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Does Routine Breach of Worker-Protective Labour Law Constitute a Breach of the Rule of Law?

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Introduction

1. The Problem of Routine Breach

Routine breach of worker-protective labour law has become a pervasive and normalised feature of the legal governance of work. In the United Kingdom, statutory protections governing minimum wages, working time, paid leave, and workplace conditions remain formally intact, yet empirical evidence consistently demonstrates high levels of non-compliance.[1] Workers are underpaid, denied statutory entitlements and subjected to unlawful working practices with a frequency that is difficult to reconcile with the continued existence of a comprehensive legal framework governing the employment relationship. These developments are not confined to isolated sectors or marginal actors but are observable across a wide range of industries and forms of work, including both traditional employment and newer, more fragmented labour arrangements.[2]

The dominant response to this phenomenon has been to frame it as an enforcement problem. Within this account, routine breach is explained by reference to institutional weaknesses: declining trade union density, the erosion of collective bargaining, under-resourced labour inspectorates, fragmented regulatory regimes, and increasing reliance on individualised, complaint-driven enforcement mechanisms. These explanations are important and well-supported. However, they leave a more fundamental question underexplored. The difficulty is not simply that labour law is inadequately enforced. It is that labour law continues to operate as a recognisable legal framework under conditions in which its practical effects are systematically weakened.

Employers continue to adopt the language of compliance. Regulatory bodies continue to operate through formally legal procedures. Workers continue to hold statutory rights. Yet these elements coexist with patterns of routine non-compliance that are both widespread and persistent. The problem, therefore, is not one of legal absence, but of the continued presence of legality under conditions in which the capacity of the law to constrain the exercise of

[1] See, for example, D. Whyte and R. Dukes, 'Briefing: The Government's Fair Work Agency Risks Becoming a "Toothless Watchdog"' (Institute of Employment Rights, 7 April 2026) <https://www.ier.org.uk/publications/briefing-the-governments-fair-work-agency-risks-becoming-a-toothless-watchdog/>. See also R. Dukes, 'Neoliberalism and the Rule of Law: Employment Rights Enforcement in the UK' (forthcoming, *German Law Journal*) [manuscript on file with author], esp p. 17.

[2] Dukes, 'Neoliberalism and the Rule of Law', 1-3, 11-12.

economic power appears attenuated. This raises a more difficult question than that typically posed within labour law scholarship: not simply whether labour law is effectively enforced, but whether legality itself continues to operate as a meaningful constraint on power.[3] The point is not that labour law has ceased to exist. On the contrary, the difficulty addressed in this thesis arises precisely because worker-protective norms remain formally present. Statutory rights continue to define minimum entitlements. Tribunals and enforcement bodies continue to exist. Employers continue to describe themselves through the language of compliance, procedure and good governance. The problem is therefore more subtle than one of 'lawlessness' or open illegality. It concerns a condition in which legal form persists while the institutional conditions necessary to make that form practically effective are weakened.[4]

This distinction matters because much rule of law analysis proceeds from a visible contrast between legality and lawlessness. The routine breach of labour law presents a less dramatic but, in some respects, more revealing case. It does not involve the formal suspension of legality, nor the disappearance of legal institutions. Instead, it involves the ordinary coexistence of legal norms with patterns of non-compliance that are sufficiently widespread, persistent and institutionally absorbed to raise doubts about whether those norms still operate as practical constraints on employer power. The question is therefore not whether individual employers sometimes break the law. No legal system eliminates breach entirely. The question is whether breach becomes sufficiently normalised that the practical relationship between law and power is altered.

The empirical basis for assessing that claim is developed in Chapter 4, which examines the institutional conditions through which routine breach is produced, obscured and absorbed in the contemporary United Kingdom labour law system. This is the sense in which routine breach raises a rule of law question. The rule of law is not exhausted by the existence of rules, nor by the availability of formal remedies in principle. If legal rights are routinely unavailable in practice, if breach is difficult to detect, if workers are structurally unable to complain, and if organisational compliance comes to be demonstrated through procedural forms rather than substantive constraint, the rule of law is weakened even though its

[3] G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, 2013), 19-23.

[4] G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61; L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012); *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

institutional vocabulary remains intact. The problem is not legal absence, but ineffective legality: a condition in which law remains visible, but its capacity to require power to justify itself is diminished.[5]

2. Research Question and Central Claim

This thesis addresses that question by asking:

Does the routine breach of worker-protective labour law constitute a breach of the rule of law?[6]

At first glance, the answer may appear straightforward. If legal rules exist but are routinely not complied with, then the rule of law is undermined. Yet this intuition obscures the complexity of the phenomenon under examination. The rule of law is not simply a matter of compliance rates, nor can it be reduced to the existence of legal rules or institutions. It is a concept that has been understood in multiple ways, ranging from formal accounts emphasising generality and predictability, to more substantive approaches concerned with justice and rights.

This thesis adopts a different approach. It treats the rule of law as a teleological concept, concerned with the purposes that legality is meant to serve, while recognising that even formal accounts of the rule of law share a core concern with law as a means of controlling power. Drawing in particular on the work of Martin Krygier, it understands the rule of law as oriented toward the *reduction of arbitrariness in the exercise of power*.[7] From this perspective, the significance of legal norms and institutions lies not in their formal characteristics alone, but in their capacity to render authority accountable, to structure justification, and to constrain the exercise of power in practice.

The central claim of this thesis is that routine breach of worker-protective labour law constitutes a breach of the rule of law, not because legal rules have disappeared, but because

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[5] M. Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Hart Publishing, 2009), 45-69; L. B. Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press, 2016), 113-122, 206, 214-217.

[6] For the wider socio-legal framing of employment law enforcement and compliance, see R. Dukes and E. Kirk, 'Law, Economy and Legal Consciousness at Work' (2021) 72 *Northern Ireland Legal Quarterly* 741; E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405.

[7] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69.

the conditions under which legality constrains power have been transformed.[8] It reflects a transformation in the conditions under which legality operates. Labour law persists as a system of formal norms, institutions, and procedures, yet its practical operation is increasingly mediated through organisational practices, administrative routines, and managerial techniques that reshape how legal obligations are interpreted and applied. Under such conditions, legality may remain intact in form while losing its capacity to function as an effective constraint on power.

Routine breach is therefore not simply a failure of enforcement. It is symptomatic of a broader transformation in legality itself. The claim is deliberately narrower than saying that every violation of labour law constitutes a breach of the rule of law. Such a claim would be both implausible and analytically unhelpful. Legal systems are always marked by some degree of non-compliance. The significance of routine breach lies instead in its pattern, persistence and institutional conditions. Breach becomes a rule-of-law problem where worker-protective norms are systematically unable to discipline the exercise of employer power, and where that inability is not exceptional but structurally reproduced.

This formulation also avoids treating the rule of law as a free-standing moral ideal detached from institutional practice. The rule of law question is not whether labour law achieves justice in any comprehensive sense. Nor is the thesis concerned to defend a thick substantive conception of the rule of law in which legality is equated with fairness, equality or social democracy. Its claim is more limited. Even relatively formal conceptions of the rule of law are concerned with the control of arbitrary power. Once that purpose is taken seriously, the routine failure of worker-protective norms to constrain private economic authority becomes jurisprudentially significant.[9] This matters especially in the labour law context because the workplace is a legally constituted site of power. Employer authority is not merely social or economic. It is structured through contract, property, managerial prerogative, organisational procedure and statutory classification. Labour law therefore does not introduce law into an otherwise non-legal domain. Rather, it modifies an already juridified field by subjecting employer power to public norms, procedural obligations and institutional forms of accountability. Where those norms can be routinely breached without effective detection,

[8] Ibid. See also Dukes, ‘Neoliberalism and the Rule of Law’.

[9] M. Krygier, ‘Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?’ in J. E. Fleming (ed), *Getting to the Rule of Law: NOMOS L* (New York University Press, 2011), 64-104; Krygier, ‘The Rule of Law: Legality, Teleology, Sociology’, 45-69.

challenge or remedy, the problem is not simply that workers lose particular entitlements. It is that the legal architecture designed to make employer power answerable no longer reliably performs that function.[10]

3. Labour Law and the Rule of Law Tradition

To understand the significance of this claim, it is necessary to situate labour law within the broader rule-of-law tradition. Labour law is often treated as an exceptional or anomalous field, concerned with distributive justice, social protection, or the correction of market inequalities. From this perspective, it appears to sit uneasily alongside more formal accounts of legality that emphasise neutrality, generality, and predictability.

This thesis challenges that framing. Building especially on the work of Philip Selznick, it argues that labour law is not external to the rule of law but historically emerges as part of its development.[11] As industrial capitalism transformed the organisation of economic life, it generated new forms of concentrated private power within the workplace. The employment relationship became a site of governance in which employers exercised significant authority over workers' conditions, remuneration, and security. In this context, the extension of legal regulation into the workplace can be understood as part of a broader effort to subject that authority to publicly articulated norms.

From this perspective, labour law represents a continuation of the rule-of-law project. It extends mechanisms of constraint beyond the state into the governance of private economic power. Its significance lies not in the pursuit of distributive justice as such, but in its capacity to render the exercise of employer authority subject to justification, scrutiny, and institutional discipline.

The weakening of this capacity therefore raises a question that extends beyond labour law itself. It calls into question whether the rule of law can continue to operate as a meaningful constraint on power under contemporary conditions. Its rule-of-law significance therefore lies

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[10] P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969), 30-33, 71-79, 108; E. Anderson, *Private Government: How Employers Rule Our Lives* (and Why We Don't Talk About It) (S. Macedo ed, Princeton University Press, 2017), 37-65; L. Wedderburn, *The Worker and the Law* (3rd edn, Penguin, 1986), 4-10.

[11] P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969), 30-33, 71-79, 108.

not only in the articulation of worker-protective standards, but in the institutional arrangements through which those standards are made effective.[12]

4. From Enforcement Failure to Transformation in Legality

The conventional framing of routine breach as an enforcement problem rests on an implicit assumption: that legality remains intact, and that the task is simply to improve the mechanisms through which legal rules are enforced.[13] This thesis challenges that assumption. It argues that the persistence of routine breach reflects a transformation in the conditions under which legality is produced and recognised.

