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# Freedom of Association and the Right to Contest: Getting Back to Basics

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## Freedom of Association and the Right to Contest: Getting Back to Basics

I.

British and North American labour lawyers have become inured to the discourse of crisis in respect of collective worker voice. Collective bargaining through independent trade unions is in precipitous if not terminal decline, especially in the US private sector.<sup>1</sup> This has led to a renewed focus on ‘freedom of association’ (FOA), a principle with a venerable international law pedigree, as a potential source of normative support. Whatever else FOA means in the labour context, it surely protects the freedom to form and join a trade union. For some theorists, the content of FOA as a fundamental labour right begins and ends there.<sup>2</sup> Yet there has been a good deal of work on the possibilities of FOA both above and below this platform of a freedom to form and join trade unions.

Much recent work seeks to build up from that platform, in what we call a strategy of ‘ascent’: How much *more* does FOA protect above and beyond union formation? Does it, for example, entail a right to strike? A duty on employers to bargain with the employees’ chosen trade union representative? Does it require at least the rudiments of a legal system (for example, along Wagner-like lines) for enforcing the duty to bargain? Constitutional litigation has been fertile in this regard in Canada and Europe, even if scepticism remains about the social impact of legal victories in the rarefied arena of constitutional courts.<sup>3</sup>

In parallel with this debate, however, there is also serious engagement with the question of what might lie underneath and prior to the freedom to join and form trade unions (rather than above and beyond it). This enquiry – we call it a strategy of ‘descent’ – implies that there is a deeper substrate beneath the protection of basic trade union freedoms – something that is logically and practically prior to the formation of a union,

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<sup>1</sup> For a recent summary of trade union density levels in a range of countries, see the OECD figures at <http://stats.oecd.org/Index.aspx?QueryId=20167>

<sup>2</sup> H Collins, ‘Theories of Rights as Justifications for Labour Law’, in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, 2011) 137, 151

<sup>3</sup> In the Canadian context, the most recent constitutional battle was fought in *Fraser v Ontario (Attorney General)* [2011] 2 SCR 3. In the European context, see *Demir and Baykara v Turkey* [2008] ECHR 1345, discussed in J Hendy and K D Ewing, ‘The Dramatic Implications of Demir and Baykara’ (2010) 39 ILJ 2. For a sceptical view of the potential of constitutional litigation to bring about social and economic change, see H Arthurs and B Arnold “Does the Charter Matter?” (2005) 11 *Review of Constitutional Studies* 37

and that is independently deserving of protection. In short, does FOA have anything to offer to workers acting outside the ambit of unions, and to workers with little prospect of, or perhaps even desire for, union representation? Our own enquiry is firmly within this latter stream of labour law theory.

If FOA entails only the rights to form and act through unions, it risks becoming vestigial in a world in which unions are receding, even fading, from the scene – and that is what most private sector workers in the US, UK, and Canada face today. To begin with, the formation of a trade union in that world is itself often very challenging. We think that is partly due to the inadequate protection of workers' rights to act as individuals and through informal groups to contest employer power. Unionization is often the culmination of a longer process of identifying and learning to promote shared aims. Rights of individual and informal contestation are very likely necessary (at least in a mostly non-union world) for workers to be capable even of forming a union. The freedom to form and join independent trade unions thus requires a practical underpinning of rights to contest employer power both individually and collectively (perhaps in informal or spontaneous groups) outside the institutional context of a trade union. One can thus reason 'down' from the traditional FOA to an entitlement to engage in less formal forms of contestation that are under-protected in all three of the labour law systems on which we focus.

But our argument here is grounded not only in positive international labour law and what is practically necessary for its realization; it is grounded as well in a more fundamental normative premise: citizenship in a free and democratic society entails the right to be free from 'domination' by others. As elaborated most fully by Phillip Pettit, 'freedom as non-domination' requires not merely non-interference in individuals' life choices (including their contractual choices); it requires the ability to contest the decisions of others, both public and private actors, who wield power over one's life and livelihood.<sup>4</sup> In the employment context, that entails a basic right of individuals to challenge employer decisions free from the threat of reprisals; and it also entails a right to do that in association with others, through a union or otherwise.

So we seek here both to reason 'down' from the traditional FOA to its practical prerequisites, and to reason 'up' from the idea of 'freedom as non-domination' to individual and collective rights to contest employer power, including but not limited to

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<sup>4</sup> There is a rich literature. The most recent statement of Pettit's views is set out in P Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge, 2012). There have been some innovative attempts to work through the implications of Pettit's political theory within the labour law context: see, for example, V Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 MLR 912; N Hsieh, '[Workplace Democracy, Workplace Republicanism, and Economic Democracy](#)' *Revue de philosophie économique* 9 (2008) 57.

the right to form a union for the purpose of bargaining with the employer. 'Freedom as non-domination' provides a strong normative underpinning not only for the contestatory rights of individuals and informal groups but also for the traditional FOA itself – the right to form and join a union, certainly, and perhaps also rights to bargain collectively and to strike. This theory helps give content to the traditional but rather opaque invocation of 'unequal bargaining power' as a justification for the right to act through trade unions.<sup>5</sup> Given the economic power that employers have over workers (at least most workers most of the time), the right to form a union is necessary to ensure worker-citizens' freedom from domination by their employers.<sup>6</sup> Necessary but not sufficient. Even more basically, freedom as non-domination requires that individuals or informal groups of workers have the right to contest – question, criticize, disagree with – employer decisions about the organization, terms, and conditions of work without risking employer reprisals.

Part II sets out a two-dimensional taxonomy of rights of contestation: On one axis, from individual to more collectivized forms of contestation, and on the other axis from the "thinnest" version of freedom from state interference and coercion through 'thicker' protections requiring state intervention on behalf of employee rights. Part II will then use this taxonomy to briefly describe the positive law of our three target countries, the US, UK, and Canada.

Part III briefly reviews some of the extant arguments seeking to ground rights of individual and informally concerted contestation in positive labour law, especially in North America. These arguments seek to reason 'down' from FOA, and the statutory right to engage in trade union (or other concerted) activity, to a right to engage in informal or individual protest activity. While these 'top down' arguments may carry the day under positive law, and may carry weight with those who begin with a commitment to the traditional FOA, we think these arguments beg crucial questions about the normative basis for individual workers' rights to oppose or complain of employer actions.

Part IV sets forth our own argument for the recognition of individual and informal rights of contestation. We begin by contending, with Pettit, for a normative commitment to individual freedom, understood as 'non-domination.' From that foundation, we seek to build upward to collective rights of contestation, including the right to contest employer power through a union. We maintain that the 'bottom up' argument brings crucial

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<sup>5</sup> We will return below to this issue. But note for now one problem with the traditional justification for protecting unionization: It is not after all bargaining 'equality' that is sought or achieved through unionization; it is more like 'enough' bargaining power; but then how much is enough?

<sup>6</sup>Pettit himself defends such a view, in P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, 1997) 95

normative heft both to the arguments for individual and informal rights of contestation and to the traditional FOA (that is, the right to form and act through trade unions). In Part V, we offer some concluding reflections on the implications of our analysis.

