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# REPUBLICAN NON-DOMINATION AND LABOUR LAW: NEW NORMATIVITY OR TROJAN HORSE?

## I INTRODUCTION

‘The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.’<sup>1</sup>

And so begins almost any introductory lecture or textbook on labour or employment law. It is a credo for the discipline. As soon as the words are laid out fresh for a new audience, a multitude of further questions arise. Are the normative concerns confined to ‘bargaining power’, or are there other forms of private power that are normatively troubling? Should we be suspicious of power even where it is wielded by good employers disposed to treat their workers well? Are highly precarious workers, engaged in multiple work arrangements with different work-providers, emancipated or dominated given the dispersal of economic risk? Does worker-protective labour law itself constitute a form of dominating power in the lives of workers and employers? Can workers sometimes wield dominating power through ‘voice’, particularly where the strike weapon is being deployed?

These are all difficult questions. They have led some labour law scholars to reach for a ‘new normativity’, one that might provide a more discriminating analysis of power, its definitional elements, the normative problems arising out of unequal power, and the most effective regulatory tools for ameliorating domination. The neo-republican political tradition is concerned with domination, and it is based upon a civic ideal of freedom as an equal status based upon non-domination.<sup>2</sup> A growing band of neo-republican political theorists are developing and refining the idea of non-domination and its role in political thought. We might even think of this as a developing neo-republican research project. It is important to emphasise that this neo-republican agenda creates a space for disagreement and debate. There is no simple uniformity of views amongst neo-republican thinkers. This is a reflection of the vibrancy and richness of neo-republicanism as a living political tradition.

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<sup>1</sup> P.L. Davies and Mark Freedland (eds), *Kahn-Freund’s Labour and the Law* (Stevens & Sons, 3<sup>rd</sup> ed 1983) 18.

<sup>2</sup> The term ‘neo-republican’ is used by Robert S Taylor, to describe the tradition of civic republican thought concerned with freedom as non-domination: Robert S Taylor, *Exit Left: Markets and Mobility in Republican Thought* (OUP, 2017) v.

It will be argued that theories of non-domination are in fact very diverse. These normative variations lead to very different policy proposals. In this sense, neo-republicanism does not represent a single ‘new normativity’: it represents multiple normativities. The article begins by examining Frank Lovett’s recent analytical work on the concept of domination. It identifies some difficulties with Lovett’s specific regulatory proposals, especially his proposals to deregulate worker protective laws. The next section then focuses upon the neo-republican work of Philip Pettit. While Pettit characterises his theory as a progressive ‘left-of-centre’ model of social justice,<sup>3</sup> there are some crucial ambiguities in Pettit’s account that undermine its progressive credentials. This is reflected most strongly in his restrictive approach to the right to strike, and his reductive understanding of the ‘contract of employment’ as a domination-constituting legal institution.

In the penultimate section, ‘Neo-republicanism at the Crossroads’, I examine the diverse futures of neo-republican labour law. This focuses on the recent work of Robert Taylor and Alex Gourevitch. The article concludes with a plea for caution. While neo-republican theories of non-domination provide some deep insights into the nature of private power in the workplace, at least some of those neo-republican strands have the potential to unleash a process of radical labour market deregulation. In this way, neo-republicanism could end up being a Trojan horse, disguising the neoliberal deregulation of worker-protective labour law in the republican rhetoric of citizenship and emancipation.

## **II LOVETT’S THEORY OF NON-DOMINATION AND THE ABOLITION OF WORKER-PROTECTIVE LABOUR LAW**

In his recent book, *A General Theory of Domination and Justice*, Frank Lovett has provided an important analytical contribution to the republican tradition based upon freedom as non-domination.<sup>4</sup> According to Lovett, domination occurs in *social relationships* characterised by a degree of *dependency*, where there is an *imbalance of power* between the agents in the social relationship, and that power is wielded on an *arbitrary* basis. This account invites a series of further questions. What is a ‘social relationship’ and why is such a relationship

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<sup>3</sup> Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (CUP, 2012) 127.

<sup>4</sup> Frank Lovett, *A General Theory of Domination and Justice* (OUP, 2010)

necessary for domination to be present? How should we measure ‘imbalance of power’? How might domination be mitigated through legal norms? The employment relation seems to be an important context where private domination, so defined, might be present. Thus, Lovett identifies employer domination of workers as a core instance of private domination,<sup>5</sup> along with feudalism, slavery, patriarchal family arrangements and totalitarian government.<sup>6</sup> Some of the book is accordingly devoted to suggesting policy proposals for reducing domination in the employment sphere.<sup>7</sup>

Most labour lawyers have their own intuitive sense of domination. Many of them might well identify *O’ Kelly v Trusthouse Forte PLC* as a paradigm instance of private domination.<sup>8</sup> *O’ Kelly* involved claims for interim relief by ‘regular casual’ workers based on allegations of dismissal because of trade union membership and trade union activities. The claimants were ‘casual’ staff who worked on a ‘zero hours’ basis as waiters in the Banqueting Department of the Grosvenor House Hotel. Does Lovett’s concept of domination provide a useful analytical tool for understanding the contours of domination and vulnerability in these situations of extreme casualization? In my view, Lovett’s account has the potential to lead us to some odd and unexpected places when it is used as a lens for *O’Kelly*.

As most labour lawyers know, the fundamental question in *O’ Kelly* was whether the casual waiters were employed as ‘employees’ under a ‘contract of employment’. The Industrial Tribunal concluded that during periods of work at specific engagements, the waiters were in fact engaged as self-employed ‘independent contractors’ rather than employees employed under a contract of employment. Furthermore, there was no overarching contract that spanned periods of work engagement. The employer was under no legal obligation to make offers of work, and the waiters were under no legal obligation to accept offers of work. In the jargon familiar to UK employment lawyers, there was no ‘mutuality of obligation’ sufficient to sustain an ‘umbrella contract’ that spanned the periods of work undertaken from time to time.<sup>9</sup> The upshot of this was that the casual waiters were unprotected from acts of trade union discrimination by the employer, because legal protection was confined to ‘employees’. *O’Kelly* exemplifies highly precarious work arrangements that are described loosely as

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<sup>5</sup> *Ibid* 197.

<sup>6</sup> *Ibid* 30 and 93.

<sup>7</sup> *Ibid.* chapter 7.

<sup>8</sup> [1983] ICR 728, CA.

<sup>9</sup> On the concept of ‘mutuality of obligation’ in English labour law, see N. Countouris, ‘Uses and Misuses of “Mutuality of Obligations” and the Autonomy of Labour Law’, in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Hart, 2015) 169.

‘casualised’ or ‘zero hours’ employment practices.<sup>10</sup> Such practices have become more prevalent in recent years, and these arrangements are widely regarded as embodying a form of highly insecure and precarious work.

In short, it is an orthodox and widely shared intuition of labour law that casual work is a core instance of private domination. Moreover, it is an orthodox tenet that such casualised work practices should be rendered more stable and less precarious through legal regulation. This would include the guarantee of fundamental social rights such as freedom of association. It would also encompass the enforcement of labour standards guaranteeing minimum hours, a living wage, unfair dismissal protection, and some legal supports for worker voice in the workplace.

Re-reading *O’ Kelly* through the lens of Lovett’s theory prompts two concerns about non-domination theory. The first concern relates to the role of ‘social relationships’ in Lovett’s theory, and its identification of ‘dependence’ as an element that magnifies private domination.<sup>11</sup> One way in which ‘dependence’ might be reduced is through the discouragement of stable, long-term arrangements based upon reciprocity and trust. In a world where everyone is self-employed, exchanging work for remuneration in frictionless spot contracts, there will be less ‘dependence’. In turn, this will tend to minimise private domination. This seems to have the odd implication in *O’Kelly* that domination is reduced precisely because there is no long-term, stable and reciprocal contract. Yet the presence of an open-ended contract of employment, with its associated protective norms, is conventionally regarded by labour lawyers as a factor that reduces private domination.