This transformation can be observed at multiple levels. Historically, labour law enforcement in the United Kingdom operated through a relatively dense institutional ecology, combining collective organisation, workplace-level oversight, and public regulation. The significance of this ecology lay in the fact that enforcement was not imagined as a purely external intervention by the state after breach had occurred. Compliance was embedded within the ordinary governance of the workplace. Trade unions and workplace representatives supplied forms of presence, knowledge and leverage that formal legal institutions could not easily replicate. They were able to observe employer practices as they developed, identify patterns of underpayment or unsafe working conditions, and translate individual grievances into collective demands. In this sense, collective organisation operated as a practical condition of legal effectiveness. It did not involve mere bargaining over terms and conditions; it helped make labour standards visible and contestable within the workplace itself.[14]

Kahn-Freund's account of labour law is helpful precisely because it avoids treating the legal system as the sole source of constraint. For Kahn-Freund, the effectiveness of labour law depended upon the existence of countervailing social power. Legal rules mattered, but they operated within a wider institutional field in which workers' collective organisation could give practical force to norms that might otherwise remain formal. This is why his famous

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[12] See L. Wedderburn, *The Worker and the Law* (3rd edn, Penguin 1986); Dickens, *Making Employment Rights Effective*. See also *R (Unison) v Lord Chancellor* [2017] UKSC 51, [68] (Lord Reed).

[13] For a comparable argument in the Australian context, see F. Flanagan and S. Clibborn, 'Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?' (2023) 45(3) *Sydney Law Review*, 337, 340-341.

[14] O. Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1972), 18-19; Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), paras 568-586; R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *Journal of Law and Society* 612.

insistence that even the most efficient inspectors could do little where workers were afraid to complain remains so important. It captures a structural point about enforcement: legal rights are not self-activating. They require institutions, relationships and capacities through which breach can be identified and challenged[15].

This also helps clarify the role of collective bargaining in the present argument. Collective bargaining was not enforcement in the strict legal sense. It did not operate simply as a mechanism for the vindication of statutory rights. Its significance was more ecological. It created workplace institutions, channels of communication, expectations of justification and forms of collective pressure that supported the observance of legal and quasi-legal standards. In this respect, the post-war settlement cannot be reduced either to state enforcement or to voluntarism. It involved a layered arrangement in which collective power, public regulation and specialist legal institutions interacted to make labour standards practically available.

Trade unions, labour inspectorates, and specialised adjudicative bodies interacted to embed legal norms and collectively-bargained norms within the everyday practices of the workplace. Compliance was not secured solely through formal legal mechanisms, but through the continuous operation of collectively organised power and institutional oversight.

From the late twentieth century onwards, this settlement was progressively restructured.[16] The erosion of collective bargaining, the weakening of trade unions, and the fragmentation of regulatory institutions altered the mechanisms through which labour law was realised in practice. Enforcement increasingly relied on individualised claims-making and organisational self-regulation, rather than embedded, collective forms of oversight.

At the same time, developments within organisational and regulatory practice have reshaped the meaning of compliance itself. As socio-legal scholarship has shown, legal norms are not simply applied to organisations but are interpreted and operationalised within them.[17] Organisations develop internal compliance structures - policies, procedures, audit systems - that translate legal requirements into forms compatible with managerial priorities. Over time, these structures may even come to define what compliance is understood to entail.

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[15] O. Kahn-Freund, *Labour and the Law* (P. Davies and M. Freedland eds, 3rd edn, Stevens & Sons, 1983), 13-14, 19, 21-22; R. Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014), 69-91.

[16] See Dukes, 'Neoliberalism and the Rule of Law', 11-13.

[17] Edelman, *Working Law*, 113-122, 206, 214-217.

As Lauren Edelman has forcibly argued, the result is a partial decoupling of legal form and legal substance.[18] Compliance becomes associated with the presence of formal procedures rather than the effective realisation of legal norms. Legality is not displaced, but reconstituted in a form that prioritises visibility, standardisation, and procedural adequacy.

These developments are reinforced by broader transformations in governance. As Alain Supiot has argued, contemporary regulatory systems increasingly operate through 'governance by numbers', translating legal norms into quantifiable targets and performance indicators.[19] Under such conditions, legal judgment is displaced by managerial evaluation, and the justificatory discipline traditionally associated with law is replaced by techniques of measurement and optimisation.

Taken together, these changes suggest that the persistence of routine breach cannot be understood solely as a failure of enforcement. It reflects a shift in the institutional environments through which legality operates. These developments therefore require not only conceptual analysis but empirical investigation and explanation. It is this task that Chapter 4 undertakes.

5. Methodological Approach

The central question that this thesis addresses - whether the routine breach of worker-protective labour law constitutes a breach of the rule of law - cannot be answered through doctrinal analysis alone. Doctrinal analysis can identify the content of legal rights, the formal structure of enforcement mechanisms, and the circumstances in which particular legal duties are breached. It cannot, by itself, explain why legal norms may persist formally while losing their practical capacity to constrain power. Nor can it capture the institutional processes through which legal obligations are translated, diluted, normalised or rendered practically contestable within the workplace.

The thesis therefore treats legality not simply as a body of rules but as an institutional and social practice. This follows from the conception of the rule of law developed throughout the thesis. If the rule of law is understood teleologically, as concerned with the reduction of

[18] Edelman, *Working Law*, 113-122, 206, 214-217.

[19] A. Supiot, *Governance by Numbers: The Making of a Legal Model of Allegiance* (S. Brown tr, Hart Publishing, 2017), 9-10, 145-147.

arbitrariness in the exercise of power, then the relevant question is not only whether legal rules exist, but whether they operate in practice as constraints on authority. A methodology capable of answering that question must attend to the institutional environments through which legal norms are interpreted, mediated and applied.

The thesis is therefore theoretical in orientation but empirically informed.[20] It does not undertake original empirical fieldwork, nor does it seek to provide a comprehensive quantitative account of non-compliance across labour law. Instead, it draws on existing empirical research, policy materials, enforcement data, institutional reports and socio-legal scholarship to ground a theoretical argument about legality. The empirical material is used not merely to illustrate doctrinal failure, but to examine the conditions under which legal form may persist while legal constraint is weakened.

This approach draws on three overlapping traditions. First, it draws on rule-of-law theory to clarify the concept of legality at stake. In particular, Krygier's teleological account provides the framework through which the rule of law is assessed by reference to its capacity to reduce arbitrariness, rather than by reference to formal legal attributes alone. Secondly, it draws on socio-legal scholarship, including Legal Realism and the sociology of law, to examine how legal norms operate within social and institutional contexts. This is particularly important in the labour law context, where the effectiveness of legal rights depends not only on their formal enactment, but on the organisational, collective and regulatory conditions through which they become practically enforceable. Thirdly, it draws on Critical Legal Studies and related traditions to analyse how legal form may retain its appearance of neutrality and coherence even where its constraining function is weakened.[21]

The socio-legal orientation of the thesis is especially important because routine breach is not merely a matter of observable non-compliance. It is also a matter of legal meaning. A worker may have a statutory right and yet lack the knowledge and practical capacity to invoke it. An

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[20] S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *Journal of Industrial Relations* 735; L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023); E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019).

[21] R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1; P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969).

employer may maintain a compliance procedure and yet fail to alter the underlying distribution of power in the workplace. An enforcement body may process cases according to formal procedures and yet lack the resources, mandate or institutional orientation necessary to address systemic breach. In each case, the question is not simply whether law exists, but how legality is produced, recognised and acted upon within particular institutional settings.

The thesis therefore uses empirical material diagnostically. Chapter 4, in particular, does not seek to offer an exhaustive empirical account of non-compliance with worker-protective labour law in the UK. Rather, it uses existing research on labour inspection, tribunal access, regulatory fragmentation, organisational compliance and fissured work to demonstrate how the theoretical vulnerabilities identified in Chapters 1-3 are realised institutionally.[22] The empirical material matters because it shows that routine breach is not episodic or accidental. It is patterned through enforcement design, institutional capacity, the organisation of work and organisational practice.

This also explains why the thesis does not treat enforcement as a merely administrative question. Enforcement is part of the legal architecture through which labour law becomes capable of constraining power. Where enforcement is individualised, fragmented, under-resourced or translated into managerial routines, the legal norm does not simply become harder to vindicate. Its relationship to power changes. The methodological claim of the thesis is therefore that routine breach must be studied across doctrinal, institutional and theoretical registers. A purely doctrinal account would risk treating non-compliance as a gap between law and practice. A purely empirical account would risk describing patterns of breach without explaining their jurisprudential significance. A purely theoretical account would risk abstracting the rule of law from the institutions through which it is realised. The method adopted here seeks to avoid each of these limitations by examining how legality is constituted, mediated and weakened in practice.

The thesis accordingly does not ask only whether labour law is enforced. It asks whether the institutional conditions that allow labour law to function in conformity with the rule of law - that is, as a constraint on the exercise of private economic power - remain intact. That

[22] L. B. Edelman, *Working Law*, 113-122, 206, 214-217; D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 60-72; S. Mustchin and M. Martínez Lucio, ‘The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work Inside the British State’ (2023) 44 *Economic and Industrial Democracy* 528.

question requires a method capable of moving between legal theory and institutional reality. It is in that movement that the thesis locates the rule-of-law significance of routine breach.

6. Structure of the Thesis

The argument developed in this thesis proceeds across a series of analytical levels, each of which approaches the same underlying problem from a different perspective. Although the chapters are framed through distinct lenses, they are not intended as separate or cumulative arguments in the conventional sense. Rather, they are designed to track a single phenomenon - the weakening of labour law's capacity to constrain power - across historical, conceptual, empirical, and normative dimensions.

In recent decades, one of the most influential accounts of the rule of law in scholarship and in policy discourse has been that developed by Friedrich Hayek. The thesis therefore begins with this account. Chapter 1 reconstructs Hayek's definition of the rule of law as a system of general, abstract, and impersonal rules, demonstrating how, within this framework, labour law can appear as a departure from legality rather than an instance of it. This chapter establishes the conceptual tension that underpins the thesis.

