plausible thing to do? Considering concepts in this way *as ideal constructions representing social constructions*, we can use them as heuristic devices allowing us to explore and learn something about both the real world and the way people have perceived and perceive it, for theoretical and practical purposes. It is in this way that we will deal with contract and status as concepts, hoping that they will shed light both on past and present realities and present and future possibilities of industrial justice and democracy at work.

If contract is at once a concept and an ideology, it is also an institution – today, arguably, the key legal institution in the field of work relations (Dukes, 2019; Rogers, 2023). Status builds a bridge from the institution of contract to the world of social structure, the encompassing social order where interests emerge and are endowed with different kinds and amounts of power, effective in both the state and the economy and, put together, in the political economy. That we explicitly address *contract* serves to remind political economists of the fact that foremost among the institutions that structure a modern society is the law, a highly sophisticated web of rules and provisions for rule enforcement, including importantly rules on how to change rules, intertwined but not identical with the state. Vice versa, by bringing in *status* as inevitably

underlying and informing a society's legal system, we draw the attention of students of law to the fact that what they study is embedded in a complex configuration of political, economic and social forces with which it maintains a multifaceted *Wechselwirkung* – a relation of interdependent mutual causation. Conceptualizing contracting for work as an historically changing, dynamic *interplay between contract and status* opens a path to an analytical approach that can be subsumed under the label of *law and political economy*. Drawing on both legal and political-economic theory, this is not to be confused with *law and economics* but is akin, rather, to *law and society* or, more particularly, an *economic sociology of labour law* (Ashiagbor, 2018; Dukes, 2019; Zatz, 2021). As we intend to demonstrate, a law and political economy approach is particularly apposite for the study of labour law as a dynamic institution facing social pressures for industrial justice in a dynamic capitalist economy and society.

Contract, status and industrial justice

The concepts *contract* and *status* have long been used to signify different types of social relation, with 'contract' referring to voluntary agreement and the free stipulation of terms by the parties to the relationship themselves, and 'status' referring to the rights and obligations, privileges and duties, capacities and incapacities accruing to the parties by reason of their belonging to a particular social or legal category: father, wife, master, servant. In *Economy and Society*, Max Weber usefully distinguished between whether a contract had been 'freely concluded according to the free choice of the parties' and whether its content had been 'freely chosen' (Weber, 1978 [1922], p. 670). He thereby recognized that particular relationships might be configured by elements of both contract and status. While status was typically attributed to someone by the law 'independently of his own acts of consociation'

(ibid., p. 669), it was also possible to talk of 'status contracts' which, having been 'freely concluded' by the parties, created 'political or other personal associations, permanent or temporary', in a way which effected 'a change in the total legal situation and the social status of the persons involved' (ibid., pp. 672–3). Master and servant was a prominent example of a 'status contract': actors were (formally) free to decide whether or not to agree to the hiring of one by the other, but, on conclusion of such an agreement, one would become the master and the other the servant, and certain rights and obligations would be enjoyed and owed accordingly.

In the nineteenth century, an historical tendency was observed by Weber and others for status relations to be gradually transformed into contractual ones. According to Henry Maine's famous dictum, this tendency – 'a movement from Status to Contract' – was the marker of 'progressive societies' (Maine, 1861). A hundred years later, the identification of contract with progress – of marketization with liberation – was widely doubted, especially where labour markets were concerned. Social progress was understood to lie instead with a restoration of status limiting freedom of contract so as to eliminate the impact of unequal market power on the terms of contracts for work. This would fulfil the implied promise of contract providing for voluntary and therefore, it was believed, equitable agreement among equals, enhancing the bargaining power of the otherwise weaker party. Prominent among those who saw in the rise of trade unionism and collective bargaining an egalitarian and democratic reversal of the liberal movement from status to contract was Frank Tannenbaum (1964). In his account, New Deal industrial relations ended the pseudo-voluntarism of free contracting for work, which was in fact a dictatorship of one class over the other, replacing it with true freedom for workers by providing them with the ability to say no to oppressive and exploitative demands by employers, if not individually then collectively. Formal

freedom of contract was supplemented or replaced, in other words, by the status of *industrial citizenship*.

Industrial citizenship involved recognition of the worker as a bearer of rights on the one hand and recognition of industry and the economy as spheres of public interest and democratic governance on the other. Like other kinds of status, it did not come to be determined by the parties involved but was, rather, public in nature. It was not merely social, like master and servant, but political, established in the democratic class struggle to regulate work relations between capital and labour, the most important arena of conflict and cooperation in a capitalist society. In contrast to the stark hierarchy of the master and servant model, citizenship implied here, as elsewhere, egalitarianism and mutual respect. Under capitalism this was not unproblematic. Public policy arguments in favour of industrial citizenship, or industrial democracy, sometimes rested on a functionalist logic that characterized workers' rights, especially to collective bargaining, as the price that capital had to pay to ensure economic cooperation and social stability. As time passed, however, reconciling collective bargaining with a Keynesian macro-economic responsibility for the government to provide for full employment proved to be difficult. An inherent tension or incompatibility made itself felt – a zone of conflict and uncertainty in the institutional structure of the postwar settlement. Full employment empowered trade unions to make gains in collective bargaining at the workplace that capitalist employers were willing and able to concede only if the state allowed for a going rate of inflation that curtailed workers' distributional gains *ex post* – while in the longer run it also undermined capital's willingness to invest and employ. Ultimately this encouraged the neoliberal revolution, as states and governments felt pressured by threats of capital flight in the course of 'globalization' to give in to capitalist revisionism.

Viewed from today, the most striking success of industrial citizenship was its narrowing of income and

wealth inequalities between the poorest and richest in our societies.[3] It also made for greater security of employment, and therefore income, for the majority of workers, who could expect to stay with the same employer for the whole of their working lives if they so desired. Through their trade unions, it involved workers in the governance of their wages and other terms and conditions. Following Hirschman (1970), it guaranteed them 'voice', making it unnecessary for them to make use of the possibility, always inherent in contract but potentially costly for the weaker party, of 'exit'. This contributed to a sense of fairness at work and a sense of citizenship in work which, through the connection between trade unions and social democratic parties, served indirectly to strengthen participation and confidence in political democracy. It also raised workers' aspirations, resulting in more self-confidence when pursuing their interests and making them less subservient in articulating grievances.[4]

All that said, the version of industrial citizenship that existed in the era of high industrialism suffered from a number of shortcomings, even from the perspective of workers – which partly explains why it was not more vigorously defended. An important critique, voiced with different emphases and to different ends from the right and the left, takes aim at the rigidities, confinements and restraints of the work regime as it developed in the 1960s and 1970s. Taylorism and Fordism rested on the willingness of workers to accept often extremely monotonous work in exchange for job security and the promise of 'career', or at least wage, progression. Industrial citizenship was constructed on the basis of a so-called male-breadwinner model that, while it limited the labour supply of households, rendered women economically dependent on their husbands or fathers. Channelling men into stable full-time employment, the model assumed that women needed, at most, only part-time and lower paid work: pocket money for them, a wage supplement for the family. In seeking to protect regularized full-time employment, trade unions at

times protected the interests of a white male membership over those of female and other marginal workers, including immigrants. Social protections premised on the 'family wage' and on androcentric views of 'work' and 'contribution' served less to protect 'society' per se, as Nancy Fraser has argued, than to protect male domination (Fraser, 2013). When the rights and protections afforded by labour law, social welfare and trade unions are understood in this way, even workers may develop a preference for freedom of contract – not as an end in itself or as a route to total marketization but, rather, as a means to emancipation, broadly conceived.

In what follows, we proceed on the premise that capitalist work relations necessarily comprise elements of *both contract and status*. With the important exception of various forms of forced labour and modern slavery, modern work relations are invariably contractual, meaning that the parties exercise formal freedom of contract when entering into them. The regulation of work relations by means of contract alone is, however, unrealistic: elements of status – including implicit rules and implied understandings – are always present, not to mention structural positions aligned with social and economic resources that differently restrict the agency of the parties. To argue otherwise, as platforms such as Uber do when they claim to create labour markets without search frictions and only minimal transaction costs, is to project a neoliberal utopia: contracts without status, an economy without a society – in other words, an undersocialized model of monadic social action that has no basis in the reality of social life (Durkheim, 1964 [1893]). It is to overlook Karl Polanyi's central insight that, without some form of protection from what he calls 'the vagaries of the market', the 'fictitious commodity' of labour will ultimately be destroyed (Polanyi, 2001 [1944]).

Like Polanyi's countermovement, status may come in a variety of forms that are more – or less – desirable from the perspective of workers, employers and society at

large: servitude, indenture, industrial citizenship, formal membership of a particular profession or occupation. It remains to be investigated how status and contract have been differently configured, and differently understood, at various points in time. A particular point of interest for us is the role of law and other public institutions in shaping these configurations, directly and indirectly. Here we remain conscious of the fact that even apparently 'private' contracting proceeds within a context that is structured in myriad ways by law and by the state. In addition to the law and political economy of work relations, we are interested in competing ideas of fairness or justice and the ways in which the latter may shape the former, just as the former shape the latter. Our understanding of status is wide enough to include both social norms and legal rules, as well as shared beliefs, held by particular groups or across particular sectors or localities, about what is fair or just in a given context. We also remain attentive to how different legal statuses can become bound up with or influenced by social statuses associated with gender, race, age, nationality, social class, and so on.

Contracting for work and the proletarian condition

In modern systems of labour law, a fundamental distinction is drawn between employment and self-employment. The employee is one who works under a contract of employment, or contract of service, whereas the self-employed worker has a contract for services or a series of such contracts with different clients. Where parties agree a contract for work, the law performs two functions simultaneously: it both identifies the type of contract in question (is it a contract of service or a contract for services?) and prescribes, accordingly, the content and functioning of that contract, injecting it with elements of status, or status-ordained rules (Freedland, 2016).

The distinction between employment and self-employment is fundamental to systems of labour law because, typically, only employees are accorded employment rights, including collective or solidaristic rights to form and join trade unions. The law recognizes that the employee is in a position of subordination or vulnerability relative to the employing organization. The self-employed worker, in contrast, is treated as independent – economically, organizationally – from those with whom she contracts to work in return for money and, as such, not in need of the protection of the law or union membership. Underpinning this rationale is a social or legal imaginary (Taylor, 2002) of the self-employed worker as a small businessperson, sole trader or entrepreneur, who willingly foregoes the security of employment in favour of autonomy and the chance to turn a profit. The employee may be imagined, in contrast, to have accepted that her work will be regulated and controlled by management and that she will enjoy only limited freedom in the course of the working day, but that, as compensation, she can rely on a pay cheque coming in at the end of every month, on sick pay when she is ill, and on a pension when the time comes to retire. Workers, according to the pop psychology of economic theory, are 'risk-averse'; they have a 'psychological preference' for security.[5] Entrepreneurs are willing to take risks and hope to be rewarded for it.

In labour law, self-employment tends to figure as a residual category: if a worker is not an employee, she is self-employed; if it is not a contract of service, then it must be a contract for services. Wherever contracts for work are drafted so that the worker falls outside of the legal category of employees, he or she will be characterized in law, instead, as self-employed. Not all such workers have the characteristics of a sole trader or entrepreneur, however; some may be economically or organizationally subordinate to the employing organization in a manner similar to employees. A mismatch can therefore arise between the scope of application of employment law, on

the one hand, and the vulnerable or subordinated workers to whom it *ought* to apply, according to its foundational rationale, on the other. Some legal systems attempt to address this problem by recognizing, in addition to employees, an intermediary category of 'dependent contractor' – essentially an own-account worker who works for one employer only for a period of time – who enjoys some but not all of the rights of an employee (Williams and Lapeyre, 2020). This can bring problems of its own, however, if, as an unintended side effect, it becomes easier still for employers to avoid employment proper and the labour law, tax and social security obligations that come with it.

While it may be understood or treated by labour lawyers as a residual, catch-all category, self-employment is also a specific kind of legal status, albeit a rather thin one, meaning that some rights and obligations attach to the self-employed worker (and possibly also to the 'employing' organization or client) by reason of her being self-employed.[6] Insofar as the status of self-employment, or employment, has its basis in contract, it becomes a matter that, at least in principle, is contestable or up for negotiation. In practice, employing organizations typically enjoy a wide freedom to draft the terms of the contract unilaterally by reason of their superior market power, offering these terms to prospective workers on a take it or leave it basis. That said, the context within which such drafting or negotiation proceeds is shaped by the law in a wide variety of ways, both direct and indirect,[7] and the measure of the employer's freedom to dictate terms varies from jurisdiction to jurisdiction.[8] Particular rules might act to incentivise and facilitate the parties' choice of self-employment over employment, or vice versa (Behling and Harvey, 2015). The law might be constructed so as to give more or less weight to the explicit terms of a contractual agreement over the 'realities' of the corresponding work relation,[9] and it might make it easier, or not, for a worker to contest her employer's characterization of their

relationship in the written contract on the basis that it is not a true reflection of those realities.[10] Even in the case of spot contracts, then, contracting for work is never wholly private but always shaped, to some degree, by public institutions, including, in particular, labour, tax, and social security law.

In light of current trends involving the fissuring of workplaces and the casualization of work, we refer throughout the book to *work relations*[11] and contracts for *work*, intended as inclusive of but broader than employment relations and contracts of employment. When we speak of employing organizations, we use the term 'employing' broadly to denote the purchase of work from others. We prefer the concept of *contracts for work* to the perhaps more commonly used idea of *contracts for labour services*, because we wish to retain a focus on the worker as human being and not let that be obscured through the designation of 'work' as 'service provision'. The concept of *work* still carries a memory of Marx's identification of work with practice, the self-production of the human species in its interaction with nature and society. While we conceive of contracting as a form of private ordering, we remain alert to the all-important role of the state and of society, and the ways in which law and social norms and structures can affect, and indeed control, contracting behaviour and its outcomes, even and precisely in formally 'deregulated' labour markets. For example, law can impose limits on contractual freedoms; it can define remedies in case of breach; it can shape actors' understandings of what is 'normal' or 'fair' in a given situation; and it can encourage the design of avoidance strategies to take an agreement outside of the scope of application of particular rules. More fundamentally, law constructs or reinforces power relations within the economy by assigning property rights to some and not to others. Trade unions, too, may fulfil important functions in respect of contracting for work, both strengthening the hand of workers when contracts

are negotiated and acting thereafter as ‘guardians of the contract’ to ensure that its terms are respected (Streeck, 2005).

To assist with the identification and analysis of the interplay of the public and private dimensions of contracting for work – of constraint and choice, status and contract – we make use throughout the book of the concept of the *labour constitution*, developed by us in previous work with reference to the writings of Weber and Hugo Sinzheimer. For our purposes, the labour constitution is the historically given ensemble of rules, institutions, social statuses, economic and technological conditions which together affect who gets what work under which terms and conditions (Dukes, 2019; Dukes and Streeck, 2020b). As such, it can be used to map the various contexts – regulated spaces, or regimes – within which contracting for work proceeds: a particular workplace, company, sector, locality and jurisdiction. Speaking of the labour constitution allows us to retain a focus on matters that can be obscured when the labour market is chosen as the primary unit of analysis, or as the set of practices which frames the field of enquiry, especially the ways in which actors’ behaviour is shaped by social macro-structures and institutions, including legal rules, that are not reducible to an economic logic. Framing our analyses around labour constitutions also allows for the focus to extend to workplaces and working lives in addition to labour markets, and for recognition that work relations tend to endure over time and should not be thought of simply as one-off exchanges of labour for money. This is especially so with respect to the ways in which actors’ behaviour is shaped by social macro-structures and institutions, including legal rules, that are not reducible to an economic logic.

In making the case for the reinstitution of democracy at work, we assume the existence of shared interests among groups of workers and among workers as a social class. We define ‘working class’ for our purposes as the

multitude of those subject to what we call the *proletarian condition*. By proletarian condition we mean a location in the social structure which engenders a specific anxiety that we call proletarian, reflecting two kinds of structural insecurity: first, a position in the market that renders you dependent on finding someone who will buy your labour and, second, a position in the hierarchy of an organization of production that does not allow you to offload the uncertainty of your market situation onto subordinates and, indeed, makes you vulnerable to others offloading their uncertainties onto you. In a proletarian condition, there is an ever-present risk that economic change may disrupt your work–income nexus, depriving you of your livelihood, your accustomed way of life, the respect of others, the ability to raise your children in a way that allows them to grow into full members of the community, and so on. Many so-called self-employed workers fall within this definition, which to an important extent overwrites the traditional distinction between wage-dependent workers and price-dependent subcontractors, or small business. Also included are pensioners, since they live on wages earned under the proletarian condition and withheld or invested for their retirement, making them dependent, one way or another, on capitalist economic growth. We draw the line where people, employed or not, have sufficient assets to exist outside of labour markets and hierarchical chains of command – enabling them to choose to withdraw from wage labour, to live comfortable lives without it and without a social welfare state derived ultimately from the work–wage nexus. Note that we anchor the proletarian experience in both markets and hierarchies, and that we do not limit it to wage workers in a narrow sense. Anybody at risk of losing their income and social status at the receiving end of capitalism's 'creative destruction' is included and assumed to be in a position to benefit from socially regulated contracting for work in the society at large and from industrial democracy at the workplace.

Chapter outline

Following this introductory chapter, the book revisits scholarly writing on work relations and labour law from the later twentieth century, which conceptualized the postwar achievement of industrial citizenship in terms of a particular configuration of status and contract. The first work to be considered is Philip Selznick's *Law, Society and Industrial Justice* from 1969, written in the then emerging tradition of law and society scholarship (Trubek, 1990). Here, Selznick argued in favour of trade unionization and collective bargaining – the extension, as he put it, of the rule of law from the public to the private sphere. His interest in this topic was informed by a longer-standing concern with the fate of values, or ideals, in the course of social practice, and here, as elsewhere, he developed an approach to his subject which blended elements of normative theory with sociology and of natural law with legal positivism (Krygier, 2012). Though there is undoubtedly much to admire in Selznick's study, it can strike one today as strangely idealistic. In light of the later triumph in corporate governance of the imperative to maximize shareholder value, his decision to treat central elements of the capitalist economy (including the defining constraint to turn a profit as a contribution to private capital accumulation) as 'external' to organizations can appear naïve or misguided. For our purposes, his book is nonetheless of interest both as a leading exemplar of the American industrial sociology of the day and for its focus on questions of law and legal change. It has long been recognized, by scholars of labour law and work relations alike, that procedural rules can open up the legal regulation of work under contract to the participation, indeed the self-government, of workers and employers, correcting the tendency of contract law to obscure the collective and public-political nature of such regulation – the important collective class and societal interests

at play. With his notions of 'incipient law' and of legal development as problem-solving, Selznick can help us to bridge the gap between normative arguments, centring on principles and policy objectives, and the more stringent perspectives of both sociological realism and theories of collective agency.

To throw into relief the foundational assumptions underlying Selznick's analysis of the accumulation of status rights for workers in the large American corporations of his time, we also look at the political and legal construction of such rights in Weimar Germany, following the soldiers' and workers' revolt of November 1918. Contrasting thereby private and public modes of generating status, we set the stage for a discussion of their comparative vulnerability to political and economic change. It was after 1918 that the seminal work of the legal scholar Hugo Sinzheimer bore political fruit in the form of the constitution of the Weimar Republic, with its provisions for industrial democracy through free collective bargaining and worker participation in the regulation of conditions of employment and production. With hindsight and a good deal of conceptual abstraction, we observe that both the USA of the 1960s and Germany in the 1920s – each treated by our authors as sites of industrial citizenship – had experienced a revolution of sorts: Roosevelt's New Deal in the USA and the anti-imperial, pro-republican reform constitutionalism of 1919 in Germany. Moreover, both New Deal and Weimar reformism were ultimately followed by anti-reformist counter-revolutions, quite different in method and appearance but similar in results, certainly with respect to work relations and labour law. Neoliberalism in the United States and authoritarian liberalism in Germany were each bent on undermining trade unions and undoing industrial citizenship and industrial democracy, the one through free markets and the other through a labour regime that eventually encompassed the slave labour of wartime.[12]

In chapter 3, we revisit a strand of industrial relations scholarship that originated in Western Europe in the 1970s, subsequent to the wave of unofficial strikes at the end of the preceding decade. In stark contrast to Selznick's law and society approach, the new industrial relations scholarship offered a theory of conflict rather than integration, if not Marxist in outlook then certainly *marxisant*. Nevertheless, it also followed an institutional approach in a broad sense, drawing in places on the conceptual framework of status and contract. In the 1980s and 1990s, that literature had to face the challenge of accounting for the demise of what had turned out to be no more than a historical interlude of status placing limits on contract so as to sustain something like industrial citizenship for a significant section of the workforce.[13]

With the close attention it paid to questions of political economy and of capitalism as a driving force in institutional change, critical industrial relations theory stood as a corrective, or perhaps a supplement, to Selznick's exclusive focus on the internal dynamics of organizations. With hindsight, we can see that it also went some way towards explaining why Selznick's image of the future of capitalism was so dramatically falsified by the course of events. Like Selznick's law and society approach, however, the conceptualization of industrial citizenship in the critical industrial relations theory of the 1970s and 1980s remains instructive not only for what it observed but also for what it failed to observe – which, as we argue, is in turn instructive for what needs to be observed today. A particularly significant lacuna concerned the inherent attraction of contract to workers as an emancipatory institution: the attraction of release, historically, from a servile status and a relation of service to a 'master' and, later, from the over-regulated and stultifying routine of the Fordist–Taylorist regime of industrial production. From the standpoint of today, critical industrial relations may also be charged with overestimating the attractions of industrial citizenship for employers: the economic benefit

that they could secure by conceding to their workers employment rights, including rights to collective representation and participation in managerial decision-making. Especially in the expanding services sector, and with the help of developments in technology, it now appears increasingly possible to organize work in a manner that ensures managerial control without creating significant opportunities for workers to sabotage the labour process, thereby unburdening employers of the need to secure workers' goodwill.

In chapter 4, we undertake to conceptualize the new work relations which can blur the boundaries between wage labour and self-employment, or between labour relations and commercial relations, injecting elements of entrepreneurship into what used to be wage-dependent employment. While, in some sectors of the contemporary workforce, trends towards self-employment and entrepreneurship appear to meet with worker demands for individual choice and flexibility at work, they also undermine security and stability for workers who depend on these for their livelihood. Moreover, many who are categorized in their contract for work as self-employed are afforded very little if any opportunity, in practice, to act as entrepreneurs to their own advantage – Uber drivers and other gig workers are an obvious case in point. We do not offer a comprehensive survey here of emerging forms of work and employment but instead develop a small number of archetypes of changing work roles and contractual arrangements. Drawing on published journalistic, ethnographic and socio-legal studies, we include in our investigation gig workers, Amazon warehouse workers, care workers and university professors. Their designation as archetypal is not intended to imply any particular representativeness in terms of the overall numbers involved. Rather, these are job types which loom large in the current collective consciousness, much commented upon in the academic literature as well as in mainstream media and figuring in contemporary fiction and film. The first two,

gigging and fulfilling orders in an Amazon warehouse, are of interest in part for their apparent novelty; the latter two, home care work and academia, because of ongoing changes, rapid and significant, in the organization of the work – including the emergence of an ethos or expectation of entrepreneurialism on the part of the worker. Taken together, they indicate important contemporary trends in the development of occupational structures and the organization of work.

Our four archetypes confirm that the dominant trend in work relations in the past thirty years has been the expansion of what might be thought of as the private ordering of employment relations by employing organizations. In the absence of trade unions and of universally applicable and readily enforceable employment rights, the freedom of employing organizations has grown to unilaterally determine the terms of contracts for work and to use such contracts to assign to workers whichever status suits the employer best, increasingly that of dependent or independent contractor rather than employee. States have played an important role here in facilitating, encouraging and even institutionalizing the expanded power and freedom of employing organizations relative to labour. They were also instrumental in broader processes of economic liberalization, in particular the progression from an era of globalization to one of hyper-globalization, where global value chains run by global firms take the place of international trade between countries governed by nation-states (Rodrik, 2011).

In the final chapter, we consider the extent and the limits of private ordering in employment relations today, drawing again on the earlier work of Selznick, Sinzheimer and others. An examination of the role of the state and of workers themselves in opposing, tolerating or facilitating private ordering by labour-using organizations provides some preliminary indications of how to address anew questions of industrial justice and democracy at work. While we identify significant obstacles to the achievement

of industrial justice today, we also take inspiration from Selznick, seeking out latent values in currently existing social arrangements that, in the right conditions, might develop and be helped to develop in precisely that direction. We draw in particular on recent ethnographic studies of so-called occupational communities – groups of workers formed around a common position in work and employment – which reveal working life and relations between co-workers to be sources of normativity: 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, work and employment relations may give rise to social identities and ideas of social justice formed around them. Social bonds between workers in the same occupation or workplace may produce and sustain strong and enduring beliefs regarding fairness and justice at work, unless such relations are suppressed by management and made impossible by an asocial organization of the labour process. Preventing such suppression and prohibiting work organization of this sort ought, we argue, to form a central pillar of public intervention in contracting for work, now and in the future.

In terms of public policy and legislation, what this points to is a fundamental need for broadening and strengthening workers' freedom of association, newly conceived to fit with changing social and economic circumstances. A policy priority should be to institute decentralized forms of collective action in and supported by an overarching labour constitution, understood – why not? – in a Hayekian sense, as *mechanisms of discovery*: discovery of interests, action potential, procedural and substantive rules that are effective on the ground and more easily enforceable for being rooted in workers' sense of justice as related to their lived experience at work and beyond.

2
Justice, Productivity and Power at Work

What can law, and labour law in particular, contribute to the civilization of work relations – relations in a capitalist society between providers and users of labour in labour markets and organizational hierarchies? What kind of law is required to regulate the sale of human labour as a commodity so that human dignity is protected? Who can make such law, and how can it keep pace with a changing technological and organizational environment? How, in other words, can justice in work coexist with both productivity of work and control over work?

In this chapter, we lay the foundation for a more thorough exploration of these issues in the remainder of the book. We do so by looking at two major theoretical contributions dealing with the legal regulation of contracting for work. The first is the law and society analysis developed by the eminent American sociologist Philip Selznick, the second the critical socio-legal tradition that evolved in the 1920s in Weimar Germany under the intellectual leadership of Hugo Sinzheimer. In a study of labour law, the inclusion of Sinzheimer needs little justification. Since the earlier part of the twentieth century, the Weimar tradition has been influential across Europe and elsewhere, and Sinzheimer's

contribution is rightly acknowledged to be foundational. Selznick, on the other hand, was not a scholar of labour law but a sociologist who tried to make sense of the role of law within employing organizations. In doing so, he was able to clarify the relationship between moral values, social norms and formal rules in the governance of work under contract – a relationship that remains vital today for understanding and progressively developing labour law.[1]

Selznick and Sinzheimer stand for two divergent paths towards integration overlaying conflict, towards justice perceived and justice realized, each originating in an important tradition in social theory. For both, the question of all questions is how something like moral unity, a shared sense of fairness and equity, can arise in a capitalist political economy regulated by law. By looking at the differences and commonalities of the two approaches, we aim to shed light on the central assumptions of both and to progress towards an updated conceptual framework for the legal regulation of work relations in the emerging post-industrial world.

