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## **‘INDIVIDUALISM’ AND ‘COLLECTIVISM’ IN COLLECTIVE LABOUR LAW**

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### **ABSTRACT**

This article examines the concepts of ‘individualism’ and ‘collectivism’ in collective labour law. A popular critique of freedom of association norms characterises such norms as ‘individualist’ or ‘individualistic’. This individualist bias undermines the institutions of collective labour relations. The ‘individualist’ critique is often coupled with the development of an alternative positive account of collective labour law that is based upon a foundation of ‘collectivism’. ‘Collectivist’ labour law encompasses a concern for collective or group rights, rather than rights for individuals; it affirms collective values; and the metric of legitimacy of a legal regime of freedom of association is the extent to which it supports collective bargaining through independent trade unions. On this conventional approach, ‘individualism’ and ‘collectivism’ stand in opposition to each other. This article argues against this dichotomous understanding of ‘individualism’ and ‘collectivism’. A comparative perspective on the ‘right to organize’ supports the view that individual and collective rights can stand in a complementary relation to each other. Furthermore, the union’s right to exclude may sometimes legitimately yield to competing individual rights, such as the right not to be subjected to unjust discriminatory treatment. The important task for labour lawyers is to identify an effective combination of collective and individual rights in order to promote just and decent outcomes in the workplace.

## 1. INTRODUCTION

Two of the most heavily used critical concepts in collective labour law are ‘individualism’ and ‘collectivism’.<sup>1</sup> Often, ‘individualism’ is used to convey an adverse normative judgement when it is deployed in the labour law literature. In the hands of Lord Wedderburn and Bob Simpson particularly, ‘individualism’ and ‘collectivism’ can seem to be locked in a kind of zero-sum game for supremacy, with the decline of the norms and institutions of collective labour law corresponding to the rise of ‘individualism’. Yet for all their ubiquity, there has been surprisingly little systematic analysis in the labour law literature of what might be entailed by ‘individualism’ and ‘collectivism’ in the field of labour law.

As a normative ideal in the history of politics, ‘individualism’ is a heterogeneous concept. Sometimes it has been used with negative connotations. Steven Lukes has suggested that, in historical terms, ‘individualism resides in dangerous ideas, for others it is social or economic anarchy, for yet others it is the prevalence of self-interested attitudes among individuals.’<sup>2</sup> It should not be imagined that this ‘social cohesion’ critique of ‘individualism’ is a property exclusive either to right-wing or left-wing political thought. ‘Individualism’ was as likely to be used as a term of abuse by socialists committed to socialist cooperation in a productive commonwealth, as it was by conservatives concerned to preserve the authority of tradition and the existing social order. ‘Individualism’ was likewise the stirring call to arms of radicals committed to the overthrow of political and religious oppression, and the emancipation of citizens through liberal rights and democratic government.<sup>3</sup> In short, ‘individualism’ and ‘collectivism’ are terms shot through with conceptual and normative disagreement. Given this heterogeneity, there is significant value in pausing to reflect on their use in labour law. In so doing, we might sharpen our awareness of what is really at stake in categorising a legal right or policy as ‘individualist’. It also helps to avoid the term becoming mere shorthand to signal normative disapproval of a law or policy that we happen to dislike, detached from more precise analytical meanings.

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<sup>1</sup> For some recent examples in the *Industrial Law Journal*, see A. L. Bogg, ‘Employment Relations Act 2004: Another False Dawn for Collectivism?’ (2005) 34 *ILJ* 72 and B. Creighton, ‘A Retreat from Individualism? The Fair Work Act 2009 and the Re-collectivisation of Australian Labour Law’ (2011) 40 *ILJ* 116.

<sup>2</sup> S. Lukes, *Individualism* (Oxford: Blackwell, 1973) 9.

<sup>3</sup> For a full discussion of this heterogeneity in historical perspective, see Lukes, *ibid* 3-39.

This article offers a modest contribution to that clarificatory task, and it is a task that is vitally important. I argue that the categorisation of legal rights as ‘individualist’ is prone to interpretive difficulties, for such categorisations are usually more complex than a single descriptive label is able to convey. Rights may be ‘individualist’ in respect of the right-holder; or they may be ‘individualist’ in terms of standing to enforce the right; or they may be ‘individualist’ in respect of the remedies available to repair infringements of the right; or they may be ‘individualist’ in terms of their purpose and social effects. Furthermore, the sphere of trade union autonomy and the trade union’s right to regulate its own membership criteria is testament to the complexity of the interactions between ‘individualism’ and ‘collectivism’. Some forms of ‘individualism’, such as those concerned to protect individuals from unjust discrimination by social groups, are morally compelling. The thread that runs through the arguments to follow is that it is better to develop a coherent structure of individual *and* collective rights that lead to just social and economic outcomes in the sphere of work. This should lead us to elevate questions of substance over questions of form in the design of legal regulation, to be attentive to what works in promoting social justice.

Before proceeding, it is important to place my normative cards face up on the table. It is my belief that there is an important sense in which all labour lawyers should embrace ‘individualism’. As we shall see, some ‘collectivist’ labour lawyers, such as Bob Simpson, have issued a passionate plea to position ‘values of collectivism’ at the moral centre of collective labour law.<sup>4</sup> We should be cautious, I think, before accepting the call to endorse ‘values of collectivism’ as the foundation of collective labour rights. The first reason for caution is the powerful appeal of the ‘humanistic principle’ in normative philosophy. The ‘humanistic principle’ holds that ‘it is individual well-being that is of “ultimate concern”.’<sup>5</sup> There are various formulations of this principle. For example, Finnis renders this principle in terms of the ‘priority of persons’ in normative ethics and the organisation of political and legal arrangements.<sup>6</sup> This establishes a basic moral plateau for the acceptability of legal and political theories. It also has important implications for our understanding of associations and

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<sup>4</sup> B. Simpson, ‘Freedom of Association and the Right to Organize: The Failure of an Individual Rights Strategy’ (1995) 24 ILJ 235, 251.

<sup>5</sup> See D. Newman, *Community and Collective Rights* (Oxford: Hart, 2011) 12, citing J. Raz, *The Morality of Freedom* (Oxford: OUP, 1986) 194.

<sup>6</sup> J. Finnis, ‘The Priority of Persons’, in J. Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: OUP, 2000) 1.

their relationships with individual well-being. Ultimately, the value of an association stands or falls in its contribution to the well-being of individual persons. According to Langille, for example, the ‘primal aspiration’ of collective activity is ‘the good of the worker as an individual human being’.<sup>7</sup> In his work on collective rights, Newman has argued that what he describes as the ‘service principle’ is entailed by the ‘humanistic principle’; the ‘service principle’ holds that associations must serve the well-being interests of individual members of the group.<sup>8</sup> This would exclude some highly corporatist or authoritarian accounts of social groups and their relation with individual members.<sup>9</sup> If proponents of ‘collectivism’ *do* deny that individual well-being is of ultimate concern, then we should insist that its protagonists present their alternative account of what is of ‘ultimate concern’. If not the good of individual persons, then what else?

The second reason is that the call for ‘values of collectivism’ may betray an assumption that only ‘collective values’ can provide a normative foundation for collective rights. Given that I shall argue that collective rights are an essential element in a decent structure of collective labour law, does this not require me to join with Simpson in endorsing ‘values of collectivism’ as the foundation of the discipline? Such a move rests upon a flawed assumption, I would suggest, which is that the ‘humanistic principle’ can only provide a normative grounding for individual rights. There are some scholars who take that view, arguing that the fundamental components of freedom of association must consist of individual rights, but this assumption is based upon faulty thinking.<sup>10</sup> It is perfectly possible to develop a theory of collective rights that satisfies the constraints of the ‘humanistic principle’.<sup>11</sup> Indeed, most plausible theoretical accounts of group rights are consistent with the requirements of the ‘humanistic principle’, grounding those rights in their contribution to individual well-being.<sup>12</sup> In this way, we can be individualists on matters of ultimate value

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<sup>7</sup> B. Langille, ‘The Freedom of Association Mess: How We Got into It and How We Can Get Out of It’ (2009) 54 *McGill Law Journal* 177, 188.

<sup>8</sup> Newman n.5 at chapter 5.

<sup>9</sup> See, for example, R. Scruton, ‘Corporate Persons’ (1989) 63 *Proceedings of the Aristotelian Society Supp* 239, and for a critique that would be sympathetic to the ‘humanistic principle’, see J. Finnis, ‘Persons and their Associations’ in J. Finnis, *Intention & Identity Collected Essays: Volume II* (Oxford: OUP, 2011) 92.

<sup>10</sup> Langille, n.7 at 186.

<sup>11</sup> For an admirable example, see Newman n.5.

<sup>12</sup> See A. Bogg and K.D. Ewing, ‘A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada’ (2011-2012) 33 *Comparative Labor Law and Policy Journal* 379, 401-408.

while providing a compelling normative justification for collective rights in the legal regime protecting freedom of association.

Finally, it is important to be precise about the wider political and economic contexts to the uses of ‘individualism’. As Steven Lukes has demonstrated, ‘individualism’ displays heterogeneity in its various guises in political, social and economic theory. Economic individualism postulates the ‘unfettered self-interest of individuals’ as a methodological and a normative anchor.<sup>13</sup> It found its strongest modern articulation in the works of Hayek and Friedman in the defence of laissez-faire liberalism and the minimal state.<sup>14</sup> Political individualism rests upon a concept of citizenship as a status of ‘independent and rational beings, who are the sole generators of their own wants and preferences, and the best judges of their own interests’.<sup>15</sup>

Political individualism could be said to rest upon a theory of ‘asocial individualism’, with the individual treated as severable from social needs, values and attachments.<sup>16</sup> This is sometimes connected to political concerns about the erosion of community through the assertion of rights claims.<sup>17</sup> It also underlies communitarian concerns about the erosion of social solidarity by human rights discourse.<sup>18</sup> I suspect that when many labour lawyers are taking aim at ‘individualism’, it is these targets that the critics have in mind. These economic and political theories of individualism might be described as ‘abstract individualism’, in the abstraction of the individual from her social commitments and attachments.<sup>19</sup> Other forms of ‘individualism’ have very different normative implications. For example, Lukes has defended a concept of ‘individualism’ based in ‘un-abstracted individuals in their concrete, social specificity, who, in virtue of being persons, all require to be treated and to live in a social order which treats them as possessing dignity, as capable of exercising and increasing their autonomy, of engaging in valued activities within a private space, and of developing their

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<sup>13</sup> Lukes, n.2 at 89.