Chapter 2 situates labour law within the rule-of-law tradition historically, drawing on Legal Realism, Hasnas, E. P. Thompson, legal pluralism and Selznick to show why labour law should not be treated as an external interference with legality. It argues that the workplace was already a legally constituted site of private power, and that labour law developed as part of legality's response to that power by requiring employer authority to assume forms of justification, contestation and institutional restraint. Chapter 3 then examines the conceptual stability of this account, engaging with Critical Legal Studies and related traditions to demonstrate that the autonomy on which such constraint depends is neither fixed nor secure, but contingent and vulnerable to ideological reconfiguration.

Chapter 4 moves to the empirical level, analysing developments in the United Kingdom to show how these vulnerabilities are realised in practice, as enforcement is restructured in ways that allow legality to persist while weakening its practical effects. In doing so, it provides a diagnostic bridge between the conceptual account developed in Chapter 3 and the constitutional argument advanced in Chapter 5, demonstrating that routine breach is not episodic but institutionally patterned. Chapter 5 returns to the rule of law at a more general

level, drawing on Krygier and Supiot to argue that developments in the field of labour law raise a constitutional question about whether legality continues to function as a meaningful constraint on power under contemporary conditions.

The thesis does not advance a series of discrete claims but demonstrates how a single problem - the persistence of legality alongside routine breach - can be understood across multiple levels of analysis. The recurrence of similar themes across chapters reflects this design, as each stage of the argument examines the same underlying phenomenon rather than introducing a new one.

7. Contribution

The thesis makes three main contributions.

First, it reframes routine breach of worker-protective labour law as a rule-of-law problem, rather than solely an issue of enforcement or compliance. Labour law scholarship has long recognised the central importance of enforcement, particularly where rights depend upon individual workers' ability to identify breach, initiate claims and withstand retaliation. This thesis builds on that literature but frames the analysis differently. It argues that routine breach does not merely indicate that enforcement mechanisms are weak. It raises a deeper question about whether legal norms continue to operate as practical constraints on employer power. The contribution is therefore to connect labour law's enforcement crisis to the jurisprudential question of legality itself.[23]

Secondly, the thesis contributes to rule-of-law theory by extending the analysis of arbitrary power beyond the state. Formal and liberal legalist accounts often associate the rule of law with constraints on public authority. This thesis argues that such accounts are incomplete where significant power is exercised through private legal forms, especially contract, property, corporate organisation and managerial authority. The employment relationship is a particularly important site for this argument because employer power is both private and juridically constituted. It is exercised through legal forms, yet may have profound consequences for workers' income, time, status, security and dignity. A theory of the rule of

[23] G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61; C. Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010), 27-52; L. Dickens, *Making Employment Rights Effective*, 29-48.

law concerned with the reduction of arbitrariness must therefore be capable of addressing private economic power.[24]

Thirdly, the thesis develops a socio-legal account of legality as an institutional achievement. It argues that law's capacity to constrain power depends not merely on the formal validity of rules, but on the practices, institutions and social understandings through which those rules are made effective. This contribution draws together Legal Realist, socio-legal and critical legal traditions. From Legal Realism, it takes the insight that law is constitutive of social and economic relations rather than external to them. From Thompson and Selznick, it takes the claim that legality operates through practices of justification and institutional responsiveness. From Critical Legal Studies, Edelman and Supiot, it takes the warning that legal form may persist while its constraining function is absorbed into organisational or managerial techniques.[25]

The thesis also makes a more specific contribution to labour law scholarship. It challenges the assumption that labour law's rule-of-law significance lies only in the creation of rights or remedies. Instead, it argues that labour law matters as a legal project because it renders employer power answerable. Its institutional forms - collective bargaining, statutory rights, tribunals, inspectorates, grievance procedures and regulatory agencies - are significant because they provide mechanisms through which managerial authority can be scrutinised, justified and constrained. Where those mechanisms are weakened, labour law may remain formally intact while losing its rule-of-law function.

Finally, the thesis contributes a conceptual vocabulary for describing a condition that is often visible but difficult to name: the persistence of legality alongside routine breach. This is not simply non-compliance. Nor is it lawlessness. It is a condition in which legal form remains present but the institutional pathways through which law disciplines power are weakened or reconfigured. Naming this condition matters because it prevents the rule of law from being reduced to the formal existence of legal norms. It insists instead that legality must be assessed by its practical capacity to structure, justify and constrain power.

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[24] E. Anderson, *Private Government*, 37-65; P. Selznick, *Law, Society and Industrial Justice*, 71-79, 270-274; Krygier, 'Four Puzzles About the Rule of Law', 64-104.

[25] R. L. Hale, 'Coercion and Distribution', 470-478; E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1975), 258-269; P. Selznick, *Law, Society and Industrial Justice*, 30-33, 108; L. B. Edelman, *Working Law*, 113-122; Supiot, *Governance by Numbers*, 9-10, 145-147.

8. Conclusion

The routine breach of worker-protective labour law presents a challenge that cannot be adequately captured by conventional accounts of enforcement failure. Such accounts identify important institutional weaknesses, but they do not fully explain why the persistence of formal legal rights can coexist with widespread patterns of non-compliance. The problem addressed in this thesis is therefore not merely that labour law is sometimes breached, but that breach may become routine under conditions in which legal norms continue to appear valid, enforceable and institutionally recognised.

The thesis argues that this condition raises a rule-of-law problem. If the rule of law is concerned with the reduction of arbitrariness in the exercise of power, then it cannot be assessed solely by reference to the formal presence of legal rules. It must also be assessed by reference to the institutional conditions through which those rules constrain power in practice. Labour law is central to that inquiry because it represents one of the principal ways in which modern legal systems have sought to discipline private economic authority. Where worker-protective norms are routinely breached without effective challenge, the question is not simply whether labour law is working, but whether legality continues to perform its constraining function in the workplace.

The argument developed in the chapters that follow is therefore both labour-law specific and jurisprudential. It is concerned with the enforcement of worker-protective norms, but also with what routine breach reveals about law's capacity to rule under contemporary conditions. Where legal form persists while legal constraint weakens, the rule of law is not secured by the existence of rights alone. It depends upon the institutional, collective and social conditions that make those rights usable, contestable and capable of disciplining power. The question is not whether law remains, but whether it still rules.[26]

[26] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68]; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69; P. Selznick, *Law, Society and Industrial Justice*, 108.

Chapter 1: Hayek's Rule of Law and the Challenge of Labour Law

1.1 Introduction

This chapter begins by reconstructing the conception of the rule of law against which labour law has often appeared problematic: a liberal legalist account, most powerfully articulated by Hayek, in which legality is associated with generality, abstraction and predictability. The rule of law remains one of the most enduring and contested principles in legal and political thought.[27] At its core, it aspires to constrain arbitrariness in the exercise of power.[28] Yet the nature of that constraint - whether procedural or substantive, neutral framework or instrument of political economy - has long been disputed.[29] Friedrich Hayek's account is among the most influential.[30] He understands legality not in terms of its distributive effects, but by reference to formal attributes: generality, equality, and legal certainty.[31] On this view, law provides a stable framework within which individuals may organise their affairs, securing freedom not through outcomes but through the form of legal rules themselves.[32] These 'forms' or 'virtues' are not merely desirable; but are constitutive elements of legality itself, drawing the boundary between a system governed by law and one subject to discretionary rule.[33] The function of law, on this account, is not to secure social or economic objectives but to provide a neutral architecture within which individuals can act freely, unencumbered by arbitrary power.[34] Not least because Wedderburn identified Hayek's work as central to the intellectual framework of the labour legislation of the 1980s, his proceduralist account of the rule of law provides a critical point of departure for this thesis.[35] This chapter thus engages with Hayek's argument

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[27] B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004), 3-4, 32; J. Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21(2) *Law and Philosophy* 137; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

[28] F. Hayek, *The Constitution of Liberty* (R. Hamowy ed, University of Chicago Press, 2011), 205-224; F. Hayek, *Law, Legislation and Liberty*, Volume 1: Rules and Order (Routledge, 1982), 35-54 ('LLL 1').

[29] See, for example, P. Craig, 'Formal and Substantive Conceptions of the Rule of Law' [1997] *Public Law* 467; J. Raz, *The Authority of Law* (Oxford University Press, 1979), 210-229; J. Waldron, 'The Concept and the Rule of Law' (2008) 43(1) *Georgia Law Review* 1.

[30] R. Hamowy, 'Introductory Essay', in *The Constitution of Liberty*, 21-22.

[31] F. Hayek, *Law, Legislation and Liberty*, Volume 1: Rules and Order (Routledge, 1982), 35-54 ('LLL 1').

[32] Hayek, *Constitution of Liberty*, 205-206, 210-211, 221-224; Hayek, *LLL 1*, 126-128; Hayek, *LLL 2*, 46-48; Hayek, *LLL 3*, 100-101.

[33] Ibid.

[34] Hayek, *Constitution of Liberty*, 220-221, 340.

[35] See L. Wedderburn, 'Freedom of Association and Philosophies of Labour Law' (1989) 18(1) *Industrial Law Journal* 1, 7-9, 15.

in order to address the broader question that animates the thesis: whether worker-protective labour law can be accommodated within a conception of legality structured by these commitments.

For Hayek, the answer is unequivocal.[36] Labour law exemplifies the shift from *Nomos* - an evolved order of abstract and general rules - to *Thesis*, law as a consciously designed instrument of governance.[37] Unlike private law, which Hayek sees as preserving the neutral constraints of *Nomos*, labour law, in his account, introduces asymmetries that disrupt market coordination and subordinate legality to distributive aims.[38] If, for Hayek, the rule of law ensures that law remains a constraint on power rather than an instrument of control, labour law appears as its negation: a rupture in legal ordering that supplants stability with political contingency. [39]It does not simply operate within a legal framework but alters its character. Law becomes not a constraint on power, but a means of directing it.[40]

The chapter proceeds in three stages. It begins by unpacking Hayek's argument that legality, properly understood, serves as a bulwark against arbitrariness, stabilising expectations through general and abstract rules rather than discretionary commands.[41] Identifying the core features he deems essential to legal legitimacy, it shows that these conditions are not merely desirable features of legal systems but constitutive elements of legality itself. Where legal norms remain general, abstract, and stable, they function as constraints on authority; where law is instrumentalised for economic outcomes, it ceases, in Hayek's sense, to be law in the proper sense.[42] Having established the structural safeguards that Hayek argues sustain the rule of law, the chapter then turns to its wider significance within political and economic thought.[43] It considers his argument that the rule of law is the essential condition for economic and political freedom, situating legality within his broader vision of governance, liberalism,

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[36] Hayek, *LLL 1*, 124-144; F. Hayek, *Law, Legislation and Liberty*, Volume 2: The Mirage of Social Justice (Routledge, 1982), 38-48 ('LLL 2').