The second concern relates to the role of labour standards and fundamental ‘basic liberties’ in Lovett’s account. Surprisingly, perhaps, Lovett advocates the *deregulation* of labour standards as a regulatory strategy for minimising domination.<sup>12</sup> Again, this seems counter-intuitive to the labour lawyer. The ‘basic liberties’ and other labour standards are usually regarded as domination-reducing norms that protect weaker parties by limiting the

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<sup>10</sup> For a recent discussion, see J. Kenner, ‘Inverting the Flexicurity Paradigm: The United Kingdom and Zero Hours Contracts’, in E. Ales, O. Deinert and J. Kenner (eds), *Core and Contingent Work in the European Union: A Comparative Analysis* (Hart, 2017) 153. As Kenner observes, ‘there is no single typology’ so that the term is best understood as encompassing a ‘spectrum’ of precarious work arrangements (153). For further discussion of these arrangements, see A. Adams, M. Freedland and J. Prassl, ‘The “Zero-Hours Contract”: Regulating casual work, or legitimating precarity?’ (European Labour Law Network Working Paper No. 5, March 2015) and Z. Adams and S. Deakin, *Re-regulating Zero Hours Contracts* (Institute of Employment Rights, 2014).

<sup>11</sup> Lovett (n 4) ch 2.

<sup>12</sup> *Ibid* 197-198.

opportunities for arbitrary interference by employing entities. Should these features of Lovett's theory concern us? If so, are they peculiar to Lovett's theory or do they reflect broader currents in neo-republicanism?

### ***Social relationships and dependence in employment***

According to Lovett, relations of domination always occur in 'social relationships'.<sup>13</sup> A 'social relationship' is defined by Lovett as involving a situation where the parties are related to each other *strategically*. A 'fully strategic' situation is where 'what two or more persons or groups will each want to do depends in part on what the others are likely to do, and everyone is aware of this fact.'<sup>14</sup> The strategic character of social relationships leads to some familiar features of domination. For example, the uncertainty that arises out of exposure to arbitrary interference undermines the ability to lead an autonomous life, and may generate psychological harms such as anxiety or depression.<sup>15</sup> The strategizing of the weak to crave the favour and indulgence of the master, such as fawning and ingratiating behaviour, undermines the self-respect of weaker parties.<sup>16</sup>

These strategic relationships may be contrasted with what Lovett describes as 'parametric' situations. A 'parametric' situation is to be found in 'the interactions among buyers and sellers in a fully competitive market...This is because each individual buyer or seller can safely regard equilibrium prices as determined by the market as a whole, and decide what to do on the assumption that neither they, nor anyone else, can affect those prices unilaterally.'<sup>17</sup> Lovett states that 'many of the economic relations between persons or groups in a fully competitive market would not count as social relationships, so defined.'<sup>18</sup>

Would the arrangement in *O'Kelly* count as a strategic or a parametric situation? In an intriguing footnote to his analysis of the distinction between strategic and parametric situations, Lovett concedes that 'even in a fully competitive market, however, people might enter into arrangements that would count as social relationships: labor contracts, for instance.

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<sup>13</sup> Ibid chapter 2.

<sup>14</sup> Ibid 34.

<sup>15</sup> Ibid 132.

<sup>16</sup> Ibid 133.

<sup>17</sup> Ibid 35.

<sup>18</sup> Ibid 36.

Thus, not all economic relations between persons or groups are parametric.’<sup>19</sup> In *O’Kelly*, the employer and the waiters determined from time to time whether to enter into discrete contractual arrangements for work. Is it satisfactory to explain these arrangements on the basis that there is a ‘social relationship’, and hence potential domination, only once a work arrangement is entered into during a discrete ‘labor contract’? In other words, there can be domination *within* a work engagement, but not outside of it.

That seems unsatisfactory. The employer’s unfettered economic power to decide whether or not to offer work is the principal source of private domination here. We could readily imagine the casual waiters engaging in ingratiating and fawning strategies to attract future offers of work from the employer, particularly where there is a high degree of economic dependence on the work arrangement. This also means that the employer enjoys a significant power to grant or withhold offers of work on an arbitrary and capricious basis. Yet if these arrangements are simply attributable to market forces, and therefore ‘parametric’ rather than ‘strategic’ interaction, there is no domination because there is no overarching social relationship.

It might be countered that *O’ Kelly* is a difficult case because it displays features that are ‘strategic’ as well as ‘parametric’. In social terms, these waiters had been engaged in a long-term arrangement with the employer, even if in legal terms the arrangements were casual and intermittent. One regulatory response would be to purge the ‘strategic’ dimensions from the arrangement, to achieve a thoroughgoing marketization of work relations. In other words, the problem in *O’ Kelly* is not solved by using legal regulation to treat the waiters as employees under long-term contracts of employment. It is solved by making them more like independent self-employed contractors, interacting parametrically in a market situation. In extreme forms, this might countenance the use of regulation to discourage or even dismantle ‘standard employment relationships’. Reciprocal commitments beget dependence, and dependence is a republican vice.

According to Lovett, ‘dependence’ is correlated with the exit costs of withdrawing from a ‘social relationship’.<sup>20</sup> The lower the exit costs, the lower the degree of dependence. There should be effective exit rights from social relationships such as employment.<sup>21</sup> The elimination of dependence would mean the elimination of domination: ‘In a perfectly free

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<sup>19</sup> Ibid 36, n 20.

<sup>20</sup> Ibid 53.

<sup>21</sup> Republican exit is a strong theme in Taylor’s work (n 2).

market...there would theoretically be no dependence, for all entries and exits would presumably be costless...Scenarios like the one described above, for example, would not arise, because free entry into any market would make attempts at employer collusion impossible...Since at least some degree of dependency is a necessary condition for domination, in a perfectly free market there would be none.’<sup>22</sup> To this end, Lovett identifies specific ways in which dependence might be reduced or eliminated, such as the provision of unemployment benefits for workers, and the legal proscription of employer collusive practices such as blacklisting.<sup>23</sup> These interventions provide resources and protections that promote the mobility of labour, to ensure that exit is a credible option.

The effective resourcing of exit for workers represents an attractive and radical policy agenda. Lovett’s work should be praised for its repositioning of exit as a domination-reducing strategy in employment regulation. Nevertheless, there are significant risks attached to Lovett’s arguments, because the reduction of dependence could also lead to a ‘demutualisation’ of employment relations. In their path breaking study, *The Legal Construction of Personal Work Relations*, Freedland and Kountouris develop a notion of ‘fair mutualisation’.<sup>24</sup> This envisages a fair sharing of risk between the various parties involved in the provision and supply of work. This ‘mutualisation/demutualisation’ axis maps onto the ‘dependence/non-dependence’ axis. Fair mutualisation encompass a core value of ‘stability’, and stability is instantiated in secure, open-ended and reciprocal ‘standard employment relationship’.<sup>25</sup> Stability and dependence seem to go hand in hand. Is demutualisation a fair price to pay for non-domination? Lovett is cautious in addressing that question: ‘it will be impossible to eliminate all dependencies. What is more, it is far from clear that we would want to, were it in our power to do so. Dependency on one’s family, on one’s friends and loved ones, on one’s job, and so on is an irreducible and not always lamentable fact of every day social life.’<sup>26</sup>

‘Stability’ sets itself against the flexibilisation of work relations, and it identifies something of deep and enduring value in the social relationships that give rise to strategic interactions. Lovett’s insistence on ‘social relationship’ as a necessary condition of domination

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<sup>22</sup> Lovett (n 4) 53.

<sup>23</sup> Ibid 54.

<sup>24</sup> Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP, 2011) 433-446.

<sup>25</sup> On the notion of ‘stability’ as a value in personal work relations, see Freedland and Kountouris, *ibid*, 379-382.