## II.

We will shortly turn to the normative case for a 'right to contest' in the workplace context. But it may be useful first to distinguish two dimensions along which rights of contestation might be arrayed. The first dimension is 'collectiveness' – from the individual dissenter (A) to small, informal groups of dissenters (B) -- in both cases with no union in the picture -- to groups claiming or seeking union representation. One may divide the latter into those who seek to organize a union (C) and those who claim workforce-wide (even "exclusive") union representation based, for example, on a majority vote of workers (D). The second dimension is what we might call "thickness"; it runs from purely negative rights against state interference (1), to state protection of negative rights against employer reprisals (2), to an affirmative employer duty to bargain in good faith, enforced by the state (3), to an employer obligation to make reasonable concessions (for example, through mandatory interest arbitration) (4).

It would obviously be possible to divide up these rights differently, and to multiply categories of activity or protection. Our categories are chosen with an eye to the salient features and major variations of US, UK, and Canadian labour law, and even so are quite rudimentary. For example, those who claim union representation on a members-only, non-exclusive basis might be squeezed into row C, or might warrant a separate row. In addition, the taxonomy here leaves out one important type of contestation – the right to withdraw one's labour or to strike. That is not because it is unimportant but because it is too important to squeeze into this taxonomy. We think the 'right to strike' is best conceived as a hybrid of the right to contest and the right to exit or quit, and that it could be usefully decomposed along the same two axes. But we must leave that project for future work.

The most libertarian conception of employee rights would recognize only those in Column 1: the freedom of individual workers to speak up for themselves and contest employer decisions, and to some degree the freedom to do those things in association with others, without state interference.<sup>7</sup> In US law, those rights against state interference (or 'state action') are enshrined in the federal Constitution; Canada and the UK have equivalent protections of these fundamental civil liberties. But most modern market societies, and certainly our three Anglo-American regimes, go further and grant

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<sup>7</sup> For a philosophical defence of this libertarian conception, see R A Epstein, 'A Common Law for Labor Relations: a Critique of the New Deal Labor Legislation' (1983) 92 Yale LJ 1357

some degree of affirmative state protection of at least some forms of employee contestation. At a minimum, they protect some employee contestation rights against *employer* interference and reprisals (column 2) -- and that requires affirmative state intervention on behalf of employee rights.

All three regimes recognize the traditional core of FOA -- the right to form and act through a union -- as against employer interference (2C and 2D) and all of them protect those rights against employer reprisals. The regimes vary in how broadly and how effectively they protect that right, but that is not our concern here. They all afford formal protection of the right to form trade unions and, subject to majority rule, the right of workers to act through the union to pursue grievances or seek improvements. (Most of the recent constitutional controversies within Canadian labour law concern the "thickness" of that right -- that is, whether and to what extent to populate Column 3 of Rows C and D.)

We are more concerned here, however, with the question whether employees are protected when they act outside the context of a union or union organizing effort -- whether they do so as a precursor or as an alternative to union organizing (that is, cells 2A and 2B). Our three regimes vary in the scope of that protection, and they vary in somewhat surprising ways.

To begin with, of the three, the famously liberal US regime appears surprisingly to include the most robust rights of employee contestation. (Perhaps less surprisingly, that appearance turns out to be misleading.) The US labour law regime is the only one of the three regimes to explicitly protect not only trade union activity, but also informal 'concerted activity' by two or more workers, without any trade union representation or involvement, against employer reprisals (cell 2B).<sup>8</sup> That includes both verbal contestation and strikes. The iconic case is *Washington Aluminum*: several unrepresented workers were fired for walking off the job in protest of cold temperatures; the NLRB, affirmed by the Supreme Court in 1962, held that their work stoppage was protected 'concerted activity,' and ordered their reinstatement.<sup>9</sup> That remains the law.

The right to engage in informal concerted activity under the NLRA is not a particularly "thick" right within our scheme; employers have no duty to bargain with a group of workers, even if they do claim union representation, unless the workers have surmounted the hurdle of majority support and exclusive representation. (Professor Charles Morris has vigorously contended that this is a misinterpretation of the NLRA,

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<sup>8</sup> NLRA Sec. 7, 29 USC §157.

<sup>9</sup> *National Labor Relations Board v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

and that the duty to bargain should extend to workers who claim union representation on a members-only basis; but the mistake, if it is one, is a fairly entrenched one.<sup>10</sup>) The employer is free to just say no to unrepresented workers' demands; but under the NLRA, the workers cannot be punished merely for voicing them or seeking to bargain.

By contrast, the labour laws of Canada and the UK would not define this informal collective voice as protected activity, even if the employees were merely petitioning the employer for improvements, because protected labour activity is defined in terms of trade union involvement. That is reasonably plain from the face of the Canadian statute, though it is difficult to find cases to illustrate the point.<sup>11</sup> In the UK, the statutory formula explicitly protects an employee who 'had taken part, or proposed to take part, in the activities of an independent trade union'.<sup>12</sup> In *Chant v Aquaboats Ltd.*, for example, an employee (who was a trade union member) organized a petition regarding health and safety concerns in the workplace.<sup>13</sup> The petition was vetted but not explicitly authorized by the union before it was presented to the employer. Following his dismissal, the court concluded that there was an insufficient nexus between his individual actions and the trade union; rather, his activities were the (unprotected) activities of an individual trade unionist. In other words, the statutory versions of FOA in Canada and the UK are explicitly confined to the core of trade union activity, with the UK position perhaps representing an extreme example of that tendency.

So US labour law is broader than that of many developed countries in its formal protection of informal concerted activity.<sup>14</sup> But the surprisingly broad protection of 'concerted activity' in the US operates against the stark background of employment at will, which generally allows employers to fire employees for no reason. So while it is unlawful under the NLRA for an employer to fire an employee for walking off the job with several co-workers as in *Washington Aluminum*, it is lawful to fire a employee for politely (but singly) questioning a change in work schedules. Employment at will,

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<sup>10</sup> See C J Morris, *The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace* (Cornell, 2004).

<sup>11</sup> We are grateful to Professor David Doorey for a very helpful discussion of this point.

<sup>12</sup> See Trade Union and Labour Relations (Consolidation) Act 1992 s 152

<sup>13</sup> [1978] 3 All ER 102

<sup>14</sup> Those formal protections are confined to statutory 'employees,' and fail to protect many workers' basic FOA; and they are backed up with an enforcement and sanctions regime that fails to deter unlawful reprisals. See L Compa, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (Cornell, 2000). Moreover, other aspects of formal US labour law are peculiarly cramped. US law on the 'right to strike' – which allows employers to 'permanently replace' most lawful strikers although not to fire them – takes a bigger toll on employees' rights than what is added by the generous conception of 'concerted activity' and is identified by some scholars as a major culprit in union decline in the U.S. See J Getman, *The Betrayal of Local 14: Politics, Paperworkers, and Permanent Replacements* (Cornell, 1999).



together with the 'concerted' requirement of the NLRA's protections, leaves individual dissenters, however reasonable their concerns and their means, without a legal leg to stand on.