[37] Hayek, *LLL 1*, 72-80, 124-144.

[38] Hayek, *LLL 1*, 101-109, 118-123, 141-144; Hayek, *LLL 2*, 82-88, 140-143.

[39] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 2*, 38-48, 86-88.

[40] Hayek, *LLL 1*, 126-128; F. Hayek, *Law, Legislation and Liberty*, Volume 3: The Political Order of a Free People (Routledge, 1982), 100-102 ('LLL 3').

[41] Hayek, *Constitution of Liberty*, 205-224, 229. The point of departure lies in how that constraint is understood and institutionalised.

[42] Ibid.

[43] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 1*, 35-54.

and critique of instrumentalism.[44] Here, the rule of law is framed not simply as a means of ordering legal relationships but as the precondition for a spontaneous, self-regulating social order.[45]

From this vantage point, the chapter turns to Hayek's later work in *Law, Legislation and Liberty*, in which he consolidates his view that the rule of law provides, beyond a constraint on state power, the structural conditions that sustain social and economic co-ordination and personal freedom.[46] Labour law, in this framing, does not merely deviate from the formal attributes of legality but marks a fundamental shift in legal ordering, subordinating spontaneous, evolved rules to political design.[47] By codifying regulatory and distributive objectives into legal structures, labour law, for Hayek, represents not simply a departure from legality but its negation.[48] The significance of this critique lies not only in the legal and political climate in which labour law comes to be treated as suspect, but in the conception of legality on which that result depends.[49] Where Hayek's framework presumes a sharp distinction between law as a neutral, pre-political order and law as a consciously designed instrument of governance, the question that remains is whether labour law can be accommodated within such a framework at all.[50] Whether that separation can be sustained, and whether labour law represents a departure from legality or an instance of its development, is the question to which the following chapter turns.[51] Indeed, where Hayek's account offers a rigorous and internally coherent vision of legality grounded in generality, abstraction, and stability - law constrains power by limiting the scope for discretionary intervention and by sustaining the conditions under which individual freedom and social coordination can emerge - it is precisely this conception that renders labour law problematic.[52] As we explore in more detail in the following chapter, as a body of differentiated, purposive,

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[44] Hayek, *Constitution of Liberty*, 148-150, 205-224; Hayek, *LLL 1*, 35-54, 124-144.

[45] Hayek, *LLL 1*, 35-54.

[46] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 1*, 35-54, 72-80.

[47] Hayek, *LLL 1*, 72-80, 124-144; Hayek, *LLL 2*, 38-48.

[48] Hayek, *LLL 1*, 126-128; Hayek, *LLL 2*, 82-88, 140-143; Hayek, *LLL 3*, 100-102.

[49] Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 7-9, 15; Hayek, *LLL 2*, 140-143.

[50] Hayek, *LLL 1*, 72-80, 124-144.

[51] Hayek, *LLL 1*, 126-128; Hayek, *LLL 3*, 100-102.

[52] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 1*, 35-54, 124-144.

and adaptive rules, labour law appears not simply as an extension of legal regulation but as a transformation in the character of legality itself.[53]

1.2 The Rule of Law as a Meta-Legal Order: Hayek's Framework for Freedom

Friedrich Hayek remains one of the most influential theorists in defining the rule of law as a procedural ideal, advancing the view that abstract, general, and predictable legal rules form the essential conditions for individual liberty and economic coordination.[54] For Hayek, however, the rule of law is not simply a feature of legal systems but a framework through which legality itself is constituted.[55] It is, in his terms, not a rule of law, but a rule about what law ought to be: a 'meta-legal doctrine or political ideal'.[56] On this account, a legal system can be regarded as law in the full sense only insofar as it conforms to certain formal requirements - most prominently generality, equality before the law, and legal certainty.[57] These requirements are not external constraints imposed upon law but conditions internal to its very character.[58] Where they are absent or eroded, law does not merely function imperfectly; it ceases to operate as a stable and impersonal framework of rules and instead becomes increasingly dependent on discretionary authority.[59] In this sense, legality is defined not by the ends law serves, but by adherence to these formal attributes.[60] The rule of law, for Hayek, therefore operates as a criterion of legality itself, distinguishing a legal order governed by general and predictable rules from one in which power is exercised arbitrarily.[61]

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[53] Hayek, *LLL 1*, 124-144; G. Davidov, 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) 34 *Oxford Journal of Legal Studies* 543; H. W. Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34(4) *Comparative Labor Law and Policy Journal* 585, 585-592. See also Chapter 2.

[54] Hayek, *Constitution of Liberty*, 205-224, 310-324. On the ways in which liberal political theory has significantly influenced the rule of law concept see Tamanaha, On the Rule of Law, 32.

[55] Hayek, *Constitution of Liberty*, 210-211.

[56] Ibid, 205-206.

[57] Ibid, 205-224, 310-324.

[58] Ibid, 205-206, 210-211; Hayek, *LLL 1*, 126-128.

[59] Hayek, *Constitution of Liberty*, 221-224, 315-318; Hayek, *LLL 1*, 126-128.

[60] Hayek, *Constitution of Liberty*, 205-211, 221-224.

[61] Ibid.

1.3 Law, Command, and Freedom: The Structure of Non-Arbitrary Order

On this account, the distinction between law and command becomes central to Hayek's understanding of how the rule of law operates as a constraint on arbitrary power.[62] In his Commemoration Lectures in Cairo, Hayek set out - albeit in truncated form - his account of the attributes of a legal system consistent with the rule of law: '[t]he end', he proffered, 'is to limit coercion by the power of the state to instances where it is explicitly required by general abstract rules which have been announced beforehand and which appl[ied] equally to all people, and refer to circumstances known to them,'[63] 'Law in its ideal form', writes Hayek, 'might be described as a "once-and-for-all" command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time.'[64]

Where law takes the form of general and abstract rules, it does not prescribe outcomes but structures the conditions within which individuals may act.[65] Rather than directing conduct toward specific ends, such rules operate as conditions of action, structuring the environment in which individuals make decisions without determining those decisions in advance.[66] As Hayek explains, 'as we move from commands to laws, the source of the decision on what particular action is to be taken shifts progressively from the issuer of the command or law to the acting person.'[67] By contrast, commands operate differently.[68] A direct command prescribes a specific course of action, leaving the individual 'no chance to use [their] own knowledge or follow [their] own predilections'.[69] The distinction is therefore not simply formal but structural: whereas commands determine outcomes, laws define the framework within which outcomes are determined by individuals themselves.[70] In this sense, the 'abstract character' of 'true law' lies in its ability to provide only the framework within which

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[62] Hayek, *Constitution of Liberty*, 218-224.

[63] F. Hayek, The Political Ideal of the Rule of Law (National Bank of Egypt, 1955), 34, quoted in R. Hamowy, 'Introductory Essay' in F. Hayek, *The Constitution of Liberty* (R. Hamowy ed, University of Chicago Press, 2011), 8.

[64] Hayek, *Constitution of Liberty*, 218.

[65] Hayek, *Constitution of Liberty*, 218-224.

[66] Ibid, 218-219, 221-224.

[67] Ibid.

[68] Ibid, 218-219.

[69] Ibid.

[70] Ibid.

individuals act, leaving the relevant decisions to them rather than to the issuer of a command.[71] For Hayek, this is what distinguishes law from domination: where individuals obey general abstract rules laid down without regard to their particular application, they are not subject to another person's will and are therefore free.[72,73] Indeed, '[i]t is because the lawgiver does not know the particular cases to which his rules will apply… that it can be said that laws and not men rule.'[74]

In this way, the coercive force of law is depersonalised.[75] Where rules are general and abstract, coercion does not reflect the will of a particular authority directed toward particular ends, but operates through a framework that applies independently of any specific intention.[76] It is in this sense that Hayek identifies the rule of law as establishing 'the essential conditions of individual freedom'.[77] Freedom, on this account, does not consist in the absence of all constraint, but in the "independence of the arbitrary will of another".[78] Where individuals act within a system of general rules laid down independently of particular purposes, they are not subject to another's will, but operate within a stable framework that enables them to pursue their own ends and not the whims of officials or temporary political expediencies.[79] Critically, he writes, '[w]hen we obey laws… in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free.'[80] The rule of law, therefore, does not eliminate coercion but transforms its character.[81] Coercion becomes predictable, structured, and limited by rules that apply equally and in advance, rather than being exercised through discretionary or ad hoc decision-making.[82] On this account, the distinction between law and command is not merely descriptive but foundational: it marks the boundary between a legal order that constrains

[71] Hayek, *Constitution of Liberty,* 220.
[72] Ibid, 221.
[73] Ibid, 221-224.
[74] Hayek, *Constitution of Liberty,* 221.
[75] Hayek, *Constitution of Liberty,* 221-224.
[76] Ibid, 218-224, 314-318.
[77] Ibid, 148-150, 205-224.
[78] Ibid, 58, 109-112.
[79] Ibid, 109-112, 218-224.
[80] Ibid, 221.
[81] Ibid, 148-150, 218-224.
[82] Ibid, 205-224, 310-324.

power through general rules and one in which power is exercised through discretionary direction.[83]

This distinction between law as a framework of general rules and command as directed intervention underpins Hayek's broader account of law as a spontaneous order.[84] Crucially, it is this feature of law - as a system of general conditions rather than directed outcomes - that allows it to perform a further function within Hayek's framework: not only constraining power, but enabling coordination.[85] On this account, the formal attributes of legality - generality, equality, and certainty - do not merely constrain the exercise of power, they also define the conditions under which complex forms of social and economic coordination can emerge without central direction.[86] Law, in this sense, is not conceived as an instrument for achieving particular outcomes, but as part of an evolved system of rules that enables individuals to coordinate their actions on the basis of dispersed knowledge and independent decision-making.[87] What is at stake, therefore, is not simply the form of legal rules, but the kind of order they make possible.[88] This account is developed more fully in *Law, Legislation and Liberty*, where Hayek extends his earlier analysis by situating the rule of law within a broader theory of spontaneous order.[89] Where *The Constitution of Liberty* presents the rule of law as a procedural safeguard against discretionary authority, Hayek's later work rearticulates it as the structural foundation of an emergent legal and economic order.[90] It is at this point that Hayek's distinction between different forms of law becomes central.[91]

1.4 Nomos and Thesis: Two Forms of Law

The distinction between law as a framework of general rules and command as directed intervention underpins Hayek's broader account of law as constituting a 'spontaneous order'.[92] It is developed most fully in *Law, Legislation and Liberty*, where Hayek refines his

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[83] Ibid, 218-223; Hayek, *LLL 1*, 126-128.