<sup>14</sup> Ibid., 92-93.

<sup>15</sup> Ibid., 79.

<sup>16</sup> On the idea of ‘asocial individualism’ in liberal theories, see S. Mulhall and A. Swift, *Liberals and Communitarians* (Oxford: Blackwell, 2<sup>nd</sup> ed 1996) 13-18.

<sup>17</sup> S. Avineri and A. de-Shalit, ‘Introduction’ in S. Avineri and A. de-Shalit (eds), *Communitarianism and Individualism* (Oxford: Oxford University Press, 1992) 4-5.

<sup>18</sup> M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1993).

<sup>19</sup> Lukes n.2 at 152.

several potentialities'.<sup>20</sup> If *this* is what 'individualism' is taken to mean, then 'collectivists' in labour law have every reason to endorse it.

The argument is structured in the following way. Section 2 sets out the historical development of 'individualism' in labour law, charting its use in the work of Otto Kahn-Freund, Lord Wedderburn and Bob Simpson. While each of these scholars can be understood as working within the broad tradition of collective *laissez-faire*, there were significant differences between them on the meaning and import of 'individualism'. In Bob Simpson's work, the concept of 'individualism' is deployed as a systematic critique of British labour law on the 'right to organize' and the legal regulation of trade union autonomy. Simpson's work on freedom of association marks the highpoint of the 'individualist' critique in collective *laissez-faire*.

In section 3, the different permutations of 'individualism' in the 'right to organize' are examined, drawing upon comparative material. This comparative analysis demonstrates that 'individualism' and 'collectivism' are in fact rather complex terms, and it questions the usefulness of criticising a given right as 'individualist' without further elaboration and precision. Some individual rights, such as the right not to be victimised for trade union membership or activities, provide a crucial underpinning to the 'right to organize'. Furthermore, elements of the 'individual' and 'collective' can be blended in different ways across a range of axes: we might be concerned with protecting collective right-holders by conferring freestanding group rights; or we might grant rights of standing to trade unions to enforce individual rights on behalf of the primary right-holder; or we might incorporate the 'collective' into the range of remedies available where an individual trade unionist is victimised to compensate the trade union itself for its own associated losses. In short, we might say that rights could have strongly *individual* features without thereby being *individualistic*. For example, the individual right to strike, correlative to a doctrine of contractual suspension and strong unfair dismissal protection, is an individual right that provides a critical legal underpinning to the operation of collective labour relations. It is individual but not individualistic. By contrast, the right to refuse to participate in lawful strike

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<sup>20</sup> Ibid., 153.

action is an individual right whose purposes and social effects on collective labour relations could properly be described as individualistic.<sup>21</sup>

In section 4, the ‘individualist’ critique of the legal regulation of trade union autonomy is examined. Various problems with the ‘individualism’/‘collectivism’ distinction are identified. These problems may be regarded as undermining the utility of the ‘individualist’ critique. Some individual rights, such as the right to exit a trade union, provide a strong foundation for the trade union to assert its autonomy against state regulation. Other individual rights, such as the right not to be subjected to unjust discrimination, should take priority over collective autonomy. In other words, some forms of ‘individualism’ are morally appropriate, and some forms of ‘collectivism’ are morally suspect.

## **2. THE GENEALOGY OF ‘INDIVIDUALISM’ IN BRITISH LABOUR LAW**

In this section, I examine the historical development of ‘individualism’ in the work of Otto Kahn-Freund, Lord Wedderburn and Bob Simpson. Each of them may be understood to have adhered broadly to the principles of ‘collective laissez-faire’, using it as a normative framework for the elaboration and critical analysis of labour law. Yet there were significant variations in the normative implications of ‘individualism’ between these three scholars. In Kahn-Freund’s work, ‘the individualist tradition’ was endorsed as a valuable aspect of the common law tradition in protecting the freedom of the individual worker. By contrast, Lord Wedderburn’s engagement with individualism, especially in his work in the late 1980s on freedom of association, marked a significant turn in its critical usage. Lord Wedderburn deployed ‘individualism’ both as a critique of human rights law under Article 11 of the European Convention on Human Rights (ECHR), and as a more general critique of patterns of common law adjudication on freedom of association. Finally, Bob Simpson provided the most developed account of ‘collectivism’ and ‘individualism’ as critical concepts in the development of British labour law as it related to freedom of association. We find here the most decisive normative repudiation of ‘individualism’ as a principle of collective labour law, and a particularly strong contrast with the role of ‘individualism’ in the work of Kahn-Freund.

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<sup>21</sup> I am grateful to Mark Freedland for pressing me on this distinction.



### A. Otto Kahn-Freund and ‘the individualist tradition’

The final section of Kahn-Freund’s seminal essay published in 1959, ‘Labour Law’, is focused on ‘the individualist tradition’ in British labour law.<sup>22</sup> This section on individualism is perhaps less well-known than other parts of the essay, such as his formulation of the principle of ‘collective laissez-faire’ and the tradition of ‘legal non-intervention’.<sup>23</sup> Indeed, its content provides something of a jolt to the contemporary student of British labour law, given the negative connotations of ‘individualism’ in contemporary labour law. This starting assumption may lead us to expect a thoroughgoing critique of the regressive tendencies of the English common law in collective labour relations, and the reactionary quality of that section of ‘public opinion’ formed by the English legal profession. Instead, Kahn-Freund provides a careful elaboration of the ‘individualist tradition’ that provides a cautious yet unmistakably positive normative evaluation. There are two dimensions to Kahn-Freund’s elucidation of the ‘individualist tradition’. First, he provides a normative appraisal of the principle of ‘freedom of contract’ in the English common law. Second, this is linked to a justification for the intervention of the common law to restrain abuses of power by trade unions against individual trade unionists. In this way, the ‘individualist tradition’ is *not* regarded by Kahn-Freund as antithetical to the rules and practices of collective labour relations. On the contrary, it provided an indispensable part of the system of collective laissez-faire.

The first principle of ‘the individualist tradition’ was the deep aversion of the English common law to any form of legal compulsion in the individual contract of employment, and ‘the refusal to have even a vestige of compulsory labour in peacetime’.<sup>24</sup> In this respect, Kahn-Freund had been evidently moved by the speech of Lord Atkin in *Nokes v Doncaster Amalgamated Collieries* where Lord Atkin had stood against the transfer of contracts of employment in an amalgamation of companies: ‘I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve,

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<sup>22</sup> O. Kahn-Freund, ‘Labour Law’, reprinted in O. Kahn-Freund, *Selected Writings* (London: Stevens & Sons, 1978) 1, reprinted from M. Ginsberg (ed), *Law and Opinion in England in the 20<sup>th</sup> Century* (London: Stevens & Sons, 1959), 215.

<sup>23</sup> *Ibid.*, at 31.

<sup>24</sup> *Ibid.*

and this right of choice constituted the main difference between a servant and a serf.<sup>25</sup> Certainly, Kahn-Freund was astute to the various ways in which this principle of freedom of contract had been eroded. In this respect, he noted the wartime measures of Essential Work Orders and the scheme of compulsory arbitration introduced in Order 1305 that criminalised striking; the operation of the Dock Labour Scheme; and the range of state steering mechanisms to promote employment and labour mobility. Nevertheless, most of these measures were to be regarded as exceptional, agreed by both sides of industry during periods of national peril. Moreover, these measures were legislative or governmental in origin. In ‘Labour Law’, Kahn-Freund seemed to regard the common law as providing a libertarian backstop that protected ‘the power to decide whether or not to enter into or to terminate the employment relationship.’<sup>26</sup>

The second principle of ‘the individualist tradition’ was ‘the protection of the individual against superior social forces’ and the increased willingness of courts ‘to protect minorities inside trade unions’.<sup>27</sup> For Kahn-Freund, the intervention of the common law in the internal affairs of trade unions is described as ‘an almost necessary corollary of the growing policy of non-interference with labour-management relations, and especially with the operation of 100 percent union and closed-shop practices’.<sup>28</sup> The trade unions’ power of interference in the ‘right to work’ of workers, facilitated by the law’s toleration of closed shop practices, meant that it was necessary for the courts to ‘prevent unions from misusing through wrongful expulsion their power of industrial ostracism’.<sup>29</sup> It is perhaps also surprising to see Kahn-Freund refer approvingly to Lord Denning’s judgment in *Lee v Showmen’s Guild of Great Britain*.<sup>30</sup> In ‘Labour Law’, Kahn-Freund was focused on the common law’s restraint of ‘arbitrary’ expulsions from trade union membership, and he observed that the courts ‘cannot

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<sup>25</sup> Ibid., at 32, citing Lord Atkin in *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. Kahn-Freund also noted Lord Atkin’s dissent in *Liversidge v Anderson* [1942] AC 206 and his role ‘as one of the champions of civil liberties in our time’.

<sup>26</sup> Kahn-Freund n.22, at 31. Kahn-Freund’s views on ‘freedom of contract’ developed significantly over his career, and in his later work Kahn-Freund adopted a somewhat more troubled attitude towards the emancipatory potential of the common law. For a subtle and sensitive discussion of this development, see M. Freedland, ‘Otto Kahn-Freund, the Contract of Employment and the Autonomy of Labour Law’, in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl (eds), *The Autonomy of Labour Law* (Oxford: Hart, 2015), 29.

<sup>27</sup> Kahn-Freund, n.22 at 36.

<sup>28</sup> Ibid., 37.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid., at 37, citing *Lee v Showmen’s Guild of Great Britain* [1952] 2 QB 329.

control admissions'.<sup>31</sup> In retrospect, that statement is rather too categorical, as Lord Denning's later judgment in *Nagle v Fielden* was to demonstrate.<sup>32</sup> Furthermore, Kahn-Freund's strictures against judicial control over admission were supported by his view that there is not 'in a very homogeneous society, much need for doing so.'<sup>33</sup> This contrasted with the United States, where the emergence of a 'duty of fair representation' was a necessary counterpart of exclusive bargaining representation in a racially divided society.<sup>34</sup> It was obviously implicit in Kahn-Freund's position that if British society became more heterogeneous, the normative arguments in favour of a more assertive 'individualist tradition' would be strengthened.