While UK and Canadian labour laws do not expressly protect either informal collective protest or individual protest outside the confines of union activity, those regimes may afford some indirect protection by way of their unjust dismissal laws (even if those laws are rather weak by international standards). Employers' obligation to justify discharge and serious discipline, or to pay a statutorily prescribed severance stipend, probably affords a measure of indirect protection to workers' non-disruptive forms of contestation, whether they speak up as individuals or in concert with co-workers. It is hard to find cases on point (in part because it is usually much cheaper for employers to pay the modest severance amounts required for unjustified dismissal than to contest the matter in court). But it is almost certainly true that some dismissals based on individual or collective presentation of grievances would be deemed arbitrary and unjustified under these laws.

It is in some ways puzzling that the right to form a union is more firmly and widely established in Western labour law systems, including those on which we focus here, than is the right of individuals to protest injustice, whether alone or in concert with others. Employee contestation rights are most likely to be protected against employer reprisals when they are most likely to disrupt employer interests and most likely to be backed by employees' own collective power. We will argue below that an individual right of contestation is at least as deserving of legal protection – that it is more 'fundamental' than the right to form a union as a matter of first principles, and that it is more necessary given the power imbalance in the non-union setting. But if a puzzle is presented by our survey so far, it is one that is replicated in international labour law itself, which defines the FOA entirely in terms of the formation and freedom of action of trade unions.<sup>15</sup>

When we move further to the right side of the diagram toward a thicker conception of employees' right to contest employer power – the duty to bargain in good faith or even to make concessions to employees – the priority of collective contestation seems more logical, if not inevitable. It is one thing to constrain employers from retaliating against individuals or small groups who raise their voices against employer decisions; it is another thing to affirmatively oblige the employer to bargain with every such individual or group. The resulting imposition on employer discretion and resources, and the limited gains for 'industrial peace,' make it unsurprising that these affirmative

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<sup>15</sup> See, e.g., ILO Right to Organise and Collective Bargaining Convention, 1949 ( No 98)



obligations usually arise only when workers have reached some collective consensus about their grievances and demands.

An employer duty to bargain or consult in good faith with individual employees or small groups of employees, without union representation, is neither inconceivable nor unprecedented in Anglo-American law.<sup>16</sup> Professor Matthew Finkin has pointed to a smattering of US laws that obligate employers to meet and confer with employees regarding potential accommodation of employee disabilities, medical needs, or family obligations.<sup>17</sup> Other countries have gone further in requiring employers to deal with unrepresented employees, either as individuals (in the notable case New Zealand<sup>18</sup>), or through works councils or other mandatory consultation procedures (especially in the EU, including the UK). By and large, however, in the US, UK, and Canada, it is only when a majority within the relevant employee group has chosen union representation that employers acquire affirmative obligations to bargain in good faith, and often to provide relevant information.

### III. Grounding rights of individual and informal contestation: The arguments internal to labour law

We are obviously not the first to argue for broader protection of both informal concerted activity and individual worker voice, either as prelude to trade union activity or for its own sake. Given the intensity of the crisis in North America, it is no surprise that the leading protagonists in the debate over non-union forms of employee voice are drawn from these jurisdictions. If worker voice is to have a future as well as a glorious past, it is going to have to take forms that fall outside the realm of trade union activity. Indeed, if worker voice *through trade unions* is to have any kind of future, then protecting less institutionalized forms of contestation is equally critical. Given the obduracy of labour law regimes (especially but not only in the US), one crucial question is whether one can ground the protection of those new forms of voice within the existing legal sources.

In the US, positive labour law protects 'concerted activity ... for mutual aid or protection', but not (as far as the US courts are concerned) the 'FOA' in international labor law. Canadian law, by contrast, explicitly recognizes the FOA in its Charter, informed by international law; but its labour statutes protect only 'trade union' activity. North

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<sup>16</sup> As noted above, Morris argues that the NLRA, properly construed, compels employers to bargain on a members-only basis with employees who choose to be represented by a union.

<sup>17</sup> M Finkin, 'Employee Self-Representation and the Law in the United States' *Osgoode Hall Law Journal* (2013, forthcoming)

<sup>18</sup> For discussion, see G Anderson, 'Good Faith in the Individual Employment Relationship in New Zealand' (2011) 32 *Comparative Labor Law and Policy Journal* 685

American scholars have sought to ground rights to individual and (in Canada) informally concerted activity in those instruments.

Let us begin north of the US border with Professor David Doorey's recent work on 'graduated freedom of association.'<sup>19</sup> Doorey begins with an appealing case for protection: X and Y join a grassroots advocacy group in order to press their temporary employer – a fairground operator – to respect norms of decent work, and are dismissed for their trouble. X and Y have no remedy under the Canadian labour relations statutes because they were not engaged in *trade union* activity; unlike US law (but like UK law), there is no statutory protection for informal concerted action outside the union setting. Doorey argues trenchantly that the 'FOA' under the Charter requires at least this much protection for all employees, regardless of statutory coverage. In giving content to this 'thin' version of FOA, Doorey takes as his model the 'much-maligned' Agricultural Employees Protection Act 2002 (AEPA),<sup>20</sup> which protects employees from reprisals for joining and acting through an employee association, and obligates the employer to consider representations and engage in a 'meaningful dialogue' with an employee association. Doorey argues that this 'thin' FOA should operate as a basic floor for all workers, not as a substitute for the traditional Wagner model (as the AEPA is for agricultural workers), but as a supplement. That is, the 'thin' FOA would protect all workers unless or until they had formed a union, at which point it would be displaced by the 'thicker' statutory version of FOA, and exclusive collective bargaining, when its requirements are met.

Given the non-protection of informal, non-union concerted activity under Canadian law, Doorey's argument makes an important contribution to the Canadian debate. Yet the argument seems to beg the question: what right is it that is being exercised in concert, or in association, with others? Is it an individual right to make collective representations to the employer, and to have those representations considered in a process of meaningful dialogue? (That seems nonsensical. How could one have an *individual* right to make *collective* representations?) Or is it an individual right to dissent or to make contestatory demands? If it is the latter, it would seem to require further normative grounding from outside FOA. So argues Professor Brian Langille in the Canadian constitutional context: The FOA, properly understood, is nothing more nor less than the freedom to do with others that which one is at liberty to do as an individual.<sup>21</sup> Let us

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<sup>19</sup> D Doorey, 'Graduated Freedom of Association: Worker Voice beyond the Wagner Model' (2012) 38 *Queen's LJ* 515

<sup>20</sup> SO 2002, c 16, as construed in *Ontario (AG) v Fraser*, 2011 SCC 20, [2011] 2 SCR 3.