[84] Hayek, *Constitution of Liberty*, 218-223; Hayek, *LLL 1*, 35-54.

[85] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 35-43, 48-54.

[86] Hayek, *Constitution of Liberty*, 310-324; Hayek, *LLL 1*, 35-54.

[87] Hayek, *LLL 1*, 35-54, 72-75.

[88] Ibid.

[89] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 35-54, 72-80.

[90] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 1*, 35-54.

[91] Hayek, *LLL 1*, 72-80, 124-128.

[92] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 35-54.

earlier procedural account of the rule of law by situating it within a broader theory of legal and social organisation.[93] Central to this account is the distinction between *Nomos* and *Thesis*, which marks not merely a classificatory distinction between different kinds of legal rules, but a deeper division concerning the function of law itself.[94]

Nomos refers to rules of just conduct that emerge over time through processes of social interaction, adjudication, and gradual refinement.[95] These rules are not designed to achieve particular outcomes but arise as part of an evolutionary process through which stable patterns of behaviour are formed.[96] In this sense, *Nomos* corresponds to law in its 'material' sense: '[t]he chief function of rules of just conduct is to tell each what he can count upon, what material objects or services he can use for his purposes, and what is the range of actions open to him.'[97] Such rules do not prescribe specific results but establish a framework within which individuals can pursue their own ends.[98]

The defining feature of *Nomos*, on this account, is its generality.[99] Rules are formulated without reference to particular persons, groups, or outcomes, and apply across classes of cases rather than targeting specific situations.[100] Law, in this sense, operates as a structure of constraints that shape the environment within which action takes place, rather than as a mechanism for directing action.[101] It is this feature that allows *Nomos* to function as a framework for coordination: by stabilising expectations, it enables individuals to form plans on the basis of predictable rules that apply independently of any particular intention.[102] Generality, then, is not merely a formal requirement of law but performs a substantive function within Hayek's framework, namely preserving stable legal expectations - or what he terms 'legitimate expectations' - that allow individuals to form long-term agreements with confidence that obligations will be upheld, invest, and adjust to competitive conditions

[93] See also Hayek, *LLL 1*, 72-80.

[94] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 35-54, 72-80.

[95] Hayek, *LLL 1*, 72-80, 101-109.

[96] Hayek, *LLL 1*, 74, 77-80, 101-109, 118-123.

[97] Hayek, *LLL 1*, 108-109.

[98] Ibid.

[99] Hayek, *LLL 1*, 72-80, 124-128.

[100] Hayek, *Constitution of Liberty*, 221-224; Hayek, *LLL 1*, 72-80.

[101] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 108-109.

[102] Hayek, *LLL 1*, 108-109, 118-123.

without fear of sudden rule changes.[103] Because rules are laid down in abstraction from particular circumstances, they are formulated in ignorance of the specific cases to which they will apply.[104] In doing so, they limit the possibility that law can be used as an instrument to advance particular interests or objectives.[105]

Indeed, his understanding of *Nomos* is reflected, for Hayek, most clearly in the domain of private law.[106] Private law, which Hayek describes as 'based on customary rules that emerge over time', developed out of the need 'to facilitate voluntary cooperation and interaction between individuals', enabling them to 'interact freely without being subjected to *arbitrary* changes in rules'.[107] Unlike *Thesis,* which subordinates law to predetermined policy goals, private law operates without a prescriptive function.[108] It ensures that legal stability supports rather than directs economic coordination, its neutrality lying not in the absence of effects but in its provision of a framework that 'ensures the general conditions necessary for peaceful cooperation and economic coordination' without imposing specific outcomes.[109] Closely linked to this is the end-independent character of *Nomos*, rules do not direct individuals toward specific purposes but instead provide the conditions under which individuals can make use of their own knowledge and pursue their own plans.[110]

The law of property, contract, and tort does not, on this account, direct individuals toward particular outcomes, but establishes general conditions under which interactions may take place.[111] Rules governing ownership, exchange, and liability operate independently of any specific purpose, defining the boundaries within which individuals may act rather than prescribing the ends they must pursue.[112] In this way, private law exemplifies the function of law as a framework of coordination: it stabilises expectations by providing general rules that apply across unknown cases, allowing individuals to make use of their own knowledge in

[103] Ibid, 118-123; *Constitution of Liberty,* 229.
[104] Hayek, *Constitution of Liberty*, 221-224.
[105] Ibid; Hayek, *LLL 1*, 124-128.
[106] Hayek, *LLL 1*, 101-109, 118-123.
[107] Ibid, 72-80, 101-109, 118-123.
[108] Hayek, *LLL 1*, 101-109, 124-128.
[109] Ibid, 108-109, 118-123.
[110] Hayek, *LLL 1*, 108-109, 118-123.
[111] Hayek, *LLL 1*, 101-109, 118-123.
[112] Hayek, *LLL 2*, 101-106, 123-129.

forming and executing plans.[113] What is at stake, within this framework, is not merely the form of legal rules, but their capacity to operate independently of particular purposes, thereby limiting the extent to which law can be used as an instrument of directed control.[114]

This stabilising function is reinforced by the other formal attributes Hayek associates with the rule of law, particularly certainty and equality.[115] Where rules are general, consistently applied, and relatively stable over time, individuals are able to anticipate how others will act and to coordinate their behaviour accordingly.[116] Law thus provides the conditions for what Hayek understands as spontaneous order: a system in which complex patterns of interaction emerge not through central direction, but through the alignment of individual plans within a shared framework of rules. [117] Hayek illustrates this most thoroughly through his account of the market as a spontaneous order.[118] Just as prices communicate dispersed information about supply and demand without central direction, general legal rules provide the conditions under which individuals can coordinate their actions without needing to share common ends.[119] The role of law, in this sense, is analogous to that of the price system: it does not dictate outcomes, but enables individuals to adjust their conduct in light of stable and publicly known conditions.[120] Coordination emerges not because outcomes are planned, but because the framework within which action takes place remains sufficiently predictable.[121] The significance of this, for Hayek, is that order does not depend on agreement or direction, but on the stability of the conditions within which action takes place.[122]

Thesis, by contrast, refers to law in its instrumental or purposive form.[123] Unlike *Nomos*, which emerges through processes of evolution and adjudication, *Thesis* consists of deliberately enacted rules designed to achieve specific social, economic, or political

[113] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 108-109, 118-123.
[114] Hayek, *LLL 1*, 124-128.
[115] Hayek, *Constitution of Liberty*, 310-324.
[116] Hayek, *Constitution of Liberty*, 229, 310-324.
[117] Hayek, *LLL 1*, 35-54.
[118] Ibid, 71-75. See also *LLL 2*, 109-120.
[119] Hayek, *LLL 1*, 35-54; Hayek, *LLL 2*, 109-120.
[120] Ibid.
[121] Hayek, *Constitution of Liberty*, 229, 310-324; Hayek, *LLL 1*, 35-54.
[122] Hayek, *LLL 1*, 35-54, 108-109.
[123] Hayek, *LLL 1*, 124-128.

objectives.[124] These rules are not end-independent but are oriented toward particular outcomes, reflecting the intentions of those who create them.[125] The defining feature of *Thesis*, therefore, is its purposiveness.[126] Rather than providing a framework within which individuals pursue their own ends, it directs conduct toward ends determined by legislative or administrative authority.[127] In this sense, *Thesis* reintroduces into law the very element that the rule of law, in Hayek's account, is intended to exclude: the substitution of general rules for discretionary direction is replaced by a system in which rules themselves become vehicles for the pursuit of particular purposes.[128] This shift has implications not only for the content of law but, critically, for its function.[129] Where *Nomos* operates as a system of general conditions that facilitate coordination, *Thesis* transforms law into an instrument of policy.[130] Legal rules become tied to specific outcomes, and their application is assessed not in terms of their generality or consistency, but in terms of their effectiveness in achieving particular goals.[131] Law, on this account, is no longer a framework within which individuals act, but a mechanism through which outcomes are shaped.[132] In this way, the distinction between law and command, central to Hayek's account of the rule of law, begins to collapse.[133] The distinction between *Nomos* and *Thesis* thus marks a transition from law as a system of rules governing interaction to law as a means of directing social and economic life.[134] It is not simply that different kinds of rules are introduced, but that the role of law itself is reconfigured.[135] Where *Nomos* constrains power by subjecting it to general rules, *Thesis* expands the scope of purposive intervention, allowing law to be used as a tool in the pursuit of particular objectives.[136]

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[124] Hayek, *LLL 1*, 72-80, 124-128.

[125] Hayek, *LLL 1*, 124-128, 131-133.

[126] Ibid.

[127] Ibid. See also p. 131-133.

[128] Ibid; *Constitution of Liberty,* 218-224.

[129] Ibid.

[130] Ibid; Hayek, *LLL 1*, 108-109.

[131] Ibid.

[132] Ibid; Hayek, *LLL 2*, 38-48.

[133] Hayek, *Constitution of Liberty*, 218-224; Hayek, *LLL 1*, 126-128.

[134] Hayek, *LLL 1*, 72-80, 124-128.