Selznick's *Law, Society, and Industrial Justice*

Philip Selznick was a scholar with an unusually wide range of interests, from organizational theory through the sociology of law to moral philosophy (Krygier, 2012; Priban, 2017). In 1969, he published *Law, Society, and Industrial Justice*, in which he addressed the question whether the rule of law should apply, in modern industry, to employment relations (1969, p. 3). On one reading, the volume comprises the construction of an argument in favour of such an extension of the rule of law from the field of government to employment relations – an argument which echoed by then well-established lines of reasoning in industrial relations and labour law (Webb and Webb, 1897). The power that the employer wields over the worker is analogous to the power wielded by the

sovereign over the subject, so that reasoning goes, and should be limited in similar ways and on similar grounds (Selznick, 1969, pp. 38, 70–1). In line with his broader interests in the 'embodiment of ideals in institutions, the infusion of group life with the aspirations and constraints of a moral order', however, Selznick viewed the extension of the rule of law to industry as a process of what he called moral and legal evolution (ibid., p. 3). His focus lay with the internal dynamics of organizations rather than with either external pressures for change or real-world outcomes.

At the time of writing, Selznick felt able to identify an immanent strain within organizations towards *legality* (1969, p. 11): 'an evolution from arbitrary power to self-help to accommodation to the beginnings of a rule of law' (ibid., p. 22). As he himself emphasized, there was nothing inevitable about such progression: in this specific case, as more generally, the embodiment of ideals in institutions was likely to be 'partial and incomplete … born of confusion and sustained in struggle' (ibid., p. 3). Rather than predicting a particular future, the primary aim of Selznick's endeavour was to understand 'the values themselves … the characteristic ways they are elaborated and extended … the social circumstances that invite or resist them' (ibid.). As he put it in later work, he wished to develop 'a theory of institutional change and response whose intellectual function is to identify potentials for change in a specified range of situations' (Nonet and Selznick, 1978, p. 23).

In the United States in the late 1960s, employment relations were shaped within organizations primarily by management, and by trade unions bargaining collectively with management. In *Law, Society, and Industrial Justice*, Selznick devoted a chapter to each, identifying in these elements of the 'inner order' of industrial organization the origins of the evolutionary strain towards legality (1969, p. 212). Referring to Max Weber, he first emphasized the impulse to formal rational law and to the rule of law

that was contained within bureaucratization as a social process (ibid., pp. 75–82). As the management of firms had become more bureaucratic, so those firms had evinced a strain towards internal legality (ibid., p. 82). Human resource management techniques and the 'managerial need to take account of human needs and aspirations' could also tend towards rule-governed decision-making, but only where they were supplemented by a 'political dimension': the creation of trade unions, the struggle for recognition and power, the demand for new foundations of authority and new forms of participation (ibid., pp. 75, 121). Trade union recognition and collective bargaining could serve to constitute a particular method of management, equivalent in this case to a particular form of government. 'Management becomes more conscious of rules, more conscious of rights, and more capable of building that consciousness into the routines of institutional life' (ibid., p. 154). Decent treatment of the worker was no longer in the gift of human resource managers but was now the workers' due: a claim of right (ibid., p. 120). The endpoint of the pathway of moral evolution – not inevitable but foreseeable – was, then, a constitutional order within the organization, the organization now understood to be a polity and the worker a rights-bearing member of that polity. In a similar vein, Adolf Berle spoke at the time of an emerging 'corporate conscience', and here he was cited with approval (ibid., p. 71).

> So, it seems, the corporations have a conscience, or else accept direction from the conscience of the government. This conscience must be built into institutions so that it can be invoked as a right by the individuals and interests subject to the corporate power. (Berle, 1954, pp. 113f.)

Law, Society, and Industrial Justice could be read in large part, wrote Selznick, as a 'quest for corporate conscience: its origins, its locale, its sustaining forces, its legal implications, its troubles and limits' (1969, p. 71).

In charting the course of the moral evolution of employing organizations, a particular point of interest for Selznick was the role played by law in mediating social change (1969, p. 122). In a chapter entitled 'The quest for a law of associations', he reviewed 'the competence of Anglo-American law to grasp the associational reality of industrial life' and found it wanting (ibid., p. 35). In respect of employment relations, he argued that, to conceive of such relations as contractual, and as consisting simply of the sale of labour in return for a wage, was highly reductive: 'a radical abridgment of the true legal and social situation' (ibid., pp. 135, 52–62). More accurate and more useful was to recognize that contract was supplemented, in this case, by *status*: by a set of rules imposed upon the parties rather than agreed by them voluntarily. From early modernity until as late as the nineteenth century, workers had had the status of servants employed by a master (ibid., pp. 122–37). In the late twentieth century, as organizations evolved into constitutionalized polities, the worker assumed the status of *industrial citizen*, with industrial citizenship conceived of here as particular to a single organization. The collective agreement – known in the United States as a collective contract – was, meanwhile, a *constitutive* contract: 'an instrument of government', which provided for the recognition of the trade union and the participation of the employees, through their union, in the continuing process of corporatist rule-making and rule administration (ibid., pp. 137, 153; Cox, 1958, p. 22).

Selznick's consideration of the role of law in organizational evolution began with a set of observations regarding the nature of law – its generic quality as and occupation of a *realm of value*. Drawing on the work of both the legal positivist H. L. A. Hart and the natural law theorist Lon Fuller, Selznick reached the conclusion, of central importance to his wider project, that law should be seen as endemic in all institutions that relied for social control on 'formal authority and rule-making' (Selznick,

1969, p. 7). He then turned to consider law from the perspective of moral evolution, asking what it meant to 'legalize' an institution (ibid., p. 8). Law was not only a functional necessity, he emphasized, it was also infused with normativity, with value (ibid., pp. 8–11). When we progress from thinking simply about law to thinking about the additional attributes that would warrant the designation *good* law, he suggested, it becomes clear that the concept of law contains within it the connotation of a 'special kind of order', namely, *the rule of law*, or, as we might otherwise refer to it, *legality* (pp. 10–11) – recognizing and safeguarding a fundamental right of the human being not to be treated arbitrarily, like a thing or an animal.

In later chapters, and especially in the course of his analysis of collective bargaining, Selznick went on to discuss the relation between social change and legal change in a manner that recalled Eugen Ehrlich's work on the importance of 'living law'. 'The center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself' (Ehrlich, 1936, p. xv; cited in Selznick, 1969, p. 34).[2] While he recognized that legal change could occur in a variety of ways, Selznick was particularly interested in instances where new laws grew up out of people's associations; where social change, and the 'realities of group life', caused expectations of or demands for legal change (ibid., pp. 32, 274–6). In the context of employment relations, a key example was of course the negotiation by trade unions and management of rules, set down in collective agreements, and classically and authoritatively analysed by John Dunlop (1958). In some circumstances these rules could rightly be characterized as 'incipient law', which Selznick defined as 'a stabilized public sentiment or pattern of organization; ... a compelling claim of right or a practice so viable and so important to a functioning institution as to make legal recognition in due course highly probable' (1969, p. 32). Quite apart from the

actions of their trade unions, employees' opinions and beliefs might also be relevant to questions of legal change, casting light on the meaning of fairness and the claims of rights associated with modern industry: 'if public opinion among employees crystallizes, taking some forms rather than others, it will in the long run decisively affect the evolutionary process' within organizations (ibid., p. 183). Once called into action, legal change could facilitate social change, confirming rights, for example, and extending them to other actors or contexts. 'Law works best when appropriate social foundations exist, but those foundations do not obviate the need for legal support and direction' (ibid., p. 275).

Considering the manner of legal change in addition to its instigation, Selznick demonstrated the importance of legal concepts and legal principles as effective tools for 'bringing existing authoritative materials to bear on new situations' (1969, p. 143). The study of the law of associations mentioned above and of the application of the concept of contract to union–management collective agreements provided important case studies of social and legal dynamics, revealing how legal concepts could strain against social conditions and relations. It had to be borne in mind, cautioned Selznick, that legal concepts were not to be assessed only by the extent to which they fit with reality. Concepts involved cognitive judgements but had also to serve the purpose of maintaining continuity with established ideas and lines of legal reasoning: the integrity of the legal system (ibid., p. 143). When it came to legal principles, the challenge was to work out the relation between them and the changing structure of society. 'The ideal is to be realized in history, not outside of it; and history makes its own demands, offers its own opportunities' (ibid., p. 28). New circumstances did not necessarily alter *principles*, but they could require that new *rules* of law be formulated or old ones changed. As this 'evolution' progressed, the line between the legal and the political became blurred (ibid.).

Bringing capitalism back in

Why does Selznick's world, with its optimistic depiction of the benevolence of social evolution, appear so far removed from us today? When he wrote *Law, Society, and Industrial Justice*, Selznick's view was shaped by mainstream American sociology, then dominated by structural functionalism.[3] The study of society meant the study of institutions, organizations and normative social integration; of an essentially unidirectional path of social development towards the progressive inclusion of ever more spheres of social life into society's evolving normative unity. Political economy was almost entirely absent, as was the central theme of classical sociological enquiry: capitalism, capitalist development, and their tensions with society and social development. There was still a capitalist economy but it was now firmly integrated in the normativity of the social. To the extent that it gave rise to special interests, just as other sectors of society did, these were governed in a pluralist polity by a democratic state upholding society's legitimate normative order. Social development had integrated capitalist development and turned capitalism into a mere method of wealth creation, an institutional arrangement ruled by society rather than ruling it – like socialism in the Soviet Union but better. In a competitive joint search for the optimal organization and best institutions for modern industrialism, there was even a prospect of peaceful global convergence with socialist planning (Kerr et al., 1960).

By the late 1960s, the dominant social science paradigm – as authoritatively articulated by Talcott Parsons in *The Social System* (1951) – comprised the economy, capitalist or not, as one of four societal 'subsystems', tamed by and embedded in society's normative order. As such, the economy was charged with what Parsons called 'adaptation' – adapting society and its resources to changing internal and external conditions. 'Goal attainment', including

the choice of goals for collective pursuit, was for the political system alone. What had earlier been conceived as a self-driven, or profit-driven, unruly, and potentially destructive mode of economic development came to be defined as subservient to social goals set for society as a whole by politics and the state in accordance with social values held by the community. In 'organized society' – considered identical to 'modern society' – capitalism became a landscape of large corporations with dispersed 'public' ownership, under the control of professional managers, with oligopolistic market power and cost-plus pricing – quasi-utilities regulated by government, seeking steady growth rather than short-term profit. In the epochal book by Berle and Means (1933) – for many years the uncontested foundational account of the structure and function of large firms – the take-home message was that the modern corporation was not so much capitalist as it was an organization, subject to the dynamics of organizational rather than capitalist life, driven by social norms rather than competitive markets, by the general development of society as a normative entity. It was, in other words, something like a public institution charged by 'society', as represented by a pluralist polity, with responsible stewardship of its collective resources.

For mainstream sociologists, the concept that offered itself for the analysis of organizations of this sort was *bureaucracy*. This was a frequent theme in the work of Weber, who used it almost synonymously with *organization*. In the postwar United States, the concept, and Weber generally, was received in two different ways. On the West Coast, under the influence of the German émigré Reinhard Bendix, the Weber of class, status and party ruled supreme, with conflict and struggle understood as central categories of sociological theory. But it was in its East Coast reception, as represented above all by Parsons at Harvard, that the notion of bureaucracy became a cornerstone of American Weberianism, understood however in a strikingly benign way. In place of Weber's culturally

pessimistic view of bureaucratization as the emergence of an 'iron cage' subjecting human life to ever more detailed rules, stifling entrepreneurialism, creativity and human liberty, what was now emphasized was the connection Weber also made between bureaucracy and the rule of law, administrative predictability, and public accountability. Weber considered these central civilizational achievements in the course of occidental rationalization, provided that bureaucracies were governed by strong political, non-bureaucratic leadership. By the late 1960s, Selznick had moved all the way from the 'pessimistic' to the 'optimistic' account. In *TVA and the Grass Roots* (1949), his view of large organizations was that of Robert (later Roberto) Michels, a student of Weber's. In his book on political parties (1989 [1911]), Michels had proposed what he called an 'iron law of oligarchy': that political movements, as soon as they become organized, inevitably become dictatorships of small oligarchic elites, even if set up in pursuit of democracy, and all the more so if they are movements of the working class.[4] Selznick published *Law, Society, and Industrial Justice* in 1969, more than twenty years after he had turned away from the Trotskyite 'rank-and-file' leanings of his youth, and had become, as of 1948, a Truman Democrat (Selznick, 1995) – that is to say, a New Deal reformist. By then, he was celebrating the social benevolence of a rule-governed way of life and ascribing to large corporations a civilizing dynamic capable in the right circumstances of superseding capitalist class conflict, precisely in the critical battle zone where capital and labour meet to contract for work (Krygier, 2012, pp. 16–21).[5]

In the late 1920s, Werner Sombart had presented an earlier variant of the capitalism vs. bureaucracy, or normative society, antinomy in his concept of 'late capitalism'. Sombart believed more firmly than Weber in the historical inevitability of socialism, even in the United States (Sombart, 1976 [1906]), and unlike Weber he considered this a basically attractive prospect. Socialism,

he thought, would arise out of what he called 'late capitalism', which would materialize first and foremost in the large organizations employing wage labour, conceived along the same lines as by Berle and Means. The parallels between Sombart's 'late capitalism' and Selznick's emerging future of industrial justice are striking enough to justify a longer quotation (Sombart, 1930, p. 207):

> Freedom from external constraint characteristic of the period of full capitalism is superseded in the period of late capitalism by an increase in the number of restrictions until the entire system becomes regulated rather than free. Some of these regulations are self-imposed – the bureaucratization of internal management .... Others are prescribed by the state – factory legislation, social insurance, price regulation. Still others are enforced by the workers – works councils, trade agreements.[6] The relation between employer and employee becomes public and official. The status of the wage worker becomes more like that of a government employee: his activity is regulated by norms of a quasi-public character ... his wage is determined by extra-economic, non-commercial factors .... By and large, flexibility is being replaced by rigidity ....

'Late capitalism' did not, however, turn into socialism, nor did it last. The moment American sociology forgot capitalism for good, redefining capitalist society as a 'social system', was precisely the moment when the neoliberal anti-bureaucratic revolution began to take shape, aimed at a rejuvenation of capitalism. Neoliberalism was a movement to end capitalism's institutional confinement and re-create it as a structural constraint on reformist, redistributive-egalitarian political action and social rule-making. It was a movement to restore profitability to its rightful capitalist place beyond and above social development, inclusion and integration – the central tenets of 'late capitalism' and structural functionalist sociology alike. As such, neoliberalism amounted to the resurgence of a second, temporarily submerged logic of institutional

and social change, disruptive rather than continuous, destructive rather than evolutionary, creative in the sense of unpredictable, unruly and subversive of extant rules – a logic of capital accumulation claiming precedence over the logic of normative evolution, believed by American sociology in the 1950s and 1960s to govern modern society as a whole.

As it happened, among the primary targets of the neoliberal revolution was the corporation. In September 1970, the economist Milton Friedman opened fire in an article published not in an academic journal but in the *New York Times Magazine*: 'The social responsibility of business is to increase its profits'. In what was widely considered somewhat frivolous at the time but later became a landmark document in the history of twentieth-century political economy, Friedman reminded his audience that the capitalist corporation was owned not by society but by shareholders. This was a direct attack on Berle and Means, with their separation of ownership and control, the former irrelevant and the latter exercised by management in subservience to the public interest and the state. Businessmen speaking about the 'social responsibilities of business', wrote Friedman (1970, p. 17),

> believe that they are defending free enterprise when they declaim that business is not concerned 'merely' with profit but also with promoting desirable 'social' ends; that business has a 'social conscience' and takes seriously its responsibilities for providing employment, eliminating discrimination, [and] avoiding pollution .... In fact they are preaching pure and unadulterated socialism ... unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades.

According to Friedman, managers who pretend to act socially responsibly are in fact pursuing asocial special interests, namely their own. By not devoting themselves to the maximization of profit, avoiding the hardships of market competition, they steal from their principals, the

shareholders. Using shareholders' money to buy social reputation for themselves as stewards of the common good and to pay themselves high salaries, they make the capital entrusted to them less productive than it could be, while arrogating to themselves the right to decide what is and is not in the public interest. Only the market, with its strict principles of ruthless competition on penalty of elimination, keeps business honest, and only maximized profits ultimately serve a society that depends on a flourishing capitalist economy. Neoliberalism is built on the premise that what really serves the interest of all in a capitalist economy-cum-society is an optimal allocation of capital, which can only be the result of intense competition; under neoliberalism, the highest form of moral development is accepting profit-making as a moral commandment, and the optimal contribution to public prosperity is the relentless optimization of private gain.

The neoliberal revolution, then, involved a reprivatization of the corporation, extricating it from its social entanglement and public status. Instead of society governing the economy, the economy, responsible to capital rather than a collectively defined public interest, was to govern society. What managerial do-gooders were offering society on behalf and at the expense of their shareholders – 'providing employment, eliminating discrimination, avoiding pollution' – was not ruled out; but it could be justified only to the extent that it contributed to the supreme objective of profit-making (or, as Marx called it: 'plus-making') in the service of capital accumulation. A capitalist society, Friedman reminded his readers, thrives not on 'social responsibility' but on profitability, which, it is true, may sometimes be enhanced if acts of profit-making are made to appear to be motivated by moral progress. Be that as it may, when in the 1980s and 1990s globalization created an unprecedented degree of both capital mobility and competition, the profit constraint on businesses became increasingly tight, and with it the constraints on governments trying, with declining success,

to impose social responsibilities on national economies other than the maximization of profits in increasingly global markets and global value chains.

Sinzheimer and the theory of labour law

In *Law, Society, and Industrial Justice*, Selznick did not cite the work of Hugo Sinzheimer; nor do we have any other reason to believe that he was familiar with it. Nonetheless there are enlightening parallels between the two. In Sinzheimer's work, we find perhaps the earliest and most explicit effort to ground labour law conceptually in a humanistic concern: how to ensure that the peculiar nature of labour – nothing other than humanity itself (Sinzheimer, 1976a [1927]) – is respected, even where it is traded as a commodity and subjected to managerial control.[7] Sinzheimer did not use the language either of industrial citizenship or of contract and status, but described the purpose of labour law rather in terms of recognizing the humanity of the worker. In private law, he explained, the worker figured as a legal person with formal freedoms but, by reason of his reliance on capital for a wage, he remained substantively unfree. The task of labour law was to emancipate the worker from the relationship of subordination to the owner of capital – 'to temper the employer's power to command' (Kahn-Freund, 1981, p. 79). It should do this through the institution of what Sinzheimer called a *labour constitution*: in essence, a set of legal rights and procedural rules intended to facilitate the involvement of labour as a collective actor in the regulation of the economy as a whole, and of particular industries and workplaces.

While normatively, for Sinzheimer, labour law was the body of law that recognized the humanity of the worker, in substance it was a field that was still in the process of *becoming*. Labour law, or 'social law' – he used the terms almost synonymously – was an expression of social

reformism, denoting a body of emerging social norms that had still to be implemented – or 'announced' – in formal law (Sinzheimer, 1976d [1936]; Seifert, 2011). Being familiar, like Selznick, with the then recently published socio-legal scholarship of figures including Eugen Ehrlich and Karl Renner, Sinzheimer recognized the social group as a source of norms and conceived of collective bargaining as a process through which social norms, collectively negotiated by the unions and employers' associations, could acquire the status of formal legal rules. In an article entitled 'Theory of social law', he considered the various ways in which social law and formal legal rules were interrelated. Formal rules might have their origins in social norms and in the state's 'announcement' of the latter, for example; alternatively, they might originate with the state, in which case formal rules might also shape the development of social norms (Sinzheimer, 1976d [1936]).

Though there are apparent similarities here with Selznick's discussion of incipient law, Sinzheimer did not identify or assume any 'immanent strain' towards the rule of law and industrial democracy but sought, rather, to identify agents capable of ensuring this result (Sinzheimer, 1976d [1936]). In the Weimar context of manifest destitution and hunger alongside ostentatious wealth, and of political conflict assuming the highly visible form of revolutionary workers' councils engaged in street battles with the *Freikorps*, it appeared obvious that moral evolution had to be anchored in a changed distribution of power in society. The realization of normative ideas could not be left to the benevolence of organizational elites, nudged on by general civilizational trends and self-executing social pressures. For Sinzheimer, indeed, preventing a price dictatorship of the stronger party in the labour market and an organizational dictatorship of management on the shop floor required nothing less than the democratization of state and society from the bottom up – a democratic state constitution to encompass and sustain a democratic labour constitution. In addition

to the collective representatives of labour and capital, Sinzheimer understood the state itself to be indispensable to the process of democratization (ibid.). Only the state could perform the role of coordinating social processes of norm creation so as to ensure that all interests (including non-economic ones) were fairly represented; only the state could guard against the domination of the more (economically) powerful and the threat – here he referenced Michels (ibid., p. 178) – of the iron law of oligarchy.

Unlike Selznick's sociological theory, then, what we might call the Weimar tradition in labour law recognized the need for status constraining formal freedom of contract to be political and public in nature, supported and defended by an institutionally safeguarded balance of power between capital and labour in the society at large.[8] Values and ideas were as important for the Weimar labour law tradition as they were for American sociology in the 1960s. While, for the latter, they were of a general, civilizational kind, for the former they had to be more specific, opposing in particular the commodification and commercialization of human labour under capitalism. Justice at work – industrial justice – was premised here, as it was for the Webbs, on democracy at work. To be realized in social life, democracy had to be legally institutionalized at two levels of economic organization: at that of the economy as a whole, where it was entrusted to national trade unions and sector-wide collective bargaining, and at that of the workplace, where it was to be secured by elected representatives of the workforce, or works councils, endowed with legal rights to *Mitbestimmung*, or codetermination.

Throughout the twentieth century, scholars of labour law routinely pointed to the shortcomings of formal law, especially legislation, when it came to the regulation of work relations or contracting for work. In a dynamic capitalist economy, industrial practice is constantly changing; for this reason alone, work relations, in both markets and organizations, cannot be regulated by the state alone, as state legislation cannot react quickly

enough to newly arising needs and points of contention. Neither does legislation that aims to establish universally applicable rules necessarily fit very well with diverse local conditions in different regions, sectors and workplaces, requiring less statist and less formal modes of governance. In Selznick's organizational perspective, responsiveness and flexibility are provided by the informal practices of human resource management under the influence of social norms of fairness and the rule of law, supported by trade unions and collective bargaining. In the Weimar tradition, emphasis is placed less on corporate management and more on collective, in addition to individual, contracting. Collective bargaining and collective agreements, complemented by workplace institutions of industrial democracy, join state law-making and legislation as an additional, authoritative source of protective limitations of formal contractual freedom and hierarchical authority. Rather than relying on civilizational progress at the organizational level, the state delegates rule-making and rule enforcement to legally empowered organizations of workers negotiating with employers at the sectoral and workplace level, within limits defined for them in a formal labour constitution as part of the country's political constitution.

While Selznick's sociology of law and organization tells us little about institutional architectures above the workplace, their structures and their evolution in the context of national politics and political economies, it offers indispensable insights into the social foundations of labour law at its bottom, as it were, where it intersects with social action and interaction, at the workplace and in society at large. Here, Selznick emphasizes the importance of the normative orientations of those selling and buying labour and of their dynamic development under the impact of cultural, technological and economic change. He examines how workers translate their shared experiences of work into ideas of legitimate rights and demands for fair treatment in the market as well as at the workplace. As a sociologist, Selznick is in a privileged

position to draw attention to the nature of social norms as *living law*, or *incipient law*, as he put it. To recall, incipient law is still at the stage of shared sentiment, bridging the gap between the relative certainties of cultural traditions and the new puzzles posed by changing circumstances over right and wrong, what is just and what is not. It is waiting to be recognized, one way or another, as formal law, and to acquire legitimacy as such, for as long as it continues to correspond with current norms of fairness and with the experienced reality of the workplace.

One of the broader lessons to be drawn is that, if labour law is to remain in touch with its subjects and constituents, it must be open to the reality that it is intended to regulate. It must be open to adjustment by norm-setting collective-associative action at the level of collective status provision and responsive to the evolving social and cultural relations within groups or communities of workers that expect the law of the land to balance their duties and obligations equitably. In addition to legislation and judicial decision-making, labour law has other sources, in particular the collective action of its subjects in response to it. This means that its systematic coherence is continuously challenged from below, until the new has been incorporated into the old and doctrinal coherence restored – if only for a time given the relentlessness of industrial and associated social change. Labour law, in other words, is in a particularly pronounced way *participatory law*. It is developed not only by the state as legislator but also by its subjects, under ground rules set by the applicable labour constitution, which may or may not try to balance the asymmetries between them with respect to their market and organizational power.

Labour law and the economic constitution

The United States of the 1960s and Germany in the 1920s were very different societies. It is true that emergent ideas

of industrial justice and how it was to be enshrined in the legal order resembled each other across space and time, in important and sometimes surprising respects. The contexts, however, in which they became institutionalized for a time and the politics that made that institutionalization possible were widely dissimilar. In Germany, it was recognized that it was not only the employers' organizational power at the workplace that needed to be tamed but also employers' class power in state and society. The fight for industrial justice was a fight not for a rule-of-law-based form of management – though it encompassed that too – but, rather, for democracy in the society at large. That being so, there could be no hope of a gradual, evolutionary dynamic of, as it were, self-civilization of the capitalist labour process. Nothing less was required than mass political mobilization in a generalized conflict between the social classes over the nature of industrial society – exploitative or equitable, authoritarian or democratic, market-liberal or socialist; a conflict over industrial and, indeed, economic democracy as part and parcel of political democracy, over the domestication of markets, as well as corporate hierarchies, in and by society. In the United States, by comparison, it was only in the decades of the neoliberal revolution, or counter-revolution, after the 1970s that the deep dependency of industrial justice on the politics of capitalism was again laid bare, disproving long-held optimistic beliefs that the country had immunized itself against class conflict through liberal democracy.

The Weimar labour constitution reflected the class structure and class conflicts of the mature industrial economy that emerged out of the war of 1914–18, with its large mines, shipyards, factories and the revolutionary workers' councils that had taken control of workplaces in the final months of the war. Construction of that labour constitution had to overcome several challenges. As a matter of some urgency, the revolutionary workers' councils had to be integrated into a parliamentary

democracy; production had to be restarted so that people wouldn't starve to death. Local relations between capital and labour, as constituted through individual and collective contracting for work, had to be connected to a national political framework defining the status of the parties to the contract so as to provide for a modicum of equitable class cooperation. Aiming to address all this, Article 165 of the Weimar Constitution declared capital and labour, represented by their national peak associations, to be equal co-governors of the national economy, mediating both horizontally between the classes and vertically between the workplace and the economic policy of the state.