<sup>21</sup> B Langille, 'The Freedom of Association Mess: How we got into it and how we can get out of it' (2009) 54 *McGill LJ* 177, which draws upon the earlier work of S Leader, *Freedom of Association* (1992)

put aside for now the hotly debated question whether the FOA can, *contra* Langille, serve as a platform from which to ascend to more fulsome trade union rights, such as a right to compel the employer to bargain in good faith through the imposition of correlative duties.<sup>22</sup> But we think Langille is onto something in arguing that, as a conceptual matter, FOA tells us nothing about which things we are entitled to do as an individual.<sup>23</sup> That enquiry depends upon a separate normative theory of an individual's entitlements. Once those individual entitlements are identified, FOA then extends protection when we exercise our individual rights or liberties in concert with others.

The special value of FOA, then, is that it underscores the need to protect individuals when they choose to exercise their liberties or rights with others. One might ask why this is necessary: If the individual action is protected either as liberty or right, doesn't this individual protection protect the group in an aggregative way? But historically the collective dimension itself has often drawn reprisals. That is shown by the laws condemning conspiracy and 'combinations' in restraint of trade, and the application of both to collective labour activity; that is good reason in itself to underscore the entitlement to act collectively when it exists. Moreover, concerted action by employees is often more threatening than individual protest to managerial prerogatives, and more likely to trigger reprisals. For that reason, too, it may be necessary to expressly affirm legal protection for concerted activity through FOA. But we should be skeptical of attempts to derive those individual rights that are being exercised collectively from FOA itself.

The enquiry may seem like an esoteric quibble, but much can be lost by failing to take it on. For example, Doorey suggests that his version of 'thin' FOA does not imply an individual right to strike. That makes sense; one cannot ground such a right in FOA alone – i.e., in the liberty to do with others what one is entitled to do alone. But if there is (as we believe) a deeper basis for an individual right to withdraw labour, then FOA *can* protect individuals' right to withdraw labour in concert with others.<sup>24</sup> Similarly, we think Doorey's argument for (at least) the 'thin' freedom of workers to associate with others peacefully to pursue shared aims seems to assume a more basic individual right

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<sup>22</sup> For a defence of the view that it can serve as a platform, see A L Bogg and K D Ewing, 'A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada' (2012) 33 *Comparative Labor Law and Policy Journal* 379

<sup>23</sup> That is, which things we are at liberty to do or have a right to do. One might still contend on empirical, practical grounds that the FOA requires the protection of individual and informally concerted activity.

<sup>24</sup> And if there is an individual right to withdraw labour in protest of employer action under some circumstances (a hybrid of the right to quit and the right to contest), and to be free from employer reprisals in doing so, then the FOA may protect a right to strike in association with others. As noted above, we think these issues require more elaboration than we can give them here.

peacefully to pursue one's own aims. We do not think that the 'thin' collective freedom he advocates can be derived from 'above,' that is, from FOA itself.

It may be more fruitful to start from the more concrete statutory rights to engage in trade union activity and, in US law, 'other concerted activity.' One may be able to reason 'down' from the right to form and join a union to informal concerted action (or 'down' from the right to engage in concerted activity to rights of individual dissent) based on legislative purpose.<sup>25</sup> One such argument, previewed above, is practical, and is based on the apparent psychology of collective action: It often takes someone who is willing to stand up to the employer, even alone, to plant the seeds of concerted activity and eventually union organizing. That appears to be the instinct underlying cases like *Washington Aluminum* in the US: informal concerted activity may be the early stirrings of collective impulses that may lead to union organizing. We think these psychological arguments gain persuasive power as union density falls. In the old days, workers who were dissatisfied with workplace terms and conditions might be expected to consider unionization as a matter of course; unionization was familiar and normal, and dissident impulses were quite likely to flow into union channels. That is no longer true for many non-union workers. So even if FOA means the right to form and join trade unions, that right, to be effective, might require the protection of 'pre-union' forms of employee dissent.

A different sort of argument can be found in the US labour board's erstwhile theory of 'constructive concerted activity': individual employee complaints about a breach of public statutory regulations were treated by the NLRB for a time as 'concerted activity' because such complaints were *presumed* to be of concern to employees as a group and to have been made on behalf of those workers.<sup>26</sup> The idea of 'constructive concerted activity' captures a functional truth that individual activity in fact can advance collective interests. The argument was rejected by most courts on textual grounds, and has since been abandoned by the NLRB. But much like the 'group psychology' argument, this is an attempt to derive an individual right of dissent based on its kinship with group dissent (without putting either one on a firm normative footing).

Professors Gorman and Finkin in their important 1981 article begin to fill that gap.<sup>27</sup> They argue that the statutory language does not require the paradox of permitting the

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<sup>25</sup> Langille is thus wrong, we think, to the extent that he argues that the FOA *cannot* mean anything more than the liberty to do in concert what one is entitled to do as an individual. A particular enactment of that language might mean more than that as a matter of positive law.

<sup>26</sup> For discussion, see R A Gorman and M W Finkin, 'The Individual and the Requirement of "Concert" under the National Labor Relations Act' (1981) 130 *University of Pennsylvania Law Review* 286, 289-310

<sup>27</sup> Ibid

dismissal of an individual employee who voices a grievance about her salary while protecting a group of employees who voice the same grievance. They contend that the historical proponents of workers' foundational legal rights assumed that individual worker protest was lawful and entitled to protection, but that they insisted on singling out 'concerted' activity in order to repudiate a history of heightened legal hostility to concerted worker action. Gorman and Finkin conclude that the statutory distinction between individual and concerted action 'proceeds upon a false dichotomy, for at the core of the freedom of the individual to protest in a group necessarily lies the freedom of the individual to protest at all.'<sup>28</sup> But why 'necessarily'? Theirs is chiefly a masterful argument about the proper interpretation of the NLRA's Section 7 given the particular history behind that language; they do not, because they do not have to, probe the normative basis for protecting individual protest against reprisals. But they argue that, for the statute's proponents, the answer lies in the contemporary meaning of 'industrial democracy' and 'industrial citizenship,' which animated the framers of the NLRA and thus illuminate the purpose of the statute.<sup>29</sup> In that they come very close to what we consider the heart of the matter.

In more recent work, Finkin configures the 'right to complain' more broadly in terms of enabling individual contractual agency, a form of individual self-representation, not as a precursor to union representation but as a substitute (for some employees and some topics).<sup>30</sup> He begins by pointing to strong evidence that many employees prefer individual bargaining to group bargaining, especially on topics that implicate privacy concerns. Finkin shows that, in the epic New Deal shift from the old regime of individual liberty of contract, and the well-nigh irrebuttable presumption that individuals were capable of bargaining for themselves, to the embrace of government support for collective bargaining, US law missed the intermediate step of attempting to ensure that individuals actually could bargain or at least speak up for themselves. By leaving intact the employment at will presumption, subject to the right to bargain (mainly through a union) for protection against arbitrary dismissal, unrepresented individuals were left again without a leg to stand on in dealing with their employer.