<sup>26</sup> Lovett (n 4) 53.



destabilises the normative value of ‘stability’ in work relations. Of course, Lovett concedes that dependence is ‘not always lamentable’, but should we rest easy with such an equivocal republican endorsement of the standard employment relationship? Consider a pared analytical definition of domination in terms of *an ‘imbalance of power’ where such power is wielded on an ‘arbitrary’ basis*. It is not clear what would be lost by this narrower definition that dispenses with the need for a ‘social relationship’. Neo-republicans should be concerned with the widest possible range of domination. Dispensing with the requirement of a ‘social relationship’ means that domination more easily encompasses a wider span of work relations that deviate from the standard employment relationship, particularly highly casualised arrangements like those in *O’ Kelly*. The economic power to allocate work and to enter into contractual arrangements for that purpose is a source of private domination that can have corrosive effects on the wellbeing and self-respect of precarious workers. It is not simply depersonalised ‘market forces’.

Lovett’s analysis may reveal deeper strains in neo-republican thought. His approach to dependence highlights a core normative ambiguity of the personal employment contract, which is its paradoxical role in both constituting *and* restraining private domination. For neo-republicans, the personal employment contract is an object of suspicion, given its domination-constituting role. Unfortunately, the domination-restraining elements of the personal employment contract may have been under-appreciated in neo-republican thought. This is also linked to a second feature of Lovett’s argument, which is his proposal to *deregulate* labour standards as a domination-reducing strategy.

### ***Non-domination and the deregulation of labour law***

Lovett’s work is focused principally on a theoretical elaboration of the concept of domination. It is less concerned to set out detailed policy proposals for minimising domination. Nevertheless, Lovett’s work contains some interesting regulatory proposals to minimise domination in the sphere of work. Lovett’s preferred strategy is based upon a ‘free market together with an unconditional basic income.’<sup>27</sup> It is important to acknowledge that this is different to the standard libertarian argument in favour of free markets. While minimal libertarian states are likely to limit public domination, Lovett concedes that over time

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<sup>27</sup> Ibid 200.

untrammelled markets generate social and economic inequalities that create opportunities for private domination.<sup>28</sup> On his republican account of justice as minimising domination,<sup>29</sup> these inequalities will require correction, so that citizens are not compelled to trade their non-domination and civic independence in order to meet their basic subsistence needs. The provision of a basic income at an adequate level would curtail the need for paternalistic state intervention, because citizens are unlikely to trade away their civic independence where their basic needs are met.

The effective resourcing of worker exit through basic income would ‘have the added benefit of eventually obviating the need for many other sorts of paternalistic protections as well: workers can comfortably hold out for safe jobs on fair terms if they do not have to worry about meeting their basic needs in the meantime...Occupational Safety and Health Administration-style workplace regulations and minimum-wage requirements might become unnecessary.’<sup>30</sup> This reflects a more general concern in Lovett’s work to limit intrusive employment regulation, which is identified as a potential source of *public* domination. The use of prohibitive regulation to ‘block’ undesirable market exchanges or workplace regulations to regulate employment contracts directly by reducing the scope for arbitrary treatment could be effective in limiting ‘gross abuses’.<sup>31</sup> Beyond this, however, there is a risk that paternalistic legislation and public administrative discretion might grow exponentially to keep pace with new forms of private domination, creating a ‘regulatory structure so dense and intrusive’ as to constitute a source of public domination in the lives of citizens.<sup>32</sup> Regulatory intervention might therefore lead to an increase in overall levels of domination experienced by citizens. Resourcing and protecting worker exit mitigates the risks of escalating public domination, and it empowers worker-citizens to dissociate from private domination in the workplace. This is likely to be a better overall domination-minimising strategy.

Lovett’s theory presents an important and disruptive challenge to standard labour law discourse around labour market deregulation. On Lovett’s approach, deregulation is not simply the libertarian counterpart of the minimal state. There might also be a progressive republican case for deregulation. The republican state has a public duty of justice to provide

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<sup>28</sup> Ibid 193-196.

<sup>29</sup> Ibid 159.

<sup>30</sup> Ibid 198 n 13.

<sup>31</sup> Ibid 197.

<sup>32</sup> Ibid.

positive support, through the distribution of material resources to citizens, as the basis for republican exit rights for workers. Without an unconditional basic income, the free market will generate inequalities which give rise to private domination of weaker parties. With a basic income in place, exit and mobility might be a sufficient safeguard against employer domination.

These republican arguments also present an important challenge to standard worker-protective justifications for legislated labour standards. Lovett's work questions the widely shared assumption that unchecked growth in worker-protective juridification is an entirely benign phenomenon. Domination comes in a myriad of forms: employers might dominate workers; strong trade unions might dominate small employers, consumers, or non-unionists; administrative agencies with discretionary powers of coercive intervention might dominate a range of labour market actors. There is no obvious reason why one particular segment of private domination, such as exists between employers and workers, should be singled out for minimisation, especially where the legislative 'cure' for employer domination increases overall levels of domination in society.

Should Lovett's theory prompt a fundamental rethinking of the very idea of worker protective labour law? While the theory contains some important insights, there are three notes of caution. First, the assumptions about the effects of a basic income on levels of private domination are highly speculative, with some research even suggesting that a basic income might increase levels of insecure and exploitative work.<sup>33</sup> Moreover, this will depend upon the level at which the basic income is set. Lovett adopts a very cautious approach to the level of basic income, given concerns about its sustainability for future generations. Thus, he observes 'that the unconditional basic income will not be exceedingly generous. Indeed, it is important to observe that the grant provided by the highest sustainable basic income might not be large enough by itself to cover all of its recipients' basic needs.'<sup>34</sup> In these circumstances, the deregulation of labour standards looks like a risky domination-reducing strategy.

Second, it is not clear how the empowered exit mobility of workers will modify the structural constituents of domination in labour markets, such as hierarchical firm organisation,

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<sup>33</sup> Sonia Sodha, 'Is Finland's Basic Universal Income a solution to automation, fewer jobs and lower wages?', accessed at <https://www.theguardian.com/society/2017/feb/19/basic-income-finland-low-wages-fewer-jobs> (accessed 6th March 2017).

<sup>34</sup> Lovett (n 4) 203.

bureaucracy, and widespread employer control of the labour process. This may constitute a situation of what Lovett has described as ‘decentralized domination’, whereby workers simply enjoy a choice between dominating agents.<sup>35</sup> While more competitive labour markets could improve working conditions, kindly masters are still masters: ‘Economic rationality may have argued for gentleness among their masters, but it remained objectionable from the socialist point of view that workers lived in subjection to those masters: that their employers were, precisely, masters.’<sup>36</sup> There may also be legitimate concerns about republican anti-paternalism where workers’ aspirations and preferences have adapted and adjusted to the structural constraints of ‘decentralized domination’. To off-set these ‘adaptive preference’ effects, it might be necessary for coercive legislation to take a more interventionist approach and compel workers to experience more civic forms of working life.<sup>37</sup> The opportunity for free republican labour may not be valued highly where workers have not experienced the republican status of non-domination, or regard it as an unrealistic option.<sup>38</sup>

Finally, Lovett’s suspicion of ratcheting public domination in the enforcement of labour standards is based upon a narrow view of regulatory techniques. Take the example of ‘zero hours’ contracts as in *O’Kelly*. The regulatory choice need not be a binary one between prohibition and permission. The prohibition of casual work arrangements might lead to ingenious attempts at circumvention and the creation of new forms of highly precarious work arrangement. In turn, Lovett is concerned that this might trigger escalating levels of public domination, as legislation attempts to keep pace with labour market changes driven by technological advances. Yet legislation might target especially egregious forms of zero hours contracting, for example by banning the use of ‘exclusivity clauses’ that purport to tie the worker to a single employer.<sup>39</sup> The law might reverse the ‘default’ bargaining position, so that ‘zero hours’ arrangements are presumptively unlawful unless there is a valid individual waiver by the worker, and the employer is able to justify the use of such an arrangement as a

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<sup>35</sup> Ibid 52-54.

<sup>36</sup> Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP, 1997) 141.