It is a surprising fact, therefore, given the subsequent development of 'individualism' in the scholarly literature, that in Kahn-Freund's own estimation of collective *laissez-faire*, 'individualism' was a virtue of the British industrial relations system, not a threat to it. Indeed, the 'individualist tradition' was an occasion for praise of the English common law, rather than a critical attack on the regressiveness of the English judiciary.<sup>35</sup> It is also important to view the two dimensions of 'the individualist tradition' as linked elements. Kahn-Freund was equally condemnatory of 'the futility of attempts to make people work *or employ* under threats of committal and attachment'.<sup>36</sup> In other words, the principle of freedom of contract was symmetrical, encompassing both the freedom to enter the relationship *and* the freedom to terminate it, for both parties.<sup>37</sup> This provided an argument against restrictions on the dismissal powers of the employer. Although this is left obscured in Kahn-Freund's analysis, this strong attachment to freedom of contract in fact provided the legal underpinning to prevalent union closed-shop practices. While this state of affairs provided a strong social underpinning to trade unions' 'right to organize', it simultaneously justified an interventionist role for the courts in protecting the individual from arbitrary or unjust disciplinary practices by trade unions in closed shop arrangements. In other words, the

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<sup>31</sup> *Ibid.*

<sup>32</sup> [1966] 2 QB 633.

<sup>33</sup> Kahn-Freund, n. 22, at 37.

<sup>34</sup> P. Davies and M. Freedland (eds), *Kahn-Freund's Labour and the Law* (London: Stevens & Sons, 3<sup>rd</sup> ed 1983), 91.

<sup>35</sup> This may reflect deeper divergences between scholars such as Kahn-Freund and Wedderburn in their attitudes towards the English common law as a body of norms. For discussion, see A. Bogg, 'The Hero's Journey: Lord Wedderburn and the "Political Constitution" of Labour Law' (2015) 44 *ILJ* 299, 314-315.

<sup>36</sup> Kahn-Freund, n. 22 at 34.

<sup>37</sup> *Ibid.*, 31.

common law's strong protection of individuals against trade union abuses was the necessary counterpart of a highly collectivist collective bargaining regime. It should nevertheless be remembered that these arguments were being crafted in 1959, when the virtues of 'industrial autonomy' were at their height, and the social strength of trade unions taken as a political given. This concern with individual freedom was also developing in a wider intellectual context where ideas in political philosophy were no doubt being shaped by the prospect of totalitarianism as a credible threat to liberal institutions.<sup>38</sup> In later years, when collective laissez-faire faced profound and existential challenges, scholars would begin to reappraise the ways in which 'individualism' might be used to attack collective labour relations.<sup>39</sup>

### **B. Lord Wedderburn: Individualism and Human Rights**

A significant shift in the ideological resonance of 'individualism' occurred during the 1980s, and this had implications for its use as a critical concept in labour law scholarship. That shift was reflected most strongly in Lord Wedderburn's work on freedom of association, in particular his seminal piece 'Freedom of Association or Right to Organise? The Common Law and International Sources'.<sup>40</sup> The piece provides a subtle and comprehensive analysis of freedom of association in international, European and Commonwealth law, with a specific focus on the development of trade union rights under Article 11 of the ECHR. It may be read as a contribution to the constitutional debates at that time surrounding 'incorporation' of the ECHR into domestic law, and it provided a salutary warning about the constitutional empowerment of the English judiciary in the face of a vague and open-textured textual formula in Article 11. Yet its principal target is the judicial treatment of freedom of association by the European Court of Human Rights, and it is here that the analytical contrast between 'individualism' and 'collectivism' is deployed most forcefully.

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<sup>38</sup> Isaiah Berlin delivered his famous inaugural lecture in Oxford in 1958, entitled 'Two Concepts of Liberty', which would later form the basis of his signature work, *Four Essays on Liberty* (Oxford: OUP, 1969). I am grateful to Tonia Novitz for pointing me to this most interesting parallel.

<sup>39</sup> 'Labour Law' was reprinted in a volume *Selected Writings* published in 1978, to honour Kahn-Freund's contribution to *The Modern Law Review*. In his 'Note' to 'Labour Law' (n.22 at 39-40), Kahn-Freund acknowledged the profound changes in law and society that had occurred between 1959 and 1978, and he noted the growth of statutory rights during the 'social contract' period – many of them 'individual' in form – that supported trade union activities in the workplace.

<sup>40</sup> Lord Wedderburn, *Employment Rights in Britain and Europe* (London: Lawrence & Wishart, 1991), 138, originally published in (1987) 18 *Industrial Relations Journal* 244.

According to Wedderburn, Article 11 was ‘a sham formula’, based upon an ‘attenuated interpretation’ of the constituents of freedom of association, which was a ‘false prospectus’ for workers and trade unions.<sup>41</sup> This scathing assessment is based upon the ‘individualistic’ theory of freedom of association that shaped the jurisprudence under Article 11. This ‘individualism’ was reflected in three specific features of Article 11 jurisprudence. First, freedom of association was framed as a civil and political right such that ‘whereas the provisions in such conventions as the ECHR were couched largely in terms of *individual* rights, the ILO conventions are also with the elaboration of *collective* rights’.<sup>42</sup> Consequently, individualism emerges as a critique of juridical form, and specifically the identity of the right-holder under the relevant instrument. Since the ECHR is based upon rights for individuals, rather than collective rights for groups such as the trade union itself, it is insufficient to provide an underpinning for collective labour relations. While Wedderburn acknowledges that ‘the duality would not matter so much if the mechanisms for the enforcement of the ECHR’ and other more collective instruments such as the ILO or the European Social Charter were equivalent, in practice they were not.<sup>43</sup> This remedial asymmetry had the effect of privileging the individualist conception of freedom of association at the international level.

Second, this individualism was reflected in the content of freedom of association in many constitutional fora. The ECtHR and a variety of constitutional courts in the commonwealth favoured a judicial interpretation of freedom of association that had ‘very little collective content at all’.<sup>44</sup> In particular, the collective rights to organise, to bargain collectively, and to strike, were treated as extraneous to the constitutional protection of freedom of association, the effect of which was to distil a ‘grim reduction of freedom of association to the right to associate together for some purpose or other, however restricted’.<sup>45</sup> By contrast, protecting the rights to organise, to bargain collectively and to strike through freedom of association would mean that ‘protection...for collective purposes’ was ‘built’ into the individual freedom.<sup>46</sup> Finally, individualism was reflected in the strong judicial protection of the

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<sup>41</sup> *Ibid.*, 150.

<sup>42</sup> *Ibid.*, 141.

<sup>43</sup> *Ibid.*, 143.

<sup>44</sup> *Ibid.*, 144.

<sup>45</sup> *Ibid.*, 146.

<sup>46</sup> *Ibid.*, 147.

*negative* right to disassociate, particularly under the ECHR.<sup>47</sup> This ‘formalistic’ approach to negative freedom of association meant that human rights litigation provided a mechanism for dissentients to destabilise union security arrangements.<sup>48</sup> It reflected the fact that ‘the function of conventions like the ECHR is largely to protect rights as they inhere in the individual’.<sup>49</sup> The effect of this was that incorporation of Article 11 into domestic law might simply provide ‘yet another avenue for individuals to litigate against trade unions’,<sup>50</sup> rather than operating as a powerful political instrument to promote collective interests.

Wedderburn’s elaboration of ‘individualism’ marked a significant departure from Kahn-Freund’s earlier work on the ‘individualist tradition’. Five aspects warrant particular emphasis. First, individualism is now being deployed as a critique of legal form, whereas in 1959 the light legal structure of collective labour law rendered this analytical focus less apt. More specifically, in Wedderburn’s work it is being used to critique the structure and content of the right to freedom of association. This ‘human rights’ conception of freedom of association envisages an individual right-holder, and its content is detached from collective activities such as collective bargaining or union organisation. Second, Wedderburn identifies individualism as a *threat* to collective structures, in empowering dissentient individuals to obstruct the collective will of the trade union. By contrast, Kahn-Freund was more concerned with regulating and restraining abuse of power by collectivities such as trade unions against individuals. In other words, for Kahn-Freund there was an inverse proportionality between the organisational strength of trade unions and their permitted autonomy to organise their own internal affairs vis-à-vis trade union members. Wedderburn was more amenable to a situation where the collective strength and internal autonomy of trade unions is accorded maximal latitude by the legal framework.

Third, Wedderburn’s work evinces a distrust and scepticism of the common law as an individualist body of norms, whereas for Kahn-Freund ‘the individualist tradition’ was a valuable dimension of the common law’s heritage. Wedderburn traced the ways in which judicial development of freedom of association in common law jurisdictions as diverse as

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<sup>47</sup> Wedderburn’s particular focus is on *Young, James and Webster v United Kingdom* [1982] 3 EHRR 38.

<sup>48</sup> Wedderburn links ‘formalism’ and ‘individualism’: *ibid.*, at 144.

<sup>49</sup> *Ibid.*, 142.

<sup>50</sup> *Ibid.*, 150.

Canada, India and Trinidad displayed individualistic tendencies.<sup>51</sup> By contrast, constitutional courts operating in European social democratic systems had adopted more collectivist interpretations of freedom of association. Fourth, Wedderburn's intervention was emblematic of a strong strand of human rights-scepticism in British collective labour law scholarship in the late decades of the twentieth century. This was based upon a deeper set of reservations that this would entail an expanded role for the judiciary in developing labour law norms, and that human rights discourse was irredeemably individualistic in its normative foundations and social impact. Finally, Wedderburn was ultimately rather nuanced on the issue of the interaction between 'individualism' and 'collectivism': 'just as the collective freedom cannot function without the individual freedom, so the latter, where trade unions and protection of interests are concerned, is meaningless without the former'.<sup>52</sup> There is no blithe elevation of the 'collective' over the 'individual'. Rather, the individual and collective dimensions of freedom of association are, in the end, complementary and mutually reinforcing. For Wedderburn, it was impossible to have one without the other.