The focus of Finkin's recent article is not on the normative case for a right to complain but mainly on where it can and cannot be found in US law and elsewhere. He describes US law on the matter as a formless mishmash of assorted protections that add up to much less than a robust 'right to complain,' or right of self-representation. And he argues in short – going back to our taxonomy – that the law should complete its very

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<sup>28</sup> Ibid 345

<sup>29</sup> Ibid 343

<sup>30</sup> Finkin, above n 17

halting and partial move from Box A/1 to Box A/2, and guarantee the protection of individual complaints and suggestions against employer reprisals. The article is highly provocative, and productive, for its rehabilitation of an individual bargaining right and the attempt to identify and fortify its legal manifestation. But it does not go as far as the earlier co-authored article does in identifying the normative foundations of the individual right to complain.

What is still missing is a sustained normative defence of an individual right to complain. Without that normative defence, it might easily be caricatured as a charter for the disgruntled and disaffected. With a proper normative defense, the individual right to complain could become a sturdy basis upon which to build upward -- to ground both existing and as-yet unrecognized rights to engage in informal concerted activity, and even to more firmly ground existing rights to engage in trade union activity.

#### IV.

We think that there is a deeper conceptual foundation for these individual and informal contestation rights, one that clarifies their relation to the conventional FOA right to form and act through a trade union, and that grounds the case for the full range of employee contestation rights up to and including union activity. We find that conceptual foundation in Professor Philip Pettit's influential elaboration of a 'republican' theory of political justice, the foundation of which is his conception of 'freedom as non-domination.'<sup>31</sup> Using this framework, we derive an *individual right of contestation* that provides a possible method for refining and clarifying the foundations in the strategy of descent as developed by Doorey and Finkin.

On Pettit's theory of *freedom as non-domination*, a citizen's freedom is compromised where other agents (individual or collective) enjoy a capacity to interfere arbitrarily in her choices. 'Being unfree does not consist in being restrained; on the contrary, the restraint of a fair system of law – a non-arbitrary regime – does not make you unfree. Being unfree consists rather in being subject to the potentially capricious will or the potentially idiosyncratic judgement of another.'<sup>32</sup> Even if there is no actual interference in choices, the vulnerability to interference is a form of unfreedom, for it forces one to anticipate and accommodate oneself to the other's desires, backed as they are by the power to interfere. Moreover, and especially where there is a shared awareness of this vulnerability, it is a shaming and demeaning status to occupy. The dominated citizen might resort to strategies of deference or subterfuge in order to placate the powerful.

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<sup>31</sup> See, particularly, Pettit, above n 4

<sup>32</sup> Pettit, above n 6 at 5

By contrast, the free citizen enjoys that status in virtue of laws, institutions, and social norms that impose effective external constraints on the capacity of other agents to interfere in her choices arbitrarily or with impunity. 'Freedom ... requires the capacity to stand eye to eye with your fellow citizens, in a shared awareness that none of you has a power of arbitrary interference over another.'<sup>33</sup> Pettit distinguishes this view from liberalism's insistence on 'negative' freedom from interference, and on the centrality of 'consent' to justify the exercise of authority over others.<sup>34</sup> 'Freedom as non-domination' shifts the focus – helpfully, we think -- from consent to contestability.

We do not pretend to offer a full defence of Pettit's theory here; he does that rather well himself. But one of its attractive features is that it puts the employment relationship, and the characteristic asymmetries of power inherent in that relation, near the center of democratic theory (where we think it belongs).<sup>35</sup> To see why, consider Pettit's basic heuristic for judging whether freedom as non-domination is ensured:

[P]eople should securely enjoy resources and protections to the point where they satisfy what we might call the eyeball test. They can look others in the eye without reason for the fear or deference that a power of interference might inspire; they can walk tall and assume the public status ... of being equal in this regard with the best.<sup>36</sup>

Its application is conditioned by the local circumstances in a given political community. Where the citizen's 'basic liberties' are supported by a mix of legal protections and public resources that meet this 'eyeball test', it can be said that the citizen is 'the liber, or "free person", in the republican tradition.'<sup>37</sup>

Pettit goes on to elaborate a number of basic liberties that are necessary to fulfill this 'eyeball test,' several of which go directly to the ability of the *employee* to look into the eye of her employer without fear or hesitation: the freedom to express what one thinks; the freedom to associate with others who are likewise willing to associate; and the freedom to change occupation and employment.<sup>38</sup> We want to argue that, if and only if these three basic liberties are secured, then employees are sufficiently free from domination by their employer so as to meet the requirements of republican citizenship.

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<sup>33</sup> Ibid

<sup>34</sup> And he sees elements of the republican view lurking in the more attractive versions of liberalism.

<sup>35</sup> Pettit, above n 4 at 114-115. In Otto Kahn-Freund's canonical reflections on law and power, and the subordinate nature of the employment relation, we detect an alignment with Pettit's core ideas of non-domination. For further discussion, see A L Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 146-147

<sup>36</sup> Pettit, above n 4, 84

<sup>37</sup> Ibid 82

<sup>38</sup> Ibid 103



Moreover, we want to argue that ‘freedom as non-domination’ supplies a normative foundation for individual and informally concerted employee contestation of employer power, as well as for the freedom to form and act through trade unions.

(1) *The freedom to change occupation and employment.*

(a) We begin, albeit just briefly, with the employee’s freedom to quit the employment relationship and to choose to enter contractual relations with other employers. In our view, the importance of this labour freedom cannot be gainsaid. But we leave for another day the elaboration of this freedom and in particular its relation to the ‘right to strike.’ For now we simply observe that the ‘eyeball test’ heuristic may put in doubt the legitimacy of various contractual devices for limiting the employee’s freedom to quit, such as post-termination restrictive covenants or extensive notice periods.<sup>39</sup>

(b) The basic liberty to quit and change jobs or occupations, suitably protected and resourced, is a necessary but by no means a sufficient safeguard in ensuring non-domination in the employment relationship.<sup>40</sup> Nor is it the case, as Richard Epstein contends, that respect for the employee’s right to quit requires respect for the employer’s right to fire at will. On the contrary, the employer’s right to fire an employee arbitrarily typically enables ‘domination,’ and thus threatens the freedom, of the latter in ways that the employee’s freedom to quit does not enable the employee to dominate the employer.<sup>41</sup> Even good employers in an at-will world are a dominating presence in the lives of their employees because they have *the capacity to interfere for ill* in their employees’ choices. Such a state of affairs would fail to meet the ‘eyeball test’.

The fundamental ‘freedom from domination’ offers a rationale for much of what Pettit identifies as the ‘standard approach’ to regulating in spheres such as employment, that is, imposing ‘legal duties on the presumptively stronger party ... and thereby establishing the corresponding rights of the weaker.’<sup>42</sup> Conventional labour rights regulating the minimum wage and working time, for example, put a floor on the

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<sup>39</sup> It may also cast doubt on immigration restrictions that tie the right to remain in a territory to employment with a single employer, and may require provision public resources in the form of a system of public unemployment insurance. See Pettit, above n 4, 113-115.

<sup>40</sup> Cf R A Epstein, ‘In Defense of the Contract at Will’ (1984) 51 University of Chicago LR 947

<sup>41</sup> Economically-minded critics might respond that ‘domination’ (just like ‘inequality of bargaining power’) is all a matter of labour market forces, which might in any particular case favour the employee. We think that employees’ ability to ‘dominate’ an employer is a rare exception that should not distract from the far more usual case of employer domination. Even a highly skilled employee usually experiences far more economic and social dislocation in the event of discharge than an employer experiences in the event of an important employee’s departure, in part because of the virtual impossibility for the employee of diversifying her investment of her own ‘human capital’ or of storing it up for future use.