<sup>37</sup> The classic presentation of this ‘adaptive preference’ argument is Cass Sunstein, ‘Legal Interference with Private Preferences’ (1986) 53 *University of Chicago LR* 1129.

<sup>38</sup> Ibid 1148.

<sup>39</sup> ERA 1996 s 27A

proportionate way of meeting a legitimate business need.<sup>40</sup> Another possibility is to confer procedural rights on the worker, such as a right to request fixed hours working.<sup>41</sup>

The most effective forms of regulatory intervention would induce wider systemic effects, modifying the broader social and economic context to casualization practices rather than targeting specific contractual arrangements.<sup>42</sup> For example, Fudge and McCann discuss the possibilities for the development of sectoral codes of practice on the fair use of zero hours contracts, negotiated by the social partners and supported by the state.<sup>43</sup> The most effective forms of regulatory intervention might be less reliant on the coercive techniques of legislative prohibition. In sum, Lovett's public domination critique of labour market regulation requires supplementation with a far more nuanced typology of regulatory interventions.<sup>44</sup>

### **III PETTIT'S THEORY OF NON-DOMINATION**

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. One who is vulnerable to arbitrary interference, and especially where there is a shared awareness of this vulnerability, occupies a shaming and demeaning status, and might resort to strategies of deference or subterfuge in order to placate the powerful. By contrast, republican citizenship is based upon an equal civic status, underpinned by public laws and institutions that impose effective external constraints on arbitrary interference. '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>45</sup>

According to Pettit, this equal civic status requires the effective public resourcing and protection of 'basic liberties' in the relations between private citizens.<sup>46</sup> These 'basic liberties' consist of those freedoms that are capable of being exercised and enjoyed equally

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<sup>40</sup> For an approach along similar lines, see Ewan McGaughey, 'Are Zero Hours Contracts Lawful?' (November 29, 2014). Available at SSRN: <https://ssrn.com/abstract=2531913> or <http://dx.doi.org/10.2139/ssrn.2531913>.

<sup>41</sup> Judy Fudge and Deirdre McCann, *Unacceptable Forms of Work* (ILO, 2015) 72.

<sup>42</sup> See David Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, cited Fudge and McCann, *ibid* 59.

<sup>43</sup> Fudge and McCann (n 41) 73.

<sup>44</sup> For a recent perceptive discussion of 'reflexive' theories of regulation, see Diamond Ashiagbor, 'Evaluating the Reflexive Turn in Labour Law', in Alan Bogg, Cathryn Costello, A.C.L. Davies and Jeremias Prassl (eds), *The Autonomy of Labour Law* (Hart, 2015) chapter 5.

<sup>45</sup> Pettit (n 36) 5.

<sup>46</sup> Pettit (n 3) 92-107.

by all citizens. This would require the republican state to entrench such freedoms as ‘the freedom to think what you like’ and ‘the freedom to travel within the society’ as ‘basic liberties’.<sup>47</sup> The specification and content of these ‘basic liberties’ is determined through Pettit’s ‘free-person heuristic,’ or ‘eyeball test’: ‘people should securely enjoy resources and protections to the point where 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, objective and subjective, of being equal in this regard with the best.’<sup>48</sup>

It is a great strength of Pettit’s account of ‘basic liberties’ that it is rooted in a concern to ameliorate *private* domination between citizens. By contrast, standard liberal accounts of freedom focus on state infringement of freedom, and are sometimes sceptical of the ‘horizontal’ extension of public rights into the private sphere.<sup>49</sup> This also marks an important difference with the structure of Lovett’s republican argument, where his discussion of basic liberties is framed as a concern to impose constitutional limits on *public* democratic processes.<sup>50</sup>

On Pettit’s republican account, the ‘basic liberties’ demarcate a protected zone of freedoms that must be insulated from arbitrary interference by other private parties.<sup>51</sup> In particular, Pettit’s eyeball test leads to the need for ‘special insulation’ of the ‘basic liberties’ within ‘relationships like those of wife and husband, employee and employer, debtor and creditor, where there are often asymmetries of power’.<sup>52</sup> Pettit is therefore concerned to elaborate a republican account of labour standards, and the employment relation lies at the centre of Pettit’s democratic theory. This ‘special insulation’ regime of republican labour law requires the state to impose legal duties on the stronger party to restrain the arbitrary exercise of private power. This would include ‘for cause’ dismissal protection, encompassing ‘constraints within workplace relations that deny an employer the right to fire without cause, imposing something like a requirement to defend an appeal against dismissal in an agreed

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<sup>47</sup> Ibid 103.

<sup>48</sup> Ibid 84.

<sup>49</sup> For discussion, see Jean Thomas, *Public Rights Private Relations* (OUP, 2015).

<sup>50</sup> Lovett (n 4) 219.

<sup>51</sup> That in turn requires a level of public resourcing and legal protections. This will include ‘infrastructural programmes’ such as universal education and a public regime of property and contract rights: see Pettit (n 3) 110-12; and ‘insurance programmes,’ which might include basic income support, public health provision, and legal aid: see Pettit (n 3) 112-14.

<sup>52</sup> Pettit (n 3) 114.

forum.’<sup>53</sup> It also includes ‘legalizing the unionization of employees and recourse to strike action’.<sup>54</sup> This is because ‘the resort to collective action...may represent the only hope of winning freedom as non-domination for those who are employed.’<sup>55</sup> Pettit defends the public provision of unemployment insurance to resource effective ‘exit’ rights for workers, as part of a public republican programme of insurance for citizens.<sup>56</sup> Pettit’s approach to ‘special insulation’ is also attuned to the specific vulnerabilities of precarious workers. For example, in their republican audit of Spanish governmental reforms implemented under Prime Minister Zapatero, Luis Marti and Pettit offer a favourable assessment of specific legal measures to protect illegal migrant-workers and those employed on fixed term contracts.<sup>57</sup>

Pettit’s theory is very promising as a political theory to provide a new normative basis for labour law. For example, Nien-he Hsieh has developed a neo-republican theory of labour law centred on worker voice, justifying the creation of workplace institutions and guaranteeing labour rights that empower worker contestation of employer power.<sup>58</sup> In later work, Bogg and Estlund took their inspiration from Pettit’s ideal of democratic contestation, tracing the specific implications of Pettit’s ‘basic liberties’ of freedom to change employment, freedom of expression, and freedom of association, as a grounding for workers’ fundamental entitlements in the constitutional law of the workplace.<sup>59</sup> On this approach, a ‘right to contest’ was encompassed within the ‘basic liberties’ of freedom of expression and freedom of association. Overall, Pettit’s version of neo-republicanism appears to provide a powerful new normativity for reconceiving the rights, institutions, and governance structures of worker-protective labour law.

Nevertheless, there are two aspects of Pettit’s theory that warrant further examination. Each may disclose deeper fault lines in neo-republicanism. The first is reflected in Pettit’s ambivalence about the right to strike, and his concern that it is a source of private domination. The second is reflected in Pettit’s preoccupation with the contract of employment as a legal

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<sup>53</sup> Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (Norton, 2014) 105.

<sup>54</sup> Pettit (n 3) 115.

<sup>55</sup> Pettit (n 36) 142.

<sup>56</sup> Pettit (n 3) 112-114.

<sup>57</sup> Jose Luis Marti and Phillip Pettit, *A Political Philosophy in Public Life: Civic Republicanism in Zapatero’s Spain* (Princeton UP, 2010) 79-80.

<sup>58</sup> ‘Rawlsian Justice and Workplace Republicanism’ (2005) 31 *Social Theory and Practice* 115,134.

<sup>59</sup> Alan Bogg and Cynthia Estlund, ‘Freedom of Association and the Right to Contest: Getting Back to Basics’ in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014) 141.

device that constitutes private domination; this echoes the approach of Lovett, and his concern with ‘dependence’ in social relationships.