American organized labour never came even close to this kind of public status, which is why it might with Selznick have hoped for a benevolent evolutionary dynamic in complex organizations carrying it towards industrial citizenship with the help of liberal democracy.[9] Neither did organized labour in Germany after 1945, the end of the Second World War. While in the Federal Republic it managed for a considerable time to recreate the Weimar tradition of centralized collective bargaining at the sectoral level, sectoral and national joint economic councils with employers and unions did not materialize, due to employer resistance. Note that in the United Kingdom a parallel but different attempt was made to bring industry under social control when after 1945 almost half of the country's industrial capacity was nationalized. In the 1960s and 1970s in Germany, after nationalization had been in large part reversed, National Economic Development Councils were created with a hope, on the part of some, that they would give rise to something like the quasi-public, corporatist joint economic regime that had figured so prominently in the labour constitution of the Weimar Republic. American labour, by comparison, even at the height of its power, remained limited to an often precarious presence in a workplace that with time came increasingly to be controlled by employers.

Notwithstanding the dramatic differences between the political and constitutional conditions of Germany in the 1920s and 1930s and the United States of the 1960s, there are also important commonalities. Selznick's corporation existed in a – for the historical moment – state-administered variety of capitalism – a capitalism so pacified that to many it was no longer recognizable as such, or, if it were recognized, this was not considered relevant to social structure and social change, including industrial citizenship. Nonetheless, the pre-counter-revolutionary capitalism of the United States awaiting its impending neoliberal transformation was also and at the same time a post-revolutionary capitalism, conquered by the New Deal and reorganized under its auspices. It was a de-liberalized, organized, regulated capitalism without precedent in the history of the country. In was only in this context that the private corporation had become something like a public utility, mistaken by many for a communal wealth-creation machine operated and sustained under government supervision. Broad sectors of the US economy were dominated by oligopolies or almost-monopolies – General Motors, General Electric, General Dynamics, US Steel, AT&T, Boeing – which were huge bureaucratic organizations functioning on a cost-plus basis and maintained by a government that regulated their activities while protecting them from foreign and often even domestic competition.

The labour constitution proposed by Sinzheimer and instituted by the Social Democratic Party was based on the assumption that the economy would henceforth be planned, or state-managed – still capitalist but certainly not liberal-capitalist. State oversight of production in pursuit of the common good was to be ensconced in nationwide institutions of economic democracy, including sectoral and national joint industrial councils, which in the view of the unions and the Social Democratic Party were to be charged with regulating investment and production, to ensure that the basic interests of workers were respected.[10] Insofar as each put an end for the time being to liberal

capitalism and replaced it with some sort of publicly planned capitalism, the German revolution of 1918 and the American New Deal of the 1930s and 1940s may be seen as functionally equivalent. Like the New Deal in the United States, industrial democracy in Germany required and was conditional upon economic and, ultimately, political democracy: a non-liberal political economy under a government willing and able to regulate competition, not only inside the country but also across its borders.

We know what happened in both cases. In the United States, industrial democracy in the form of industrial citizenship went under in a secular transition to a politically disorganized liberal, indeed neoliberal capitalism. In Germany, the ambition to democratize the economy, enshrined in the labour constitution of 1918/19, was gradually hollowed out or perverted during the course of the 1920s and early 1930s (Kahn-Freund, 1932) and overturned, once and for all, in 1933, in favour of 'authoritarian liberalism'.[11] The victory of the Nazis deprived German Social Democracy of the opportunity to demonstrate that capitalism *can* be democratically transformed to accommodate a labour regime, in markets and corporate hierarchies, that limits the power of capital and makes capitalist profitability conditional on industrial justice.

'Crisis in labour law'

In 1932, at a time of economic and political crisis and catastrophic levels of unemployment, Sinzheimer wrote an essay in which he reflected at length on the fundamental importance of political economy to labour law ([1976c [1933]). The crisis had cast doubt, he suggested, on the capacity of labour law to function as intended within a capitalist – 'private law' – economy, raising the price of labour and providing for the joint management of production by labour and capital. It had thrown into stark relief something that had always been the case, namely

that the situation of the worker was ultimately defined by economic relations, the assumptions upon which they were based, and the ways in which they were ordered. In a time of crisis, the economy no longer produced a yield sufficient to meet the needs of the mass of the people. Large sections of the economy, of production, were inactive, and this was so despite a development of the means of production as never seen before. While people starved to death, goods and foodstuffs lay unused in warehouses because buyers could not be found. Workers did not work.

In his 1933 article, Sinzheimer diagnosed a 'crisis in labour law', which he described as a direct consequence of crisis in the economy. The output of the economy no longer corresponded to the collectively agreed rates of pay, and employers refused to bear the 'social burden' that honouring those rates would have entailed. In the face of devastating levels of unemployment, the workers' capacity for collective action was greatly diminished, such that they were unable to force the employers' hand. The government, meanwhile, acted to amend the law so as to free the supposedly 'natural' laws of the economy from the 'artificial' constraints of labour law – to 'recontractualize' labour law to the benefit of employers, with the value of work thereby radically reduced. While billions of *Reichsmark* of public money were spent in propping up the private sector (in something approaching a 'grotesque paradox'), no means could be found, apparently, of public job creation.

For Sinzheimer, the crisis in the economy served to reveal the tension in which labour law *always* existed, in the Weimar Republic and any other capitalist economy: a tension between the 'social' rationality of labour law itself and the 'individualistic' rationality of the economic order. By recognizing and guaranteeing the role of labour in the regulation, or ordering, of the economy, labour law sought at once to emancipate the worker from his or her relation of subordination to the employer and to ensure that the economy would function in furtherance

of the common interest, as jointly identified by the representatives of labour and capital. It sought, in other words, to *socialize* the economy. Plainly it had failed in that objective. What had been made clear by the economic crisis, if it hadn't been obvious already, was that the economy continued to be ordered around the pursuit by individuals of their own private interests. Within such an economy, labour law did not and *could not* have the intended effect, since all efforts to raise the value of labour and to emancipate workers were resisted by the self-interested owners of capital. Based as it was primarily on the principles of private law, the current economic order pulled in an opposite direction to labour law. As a result, labour law was at risk of 'an inner destruction of its new, unique, fundamental substance', and this posed a danger not only for labour law but 'for the totality in which we all live' (1933, p. 141). The crisis of labour law was a crisis of the entire economic order. Labour law had to be renewed, and such renewal would require the deep restructuring of the entire economic order. Economic law would have to be rethought as a matter of social law as well, the economy reorganized according to principles of social rather than private law.

Today we cannot of course simply turn back the clock and restore what was lost with the end of state-administered capitalism in the United States and the destruction of economic democracy in Germany. What we can learn from both the legal sociology of Selznick and the political economy of the industrial democracy tradition in Germany is that an emancipatory and democratic *labour constitution* must in one way or another come hand in hand with an *economic constitution* that places limits on free markets and competition. Reconstructing status as a framework for contract to secure industrial justice may ultimately require a reconstruction of the economy, making it subservient to society.

3

The Rise and Fall of Industrial Citizenship

In this chapter, we explore the configurations of status and contract that were characteristic of the postwar era of industrial citizenship. In doing so, we recall the rise and fall of a labour constitution under which workers and trade unions were at the peak of their power in the capitalist political economy. To assess whether and to what extent the conceptualization of industrial citizenship as a stylized relationship between status and contract adequately reflected the social reality of that time, we place the two concepts and the reality they represented in the context of their co-evolution during and after the postwar social compact.

Status, we discover, was defined in both classical sociology and postwar industrial relations scholarship as a necessary supplement to and limit upon contract. Contracts for the exchange of work for wages were considered to be unequal – unilateral dictates rather than voluntary agreements. They were also considered to be incomplete in respect of the specification of the obligations of the worker. It followed that something like status was required not only to even out power differentials between the parties but to fill in the gaps in the contract, thereby

securing the worker's consent and willingness to work in good faith within the limits of the employer's legitimate authority. In the postwar literature, industrial citizenship was understood to provide a particular political, publicly guaranteed democratic foundation for cooperation at work between buyers and suppliers of labour. As globalization progressed and neoliberalism took hold during the 1980s, the scholarship of the time observed a 'polarization of status and contract' (Streeck, 1992), in different forms, with a resultant dualism between a core of workers with job security and employment rights and a periphery of casualized and highly precarious labour. A paper originally written in 1986 by one of the authors of this book concluded with speculations on the implications of dualism for economic productivity and social stability, asking how these could be achieved if employment relations were increasingly a realm of private ordering rather than industrial democracy (ibid.).

In the third and final part of the chapter, we argue that the neoliberal turn, or revolution – in shorthand, the replacement of industrial justice in contracting for work with flexibility – revealed previously little understood features of industrial citizenship: tensions and contradictions that were typically overlooked or neglected in contemporary theories of industrial justice and in the regulation of labour markets and the governance of the labour process. Looking back, we are therefore able to identify a number of conceptual blind spots – gaps between social reality and its stylized image – which, we believe, might tell us something about the political vulnerabilities of the taming of contract by status as institutionalized in the 1960s and 1970s and enable us to understand better the forces that overthrew this configuration – forces that may need to be restrained if industrial citizenship is to be renewed and reinstituted today. In chapters 4 and 5, we then attempt to capture what is new today in contracting for work and the regulation of labour at the point of production, asking what this means for a

potential renewal of contract and status as a protective configuration of social and legal institutions. How might that configuration have to be transformed for a restoration today of something like industrial justice?

Status and contract in the age of industrial citizenship

In postwar industrial relations scholarship, debates involving diverse theoretical approaches revealed an underlying tension between industrial peace and social progress as political objectives. On the social progress side of the debate, the call for something like status drew more or less explicitly on nineteenth-century theoretical reflections in sociology and law concerning the limited capacity of a liberal order to provide for social integration, constituted as it was by voluntary contractual relations between independent, autonomous individuals (Streeck, 1992). In sociology, authors as diverse as Marx, Durkheim and Weber had expressed the view that, in particular, relations between owners of capital and sellers of labour meeting in the newly instituted 'labour markets' were so deeply distorted by differences in power, deriving from differences in need and urgency, that they could give rise only to unequal contracts. As such they lacked the normative justification expected by liberal theorists, such as Maine and Spencer, to flow from the parties' exercise of 'free will' in entering into their relationships.[1] Unless something was done, modern society was therefore threatened by disruptive conflicts over social justice especially at its very core – modern industry – where its material life and, presumably, growing prosperity were to be produced.

Characteristic of the literature of the time was a dual concern with *social stability* and *economic productivity*, both inherited from the classical tradition and reflective of then current politics. In two respects, contract was considered incapable of pacifying the relationship between

capital and labour. This was so in the *market*, where employers seeking to hire labour could afford to wait and so to force unemployed workers, in more urgent need of employment than employers were in need of them, to submit to the conditions offered to them, both exploiting and adding to economic inequality. And it was so at the *workplace*, where the contract, entered into by ostensibly free and equal partners, gave rise to a one-sided relationship of authority – and had to, given the inevitably incomplete job description in a contract written in and for a technologically and economically dynamic economy. Industrial relations, then, was conceived as the construction and maintenance of essentially public institutions capable of healing the deficiencies of the private contract as a foundation for productive cooperation between classes with different interests and market power.

It was here that status came into play. Retracing the social-theoretical tradition, status was defined as 'a complex of rights and duties imposed on individuals *a priori* as a consequence of their belonging to a particular social category' (Streeck, 1992, p. 43), or, with Weber, as a 'starting point for (an individual's) further legally relevant activities', more generally as 'a special and intrinsic quality [that] is attributed to him by the law independently of his own acts of consociation' (Weber, 1978 [1922], p. 669). As such, status could be treated as an institution that was part of what Durkheim, in his *Division of Labour* (1964 [1893]), summarily described as the 'non-contractual conditions of contract': the conditions which buttressed and made viable contractual relations, given that contract pure and simple could not hold a society together.[2] Following the classical tradition, then, status was understood to designate an institution beyond individual volition – in other words, a social institution. Contract, in contrast, was what allowed individuals to arrange their mutual relations as they pleased, provided that their chosen arrangement remained within the limits drawn for them by their respective statuses.[3] In the functionalist-cum-political

perspective of the postwar era, the politics of industrial relations consisted in the construction of status rights and obligations suitable to repair the deficiencies of contract as a medium of social integration – the objective being that contracts for work could and would be formed in a way that allowed them to be perceived as equitable and therefore just, in particular by the weaker party. In both the labour market and the workplace or firm, the task of the political institutionalization of industrial relations, including labour law, as a high art of class compromise if not reconciliation, was to limit the freedom of contract of buyers and sellers of labour through the imposition of a modern, non-traditional, politically constructed status. As T. H. Marshall put it in his seminal account of the welfare state as a product of an evolving hierarchy of rights, that status was *industrial citizenship* (Marshall, 1965 [1949]).[4] Whereas in pre-modern times, work relations had been determined by the parties' status as *master and servant*, industrial citizenship had as its paradigm the status of citizen in a democracy, egalitarian rather than hierarchical.

In the postwar decades, institutionalists, as they were then called, considered the undergirding of private contract by public status as essential for social justice, social justice as essential for social peace, and social peace as essential for industrial performance and economic growth. As to how to achieve such undergirding there was, however, disagreement, especially in the 1960s and 1970s in the light of contemporary conflicts over industrial relations and its 'reform'. With the growing intensity of industrial conflict, a left wing of industrial relations reformists lost their faith in the desirability of integrative institutions. With an old or new allegiance to a class-theoretical view of society, which in the case of Alan Fox resulted in his departure from the 'Oxford School' of industrial relations,[5] they now considered as an historical possibility nothing less than the revolutionary overthrow of capitalism, brought about by contract insufficiently redeemed by status (Fox, 1974). Focusing on work organization and the need for

mutual trust across hierarchical levels, Fox and others maintained not only that modern politicized status had been unable to supplant the feudal legacy of master and servant but that, without that legacy, it would be unable to do its job: to guarantee the smooth operation of a hierarchical workplace organization. With its paternalistic implications, however, feudal status was subject to erosion by management insisting on its right to manage, if need be against workers' wishes, and by workers and unions insisting in turn on ever more specific, detailed, rigid circumscription of both their rights and management's duties, precisely to remove the last remnants of the master–servant tradition. According to Fox, these dynamics were bound to set in motion a 'spiral of low trust', driven by an underlying fundamental class conflict that was incurable by even the most sophisticated of institutional stopgaps.

Similar considerations arose in respect of labour markets, as observed in particular by Tannenbaum and Marshall commenting on the role of trade unionism and collective bargaining in industrial democracies (Tannenbaum, 1964). Already Marshall had wondered how institutionally empowered trade unions could be made to act 'responsibly' – defining and defending their interests under industrial citizenship so as not to kill but, rather, feed and fondle the capitalist goose laying golden eggs, supposedly not just for them but for society as a whole.[6] Contracting for work was to be pacified by balancing the secular move in a liberal society from status to contract by a secular countermove from contract to status, in the form of a legal right for workers to collective bargaining, politicizing the contract by collectivizing it. Reconciling this with a Keynesian responsibility for the government to provide for full employment turned out to be difficult, however, since full employment created opportunities for collective opportunism on the side of unions, as perceived by British and other governments in the 1960s and 1970s.[7] In fact, it was widely taken

for granted at the time that it had been the political guarantee of full employment that had led to the strike waves, the overshooting wage settlements and the rising rates of inflation – the very developments that had in turn caused the rethinking of industrial relations and labour law and demands for industrial relations reform. Worker 'bloody-mindedness' – the opportunistic use of politically provided opportunities for 'excessive' wage increases – was considered by 'bourgeois' economists to be economically stupid and by left sociologists as retaliation by workers for being locked into a proletarian existence, or simply as a legitimate replication of observed capitalist greed. As early as 1944 Marshall had been of the view that the main burden in the restructuring of society to advance social justice should be borne by government and by social policy, in response to social rights grown out of political rights, with collective bargaining relegated to the back seat (Marshall, 1965 [1949], pp. 105–26). The 1970s and 1980s were then the high time for attempts to formulate an 'incomes policy': how to get trade unions to 'behave' even when, in the absence of both legal sanctions under 'free collective bargaining' and the economic threat of unemployment, they didn't *have* to do so (Flanagan and Ulman, 1971; Boyer et al., 1994).

Extracting wage restraint from politically empowered trade unions posed difficult problems of institutional design that were at the centre of contemporary discussions on industrial relations reform. In the postwar era, governments had made contracting for work – the system of wage labour under capitalism – acceptable to workers by establishing a set of status-generating institutions that applied, irrespective of market conditions, to all citizens who sought or were in employment. In particular, a catalogue of rights was written by public policy into private contracts, complementing and, if necessary, overriding what the parties had agreed, to be monitored and enforced by the state – limiting formal freedom of contract in order to extend the substantive freedom of contract of the party

in the weaker market position. In the 1950s, this notion of inalienable worker rights beyond contract and protected from managerial discretion, constituted by legislation or collective bargaining, became the very basis of the concept of an 'industrial relations system', as famously developed in the United States by politically influential academics such as John Dunlop and Clark Kerr (Dunlop, 1958; Kerr et al., 1960).[8] Conceived as a subsystem of society in the sense of Parsonian structural functionalism, separate from and on the same plane as the economic system, the industrial relations system was supposed to function with relative autonomy, according to a logic and to social values of its own that had to be respected by all parties in the labour market, especially the economically stronger (Parsons, 1951).[9] At the same time, it had to be able to do its duty: to contribute to the governability of capitalist society and, in particular, the state-administered capitalism of the time (Brown, 2015).

A further important bipolar distinction in the literature is that between *pluralism* and *corporatism*. Pluralism denotes a capital–labour relationship where the class interests of either side are independently institutionalized and expressed as equally legitimate: the *social* interests of workers and the *economic* interests of employers, the rights of workers and management existing side by side, mutually undiluted, their conflict contained by procedural rules protecting the interests of society at large. While unions fight for wages and conditions, employers fight for productivity and profitability, both by right, and the government ensures that the fight does not excessively disrupt social peace and industrial cooperation. Institutionalized industrial relations, involving labour, capital and the state, are to produce a 'web of rules' for the conflictual interaction between interest-conscious workers and interest-conscious employers, one that stabilizes their relationship and protects both from fluctuations of markets and market power (Dunlop, 1958). Pluralism in this sense *de-economizes* industrial relations, forcing

employers to put up with a 'pervasive moral indifference [on the part of] workforces to the firm's economic goals' and a corresponding 'shift of [worker] loyalties toward the unions' (Streeck, 1992, p. 57). In practice this implied acceptance by workers and unions of the Taylorist organization of work, specifically designed to function 'at arm's length', regardless of whether workers identified with their work or cared about their place of employment. It also implied acceptance by employers of hard bargaining, with their workplace conflicts settled not by appeals to shared values, such as company or national patriotism, but by a sober assessment of the two sides' conflicting interests, weighted by conjuncturally shifting power relations.

Corporatism, in turn, was seen as an alternative to pluralism, or as an improved follow-up model, upon which some of the anti-neoliberal industrial relations reformists of the 1980s placed great hopes. For present purposes, corporatism may be defined as another variant of public status underpinning private contracting for work, both in labour markets and in the governance of work at the point of production. Unlike pluralism, it pulls workers into management and unions into the state, as co-responsible co-agents on the inside of both the firm and government. In this way it promises to integrate worker interests in high wages and secure employment with business interests in economic productivity and state interests in political stability. In some quarters, corporatism – or, more precisely, the neo-corporatist corporatism of postwar Western democracies – has always been mistrusted as a disguised form of paternalism, of co-optation of trade unions into capitalism, if not a thin veiling of corruption and class betrayal or even fascism.[10] Its defenders, in contrast, understood it to be an important step in the organized working class's advance towards the commanding heights of the economy, via worker participation or co-determination, as well as the government of the democratic state. There trade unions, in

their 'conflictual partnership' with capital (Müller-Jentsch, 2007), became part of a 'semi-autonomous industrial government', indispensable, if properly institutionalized, to the proper functioning of the government of the state. Taking their cues from countries such as Sweden and, to an extent, Germany, neo-corporatists understood the concession of corporatist status to workers and unions to be the price – a high price, to be sure – that capital had to pay in 'political exchange' for the cooperation of labour in the pursuit of rising productivity, secure profitability and monetary stability – goals that assumed particular importance in the face of rising international competition (Pizzorno, 1978).

A corporatist transformation of pluralist work relations was the last expedient of social democratic labour politics, peddled to capital and governments alike as the right (and only) European, or indeed Western, response to what was then seen as the 'Japanese model' (Dore, 1973). In contrast to Japanese-style enterprise unionism, class corporatism was supposed to even out inequalities not just within the working class but also between labour and capital, in line with egalitarian values. Adherence to these was argued to be essential not just for democracy but also for industry, in that it and it alone would restore a cooperative spirit among workers, without which advanced capitalism either couldn't function at all or could function only with inferior results. In fact, egalitarian values were upheld longer than elsewhere in countries that conformed to some extent to the democratic-corporatist model of industrial relations, renewing expectations that economic efficiency and social justice might be mutually conducive. Where it had proved impossible, during the 1970s and 1980s, to move from pluralism to either corporatism or, for that matter, socialism, as for example in the UK and the USA, the transition to neoliberalism began earlier, before the issue of status and contract took an entirely new turn in the 1990s, with the rapid progress of internationalization and globalization.[11]

The neoliberal turn: flexibility versus justice

In the early years of neoliberalism, much of the discussion of industrial relations was framed in terms of the 'competitiveness' of Western economies – or, more precisely, Western manufacturing – relative to Japan and its 'production model', then seen as superior. Given the political nature of modern status embedded in national, and nationally different, contracting for work regimes, this perspective appeared only natural at the time. A dominant concern was that firms that had the parameters of their employment practices set for them externally, standardized at national level by a democratic state or a pluralist nationwide industrial relations system, were unable to match the performance in global markets of competitors allowed by a committed workforce or by national laws flexibly to adjust to changing economic and technological conditions. Pressures for adaptation were mounting and were seen by many as threatening to abolish industrial relations 'as an autonomous area of action decoupled from the overall strategy of the firm' (Streeck, 1992, p. 65). Questions posed included what would succeed the specific balance between status and contract that had been underlying the Fordist–Keynesian mode of regulation; how much of that balance would and could be preserved by political reform; and how the new regime would differ from the old, especially with respect to the way contracts for work were to be completed or underpinned, if at all, by some kind of status.

By the 1990s at the latest, the principal concern in industrial relations theory and practice was no longer to accommodate, or, on the contrary, to exploit for progressive reform, the worker militancy of the 1970s but, rather, how to adjust the capitalist economies of the 'West' to global competition. In this context, trying to understand the logic of the institutional change under way, some observed a 'polarization' of industrial

relations systems 'in two opposite directions: "back" to an overwhelmingly contractual and "forward" to a primarily status-determined order' (Streeck, 1992, p. 66).[12] This was meant in several ways. There was, first, a suggestion that different national systems might be differently affected by de-unionization leading to less status and more contract: 'corporatist' Sweden and Germany less so than 'pluralist' Britain and the United States. There was also the suggestion that corporatist systems, regardless of their relatively stable trade unions, might become more internally fragmented as a result of diverging economic and technological conditions making encompassing class organization and regulation at the national level more difficult. More generally, a distinction was suggested between systems that sought to increase competitiveness, through a reduction of status rights accompanied by an extension of contractual obligations, and systems that aimed at an extension of status obligations of workers in exchange for a contractual protection or new creation of status-like rights also of workers. Both approaches were regarded as attempts to restore flexibility through a renewed linkage of workers to the economic fate of the firm. The better understood approach was the first, the 'neoliberal' one, implying intensified recourse to short-term, (status-)'free' labour contracts to facilitate the quantitative and qualitative adaptation of workforces. 'Status', it was argued, 'survives in this variant at most in its traditional form as a moral obligation of obedience, the importance of which for the stability of a neo-liberal contractual order is, however, probably slight compared to the compulsion of economic circumstances under high unemployment' (ibid.).

The alternative path to 'competitiveness', said to be less well understood, was described as encompassing a variety of forms of internal labour markets 'with high security of employment, the adaptive capacity of which is guaranteed by increased internal flexibility' (Streeck, 1992, p. 66). Looming in the background was,

again, the so-called Japanese model, as depicted in the seminal work of Ronald Dore, who identified 'internal flexibility plus external rigidity on the basis of status-like employment' as 'a functional equivalent to external flexibility plus, unavoidable in this case, high internal rigidity' (Dore, 1986, p. 66). Promises of long-term if not lifetime employment for some, *de facto* if not *de jure*, were set against short-time employment at will, based on contract pure and simple, as conceded by weakened trade unions and condoned if not sponsored by governments concerned about unemployment, overburdened social security systems, low investment and, of course, national competitiveness.

The contrast between status-based and contract-based employment was understood to distinguish between countries, corporatist and pluralist-liberal, but also between sectors within countries, firms within sectors, and groups of workers within firms. Status had become, as it were, *privatized*: a matter of choice for human resource management rather than an external condition imposed upon employers and workers *as* employers and workers, through politics, collective bargaining and the law. Where different status and contract configurations occurred in the same country, and even the same firm, the concept that seemed most fitting was 'dualism', appropriated from earlier literature on industrial organization (Berger and Piore, 1980). For industrial relations, the notion of dualism was used influentially by John Goldthorpe (1984) to distinguish between two types of national industrial relations systems, corporatist and dualist. The latter had corporatist elements in its economic 'core', supported and made possible by flexible spot-market contracting at its 'periphery'. The former was characterized by a generally corporatist order supported and instituted by the state and, one should add, at risk of gradually turning dualist under the pressure of business and political interests in competitiveness and profitability.

As observed in the 1980s and 1990s, the notion of a polarization of status and contract raised two conceptual issues that were touched upon by scholars but, from today's perspective, not satisfactorily addressed. What is status like, and what can it achieve, if it does not take the form of industrial citizenship? Secondly, what is contract like if it is not embedded in status, and can it nevertheless perform the function of constituting and regulating stable work relations? As to the former, it was suggested that, in a dualist context, status ceases to be 'a mechanism of political redistribution, and turns into an individual right of private property', no longer 'against but within market and contract … an outcome of interest-led individual action and without recourse to either (re-)distributional politics or residues of feudal status' (Streeck, 1992, p. 68) – labour law, in other words, receding into general contract law. As to the latter, transaction cost economics seemed to offer the prospect of successful voluntary, contractual, market-driven status-building through private institution-building, depending on the nature of the 'labour services' being traded (Williamson et al., 1975). Where these were transaction-specific, or idiosyncratic, requiring long-term investment that made the parties vulnerable to each other's 'opportunism with guile', the two sides would act out of rational self-interest to devise specific mechanisms of 'governance' to stabilize their interaction and cooperation. If they managed to regulate their mutual rights and obligations through 'contracting in its entirety', they might construct a private but nevertheless stable order, customized for their particular needs and purposes. All contracts, or at least the contracts that matter, are by their nature *relational* and can therefore be written so as to consider and integrate the interests of both sides – a job to be performed, presumably, by experts in contract law.[13]

Both versions of 'status based in contract' – status as private property or status as private government – depoliticize the regulation of contracting for work by turning it into a primarily private affair. Labour law fades

into contract law and mandatory institutions give way to voluntary agreement – spot-market contracting included if the parties to 'contracting in its entirety' wish it. One consequence was believed to be the end of any comprehensive ordering of the labour market. In its place some envisaged a 'multiplicity of the most diverse contractual forms and contents' (Streeck, 1992, p. 70), extending from a transformation of firms into 'closed moral status communities' to a 'disintegration of company hierarchies in favour of market- and contract-type supply relationships between autonomous "profit centres" or even firms.' Where highly specific assets were at stake, it was observed that, in the absence of community-type social integration, 'the labour contract seems to lose its special features and become increasingly subject to the same laws as any supply or service contract – into which it often turns also in form.'[14] Again the issue of dualism appeared, in that, where specialized 'core' suppliers of work were internalized into the firm via long-term contracts of employment, their status contrasted starkly with the situation of 'peripheral' workers transacting in a spot labour market where they were more exposed than ever to fluctuations in demand.