### **C. Individualism and Collectivism in the work of Bob Simpson**

The distinction between 'individualism' and 'collectivism' as an analytical framework is developed most fully in Bob Simpson's work on freedom of association during the 1990s. Two pieces stand out as exemplars of this analytical approach. The first piece, 'Freedom of Association and the Right to Organize: The Failure of an Individual Rights Strategy', was explicitly indebted to Wedderburn's earlier work on freedom of association.<sup>53</sup> It was prompted by the decision of the House of Lords in *Wilson and Palmer*, where a majority of the House of Lords concluded that the withholding of pay rises in order to disestablish collective bargaining arrangements was not 'action short of dismissal' on the grounds of 'membership' of an independent trade union.<sup>54</sup> It developed a powerful critique of the legal framework of the 'right to organize' in British labour law as a highly individualist body of law that was unsuited to promoting joint regulation through collective bargaining. The second piece, 'Individualism versus Collectivism: An Evaluation of section 14 of the Trade Union

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<sup>51</sup> *Ibid.*, 145-149.

<sup>52</sup> *Ibid.*, 142-143.

<sup>53</sup> B. Simpson, 'Freedom of Association and the Right to Organize: The Failure of an Individual Rights Strategy' (1995) 24 ILJ 235.

<sup>54</sup> *Associated Newspapers Ltd v Wilson and Associated British Ports v Palmer* [1995] ICR 406.

Reform and Employment Rights Act 1993', analysed and critiqued the other dimension of freedom of association concerned with trade union autonomy and the legal regulation of internal trade union affairs.<sup>55</sup> Specifically, it was concerned with the new 'right' introduced in section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) for an individual to choose which union to join, and it speculated on the impact of this new individual right on the voluntary regulation of inter-union competition by the Trades Union Congress (TUC) dispute resolution procedures. Taken together, these pieces provided a systematic critique of 'individualist' freedom of association in British labour law.

Beginning with 'Freedom of Association and the Right to Organize', this piece developed and deepened Wedderburn's individualist critique of Article 11. Simpson's critical analysis was concerned with domestic law, however. It appraised the legal strategy in the 'social contract' period to construct 'a collective "right to associate" out of the bricks of certain "individual" employment rights'.<sup>56</sup> This legal structure consisted of a code of individual rights protecting employees from victimisation and dismissal on the grounds of trade union membership and trade union activities at an appropriate time, alongside positive organisational supports such as the individual right to paid time off for trade union officials. According to Simpson, judgments such as *Wilson and Palmer* represented the culmination of a failed strategy based upon a statutory structure of *individual* rights for workers, rather than freestanding *collective* rights for trade unions. This legal structure was hobbled by formal and individualistic interpretations of core statutory concepts in the hands of a judiciary that was obtuse to the collective dimensions of trade union freedom. In this respect, Simpson favoured Wedderburn's hostility towards the individualism of the English common law over Kahn-Freund's more positive assessment.

It was therefore necessary to adopt an alternative 'collective rights' strategy that would give the union itself a legal right of redress in situations such as *Carrington v Therm-A-Stor*.<sup>57</sup> Thus, where the employer engaged in retaliatory action against employees by selecting them for redundancy in response to the trade union's recognition claim, the trade union should be able to pursue its own remedies in that situation. This would reflect the fact that the trade

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<sup>55</sup> (1993) 22 ILJ 181.

<sup>56</sup> Lord Wedderburn, 'The Employment Protection Act 1975: Collective Aspects' (1976) 39 MLR 168, 169.

<sup>57</sup> [1983] ICR 208 (CA).



union itself suffered its own collective harms where its organisational activities were impeded by acts of victimisation against individual employees. In *Carrington*, it may be recalled, the Court of Appeal had concluded that since the acts of victimisation were not attributable to anything the victimised individuals had done personally, they had not been victimised on account of *their own* trade union activities. Consequently, neither the dismissed employees nor the trade union itself had any form of legal redress. Simpson also argued in favour of a collective right for the trade union to protect its own interests in *Wilson and Palmer* situations, where employers used financial inducements to undermine collective agreements.

It would fail to do justice to the richness of Simpson's argument to suggest that it was simply an application of Wedderburn's earlier ideas on 'individualism'. In fact, Simpson provides a nuanced and multi-layered perspective on the various axes of individualism within a structure of labour rights. First, individualism may be concerned with the *identity of the right-holder*. Thus, one of Simpson's concerns with the *Carrington* lacuna is the absence of a legal right vested in the trade union itself. Second, individualism may relate to the *substantive content* of the right. Thus, Simpson is justifiably critical of judicial interpretations that eschew a 'purposive' approach which leads 'to the construction of individual rights which excludes any possible collective dimension'.<sup>58</sup> A striking example of this is the judicial interpretation by Lord Bridge and Lord Lloyd in *Wilson and Palmer* of 'membership' as excluding the collective dimension of trade union services and facilities, such as collective bargaining.<sup>59</sup> It represented a pattern of jurisprudence where the judicial approach is 'to separate the individual from the collective for the purposes of interpretation and application of the law.'<sup>60</sup>

Third, individualism might describe the remedies associated with a rights-violation. Thus, one of Simpson's major criticisms of the 'individual rights' strategy is the absence of effective collective remedies where trade unions themselves experience losses that are separate from the losses of individuals. In support of this perspective on remedies, he cited the pertinent observations of Sir John Donaldson in *Shipside (Ruthin) Ltd v TGWU* where it was recognised that the dismissal of an individual trade union activist could be 'a blow aimed at the union itself, particularly in the case of the dismissal of a union official.'<sup>61</sup> This

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<sup>58</sup> Simpson, n.53 at 244.

<sup>59</sup> Discussed by Simpson, *ibid*, 243.

<sup>60</sup> *Ibid.*, 247.

<sup>61</sup> [1973] ICR 503, 506.

collective loss (of institutional security and prestige; of organisational strength and worker support; of recognition by the employer) could not be rectified by an award of compensation to the individual. Fourth, Simpson is concerned to identify the *social effects* of legal rights on industrial relations practices. This chimed with his concern for a ‘law in context’ approach,<sup>62</sup> assessing the law-in-practice rather than the law-in-the-books. For Simpson, the proper metric for this empirical assessment was the extent to which legal rights support or undermine joint regulation through collective bargaining. Finally, he specifies the importance of basing a new legal strategy on ‘the values of collectivism’.<sup>63</sup> This indicates a concern for the underlying normative foundations of rights, and a clear preference for collectivist values. Suffice it to say that Simpson does not elaborate on what the ‘values of collectivism’ consisted in; or how they differed from the values of individualism; and what the relationship between these values and the specific form of a legal strategy might be. I have already cast doubt on this feature of Simpson’s work in the introduction’s endorsement of the ‘humanistic principle’.

This multi-layered approach to individualism, operating across a range of possible axes, provided a powerful analytical tool for analysing labour rights. In particular, it provided a way of avoiding crude reductionism in the use of individualism as an analytical device. For, on Simpson’s approach, to characterise a labour right as ‘individualist’ is to invite a series of further and more discriminating questions about *which* aspect of the right is being so described: the right-holder? The substantive content of the right? Its associated remedies? It also opened up the possibility that labour rights regimes might blend different component ‘individual’ and ‘collective’ elements in complex ways. For example, it might be possible to guarantee rights for individuals, enforceable either by the individual *or* their trade union, and giving rise to a range of individual and collective remedies for breach. Such a right would be both individual *and* collective. In the end, Simpson might assert that the important question was whether the blend of elements generated a right that worked in supporting joint regulation.

For all its analytical openness, it is nevertheless possible to detect a harder normative line in Simpson’s work when compared with the work of Wedderburn’s upon which Simpson builds. It should be recalled that Wedderburn regarded individual and collective freedoms as

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<sup>62</sup> B. Simpson, ‘The Changing Face of British Collective Labour Law’ (2001) 21 OJLS 705.

<sup>63</sup> Simpson, n.53 at 251.

existing in a complementary relation. At points, Simpson seems rather impatient with ‘individual rights’ as a legal strategy for implementing the right to organize. Thus, Simpson argued that ‘any serious legislative strategy in support of the joint regulation of working life needs to focus on collective *rather than* individual rights’.<sup>64</sup> Elsewhere, his approach is more restrained. So in arguing for a collective right in *Carrington* situations, this is proposed ‘*in addition* to adequate protection for individual workers’.<sup>65</sup> He also acknowledges the practical utility of certain individual rights such as the right to paid time off for union officials, which contributed to an increase in shop stewards in the workplace and so strong workplace organisation.<sup>66</sup> Nevertheless, Simpson’s patience with ‘individual rights’ seems rather more fragile than that displayed in Wedderburn’s earlier work on individualism in freedom of association.

The second piece, concerned with trade union autonomy, is rather more explicit in postulating a conflict between individualism and collectivism in the sphere of freedom of association, and this is reflected in the article’s title ‘Individualism *versus* Collectivism’. The article examines the statutory right inserted into section 174 of TULRCA 1992, the effect of which was to subject trade union admissions and expulsions to an unprecedented level of state control. Specifically, an individual could only be excluded or expelled from trade union membership in circumstances permitted by the legislation. Controversially, it was not a permitted ground of exclusion or expulsion where an individual had refused to participate in industrial action, thus removing a central element in the trade union’s capacity to enforce social norms of solidarity in strike situations. Nor was it a permitted ground to exclude or expel on the basis of the individual’s membership or non-membership of another trade union. This excluded ground was targeted at the enforcement of the ‘Bridlington Principles’, administered by the TUC Disputes Committee, which were designed to regulate organisational competition between affiliated trade unions. Since membership of another trade union was not a permitted ground of exclusion or expulsion, the enforcement of the ‘Bridlington Principles’ was impeded by s. 174.

The article also displays a ‘law in context’ approach to the evaluation of critique of s. 174. It sets s. 174 in the wider context of Conservative reforms on the closed shop, union finances

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<sup>64</sup> *Ibid.*, 237 (emphasis added).

<sup>65</sup> *Ibid.*, 250 (emphasis added).