### *Domination and the right to strike*

There are many statements in Pettit’s republicanism that attest to the republican virtues of trade unions, including recourse to strike action to challenge and contest employer domination. Even in his early eulogies to the republican role of the 19<sup>th</sup> century trade union movement, however, it is possible to detect latent concerns about the strike weapon as a form of *worker* domination. For example, Pettit evaluated a ‘strategy of reciprocal power’ for securing non-domination in his first major work of republican theory.<sup>60</sup> Under this ‘reciprocal power’ strategy, ‘each achieves non-domination through having resources sufficient to ensure that every act of interference by another can be effectively resisted’.<sup>61</sup> Pettit regards this general decentralized approach to securing non-domination as unattractive. At its worst, it leads to a situation of ‘self-protection, including pre-emptive self-protection’ which will lead everyone to be worse off.<sup>62</sup> On this basis, Pettit argues that it would be better for everyone to secure non-domination through constitutional provision than through the decentralized pursuit of self-protection.<sup>63</sup> Pettit offers a measured assessment of the freedom to strike from this ‘reciprocal power’ perspective: ‘The trade union movement almost certainly advanced the non-domination of workers in the industrial world of the nineteenth century. And that movement increased workers’ non-domination precisely by giving them collective powers with which to confront the powers of employers.’<sup>64</sup> This provided a special instance of a ‘reciprocal-power strategy *within the framework of a constitutional state.*’<sup>65</sup> In general, however, the reciprocal power strategy was to be avoided.

In his later work, Pettit’s concerns with the right to strike are more pronounced, especially as regards ‘consumers’ and ‘small employers’. For example, Pettit invites us to consider a scenario ‘where the union of workers in the newspaper office calls a strike in order to punish the management but fully recognize that this will frustrate readers’.<sup>66</sup> According to Pettit,

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<sup>60</sup> Pettit (n 36) 92-95.

<sup>61</sup> Ibid 94.

<sup>62</sup> Ibid 95.

<sup>63</sup> Ibid

<sup>64</sup> Ibid

<sup>65</sup> Ibid 95 (*emphasis added*)

<sup>66</sup> Pettit (n 3) 40.



even where the union is ‘imposing its will’ on the consumers of the newspaper collaterally as a way of placing pressure on the employer to the primary dispute to improve wages, this would still be a case of an ‘invasive hindrance’ of the consumers’ choices and a source of private domination. Pettit also invites us to ‘think of the case of small entrepreneurs who are held to ransom by the primary or secondary picketing of a powerful trade union that can put them out of a business.’<sup>67</sup> In order to restrict the dominating presence of the strike in the lives of citizens, Pettit envisages a range of republican restrictions. These would include the use of the criminal law against corporate agents such as trade unions that abuse their powers.<sup>68</sup> Pettit also suggests that the law might impose a requirement of prior recourse to compulsory grievance arbitration, operating as a constraint on lawful industrial action.<sup>69</sup>

From the perspective of ILO standards, Pettit’s proposed restrictions on the right to strike violate international law. For example, ‘essential services’ has been defined narrowly by the ILO as services ‘the interruption of which would endanger the life, personal safety or health of the whole or part of the population’.<sup>70</sup> Compulsory arbitration is only permitted in limited situations, such as essential services strikes or during periods of ‘acute national crisis’.<sup>71</sup> Compulsory arbitration would constitute a violation of ‘the right of workers’ organizations to organize their activities and formulate their programmes, as laid down in Article 3 of Convention No. 87’.<sup>72</sup> The ILO has also set a very high threshold for the use of the criminal law in strike disputes. For example, the Committee on Freedom of Association has stated that ‘the authorities should not resort to arrests and imprisonment in connection with the organization of or participation in a peaceful strike; such measures entail serious risks of abuse and are a grave threat to freedom of association.’<sup>73</sup>

The ILO position does not necessarily present a fatal objection to Pettit’s normative proposals for a republican strike law. Pettit might argue that the yardstick of international labour standards itself stands in need of correction in the light of a republican theory of social justice. After all, international labour standards are not some kind of ‘Platonic form’.<sup>74</sup> Like many positive laws, these instruments reflect the relative political power and organisational

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<sup>67</sup> Pettit (n 53) 91.

<sup>68</sup> Ibid 92.

<sup>69</sup> Ibid 105.

<sup>70</sup> Bernard Gernigon, Alberto Odero, and Horacio Guido, *ILO Principles Concerning the Right to Strike* (International Labour Office, 2000) 20.

<sup>71</sup> Ibid 26.

<sup>72</sup> Ibid 27.

<sup>73</sup> Ibid 43.

<sup>74</sup> Bogg and Estlund (n 59) 159.

interests of the constituents that negotiated them. Nevertheless, such a radical and serious departure from established international norms should at least place a heavy argumentative burden on those proposing such a change. It also raises a wider set of questions about neo-republicanism in the light of Pettit's reservations about the strike weapon. Does this feature of Pettit's work simply represent a narrow concern with the *strike* as a form of worker voice, given the distinctive coercive properties of withdrawals of labour? Or does it imply a wider concern with worker voice as a more general source of private and public domination? If the latter, this would run counter to the theory of neo-republican labour law developed by Hsieh. As we shall see, the wider concern is strongly represented in the recent neo-republican work of Robert Taylor who purports to build upon Pettit's neo-republicanism in developing what he describes as an 'exit-oriented' version of that theory.<sup>75</sup> This regulatory focus on exit in Taylor's work reflects an underlying concern that state intervention to promote worker voice is likely to increase net levels of domination in society.

### ***Domination and the contract of employment***

According to Taylor, Pettit's 'praise' of unions often occurs 'within the context of monopsonistic or oligopsonistic labor markets and is usually historical in nature', formulated within the specific historical context of nineteenth century capitalism.<sup>76</sup> This particular historical viewpoint is also evident in Pettit's understanding of the employment contract. For example, Pettit describes how the early socialists regarded 'individual employer-employee contracts as a form of the very slave contract which republicans had always repudiated, and they railed against the domination which was realized under the terms of such contracts.'<sup>77</sup> Or again, 'let us suppose that individual contracts of employment are wrested from workers under the spectre of destitution, and that they put the employer in a position of domination relative to employees.'<sup>78</sup> While Pettit's observations appear to represent a radical perspective on the contractualisation of employment, Pettit's arguments are in fact based upon a reductive conception of the employment contract. This reductive understanding has some rather pernicious effects. It impedes the ability of Pettit's theory to identify the full pattern of

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<sup>75</sup> Taylor (n 2).

<sup>76</sup> Robert S Taylor, 'Market Freedom as Antipower' (2013) 107 *American Political Science Review* 593, 600.

<sup>77</sup> Pettit (n 36) 142.

<sup>78</sup> *Ibid.*

domination in work relations. It also misses the regulatory potential of the contract to ameliorate such domination.

From a nineteenth century historical perspective, this assertion of a strong alignment between contract and domination is natural one. The contract of service represented a unique fusion of the civil law of contract and the statutory criminal law based upon Master and Servant legislation. According to Simon, this fusion constituted an overt legal asymmetry between employers and workers. Whereas the employer was liable only in civil law for damages for breach of contract, 'the servant who broke his contract was punished as a criminal with imprisonment and hard labour up to three months.'<sup>79</sup> The criminal law was viewed as integral to the maintenance of labour discipline, especially among small employers.<sup>80</sup> Following the repeal of the Master and Servant legislation, the early contractualisation of the employment relation integrated the norms of subordination and the employer's right to the servant's obedience into the very structure of the employment contract.<sup>81</sup>

This conceptualisation of the contract of employment, which lies at the heart of Pettit's theory of the employment relation, generates two fundamental problems. The first problem lies in its constrained view of the incidence of private domination in work relations. By identifying the contract of employment as synonymous with domination in work relations, it marginalises and occludes a wide range of extremely precarious and exploitative work arrangements that are characterised by a high degree of vulnerability to arbitrary power. For example, 'illegal' migrant workers, domestic workers, casual or zero hours' workers, the precarious 'self-employed', workers in the informal economy, children, and trafficked sex workers, will often lack a contract of employment. Indeed, their vulnerability is often partially constituted by the *absence* of a contract of employment. Yet these extreme forms of labour market domination will be missed if the locus of private domination is taken as circumscribed by the contract of employment.