Private governance of contracting for work, this suggested, cannot and does not engender industrial citizenship. Rather than equalizing the status of sellers and buyers of labour across an entire society, it gives rise to a wide variety of local and sectoral industrial orders shaped by local power relations and the strategic whims of managements driven to cut costs and raise profits. Status of this sort, it was argued, 'is based not on citizenship but on property rights', rendering it 'unusable as a motor for redistribution and redistributive justice'; in fact, it 'goes hand in hand with growing social inequality.' In such circumstances, 'the corporatist conversion of the labour contract into a social contract, on the pattern of Sweden or postwar Germany and Austria, is ruled out' (Streeck, 1992, p. 70), raising the question whether the new dualism, penetrating not just into pluralist but also into

corporatist labour regimes, was a necessary price to pay for a restoration, felt to be overdue, of the competitiveness of Western manufacturing: whether flexibility without justice, based on private ordering rather than public citizenship, would against the Durkheimian odds achieve its proclaimed objective, the revitalization of Western capitalism for competition with its new Eastern rivals.

Looking back, looking forward

Examining status and contract today, as both concepts and institutions, we find a number of weaknesses in the way that they conceptualized work and work relations in the 1980s and 1990s. First, it seems clear that the concept of *dualism* was rather too simple a description of the labour regime after the decay of the postwar settlement. A dualist labour market and employment regime is defined, as we have seen, as consisting of two sectors, a corporatist centre and a market-governed periphery. The size of the periphery relative to the core is left unspecified, however, and no indication is given either of whether the relative size of the two sectors is stable or changing and, if the latter, in what direction. Unless we can be certain that the forces that make for stability in the core are stable themselves, keeping the fringe from eating inwards, the possibility arises that dualism may be no more than a transitional condition. We might be moving, in other words, from a regime of status-based industrial citizenship for all to one of market-driven and contracted-based precarious employment for all, the latter taking the place of the former and the former turning, at best, into a marginalized and shrinking subsector of the latter.[15]

A second weakness of dualism as a concept is its treatment of the periphery as, in essence, a residual category. Characterizing it by what it is not, it obscures the exact nature of contracting for work in this segment of the economy. With hindsight, as the corporatist model of

unified, industrial citizenship-based employment receded into the background, it gave way not to a unified market-based status of precarious employment but to a wide variety of contractual arrangements, designed to fit the particular circumstances of the situation in which they were made and shaped by the particular relationship of power between the particular parties. To understand the evolution of status and contract, past and present, that variety needs to be opened up and conceived as what it *is* rather than what it is not.

Taking a closer look at contracting for work in the era after industrial citizenship, we also learn that we need to be more specific regarding the nature of the status that underlies it. Whenever law is involved or is, in principle, available for recourse – even in a neoliberal 'free' labour market – contracted status is more than just a private construction. Even where industrial citizenship has been pushed into the background or abolished, account has still to be taken of the civil rights, in Marshall's sense – legal capacity, freedom of contract – that allow individuals and organizations to become market participants. Participation in markets is always dependent on some sort of public status, in other words, and even where the state chooses not to, it commands a unique capacity to limit actors' freedom of contract. Conceptually this implies that status must be defined more broadly than it typically was in the Golden Age, not as a contingent corrective supplement to contract but as its logical complement and companion: no contract without status.

This relates to a particular mistaken conception of the neoliberal political economy as a stateless, private, market-only, no longer political economy. 'Stateless' neoliberal capitalism is cast here as something like a state of nature, state-managed capitalism as a deviation from the norm. In accepting the validity of this conception, one buys into an almost purposefully deceptive, self-serving self-description of neoliberalism that absolves politics and government of their responsibility for the political regulation and

social consequences of capitalism. To avoid reinforcing this ideology, it is necessary to observe strict discipline in writing and speaking about the neoliberal political economy, above all not to use shorthand language that characterizes the rise of neoliberalism as a withdrawal of politics and the state from the economy. In fact, a neoliberal order is as much a politically constructed order as, for example, a social democratic one. To the extent that it is de-politicized, it is so for political purposes and by political means, which is why it remains politicized at its core. In this light, the privatization of status – leaving status to be defined by market participants and their contracts, or by social structures and conventions without political adjustment – is revealed to be a political strategy of governments to make themselves unanswerable for the effects of politically liberated market forces on the outcomes of contracting for work. In returning the control of economic transactions to the stronger market actor, neoliberal governments expect to please those in control of capital – hoping that this will make them stay put instead of taking their capital on the road. Only happy capital contributes to economic growth, and it is made happy through a removal of protections, either directly through deregulation of contracting for work or indirectly by exposing such contracting to international competition, thereby weakening the market power of those whose labour capital needs to buy at a low enough price to allow for an acceptable rate of profit.

To repeat the point: there is exactly as much politics in neoliberalism as there was in social democracy or state-administered capitalism, albeit of a different kind.[16] Markets are set free by political intervention, borders opened and regulations lifted, just as markets were once contained, borders controlled and regulations imposed. The same applies to the function of contractual relations regarding human labour and the status of those engaging in them. Once markets are liberated they must be secured against attempts to reinstitute protections and

redistribution by those depending for their economic life and social status on public intervention, workers in particular. Markets are political constructions that need to be politically defended against those disadvantaged by them, and for that strong states are needed. That states under neoliberalism do not disappear but, on the contrary, remain powerful guardians of the national economy, now in a newly liberated condition, creates a need for the state to defend itself against being taken over by anti-market forces – social classes interested in an active interventionist state. This is another way of saying that, even where the status that underlies and informs contract does not limit contractual freedom, or does so only marginally, it is status nonetheless. Importantly this implies in turn that status of a neoliberal variety might *in principle* be redefined according to some model of industrial citizenship – just as the neoliberal state could *in principle* be appropriated by anti-neoliberal political interests using it to re-regulate markets, including regimes of contracting for work.

This brings us to a somewhat different point, namely the manner in which the industrial relations perspective of the 1980s underestimated the attraction of contract compared to status – the attraction, to be more precise, of contracting 'freely' without the external imposition of the kind of rights and obligations constitutive of status. Rather than being invented, as it were *ex post*, as a political and civilizational remedy to the asymmetry of contract in capitalist labour markets, status also pre-dated the advent of capitalism in the form of the master–servant relation – a relation that in various ways survived underneath and within the modern, or modernized, status of industrial citizenship. This was noted, as we have seen, by Fox, in his perceptive analysis of the functions and dysfunctions of Fordist–Taylorist work organization. As described in greater detail by Fox's colleague Otto Kahn-Freund, pre-modern (meaning pre-twentieth-century) labour law specified the obligations and rights of those able to avail themselves as 'masters' of the labour power of 'servants',

in a manner that was heavily weighted in favour of the former to the disadvantage of the latter (Kahn-Freund, 1977; Deakin and Wilkinson, 2005). Indeed, as late as the eighteenth century, service for some was not so very different to serfdom or slavery, involving a duty to serve one's master at any time, day or night – a 'state of subjection', as Blackstone put it – that could endure for a year or several years (Kahn-Freund, 1977, pp. 516–18, 522; Craven and Hay, 2004).

It is interesting to note that contemporary commentaries went to great lengths to differentiate the position of servants from that of serfs or slaves, emphasizing precisely the exercise by the former of (formal) freedom of contract (Steedman, 2009). 'A Servant in the Intendment of our Law seems to be such a one as by Agreement and retainer oweth Duty and Service to another, who therefore is called Master.'[17] 'The terms of the Covenant convey to the Master a right over the Offices of his servant, but I think, not over his Person' (Taylor, 1767, cited in Steedman (2009, p. 2). When Lord Mansfield was called upon to decide the case of Charlotte Howe, purchased as a slave in America and brought to England to work as a domestic, it was precisely the lack of a contract which led him to conclude that she was not a servant.[18] 'The statute says there must be a hiring, and here there was no hiring at all. She does not come within the description.'[19] If a contract – an agreement, or 'hiring' – was required to create the relation of master and servant, however, it is equally the case that the nature of that relation was governed not only by the terms of the agreement but also, as Kahn-Freund explained, by a set of statutory and common law rules, however softened by custom, that were highly punitive from the perspective of the worker (Kahn-Freund, 1977).

Not only slaves but also servants, then, might readily have perceived a transition 'from status to contract' as emancipatory, a point that must be conceded to nineteenth-century liberal progressivism.[20] In principle at least, but not necessarily in practice, contract fixed the

obligations of workers in the form of terms which circumscribed what had previously been general, open-ended duties to serve. In principle, it also provided workers with the opportunity to agree or not to the terms offered and to enforce agreed terms against errant employers. As such, the contractualization of work offered intrinsic attractions to workers well into the era when contracts for work had been embedded in the modern status of industrial citizenship – especially to those categories of workers who were still caught in traditional master–servant-like relationships. Where, for example, early twentieth-century efforts at organizing domestic servants were partially or temporarily successful, the primary desire expressed by the workers was precisely for a 'contract' (Delap, 2011, pp. 50, 87ff.).

Contrary to the conventional view, the master–servant model of employment was not straightforwardly replaced by a contractual model at or around the time of the industrial revolution, or indeed at any later date. While work relations may have become increasingly 'contractualized' during the course of the nineteenth century, the master and servant model continued to influence the nature of such relations and the law regulating them in very significant ways (Deakin and Wilkinson, 2005). Even at the height of industrial citizenship in the mid-twentieth century, the characterization of the civilized wage relationship – the modern status-supported contract of employment – as *universal*, and of work relations systems as consequently *comprehensive*, was somewhat exaggerated. Neither trade unions nor the law were ever able, indeed ever came close to being able, to penetrate into the more remote corners of the economic landscape – agriculture, domestic service, construction, hospitality and catering – where powerful employers, unorganized workers and non-industrial ways of production stood in the way of regularizing contracting for work along the lines of high industrialism. In these remote and typically overlooked corners of national and sectoral labour constitutions, alternative

forms of working relations survived which looked rather more like master and servant than industrial citizenship. In those sectors where industrial citizenship did become well established, it remained the case, moreover, that contracts of employment were by their nature incomplete, the efforts of trade unions to eliminate pre-modern elements of the employment relationship in favour of contractual specification of mutual rights and duties having met with effective resistance by employers. When called upon to 'fill the gaps' in contracts of employment, courts often read into them obligations derived from the old master–servant model: general duties of obedience and loyalty owed by the worker to the employer (Freedland, 2015). Even today, therefore, it remains possible to detect remnants of employees' status as servants in contemporary systems of labour law, not least in the very notion of a contract *of service*, which is a widely used synonym for the contract of employment (Riley, 2016). The law implies into all such contracts some rules that accord with the notion of industrial citizenship – rights to a minimum wage, to paid breaks and holidays, and so on, and to participate collectively in some kinds of decision-making through membership of a trade union – and others that are redolent of a hierarchical relationship of service (Deakin and Wilkinson, 2005).

What all of this points to is that the relationship between contract and status must be understood to evolve over time, with its future – or, better: its possible futures – open but inevitably conditioned by its past. Never has contract existed without status, nor did contract appear out of the blue to replace status, or vice versa. Contractual relations slowly crept into feudal status, beginning as far back as the Middle Ages, to coexist with it for a long time (see table 3.1). As civil rights introduced free agency in the business of selling and buying labour, service joined servitude and blended into it, the master–servant relationship both modified by and lending substance to contracts of service. Part of the feudal legacy, well into the era of early industrialism, was a patriarchal underpinning of authority

relations at the workplace, often but not necessarily coming together with a paternalistic concern for the worker as an imagined family member, the relationship as a whole governed by what Max Weber called traditionalism: a normative orientation for which rights and duties are legitimate on account of their having existed in the past and been inherited from it.

At the height of the postwar settlement, industrial citizenship changed this, though by no means completely. Democratic authority tried to take the place of patriarchal authority, or inserted itself into it, contesting its legitimacy without being able fully to extinguish it. Politics, politically negotiated mutual obligations, offered to replace paternalistic good or not-so-good will, and did so in some workplaces, sectors and countries. Social democracy supported and formally established collective in addition to individual contracting, limiting the space for private agreements between sellers and buyers of labour and supplanting the master–servant template with specific rights and obligations produced under the guidance of formal institutions of industrial democracy. Service became employment, the modern form of waged labour, its legal meaning and substantive content defined by political agency rather than social tradition: industrial citizenship.

Table 3.1 Status and contract over time

<table>
<tr><td>Feudal bondage</td><td>Civil rights</td><td>Industrial citizenship</td><td>Commercialism</td></tr>
<tr><td>Servitude</td><td>Service</td><td>Employment</td><td>Work</td></tr>
<tr><td>Serfdom</td><td>Master–servant contracting</td><td>Collective contracting</td><td>Individual contracting</td></tr>
<tr><td colspan="2">Patriarchal authority
Paternalist
Traditionalism</td><td>Democratic authority
Politicized
Social democracy</td><td>Market authority
Privatized
Neoliberalism</td></tr>
</table>

With some degree of confidence, we can now conceptualize neoliberal work relations as novel configurations of status and contract. As we have pointed out, neoliberalism is the institutionalization of market authority by political means; in that sense it amounts to commercialization, to an attempt to turn labour into a commodity like any other (table 3.1). Neoliberalism privatizes, or re-privatizes, contractual relations that under the postwar settlement had become political and public. More precisely: the core of the neoliberal project, as sold to society, is the creation of a liberal era of contractual freedom, of contract without status, presented as a return to an ideal past that never in fact existed. It is a figment of political ideology in at least two respects: first, because contract is always and necessarily supplemented by status and, second, because contract without public status, amounting in effect to a modernized master–servant contract, is not a state of nature but is instituted and enforced by economic power and political and legal means. In the neoliberal imagination, where there once was employment, in its ideal-typical self-stylization displacing or subsuming service, there is now contracted work of many different kinds, in the legal form of employment or not, enriched with the tradition of service or not, underpinned by *de facto* servitude or not.

While it is not central to our concern here, it is important to recognize that among the diverse products of the decay of industrial citizenship are forms of procurement of labour for capitalist production that are anything but voluntary and far from contractual, substantively or formally. Even and precisely under neoliberalism, contracting for work may be replaced with coercion to work, either along global value chains outside industrial, or post-industrial, countries or in prisons and similar institutions inside them. Civil rights, in the sense used by Marshall, are by no means a guaranteed bottom line as industrial rights are rooted out and social rights curtailed – as much as they might have seemed safe when social progress was still imagined to proceed in an irreversible sequence of

institutionalized progress. De-commodification of labour, that is to say, need not take the form of redistributive political status guarantees; it can also mean that workers are deprived of the modern freedom to decide who they will work for and under which conditions – in other words, the freedom of the market, little as that might have meant when states still had to provide for free collective bargaining (Hyman, 2022). Modern slavery is surprisingly frequent in globalized production systems, as is prison labour in the United States and elsewhere (Fudge, 2018; LeBaron and Roberts, 2010; LeBaron, 2021; Zatz, 2021). There is no reason to assume that neoliberalism, with its celebration of the 'creative destruction' of institutions that impede an ever more efficient 'combination of production factors' (Schumpeter, 1934), would, when it comes to finding the most efficient way of putting labour to work, end its quest for the liberation of enterprising capital from restrictions in the name of 'social justice'.

As to where our enquiry will lead us in the remainder of this book, the principal question that needs to be addressed is how far the neoliberal order with its intended full commercialization of labour, contracted as well as extracted, can advance and how stable it can be. Which remnants of modern and pre-modern status are still present and functionally required? What roles do the law and the state play in neoliberal contracting for work in a narrow sense and in the neoliberal labour constitution at large? In particular, we will ask whether the neoliberal suppression of public status can be reversed and in what form. Can the political nature of a neoliberal labour regime dressed up as non-political be made visible again and harnessed for a political and legal reform that restores the humanistic intention of labour law? Can status once again become more than the repository of pre-modern subservience or postmodern subjection in work relations without trade unions and collective bargaining?

4
Liberalization as Emancipation?

In this chapter, we examine current trends in the fields of employment relations and labour law through an empirical investigation of four archetypal workers in the third decade of the twentieth century: gig workers, Amazon warehouse workers, care workers and university professors. In selecting these four archetypes we have been guided by our interest in the division of workforces into 'core' and 'periphery' observed in the 1980s and 1990s, together with the particular configurations of status and contract which that division represented. Has this trend continued, and do the terms core and periphery still help us to make sense of work relations today? We are interested too in the manipulation of contractual terms by employers, so as to take workers outside of the category of employee, and in the migration of the exchange of money for work into the less-regulated world of entrepreneurship, real, 'bogus' and imaginary. Why does this happen? How, if at all, does it shape how workers think of their own employment status and work relations, how they understand their rights and obligations and those of their employers, and what it would mean today to be treated fairly at work?

The chapter begins with a discussion of broad trends in political economy since the 1980s and the pressures brought to bear on employers and employing organizations to shed parts of their workforce and to contract for work other than through the creation of employment relations. The key concept here is no longer 'dualization' but rather 'fissuring', referring to the legal fissure, or gap, that is thereby created, quite deliberately, between employing organizations and those who work for them, no longer bound together by a contract of employment or, in some cases, any contract at all (Weil, 2014). As industrial citizenship recedes or is deconstructed, we observe an erosion of the distinction, central to it, between employment and self-employment. A confusing variety of private status constructions appear – a bricolage of statuses based in contract rather than the other way around – with both the creativity of human resource professionals and contract lawyers and new technologies harnessed to recombine elements of contract and status from the industrial and pre-industrial age. Because the law remains tied to the old employed/self-employed dichotomy, however, it can become difficult, from a legal perspective, both to categorize a worker as one or the other and to identify 'the employer' from a number of organizations with which the worker is contractually or organizationally bound.

In the second part of the chapter, we turn to investigate these developments further through a depiction of the work relations of our four archetypal workers. By 'archetypal', we mean here that these kinds of work occupy a prominent position in the current collective consciousness, much commented upon in the academic literature as well as the mainstream media and figuring in contemporary fiction and film. Considering their work relations through the frame of contract and status reveals a somewhat complex picture, in part because contracts may have been drafted with the specific intention of characterizing the relation as one thing when the facts suggest something other. Contract and status may not align. Similarly, while

the legal status of self-employment and the imaginary or ideology of entrepreneurship are closely related conceptually and usually go hand in hand, they can also occur in isolation from one other. An employee may be encouraged to think of herself as an entrepreneur, for example – to 'own' the job, to 'invest' in the career – or a self-employed worker to hope for employment status as a reward for uncomplaining performance.

The fissuring of employing organizations

In the field of industrial or employment relations, both practical concerns and theoretical perspectives have been transformed since the 1980s and 1990s. When the sociological and legal tradition of status and contract was invoked by Streeck in 1986 to understand the dynamics of industrial relations, labour law and, indeed, capitalist development, the primary concern was still the postwar problem of integrating an organized working class – one that had made itself powerfully heard in the industrial strife of the late 1960s and thereafter – into a capitalist production system dependent upon class cooperation. Industrial citizenship, as defined in the tradition of Marshall and others, was deemed essential for this: the price to be paid by capital and the state in order that labour should continue to play along. None of this is pertinent today, and nor is the issue, of overriding importance in the 1980s, of the economic competitiveness of Western capitalist nations in relation to each other and, above all, to Japan. In both respects, domestic and international, what used to be the politics of industrial relations has dramatically lost its significance.

Several explanations, more or less related, offer themselves for the profound de-politicization of both industrial relations and the discourse regarding its legal regulation. One is globalization, in the form it took in the 1990s. Rather than pitching national systems with distinct

national institutions against each other, as one might have expected in its early stages, globalization turned out to be, above all, a giant opportunity for capitalist firms in the old industrial countries to relocate production to wherever suited them best.[1] As a consequence, production chains came to cross national boundaries in a major way. Comparison between Japan and China is instructive here: the Asian competitor of the 1980s and its successor since the 1990s. Whereas Japan confronted Western capitalism with a distinct and compact production system of its own, China grew into an industrial power as a place for Western firms to 'make or buy' – to set up plants to produce components for their products or to rely on Chinese firms as subcontractors. In either case, they were by and large free to experiment with work and production regimes of their own choosing, unrestrained by national institutions of industrial citizenship, either at home or in their host country.

Especially where it involved the relocation of production in whatever form, globalization increased the power of internationalizing firms in their home labour markets and societies. One result was a dramatic decline in trade union membership and union-led strikes, reinforced by successful government efforts to suppress inflation, which limited the capacity of unions to strike for high wage increases without risking unemployment (tables 4.1, 4.2a and 4.2b).[2] Another factor weakening postwar industrial citizenship was de-industrialization, which was accelerated by globalization. In its course, large production plants disappeared or were continuously downsized, partially solving the problem that Fox and others had in mind when they wrote about the need for concessions to workers to motivate them to cooperate within a Taylorist work organization intended and designed to function without such motivation.[3] Now, in a shrinking manufacturing sector, integrating the remaining workforce into the firm as an imagined productive community became much less expensive for employers than had previously been

Table 4.1 Trade union organization in seven countries, 1990–2018

All workers

	1990	*2005*	*2018*
France	10.7	8.6	8.8
Germany	31.2	21.5	16.5
Italy	38.7	33.3	34.4
Netherlands	24.6	21.0	16.4
Sweden	80.1	75.7	64.9
UK	39.6	27.0	23.4
USA	15.5	12.0	10.1

Women

	c. 1990	*c. 2005*	*c. 2018*
France	–	9.8	–
Germany	25.5	14.3	12.9
Italy	–	31.2	28.1
Netherlands	18.0	14.3	15.0
Sweden	84.8	73.2	69.6
UK	31.5	29.6	26.2
USA	12.3	10.8	9.9

Commercial services

	c. 1990	*c. 2005*	*c. 2018*
France	11.5	8.6	10.0
Germany	–	17.1	10.9
Italy	32.8	24.0	23.5
Netherlands	12.6	17.1	12.7
Sweden	64.2	64.0	60.0
UK	25.6	17.8	13.2
USA	9.5	7.7	5.5

Notes: Commercial services include trade and commerce; hotels, restaurants and catering; transport and communication; banking and insurance; business services and real estate.

Time-series on women and commercial services had a substantial number of missing observations in the years of interest. This has been solved by using observations from adjacent years, usually between one and three years before or after the year of interest.

Source: Jelle Visser, ICTWSS database, version 6.1. Amsterdam Institute for Advanced Labour Studies (AIAS), October 2019.

Table 4.2a Average number of days not worked due to strikes and lockouts in seven countries, five-year periods, 1971–2015

	France	*Germany*	*Italy*	*Netherlands*	*Sweden*	*UK*	*USA*
1971–5	3,861,325	1,246,561	20,874,175	164,432	256,884	13,083,800	23,586,840
1976–80	2,653,081	1,090,026	19,221,692	126,468	931,241	12,853,800	22,049,440
1981–5	1,411,260	1,153,289	11,125,450	95,258	156,666	9,374,000	11,801,640
1986–90	700,265	113,425	4,636,393	67,319	534,973	3,039,800	8,633,320
1991–5	530,380	553,760	2,683,280	193,066	183,876	526,200	4,669,220
1996–2000	400,064	51,339	1,097,840	28,080	33,122	512,200	7,383,320
2001–5	624,991	113,914	1,890,826	91,340	131,065	695,240	1,650,700
2006–10	1,437,260	187,643	735,714	45,320	40,813	674,992	1,266,560
2011–15	472,378	310,479	–	69,860	14,803	608,100	676,220

Notes: For some five-year periods, there are fewer than five observations available. Where there are four or three data points, averages are calculated on these years only. In the one case where there are fewer than three data points (Italy, 2011–15), no average was calculated (–).

For France, Germany, the Netherlands and Sweden, ILOSTAT provides separate time-series for different periods between 1971 and 2015, which draw on different primary data sources.

Source: ILOSTAT, Work stoppages, United States 1971–3, US Bureau of Labor Statistics.

Table 4.2b Average number of days not worked due to strikes and lockouts in seven countries, five-year periods, 1971–2015

	France	*Germany*	*Italy*	*Netherlands*	*Sweden*	*UK*	*USA*	*Summary index*
1971–1975	100	100	100	100	100	100	100	100
1976–1980	69	87	92	77	363	98	93	93
1981–1985	37	93	53	58	61	72	50	56
1986–1990	18	9	22	41	208	23	37	28
1991–1995	14	44	13	117	72	4	20	15
1996–2000	10	4	5	17	13	4	31	15
2001–2005	16	9	9	56	51	5	7	8
2006–2010	37	15	4	28	16	5	5	7
2011–2015	12	25	–	42	6	5	3	4

Notes: 1971–5 = 100

The summary index was calculated by taking the average strike days of the seven countries in each five-year period (for six countries in 2011–15) and transforming the results into an index.

thought: the mere possibility of relocation or downsizing was often enough to ensure a level of engagement, if not trust, sufficient for the performance of work tasks at a level of diligence sufficient from the point of view of the employer.

In comparison to the vertically integrated and highly bureaucratic corporations of the postwar era, firms today employ strikingly small numbers of employees (Weil, 2014).[4] Whereas IBM directly employed workers, for example, from designers to engineers to the assembly line worker who pieced together the computers and components, amounting to a global workforce of 345,000 in 2020 (434,000 in 2012), Apple, with a revenue almost five times that of IBM, directly employs fewer than a tenth of the 750,000 workers who design, sell, manufacture and assemble its products in various locations around the world (Weil, 2014, pp. 7–8). In the hospitality sector, large percentages of staff are employed by franchisees rather than directly by the company whose name appears above the hotel entrance. Cleaning and janitorial staff are often employed through third-party agencies or service providers, or they may be 'self-employed', at least according to the terms of their contracts. Indeed, from hotels to corporations, hospitals and universities, it has become standard practice to contract out for cleaning and janitorial services, for gardening, landscaping and security, sometimes even for human resource, payroll and IT services. Franchising agreements have spread from hospitality and fast food into many and varied sectors of the economy.

For a lead company, such arrangements involve savings in labour costs as *wages* are replaced by a *price* payable for labour and other services, and liability is offloaded for tax and social security contributions and for compensation for workplace accidents and other injuries to the workers' health. The price payable for services tends to be much lower than wages would be, partly because of savings on taxes and social security contributions, partly because of

competition between subcontractors, and partly because of the dynamics of wage-setting within large companies, which are affected by employee perceptions of fairness and, especially, by their comparison of their own wages with what co-workers earn (Weil, 2014, ch. 4; Selznick, 1969, ch. 6). Seeking to act fairly in the eyes of employees, whether through corporate beneficence or enlightened self-interest, mid-sized and large firms are likely to introduce bureaucratic procedures around wage-setting and promotions. To reduce wage differentials between co-workers, they may pay the lower skilled more than those workers would earn outside of the firm and, in a bid to realign their productivity with those higher wages, they might invest in training the lower skilled. All of this costs money; much of it becomes unnecessary as the workforce shrinks.