[135] Hayek, *LLL 1*, 126-128; Hayek, *LLL 3*, 100-102.

[136] Hayek, *LLL 2*, 38-48.

1.5 Kosmos and Taxis: Two Forms of Order

The distinction between *Nomos* and *Thesis* is mirrored in Hayek's broader account of social organisation, which differentiates between *Kosmos* and *Taxis.*[137] This extension is not merely analogical.[138] It situates the legal distinction within a general theory of social order, showing that the contrast between general rules and purposive intervention corresponds to two fundamentally different modes of coordination.[139] These concepts extend the *Nomos/Thesis* distinction beyond the legal domain, situating it within a general theory of how complex social orders arise and are maintained.[140] Rules of *Nomos* sustain *Kosmos* by providing the general conditions under which spontaneous coordination can occur.[141] Conversely, the expansion of *Thesis* is associated with a movement toward *Taxis*, in which law becomes an instrument of direction rather than a framework of coordination, and where social order is increasingly shaped through purposive intervention rather than the alignment of individual plans.[142]

Kosmos denotes a spontaneous order: a system that emerges through the interaction of individuals following general rules, without central direction or design.[143] Markets, languages, and the common law are Hayek's paradigmatic examples.[144] Such orders are not the product of deliberate construction but arise as unintended outcomes of individual actions.[145] Their defining feature is not simply decentralisation, but their reliance on dispersed and tacit knowledge, which no central authority could ever fully possess or organise.[146] Characterised by complexity, adaptability, and reliance on *dispersed knowledge,* such orders represent the result of human action but not of human design.[147]

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[137] Hayek, *LLL 1*, 35-54.

[138] Ibid. See also p. 48-50.

[139] Ibid.

[140] Hayek, *LLL 1*, 35-54.

[141] Ibid. See also p. 108-109.

[142] Hayek, *LLL 1*, 48-50, 124-128; Hayek, *LLL 2*, 38-48.

[143] Hayek, *LLL 1*, 35-43.

[144] Hayek, *LLL 1*, 36-37, 72-75.

[145] Ibid.

[146] See also *LLL 2*, 44-46.

[147] Hayek, *LLL 1*, 35-43; *LLL 3*, 126, 123-130. However, as society becomes larger and more complex, this personal knowledge becomes impractical, and thus, the need for general rules of conduct emerges to facilitate cooperation and order.

Within this framework, the rule of law is aligned with *Kosmos*.[148] General, abstract, and stable rules provide the conditions under which individuals can coordinate their actions on the basis of local knowledge and independent decision-making.[149] Because no central authority possesses the knowledge required to organise complex social systems, coordination must occur through the alignment of individual plans within a shared framework of expectations.[150] Law, in this sense, does not impose order from above but sustains the conditions under which order can emerge endogenously.[151] The generality and stability of legal norms give way to discretionary intervention, as 'obedience to the universal rules of just conduct has been abandoned' in the 'name of "social" aims' as law is increasingly tailored to serve specific economic and social objectives.[152] *Taxis*, by contrast, refers to a constructed order: a system deliberately organised to achieve specific ends through directed intervention.[153] Unlike *Kosmos*, which evolves through decentralised processes, *Taxis* depends upon centralised decision-making and the conscious allocation of resources toward particular objectives.[154] Such systems are typically associated with organisations rather than societies as a whole, where coordination is achieved through hierarchy and command rather than through general rules.[155] When law becomes a tool of political or economic planning, it ceases to provide the neutral conditions for spontaneous coordination, 'preventing the persons to whom the specific commands are directed from adapting their actions to circumstances known to them' and instead becomes an instrument of coercion 'by making them serve some particular ends which others are not required to serve, and which will be satisfied at the expense of some other unpredictable effects.'[156] Whereas a legal system embedded in *Kosmos* supports a self-regulating society, a legal system directed by *Taxis* imposes rigid, state-imposed commands that undermine both the rule of law and the foundations of a free market economy:[157]

> 'In consequence, the degree of power of control over the extended and more complex order will be much smaller than that which we could exercise over a made order or

[148] Hayek, *LLL 1*, 38-54, 72-80.

[149] Hayek, *LLL 1*, 35-54.

[150] Ibid.

[151] Ibid.

[152] Hayek, *LLL 1*, 141-142; Hayek, *LLL 3*, 31-32, 143-144.

[153] Hayek, *LLL 1*, 36-37, 48-50.

[154] Ibid. See also F. Hayek, *The Road to Serfdom* (University of Chicago Press, 1944), 87-88.

[155] Hayek, *LLL 1*, 46-50.

[156] Hayek, *LLL 1*, 49-50, 112-113.

[157] Hayek, *LLL 1*, 35-54, 48-50; Hayek, *LLL 2*, 38-48.

> taxis. There will be many aspects of it over which we will possess no control at all, or which at least we shall not be able to alter without interfering with - and to that extent impeding - the forces producing the spontaneous order. Any desire we may have concerning the particular position of individual elements, or the relation between particular individuals or groups, could not be satisfied without upsetting the overall order.'[158]

The significance of this distinction lies in what it reveals about the function of the rule of law within Hayek's framework.[159] A legal system grounded in general and abstract rules does not merely constrain power; it enables a particular form of social order - one in which coordination emerges through decentralised processes rather than central direction.[160]

1.6 Labour Law and the Shift to Legal Taxis: From Neutrality to Design

It is against this conceptual background that Hayek situates the development of labour law.[161] By framing governance in these terms, Hayek argues that legal instrumentalism does not just threaten economic freedom - it fundamentally restructures society, replacing spontaneous order with bureaucratic control.[162] If the rule of law is understood as the condition of a spontaneous order sustained through general rules, then the emergence of forms of regulation oriented toward particular economic and social outcomes appears, within this framework, not simply as an expansion of law, but as a transformation in its function.[163] Indeed, in *Law, Legislation and Liberty,* Hayek situates the rise of the post-war welfare state and labour law in particular within a broader historical trajectory of legal reconfiguration, tracing its emergence as part of a shift in the nature of legality itself.[164] Labour law, on this account, exemplifies the movement from *Nomos* - the general, evolved rules that sustain spontaneous order under the rule of law (*Kosmos*) - towards *Thesis*, the consciously designed legal

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[158] Hayek, *LLL 1*, 41-42.

[159] Hayek, *LLL 1*, 35-54, 48-50.

[160] Hayek, *LLL 1*, 72-73.

[161] Hayek, *LLL 1*, 124-144: linking the rise of 'legal positivism' and socialist ideologies which view law as an instrument for achieving specific social outcomes rather than as a framework for securing liberty to the transformation of private into public law through 'social' legislation (see more Chapter 3); Hayek, *LLL 3*, 88-89, 142-144.

[162] Ibid; Hayek, *LLL 2*, 38-48, 82-88.

[163] Hayek, *LLL 1*, 35-54, 124-128; Hayek, *LLL 2*, 38-48.

[164] Hayek, *LLL 2*, 140-143, citing W. S. Jevons, The State in Relation to Labour (Macmillan, 1882).

interventions characteristic of constructed order (*Taxis*).[165] This shift is significant not simply as a change in legal content, but as a reorientation of law's function: from a framework of coordination to one increasingly designed to 'assist the achievement of particular ends'.[166] Where *Nomos* reflects legal principles that emerge through custom, precedent, and decentralised adaptation, *Thesis* denotes the deliberate use of law to pursue specific social and economic objectives.[167] For Hayek, the importance of this transformation lies not merely in the introduction of new regulatory content, but in the way in which law becomes oriented toward outcomes rather than conditions.[168] Law, in this sense, ceases to operate solely as a framework within which individuals pursue their own ends and comes to play a role in shaping those ends.[169]

Labour law, on this account, does not merely regulate market relations but embeds distributive considerations within the legal order, altering economic relationships through state-imposed mandates, rather than leaving them to evolve through decentralised coordination.[170] Whereas private law had developed to stabilise expectations within voluntary exchange, labour law introduces conditions that reshape those relationships, constraining contractual freedom and modifying the processes through which market outcomes are 'spontaneously' reached.[171] The concern, within this framework, is not regulation as such, but the extent to which legal rules remain general and end-independent.[172]

1.7 From Generality to Differentiation

A central feature of this shift, within Hayek's framework, is the departure from generality.[173] Where *Nomos* operates through abstract and universally applicable rules, labour law is characterised by differentiation: it applies distinct rules to different categories of actors,

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[165] Hayek, *LLL 1*, 35-54, 72-80, 124-144.

[166] Hayek, *LLL 1*, 124-128, 131-133.

[167] Hayek, *LLL 1*, 72-80, 124-128.

[168] Hayek, *LLL 1*, 124-128; Hayek, *LLL 2*, 38-48.

[169] Ibid.

[170] Hayek, *LLL 2*, 82-88, 140-143; Hayek, *LLL 3*, 88-89, 142-144. For example, Hayek argues that the chief coercive power of trade unions lay in their ability to exclude workers from employment.

[171] Hayek, *LLL 1*, 101-109, 118-123; Hayek, *LLL 2*, 140-143.

[172] Hayek, *LLL 1*, 124-128; Hayek, *LLL 2*, 38-48.

[173] Hayek, *LLL 1*, 141-144; Hayek, *LLL 2*, 38-48. Hayek argues that 'social justice' is inherently indeterminate and politically contested and thus requires discretionary state intervention, leading to the replacement of general legal principles with outcome-driven regulations.

reflecting the organisation of work and the structure of employment relationships.[174] '[T]he progressive replacement of private by public law' had 'already gone far to destroy the characteristic attribute of universal rules of conduct, the equality of all under the same rules' by the end of the 20th century.[175] What began as sector-specific intervention to regulate employment conditions expanded throughout the 20th century into a comprehensive legal architecture - one that, in Hayek's view, not only entrenched labour law as an instrument of economic governance but culminated in its most decisive break from *Nomos*: the legislative entrenchment of collective bargaining and the rise of state-backed trade union power.[176]

Hayek's discussion of early industrial legislation, such as the Factory Acts, requires a distinction between general regulation and commands.[177] He acknowledged that British factory legislation could rely on general rules. Its application to particular categories of workers did not, by itself, place it outside Nomos.[178] His objection concerned legislation that used differentiated treatment to secure particular outcomes, turning rules of conduct into instruments of administration. In his account, that tendency became more pronounced over time.[179] Driven by 'the fable convenue that free enterprise has operated to the disadvantage of the manual workers', post-war labour law, Hayek argued, was not an isolated deviation but the culmination of a historical process in which legal structures were increasingly reoriented to direct economic and social outcomes.[180] As he writes, '[w]hen the aim of legislation is higher wages for particular groups of workers, or higher incomes for small farmers, or better housing for the urban poor, it cannot be achieved by improving the general rules of conduct.'[181] In Hayek's account, then, such measures are significant not because they regulate working conditions per se, but because they connect legal rules to particular outcomes rather than general conditions of conduct.[182] Legal rules increasingly distinguish between categories of workers, employers, and industries, structuring obligations in ways that reflect economic

[174] Davidov, 'Setting Labour Law's Coverage', 544-566.