The second problem lies in the constrained view of the normative functions of the contract of employment. The paradox of the modern contract of employment is that it emancipates labour at the same time that it subordinates it. According to Deakin, the contract of employment as it developed in the middle decades of the twentieth century became 'a vehicle

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<sup>79</sup> Daphne Simon, 'Master and Servant', in John Saville (ed), *Democracy and the Labour Movement: Essays in Honour of Donna Torr* (Lawrence & Wishart, 1954) 160.

<sup>80</sup> Ibid 190-195.

<sup>81</sup> Simon Deakin and Frank Wilkinson, *The Law of the Labour Market* (OUP, 2005) 74-86.

for channelling and redistributing social and economic risks, through the imposition on employers of obligations of revenue collection, and compensation for interruptions to earnings'.<sup>82</sup> The contract also imposed 'limits on the employer's legal powers of command, limits which were given a contractual form as either express or implied terms'.<sup>83</sup> When employment legislation was introduced later during the 'social contract' period of UK labour law in the 1970s, the contract of employment was used as a juridical platform to operationalise this 'floor' of social rights.

The Keynesian economist Joan Robinson once famously remarked that 'the misery of being exploited by capitalists is nothing compared to the misery of not being exploited at all.'<sup>84</sup> The insight applies with equal force to the 'misery' of having a contract of employment. Taken together, these two weaknesses combine to create a double bind for Pettit's neo-republicanism. 'Contract as subordination' underestimates the distribution of domination in labour markets. It also underestimates the potential role of the contract of employment as a domination-reducing device in the regulation of labour markets.

For example, in their recent work developing a sophisticated typology of 'unacceptable forms of work', Fudge and McCann have identified a range of substantive parameters of unacceptable work.<sup>85</sup> The authors are careful to avoid the suggestion that unacceptable work is integral to informal work beyond the standard employment relationship.<sup>86</sup> Nevertheless, the substantive indicators of unacceptable work indicate the variety of ways in which the absence of a formal contract of employment can be a marker for unacceptable work. Thus, Fudge and McCann argue that forced labour, casualised 'day labour', child labour, exclusion from formal legal protections, all feature as important indicators of unacceptable work outcomes. These are also forms of work that are very likely to be conducted outside formal contractualisation. These vulnerabilities also expose the workers to extreme forms of private domination, especially those involved in domestic work, casual work, and forced labour.

One important remedial strategy is to use the standard employment relationship as a focal point for regulating unacceptable forms of work. For example, ILO Recommendation 204,

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<sup>82</sup> Simon Deakin, 'The Many Futures of the Contract of Employment' in Joanne Conaghan, Richard Michael Fischl and Karl Klare, *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (OUP, 2002) 181. For a recent defence of the standard employment relationship, see Zoe Adams and Simon Deakin, 'Institutional Solutions to Precariousness and Inequality in Labour Markets' (2014) 52 BJIR 779.

<sup>83</sup> *ibid.*

<sup>84</sup> Joan Robinson, *Economic Philosophy* (Penguin, 1962) 46.

<sup>85</sup> Fudge and McCann (n 41).

<sup>86</sup> *Ibid* 46.

Transition from the Informal to the Formal Economy Recommendation, 2015 identifies legal formalisation as a mechanism for normalising ‘informal’ work relations. To this end, paragraph 26 of the Recommendation specifies that ‘Members should put in place appropriate mechanisms or review existing mechanisms, with a view to ensuring compliance with national laws and regulations, including but not limited to ensuring recognition and enforcement of employment relationships, so as to facilitate the transition to the formal economy.’ In a similar vein, ILO Convention 189, Domestic Workers Convention 2011 Article 7 provides that ‘each Member shall take measures to ensure that domestic workers are informed of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner and preferably, where possible, through written contracts in accordance with national laws, regulations or collective agreements’. Further, Article 8 provides that ‘migrant domestic workers who are recruited in one country for domestic work in another receive a written job offer, or contract of employment that is enforceable in the country in which the work is to be performed, addressing the terms and conditions of employment referred to in Article 7’. This intersection between work and family constitutes an overlap between two prominent spheres of private domination. Domestic work should therefore be of particular interest to neo-republican theorists.

Where does this leave the neo-republican theory of labour law? Pettit’s ambivalence about the strike, and his reductive conceptualisation of the employment contract, suggest some important ways in which neo-republican labour law may have unfamiliar parameters to what we labour lawyers are used to. This same would also be true of Lovett’s work. In the final section, the recent republican work of Robert Taylor and Alex Gourevitch will be considered. In their different ways, each theorist demonstrates the potentially radical implications of neo-republican theory for labour law. The basic divergences between them also highlight the fact there is no single neo-republican template for labour law. The concept of domination, its constitutive features, and its regulatory implications for the republican state, are all deeply contested. This diversity is reflected in the radically different visions of republican free labour in the recent work of Taylor and Gourevitch.

## IV NEO-REPUBLICANISM AT THE CROSSROADS: TAYLOR AND GOUREVITCH

### *Taylor's 'exit-oriented' republicanism*

Building upon the work of Pettit and Lovett, Robert Taylor has recently provided a rigorous account of 'exit-oriented' republicanism in *Exit Left*.<sup>87</sup> Taylor's central contention is that an effectively resourced 'exit right' is likely to be the most powerful corrective to private domination in domains such as employment. Taylor's 'exit-oriented' republicanism, far from simply repackaging laissez-faire liberalism, envisages a regime of public support for exit rights to ensure that exit is a credible option even for the most vulnerable workers. Taylor describes it as an 'Anglo-Nordic' model of work regulation.<sup>88</sup> It combines aggressive labour market deregulation to promote competitive markets and mobility of labour, with strong state provision of financial resources to citizens to ensure that worker 'exit' is effectively resourced and protected.

This has two policy components that appear to extend Pettit's more tentative reservations about the contract of employment and the right to strike to their fullest normative conclusion. The first policy is an aggressive promotion of capitalist alternatives to subordinate employment, including self-employment or non-employment. If the locus of domination in employment is the *contract* of employment, this policy of resourcing exit from the contract of employment (and thus subordinate employment) makes good normative sense. The second policy embodies an aversion to empowering worker voice directly through legislation or administrative power. According to Taylor, this is because direct state empowerment of worker voice increases levels of public and private domination. This policy reflects a more generalised scepticism about the dominating effects of worker voice, beyond Pettit's narrower concern with the right to strike as such.

To begin with the first policy component, Taylor argues that the 'exit-oriented' republican state would be required to take measures to promote job creation and mobility.<sup>89</sup> This would

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<sup>87</sup> Taylor (n 2).

<sup>88</sup> Ibid 49.

<sup>89</sup> This innovative policy agenda is set out in chapter 3.

include public employment services, vocational training, ‘capitalist demogrants’ to promote self-employment, relocation vouchers, unemployment insurance, and a universal basic income. The republican state would also be required to combat monopsony and collusive practices among employers. Finally, it would need to scrutinise the economic effects of labour standards. Where legislated standards are dampening decent job creation, Taylor’s ‘Anglo-Nordic’ model requires deregulation of employment standards. The universal basic income, a feature of Lovett’s and Pettit’s republicanism also, ‘would serve as a firm backstop against employment exploitation, discrimination, and domination by making it possible for workers to exit the labour market entirely.’<sup>90</sup> A basic income would better enable workers to choose among subordinated employment, self-employment, and non-employment.<sup>91</sup>

On the second policy component, Taylor argues that the republican state should not take active steps to empower worker voice directly. In particular, Taylor takes aim at arguments for enhancing workers’ collective ‘voice’ as an alternative strategy for combatting employer domination. Taylor argues that affirmative efforts to promote workers’ ‘voice’ through trade unions would augment not only the power of weaker groups of workers facing monopsonistic employers, but also the power of monopolistic unions facing weaker employers.<sup>92</sup> This might lead to an overall increase in private domination as opposed to its reduction, echoing Pettit’s narrower republican reservations about the dominating potential of the right to strike. We might deal with this problem, says Taylor, by empowering public regulators to determine whether employers’ monopsony or oligopsony power in an industry justifies positive state support for unionisation. But these ‘easy-to-abuse discretionary powers’ might create another problem of public domination.<sup>93</sup> This might require the republican state to repeal legislation like the US Wagner Act which, according to Taylor, supports the dominating presence of monopolistic unions. It is much more straightforward, says Taylor, to provide effective resourcing for a general right to exit for workers, as opposed to this targeted resourcing for worker voice. In effect, where exit is rendered credible for the most vulnerable groups through public intervention, voice will become more audible through indirect state support.<sup>94</sup>

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<sup>90</sup> Ibid 54.