For workers, fissuring can mean that jobs that once resided inside lead companies, providing decent earnings and stable employment, now reside with often smaller firms who set wages under far more competitive conditions. Alternatively, it can mean that jobs disappear entirely to be replaced by offers of contracts for services: offers to perform the work as self-employed workers. Where complicated contractual arrangements are in place, workers may not even know the identity of the organization that employs them, in the eyes of the law – the one that is legally obligated to pay the minimum wage and observe health and safety standards, and so on.[5] In any case, workers are forced into intense competition 'outside' of the lead firms, ensuring that they cannot capture a significant share of those firms' profits (Rogers, 2023). Union organizing and the collective representation of workers' interests become more difficult as decision-making is dispersed along contractual chains, the employer function split between two or more organizations, and workers taken outside of the scope of labour rights. A world of work emerges that is much less integrated, characterized instead by spatial and organizational distancing and by a state of permanent reorganization, within and across

national boundaries. At a societal level, this leads to decreases in tax revenue and social security contributions and to an increase in inequalities as income is transferred from workers to shareholders, company executives and – to a lesser but still significant extent – consumers.

While globalization and de-industrialization may account for the increased international competition facing businesses today, the consequent pressure to cut labour and other costs, and the inability of trade unions to exert counter-pressures, they don't fully explain why businesses have responded to that pressure by fissuring or contracting out. Lowering labour costs is only one part of a broader set of aims pursued through fissuring. An additional piece of the picture concerns changes in the financial sector, which have created powerful incentives for corporations to redraw their boundaries, focusing on 'core competencies' and shedding more and more employment. Together with the rise of private equity firms, the shift away from defined benefit to defined contribution pensions and the consequent ballooning of mutual funds have led to an unheralded short-termism in the economy and a new common sense which typically sees share prices *rise* when a firm announces redundancies (Weil, 2014, p. 74). If managers are to fulfil their duty of maximizing shareholder value, they must toe the line: focus the firm's attention and resources on a set of core competencies representing its distinctive capabilities and sources of comparative advantage in relevant markets, and sell, restructure or outsource anything else. In the public sector, too, similar pressures are exerted on managers in accordance with the principles of New Public Management and, to the extent that the institution is reliant on private investors and loans, the preferences of its owners and creditors.

At the same time as pressure has grown to fissure businesses and other organizations, advances in technology have made it possible both to set quality standards and to monitor compliance without having to take or keep production – and work – in house. An ever-expanding

array of new technologies has been developed, including bar codes, electronic data interchange protocols, product identification, GPS, and other methods of tracking products through supply chains and monitoring the provision of services to customers (Weil, 2014, pp. 60–72; Rogers, 2023). These may make it possible, too, for lead firms or their subcontractors to contract with workers or labour intermediaries in countries of the global South, likely in a position in which they are forced to accept lower wages or a lower price for the work. Global value chains materialize in the form of global chains of contracts, with the sum that will eventually be paid to the workers squeezed further with each new link (LeBaron, 2021; LeBaron and Roberts, 2010). The recent experience of a mass move to working from home during the Covid-19 pandemic has increased public awareness of the sometimes highly intrusive nature of work monitoring: filming workers, taking screenshots, counting key strokes, and timing breaks away from the keyboard and the screen (O'Connor, 2021b).

While fissuring may signal the demise of huge organizations as measured by the size of the workforce, it has not entailed the disappearance of firms with huge market shares. Simultaneous to fissuring, a second contemporary trend has involved the consolidation of capital and the creation of companies that – if not quite monopolies – exercise sufficient control over essential resources within their sectors to enjoy quasi-monopoly power. Like fissuring, consolidation is facilitated by both law – especially weak antitrust or competition rules and strong intellectual property rights – and technological advances (Rogers, 2023). From a worker's perspective, it results in power disparities of breathtaking proportions between the worker, or the small firm that employs her, and the lead firm – the latter acting either as the employer (and perhaps the only or major employer in a particular locality) or, more likely, as the purchaser of labour services, looking to bring production costs down (Weil, 2009).

Four workers, peripheral and core

In the postwar decades, industrial relations scholarship emphasized the attractions of industrial citizenship for employers as well as workers: the economic benefit that employers might secure by conceding to their workers industrial citizenship rights and a share in managerial rule, as required by law or through collective bargaining. The more power employers have in the labour market and the organization of work, however, the less they require industrial citizenship. With globalization and the associated weakening of trade unions and social welfare systems, the power imbalance has swung yet further in favour of employing organizations. In the expanding services sector, legal mechanisms and new technologies can be used to organize work in a manner that ensures managerial control without creating significant opportunities for workers to sabotage or slow down or modify the labour process, unburdening employers of the need to secure workers' goodwill. At the same time, the absence of trade unions enables management not only to use economic pressures to extract compliance but also to draw on workers' intrinsic motivations for good performance in support of employer objectives, both through new 'scientific' methods of human resource management and the invitation into the labour process of what has been called a 'new spirit of capitalism': the redesign of work tasks to allow for, what post-1968 was considered, 'personal self-realization' (Boltanski and Chiapello, 2018).

All that said, the advance of neoliberalism and the disintegration of industrial citizenship cannot be fully understood without taking into account the possibilities for self-determination that self-employment, or entrepreneurship, can appear to offer the worker (Foucault, 2008 [2004]). The neoliberal *liberation* of contracting for work from the status of wage earner or industrial citizen has in some cases proven appealing to workers, with the

institutions of industrial citizenship seen, or portrayed, as limiting personal freedom, choice and 'flexibility' in daily life. The Auden poem concerning 'The unknown citizen' comes to mind here, with its satirizing of the mundane, heavily regulated existence of the Fordist worker, and its penultimate line, 'Was he free? Was he happy? The question is absurd' (Auden, 1940).[6] For some workers today, entrepreneurship can seem to hold a promise of freedom, however deceptive, from the routine and fixed hours of a permanent job, from the supervision and direction of a manager, from the obligations imposed by union membership to act, at times, in solidarity with other members, and from a normalized way of life and a standardized life course. In return for her greatly expanded freedom of choice, of course, a worker-entrepreneur must assume personal responsibility for the consequences of choices made or not made and of her own failings and shortcomings but also, potentially, of the decisions of others or sheer bad luck. Together with freedom in place of constraint comes precarity in place of security.

Gig worker

Platform or gig work offers an extreme example of fissuring, where the entire labour process is designed to meet the objective of not directly employing *any* workers, bar a tiny core of directors, brand managers, and the like. It is central to the business model of platforms such as Uber and TaskRabbit that they should be able to provide services more cheaply than their competitors – at least for as long as it takes for them to achieve monopoly or quasi-monopoly status within a particular market, with winner-takes-all returns (Tucker, 2019; Rahman and Thelen, 2019). Contracting with self-employed workers not only allows the platform to save on wages, tax and social security, and potentially to avoid liability for accidents at work, it also allows them to offload the costs of machinery and tools. Uber drivers must buy or

lease their own cars; DoorDash and Deliveroo couriers use their own bikes or motorcycles. The only thing that the platform owns is the app. Since workers are paid for the tasks that they perform and *not* for periods spent 'on call', classifying them as self-employed also enables the platforms to offload the economic risk of fluctuations in demand. Unsurprisingly, perhaps, this model has proven very attractive to investors, who have provided the platforms with almost limitless supplies of 'patient capital', in no hurry, at least for now, for a return on their investment (Rahman and Thelen, 2019).

In order to justify the characterization of workers as self-employed, platforms describe themselves as mere third parties, facilitating contracts of sale between customers and drivers, couriers and domestic workers, and providing clever algorithms and sophisticated ratings and other technology to keep transaction costs low to negligible. Workers are actively encouraged to think of themselves as 'entrepreneurs', enjoying freedom, flexibility and autonomy (Ravenelle, 2017, pp. 286–8). Innovation is an important part of the platforms' branding, and they present themselves accordingly as doing something truly novel – not taxi provision but 'ride-sharing'; not cleaning and ironing but 'neighbours helping neighbours' – something, importantly, to which existing laws and regulations do not apply. Indeed, to insist upon the application of burdensome rules and regulations to these activities, so the narrative goes, would stifle innovation in a way that was damaging not only to the platforms but also to customers and 'entrepreneurs'. When the most prominent platforms launched around a decade ago,[7] commentators in business schools willingly parroted these lines, hailing the arrival of a truly novel form of institution, hybrids of market and hierarchy (Sundararajan, 2016, p. 69). As experience quickly revealed, however, it was *not* the case that platforms had invented a modus operandi which obviated the need for the kind of top-down control of the labour process under managerial prerogative, typical of

vertically integrated employing organizations. For Uber, TaskRabbit, and the like to function as intended, they require at a minimum that a sufficient number of drivers, couriers or taskers make themselves available for work at the right times of day and, secondly, that those workers readily agree to undertake whatever gigs are assigned to them. In some cases, platforms also require that the gigs be completed in a particular way – for example, with a particular level of customer service.

While they have not done away with the need for control and direction, however, the platforms have succeeded in minimizing or obviating their reliance on contractual or other legal obligations to ensure that workers perform as required. In part this is achieved through technological innovation, including close monitoring and the embedding within the app of a ratings system (which transfers arbitrary power over workers from managers to consumers). Technology of this kind can depersonalize managerial control, making it appear impartial and 'objective', in the sense of a natural condition of the material world. At a time when weakened employment rights and rights to social welfare have significantly lessened the attractiveness of exit options for gig workers, the constant threat of 'deactivation' – summary dismissal, by any other name – or lesser forms of punishment, such as the withholding by the platform of better (more lucrative) gigs, also contribute significantly to ensuring good behaviour (Ravenelle, 2019). To orchestrate a supply of labour that is always sufficient to meet demand for services, meanwhile, platforms wield the promise of the award to a worker not only of a better rate of pay – 'surge-pricing' – but of a higher rating and, consequently, better gigs; on the other hand is the threat of a lower rating and poorer gigs (Cant, 2020). There is nothing transparent about these ratings systems, however, and of course no right of appeal for workers when they don't function as promised or expected (Prassl, 2019). From the perspective of the worker, 'management by algorithm'

and the associated lack of easy access to any human representative of the platform can result in extremely time-consuming and highly frustrating efforts to solve work-related problems, such as non-payment or under-payment of wages (Ravenelle, 2019; Kantor et al., 2021). When the problem in question involves emotive matters such as perceived unfair treatment, an 'accidental' firing or work-related illness, frustration may be compounded by feelings of hurt and humiliation at the lack of a human response (Kantor et al., 2021).

As the question of gig workers' legal status has been litigated in courts around the world, judges have shown themselves unwilling to accept that the lack of enforceable legal or contractual obligations on the worker is decisive: obligations to turn up for work, for example – ever, or at an appointed time – and, when at work, to accept the gigs offered to her via the app. Instead they have tended to focus on the powers that the platform has *in reality* to direct the worker and control the manner of work, finding variously that workers are employees or dependent contractors rather than independent self-employed entrepreneurs (De Stefano et al., 2021). Unless and until such decisions are reached by the courts, however, the opportunities for appeal exhausted, *and* the judgements respected by the platform in question, the fiction of entrepreneurship performs important functions: legal functions, insofar as the purported self-employment of workers allows platforms to escape employment law and social security obligations and to wield the threat of deactivation; and an ideological function, serving to legitimize the expropriation of the workers' employment rights (Braverman, 1974).[8] In some cases at least, gig workers internalize the platforms' vision, coming to think of themselves as entrepreneurs (Dubal, 2017; Wood, 2019).[9] A sense of injustice may arise, accordingly, *not* because of a lack of employee status and the non-applicability of employment rights, but by reason of the platform's failure to treat the workforce as it ought to treat self-employed independent

contractors: allowing them, for example, to grow their own client base and to make informed judgements about which gigs to agree to take on (Dubal, 2017). In other cases, workers appear to view gigging essentially as a job like any other, resenting, above all, the low rates of pay (Ravenelle, 2019).

Amazon warehouse worker

While there is certainly nothing new about warehouse work per se, work in an Amazon warehouse has certain novel characteristics that have drawn the attention in recent years of journalists and scholars alike. Many of these relate to the management of the workforce and the organization of the work, which can be performed, in this case, only in person, on site. In the so-called seventh generation warehouses described by journalists, including Bloodworth (2018) and Guendelsberger (2019), the labour process very closely resembles the Taylorism of an earlier era, with wearable tech and with security guards replacing the relentless rhythm of the assembly line and ever-present foremen as supervisory and disciplinary mechanisms.[10] In addition to providing details of which items to collect or store, warehouse workers' hand-held devices constantly monitor their speed, comparing them with target speeds and with co-workers, and recording 'idle time', including time spent on toilet breaks. They direct workers to take routes through the warehouses designed to minimize opportunities for interactions with co-workers, and they provide a means for remote line managers to issue additional instructions and admonishments. Each time the workers enter and leave the warehouse, their bags and pockets are checked by security guards. Breaks are timed to include the precious minutes that it takes to walk from the warehouse to the canteen, or toilets, or rest area. Depending on the season and the location, it may be stiflingly hot or freezing cold. It is always extremely noisy. Because of the constant monitoring and time pressure,

the work is stressful; because of the distances that the walking worker must cover – 10 miles per day or more – and the repetitive crouching and reaching, it is physically exhausting. At the same time, it is intensely boring. This is a working arrangement that only barely recognizes the humanity of the worker – her dignity, her physiology, her need for social interaction and stimulation.

In the eighth generation of Amazon warehouses, dehumanization is taken a step further, with workers treated – as they were on assembly lines – as appendages of the machine (Glucksmann, 1990; Rogers, 2023). Instead of walking around the warehouse and collecting items from shelves, workers are confined to phone-box-sized work stations to which robots bring shelves of items. The worker locates the required goods from the shelves, grabs them, and places them into a plastic bin. Once the bin is full, it is sent via a network of automated conveyor belts to a group of (human) packers who pack the items and fix a bar code to each package. When a new set of shelves is required, the robot removes the old one and brings a new set. The workstation is set up so that the worker cannot talk to, or even make eye contact with, any co-worker. Monitoring via a video camera and image recognition algorithms is constant, and a large, digital stopwatch enforces time discipline, displaying the number of minutes and seconds taken to perform each task. The work is fast-paced and relentless, physically demanding, stressful, and yet boring. In these warehouses, as in earlier iterations, vending machines dispense painkillers in addition to drinks and snacks.

In Amazon, as in platform-mediated gig work, a system of strict monitoring and control is underpinned by the company's manipulation of the workers' legal status. Despite their fixed hours and regular shifts, and their patent subordination to managerial control, many of these workers are not employees but, rather, dependent contractors, recruited by employment agencies on casual – even 'zero hours' – contracts (Briken and Taylor, 2018;

Guendelsberger, 2019).[11] Depending on the jurisdiction, they may enjoy a limited number of employment rights (to a minimum wage, perhaps, or to short rest breaks during a long shift), but, crucially, they do not have any rights to the job. They have no legal protection against unfair dismissal, redundancy or temporary lay-off – no right, that is, to be offered the shifts next week that they were offered this, or indeed any shifts at all. Although these workers are not employees in the narrow sense, however, the notion of entrepreneurship plays no role here. Instead, the promise of employee status is used as a carrot to control the workers, together with the stick of the constant threat of lay-off (Bloodworth, 2018; Guendelsberger, 2019). For any infraction of company rules, for late arrival, or for a day of absence due to ill health, 'points' are awarded to a worker, together with the warning that a certain number of points will lead them to be shown the door.[12] To induce workers to compete with each other to work ever faster, meanwhile, or to take on extra shifts when labour is temporarily in short supply, a manager may dangle the carrot of permanent employment: the award of a 'blue badge'.

Managerial techniques such as these have patently been designed by Amazon with a knowledge of the law in mind: employment law is carefully manipulated or worked around. Workplace monitoring of workers is not unlawful, for example, and neither is disciplining via a points system. In implementing these techniques, Amazon has also been aided by labour market conditions that ensure a reliable stream of applicants for warehouse jobs.[13] In the USA, it pays slightly higher wages than comparable employers of 'unskilled' labour (Guendelsberger, 2019; Rogers, 2023) – a commodity amply supplied by a comparably poor secondary education system and non-existent vocational training. There and elsewhere, Amazon routinely sites new warehouses in economically depressed areas (Briken and Taylor, 2018), where it quickly becomes the main or one of the main employers, sometimes causing job losses in

other sectors over time (Jones and Zipperer, 2018). It then benefits directly from social welfare systems – or 'active labour market policies' – which penalize 'job-seekers' who refuse to accept an offer of work or who leave a job during a specified minimum period (Briken and Taylor, 2018).

Care worker

The job of a home care worker involves visiting elderly, sick or disabled care-users in their own homes and assisting them with tasks such as getting washed and dressed, using the bathroom, and preparing and eating meals. While the job has not changed much over the years in terms of its function, there have been very significant changes, in many countries, to the type of contract used to hire workers and, consequently, to the workers' legal status and terms and conditions (Hayes, 2017; Boris and Klein, 2012; Moberg, 2017; Broadbent, 2014). Until recently, for example, home care workers in England tended to be employed directly by local authorities, enjoying the same rights as other employees, including rights to sick pay and holiday pay and a measure of job security (Hayes, 2017). Being under a statutory duty to provide care to those who need it and, at the same time, under pressure to save money, local authorities then took the step of contracting with private-sector companies, which undertook to provide an equivalent care service at a much reduced cost. Given the labour-intensive nature of care, however, costs could really be cut only by offering the already low-paid workers poorer terms and conditions – by a hollowing-out, or internal erosion, of the work relationship. By hiring them on casual or zero-hours contracts, private providers were able to externalize many of the costs and economic risks incurred when employing someone, offloading them, instead, to the worker: the costs of training, of a uniform, of paid time off due to ill health or parenthood. Since casual workers enjoy fewer employment rights than employees, the private providers were able, in effect, to expropriate the workers'

employment rights, profiting directly from the workers' loss. To ensure the flexibility that allows them to minimize labour costs, private providers typically went on to hire more workers than they needed, causing them to be hungry for shifts and, consequently, always available for work. This resulted in less continuity of care for care-users and lower job satisfaction for workers, who could no longer be sure that they would continue to care for the same individuals over a period of time. As with gig workers and Amazon workers, care workers' lack of job security created an effective barrier to the enforcement of any rights that they did have, contractual or statutory, for fear of losing their jobs.

Pursuant to the Care Act 2014, the UK government has most recently taken steps to individualize the sourcing of care services in England. Using a discourse of autonomy, independence and, above all, choice for the service-*user*, it has placed an obligation on local authorities to create a market in care, offering individual service-users a choice between different care providers. That obligation is met through the provision to those who qualify of a personal budget from which they can purchase care services. According to the logic of the market, the interests of the service-user and the care worker are thereby thrown into conflict as, respectively, the purchaser and vendor of care services. Relations *between* workers take the form of competition between sellers, each trying to make a sale – willing, perhaps, to forego the protections of health and safety law or minimum wage standards if this is what it takes to secure a contract. Under the resultant legal regime, workers may be employed directly by service-users, they may be self-employed, or they may work for a private care provider. If they are self-employed, employment rights will not apply to them; if they are casual workers, they are unlikely to attempt to enforce those few rights that they have for fear of losing shifts. If they are employed directly by a service-user, employment rights will be almost impossible to enforce, since this would involve legal action

against the cared-for old or disabled individual, and the payment by that individual of any compensation or other sum awarded by the court.

In her empirical study of home care workers, Lydia Hayes notes the degree to which the notion of 'care as enterprise' – of a market in care and of the supreme importance of individual choice – may be internalized by workers (Hayes, 2017, pp. 172–3). In interviews, she found the workers' own narration of their working lives to be 'steeped' in the aspirational language of opportunity and explicit criticisms of the old welfare-state era of social care provision. She also noted that pride was taken by some in their own ability to navigate a very difficult set of circumstances so as to secure for themselves sufficient paid hours per week and a corresponding income. To this extent, marketization was not 'done to' the workers, Hayes concluded, but was, rather, a process in which they were centrally engaged, both as objects and as agents (ibid., p. 172).

Hayes also draws attention to the ways in which the gender, race and class of care workers have shaped both the nature of the work and the terms of the law that regulates it. Care is often assumed to be women's work, akin to mothering. It straddles the border between voluntary and occupational work, unpaid and paid, and can be thought of as something that is owed by women to their families and even to their neighbours. If it is 'naturally' feminine or maternal, moreover, women shouldn't need any training in how to do it; according to that line of reasoning, it may be categorized as unskilled work and valued accordingly. Still today, as Hayes well demonstrates, strong echoes can be found in judicial decision-making of narratives that foreground maternal nurture and female altruism. Unpaid labour is assumed to be a component of paid care work, for example, the cost of caregiving as one that should be borne, at least in part, by the working-class women who provide the care (Hayes, 2017, p. 135–52). Similar echoes can be found, too, in the pronouncements

of politicians, who characterize care as something that should be provided 'within the family' and not by the state: mostly by women, in other words, and typically for free (ibid., p. 202).

University professor

Among academic staff, we find at first glance the kind of dualism identified at the end of the last century between core and peripheral workers performing the same, or a similar range of, tasks and roles but under very different contractual terms and conditions.[14] Within the same universities or departments, a proportion of the staff may have contracts of employment, enjoying a relatively good measure of job security or tenure, while close colleagues are hired on fixed-term or casual contracts (Gallas, 2018; University and College Union, 2020; Leendertz, 2021).[15] The nature of contractual terms in any individual case may reflect academic seniority, with so-called early career researchers (ECRs) expected to complete a series of short-term or casual contracts before eventually landing a 'permanent' post – typically at a time of life, namely their late twenties and early thirties, when they might also wish to start families and provide secure homes for them.[16] It is also far from unknown, however, for promoted academics to be hired for a fixed term, or even, in extreme but not unusual cases, on a contract drafted so as to place upon the *worker* sole responsibility for securing funds, in the form of research grants, to pay her own salary and associated costs. In some institutions, there has been an increase in teaching-only academic positions designed to maximize the time available to research 'stars', so as further to enhance both individual and institutional reputations (Brennan et al., 2017). In the USA, the existence of 'tenure-track' and 'non-tenure-track' positions divides the workforce into some who will likely progress from insecure to secure employment and some who may never do so.[17] 'For full-time non-tenure-track

faculty, job security, compensation, protection of academic freedom and inclusion in shared governance are all inferior relative to their tenure-track colleagues. The chasm is even wider when comparing tenure-system faculty to part-time contingent faculty' (Atkins et al., 2018). Data from several countries indicates a significant over-representation of white males in the more secure, more highly valued positions and an over-representation of white females and racialized academics in the less secure, less well-remunerated positions.[18]

In higher education, as elsewhere, the proliferation of different contract types has been driven by processes of marketization involving, in this case, the characterization of students as consumers and the introduction, in place of common standards, goals and ideals, of the logics of service provision and competition between and within particular institutions (Slaughter and Leslie, 2001; Collini, 2012; Fleming, 2021). Individual staff members have been thrown into competition with one another for the best (tenure-track or permanent) positions at the 'best' universities and for the best treatment once in post – promotions and wage increases but also workload allocation, office and laboratory space, individual research budgets, and so on (Brennan et al., 2017). In line with the logic of competition, there has been a very marked increase in the use of quantification to produce assessments that are easily compared and ranked (Dix et al., 2020). The rating of academic staff is facilitated by linking the funding of research to individual termed projects, whose 'outputs' can be readily evaluated. Impact factors become a proxy for the quality of journals, H-indices for the accomplishments of a scholar, university rankings for the standard of education that a student may expect to receive in a particular institution and the type of research that might be done there. Wages and other terms and conditions are increasingly individualized through the institution of performance-related pay and annual appraisals. Performance is judged with reference to both the (quantified) 'quality' and the

quantity of outputs, to external grant 'capture', and to other quantifiable measures.

An important element of the marketization of universities entails treating academic staff as entrepreneurs and encouraging them to think of themselves as such (Peter, 2017).[19] This is most obviously the case where scientific research has the potential to result in patent-protected innovations and 'spin-out' profit-making companies (Slaughter and Leslie, 2001). Across all disciplines, however, academics who lead research projects, secure research funding, and hire and manage teams of ECRs and postgraduate students can begin to feel themselves quite independent of the institutions which formally employ them – akin, at least in some respects, to small businesspeople. Confidence in their own personal marketability and capacity to find employment elsewhere may reinforce such impressions. It may cause them to make significant investments in 'building their brands', not only working unpaid overtime, spending long hours on social media, personally financing travel for work purposes, but even, perhaps, paying somebody else – a research assistant, copy editor, ghost-writer – to do parts of the job.

The injection of elements of private enterprise into the role of the university professor may be understood in historical context as a response to the failure of attempts to turn scholarship from a 'calling' (Weber, 1961 [1918]) into remunerated employment, in which a standardized amount of work is performed in exchange for a salary, under bureaucratic organizational authority governed by a status-defining set of rules. Before scholarship became the sole domain of the modern university, it was essentially reserved to wealthy amateurs – think of Darwin or Hume – or to individuals endowed with a stipend by an enlightened sovereign personally interested in science. Scholarship might be housed in academies of sciences or in colleges similar in many respects to monasteries and financed by an endowment of land or, later, capital. Scholars might depend on student fees, as did Immanuel

Kant at Königsberg and Adam Smith at Glasgow, collected personally from their students before or after class, in an offertory similar to that in church. From the nineteenth century, with the growing economic importance and rising costs of science, various attempts were made to turn scholarship into a paid occupation for people willing or requiring to make a living out of it. In Germany, for example, professors became civil servants subject, in principle, to the bureaucratic discipline that comes with that status: the expectation of delivery of a standardized performance in exchange for a standardized salary. Obviously, this conflicted in important respects with the 'aristocratic' legacy and high prestige of scholarship. This explains why the first universities explicitly protected the 'academic freedom' of their professors, entitling them to a life of '*Einsamkeit und Freiheit*' (solitude and freedom), as famously put by Wilhelm von Humboldt, then Prussian minister of education. Until a few decades ago, this made the professoriate more of a *Stand*, an estate, than a profession, delegating control of their performance to what was hopefully an internalized *Standesehre*, a sense of *noblesse oblige* overlaying whatever formal rules might be applicable to public-sector workers in general. In turn, this gave professors considerable power to resist what they saw as bureaucratic encroachment on an activity and way of life that ought to be driven not by economic but by its own purposes, as an end in itself. While bureaucratic discipline and economic rationalization took time to progress, however, they progressed nonetheless, slowly and with more or less friction.