[175] Hayek, *LLL 1*, 142.

[176] Hayek, *LLL 1*, 141-144; Hayek, *LLL 2*, 140-143; Hayek, *LLL 3*, 88-89, 142-144.

[177] Hayek, *LLL 1*, 139; Hayek, *LLL 3*, 114-115.

[178] Hayek, *LLL 1*, 139-142.

[179] Hayek, *LLL 1*, 142-144. On the limitations of binary classifications of employment and the legal construction of different personal work relations, see M. Freedland and N. Kountouris, *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011).

[180] Hayek, *LLL 1*, 68.

[181] Hayek, *LLL 1*, 142.

[182] Hayek, *LLL 1*, 123-128; Hayek, *LLL 2*, 38-48.

and institutional considerations rather than general and abstract principles.[183] The result is a legal framework in which rules are no longer indifferent to the identity or position of those to whom they apply.[184]

1.8 From Framework to Instrument

The expansion of labour law is, in Hayek's account, associated with a broader shift in the role of law in economic life.[185] Where law had previously operated as a framework within which economic activity took place, it becomes increasingly involved in shaping the terms of that activity.[186] Labour law, once governed in Hayek's account by voluntary contract and competitive forces, becomes increasingly subject to legal prescription, altering not only the form of economic coordination but its function.[187] For Hayek, the legal centralisation of industrial relations displaced decentralised market adjustment by substituting collective and statutory prescription for voluntary exchange.[188] At the heart of Hayek's critique is the claim that labour law distorts economic coordination by overriding spontaneous market adjustments with legislatively imposed redistributions of power.[189] In doing so, it restructures bargaining relations through targeted regulatory mandates that, in his view, erode the generality and impartiality required by the rule of law.[190] Rather than allowing wages to adjust through competition and decentralised negotiation according to general and stable rules, labour law, Hayek argued, imposed constraints that sever the link between price signals and competitive market forces.[191]

Minimum wage legislation, for example, establishes legally binding wage floors that alter the operation of the price mechanism.[192] Rather than allowing wages to adjust through decentralised processes of supply and demand, such rules introduce externally determined constraints that shape the outcomes of market interaction in ways not generated through

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[183] Ibid.

[184] Hayek, *LLL 1*, 141-144; Hayek, *LLL 2*, 38-48.

[185] Hayek, *LLL 1*, 124-144; Hayek, *LLL 2*, 82-88.

[186] Hayek, *LLL 1*, 101-109, 118-128; Hayek, *LLL 2*, 38-48.

[187] Hayek, *LLL 2*, 140-143; Hayek, *LLL 3*, 88-89, 142-144.

[188] Hayek, *LLL 3*, 88-89, 93-95.

[189] Hayek, *LLL 2*, 82-88, 115-120, 140-143; Hayek, *LLL 3*, 88-89, 93-95.

[190] Hayek, *LLL 1*, 141-144; Hayek, *LLL 2*, 38-48.

[191] Hayek, *LLL 2*, 72, 115-120, 140-143; Hayek, *LLL 3*, 67-70, 93-95.

[192] Hayek, *LLL 2*, 115-120, 140-143.

decentralised processes.[193] Similarly, Hayek argued, statutory labour protections which legally mandated working conditions and created special protections for certain classes of workers transformed employment from a voluntary contractual arrangement governed by reciprocal agreements into 'an object of administration with the aim of securing particular results for particular groups.'[194]

Codifying redistributive and regulatory aims into law, these developments, in Hayek's view, marked a decisive shift in the function of legal governance itself as the rule of law 'ha[d] been abandoned'.[195] The institutionalisation of collective labour relations further develops this shift.[196] Citing the Trade Disputes Act of 1906 as one of the 'landmarks in this development', Hayek argues that the coercive powers conferred on trade unions had enabled them to exclude non-unionised workers from certain industries and dictate employment conditions outside the general principles of contract and competition.[197] While public and legislative scrutiny had often been directed at corporate monopolies, Hayek argued that the real threat to the rule of law came not from private enterprise, but from organised interest groups such as unions that leveraged political influence to shape regulation in their favour.[198]

Legal recognition of trade unions, the regulation of collective bargaining, and the protection of industrial action embed organised labour within the legal structure of economic governance.[199] In doing so, the law confers differentiated legal powers and protections on particular groups.[200] This, in Hayek's account, raises questions about the extent to which legal equality can be maintained where rules allocate distinct advantages to particular actors.[201]

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[193] See S. Deakin and F. Wilkinson, *The Law of the Labour Market*: Industrialisation, Employment and Legal Evolution, 278-282.

[194] Hayek, *LLL 1*, 142.

[195] Hayek, *LLL 3*, 31-32, 143-144.

[196] Hayek, *LLL 2*, 140-143; Hayek, *LLL 3*, 88-89, 143-144.

[197] Hayek, *LLL 1*, 142; F. Hayek, 'Trade Union Immunity Under the Law', The Times (London, 21 July 1977).

[198] Hayek, *LLL 2*, 140-143; Hayek, *LLL 3*, 88-89, 143-144.

[199] Ibid. See also R. Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396 (author's accepted manuscript, 5-8).

[200] Hayek, *LLL 1*, 141-144; Hayek, *LLL 2*, 140-143.

[201] Hayek, *Constitution of Liberty*, 310-324; Hayek, *LLL 2*, 140-143.

1.9 From Stability to Contingency

A further feature of labour law is its responsiveness to changing economic and social conditions. Harry Arthurs's account traces changes in the field's scope and institutional setting as employment relations and political economies change.[202] Unlike the relatively stable framework of general rules associated with *Nomos*, labour law develops through ongoing processes of legislative reform, judicial interpretation, and institutional adjustment.[203] As Nonet and Selznick have long observed, labour law is 'neither autonomous nor immutable', but subject to continual transformation in response to evolving economic structures and political priorities.[204] This responsiveness is not incidental, but reflects the orientation of law toward particular objectives.[205] Where legal rules are connected to specific outcomes, they are necessarily subject to revision as those objectives change.[206] As an evolving regulatory mechanism, labour law does not operate as a stabilised body of rules but instead develops dialectically, shaped through ongoing engagement with transformations in employment structures, employer practices, collective bargaining dynamics, and broader workplace realities.[207] The implication, for Hayek, is not that change in law is problematic as such, but that a legal system oriented toward particular outcomes may become less predictable in its operation.[208] Where rules are continuously revised in response to changing conditions, the stability associated with general and abstract law may be more difficult to sustain.[209]

1.10 Labour Law and the Limits of Legal Neutrality

Taken together, these developments illustrate the way in which labour law, within Hayek's framework, is associated with a transformation in the character of the legal order which Hayek characterises as 'irreconcilable with the rule of law'.[210] This was not an aberration but

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[202] H. W. Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law and Policy Journal* 585 (author's conference manuscript, 1-5).

[203] Hayek, *LLL 1*, 124-144. On the legal evolution of the labour market, see Deakin and Wilkinson, *The Law of the Labour Market*.

[204] Davidov, 'Setting Labour Law's Coverage', 544-566.

[205] Hayek, *LLL 1*, 124-128, 131-133; Nonet and Selznick, *Law and Society in Transition*, 83-84, 112-113.

[206] Hayek, *LLL 1*, 131-133, 139-144; Hayek, *LLL 2*, 38-48.

[207] See also H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992): Collins shows that labour laws, such as unfair dismissal rules, are shaped by economic and institutional considerations rather than adhering to rigid, abstract rules to account for the realities of workplace relations.

[208] Hayek, *LLL 1*, 131-133, 139-144; Hayek, *LLL 2*, 38-48.

[209] Hayek, *Constitution of Liberty*, 310-324; Hayek, *LLL 1*, 131-133, 139-144.

[210] Hayek, *LLL 2*, 86.

an inevitable consequence of legal instrumentalism.[211] Once law is wielded as a tool for redistributive justice, legal stability, Hayek observed, is subordinated to an ever-shifting array of political imperatives.[212] Replacing the impartial adjudication of rights with politically determined economic directives, it leaves individuals vulnerable to 'rules for the conduct of superiors towards their subordinates', making legal compliance and enforcement increasingly unpredictable and inconsistent.[213] For Hayek, the significance of this shift lies in its implications for the relationship between law and arbitrariness.[214] If the rule of law is understood as a system of general rules that constrain power by limiting discretion, then the expansion of purposive and differentiated regulation raises the question of how far those constraints are maintained.[215] By subordinating legal certainty to political demands for redistribution, government 'must buy its authority by discrimination', eroding the generality, stability, and predictability that made the rule of law a bulwark against arbitrariness.[216] The issue, within this framework, is not the presence of regulation as such, but the extent to which 'purpose-dependent rules of organisation' displace the general and end-independent 'rules of just conduct' that sustain *Nomos*.[217] Once rights and obligations are dictated by selective regulatory mandates, politically determined distributions of power, and legally imposed economic outcomes, the rule of law is, in Hayek's account, progressively displaced by what Hayek calls 'a public law of subordination'.[218] Where legal obligations are shaped not by abstract principles but by fluctuating political demands of *Thesis*, the extent to which legal rules remain general, stable, and independent of particular objectives erodes as an imposed hierarchical system in which law ceases to safeguard neutrality and instead actively constructs economic outcomes; collapsing the distinction between governance and domination and, with it, 'the whole basis of classical liberalism' (hereafter liberal legalism) and its function as a legal constraint on arbitrary power.[219]

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[211] Hayek, *LLL 2*, 82-86.