<sup>42</sup> Pettit, above n 4, 115

employer's power to modify elements of the employment relation unilaterally, and thus curtail the employer's capacity to interfere in the employee's choices. But the link between 'freedom as non-domination' and employment protections is especially clear with regard to measures 'restricting or regulating the right of an employer to fire at will' as a way of 'screening out various options for the stronger'.<sup>43</sup> As observed above, even if there are economic incentives for employers to behave well towards employees, and even if most employers do behave well towards employees, the absence of legal restriction on arbitrary dismissal comports with domination.

(2) *The freedom to express what one thinks, or to contest employer power*: The point is underscored when we turn to the 'freedom to express what one thinks.' An employee who can be fired for no reason is subject to the employer's arbitrary interference in her choices; but among the choices in which the employer is free to interfere is the choice to protest or contest employer policies or decisions. We agree that general legal protection from arbitrary dismissal is a necessary to ensure non-domination. It limits the scope for the most oppressive forms of arbitrary treatment in the workplace, and in so doing it creates a milieu where employees can begin to meet their employer's eye. In our view, however, something more is needed to ensure non-domination. This is the employee's right to *challenge* and *contest* the employer's discretionary decision-making as it relates to the situation of the employee: let us call this the individual right to contestation. It is only where there is an individual right to contestation, protected against reprisals, that the employee is free from employer domination in her working life. While 'for cause' protection creates a moral environment that does not pervasively chill expressive activity in the workplace, neither does it guarantee specific protection for a right to contestation.<sup>44</sup>

The employee's right to contest is a workplace-specific instantiation of the basic liberty to express one's thoughts. The right promotes the employee's freedom by checking the employer's prerogative. The employee's right to contest is more precise than the more general basic liberty of free expression from which it is derived. It singles out for special protection speech that is by its nature agonistic and that is likely at times to be very unwelcome to employers. In our view, the republican theory of freedom as non-domination provides a compelling normative justification for Gorman and Finkin's idea of a 'right to complain.' That is not surprising, for Gorman and Finkin rely on strains of early 20<sup>th</sup> century US labour thought to inform the historic meaning of workers' basic

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<sup>43</sup> Ibid

<sup>44</sup> That is, without a right to contest, contestation could be considered 'cause' for discipline or discharge. Of course, the right to contest might be secured through an unjust dismissal regime by a stipulation that reasonable exercise of contestation rights would not constitute just cause for dismissal.

statutory rights; and those strains of thought were self-consciously carrying forward the 'republican' tradition from which Pettit draws his own theory of freedom as non-domination.

Of course, the right to contest is rather abstract and we know of no legal systems that recognise and protect an abstract 'right to contest' as such. Rather, the abstract right to contestation is implemented in more specific domains of regulatory activity in different legal systems. The contours of implementation will vary across the following range of parameters:

(a) Substantive scope of contestation. What sorts of employer decisions or actions should employees have the right to contest? This issue resembles scope issues arising under existing labour law, for example, in defining what counts as 'mutual aid or protection' with regard to which employees may engage in 'concerted activity' under the NLRA. We think the right to contest should encompass at least the following sorts of topics, mostly familiar within our family of legal systems: (i) employee contestation of union *and non-union* governance structures, including employees' campaigning for or against trade union representation, participating in any statutory procedures for determining whether consultative arrangements enjoy the requisite employee approval, and contesting unilateral employer decisions to establish non-union forms of employee representation; (ii) employees' assertion of statutory employment rights against employers; (iii) employees' presentation of grievances or complaints regarding term or conditions of employment. It is an interesting and important question whether employees' right to contest extends beyond terms and conditions of employment to matters of concern to the public (such as violation of environmental or securities laws or threats to public, patient, or customer safety). We think it should, but we recognize such an extension might require additional pillars of support beyond what is presented here.

(b) Legal protection. What should be the form (or 'thickness' as per the horizontal dimension of Figure 1) of legal protection?

(i) Clearly a right to contest would fail to meet the 'eyeball test' were it not accompanied by robust safeguards against employer victimisation (i.e., Column 2), whether through dismissal, threatened dismissal, or other forms of coercive interference. The scattered manifestations of the right to contest in existing law (which mainly protect employees who disclose or protest violations of statutory rights or public interests) tend to be shielded by prohibitions against employer retaliation. In US law these legal protections stand as important exceptions to employment at will; in other

jurisdictions such protections often augment those entailed by unfair dismissal laws,<sup>45</sup> or add remedies to mark the special seriousness of the violation. The republican ‘eyeball test’ would also be astute to the procedural and institutional context to the right’s enforcement, such as provision for legal representation, attorney fees, and costs, and standing rules that enable bodies such as trade unions to participate in the legal process.

(ii) The ‘eyeball test’ might militate in favor of more affirmative support for the ‘right to contest’. Apart from imposing on employers a duty to consider in good faith employees’ proposals or criticisms (which we consider below), we can imagine a case for other forms of affirmative support, such as the public provision of sufficient resources to ensure that the right to contest is a real right rather than a mere paper right. Those resources might consist in legal rights to information, without which employee may not know when contestation is warranted.<sup>46</sup> The provision of expert assistance can also enhance employees’ capacities to engage in contestation in an assured and effective way, either directly as under the European Works Councils legislation,<sup>47</sup> or through providing access to trade union support in specific contexts.<sup>48</sup> The republican ‘eyeball test’ would also countenance public support, perhaps through favourable tax subsidies, for community-based labour initiatives such as the ‘labor-community’ organizations, religious groups and worker advice centres.<sup>49</sup> These new groups can be a valuable source of moral support and expertise for employees engaged in workplace contestation.

We concede that, in reciting this ‘wish list’ of affirmative entitlements, we have gone beyond what might be defended as a minimum constellation of employee rights consistent with the ‘eyeball test’. The non-domination principle is robust enough to generate norms and desiderata as well as minimum requirements for a decent ‘republican’ regime of workplace rights, but our present focus is on the latter.

(iii) One form of ‘affirmative support’ – that is, state enforcement of employer duties of engagement – calls for separate consideration. One can certainly argue that it is not

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<sup>45</sup> In UK law, the concept of ‘automatically unfair reasons’ is marked out as a special protective category in unfair dismissal legislation, protecting employees from victimisation for asserting statutory rights. This ensures that such dismissals cannot ever be justified as reasonable in all the circumstances.

<sup>46</sup> C Estlund, ‘Just the facts? The Case for Workplace Transparency’ (2011) 63 Stanford LR 351

<sup>47</sup> See, for example, SI 1999/3323 Transnational Information and Consultation of Employees Regulations 1999, Reg 16 (5)-(6).

<sup>48</sup> See, for example, the right to a trade union companion in certain grievance and disciplinary contexts, set out in s 10 Employment Relations Act 1999. Another resourcing technique is the legal entrenchment of paid time off rights for training purposes, especially for designated employee representatives.