<sup>91</sup> As we have seen, Lovett favours a universal basic income. Pettit has also defended it from a republican perspective: Philip Pettit, ‘A Republican Right to Basic Income?’ (2007) 2 *Basic Income Studies* 1.

<sup>92</sup> Taylor (n 2) 59-60.

<sup>93</sup> Ibid 24.

<sup>94</sup> Ibid 20-25.

Taylor's arguments are powerful and provocative. The radical policy proposals to implement a republican right to exit, repositioning exit as a fundamental labour right, is particularly welcome as a contribution to the realignment of labour law. There are nevertheless two fundamental sets of problems with Taylor's 'Anglo-Nordic' republican framework. The first set of problems relate to the disintegrative impact of empowered worker exit on the standard employment relationship. The standard employment relationship establishes an institutional linkage between the domains of employment law and social security law, with subordinate employment used as the basis for the collection of social insurance contributions and taxation.<sup>95</sup> In this way, the 'flexicurity' model is still heavily dependent upon the standard contract of employment as a norm, given the increased levels of public expenditure required for 'Anglo-Nordic' labour market policies.<sup>96</sup> Taylor's arguments also reflect an uncritically benign view of new forms of self-employment in the labour market. For example, Taylor applauds 'domination-curbing developments in technology and business structure' such as developments in the Gig Economy.<sup>97</sup> What is needed is an empirical and normative examination of these new forms of employment, which often involve relations of intensive subordination and control under the formal guise of autonomous self-employment.<sup>98</sup> The most precarious new forms of employment are often to be found among the self-employed in the Gig Economy, their precariousness compounded by their exclusion from the legal and social protections attaching to the contract of employment.

The second set of problems relates to Taylor's republican scepticism about worker voice. The institutionalisation of flexicurity regimes in the Netherlands and Denmark is highly dependent upon the particular evolution of an ensemble of institutional arrangements. The empowerment of institutions of worker voice has been critical to the stability and success of those regimes. For example, Visser has expressed concerns that the sustainability of the Dutch model is now being undermined because 'unions may lack the power or representation to set the balance between flexibility and security, and between choice and responsibility

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<sup>95</sup> Simon Deakin, 'What Exactly is Happening to the Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris's *Legal Construction of Personal Work Relations*' (2013) 7 *Jerusalem Review of Legal Studies* 135, 136-137.

<sup>96</sup> ACL Davies, 'Job security and flexicurity' in Alan Bogg, Cathryn Costello, and ACL Davies (eds), *Research Handbook on EU Labour Law* (Elgar, 2016) 217, 222.

<sup>97</sup> Taylor (n 2) 53.

<sup>98</sup> Jeremias Prassl and Martin Risak, 'Uber, TaskRabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork' (2016) 37 *Comparative Labor Law and Policy Journal* 619.



right.’<sup>99</sup> Bredgaard has also noted the dependence of flexicurity on ‘corporatist systems of collective bargaining with a long tradition of cooperation, coordination and mutual trust’.<sup>100</sup> It is not possible to eradicate a core component of the ‘flexicurity’ institutional ensemble, worker voice through corporatist collective bargaining, and expect identical policy outcomes. As Bredgaard argues, ‘the history makes Danish flexicurity impossible to export wholesale to other contexts where different institutional preconditions prevail.’<sup>101</sup> The outcomes of an experiment in ‘Anglo-Nordic’ labour market policy may be especially unpredictable where labour market deregulation is occurring against a backdrop of trade union voice in precipitous decline.

Even if it was possible to replicate ‘flexicurity’ without worker voice, through a regime of resourced exit, there are residual questions about how that might be achieved. Does Taylor’s republicanism countenance the direct *suppression* of worker voice, given its potentially dominating presence? If so, how can that be reconciled with the ‘basic liberty’ of freedom of expression? Unfortunately, Taylor does not elaborate on the possible constitutional blocks to his ‘exit-oriented’ republicanism, and the idea that ‘voice’ is a fundamental constitutional entitlement of workers, not simply a policy lever. For example, Taylor asks, ‘why can’t the direct empowerment of voice supplement, substitute for, or even entirely replace the indirect empowerment exit offers?’<sup>102</sup> The answer, says Taylor, is that such empowerment requires expanded regulatory intervention by the state, which may threaten greater overall domination. We think there is a much simpler answer: ‘Voice’ cannot provide a substitute for ‘exit’ because ‘exit’ from employment is rooted in a basic liberty, *viz.* freedom from forced labour and involuntary servitude. But neither can ‘exit’ wholly substitute for ‘voice’, as Taylor would have it; for ‘voice’ is also at some level a basic liberty too, *viz.* the freedom of expression.<sup>103</sup>

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<sup>99</sup> Jelle Visser, ‘Flexibility and Security in Employment Relations: The Netherlands’, in Katherine V.W. Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013) 135, 152.

<sup>100</sup> Thomas Bredgaard, ‘Flexibility and Security in Employment Regulation: Learning from Denmark’, in Katherine V.W. Stone and Harry Arthurs (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage, 2013) 213, 227.

<sup>101</sup> *Ibid.*

<sup>102</sup> Taylor (n 2) 20.

<sup>103</sup> I am grateful to Cindy Estlund for allowing me to draw on our own collaborative work on a republican right to strike, where these arguments were developed.

### ***Gourevitch's Labor Republicanism***

Alex Gourevitch's radical republican vision, developed in *From Slavery to the Cooperative Commonwealth*, sets out a very different path to that of Taylor's 'exit-oriented' republicanism.<sup>104</sup> According to Gourevitch, republican freedom must be realised under conditions of equal liberty in the economic sphere. This requires that workers themselves, through their own collective agency, participate in the creation and operation of worker cooperative enterprises. The achievement of republican emancipation will only be enduring where workers, in the exercise of solidaristic republican virtues, combined to exercise democratic self-rule in their working lives. These habits of solidarity may be learned in the edifying practices of mutual support and aid, and shared cultural and social activities with other workers. On its face, at least, this republican vision seems to present a strong contrast with the work of republicans such as Lovett, Taylor and Pettit, given its prescription for radical structural change in liberal economic orders.

For all the differences, there are some strong underlying common themes between Taylor's and Gourevitch's neo-republicanism. Like Taylor, Gourevitch is deeply sceptical about the transformative potential of legal rights and adjudicative institutions to achieve enduring social change in the conditions of work. Thus, Gourevitch observes that 'no matter how good the labor law, there are a variety of reasons to believe it is a crude instrument, unable to deal with the immediacy, variety and complexity of many of the conflicts between labor and management in a workplace.'<sup>105</sup> Moreover, the laws implementing protective labour standards will themselves be constrained by the deep economic inequalities that impede the capacities of workers to exercise an effective political voice in the shaping of legislation.<sup>106</sup> For Taylor, worker-protective laws are an object of suspicion because they present a danger of escalating public domination. For Gourevitch, by contrast, such laws are likely to be crude and ineffective tools for securing republican freedom, softening the experience of dominated labouring rather than transforming the structural conditions that give rise to economic domination in the first place.

Like Taylor, Gourevitch is also deeply sceptical about the transformative potential of the contract of employment. For Taylor, the most effective way to facilitate escape from the

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<sup>104</sup> Alex Gourevitch, *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (CUP, 2014).