Today, efforts are everywhere well under way to redefine the modern status of the university professor as an employee of a bureaucratic organization engaged in service provision, with elements of entrepreneurship and competition taking the place of corporate (as opposed to industrial) citizenship, or membership of the organization. In this case, the orchestrated change of status may be understood as a response to the inherent lack of fit between

scholarship as a calling, or vocation, and dependent employment under bureaucratic rules, including Selznick's rule of law (Selznick, 1969). If standard employment rules cannot elicit more than an average performance from a 'worker', and if average performance is no longer regarded as enough, then 'academic freedom' on top of corporate citizenship may appear, or be presented, as an ivory tower privilege that society cannot afford to sustain. Control over professorial work must be turned over, instead, to the market.

Like home care workers, academic staff must nonetheless be recognized not only as objects but also as agents of marketization (Fleming, 2021). While some aspects of the processes at play might be found objectionable by academics (the characterization of students as consumers, for example, or the casualization of ECRs), much is masked by a semblance of meritocracy (Young, 1958; Fleming, 2021). Those who suffer the worst terms and conditions have, it might be assumed, only themselves to blame. Conversely, those with the best deals and highest salaries have deserved it. If anyone dares to complain about his lot, his opinions may be dismissed on the basis that he is simply envious of those who have done better: a loser and a bad one at that. Similarly, long-standing notions of science as a vocation can work with rather than against marketization (Weber, 1961 [1918]). Notions of the scholar as an heroic figure who follows a calling may be internalized by scholars, with the result that they more or less readily submit to a 'totalizing imperative' that requires them to commit themselves completely to their role, working evenings, weekends, holidays (Peter, 2017). To complain in such circumstances about unfair treatment would be to demonstrate a lack of dedication.

Despite the stark inequalities that undoubtedly exist in the terms and conditions of professors and ECRs, tenured and non-tenured staff, it would be wrong to assume that the status of the better-treated 'core' is one of industrial citizenship in any traditional sense. Obviously, the very

existence of two or more classes of worker within the same organization or the same sector is at odds with egalitarian notions of citizenship.[20] It should also be borne in mind that, while the terms and conditions of core academic staff are likely to be very much more generous than those of their 'junior' colleagues, they may be rather less generous than they once were. The detail varies from country to country and even from institution to institution. In the UK, for example, professors today are employees much like any other. As such, the legal rights that they enjoy have been significantly downgraded in the course of the past two or three decades: both hollowed out in terms of substance and rendered more difficult to enforce. In Germany, professors retain elements of the almost aristocratic status that they enjoyed in the universities of the modern period, with more or less unlimited academic freedom. Tenured professors are still civil servants (*Beamte*), for example, with a duty to 'devote their full dedication' to their occupation, a legal entitlement to a salary that allows them a 'standard of living commensurate with their status', and no right to strike. Such continuities, however, mask the significant changes to the role of the scholar-as-professor that have occurred in Germany as elsewhere, with academic freedom squeezed by novel pressures to create useful knowledge and earn the university significant grant income. Moreover, even where professors enjoy tenure or job security, as they do in Germany and the USA, the logic of competition and financialization can result in threats to the continued economic viability of institutions or particular departments. In that sense, even 'core' staff may experience their employment as precarious.

As for early career and contingent staff, we believe that it may not be as outrageous as it first seems to draw a comparison here with Amazon warehouse workers. The nature of the work and the physical conditions in which it is carried out are of course quite incomparable; rates of pay may be too, at least on the face of it.[21] Just as in

the case of Amazon workers, however, the contracts of academics in this category are drafted so as to render them insecure or precarious and so to allow both the carrot of permanent employment, or tenure, and the stick of termination to be liberally wielded with the aim of eliciting dedicated, obedient, hard work. If you can only publish *this* number of articles in journals with *that* impact factor, and secure a research grant of *so* many figures, you too might be awarded a blue badge.

Status and contract, public and private

In 1986, Streeck's 'Status and contract' essay observed the privatization and politicized depoliticization of employment status, as industrial citizenship was replaced by a proliferation of different arrangements stipulated to a significant extent by contract and no longer by externally imposed rules and conditions (Streeck, 1992). It described the division of workers into two groups or classes in terms – core and periphery – that were later commonly used to signify the fragmentation of once (broadly) unitary systems of labour law and work relations. For example, André Gorz referred to the emergence of a core and periphery of workers but placed rather more emphasis on what he called 'corporate culture' and 'corporate loyalty' (Gorz, 1999, p. 36). So great were the demands placed upon core workers by the corporations for which they worked that their employment relations could usefully be characterized, in Gorz's view, as neo-feudal: 'The firm offers workers the kind of security monastic orders, sects and work communities provide. It asks them to give up everything – any other form of allegiance – in order to give themselves, body and soul, to the company' (ibid.).

Twenty years later, the privatization and depoliticization of status have progressed to such an extent that the terms core and periphery have lost much of their currency, while the analogy with feudal relations appears

increasingly flawed and misleading. As Otto Kahn-Freund pointed out many decades ago, the comparison of modern employment with feudalism could only ever be taken so far given the many obvious differences between the statuses – most importantly the unilateral right of the employee to quit for any reason, though perhaps with a requirement to give notice (Kahn-Freund, 1949, cited in Selznick 1969, p. 69). It remains the case today that even the most downtrodden of workers enjoys formal freedom of contract, which fundamentally distinguishes her, as Marshall taught us, from a vassal or a serf.[22] Even in the case of relatively secure employees, moreover, what we tend to observe is not a thickening of status, as suggested by Gorz, but, rather, its retreat, as employment relations become ever more marketized (Gorz, 1999).[23] When heavy demands are made of a worker today, the expectation is that they will be met not out of loyalty or commitment to the employing organization but because the 'experience' and 'skills' acquired will serve to improve the worker's CV and marketability, or wages and bonuses. No promise is made and no expectations encouraged of employment for life; indeed, too great a degree of firm loyalty may be taken as a marker of a lack of ambition (Gershon, 2017).

If we speak of the retreat of status in connection with employment relations, we do not mean to imply that it has anywhere disappeared. As was noted above, even self-employment proper is a status relation of a sort. Moreover, the terms of written contracts can be misleading in this respect: straightforwardly 'bogus' and misrepresentative of the realities of the working relation, or – especially in large, bureaucratic organizations – supplemented by human resource management rules and procedures, which shape the status of the worker by creating and imposing their own non-contractual conditions of contract. Tech, too, can perform the function of a contractual term or the exercise of managerial prerogative, mandating, enforcing or ruling out certain behaviours on the part of the workers (Hildebrandt, 2015).

It is also important to consider the ways in which legal statuses may become bound up with or influenced by social statuses associated with gender, race, age, nationality, and so on. In pre-modern eighteenth-century England, as we have seen, the status of slave was almost entirely conflated with race in the common consciousness of the white population, so that a black woman performing domestic service was not recognized to be a servant like any other, even if the law didn't acknowledge, either, the existence of slavery within its borders (Blackett, 2019). Throughout the twentieth century and into the twenty-first, the gender and racial identity of a worker have continued to influence perceptions of the type of work and role to which she is suited, such perceptions being then internalized or resisted by the worker herself (Glucksmann, 1990). The age of a worker, too, can shape opinion regarding the acceptability or appropriateness of the terms and conditions of work, with younger workers possessing a greater readiness to suffer low pay and insecurity if they regard the job in question as temporary, as an opportunity to gain experience, or as the first rung on a 'career ladder' stretching high above. Status may be understood to be transitional, liquid, earned through promotion and bound up with the life course, and work careers to be long successive periods of probation, under the watchful eye of the market and the personnel department, the promise of a secure job with employment rights always just out of reach. The ambition of industrial citizenship, only very imperfectly achieved in the twentieth century, is to render contracting for work universally fair, overlaying, or neutralizing, ascriptive social status as a determinant of employment with a politically constituted public status, bestowed by society on everybody seeking to earn their living by paid work.

A related but distinct point is that wage labour is highly differentiated. Rather than selling 'labour' as such, people always have a particular kind of labour power to sell (Glucksmann, 1990, pp. 22–3). Moreover, some

of the specific determinants of the differences between different kinds of wage labour exist outside of and prior to production. Insofar as women bear primary responsibility for childcare, eldercare and other unpaid domestic work, for example, their availability for paid employment is time limited with respect both to hours of the day and life stages. This may impact on access to higher education and training and on opportunities for promotion and career progression. It may contribute to the channelling of female labour into particular kinds of work organized around part-time or otherwise 'flexible' jobs. Where migrant workers leave families and friends at home to seek employment overseas, and where they prefer or are compelled to work and save rather than to spend on leisure activities they, in contrast, may become available to work all hours of the day and night (Anderson, 2010). As the example well demonstrates of a meat-processing factory employing migrant labour to work twelve-hour shifts, labour supply – meaning here the specific nature of the labour power available for sale and the way of life connected to it – can shape labour markets and the organization of work quite profoundly (O'Connor, 2021c; Dias-Abey, 2021). As stated above, gender and racial divisions at work do not result solely from material differences in labour power; ideological factors also play a fundamental role in reinforcing and reproducing labour market segmentation and the concentration of particular groups in low-paid, low-status jobs (Ashiagbor, 2021).

If we continue to speak of *privatization* and *private ordering* in connection with contracting for work, it may be worth re-emphasizing that we nonetheless recognize the importance of the role of the state in facilitating, encouraging and even engineering the expanded power and freedom of employing organizations relative to labour, and in broader processes of economic liberalization (Klare, 1982). The negotiation by private actors of contracts for work is shaped in myriad ways, direct and indirect, by

state legislation and public institutions, so that it is not only labour laws that fall to be investigated here but also equality law, social security and tax, immigration law, data protection and privacy law, and the provision (or not) of childcare and other public services. A non-exhaustive list is provided in table 4.3 of forms of state action and inaction that increase the market power of employers relative to workers, enabling indecent work.

Just as the private ordering of employment relations proceeds by public licence, it is also a matter of great public interest. Where wages sink below the cost of living, the public purse must make up the difference; where workers are classified as self-employed in ever greater number, tax revenues and social insurance funds shrink. If self-employment chimes well with the demands of workers in some sectors of the contemporary workforce for freedom and self-determined (as opposed to employer-mandated) flexibility at work, it is also the case that it undermines security and stability for workers and in many cases provides them with little opportunity to engage in the kinds of entrepreneurship that they desire.

Where there is political will to address such concerns, certain courses of action readily present themselves. Simple steps could be taken, for example, to make self-employment and other forms of contract for work more difficult for an employing organization to establish, easier for a worker to challenge, and anyway less attractive from an employer's point of view by reason of the application thereto of obligations to pay minimum wages, social security and pension contributions (Williams and Lapeyre, 2020). When it is undertaken with the sole or main objective of avoiding labour law and other legal obligations, fissuring could be prohibited. It could also be made less attractive by ascribing legal responsibility to meet those obligations to lead firms as well as organizations further down the contractual chain (Weil, 2014). The law could be changed, in other words, to limit freedom of contract again in the field of employment

Table 4.3 State action/inaction and indecent work

Direct	*Indirect*
• Non-enforcement of labour law • Maintenance of migrant work programmes that remove labour rights and other rights from migrant workers • Failure to regulate labour recruitment or enforce regulation against abusive labour recruitment practices • Differential distribution of labour rights on basis of age, migration status, etc. • Indecent work in government and public authorities, e.g., contracting out for cleaning services • Facilitation of labour recruiters and intermediaries which enable exploitation • Facilitation of industries and business practices that lead to systematic abuse • Non-enforcement of trade law or ethical norms prohibiting import and export of goods made in workplaces where labour rights are not respected • Non-prosecution of businesses which fail to act proactively to ensure respect for labour rights across their supply chains • 'Outsourcing' of labour inspection and enforcement functions to private actors (e.g., auditors)	• Labour market policy placing downward pressure on wages and conditions • Removal or downgrading of rights to social security, sickness and disability benefits, state pensions, etc. • Restriction of workers' rights to organization and unionization • Withdrawal of state supports for trade unions and unionization • Privatization and fissuring of formerly publicly owned utilities and service providers • Payment of subsidies or grant of licences to firms that treat workers poorly • Substantively weak and/or poorly enforced privacy and data protection laws • Exemption for transnational investor firms from new or existing labour and social laws • Lack of regulation of debt and credit markets that facilitate debt bondage • Under-resourcing or defunding of labour inspectorates • Deregulation so as to facilitate wealth creation and concentration; policies to boost competitiveness by decreasing protections for workers • Promotion of corporate self-regulation and private governance in the arena of labour standards, social and welfare policy • Failure to develop effective supply chain regulation encompassing extra-territoriality

Source: Adapted from LeBaron and Phillips (2019).

relations, circumscribing the range of contractual arrangements available and thickening the associated statuses. Of course, the route to a full reconstruction of industrial citizenship is rather more difficult to chart, and it is to that task that we turn our attentions now.

5
Post-Industrial Justice?

In a neoliberal world, in which employment relations are characterized by impermanence and precarity, by the release of managerial action from the strictures of collective bargaining and employment law, what relevance, if any, do the decades-old analyses of Philip Selznick and Hugo Sinzheimer retain? Does it still make sense to talk of workers' involvement in the development of social norms, incipient law and formal legal rules? Can such involvement be understood with reference to the principles of the rule of law and democracy at work? What of the industrial relations literature of the postwar decades – the functionalist arguments that posited a need on capital's part to secure the consent of labour to perform its role in the capitalist system of production? Could consent figure again so prominently in scholarly or public policy arguments in favour of workers' participation in managerial decision-making, the creation and enforcement of workplace rules?

In chapter 2, we suggested that the kind of social development studied by Selznick – the evolution of normatively based sociability – had not disappeared but was no longer the only game in town. Capitalist

development interferes with and distorts but cannot eliminate social development. In the powerful imagery proposed by Karl Polanyi (2001 [1944]), there is not only movement but also countermovement, not only capitalism but also society, the two intertwined in dynamic conflict. The unipolar, normatively integrated world of structural functionalism, presupposed as a matter of course in the 1960s, has revealed itself to be bipolar, structurally conflict-ridden. Polanyi's countermovement of society against the movement of the self-regulating market builds on the same forces that account, for Selznick, for the rise of industrial justice: the norms of fairness and egalitarian reciprocity that evolve when human beings interact and cooperate. These must assert themselves, however, against the structural pressures of markets and competition, of profit-making for its own sake, deriving from the allocation and nature of property rights underlying the capitalist social organization. How successful that assertion can be depends on the distribution not just of economic capital but also of political power and the outcome of an ongoing struggle over it.

Writing firmly in the tradition of Selznick, with an ambition to combine a sociology of organizations with a socio-legal analysis of law and other norms, Lauren Edelman has provided more recent studies of the conflict between movement and countermovement – of managerial logics and the rule of law – within typically non-unionized US corporations (Edelman, 2016). Through meticulous gathering of empirical evidence over the course of several projects, Edelman has demonstrated how legal rules come to be filtered – in the absence of the political influence of unions and collective bargaining (Selznick, 1969, p. 121) – through managerial lenses alone (Edelman, 2016, p. 25; Edelman, 1992; Edelman et al., 2001). In the process, rules, including employment and equality laws, are reconceptualized so that they become more consistent with the principles of efficient management, market

rationality and the overriding obligation to maximize shareholder value, and correspondingly less consistent with the logic of rights and the rule of law. Over time, 'managerialization' of the law spills over into legal fields – as, for example, when the judiciary or legislature pays deference to organizations' *symbolic* compliance with the law: to the policies, grievance procedures, training and recruitment programmes, and so on, introduced by firms to serve as visible symbols of their commitment to employment and equality rights (Edelman, 2016, pp. 27, 107).

In the small businesses that make up a growing section of today's service economies, the kind of bureaucratic management structures and procedures analysed by Selznick and Edelman are likely to be largely or entirely absent. In Amazon, and other organizations following suit, personnel management proceeds through mobile phone apps and automated telephone services, rather than through rule- or efficiency-focused HR professionals. For an increasing number of workers, there is no employing organization at all in the physical sense, meaning a building or other place in which workers meet with co-workers and managers on a daily basis. As we saw in chapter 4, technological advances have enabled modes of managerial supervision and control, as well as methods of providing goods and services to customers, that can obviate the need for office space and shop space (Moore, 2018). In 2020, the coronavirus crisis occasioned a mass move towards working from home, which looks set in many cases to become permanent, or at least to be only partially reversed as the crisis is addressed. While homeworking can bring benefits to workers, especially to those who thereby avoid a long and costly commute, it can also undermine the workers' sense that work involves a shared effort, leaving them with the impression, instead, that they are working on their own – indeed on their own account. Those who work from home also risk losing important opportunities

to form enduring friendships and relations of solidarity with co-workers – something that is well understood by employers, who may introduce homeworking for precisely that reason.[1] Even in physical workplaces, the work may be organized so as to keep co-workers from interacting with one another (Guendelsberger, 2019; Holland, 2020). At a societal level, working from home on a large scale has implications for the integration of communities and societies, since it is likely to reduce collegial interactions between people of different racial and ethnic backgrounds, religious belief, social class, age group, and so on (Estlund, 2003).

'Today's industrial practice will not truly foretell our legal future unless it reflects the fundamental nature of modern enterprise and the enduring aspirations of employees,' wrote Selznick (1969, p. 211). The nature of the enterprise is contested, we would add, between market and society, between private ownership and public purpose, and the aspirations of those who supply it with labour power are formed under the constraints of their work situation and legal status, as well as the wider political and economic context. By reason of fissuring and other organizational innovations, work situation and legal status are characterized for many by various kinds of distance – legal, organizational, physical – between themselves and the enterprise. If we are to take inspiration from Selznick, and to seek to identify, today, latent values in existing social arrangements that might, in the right conditions, develop and be helped to develop in the direction of democracy and justice at work, then the necessary first step is to shift the focus from the organization to the group of workers to the 'occupational community' (Lipset et al., 1956). Group life can no longer be identified straightforwardly with company life; the challenge is, rather, to carve out a space for normatively productive group life apart from and, if need be, in contestation with the life – the logic – of the employing organization.

Labour constitutions and occupational communities

As the work of Sinzheimer and Selznick demonstrates, a socio-legal approach to the study of work relations and labour law can allow for normative legal reasoning to be informed by empirical research on the diverse local experiences of workers in different organizations, occupations and sectors. While informing judges and policy-makers about the objective conditions of work and employment, a sociology of labour law can 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 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 that it embeds (Salaman, 1974, p. 19).[2] 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 '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 (Durkheim, 1964 [1893]). Empirical study of occupational communities is particularly useful when

it comes to understanding workers' collective interests and to ascertaining their political capacity in the more fragmented and diverse structures of work and workplaces today.

Labour constitutions include the social organization of both formal and informal relations among workers and those between workers and their employers. According to our Max Weber-inspired definition, a 'labour constitution' is the historically given ensemble of rules, institutions, social statuses, and economic and technological conditions which together shape decision-making in respect of the question *who* gets *what* work under *which* terms and conditions (Weber, 1892; 1924 [1894]). As such, it includes the normativity of work settings that is all too often overlooked by radical theories of the labour process, which, as a result, underestimate the role of law in both structuring and mediating the conflict between the social classes, between workers and those for whom they work. So understood, the concept of the labour constitution can serve as a heuristic to map the various contexts within which work relations are regulated – the particular workplace, company, sector, locality or jurisdiction – and to analyse the consequences for workers and other actors of institutional change. The social organization of work 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, and countries. 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.

Studying *occupational communities as part of the labour constitutions within which they are embedded* allows for account to be taken of the various ways in which the formation of solidarities and social norms is shaped by the applicable law (meaning here formal legal rules), the technologies in use, and other elements of the

social and economic context. As Selznick and Sinzheimer each observed, formal law can announce or formalize incipient law, but it can also shape the substance of social norms by informing shared notions of fairness and justice, of expected and acceptable behaviour, and by configuring power relations between social actors. Today, tech and automated systems can function like rules, mandating certain behaviours or rendering them impossible and, thereby, shaping the development of social norms. Affording consideration to labour constitutions as well as occupational communities also allows for a socio-legal analysis to be supplemented with or informed by a political economic one. Questions can be addressed from a macro-perspective on the role of the state and state law in shaping economy and society, labour market institutions and employing organizations, and the capacity of particular individuals and groups to do the same.

Occupational communities and democracy at work

In the nineteenth and twentieth centuries, occupational communities were often mainsprings of trade unionism. The *locus classicus* is a book by Seymour Martin Lipset and his co-authors, *Union Democracy: The Internal Politics of the International Typographical Union* (1956). 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 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.[3]

The ITU was an extreme case, as Lipset and his co-authors 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 fellow 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 the 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 at 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 (Cannon, 1967). 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 work practices within the firm and relations between the workers, including especially relations of solidarity. If someone got married, or had a baby, or retired, for example, all co-workers were expected 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.[4]

Today, in the aftermath of the decline of industrial work and the disappearance 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, either because of the nature of the work or on account of the way that 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, fully formed and nascent, with more or less potential for development if cultivated and protected, not least by the law of the land. Examples can even be found in the gig or platform

economy, characterized, at least in principle, by a highly atomized workforce of individuals competing against each other for gigs (Ford and Honan, 2019; Cant, 2020; Tassinari and Maccarrone, 2020).

How and in what sense might today's occupational communities generate normative claims regarding work and the relationship between work and non-work? Thinning out the thick description offered by Lipset et al., Van Maanen and Barley define a contemporary occupational community influentially as:

> 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 various degrees, contentious) values, norms and perspectives that apply to but extend beyond work related matters. (Van Maanen and Barley, 1984, p. 288)[5]

To glean an overview of contemporary occupational communities, we reviewed a number of ethnographic studies that together illustrate important characteristics with respect to both their interrelations and their range of variation (Dukes and Streeck, 2020a). 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' – and may in practice provide a base, a starting point, for occupational communities in our sense to form.[6] 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. Six points stand out in our (non-exhaustive) reading of the literature that we feel are relevant for contemporary attempts by trade unions and policy- and law-makers to regulate new forms of work and

work relations in a manner that is informed by the rich normativity of social life at and around the workplace.

(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 tasks perceived to be difficult.[7] A merely instrumental attitude towards work, including paid work, even underpaid work, seems to be rare – although it tends to be assumed as a matter of course, which explains, and is explained by, the low incidence of research on the inherent normativity of work relations (Brown, 1973). Identification with work and occupation appears to occur even in the absence of stable employment and under what would widely be considered substandard terms and 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.[8] That such satisfaction is sought by workers renders 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 being paid by the employer – in other words, to subsidize the employer's wage fund out of their own life 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 be a source of conflict and an incentive to organize.

(2) Identification with work and occupation is reinforced and collectivized through workers' interactions with fellow 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 to be more or less commonplace, allowing for 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.[9] In fact, 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 becoming '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, often temporary and transitory. In some cases, life out of work becomes entirely subordinate to the demands of work – for example, in the film industry;[10] in others, occupation and employment are specifically chosen to fit a preferred lifestyle – for example, workers in resort hotels (Adler and Adler, 1999) – 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 'someone like me'. Perhaps more than ever, occupational communities produce, or appear together 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.[11]

(4) Occupational communities perform important functions for the successful discharge of work duties. Supportive cooperation among workers in the same occupation is often 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. Fellow workers are also a vital source of emotional support in moments of bad luck, either at work or in private life. They help hide or correct poor performance; cultivate a professional ethos and a sense of professionalism, including informal norms of good practice; and, as 'communities of coping', help deal with frustrations after unpleasant encounters with dissatisfied customers or aggressive superiors (Adams et al., 2012; Korczynski, 2003). By maintaining worker morale in ways 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 they foster may be used as a basis for trade union-type representation of workers, or even for formal unionization.[12] As Korczynski observes, what he calls 'communities of coping' may 'spill over to inform acts of direct resistance to management directive' (2003, p. 59). 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' (ibid.).[13] 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. One upshot of this is that solidarity among co-workers may centre 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, client needs being so diverse as to defy standardization, or employers simply seeking to cut their training costs. This may make occupational communities evolve as *communities of practice*, which may or may not be conducive to their transformation into *communities of adversarial interest formation* (Però, 2020).

A prominent case in this respect are jobs with customers or clients, where there seems to be a high degree of self-selection by workers who enjoy helping 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 the design of their job. Apparently, this adds to workers relying 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 this may make it difficult for trade unions to use the occupational communities of the new service sector as springboards of worker organization and interest representation: 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. On the other hand, identification with clients may 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.[14] 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 fellow workers. Amazon warehouse work, as we saw in chapter 4, has been designed with precisely that aim in mind.[15] 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 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.[16] As employers penetrate occupational communities, they make 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 (Apitzsch, 2010). 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 (Baratta, 2019).

Taking all this into account, and with a good deal of caution, it seems to us possible, still today, to characterize occupational communities as potential wellsprings of worker solidarity. In the right circumstances, we believe, occupational communities might provide a social foundation for the countermovement against the intensified commodification of labour and for the restoration of a normative order above and beyond the dictatorship of marginal costs and relative prices. They might serve as agents of social self-regulation and legal renewal, standing in opposition to the self-regulating market as it tries to rule social life. Against the grain of the neoliberal transformation of the corporation and of society as a whole, they might allow for first steps towards a recovery of industrial citizenship and industrial justice.

If occupational communities are to perform these roles, however, they must be protected and empowered by suitable legal institutions. Occupational communities can be vulnerable to obstruction or capture by employers capitalizing on group dynamics to foster worker loyalty

and deference. 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 in a manner that 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 have to be 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 (Dukes and Streeck, 2020a).

What we have in mind here is a restoration of industrial justice from below, driven by collective agency on the ground: in legal terms, a reimagined principle of freedom of association with broad application to all workers, including the self-employed. Given the diversity of occupational communities and highly individualized approaches to contracting for work, the construction of an industrial polity at the workplace with the support of effective procedural rules is anything but a straightforward matter. Different communities may require different sets of rights and procedures if they are to be able to turn shared beliefs about work and work relations into concrete demands and bargaining agendas and, thereafter, to engage effectively in processes of bargaining, rule-making and rule enforcement. Drawing on our analysis of work relations in the preceding chapter, we can readily foresee that rights to private communication with co-workers and to some measure of job security would be beneficial across the board, encouraging worker voice by protecting workers who speak up from forced exit (Bogg, 2017). Strong rights to data protection are desirable to prevent employer

efforts to screen job applicants with a view to weeding out those most likely to take a stand against ill or unfair treatment of themselves or their co-workers (Rogers, 2023). We would also suggest, however, 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. The policy priority would be to institute decentralized forms of collective action and collective bargaining, understood here as *mechanisms of discovery*: the discovery of interests, action potential, and new procedural and substantive rules that are more easily enforceable for being grounded in the workers' occupation- and location-specific sense of justice.

In suggesting that occupational communities be considered as sites for an overdue extensive redefinition of freedom of association, we recognize that occupational communities, like other social groups, can become exclusionary, not just on professional skills and experience but on characteristics unrelated to work, such as gender, race and age (Cant, 2020, pp. 94–7). Social norms and the shared beliefs of a particular group may not take adequate account of, or may even be detrimental to, the interests of 'outsider' groups (Mundlak, 2011). As it emerges in a particular social context, incipient law is always and necessarily specific, at least until it can be integrated into a broader, more encompassing perspective. Freedom of association does not incorporate an unlimited freedom to discriminate against others, however, and, as procedural law empowers groups to participate in law creation and enforcement, it may also set constitutional limits to their authority or capacity – limits that may be drawn to take account, among other things, of prevailing equality and human rights norms. Ultimately, however, overcoming sectionalism in a more than formal sense is not something that can be brought about by legal means alone. The amalgamation of particularistic into general values and interests is for the politics of the society as a whole, including for social movements struggling to renew

and expand collective society-wide perceptions of fairness and justice (Mouffe, 2018). Linking individual grievances into a broader programme of social reform – building coalitions between groups differently affected by the same societal conflicts – is the very essence of democratic-reformist politics. Workplace politics must be embedded, in the final instance, in a more encompassing class politics.