<sup>66</sup> *Ibid.*, 236.

and internal union democracy, such that the right could be regarded as ‘an integral part of this strand of policy which is clearly a potentially rich seam for the government to tap in pursuit of the now undisguised policy of ending collectivism in British labour relations.’<sup>67</sup> It also considers the likely consequences of s. 174 in the light of trade union practices and the body of decisions generated by the TUC Disputes Committee. In this respect, the principal measure of collectivism in this context is in the social effects of the legislation. In some respects, Simpson’s predictions are remarkably prescient, for example in his concerns about ‘the possibility of “bounty hunters” actively seeking rejection of membership applications in pursuit of the £5,000 minimum compensation award.’<sup>68</sup> The litigation in *ASLEF v United Kingdom* would provide a vindication of that prediction in the light of coordinated ‘bounty hunting’ by members of the British National Party.<sup>69</sup>

Ultimately, Simpson’s concerns are focused upon s. 174 as a political tool for encouraging the fragmentation and further erosion of strong and coordinated collective bargaining practices: ‘The fundamental issue posed by section 14 is not the survival of Bridlington as such, but the ability of mainstream unions to function as a movement coordinating their activities rather than as separate competing units.’<sup>70</sup> In this way, Simpson shared Wedderburn’s concern to limit the scope for individual dissentients to use rights-litigation to challenge existing union structures. There is little trace of Kahn-Freund’s earlier concern with ‘the protection of the individual against superior social forces’ and the increased willingness of courts ‘to protect minorities inside trade unions’.<sup>71</sup> This is not surprising. For Kahn-Freund, the idea that the law might control union admissions was unthinkable in 1959. Yet s. 174 achieved this in a single legislative stroke. Moreover, Kahn-Freund’s concern that the common law should protect the individual trade unionist had been animated by the growth in trade union power represented in strong closed-shop practices. By 1993, when Simpson was postulating the conflict between individualism and collectivism in such strong terms, the social and legal context had undergone a remarkable transformation. The closed shop was now effectively unenforceable, and trade unions were operating from a position of social,

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<sup>67</sup> Simpson, n.55 at 183.

<sup>68</sup> *Ibid.*, 189.

<sup>69</sup> [2007] ECHR 184.

<sup>70</sup> Simpson, n.55, at 193.

<sup>71</sup> Kahn-Freund, n.22, at 36.

economic and political weakness. The individual right to choose not to strike, or to choose which union to join, represented the highpoint of British labour law's 'libertarian stance'.<sup>72</sup>

### 3. INDIVIDUALISM, COLLECTIVISM, AND THE RIGHT TO ORGANISE

#### A. The UK model: strong individualism

As Simpson has argued, the UK model of the 'right to organize' is based upon a strongly individualistic model. In fact, the structure of those individual rights is strongly 'bipolar' in its form, and resembles the basic structure of a private law right.<sup>73</sup> This is because the right contemplates a single relation between an individual right-holder (the worker) and an individual wrongdoer (the employer), and the remedy aims to restore the position of the right-holder by repairing the wrong. This is marked by 'correlativity', namely that 'the liability of the defendant is always a liability to the plaintiff. Liability consists in a legal relationship between two parties each of whose position is intelligible only in light of the other's.'<sup>74</sup>

TULRCA 1992 posits rights for workers and employees not to be subjected to a detriment, dismissed or have offers made to them on a range of protected grounds including trade union membership, participation in trade union activities at an appropriate time, and use of union services. This structure is individualistic in three distinct ways. First, the right-holder is an individual worker or employee.<sup>75</sup> The trade union is not a separate right-holder with legally protected interests, but can only benefit derivatively from individual enforcements. Second, the trade union does not have standing to enforce the individual's statutory right not to be victimised. The claim must be brought by the individual worker or employee. Thirdly, the remedies are primarily focused on compensating the individual for her losses.<sup>76</sup> Hence, the individual has a secondary right to reparation against the wrongdoer, aimed at correcting the wrong that consists in the infringement of her primary right (not to be dismissed because of trade union membership, or use of union services, and so forth). The union itself has no

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<sup>72</sup> Simpson, n.55, at 192.

<sup>73</sup> E. Weinrib, *Corrective Justice* (Oxford: OUP, 2012), 2.

<sup>74</sup> *Ibid.*, at 18.

<sup>75</sup> 'Workers' are protected from 'detriment' and 'offers' under TULRCA 1992, sections 145A, 145B and 146. 'Employees' are protected from refusal of access to employment and dismissal under TULRCA 1992, ss 137 and 152.

<sup>76</sup> There is provision for a 'special award' in unfair dismissal cases: see TULRCA 1992, s.156.

remedy for its own collective losses associated with individual acts of anti-union victimisation and no right to bring a claim on behalf of a member.<sup>77</sup>

A comparative perspective demonstrates how the ‘right to organize’ might incorporate elements of ‘individualism’ and ‘collectivism’ in the specific design of complex rights. It might be possible to introduce collective rights where trade unions themselves are independent right-holders under the legislation. Even where the right-holders are individuals, it might be possible to give the trade union standing to enforce the individual rights on behalf of the right-holders. It might also be possible to build in a collective dimension to the available remedies, for example to permit redress for trade union losses associated with individual rights-violations. The law on freedom of association in the US, Canada and Australia demonstrates a variety of ways in which these building blocks that compose more complex rights might be constructed. It is accordingly too reductive to talk in terms of a ‘collective’ right to organize or an ‘individual’ right to organize, for this glosses over important distinctions in the internal architecture of complex rights.

### **B. The US ‘unfair practice’ model: modified individualism**

The legal protection of freedom of association in the US is based upon an ‘unfair labor practice’ regime, the broad structure of which was introduced in sections 7 and 8 of the National Labor Relations Act 1935 (herein after the ‘Wagner Act’ named after its sponsor, Senator Robert Wagner). Section 7 specified the fundamental associative rights of employees in the following terms: ‘employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection’. These fundamental associative rights were protected by a set of ‘unfair labor practices’ that were enumerated in section 8. From the perspective of a ‘right to organize’, there are two ‘unfair labor practices’ that are of particular importance. The first is the general provision in s 8 (a) (1) which makes it an ‘unfair labor practice’ for an employer ‘to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7’. The second is the specific provision in s 8 (a) (2) which makes it unlawful ‘by discrimination in regard to hire or tenure of employment or any term of

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<sup>77</sup> Although c.f. the ‘unfair practice’ provision under Schedule A1 statutory recognition ballot procedure, discussed in Bogg, n.1 at 78-81.

condition of employment to encourage or discourage membership in any labor organization'. These provisions are administered by an administrative agency, the National Labor Relations Board (NLRB), which adjudicates 'unfair labor practice' complaints and determines the remedies for violations under s. 8.

We can adopt a three-level structural analysis of the US 'right to organize' which provides an interesting contrast with the pure individualism of the UK position. If we begin with the *identity of the right-holder* of the primary rights guaranteed by the legislation, s. 7 of the Wagner Act specifies the associative rights as individual rights of employees rather than collective rights of the trade union itself. In this basic respect, then, there is a broad similarity with individualistic approach in the UK legislation. The associative rights under s. 7 are in this sense *individual* rights.

It is in respect of the secondary right to seek reparation for infringement of the primary right, however, that the distinctive character of the US regime becomes apparent. The legal procedure is initiated by the filing of an 'unfair labor practice' charge, and this charge may be filed by 'any person, even a stranger to the dispute' and so 'need *not* be filed by the person actually aggrieved or adversely affected by the alleged misconduct'.<sup>78</sup> As such, the standing rules for enforcement of 'unfair labor practices' are extraordinarily wide. It is for the regional directors of the Board, acting under the authority of the General Counsel, to determine whether an 'unfair labor practice' complaint should be issued against the party alleged to have breached the legal provisions. At this stage, the General Counsel 'has plenary authority to determine whether an unfair labor practice complaint should be issued'.<sup>79</sup> If the complaint is issued, the prosecutorial wing of the Board (consisting of lawyers for the General Counsel) will represent the charging party in proceedings before a separate adjudicative wing of the Board, although a charging party may also participate in those proceedings and be represented by its own lawyers.<sup>80</sup>

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<sup>78</sup> R. Gorman and M. Finkin, *Basic Text on Labor Law: Unionization and Collective Bargaining* (St Paul MN: West Publishing, 2<sup>nd</sup> edition 2004), 10.

<sup>79</sup> W.B. Gould, *A Primer on American Labor Law* (Cambridge: MIT Press, 4<sup>th</sup> ed 2004), 60.

<sup>80</sup> *Ibid.*, 61.

According to Godard, 31 percent of filings were made by individuals, compared with 69 percent by trade unions.<sup>81</sup> In this way, the enforcement of freedom of association rights under US law is both highly statist (reflected in the General Counsel's pivotal role) and, in practice, highly collectivist (reflected in the *de facto* enforcement role of trade unions in 'unfair labor practice' proceedings). It reflects the distinctive historical origins of the US statutory structure, where the Wagner Act was 'enacted in an era of swelling confidence in the administrative state' hence 'it contains no private right of action.'<sup>82</sup> The decision to avoid private law enforcement perhaps also reflected ambivalence on the part of workers and trade unions about judicial involvement in the adjudication of labour relations disputes.<sup>83</sup>

At the third level of remedies, the administrative character of 'unfair labor practice' proceedings has constrained the effectiveness of the remedial framework. As Estlund has explained: 'The New Deal choice of administrative rather than judicial adjudication largely dictated the range of remedies: reinstatement, back pay, and other equitable remedies, but no compensatory or punitive damages of the sort that only juries could award.'<sup>84</sup> There are two dimensions to this. The first is the inadequacy of remedies from an individual perspective. The Supreme Court has imposed sharp limits on individual remedies, the effect of which is that 'a worker dismissed for union activities may be awarded only reinstatement with back pay covering lost income, defined as what the worker would have earned *minus* any earnings from other employment the worker may have obtained after dismissal'.<sup>85</sup> Within the wider context of dilatory legal procedures and weak enforcement mechanisms in the US system, this translates into a culture of impunity for determined employers who are hostile to union organization and who treat union dismissals as a legitimate business cost of remaining union-free.<sup>86</sup> The second is the inadequacy of remedies from a collectivist perspective. In narrow circumstances, it is possible to obtain a 'Gissel' bargaining order where the trade union has demonstrated 'majority support' through authorisation cards and where employer unfair labor

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<sup>81</sup> J. Godard, *Trade Union Recognition: Statutory Unfair Labour Practice Regimes in the USA and Canada* (London: DTI, 2004), 18.

<sup>82</sup> C. Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven: Yale University Press, 2010), 39.

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*, 39.

<sup>85</sup> Godard, n.81 at 17.