<sup>49</sup> See K Stone and S Cummings, ‘Labor Activism in Local Politics: From CBAs to “CBAs”’ in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford, 2011) 273

sufficient to prevent employers from victimising employees who exercise their right to contest, and that the mutual respect that underpins non-domination requires that the contestation is taken seriously by the employer as the beginning of a dialogue. That is consistent with New Zealand's recognition of the employer's duty to consider even individual complaints and proposals in good faith.<sup>50</sup> At the same time, we have already conceded that, for purely practical reasons, a duty to consider employee proposals or protests in good faith is bound to be narrower with regard to individual or informal contestation than it is with regard to contestation through a trade union with majority support among the workers.

We applaud the New Zealand law, as well as Finkin's proposal for a broader right of self-representation, both of which entail a correlative employer duty to bargain with individuals. But we view a legal duty to bargain in good faith with individuals as reaching beyond minimum standards toward a more fulsome realization of the aspirations of 'freedom as non-domination'. Such legal duties are clearly permissible, and are often good policy, but in our view they are not part of the minimum set of entitlements that is necessary to support employee freedom, understood as non-domination.

This concession in regard to the 'thickness' of the individual right to contest makes sense, we think, only in view of some further implications of 'freedom as non-domination', and especially the collective dimension of the individual right to contest. The latter will bring us back to the scope of the duty to bargain in good faith.

(3) *The freedom to associate with others who are willing to associate*<sup>51</sup>: We agree with Langille that the freedom of association as a basic normative principle entitles individuals to do in concert with others what each has the right to do individually (though we disagree with the implication that positive international or national law on FOA does not or cannot expand upon this protection). That means that individual employees are entitled to join with their fellows to contest employer decisions and conduct, and thereby to bring social pressure to bear on an employer, free from employer reprisals. We think the freedom to engage in collective contestation – with one or two or many co-workers – is a vital element to ensuring non-domination in the workplace setting. At a minimum that entails a collective right to cease work (as a hybrid of the right to quit and the right to do so in association with others).<sup>52</sup> As noted above,

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<sup>50</sup> Anderson, above n 18

<sup>51</sup> Pettit, above n 4, 103

<sup>52</sup> For an exploration of the linkages between freedom of speech and the right to strike, see T Novitz, *International and European Protection of the Right to Strike* (Oxford, 2003) 71-73

however, we leave for another day the question of how far these basic principles go in requiring protection of a 'right to strike'.

There are two dimensions to the basic liberty of association with others.

(a) The republican conception of freedom of association would envisage a robust set of legal protections for the basic form of concerted activity where X and Y associate with each other for a permissible purpose, and in particular for the purpose of contestation. Recall Doorey's powerful example of temporary fairground employees meeting clandestinely with community organizers in order to avoid the employer retaliation that would be perfectly lawful under Canadian labour law. This quite obviously fails to meet the threshold of sufficiency set by the 'eyeball test'. That is partly because, for ordinary employees, individual contestation is unlikely to be effective; it is unlikely to enable employees to meet their employer's eye in presenting grievances. That is the practical importance of affirming X's and Y's freedom to associate with each other as willing citizens.<sup>53</sup> As Pettit observes, concerted action leads to 'a form of civility which leads [citizens] to work at organizing the group and at articulating shared grievances',<sup>54</sup> which in turn leads to the emergence of groups in civil society that act as checks on dominating power. For these reasons, only US law (as a formal matter) meets the 'eyeball test' in its protection of basic, informal concerted activity. Canadian and UK law, in protecting only the narrower category of trade union activity, do not.

(b) We would nevertheless expect to see specific protections for trade union rights in the sphere of freedom of association. Pettit himself acknowledges that 'legalizing the unionization of employees and recourse to strike action' is a necessary element in a legal system that tackles employer domination effectively.<sup>55</sup> And we have already noted that basic forms of concerted contestation evolve into more familiar patterns of trade union association and activity; indeed, trade unions are the paradigmatic form of contestatory associational activity in the workplace. The basic employee liberty as non-domination, and its 'eyeball test', provide strong normative grounds for requiring robust protection of union organizing, collective bargaining demands, and collective action (that is, doing together what one has the basic right to do as individuals) against employer reprisals.

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<sup>53</sup> As Pettit has argued (above n 4, 129), law is only likely to be constitutive of non-domination when 'being disposed to approve of compliance and to disapprove of deviance, citizens can become non-intentional sources of enforcement, as they observe one another's behaviour, and form attitudes of approval and disapproval in response.'

<sup>54</sup> Pettit, above n 6, 247

<sup>55</sup> Pettit, above n 4, 115

(c) By contrast, the basic liberty may not include an employer duty to bargain in good faith. In other words, it would appear that the strategy of descent – that is, of discerning rights that are less formal and less institutionalized than trade union activity – has a firmer philosophical basis in Pettit’s theory than does the strategy of ascent – that is, of ‘thickening’ the rights of trade unions. For example, Pettit says that ‘basic liberties’ ‘cannot extend to liberties on the part of anyone to determine how others act’<sup>56</sup>; and he argues against laws that entrench the rights of existing groups in freedom of association ‘since this would favour those who already happen to have formed such groups and would fail to treat people equally.’<sup>57</sup>

A conception of the basic liberty that is neutral between different forms of association, and skeptical of the particular privileges of existing ‘trade unions’<sup>58</sup>, would open the field of employee representation to new forms of association that employees might choose to represent them. That would be a good thing. On the other hand, it might rule out a fundamental *right* to collective bargaining that entails duties on employers to bargain in good faith with a trade union.<sup>59</sup> That might discourage some labour lawyers from embracing non-domination as an animating ideal for labour law. But it is important to observe that this animating ideal might nonetheless permit positive law (*including positive international law*) that imposes on employers a duty to bargain with trade unions or other employee associations, and that imposes a higher duty to bargain with associations that meet a threshold level of support among employees (as the Wagner model does). We think that is the case even if ‘liberty as non-domination’ does not require such a duty as a normative matter.<sup>60</sup>

## V

We anticipate an important objection to our claim that individual rights of contestation, exercised singly or in concert with others, should be regarded as the basic substrate of

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<sup>56</sup> Pettit, above n 4, 94

<sup>57</sup> Pettit, above n 4, 95 fn 14

<sup>58</sup> Compare, however, S White, ‘Liberal Neutrality and Trade Unions’ (2012) 33 Comparative Labor Law and Policy Journal 417

<sup>59</sup> See Langille, above n 21, and cf Bogg and Ewing, above n 22, 393-397

<sup>60</sup> That view may be consistent with Doorey, who argues that the FOA under international and Canadian labour law should entail an employer duty to consider in good faith proposals presented by employees through some kind of association, and to engage in ‘meaningful dialogue’ with such an association. (Again, that is roughly what the Canadian *Agricultural Employees Protection Act 2002* provides, albeit as a substitute for Wagner-like protections rather than, as Doorey proposes, a supplement.) This would impose a lesser duty at a lower threshold of formality than the existing statutory duty to bargain exclusively and in good faith, and with an eye to reaching an agreement, with a majority-backed trade union. We think that strikes a fair balance of interests, and may reflect positive international law on FOA, whether or not the duty to bargain is required as a matter of fundamental normative principles.