Social norms, solidarities and the law

In 1951, in reaction to the experiences of the Weimar Republic and the Nazi years, Franz Neumann wrote an essay on 'labour law in modern society' in which he advocated the rejuvenation, in the postwar Federal Republic, of the Weimar tradition (Neumann, 1951). Beginning from an insistence that the interests of workers were never coincident with the interests of the state, he emphasized, above all, the inherent ambivalence of contract in the field of work relations.[17] It was the achievement of liberalism to have conceptualized the employment relation as a contract for the sale of labour power, he wrote, and labour power as a good to be exchanged. But it was equally the failing of liberalism to have conceptualized the employment relation as *only* a contract, labour power as *only* a good to be exchanged. Privity of contract was a singularly progressive principle, since it meant that terms and conditions were explicitly stipulated as the contract was agreed and knowable from that point in time.[18] No third party could later impose new terms or disapply existing ones; nor, as Neumann's old friend Kahn-Freund had pointed out, could any third party, or indeed the employer, prevent the worker from quitting, provided he complied with any requirement, if there was any, to give notice (Kahn-Freund, 1949). In addition to being contractual relations, however, work relations were also relations of domination (*Gewaltverhältnisse*). It followed that privity of contract was necessary but not sufficient

to protect the rights and interests of workers. If contract was to deliver on its implied promise to offer both parties freedom of choice, it must be supplemented by protective employment laws and collective relations between unions, works councils, where there were such, and employers. It must be embedded, in other words, in *status* – specifically the public-political status of what we call industrial citizenship.

While Neumann referenced both employment law and collective bargaining as means of affording workers citizenship, both Weimar and postwar labour law scholarship expressed a strong preference for the latter over the former. Collective bargaining was preferred for its perceived flexibility: its ability to keep pace with industrial change, offering easy opportunities for a swift and specific adjustment of extant rules to evolving technological and market conditions (Sinzheimer, 1927, p. 46; Davies and Freedland, 1983, p. 58). With changing circumstances shaping and reshaping the interests, claims and willingness of the parties to make concessions, collective bargaining was favoured for its greater potential to secure industrial peace – or, rather, an industrial truce until the next round of negotiations.[19] And it was preferred also for 'rule of law' reasons – for the capacity of trade unions to act as 'guardians of the contract', and for the greater likelihood of rule enforcement where it could draw on a collective sense of grievance among workers articulated in and by their respective occupational communities – where the norms in question were grounded in workers' sense of justice. Above all, collective bargaining (in the case of Germany together with workplace bargaining through works councils and worker representation on company boards) was preferred by scholars of labour law for its direct involvement of workers in decision-making and processes of norm creation and enforcement. As Sinzheimer so memorably put it, labour law served to democratize the economy, ensuring that workers were free both *from* ill or unfair treatment at the hands of the

employer and *to* participate in the drafting of the rules that would govern terms and conditions and their daily working lives (Sinzheimer, 1976b [1928]). Labour law didn't only shelter workers from raw market forces, we might say with Polanyi, it also served to emancipate them.

If postwar industrial democracy may be characterized as having had precisely the ambition to embed contract in the status of industrial citizenship, it must also be conceded that it only ever realized that ambition imperfectly (Fudge and Tucker, 2000). We wrote in chapter 2 of the *de facto* exclusion from the scope of industrial citizenship of some sectors and groups of workers, including women and migrants. In the USA, a whole generation of critical legal scholars illuminated, in addition, the *anti*-democratic, legitimating function of the industrial democracy paradigm and the betrayal of the democratic promise of the Wagner Act: the manner in which collective bargaining, as instituted in that country, *contained* conflict and *disciplined* labour, allowing for some measure of negotiation of the wage bargain but no *ex ante* decision-making about the work process itself (Klare, 1981). For these scholars, industrial democracy was as inherently ambivalent as contract, with labour law granting rights to cover up and suspend fundamental conflict, imposing integration on the surface of a deep social division, purporting to produce justice between unequals and peace in spite of lasting asymmetries of power and privilege.

To acknowledge the shortcomings of particular industrial relations and labour law regimes as instituted in the postwar decades is not necessarily to undermine the normative case for industrial democracy and industrial citizenship. As we explained in chapters 2 and 3, adjudicating and thereby pacifying conflicts over contracts for work was only one of the functions of labour law in the postwar decades. Another equally important one was precisely to keep the space for conflict open, by establishing a legally protected right to pursue social and human progress at work through collective action: freedom of

association, in other words, which is an essential freedom in any democratic society. Collective as distinguished from individual labour law adds collective bargaining to the ways and means by which workers and societies may address the inequities inherent in the capitalist mode of production. The right to collective bargaining makes any contractual settlement, any substantive terms of exchange between buyers and sellers of labour power, temporary and provisional, subject to revision in the light of technological and economic, but also social and political, change – the latter including workers' evolving ideas of social justice as well as their organizational and political capacities, their 'maturity' as a class, as the Marxist tradition puts it – in short: the level of collective consciousness and collective agency of the foremost productive force under capitalism, the working class.

In a society both divided and integrated along class lines, any theory of democracy and democratic progress must place its hopes on a progressive evolution of norms of justice among those whose interests are not served by an unequal distribution of class power. In this, workers and their organizations are not left to their own devices. Ideas of industrial justice evolve in interaction with both social movements, where these make use of a democratic public sphere, and formal law. Law, as we have noted above, can influence the evolution of informal norms of justice, not least because what is legal is always at risk of appearing insufficiently just, especially in a dynamic context such as contracting for work. Legal progress in the direction of justice is precarious and contingent. Since it is and can only be politically driven, there is no guarantee of its going in the right direction – of equal justice for all, of the generalization of rights and of moral universalism. In a conflictual society, there is anyway likely to be debate about which direction is the right one. A case in point is the exclusion of particular groups from the status rights of industrial citizenship, referred to above. Generalizing these rights so that they apply to all workers is a political

process, to be driven by movements within the working class demanding that outsiders be included as insiders, as a matter of moral progress in the definition of the collective interests shared by all. Such progress can be helped and shaped by simultaneous developments in legal doctrine and jurisdiction, functioning as pointers towards a more inclusive concept of what is right and what is not and more inclusive processes of working that out.

To the extent that functionalist arguments for workforce participation in the regulation of work have been weakened by the changing nature of employment relations, of corporate governance and finance, emphasizing the 'moral dimension' (Etzioni, 1988) of industrial democracy and industrial justice may have become all the more important. As we have seen, functionalist theories of industrial democracy claimed that granting workers rights to participation in the design of the labour process would benefit not only workers but also employers – enabling the former to adapt their working terms and conditions to their own needs and at the same time raising productivity and, ultimately, profitability. Functionalist rhetoric around industrial democracy was complex. It included strategic promises made by trade unions, more or less seriously and more or less realistic, to support managerial productivity drives in exchange for rights to information, consultation and co-decision-making: ear, voice and muscle. It also included trade union efforts to sell strategic decentralization of managerial decision-making to non-managerial workers or their representatives as *democracy*, in circumstances when it was really nothing more than a social technology aimed at saving on managerial overhead.

Today functionalist arguments are often cast as outdated, on the basis that employers have succeeded in organizing the labour process and regulating work relations so that productivity depends only exceptionally on the consent of workers and trade unions. In a growing number of jobs and occupations, technological and legal innovations seem to have reduced the importance for efficient production

of individual workers' goodwill, loyalty or engagement with the task. In any capitalist economy, moreover, and in the postwar decades just as now, functionalist arguments for industrial democracy suffer from an inherent fragility, since companies will not hesitate to turn their back on consensual styles of management and corporate governance if it suits them to do so, even in the short term.[20] In the dominant Anglo-American model, at least, the first duty of the corporation, as we have pointed out, is to its shareholders. Ascribing to the new common sense that corporate 'leanness' is desirable above all else, and seeking to access the current glut of investment capital, companies might easily choose to shed workers, in one way or another, rather than to treat them well, especially if their technology allows them to replace established and well-represented workforces with less demanding 'outsiders'.

These points can easily be overstated, and often are. Even today, it seems to us that most types of paid work involve the exercise of at least some forms of discretion by the worker, creating opportunities for acts of aggression or sabotage (Blackett, 2019). As a general rule, termination of a work relation and the recruitment of a replacement worker carry costs, and labour market supply is not inexhaustible (O'Connor, 2021d). Overstated or not, however, the claim that decent work can no longer be assumed to benefit employers, as well as workers, does not justify the conclusion that law and politics must tolerate workplace despotism. From a legal perspective, the need for a just normative order is not invalidated if it cannot be derived from the need to make a profit; rather, it precedes that need and both conditions and contains it. Justice, as defined by a society's normative order, precedes efficiency, as defined by market competition, and it follows that the quest of the employer for efficiency must be bounded by the quest of workers for justice. If there is no technological constraint to organize work in a non-despotic way, then a normative constraint can and must take its place,

forcing employers to adapt their mode of operation – of production – to the normative standards of decent work that society and the law have established.

No doubt this is a tall order, for employers, workers and trade unions, for law and for politics. Ultimately, as we have argued, industrial justice and industrial democracy are a matter not only of labour law – of the institutional regime regulating contracting for work in a narrow sense – but of the surrounding labour constitution and economic constitution, widely understood. In a neoliberal economy, where workers' life chances are subject to the caprices of 'the market' and where justice, in order to be allowed for, must pass the muster of economic competitiveness, labour law that adheres to its normative tradition, with an ambition to be more than a technology of efficient human resource management, cannot escape being drawn into political conflicts with opponents who accuse it of sabotaging the 'efficient' operation of the economy. To us, this means simply that labour law that takes its mission seriously cannot avoid being part of the Polanyian countermovement against the transformation of human labour into a marketable commodity – a countermovement that inevitably concerns not only the market for labour power but also the other markets with which it communicates.

Cultivating conflict

If labour law is to meet the objective of facilitating democracy at work, it must be refocused around conflict facilitation in addition to conflict adjudication. The mantra of industrial relations pluralism, indeed of pluralism generally, holds true, namely that peace must be preceded by an unimpeded articulation of conflicting interests and their assignment to an arena where all parties have recourse to roughly similar political capacities. Interest articulation and the negotiation of compromise serve the interests of both social stability and democracy, involving

in decision-making those affected by it. Today, however, changed social structures, new technologies and organizational arrangements, and advanced managerial strategies (including the widespread use of non-disclosure agreements and private arbitration [Barmes, 2022]) typically result in grievances failing to see the light of day. This makes it impossible for them to be clearly articulated, in particular through collective rather than individual action. Employing organizations have developed ever more effective means to suppress conflicts and impose a pseudo peace on the labour market and the workplace, denying workers the means of independent organization and, with it, opportunities to reflect together on common interests and on ways to pursue them. Conflict kept latent must be allowed to become manifest before it can be adjudicated, and labour law must help to bring conflict into the open before it can proceed to resolve it.

It follows that collective as distinguished from individual labour law is, still today, of primary importance. Here we argue against the tendency to reduce labour law to a subdiscipline of private law, overlooking its role as constitutional law for contracting for work as a matter of public-political concern, one that includes class relations and class interests as well as relations between individual workers and employers.[21] Labour law not only comprises the adjudication of disagreements over individual contracts for the delivery of work but must also allow for collective voice and collective action: for trade union organization and, perhaps, other organizational and institutional forms, depending on what workers want and are able to achieve under concrete circumstances. Labour law should assume an active, indeed proactive role in institution-building, in markets as well as organizations, counteracting the growing capacity of employers to do away with the remnants of industrial pluralism in favour of monistic workplace regimes, subject perhaps to legal oversight, but deprived of worker agency as a driving force of normative development and progress.

In the transition from the era of industrial citizenship to the neoliberalism of today, what has been lost is above all the public nature of the status of the worker, politically constructed and unitary, defining a floor of rights and collective capacities overlaying, overriding, neutralizing class- and socially based ascriptive status as well as employer-designed 'status contracts' (Weber, 1978 [1922]). Restored status as a public institution governs private contract rather than being governed, or modified, by it; it inserts obligatory provisions in private contracts regardless of whether the parties to these want them to apply or not. Public status is *unabdingbar* – compulsory, non-derogable – designed to neutralize in part the superior market power of the buyer of labour and protect its supplier from the temptation or compulsion to concede unjust demands and agree under duress to unequal contracts.

A re-created industrial citizenship adapted to the conditions of today must differ from its postwar predecessor, among other things by accommodating changed life courses and family structures. It must not presuppose a standard relationship between work life and social, or family, life – as it did with the male-breadwinner model – but, rather, must allow for more diversity and choice. Renewed industrial citizenship must be more inclusive and less disciplinarian, recognizing that the promise of quasi-entrepreneurial self-determination for workers that came with the reorganization of workplaces has enduring attractions for some. Industrial citizenship of the industrial age put a premium on lasting loyalty to one's employer, assuming a desire on the part of the worker to spend his or her entire working life with the same firm, like the worker in Auden's poem, and a reciprocal desire on the part of the firm to keep him until the end of his useful life (Auden, 1940). Today's more precarious pattern of contracting for work grants flexibility not only to employers but also – *potentially* – to workers. Renewed attention to the inalienable rights of sellers of labour power must take this into account, suppressing the

disciplinarian element of the industrial citizenship of old. Moreover, in the same way in which employers feel less paternalistically obliged to their workers, workers cannot be expected any more to be as committed to work and to their employer as was the 'dedicated worker' (Kerr et al., 1960) of the 1950s and 1960s. Post-industrial citizenship must accommodate such new attitudes to work as have emerged in the transition to neoliberalism; it ought not to treat as role models those workers who are willing to work harder than others in order to win an open-ended contract with superior employment rights, privately granted and publicly mandated.

If industrial citizenship is to deliver on its inherent promise of universal application, then ways must be found in an updated labour constitution to treat the various new forms of work relations as equal with employment in the narrow sense: to grant sellers of labour the same rights as employees where their situation makes them similarly dependent. If employers continue to draft contracts so as to ensure that some workers are not employees, exploiting labour differentially and pitting insiders against outsiders, labour law must react by eliminating the distinction between employment and other forms of dependent work. Treating all dependent work relations similarly would involve extended rights of freedom of association for workers who are currently characterized as dependent or independent contractors. In the latter case, this might revive the tradition of small business associations acting as craft unions, collectively representing their members in relation to their customers-cum-employers. This might require amendments to competition (antitrust) law to exempt such associations from prohibitions against interference with free trade (Countouris and de Stefano, 2019; Lianos et al., 2019).

For T. H. Marshall, the theorist and visionary of the modern welfare state, industrial rights occupied something like an intermediary stage in the transition from political to social rights, to be absorbed ultimately by the latter

and existing, as we noted in chapter 3, partly in conflict with them. Trade unions were less reliable governors of the modern economy than the state, Marshall believed, since they represented no more than a partial view of the public interest to be safeguarded. Only the democratic state could be expected to serve the common good, and so it had to be it, not all-too-easily 'bloody-minded' union leaders, that acted as the true custodian of the interests of workers. For Marshall, as for many others, the potential of strong trade unions to exploit the state's new, 'Keynesian' commitment to full employment by imposing inflationary wage settlements on the national economy was a harbinger of economic and political crisis. We believe that it is necessary as well as possible to break with Marshall here and emphasize the inability of the welfare state to replace industrial citizenship with social citizenship – to absorb the former into the latter. In today's fragmented world of work, it seems unlikely, to say the least, that unions could negotiate wage settlements that in their national aggregate would exceed the aggregate increase in productivity. What they can do instead, and much better than government agencies of all varieties, executive, legislative or judicative, is trace in detail the confusing variety of processes of change in the world of work and, in response, fine-tune extant rules and regulations so that they can keep pace with industrial realities and changing notions of fairness and decent work deriving from them.

This is not to suggest that social rights have no role to play in a future reconstruction of industrial citizenship. On the contrary, social rights must flank industrial rights in a wide variety of ways (Deakin and Wilkinson, 2005; Whiteside, 2021). Industrial citizenship must be protected and complemented by unemployment insurance and supportive industrial and regional policies, including, in particular, vocational training and further education of incumbent workers. It must be embedded, additionally, in trade and regulatory policies that render economic internationalization compatible with social stability and social

justice, defending industrial rights against hollowing out by and in untamed markets and unregulated competition. Employers must not have access to an unlimited supply of labour, for example – whether from poorer countries or from domestic prisons – making it unnecessary for them not just to negotiate with trade unions but also to invest in worker training and improved working conditions (Zatz, 2021; O'Connor, 2021d, 2021e).

Notwithstanding the significant degree of organizational diversity found today, and the need for institution-building to be tailored accordingly, trade unions remain indispensable for a restoration of industrial citizenship and industrial democracy, even where works councils and similar bodies exist (Estlund, 2018). Non-union representation may be useful, but only to the extent that it is not by intention or in fact anti-union, making union organization and operation even more difficult than it already is. Given the nature of supply and demand in contracting for work, and in particular the many intermediary forms that exist today between employment and subcontracting, a modern version of trade unionism must bridge the divide between dependent and – formally – independent labour and allow for collective representation even of small, and especially one-person, firms to the extent that they exist to 'sell labour services' (Forde and Slater, 2005). Rights to freedom of association must be redrawn to ensure that workers are empowered to take collective action against any 'employer' or other organization that wields power over them as workers: the parent company as well as the subsidiary, for example, or the 'end-user' in a labour supply chain as well as the small local agency or gangmaster. Unions should also have the freedom to forge alliances, in the course of disputes, with other interested parties – for example, consumer groups, local communities or environmental campaigners (Anner et al., 2021).

If unions are to represent workers' interests in the ways that we envisage,[22] there must of course be a right to strike. By recognizing the right to strike, labour law admits

to the limits of its capacity to pacify the fundamental conflict involved in contracting for work. It also recognizes the humanity of the worker, which limits the power of the state, in a liberal society, to enforce even a valid contract for work against the worker's will (Kahn-Freund, 1959). In fact, at some point in the history of democratic capitalism, all liberal states had to allow for collective breach of contracts for work, in one form or other, as long as and to the extent that governments and courts could not turn free labour into forced labour, for both practical and normative reasons.

Most strikes occur when there is a violation of the fundamental beliefs of workers concerning a fair balance of wage and effort or a fair adjustment of the terms of existing contracts to changing economic and technological circumstances. Fairness in this respect means that adjustments do not just benefit the employer, and that increases in productivity or losses in market position are at least equally shared between capital and labour, ensuring equity if not equality. Note that workers tend to go on strike only where they feel that deeply held ideas of justice are disregarded (Golden, 1990). In most cases, the material losses incurred as a result of participation in a strike are not nearly outweighed by the gains achieved by a subsequent settlement, the latter always amounting to less than the initial union demand (Golden 1996).

Labour conflicts are moral conflicts as much as economic ones. That being so, the ultimate irrepressibility of the strike bears witness to the limits of the law as a pacifying technology in capitalist class conflict. It shows the provisional nature of any settlement allocating rights and responsibilities in waged work relations and makes visible the thin ground on which such settlements rest. Recognition of the right to strike secures for workers the freedom that is inherent in, or implied by, the idea of contracting for work, limiting the ability of the stronger party to the contract to impose terms and conditions unilaterally. The right to strike stands for the

fact that contractual work relations under capitalism must be embedded in a legal-institutional system that ultimately allows for an adjustment of terms and conditions by a test of strength, a contest of will and power between the two classes of capitalist society, those living and those not living in a proletarian condition. Securing justice for workers in a post-industrial world of work requires, above all, that employers be prevented from organizing work in such a way that strikes – the strongest expression of a strong collective grievance – become impossible.

By creating public or quasi-public institutions for the collective regulation of contracting for work, labour law opens itself up at the bottom where it hits the ground – the social world in which capital and labour meet, in both conflict and cooperation. By supporting collective bargaining and other modes of collective self-regulation, labour law remains responsive to changing conditions in markets and organizations, the dynamic development of which is a defining characteristic of a capitalist economy. To remain connected to what Marx had called 'the real movement' of economy and society, labour law as an institutional edifice must be more than a matter of state, more than the sum of legislation and jurisdiction. Instituting and regulating labour constitutions, labour law recognizes an additional source of law, in the form of the collective agreements or collective contracts, that is negotiated between organized workers and employers acting in a public or quasi-public capacity. In this sense, labour law, more than other fields of law, allows for the transformation of incipient into formal law, incorporating it into the formal regime regulating contracting for work.

What labour law can achieve with respect to protecting human labour from commodification is conditional on the economic constitution – the political economy – of the society in question. Markets, as Polanyi and others have pointed out, are interconnected: free markets for goods and services, capital and finance put pressure on markets for labour to be freed up too. Containing the

commercialization of the fictitious commodity, labour, ultimately requires containing the commercialization of the real commodities, goods and services. Unregulated, de-politicized markets for goods and services, and even more so for capital, make it difficult to subject contracting for work to normative demands for equity and fairness, including making work compatible with a good life outside of work. Without economic democracy – comprising the democratization of ownership in the banking system, democratic control of the investment power of pension funds, a financial transaction tax to be used to create investment funds under popular control, and so on – even the most sophisticated and well-meant regime of waged labour may have to surrender to 'the juggernaut of capital', as Richard Hyman put it (2015).

In answer to the question of whether it is possible for democracy at work to coexist with the financialized monopoly capitalism of today, we must nonetheless avoid the mistake of positing an all-or-nothing relationship between democracy at work, on the one hand, and more widely conceived economic democracy, on the other, concluding that it is pointless to work towards the former unless and until the latter has been won. 'Democracy at work and in the economy must be a multi-level process' – one that can be set in motion both from above and from below, progress at the workplace and in the wider economy reinforcing each other and creating new opportunities for strategic political, including trade union, intervention (Hyman, 2015, p. 9). An imaginative response to the 'cancer stage' of capitalism and its crises (McMurtry, 1999; cited by Hyman) is required, driving a new 'contentious politics' (Hyman, 2015, p. 21), that targets not only contracting for work but also contracting by and for capital. A reassertion of the democratic origins and the democratic potential of labour law under capitalism can and must constitute a central element of this process.

Notes

Preface

1 For either a theory of the evolution of work regimes or a praxeology of their regulation, we think it is rather too early, just as it is too early for a lasting assessment of the consequences of Covid-19 for work, the organization of work, and the position of workers in relation to employers. This book suggests that we, as legal scholars and social scientists, should not lose sight of, but rather draw attention to, the longer-term trajectories and tendencies in the evolution within modern capitalism of work relations and their regulation in law and politics.

2 A brief note on terminology: it was above all Karl Marx who emphasized the distinction between labour and labour power, the latter rather than the former being what is traded in markets for waged labour; not a particular work performance but an unspecified capacity to do work, to be currently specified by the 'employer' in a hierarchical relationship of authority. Marx scolded the economists of his time for not understanding the distinction between labour and labour power, which prevented them from understanding the nature of exploitation inherent in what later came to be called the 'labour process'. Here, we do not stick strictly to the Marxian terminology, trusting

that it will be clear from the context whether we speak of waged or subcontracted labour. Moreover, and more importantly, there are significant tendencies today in the practice of employers to fudge that distinction, tendencies with which we will take issue. In any case, when we speak of 'contracting for work' – which is our preferred term – we include both waged and subcontracted work, or labour, and the various intermediate forms between the two, in an effort to shed light on the way employment regimes have changed and are changing. We use 'labour law' broadly to refer to what is sometimes today called 'the law of work', namely the law regulating relations between workers and employers (not only employees and employers).

3 The concept is from Rokkan (1966).

4 In the German legal tradition of the early postwar decades, 'Rechtsfortschritt durch Gegenmacht' (legal progress through countervailing power).

5 The book draws in places on previously published work: Dukes and Streeck (2020a; 2020b; 2021). The research received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement no. 757395).

Chapter 1 Introduction

1 We use the terms 'decent work' and 'indecent work' throughout the book with reference to the International Labour Organization's *Decent Work* agenda (International Labour Organization, 1999).

2 From the US president, to the pope, to the World Bank, there has been quite widespread recognition in recent years of the desirability not only of more effective labour laws and labour rights but also of stronger trade unions and collective bargaining. See for example the 2020 encyclical of Pope Francis (2020), *Fratelli tutti*. See also President Biden's statement (2021) on the occasion of a union certification vote at an Amazon warehouse in Alabama. In 2014, even the World Bank retreated from its earlier position that 'laws created to protect workers often hurt them', claiming instead that employment regulations 'benefit both workers and

firms' (World Bank Group, 2014, p. 231). See also World Bank Group, 2019, p. 58: 'Employment laws … are vital to worker well-being … Governments face the challenge of striking a balance between worker protection and labor market flexibility.' Detailed programmes of labour law reform have been devised in the USA (Block and Sachs, 2018) and the UK (Ewing et al., 2016), which place strong rights to freedom of association at their centre.

3 The standard reference for the decades of what came to be called by some the Great Compression is now Piketty (2014).

4 In the *Wealth of Nations*, Adam Smith writes that, where a worker spends his whole working life performing only unskilled repetitive tasks, he may become incapable 'of forming any just judgment concerning many even of the ordinary duties of private life. Of the great and extensive interests of his country, he is altogether incapable of judging' (Smith 1976 [1776], pp. 781–2).

5 See for example Ranjan (2016).

6 We chiefly have in mind here obligations and rights in respect of tax and social insurance; employment rights, as has been explained, are not accorded to self-employed workers. See further Williams and Lapeyre (2020).

7 Freedland speaks of the contract occupying a space 'between agreement and regulation' (2016, pp. 11–18).

8 In categorizing a worker as employed, self-employed or a dependent contractor, different legal systems accord different weight to the terms of the contract, as opposed to the 'facts' or empirical characteristics of the employment relation in question. The greater the weight accorded to the terms of the contract, the wider the freedom of the employer to decide what the worker's status should be. Defining characteristics of employment also vary from jurisdiction to jurisdiction but typically include both the control exercised by the employer over the worker and how the work is done and the integration of the worker into the employing organization. Where the mode of production requires workers to turn up for fixed shifts and to perform tasks integral to the operation of the organization on its premises, it may be difficult for an employer to establish that the workers are anything other than employees.