<sup>105</sup> *Ibid* 179.

<sup>106</sup> *ibid*

dominating features of the contract of employment is to empower worker exit, including the exit into self-employment and non-employment. Gourevitch is also critical of the contract of employment as a source of republican domination: 'the labor contract, no matter how carefully regulated, cannot help but give employers the lion's share of this residual, discretionary authority. At heart, the contract is an agreement to sell the workers' capacity to labor to the employer and thus a transfer of rights of control over that property to the employer.'<sup>107</sup> According to Gourevitch, the most effective republican remedy for this feature of employment contracts is to address the phenomenon of 'structural domination'. This is constituted by deep inequalities of property and wealth which mean that, for most workers at least, there is no choice but to be dominated by some agency or another.<sup>108</sup> In other words, exit is an exercise in republican futility unless the underlying economic structures of domination are challenged and dismantled. The spread of self-governing cooperative enterprises would form the basis for a republican commonwealth of virtuous citizens fit for self-rule. In fairness to Gourevitch, it does indeed seem a strange blueprint for a well-ordered society to create exploitative transactional mechanisms for work counterbalanced by protection of the rights of workers to limit its worst excesses. It would seem far better to organize our productive economic activities in a more democratic way, to obviate the necessity for domination-reducing laws.

Fundamentally, Gourevitch would entrust this transformative process to the voluntary self-organisation of workers themselves, rather than Capital or the state. Traditional 'collective' labour rights, such as the right to strike, would therefore seem to occupy a liminal position in Gourevitch's theory. Striking creates opportunities for the experience of solidarity, an expanding realisation of wider shared interests with other workers and collective groups, and the inculcation of civic virtues. It is also a vital instrument in the forging of a new economic order based upon cooperative governance. Yet in the republican commonwealth, the strike may be expected to wither and become otiose, once the underlying structures of domination will have been swept away. The political and material conditions for sharp conflicts of interest between employers and workers will no longer exist.

In this way, both Taylor and Gourevitch represent very different strands of Utopian republican thought. While there are some European parallels with Taylor's republic of empowered exit in a free market economy, the experimental melding of 'Anglo' and 'Nordic'

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<sup>107</sup> Ibid 177.

<sup>108</sup> Ibid 178-179.

dimensions of economic policy is still an untested republican pipe dream. It might have catastrophic consequences for the most vulnerable workers. Gourevitch's vision of a republican commonwealth is certainly inspiring, but the practicalities of its realisation raise many difficult questions. Whichever direction is taken at the republican crossroads, labour law as we know it (and as represented in the work of Hsieh and, to a lesser extent, Pettit) would transform beyond recognition.

## *V CONCLUSION*

To what extent can neo-republicanism furnish a 'new normativity' for labour law? Neo-republicanism certainly represents a vibrant intellectual tradition that provides rich and thought-provoking insights into current controversies. Moreover, neo-republican theorists might have much to learn from labour lawyers, particularly their work in regulation theory. Neo-republican theorists sometimes base their normative arguments on generalized assumptions about the bluntness or ineffectiveness of labour standards, the limited institutional functions of the contract of employment, the economic inefficiency of labour market regulation, the impossibility of reducing the dominating effects of administrative discretion, and crude regulatory typologies postulating a binary choice between prohibition and permissiveness. There is now a significant literature on regulation theory and the economics of effective regulation, which develop multi-layered models to theorise effective regulatory intervention.<sup>109</sup> The conversation between labour lawyers and political philosophers is as likely to enrich the political philosophy as it is the labour law.

We must also reject any talk of a 'new normativity'. This is because neo-republicanism does not represent a single normativity. There are significant differences between neo-republican theorists, and these differences often centre upon the shape and direction of labour market regulation. As we have seen, Lovett and Taylor both endorse a radical departure from worker-protective labour law, favouring empowered worker exit over worker voice and/or labour standards. Pettit and Hsieh adopt a more positive line on labour standards, though Pettit's proposals on the right to strike depart from the norms of the ILO. Gourevitch's recent work focuses on deep structural change, advocating the creation of worker cooperatives and

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<sup>109</sup> Shelley Marshall and Colin Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Elgar, 2016).

the fostering of participatory, self-governing workplaces as a republican strategy for challenging domination.

For labour lawyers, the ongoing conflict between the politics of Left and Right is a familiar dimension of labour law's development. Does neo-republicanism take us 'beyond' Left and Right, marking out a new normative and discursive space for dialogue about the regulatory problems of work and labour? Certainly, the work of Lovett and Taylor is disruptive of lazy assumptions about the politics of labour market deregulation. Their exploration of effectively resourced worker exit, a universal basic income, and social investment in the productive and civic capacities of workers, is not simply a rehash of libertarian ideas. It represents a new style of republican reflection that must be taken seriously by labour lawyers.

Yet the conventional categories of Left and Right cannot, in the end, be dispensed with. Thus, Pettit has been keen to emphasise the socialist credentials of his republican theory, and he has argued that 'look after equal freedom as non-domination in the relations between citizens and you will have looked after an intuitive, left-of-centre, account of the demands of justice.'<sup>110</sup> Furthermore, in his recent retrieval of Hayek as a neo-republican, Taylor has argued that 'there is a case for extending the range of reasonable republican views on domination to the right, even as we move to exclude those social-democratic views at the other end of this range.'<sup>111</sup> As labour lawyers, it is important to keep these conventional political polarities in view, even as we acknowledge that neo-republicanism has led to some disruption of settled political orthodoxies.

There is a further reason to be cautious about 'new normativity' arguments, because civic republicanism itself is a diverse political tradition. Non-domination represents only one strand in the republican tradition, albeit one that is in the ascendant at the current time. For example, Michael Sandel has argued powerfully in favour of a republican vision based upon the intrinsic good of democratic self-rule, civic virtue, and political participation as the highest form of human good. Political deliberation is directed at the common good of the political community.<sup>112</sup> It favours laws and public policies to promote the inculcation of civic virtues, as the basis for an active and engaged citizenry concerned with public affairs and collective self-government. The republican state also elevates communal attachments and the

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<sup>110</sup> Pettit (n 3) 127.

<sup>111</sup> Taylor (n 2) 106.

<sup>112</sup> The classic work is Michael Sandel, *Democracy's Discontent* (Harvard UP, 1996)

good of solidarity over individual autonomy and choice.<sup>113</sup> To this end, Sandel has rejected what he describes as Pettit's 'tame republicanism', arguing instead that 'how to identify and cope with the sources of domination in the modern world is an intensely political question that too often goes unaddressed in our politics.'<sup>114</sup> For Sandel, it is only through a 'formative' political project that supports political participation and civic virtue that such a politics of the common good can be retrieved.

There is a lurking danger that this 'tame republicanism' might fold back into a more familiar neoliberal discourse, at least at the level of practical politics. The work of Lovett and Taylor could certainly be misappropriated in this way; and 'exit' has the potential to operate as a potent solvent of solidarity and voice in particular institutional contexts. There is a risk that policy-makers might pick and choose republican policies, selecting measures that deregulate labour standards and suppress worker voice, and passing over more radical proposals to expand the reach of social investment through a basic income, training and education, and grants to support entrepreneurial or cooperative economic activities. The inspiring rhetoric of neo-republican emancipation would then provide philosophical cover for neo-liberal strategies of deregulation that depart from basic labour standards. In these circumstances, neo-republicanism would become a Trojan horse for a neo-liberal attack on worker-protective labour law. That would demean the civic republican ideal.

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<sup>113</sup> For an application of these republican ideas in the labour law context, see Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart, 2009) 117-144.

<sup>114</sup> Michael Sandel, 'Reply to Critics', in Anita L Allen and Milton C Regan (eds), *Debating Democracy's Discontent* (OUP, 1998) 319, 327. Sandel is replying to another essay in that volume by Philip Pettit, 'Reworking Sandel's Republicanism', *ibid* 40.