FOA.<sup>61</sup> The objection begins with positive international labour law, which protects a specific form of concerted activity, trade union activity, rather than concerted activity as such.<sup>62</sup> But the objection it is grounded in a deeper concern that excavating the foundations of the traditional FOA right to engage in trade union activity might end up undermining that right – that ‘deconstruction’ such as we undertake might lead toward destruction.

It is important to acknowledge that FOA as it is embodied in the ILO instruments and committee decisions should not be regarded as some kind of Platonic form. Like any legislated standard, ILO conventions (and the ILO’s tripartite governance structure itself) reflect the concerns of the constituencies that participated in their negotiation and the bargaining power that trade unions have historically exercised in shaping these institutions. Those historic circumstances, and the resulting language and institutions of international law, are obviously entitled to great respect as legally binding norms, and they carry with them a bundle of (admittedly mostly ‘soft’ and quite weak) legal consequences. For those who already embrace the trade-union-centred version of FOA, that may be all that is needed. Those readers may or may not be persuaded by the arguments of others, which we review and support in Part III, for deriving rights to individual and informally concerted activity from this positive law protection of FOA. But they do not need to be persuaded as to the essential need to protect trade union activity itself.

The problem is that, as trade union membership and political power wane, more and more of the crucial participants in debates that affect labour rights are asking that very question (whether expressly or not). Why protect trade unions and trade union activity as such? Invocations of ‘unequal bargaining power’ do not answer that question for skeptics; inequalities, just and unjust, abound in the world, and do not necessarily call for the intervention of international law. Proponents of the FOA, understood solely as the right to form and act through trade unions, portray the FOA as a ‘human right,’ alongside the freedom from forced labour, from the worst forms of child labour, and from discrimination. But that does not quite answer the ‘why’ question. The right to act through a historically particularized institution – one that exercises power and enjoys various rights even as it is embattled – can easily be caricatured by opponents as a reflection of the political power of that institution rather than of basic human rights. Its

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<sup>61</sup> We thank Professor Mark Freedland for pressing this objection in a seminar discussion in Oxford. We also note that Doorey anticipates a very similar objection, or set of objections, to his idea of ‘graduated FOA.’ See Doorey, *supra* n 19, at 538-542.

<sup>62</sup> Take Article 1 of ILO Convention 98, for example, which specifies that ‘workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment’.

foundations are perhaps less self-evident than basic prohibitions of child labour or forced labour – at least to those who are not already believers.

It is partly in hopes of fortifying those foundations that we offer our own argument about freedom from domination and what it requires in the context of work. The idea of freedom from domination by others as a basic entitlement in a decent society aims in part to show why the right to form and act through trade unions, the traditional FOA, is fundamental. But that fundamental right is itself built up from other more basic rights that are logically prior to it, and that are under-protected or even ignored in most legal regimes we know about. So as the case for the traditional FOA meets resistance, as it is increasingly likely to do if current trends continue, it is important not only to be able to explain why the traditional FOA is fundamental, but also to begin to make the case for broader protection of the rights on which the FOA builds.

But that leads to the second dimension of the anticipated misgivings about our argument. For the choice to start with trade union activity (as in the Canadian and UK systems) may reflect both a deeper normative concern and a practical political concern. The normative concern might be that the protection of basic concerted activity is the protection of a highly individualized form of FOA. As a political matter, if the substrate of FOA is individualized in this way, it arguably constitutes a precarious and unstable foundation upon which the more collective forms of FOA may totter and even collapse. Individual and informally concerted contestation might be regarded by many as an adequate substitute for trade union activity, and to undermine the case for protecting the latter. That would be very undesirable, certainly from the perspective of non-domination as a baseline principle.

Thus stated, the objection is important but not answerable. Leaving aside the point that even group rights are based ultimately upon individuals and their interests,<sup>63</sup> there are three more specific responses. First, as we and others have already argued, basic forms of concerted activity are often the prelude to the emergence of trade union activity. Workers learn to collectivize through shared endeavor and it is often a natural next step to form or join a trade union.<sup>64</sup> In this way, the protection of trade union activity is practically parasitic upon the protection of basic concerted activity.

Secondly, if there is a concern that basic concerted action might serve to undermine the cohesiveness and solidarity of trade union organization, for example by encouraging fragmentation of workers' collectivities, this can be curtailed through smart regulatory

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<sup>63</sup> Bogg and Ewing, above n 22, 401-408

<sup>64</sup> See, e.g., the facts in *Palomo Sanchez v Spain* [2011] ECHR 1319, where informal concerted contestatory activity developed quite naturally into the formation of, and acting through, a trade union.

design. One possibility would be to limit (though not eliminate) legal protection for basic concerted activity in situations where there is a certified majority union. It should also be remembered that the protection of contestatory rights can serve a useful function in allowing workers to challenge non-union structures where these are regarded as contrary to the workers' interests.<sup>65</sup>

Finally, we should keep in view the analytic distinction between, on the one hand, the protection of concerted activity through FOA and, on the other hand, the specific individual right or entitlement that is being exercised collectively. We have argued in defence of an individual right to contestation as a fundamental labour right. Where *this* is the individual right that is being exercised collectively, the relation between basic concerted activity and trade union activity is likely to be mutually reinforcing. By contrast, the risks of destabilization of collective interests might be more pronounced where 'individual contractual agency' is taken as the relevant base right (as in Finkin's more recent work).

## V Conclusion

We view this chapter as illuminating an important research agenda in comparative labour law, rather than providing any definitive answers. Understanding the ways in which a fundamental right to contestation is implemented and impeded in these various jurisdictions is a vital mapping exercise and one that is worthy of the attention of comparative labour lawyers. Also important are the ways in which FOA is configured in these different systems, and the ways in which FOA and the right to contestation interact in specific regulatory contexts.

At a deeper level, we see this work as provoking a vital methodological engagement with the issue of how to identify 'fundamental labour rights'. In an important recent contribution to the topic, Hugh Collins has deployed a Rawlsian 'original position' approach to the identification of fundamental labour rights, which leads him to specify FOA as the right to form and join trade unions simpliciter.<sup>66</sup> This is a controversial move, not least because Rawls himself was careful to confine that methodology to ascertaining the 'basic structure' of liberal societies rather than resolving discrete normative issues in the sphere of work. By contrast, we have started to work through the very different implications of Pettit's republican 'eyeball test'. On this alternative approach, rather than sitting blindfold behind the veil of ignorance, the worker is invited to sit and look

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<sup>65</sup> See, for example, the ballot procedures in the Information and Consultation of Employees Regulations 2004 Regulation 8 and Regulation 30 (6)

<sup>66</sup> Collins, above n 2

her employer squarely in the eye, and to explore what rights and resources would make that possible in the power dynamics of real workplaces.