<sup>86</sup> The classic work in this vein is P. Weiler, 'Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA' (1983) 96 *Harvard LR* 1769.



practices tended to preclude the holding of a fair election.<sup>87</sup> In theoretical terms, at least, this provides a measure of reparative intervention that corresponds to the trade union's collective losses. In practice, however, 'Gissel' bargaining orders tend to be rarely issued and ineffective in practice.<sup>88</sup>

In sum, the 'right to organize' in the US displays the following structural features: (i) it is individualist in respect of the identity of right-holders; (ii) it is both highly statist (in respect of the General Counsel's discretionary 'gatekeeping' role) and collectivist (in respect of the factual prevalence of trade union complaints about unfair labour practices) in its approach to enforcement; (iii) it suffers from inadequate individual and collective provision at the remedial level.

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<sup>87</sup> Gorman and Finkin, n.78, ch 6.

<sup>88</sup> Paul Weiler, *Governing the Workplace: The Future of Labor and Employment Law* (Cambridge: Harvard UP, 1990), 237. See also Godard, n. 81 at 17.

### **C. The Canadian ‘unfair practice’ model: complementarity between the individual and the collective**

Historically, Canadian labour relations legislation was based upon the US ‘Wagner Act’ structure, with legal recognition procedures based upon the principle of majority support in the allocation of bargaining rights.<sup>89</sup> This necessitated a system of ‘unfair labour practices’ to restrain improper interference with workers’ freedom of choice to institute a regime of collective bargaining. There is a wider variation of constituent elements to this ‘model’, since labour relations are regulated at the provincial as well as federal level. The Ontario model of ‘unfair labour practices’ provides a typical example of the Canadian statutory model. For the purposes of exposition, we shall focus on the Ontario structure of unfair labour practice provisions in its labour code in order to identify salient structural differences between the US and Canadian ‘right to organize’.

Section 70 of the Ontario Labour Relations Act 1995 provides that ‘No employer or employers’ organization and no person acting on behalf of an employer or an employers’ organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union’. This has been interpreted as positing an ‘institutional’ right for trade unions, rather than any ‘personal’ right of an individual employee.<sup>90</sup> Section 72, by contrast, is concerned with the protection of employees’ rights. It provides *inter alia* that no employer ‘shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act’. This envisages a complementary structure of individual *and* collective rights, recognising the artificiality of separating out those elements in many disputes involving trade union victimisation.<sup>91</sup>

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<sup>89</sup> Godard, n.81 at 8.

<sup>90</sup> *James Mically Clock #2216 v. Board of Governors* [1991] OLRB Rep. June 735.

<sup>91</sup> *Canadian Paperworkers Union v. International Wallcoverings* [1983] OLRB Rep. August 1316.

With respect to the secondary right to seek reparation for the infringement of the primary rights protected under the legislation, individuals do not have standing to enforce the s. 70 unfair labour practice provision. Since this is an ‘institutional’ right of trade unions, enforcement of that right is confined to trade unions rather than individual employees. While employees have standing to enforce their own rights under s.72, the trade union also has standing to pursue complaints on behalf of affected employees. In situations of anti-union victimisation against individual employees, in practice the trade union will usually seek enforcement of ‘institutional’ rights under s. 70 and ‘personal’ rights under s. 72. In this way, the Ontario legislation operates rules of standing that are both collective and individual. While individuals have no standing to enforce ‘institutional’ rights, the legislation recognises the vital role of trade unions performing an enforcement role on behalf of affected employees. This offers a pragmatic response to the practical difficulties of individuals being required to enforce their own ‘personal’ rights in situations of embittered employer hostility against unionisation.

The complementarity of the collective and the individual, in respect of both primary and secondary rights under the Ontario legislation, is also reflected at the remedial level. There is much greater remedial flexibility to provide ‘make whole’ remedies for both individuals and trade unions whose rights are infringed.<sup>92</sup> This includes orders of reinstatement and back pay for dismissed employees, including interim reinstatement. There are also a range of collective remedies where the trade union can demonstrate that it has suffered institutional harms. This might include an order for trade union access to the employer’s property; reimbursement of organizational and legal costs incurred by the trade union; or ordering the posting of notices by the employer setting out its infractions under the labour code. In serious cases, it is also possible for the Labour Board to order ‘remedial certification’ of the trade union as the bargaining representative, though such orders are exceptional and issued within the context of serious violations of the ‘unfair labour practice’ provisions.<sup>93</sup>

The legal structure of the right to organize in the Ontarian jurisdiction in Canada displays the following features: (i) it combines individualist and collectivist elements in respect of right-

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<sup>92</sup> For a full discussion of the range of individual and collective remedies, see D. Doorey, *The Law of Work* (Toronto: Emond Publishers, 2017), ch 40.

<sup>93</sup> Doorey, *ibid.* See also D.D. Carter, G. England, B. Etherington, and G. Trudeau, *Labour Law in Canada* (The Hague: Kluwer, 5<sup>th</sup> edition 2002), 244-247.

holders, by positing ‘institutional’ and ‘personal’ rights; (ii) it has a relaxed approach to standing requirements, permitting trade unions to enforce ‘personal’ rights on behalf of affected individuals (though the converse does not hold since the ‘institutional’ rights of trade unions cannot be enforced by individuals); (iii) it combines individualist and collectivist elements at the remedial level, providing a range of possible remedies for the individual and collective harms that result from unfair practices. This demonstrates the scope for variation even within the broad parameters of a North American ‘Wagner Act’ model, with the Canadian conception of the ‘right to organize’ displaying complementarity between individual and collective elements across all three axes.

#### **D. The Australian system of ‘general protections’: complementarity between the individual and the collective**

In Australia, legal protection against anti-union victimisation is contained in Division 4 of Part 3-1 of the Fair Work Act 2009, and are known as the ‘General Protections’. Section 346 of the Act provides that ‘A person must not take adverse action against another person because the other person: (a) is or is not, or was or was not, an officer or member of an industrial association; or (b) engages, or has at any time engaged or proposed to engage, in industrial activity...’ The concept of ‘adverse action’ is amplified in s. 342 (1) and includes situations where an employer ‘dismisses an employee, injures an employee in their employment, alters an employee’s position to their prejudice, or discriminates between an employee and other employees of the employer’.<sup>94</sup> The category of ‘industrial activities’ protected in s. 346 (b) is similarly broad, although the legislation also protects *negative* freedom of association through its ‘General Protection’ guarantees.<sup>95</sup>

In terms of the right-holder, s. 346 contemplates legal protection for ‘persons’. As Creighton points out, the Australian approach is in some respects much wider than the UK position in extending statutory protection beyond ‘employees’ to regulate the relations between

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<sup>94</sup> A. Stewart, A. Forsyth, M. Irving, R. Johnstone and S. McCrystal, *Creighton and Stewart’s Labour Law* (Annandale: Federation Press, 6<sup>th</sup> ed 2016), [20.47].

<sup>95</sup> B. Creighton, ‘Individualization and the Protection of Worker Voice in Australia’, in A. Bogg and T. Novitz (eds), *Voices at Work* (Oxford: OUP, 2014), 241. See also V. Lambropoulos and M. Wynn, ‘Unfair Labour Practices, Trade Union Victimisation and Voice: A Comparison of Australia and the United Kingdom’ (2013) 34 *Adelaide University LR* 43.

employers and independent contractors.<sup>96</sup> Nevertheless, Creighton has emphasised that the ‘General Protections’ in the Fair Work Act 2009 do ‘not expressly confer any protections (or positive rights) upon industrial associations as vehicles for the exercise of collective voice. Instead it provides protection against adverse action for individuals who engage in industrial activity, and permits associations to initiate enforcement proceedings on behalf of their members or potential members.’<sup>97</sup>

In terms of standing to enforce the ‘personal’ rights in s. 346, the legislation makes provision for ‘collective’ enforcement of those rights. For example, in enforcing the dismissal provisions, s. 365 provides that either the dismissed individual *or* ‘an industrial association that is entitled to represent the industrial interests of the person’ may make an application to the Fair Work Commission alleging a breach of the ‘General Protections’ provisions. If the conciliation or arbitration of the dispute is not possible, the complainant may then seek a judicial remedy in the Federal Court.<sup>98</sup> The standing rules therefore adopt a complementarity approach, permitting either individual or collective enforcement of the individual right.

Finally, the remedies typically involve reinstatement or the payment of compensation that is not subject to a statutory cap.<sup>99</sup> According to s 545 (2) (b), the compensatory award is calculated by reference to ‘loss that a person has suffered because of the contravention’. Creighton and Stewart highlight the breadth of this formulation, which extends to ‘damages for non-economic loss, such as shock, distress or humiliation, or damages for loss of an opportunity.’<sup>100</sup> It may also be possible to seek an interim injunction to restrain the dismissal. The legislation also makes provision for the imposition of financial penalties. The maximum penalty for corporations is \$54,000 and \$10,800 for other persons.<sup>101</sup> It is also possible for the court to issue a discretionary order to apportion some or even the entire financial penalty to the individual, the applicant industrial association or the Commonwealth.<sup>102</sup> This enables some measure of satisfaction to be provided to trade unions that may be seriously affected by acts of individual victimization against trade unionists.

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<sup>96</sup> Creighton, n.95 at 238.

<sup>97</sup> *Ibid.*, 233.

<sup>98</sup> Stewart et al, n.94 at 687-688.

<sup>99</sup> *Ibid.*, 688.

<sup>100</sup> *Ibid.*, 689.

<sup>101</sup> *Ibid.*, 688.

<sup>102</sup> Creighton, n.95 at 245.

The legal structure of the ‘right to organize’ as protected in the ‘General Protections’ in Australian law displays the following features: (i) it adopts an individualist approach to the right-holder, conferring the primary rights on persons. Compared with other jurisdictions, however, it takes an especially broad approach to protected individuals by including independent contractors within its scope; (ii) in terms of standing and enforcement, the Australian legislation may be described as adopting a complementarity model, in giving representative ‘industrial associations’ standing to enforce the ‘General Protections’. There is also a statist element in that an inspector can seek the imposition of a financial penalty against a party contravening the ‘General Protections’;<sup>103</sup> (iii) while the remedies are predominantly focused upon individual redress, reflecting the character of the underlying primary rights, the imposition of financial penalties may provide a form of collective redress where the court apportions part of the financial penalty to an affected trade union. In this way, the remedial structure may also be characterized in terms of individual-collective complementarity.