9 See the International Labour Organization's recommendation R198 on the employment relationship (2006).
10 By facilitating union membership, funding a labour inspectorate, or administering a system of easily and cheaply accessible employment tribunals or labour courts.
11 We prefer 'work relations' to 'industrial relations', as the latter term may suggest an exclusive focus on work relations in industry as distinguished from services. Where we continue to speak of 'industrial relations', we use the concept to denote work relations specifically in the industrial era, as in the literature of the time.
12 The concept 'authoritarian liberalism' is closely linked to Carl Schmitt and his reflections on the eve of National Socialism on the need to defend a 'free economy' by establishing a 'strong state' to fend off non-capitalist or anti-capitalist organized interests intervening with public power in markets and private property rights. On Schmitt and the relationship between him and German 'ordoliberalism' after 1945, see Streeck (2015). See also Gamble (1988).
13 We draw here on a paper written by one of us in the 1980s, entitled 'Status and contract as basic categories of a sociological theory of industrial relations' (Streeck, 1992). The paper was Streeck's *Habilitation* lecture at the University of Bielefeld in 1986. In written form it first appeared in 1988 as 'Status und Kontrakt als Grundkategorien einer Theorie der industriellen Beziehungen', *Discussion Paper FS I 88 – 3*. Berlin: Wissenschaftszentrum Berlin. An extended English version was published two years later, in David Sugarman and Gunther Teubner (eds), *Regulating Corporate Groups in Europe*. Baden-Baden: Nomos, pp. 105–45. The 1992 version, lightly revised, is the one referred to in this book. Many other papers could have been used. We picked this one because of our familiarity with its underlying assumptions better and because we feel free to be relentlessly critical of its conclusions.

Chapter 2 Justice, Productivity and Power at Work

1 The *locus classicus* on what has come to be called moral economy is still Thompson (1971).
2 In correspondence with Martin Krygier in 2007, Selznick

reflected that he had not only been influenced by reading Ehrlich's work but had found himself agreeing with it (Krygier, 2012, p. 141).

3 Functionalism, wrote Selznick in a review of essays on Talcott Parsons, was 'what we were doing all along' (1961, p. 934).

4 Michels ended up a supporter of Mussolini and Italian fascism.

5 There are strong parallels between Selznick's conception of industrial justice and those of the labour law scholar Otto Kahn-Freund. As Selznick had been a Trotskyite in his youth, so Kahn-Freund would once have described himself as a Marxist. As with that of Selznick, work written in Kahn-Freund's later years is striking for its consensual brand of pluralism and its narrow conception of class conflict. Here we find an insistence upon the *universality* of conflicts of interest that downplays the distinction between private- and public-sector employers and, even, capitalist and socialist economies (see also Dahrendorf, 1959). The claim to universality follows the circumscription of conflicts of interest quite narrowly, as arising between 'management' and 'labour' over the division of profits and the desired measure of flexibility – or, alternatively, stability and security – in working arrangements (Davies and Freedland, 1983, p. 66).

6 'Trade agreements' here meaning collective agreements, or *Tarifverträge*.

7 For a fuller discussion of Sinzheimer's work and additional references, see Dukes (2014), chapter 2.

8 For further readings in the Weimar tradition, see Ramm (1966).

9 In his magisterial *Legal Foundations of Capitalism* (1924), John R. Commons pointed out that basing work relations exclusively on individual contract would result in permanent renegotiation of contractual terms, including the possibility for employers firing a worker and for workers resigning from their job 'at will', meaning any minute. 'The labor contract is not a contract, it is a continuing renewal of a contract at every successive moment, implied simply from the fact that the laborer keeps at work and the employer accepts his product' (p. 285). Rather than a contract, 'it is a usage, a custom, a habit' (ibid., p. 286) – in other words, a social relation. As such, it attracts, in Commons's terms,

'industrial government', or, in our terms, the evolution of rights and duties of status, although informal and, if you will, private in nature:

> A common law of labor is constructed by selecting the reasonable practices and rejecting the bad practices of labor ... Out of the wage-bargain a constitution of industrial government is being constructed by removing cases from the prerogative of management and the arbitrary power of unions and subjecting the foremen, the superintendents and the business agents to the same due process of law as that which governs the laborers. (Ibid., p. 312)

Commons here anticipates Selznick's legal sociology, as he tries to conceive of a labour constitution defining status rights undergirding and governing contracting for work as evolving out of normative progress. Unlike in European theories of industrial justice, the state and politics figure only on the periphery if at all, so that status needs to be derived from the inherent nature of contract.

10 In 1928 the German trade union confederation asked a group of economic experts under the leadership of Fritz Naphtali to develop a blueprint for a democratically reorganized capitalism, publicly controlled by councils of workers and employers together with state and government. Naphtali's report (Naphtali, 1984 [1928]) on *Wirtschaftsdemokratie* (economic democracy), to which Sinzheimer contributed a chapter, continued to be influential in the (West) German labour movement well into the 1960s. After the legal institutionalization of co-determination at the workplace and in the enterprise under the social democratic government in the 1970s, the idea of co-determination at the level of the national economy fell into oblivion.

11 See chapter 1, note 12.

Chapter 3 The Rise and Fall of Industrial Citizenship

1 For Max Weber,

> the formal right of a worker to enter into any contract whatsoever with any employer whatsoever does not in practice

> represent for the employment seeker even the slightest freedom in the determination of his own conditions of work … It rather means, at least primarily, that the more powerful party in the market, that is, normally the employer, has the possibility to set the terms, to offer the job 'take it or leave it', and, given the normally more pressing economic need of the worker, to impose his terms on him. (1978 [1922], pp. 729f.)

2 According to Durkheim,

> If mutual interest draws men closer, it is never more than for a few moments … Indeed, if to the heart of the matter we shall see that every harmony of interests conceals a latent conflict, or one that is simply deferred … Self-interest is, in fact, the least constant thing in the world. Today it is useful for me to unite with you; tomorrow the same reason will make me your enemy … (1964 [1893], p. 152)

Similarly Weber, for whom a purely interest-based social order critically lacks stability.

3 Writing in the later twentieth century, Otto Kahn-Freund conceived of the contract of employment as the 'general foundation' of the service or employment relation: from a legal perspective, there was no master and servant, or employer/employee, relation until the contract had been agreed (Kahn-Freund, 1977). The status of citizen, in contrast, is logically prior to contract. Citizenship permits a person to enter a market and conclude a contract, as captured by T. H. Marshall's concept of 'civil rights' (Marshall, 1965 [1949]).

4 Industrial citizenship as a concept is not particularly prominent in Marshall's exposition (1965, pp. 102–4). It is introduced as something akin to an intermediate solution for the creation of social rights before the advent of the 'Planned Society and the Welfare State' (ibid., p. 102), as an improvised expedient before the full accomplishment of democracy and, with it, an interventionist modern state (ibid., p. 122). According to Marshall, collective bargaining 'meant that social progress was being sought by strengthening civil rights, not by creating social rights; through the use of contract in the open market, not through a minimum wage and social security' (ibid., p. 103). Its significance lay

in the fact that it amounted to an 'extension of civil rights in the economic sphere', making it 'an instrument [for the workers] for raising their social and economic status, that is to say, for establishing the claim that they, as citizens, were entitled to certain social rights' (ibid.). Collective bargaining amounted to 'the transfer of an important process from the political to the civil sphere of citizenship', at a time when workers 'either did not possess, or had not yet learned to use, the political right of the franchise' – which they now, as Marshall was writing, had obtained. 'Trade unionism has, therefore, created a secondary system of industrial citizenship parallel with and supplementary to the system of political citizenship' (ibid., pp. 103–4). Here we use the concept of industrial citizenship, in a somewhat broader sense, to refer to the entirety of status rights instituted to neutralize the market power differential between workers and employers in that they enable them to negotiate collective contracts, or agreements, on a level playing field, allowing workers to reject offers they deem unacceptable.

5 On the 'Oxford School', see George Bain (2015). On Fox, see his *Beyond Contract* (1974).

6

> If citizenship is invoked in the defense of rights, the corresponding duties of citizenship cannot be ignored … [They] require … a lively sense of responsibility towards the welfare of the community. Trade union leaders in general accept this implication, but this is not true of all members of the rank and file … Unofficial strikes have become very frequent, and it is clear that one important element in industrial disputes is discord between trade union leaders and sections of trade union members. Now duties can derive either from status or from contract. Leaders of unofficial strikes are liable to reject both. (Marshall, 1965 [1949], p. 123)

Obviously this anticipates the central themes of the industrial relations 'reform' debates of the 1960s and 1970s.

7 This conflict had been anticipated by Keynes as early as the 1920s. Keynes's attitude toward trade unions was always ambivalent. On the one hand they were useful, as in a business downturn they protected demand by making wages 'sticky'. On the other hand, this could exacerbate unemployment, which would require some

sort of government intervention, including of a punitive kind. Trade unions could also cause inflation by forcing wage increases above the increase in productivity, which was possible especially where government guaranteed full employment. In such instances Keynes advocated pragmatic political remedies, ranging from informal negotiations with trade union leaders ('moral suasion') to more or less hard institutional limitations on free collective bargaining.

8 John Dunlop was professor of economics at Harvard University and from 1975 to 1976 secretary of labour under President Ford. From 1993 to 1995 he was chairman of the United States Commission on the Future of Worker–Management Relations, which produced the Dunlop Report in 1994. Among his doctoral students were Michael Piore and Richard Freeman. Clark Kerr (1911–2003) was a professor at Berkeley; he was an eminent labour economist and later became chancellor of the University of California at Berkeley and president of the University of California system.

9 Parsons, who was a colleague of Dunlop's at Harvard, maintained that societies consist of four subsystems performing different functions for the social system as a whole: goal attainment (politics), adaptation (economics), integration (the reciprocity of social roles) and latent pattern maintenance (culture). Dunlop went to great lengths to insist that his 'industrial relations system' was 'a subsystem of the social system … on the same logical plane as an economic system' (1958, p. 282). Of course this subverted Parsons's 2 by 2 fourfold table organizing principle, society consisting of fourfold tables inserted in the cells of more comprehensive fourfold tables, and this might have drawn Parsons's ire. It is reported that Dunlop, before writing up his book, requested a conversation with Parsons and asked him if an industrial relations system as a fifth societal subsystem would be OK. According to Dunlop, permission was gracefully granted. In any case, it is interesting to compare Dunlop the economist with Selznick the sociologist, the latter placing his hopes for industrial justice on social integration whereas the former emphasizes a need for institutionalized social conflict.

10 Strangely enough, this view was widely held in a country such as Sweden, which for many was a model of democratic corporatism. In his seminal analyses of the Swedish political

economy, Walter Korpi held that it was 'power resources', not institutions, that accounted for Sweden's peaceful march into socialism. That Sweden had almost no strikes at the time Korpi explained by the capacity of the two arms of the labour movement, the unions and the social democratic party, to get their demands through without having to resort to conflict. That Germany, which he did consider corporatist, had equally low strike rates was explained not by the institution of co-determination on company boards and at the workplace but by the submissiveness of German workers inherited from the fascist past (Korpi, 1978, 1983).

11 In the UK, the Bullock Committee of 1977 failed to convince employers and law-makers, but also many unions, of the benefits of legally institutionalized worker participation; the same holds for the Dunlop Commission in the USA in the early 1990s (Phillips, 2011).

12 This section closely follows Streeck (1992), which by and large represented the state of the art – or, better: the guesswork – of the time.

13 How, then, are unequal contracts possible, wherein, for example, employers require workers to live in company towns and buy from the company shop? This, according to Williamson, can only be the fault of the workers, who are simply not rational enough – too emotional if not too human – for a capitalist world:

> A chronic problem with labor market organization is that workers and their families are irrepressible optimists. They are taken in by vague assurances of good faith, by legally unenforceable promises, and by their own hopes for the good life. Tough-minded bargaining in its entirety never occurs or, if it occurs, come too late. An objective assessment of employment hazards that should have preceded any employment agreement thus comes only after disappointment.

While this reads like a plea for representation of workers by professional negotiators, Williamson never dared go that far (Williamson, 1985, p. 38).

14 Note that one of the peculiarities of the Japanese system, from a Western perspective, was long supply chains held together by subcontracting of a 'relational' kind, blurring the exterior boundaries of large firms (Dore, 1986).

15 Of course, as Richard Hyman has reminded us, the periphery in a dualist labour regime may also stabilize the core by providing for needed flexibility, allowing employers to pursue a policy of divide and rule, keeping core workers in line by threatening them with relegation to the periphery. See, for example, Stone (1974), Friedman (1977) and Rubery (1978).
16 For one of the first explorations of this, drawing on the example of Thatcherism, see Andrew Gamble's seminal *The Free Economy and the Strong State* (1988).
17 1785 text on the Law Concerning Masters and Servants, cited in Steedman (2009, p. 18).
18 *The King* v *the Inhabitants of Thames Ditton*, 1785, discussed by Steedman (2009, pp. 121–7). Like others purchased as slaves and brought to England, Charlotte Howe was thus curiously without status in the eyes of the law, since – as Lord Mansfield underlined in the famous Somerset case – neither the common law nor statute recognized the existence of slavery within English borders. In the common consciousness of the white population of England, meanwhile, the social status of the slave was almost entirely conflated with race (Blackett, 2019, p. 54). Note, for example, that, in the Somerset ruling, Lord Mansfield refers to James Somerset variously as 'the negro', 'the slave' and 'the black' (Wiecek, 1974). In Howe's case, the result was the rather circular reasoning that, because she was a slave, there had been no hiring and, because there was no hiring, she could not be a servant.
19 Cited by Steedman (2009, p. 124). The statute referred to was the Settlement Act – Poor Relief Act 1662 (14 Car 2 c 12) – under the terms of which a person could gain a settlement within a parish if he or she were first hired there for over a year and a day.
20 Although it must not be forgotten that contract's emancipatory promise could be fully redeemed only with the rise of the modern welfare state, with for example unemployment insurance protecting workers in a trade slump from starvation. It is only if feudal paternalism is replaced with modern, politically based forms of social protection that the move from feudal status to modern contract is a move in the direction of social progress.

Chapter 4 Liberalization as Emancipation?

1 The turning point was when, according to Rodrik, globalization changed into hyper-globalization – in other words, where international trade ceased to be a search for comparative advantage among different countries, as per Ricardo, but the building up of global production chains governed by global firms, in a unified world without national borders. Historically this coincided with the demise of the Soviet Union after 1989 and the creation of the WTO, with China as a member, envisaging one world without borders as a hunting ground for American multinationals under US protection. Hyper-globalization was accompanied by the financialization of the American national economy and the attempt to compensate the American working class for its job losses with cheap imported consumer goods, in what has come to be called the Walmart economy. See Rodrik (2011, 2018).

2 Table 4.1 shows a general decline over the past three decades in trade union membership for seven more or less representative 'Western' countries. Density ratios for women have mostly also declined and, apart from Sweden and the UK, on account of women's high presence in the more organized public sector, remained below male densities. The same applies to trade union organization in the new sectors of 'commercial services'. Tables 4.2a and 4.2b document the steep decline in the incidence of strikes (and lockouts) since the 1970s, to a level where labour conflicts have become almost a thing of the past in many countries.

3 'Intended and designed' are the crucial concepts here. Frederick Winslow Taylor's 'principles of scientific management' (1911) promised employers an organizational technology that would free them from the need to reach any kind of understanding with workers, even a semantic one. Taylor's world featured the huge factories of the American East Coast in the early twentieth century that employed especially German and Italian immigrants in large numbers who were not expected to understand the civilized language of English. Work processes therefore had to be arranged – that is, broken up into extremely simplified, standardized and

repetitive bodily movements – so as to make communication between workers and managers unnecessary. The unattained ideal of 'industrial engineering' was training apes instead of humans to do the work. Subsequent critique of Taylorism discovered that no factory could work on strictly Taylorist prescription, since even workers had to be treated as human beings, if only because they were capable of sabotaging the workflow if they were not, and also because task descriptions necessarily contained gaps that needed to be filled by workers interpreting them in good faith. Some critics recommended being nicer to workers, for example by painting the walls of workshops in bright colours, while others advocated various forms of power sharing with workers and trade unions, intended to make workers more cooperative by giving them some kind of voice regarding their work.

4 In the 1990s a veteran official of the employer's association of the German metal industry observed in an interview with one of the authors how the leading members of the association had changed over the years. In the 1960s, when they had a drink at the bar after a meeting they boasted about how many workers they employed, like generals proud of their huge armies. Now the opposite: they proudly report on recent cuts to the workforce and therefore increased sales per worker: 'We hardly employ anyone anymore.'

5 A warehouse is owned by company A, leased by company B, managed by a franchisee of company B, company C. The warehouse is exclusively used for the storage of goods owned by company D, and company D's branding is all over the warehouse, the lorries, and even the uniforms of the warehouse workers. The workers are hired by an employment agency, company E, which has a contract to supply labour to company C.

6 Auden satirizes not only the high degree of standardization of the life of the Fordist worker but also the recording of information by public authorities. The poem begins:

> He was found by the Bureau of Statistics to be
> One against whom there was no official complaint
> …
> Except for the War till the day he retired
> He worked in a factory and never got fired,

But satisfied his employers, Fudge Motors Inc.
Yet he wasn't a scab or odd in his views,
For his Union reports that he paid his dues.

The closing couplet in full reads: 'Was he free? Was he happy? The question is absurd: / Had anything been wrong, we should certainly have heard' (Auden, 1940).

7 TaskRabbit 2008, Uber 2009, Lyft 2012, Deliveroo 2013, Foodora 2014.

8 It would be interesting to know how Harry Braverman would have interpreted the transition from industrial citizen to the new type of semi-independent self-employed worker. In *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century* (1974), Braverman described the evolution of the industrial labour process as a continuous de-skilling of manual workers, eroding workers' control over their work and replacing it with managerial control over workers – a history of separation of conception from execution empowering a new middle class of managers exercising authority over working-class frontline workforces. As workers were cut off from conception, their wages fell as the wage share paying for conception was appropriated by management. In this context, industrial democracy and industrial citizenship might appear as compensation for workers' loss of control over and autonomy in work. On that reasoning, the work regimes of the new platform firms may be described as designed to take back industrial citizenship without restoring worker control over work, as conception, rather than being repatriated to the shopfloor, is turned over to intelligent machinery.

9 Working as a Deliveroo courier, writes Callum Cant, 'There was a sense of autonomy and independence to the job that wasn't entirely illusory' (Cant, 2020, p. 84).

10 Like Taylor, Jeff Bezos believes that people are inherently lazy, that it is human nature to expend as little energy as possible to get what we want or need, and that workers must consequently be controlled and disciplined into working hard (Kantor et al., 2021).

11 Under a so-called zero hours contract, the worker agrees to work in exchange for wages if and when work is offered, but the employer does not undertake to offer any work.

12 So low have standards of work fallen in the USA that Amazon is regarded by many workers as a good employer, relative to others. The points system is valued by some workers as a system that allows them to take a certain amount of unpaid leave (Guendelsberger, 2019, pp. 20, 55) – like a parody of Selznick's 'rule of law' provided for by employers under pressure to conform to social values.
13 According to Kantor et al. (2021), Amazon loses 3 per cent of its workers per week in the USA, which adds up to a turnover of around 150 per cent per annum, roughly twice the average for the retail and logistics sectors.
14 This section takes off with the situation in the United Kingdom and the United States. Similar developments in different forms are taking place in other countries as well, however, as we will occasionally comment upon.
15 In Germany, in 2019, 77.6 per cent of academic researchers were employed on fixed-term contracts (Leendertz, 2021). In the UK, in 2017–18, one-third of all academics, and 67 per cent of those categorized as 'research only', were employed on fixed-term contracts; 6,520 academic staff were on zero hours contracts (UCU Glasgow, 2020).
16 An 'early career researcher' is usually defined as an academic (whether a post-doctoral researcher, lecturer or assistant professor) who is within a certain number of years of completion of a doctoral degree or equivalent.
17 According to data from 2016, around 73 per cent of all faculty positions in the USA are *not* tenure track; 40 per cent of all faculty positions are part time (Flaherty, 2018).
18 In the USA, 54 per cent of full-time professors are white males, 27 per cent white females, and only 2 per cent black males, black females or Hispanic males (US Department of Education, 2019); between 1993 and 2013, the number of untenured racialized academics grew by 230 per cent (Finkelsten et al., 2016). In the UK, fewer than 1 per cent of full professors are black (HESA, 2021); 31 per cent of white academic staff and 42 per cent of BAME academic staff are on fixed-term contracts (UCU Glasgow, 2020).
19 When the vice chancellor of Imperial College in London was questioned about the suicide of a colleague, Stefan Grimm, she remarked: 'professors are really like small business owners … it's a very competitive world out there' (Fleming, 2021, p. 42).

20 'Industrial status which is, so to speak, "particularized" in a dualist environment loses its constitutive character of a right of citizenship, as well as its function as a mechanism of political redistribution.' It works 'not against but within market and contract … as an outcome of interest-led individual action' (Streeck, 1992, p. 68).
21 Note, however, that a nominally hourly rate for casualized staff may have to cover, in practice, several hours of 'invisible labour', including teaching preparation, marking and emailing with students. Recalculated to account for the invisible labour too, the true hourly rate may be lower, even, than the national minimum wage. See, for example, UCU Glasgow (2020). https://ucuglasgow.files.wordpress.com/2020/04/ucu-glasgow-anti-casualisation-report.pdf
22 Except, of course, for the various groups of coerced and enslaved workers, of increased visibility if not magnitude in the neoliberal era. See above, chapter 3.
23 Gorz (1999) recognized this very clearly in his characterization of the work relations of peripheral workers. At the end of the chapter, he briefly remarks upon the marketization of 'core' as well as peripheral employment relations (Gorz, 1999, p. 51).

Chapter 5 Post-Industrial Justice?

1 For an historical example, see Steedman (2009, p. 37): 'Combing in the later eighteenth century was usually done in workshops, not at home, as it involved the use of charcoal fires on which the combs were heated. The move to home was a stratagem by spinning factory owners of the early nineteenth century to break the power of combers working together.'
2 For a well-informed theoretical discussion of occupational community and related discussion drawing on sociological theory to good effect, see Van Maanen and Barley (1984).
3 Other classical examples of occupational communities supported by spatial or temporal or social isolation include miners, sailors and dock workers (Lipset, 1960), as well as policemen, fishermen, jazz musicians and railwaymen (Salaman, 1974; Horobin, 1957). Isolation seems to play an

important part in the formation of occupational communities among hotel workers (Lee-Ross, 2004). See also Van Maanen (2010) on urban policemen in Los Angeles, Apitzsch (2010) on film industry workers, where isolation is social rather than spatial, and Baumann (2002) on British media production.

4 Cannon emphasizes the leftist, class-political ideology of the compositors, rooted in their community and continuously reinforced by it. The ITU studied by Lipset and his colleagues was, in contrast, as conservative politically as any American craft union. This suggests, first, that there is no reason why occupational communities should, by nature, be either conservative or radical; 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. (Cannon, 1967, p. 182)

5 Like Salaman (1974), Van Maanen and Barley (1984) play down the importance of social isolation and instead emphasize the extent of involvement in and identification with an occupation.

6 On communities of practice, see Wenger (1998). For relevant case studies, see Bechky (2003), Elliott and Scacchi (2003) and Winroth (2003).

7 Compare the hotel workers described by Lee-Ross (2004), 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 (2007), who, in their study of barmen, find (p. 217) that jobs considered low status from the outside, because of no formal training and low pay, may be seen quiet differently from inside the respective occupational community. See also Guendelsberger (2019).

8 Compare Lydia Hayes’s use of the notion of the extensive ‘invisible work’ undertaken by care workers (Hayes, 2017).

It may be useful to remember in this context that David Graeber's suggestion that a large share of workers perceive themselves to be doing useless work ('bullshit jobs'), and therefore do not care much about it, has little empirical support (Soffia et al., 2021). What workers seem particularly to value about work is the social relations that may arise from it. According to Soffia and her colleagues, their data suggest that abolishing meaningless jobs and paying workers a guaranteed minimum income would not address the problem of 'alienation' in work because it would create other problems – for example, of social isolation. Rather, they emphasize 'the need for unions that are willing and able to engage in … "meaning of work conflicts" so as to overturn those social relations in which people's work is devalued by toxic workplace cultures that leave workers feeling their labour is pointless and of no use' (p. 21).

9 'From their communities', write Patricia A. Adler and Peter Adler (1999, p. 51) on transient resort hotel workers, 'they received practical assistance, companionship in their quests, and a reified sense of core values and self.'

10 See Apitzsch (2010), who treats this under the rubric of 'networking'.

11 Or without such demands. 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 (Ocejo, 2017).

12 Compare the literature on trade union mobilization which begins from the observation that, when shared by significant numbers of workers, a sense of injustice or grievance can generate a shared sense of group identity resulting, in the right circumstances, in collective organization and collective action (Kelly, 1998).

13 On the other hand, high job satisfaction in transient employment, as in the case of workers in exotic resort hotels, for whom their job is a lifestyle choice, might make occupational communities impenetrable to organizing efforts (Adler and Adler, 1999, n. 37). This would be a subject in urgent need of further exploration. For perceptive comments on the prospects of unionization in the service sector, see Macdonald and Sirianni (1996).

14 For a description of how this is achieved in Amazon warehouses, see Guendelsberger (2019) and Rogers (2023). Where the currently mushrooming 'wealth work' – the 'servant economy' of manicure, massage therapy, skincare, caretaking of animals, fitness training and the like – is organized, no longer on a personal client-provider basis but through platforms such as Uber, opportunities for workers to communicate with each other may be extremely limited. For an initial exploration of 'wealth work' in the United States, see Thompson (2019).
15 See further the call centres studied by Korczynski (2003). See also the home nurses studied by Adams et al. (2012, p. 436), whose informal interaction outside of specific job tasks is viewed with suspicion by cost-conscious managers.
16 A striking historical case of a paternalistic enterprise community is analysed in Revill (2001).
17 For similar arguments, see Forbath (1985) and Estlund (2018).
18 'Privity of contract' is a legal principle which provides that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. Neumann talks of the contract for work (*Arbeitsvertrag*) being classified as a particular type of contract (*Schuldvertrag*), with the consequence that the principle of privity of contract applied (Neumann, 1951, p. 2).
19 While conflicts of interest in employment relations were 'inevitable and necessary', as Kahn-Freund put it, there was one interest which the two sides had in common: 'that the inevitable and necessary conflicts should be regulated from time to time by reasonably predictable procedures' (Davies and Freedland, 1983, p. 26).
20 Quite apart from the fact that workers are unlikely to allow employers and their use of technology to define what it means to treat workers well. Which arrangements at work satisfy workers' demand for industrial justice is something that workers themselves would want to judge. If there is to be a legitimate temporary settlement of the conflict between worker and employer, workers must be empowered to develop and to act in furtherance of their own understandings of what it means to be treated fairly and with dignity; in other words, there must be industrial democracy.

21 Policy arguments that favour wealth redistribution through taxation rather than decent work for decent wages both miss the point that the meaning of 'decent' in this context is likely to be contested and disregard the ways in which wealth inequalities perpetuate and compound political inequalities. As David Grewal has argued in this context, 'it may be naïve to assume that after letting the inequality-producing market run its course there will be any agent left at the end of the process capable of demanding redistribution' (2014, p. 665).

22 Which obviously includes not just workers in the more or less stable core of the economy but also precarious workers on the periphery or in new service sectors. Here, amidst all the well-known misery, interesting developments in the direction of more inclusive concepts of representation are taking place in various countries and sectors, as reported by Meardi et al. (2021). There are even indications of a possible silver lining on the still dark horizon of trade unionism, as documented by O'Connor (2021c) and Irwin (2021), among others.

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