Creighton offers a cautious evaluation of the ‘General Protections’ in assessing their contribution to workplace ‘voice’.<sup>104</sup> On the one hand, Creighton is concerned with the protection of negative freedom of association in the Fair Work Act 2009 scheme, and its effects in undermining collective voice mechanisms. On the other hand, he argues that the Australian conception of the ‘right to organize’ goes considerably beyond many other Commonwealth jurisdictions in terms of the personal scope of the rights, the permissive rules on standing to enforce those rights, and the availability of pecuniary penalties in the remedial armoury of the courts.<sup>105</sup> These features were all conducive to an effective regulatory regime. The brief survey of the right to organize in the UK and the US supports Creighton’s favourable assessment. There are greater structural similarities between the Australian and the Canadian approach which, although based upon an ‘unfair labour practice’ model, is similarly infused with balanced protection of individual and collective interests in the rules on standing and enforcement, and in the provision of remedies.

### **E. Individualism and Collectivism: A Useful Distinction?**

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid., 247-248.

<sup>105</sup> Ibid., 247.

To what extent is the distinction between ‘individualism’ and ‘collectivism’ a useful one in analysing and evaluating the implementation of a ‘right to organize’? A comparative perspective suggests that there are five aspects of the distinction that warrant particular emphasis. First, the characterisation of a legal strategy as ‘individualist’ or ‘collectivist’ requires greater specificity if that characterisation is to be useful or illuminating. Very often, the bare fact that a legal right is conferred on an individual right-holder is treated as dispositive of the ‘individualist’ categorisation. The effect of this is obscure to the variety of ways in which legal rights can blend ‘individual’ and ‘collective’ elements in a complex structure. The Australian law provides an excellent example of this, where ostensibly ‘individual’ rights are supported by wide rules on standing to enforce those rights and supported by pecuniary penalties that have a collective dimension. There may be good reasons for permitting the trade union the right to pursue a victimisation claim on behalf of an individual worker, even where the individual is disinclined to pursue her claim on her own behalf. This is because the linkage between the individual and collective interest is usually strong in situations of anti-union victimisation, harm to the individual being simultaneously harm to the group itself.<sup>106</sup>

Second, it would be profoundly mistaken to fail to take seriously the critical importance of individual protections to support collective purposes. The well-documented failings of the US system are significantly attributable to the paltry *individual* remedies and legal enforcement regime where employees are dismissed with effective impunity. In this vein, Estlund has posed the following question of US law: ‘What if labor law had kept up with the times and added a private right of action for anti-union discrimination that the law already condemns? We might have had a “common law” of anti-union discrimination, with cross-fertilization from other wrongful discharge doctrines.’<sup>107</sup> In other words, a strongly enforced private right of action for anti-union discrimination, with effective remedies for victimised individuals, must be regarded as a necessary (but not sufficient) component of any collective rights strategy. This is also supported by the experience of UK law. During a statutory ballot process under the Schedule A1 recognition procedure, the Schedule makes provision for an

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<sup>106</sup> It does not follow that a trade union should be permitted to waive or extinguish an individual claim against the wishes of the individual, where she has had her right infringed by the employer. This would constitute a serious failure of corrective justice in respect of the individual’s rights and their vindication.

<sup>107</sup> Estlund, n.82 at 40.

‘unfair practice’ jurisdiction.<sup>108</sup> It envisages a collective right for trade unions or employers, and it confers no rights on individual workers. It also coupled with a collective remedy, which permits the Central Arbitration Committee to make an order that the offending party take action to mitigate the effects of the unfair practice. The ‘unfair practice’ provision is broad enough to encompass the victimisation in the *Carrington* case, through the broad category of ‘undue influence’, but it gives no legal redress to individual workers. The absence of any individual protections is unlikely to contribute to a recognition procedure that is adjudged a ‘collective’ success for trade unions, if individuals are too cowed to support the union’s recognition claim.

Third, the relative strengths of the Canadian and Australian legal regimes, in comparison to the UK and US legal regimes, is attributable to the complementarity of collective and individual protection. In this way, it is unhelpful to pose the regulatory choice as lying between either an individual rights or a collective rights strategy. Rather, a successful legal regime combines elements of both within an overarching regulatory strategy, providing rights and redress for individual workers and trade unions. This is supported by philosophical work on the nature and justification of collective rights. For example, Dwight Newman has argued that freedom of religion provides a paradigmatic instance of interdependence between collective and individual interests.<sup>109</sup> Religious groups must enjoy certain rights of non-interference with their internal governance; otherwise individual rights to engage in religious practices will be deprived of the necessary social context for their full and effective realization. Freedom of association is a compelling candidate for this ‘complementary rights’ model.<sup>110</sup> The individual right to associate would be deprived of the necessary social basis for its exercise without strong trade unions that provide an associational context for those individual choices. This interdependence of the individual and collective was also recognised by the European Court of Human Rights in *Wilson v UK*, where the Court concluded that the rights of individual trade union members *and* the independently grounded rights of the trade union had been violated by the employers’ practice of offering financial inducements to contract out of the collective agreement.<sup>111</sup> The individual rights and group rights enjoyed a mutually supportive existence under the general right to freedom of association.

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<sup>108</sup> TULRCA 1992, Schedule A1, para 27A(2).

<sup>109</sup> Newman, n.5 at 159-160.

<sup>110</sup> For discussion, see Bogg and Ewing, n.12, at 406-408.

<sup>111</sup> [2002] IRLR 568.



Fourth, the ‘individualism’ of juridical form may sometimes be less important in determining the social effects of legal rights than other regulatory choices that are ancillary to the structure or form of rights. As an example, let us consider the different evidential rules on establishing ‘anti-union animus’ in trade union victimisation cases. These procedural rules can be pivotal in determining the efficacy of legal protections. In Canada, for example, legislation or case law has established legal presumptions of improper motivation, requiring the employer ‘to tender credible evidence as to another motive.’<sup>112</sup> There are also strong legislative provisions under the ‘General Protections’ in Australian law. In situations of multiple possible reasons for ‘adverse action’, s. 360 of the Fair Work Act 2009 provides that it is sufficient if one of those reasons was a prohibited reason under the statute. Further, s. 361 of that Act provides for a legal presumption that ‘adverse action’ is for a prohibited reason unless the employer can prove otherwise. While this provision has been emasculated somewhat by judicial interpretation,<sup>113</sup> it still provides a powerful statutory technique for mitigating the evidential difficulties faced by claimants in proving the discriminator’s reason for action. In the US, by contrast, s. 10(c) of the Wagner Act places the burden on the General Counsel to prove that the employer was motivated by a prohibited reason. These evidential difficulties are exacerbated by the employers’ protected free speech rights, which limit the evidence that may be adduced to support a finding of anti-union animus.<sup>114</sup>

The UK position is more complex. In situations of anti-union ‘detriment’, the legal threshold is that the employer’s ‘sole or main purpose’ must be for a prohibited reason. The stringency of this standard is mitigated by TULRCA 1992, s. 148 (1) which provides that it is for the employer to show its ‘sole or main purpose’; though as Deakin and Morris have pointed out, it remains for the worker to prove that the motivating purpose was unlawful under the statute.<sup>115</sup> In dismissal cases, the burden of proof probably lies on the employee in demonstrating the reason for dismissal where she would otherwise lack the requisite continuity of employment for a general unfair dismissal claim; but otherwise the burden is on the employer to demonstrate the reason for dismissal.<sup>116</sup> These variations in the technical

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<sup>112</sup> Carter et al, n.93 at 237.

<sup>113</sup> *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2012) 248 CLR 500.

<sup>114</sup> Gorman and Finkin, n.78 at 159.

<sup>115</sup> See S. Deakin and G. Morris, *Labour Law* (Oxford: Hart, 6<sup>th</sup> ed. 2012), 835.

<sup>116</sup> *Ibid.*, 820

rules on procedure and evidence, while critical to the effectiveness of anti-victimisation protections, are orthogonal to the ‘individualism’ of the right. Nevertheless, strong worker-protective norms are likely to reflect the strength of the legal system’s commitment to autonomous trade unionism as an overarching policy goal. In this teleological sense, then, the detailed rules that condition the law’s effectiveness are often a function of the degree of general functional commitment to ‘collectivism’ in the legal regime.

Fifth, there are unresolved questions about how ‘collectivism’ might manifest itself in specific legal provisions. Consider the following. Should the ‘right to organize’ be confined to protecting established ‘trade union’ activities or should it also extend to more informal associational activities between workers?<sup>117</sup> US law protects ‘concerted activity’ which protects association between two or more workers.<sup>118</sup> Australian law also adopts an expansive approach to concerted activity, so as ‘to encompass ad hoc groupings of employees or contractors, so long as they have the purpose of protecting or promoting the interests of their members.’<sup>119</sup> By contrast, Canadian law focuses its protection more narrowly on trade union activities.<sup>120</sup> UK law adopts a similarly restrictive approach. In *Chant v Aquaboats Ltd*, for example, an employee (who was a trade union member) organized a petition regarding workplace health and safety.<sup>121</sup> 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. Which of these approaches is most ‘collectivist’? It depends, of course, on the meaning that one ascribes to ‘collectivism’. On the one hand, the broad protection of all forms of concerted activity might create alternative workplace associations that compete with and undermine established trade unions. On the other hand, confining the right to organize to established trade unions provides a weak norm in the circumstances of precipitous trade union decline in the private sector. Treating ‘collectivism’ as if it had a single uncontroversial meaning obscures these vital normative distinctions.

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<sup>117</sup> For a discussion of this issue from a theoretical perspective, see A. Bogg and C. Estlund, ‘Freedom of Association and the Right to Contest: Getting Back to Basics’ in Bogg and Novitz n.95, at 141.

<sup>118</sup> NLRA Sec. 7, 29 USC 157.

<sup>119</sup> Creighton, n.95 at 232, discussing s. 12 of the Fair Work Act 2009.

<sup>120</sup> D. Doorey, ‘Graduated Freedom of Association: Worker Voice beyond the Wagner Model’ (2012) 38 *Queen’s Law Journal* 515.

<sup>121</sup> [1978] 3 All ER 102.

Finally, the ‘individualist-collectivist’ perspective might be concerned with the social effects of legal norms on collective structures and practices. Where legal norms have demonstrable causal effects in supporting strong trade union organization, we might describe such rights as ‘collectivist’ (in effect, even if not in form). Given Simpson’s deep commitment to ‘law in context’, this empirical sense of the ‘collectivist’ categorisation of legal norms is especially prominent in his work. This is obviously contingent on the specification of an appropriate metric of collectivism. Furthermore, if we are seriously interested in measuring the social effects of legal norms, it is important to develop and apply rigorous empirical methods that are appropriate to that task. At times, lawyers of a ‘collectivist’ persuasion have not done this, particularly in assessing the impact of human rights litigation on workplace practices. For example, Simpson recently described jurisprudence from the Supreme Court of Canada establishing constitutional rights to bargain collectively and to strike as ‘optimistic straws in the wind’, and that ‘scepticism as to the likelihood’ of ECtHR judgments having ‘any real impact’ remains ‘an eminently defensible stance.’<sup>122</sup>

Measuring the impact of constitutional litigation on workplace practices is a worthy empirical project, but I know of no serious empirical studies to date. In the absence of such an empirical project, there is a danger that empirical speculation reflects underlying normative reservations about the judicial role or human rights discourse. Certainly, it is an advantage of constitutional litigation that it provides a *political* opportunity for workers and trade unions to prompt legislative changes by elected governments. This creates a ‘collective’ impact in prompting changes to regulatory environments that affect workers as a whole. This makes constitutional litigation qualitatively distinct from individual litigation under anti-victimisation provisions. *Wilson v UK* is an excellent case in point. It is no small irony that the ECtHR developed the idea of a trade union right to redress which was very much in line with Simpson’s earlier ‘collective rights’ proposal in his ‘Freedom of Association and the Right to Organize’ piece. That this failed to translate into a statutory *collective* right for trade unions in s. 145B TULRCA 1992 represents a failure of politics, not a failure of European human rights law. The controversial and complex character of these causal assessments underlines the difficulties involved in developing an empirically robust ‘law in context’ research agenda in this area.

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<sup>122</sup> B. Simpson, ‘Comment: Alan Bogg on Bill Wedderburn and Kahn-Freund, Freedom of Association, and the “Autonomy” of Labour Law’ (2015) 44 ILJ 352, 354-355.

#### 4. INDIVIDUALISM VERSUS COLLECTIVISM IN TRADE UNION AUTONOMY

The strongest version of the ‘individualism’ critique is set out in Simpson’s analysis of s. 174 TULRCA 1992. This statutory provision controversially protects an individual right to choose a trade union. According to Simpson, this forms part of a larger pattern of intrusive state regulation of internal trade union affairs, such as statutory balloting requirements and restrictions on trade union discipline of its members. This body of law constitutes a repudiation of ‘collectivism’ and a triumph of ‘individualism’, Simpson writes, seeming to suggest that the two ideals are locked in a zero-sum struggle for supremacy. A legitimate legal regime would accord primacy to trade union autonomy, and the collective right of the trade union to determine its own internal affairs. In my view, this presentation of a zero-sum conflict between ‘individualism’ and ‘collectivism’ is unhelpful, and it obscures more than it illuminates. There are three reasons that support dispensing with the analytical distinction, each of which I address at greater length below. First, an individual ‘right to exit’ the trade union provides a strong support for trade union autonomy and collective self-determination. As such, an *individual* right provides a foundation for *collective* autonomy, hence ‘individualism’ and ‘collectivism’ stand in a mutually supportive relation. Second, ‘individualism’ deflects attention away from the important normative differences between different types of individual right against the trade union. Some individual rights are more important than others, and deserve stronger protection where they conflict with collective decision-making. ‘Individualism’ is too indiscriminating a category. Third, many of the difficult regulatory questions in this area of the law require sensitive balancing between competing rights and interests. It is preferable to identify those competing rights and interests, and to develop arguments justifying the ascription of relative weight to these competing rights and interests, than to stack the deck in favour of a ‘collectivist’ solution. For example, where a trade union asserts a right to discriminate against black workers in its bargaining activities, it is not clear that ‘collectivism’ should prevail.

First, the effective guarantee of an individual right of exit from the group provides an important safeguard against oppressive and unjust actions by the group against its individual members.<sup>123</sup> Where individual exit is protected through the legal system, this weakens the

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<sup>123</sup> On the normative functions of ‘exit’, see Newman, n.5 at 156-165.

arguments in favour of legal intervention to impose liberal democratic structures on internal decision-making inside groups such as trade unions. That is why, as Kahn-Freund's work on the 'individualist tradition' recognised, the existence of strong closed shop arrangements provided a justification for legal intervention to protect the individual from arbitrary abuses of power. This justification was based in the absence of an individual's right to exit the trade union. Stuart White has also acknowledged this within the context of closed shop arrangements: 'Since union shop arrangements obviously have the effect of reducing the individual union member's power to exit the union if he/she so desires, they may also reduce the individual's power of "voice" within the union...The liberal state must substitute its own direct regulatory power for the indirect regulatory power of exit that the individual union member is no longer readily able to exercise.'<sup>124</sup> The effective individual freedom to exit may even entail the liberal state's toleration of associations that organise their internal affairs in illiberal or undemocratic ways.<sup>125</sup> In this way, individual exit operates in support of 'collectivist' values of trade union autonomy.

Second, 'individualism' glosses over important normative distinctions between different types of individual right. Let us take the example of the individual's refusal to participate in strike action following a lawful strike call by the trade union. Section 65 TULRCA 1992 protects an individual's right to refuse to participate in industrial action. The reasons for individual refusal are irrelevant to the existence of statutory protection: it is the individual's *choice* that is protected. By contrast, the common law adopts a more nuanced approach to individual protection. In *Esterman v NALGO*, the court adopted an interpretation of the trade union's disciplinary rules in the contract of membership that was sensitive to the member's conscientious objection to the proposed strike action.<sup>126</sup> On a bluntly 'individualist' approach, both approaches seem to be objectionable in subordinating the collective will to the individual's refusal to obey the order. This would ignore important moral differences between the two scenarios, however. An 'individualist' approach that had the purpose and effect of disrupting collective action, through the provision of a free-riders' charter, is certainly objectionable. An 'individualist' approach that is carefully tailored to a right of conscientious objection, and the importance of respecting decisions that lie at the very core of

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<sup>124</sup> S. White, 'Trade Unionism in a Liberal State', in A. Gutmann (ed), *Freedom of Association* (Princeton: Princeton UP, 1998) 330, 349.

<sup>125</sup> A. Gutmann, 'Freedom of Association: An Introductory Essay', in A. Gutmann (ed), *Freedom of Association* (Princeton: Princeton UP, 1998) 3, 23.

<sup>126</sup> [1974] ICR 625.

the person's moral personality, is attractive and legitimate. For similar reasons, liberal defenders of the closed shop have qualified this defence through the provision of a 'conscientious objection' opt-out from union security practices.<sup>127</sup>

Finally, the simple dichotomy between 'individualism' and 'collectivism' is too categorical to be useful in balancing the 'right to exclude' against important competing interests. For example, racist membership exclusion practices constitute an affront to the dignity and economic opportunities of black workers.<sup>128</sup> It is a situation where the right to exclude is, in Stuart White's terminology, in conflict with the dignitarian rights and economic opportunities of workers excluded on invidious grounds. Unlike intimate or expressive associations, trade unions would find it difficult to justify the claim that racist exclusionary practices are central to the moral personalities of their members. Consequently, such membership practices would not be entitled to presumptive respect as exercises of liberty of conscience or expression. Upholding the individual rights of black workers may involve a triumph of 'individualism' over 'collectivism', but there is nothing to be regretted in that. The moral considerations would shift again if we were evaluating the trade union's right to exclude members of far-right political parties. Here we may be strongly inclined to uphold the union's right to exclude. The trade union's expressive and conscientious commitment to egalitarian politics mean that the right to exclude is especially weighty in this situation, whereas countervailing dignitarian considerations of BNP activists are not obviously engaged.<sup>129</sup> To describe this as 'collectivist' or 'individualist' is something of a distraction from the moral balancing exercise that is needed.<sup>130</sup>

## **5. CONCLUSION: THE NECESSITY OF INDIVIDUALISM IN COLLECTIVE LABOUR LAW**

I have argued in this paper that 'individualism' is an indispensable element in a humane and decent regime of collective labour rights. At the abstract level of normative foundations, the 'humanistic principle', which identifies the good of individual human beings as the aspiration

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<sup>127</sup> White, n.124, at 346-347.

<sup>128</sup> S. White, 'Freedom of Association and the Right to Exclude' (1997) 5 *The Journal of Political Philosophy* 373, at 384.

<sup>129</sup> See *ASLEF v UK* [2007] ECHR 184.

<sup>130</sup> See V. Mantouvalou, 'Is There a Human Right Not to Be a Trade Union Member?' in C. Fenwick and T. Novitz (eds), *Human Rights at Work* (Oxford: Hart, 2010), 439.

of associational activity, establishes a basic threshold of ethical acceptability for competing theories of labour rights. Any theory of labour rights that fails to meet this threshold does not deserve our moral allegiance. The same would be true of any human community, including trade unions and other forms of labour association, which fails in evincing equal concern for the good of its individual members. With respect to the 'right to organize', individual rights and remedies are indispensable components of an effective legal regime. It does not follow from this, however, that an effective legal regime could be implemented without any incorporation of collective elements. The most effective legal regimes create space for collective interests, through the protection of group rights, broad standing rules for rights-enforcement, and comprehensive remedies. These regimes are neither 'individualist' nor 'collectivist', but are instead based upon the complementarity of individual and collective rights and remedies. With respect to trade union autonomy and the union's right to exclude, this must also be tempered by a more nuanced account of competing individual rights. In particular, not all individual rights have the same weight when balancing them against the trade union's 'collective' right to set its own membership criteria. Some individual rights, such as the right to conscientious objection or the right not to be subjected to unjust discrimination, may sometimes override the trade union's right to exclude. We need to get beyond the tribalism of 'individualism' and 'collectivism' as antithetical worldviews, and recognise the multiplicity of claims that are often elided when we fall into that reductive trap. The value of Bob Simpson's work is that it provides an admirable foundation for a balanced assessment of the virtues and vices of individualism and collectivism in collective labour law.