[212] Hayek, *LLL 2*, 82-88, 140-143.

[213] Hayek, *LLL 2*, 86.

[214] Hayek, *Constitution of Liberty*, 205-224; Hayek, *LLL 2*, 38-48. It is this relationship we look more closely at across later Chapters.

[215] Ibid.

[216] See also Davidov, 'Setting Labour Law's Coverage' 543-550; Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance', 585-592.

[217] Hayek, *LLL 1*, 142; Hayek, *LLL 3*, 102.

[218] Hayek, *LLL 1*, 143.

[219] Hayek, *LLL 2*, 44.

1.11 Conclusion

Hayek's account of the rule of law presents a powerful and internally coherent vision of legality as a system of general, abstract, and stable rules, through which both individual freedom and complex forms of social coordination can be sustained.[220] By grounding legality in the formal attributes of generality, equality, and certainty, he offers a conception of law that seeks to constrain the exercise of power by limiting the scope for discretionary intervention.[221] Within this framework, law is not an instrument for the pursuit of particular ends, but a structure within which individuals may pursue their own ends and through which spontaneous order can emerge.

It is precisely this understanding of legality that renders labour law problematic.[222] As we next explore, as a body of differentiated, purposive, and adaptive rules, labour law appears not simply as an extension of legal regulation, but as a transformation in the character of law itself: from a framework of coordination to an instrument directed toward particular outcomes. On Hayek's account, therefore, labour law does not merely depart from the rule of law - it calls into question whether legality can remain a constraint on power once it becomes entangled with the pursuit of social and economic objectives. The difficulty, within this framework, is not simply one of doctrinal inconsistency, but of whether the formal attributes of legality can be sustained under such conditions.

Yet this account rests upon a particular understanding of what law is, and of the relationship between legality and social order.[223] In particular, it depends upon the distinction Hayek draws between evolved rules of just conduct and consciously made legislation: between law as the product of gradual social development and law as an instrument of political design. That distinction is central to his critique of labour law, for it allows statutory intervention to appear as an intrusion upon an otherwise spontaneous legal order. Whether that separation can be sustained - historically, conceptually, or institutionally - is the question to which the following chapter turns. By examining alternative accounts of the rule of law, and the

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[220] These criteria are widely accepted among rule of law theorists. On Fuller's authoritative account of legality see L. Fuller, *The Morality of Law* (Yale University Press, 1969), 46-91.

[221] Hayek, *Constitution of Liberty*, 205-224, 310-324.

[222] Hayek, *LLL 1*, 124-144; Davidov, 'Setting Labour Law's Coverage' 543-550; Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance', 585-592.

[223] Hayek, *LLL 1*, 35-54, 72-80, 124-128.

historical development of labour law within it, the next chapter considers whether labour law should be understood as a departure from legality, or instead as part of law's continuing development in response to changing forms of power.

Chapter 2: Labour Law and the Rule of Law: Legitimacy, Constraint, and Private Power

2.1 Introduction

Chapter 1 showed that, within Hayek's framework, labour law appears as a departure from legality because it is purposive, differentiated and responsive to social and economic conditions. This chapter challenges the historical and conceptual assumptions on which that conclusion depends. It asks whether labour law is better understood not as an exception to the rule-of-law tradition, but as part of its development in response to private economic power. [224]It asks whether labour law belongs within this tradition, challenging formalist accounts that define the rule of law as a static procedural ideal grounded in generality, predictability, and institutional autonomy. While liberal legalist scholars such as Hayek present legality as an impersonal framework insulated from political and economic pressures,[225] this account cannot adequately explain how law has functioned historically.[226] On the account developed here, legality doesnot operate as a detached structure imposed from above, but as a mode of governance whose authority depends on its capacity to engage with the institutional contexts in which power is exercised, rather than stand apart from them.[227]

On this view, the rule of law cannot be understood solely as a constraint upon public authority. It is concerned more broadly with the conditions under which power is required to assume legal form and justify itself within shared procedural expectations. To do so, it asks whether the accounts within this formalist tradition that define the rule of law as a static procedural ideal rather than a responsive legal order capable of adapting to shifting regimes

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[224] This chapter proceeds from the premise, developed more fully in Chapter 5, that the rule of law is concerned not merely with procedural regularity, but with the constraint of arbitrary power. See Krygier, 'Four Puzzles About the Rule of Law', 64-104.

[225] Hayek, *Constitution of Liberty*, 205-210; Hayek, *LLL 1*, 85-88.

[226] See P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969); Nonet and Selznick, *Law and Society in Transition*. Selznick draws from, and is a critical component of, the sociological tradition of legal thought which understands law not as a closed system of norms but as an evolving institution historically embedded in broader structures of social power, organisation and legitimacy, see e.g. E. Durkheim, The Division of Labour in Society (1893, Free Press, 1997); M. Weber, *Economy and Society* (1922, University of California Press 1978). While Durkheim saw law as an expression of the underlying form of social solidarity and Weber emphasised its rationalisation under capitalism, Selznick builds on both by foregrounding law's institutional development and its capacity for internal reform by conceptualising legal legitimacy as dependent upon law's ability to respond to new configurations of power without abandoning its procedural foundations.

[227] Selznick, *Law, Society and Industrial Justice*; Nonet and Selznick, *Law and Society in Transition*, 60, 72-77.

of governance and disciplining power in both public and private domains, are tenable.[228] As the organisation of economic life shifted under industrial capitalism, power became increasingly concentrated within private institutions, most notably the firm.[229] This transformation posed a structural challenge for legality: if law was to retain its authority as a constraint on arbitrary power, it could not remain confined to the public sphere but had to extend into these emergent sites of governance.[230]

Against this background, the chapter develops an alternative account of the rule of law, drawing on Philip Selznick's conception of law as a *responsive* institution.[231] It begins with Legal Realism, rejecting the idea that law operates as a neutral framework separable from the social and economic relations it structures. The focus here is on the realist critique of the public/private divide, and the extent to which private law rules organise and sustain relations of power within the so-called private sphere. It then turns to historical and sociological accounts of legality to show how legal constraints emerged through processes of contestation, institutional development, and adaptation to shifting forms of authority. E.P. Thompson's analysis demonstrates how law acquired legitimacy through its capacity to impose justificatory demands upon those who exercise power, while Selznick's institutional theory explains why this capacity depends on law's responsiveness to new configurations of governance.[232]

Situated within this trajectory, labour law appears not as a deviation from the rule of law, but as one of its institutional expressions. As managerial authority became embedded within the organisation of work by contract, the legal system was required to extend its constraining logic into the workplace in order to preserve its own credibility. Labour law emerged, on this account, not as a normative project aimed at achieving fairness, but as an institutional adaptation to the presence of private power - rendering it intelligible, contestable, and subject to rule-bound forms of justification.[233] In this sense, what appears within a Hayekian

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[228] See e.g. H. Dagan and A. Dorfman, 'Just Relationships' (2016) 116 *Columbia Law Review* 1395, 1401-1406. The authors term this 'traditional view' as one in which private law is conceptualised around a 'commitment to the values of formal freedom and equality'.

[229] Anderson, *Private Government*, 37-65.

[230] Chapter 3 returns to this theme, arguing that shared legal expectations are not incidental to the rule of law but constitutive of its authority and function. See Chapter 3.

[231] Selznick, *Law, Society and Industrial Justice*, 10-13, 30-33.

[232] Ibid; Thompson, *Whigs and Hunters*, 258-269.

[233] Ibid.

framework as a departure from the rule of law may instead be understood as a response to the relocation of power within the institutional structures of modern economic life.[234]

The chapter therefore advances a specific claim: labour law forms part of the rule-of-law tradition to the extent that it functions to constrain the arbitrary exercise of economic power. This reframes the relationship between labour law and legality, shifting the question from whether labour law departs from formal rule-of-law principles to whether, and under what conditions, it sustains the rule of law's core function as a constraint on arbitrariness in response to the relocation of power within the institutional structures of modern economic life.

2.2 From Neutrality to Function: Legal Realism and the Public-Private Divide

The liberal legalist tradition, epitomised by Hayek, has long imagined the rule of law as a bulwark against the excesses of state power.[235] Chapter 1 showed, law, according to Hayek, is not an instrument of governance but a safeguard against arbitrary authority: an impersonal framework that secures individual liberty through general, stable, and predictable rules.[236] Rooted in a sharp demarcation between the public and private spheres, Hayek idealises the common law as a spontaneously evolved order - one that preserves liberty not through political deliberation but by restraining political authority while allowing private economic relations to regulate themselves.[237] His account of the 'law of liberty', and his vision of a "private law society" thus depends upon this vehemently defended distinction.[238] Public law constrains the state, while private law, or *Nomos*, is treated as a pre-political order facilitating

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[234] For a clear statement of this argument within Critical Legal Scholarship, see M. Tushnet, 'Critical Legal Studies and the Rule of Law' in J. Meierhenrich and M. Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), 328-339.

[235] See A. V. Dicey, *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan 1959), 188-193. This account continues to exert considerable influence today, with contemporary accounts such as the World Justice Project echoing the liberal legalist legacy by defining the rule of law primarily in terms of constraints on government power, the primacy of legal rules over discretion, and the safeguarding of individual rights. See World Justice Project, What is the Rule of Law? https://worldjusticeproject.org/about-us/overview/what-rule-law.

[236] Hayek, *Constitution of Liberty*, 205-210; Hayek, *LLL 1*, 85-88.

[237] Ibid. Indeed, proponents of the early market economy, such as Adam Smith, believed that early markets would provide liberation due to the viability and predominance of small-scale independent production (for this reason classic liberalism was closely tied to the historical context of the sixteenth and seventeenth centuries in which it emerged). Anderson, *Private Government*, 13-42; and Deakin and Wilkinson, *The Law of the Labour Market*, 2-20.

[238] F. Hayek, 'The Liberal Order and the Market Economy' in F. Hayek, Studies in Philosophy, Politics and Economics (Routledge & Kegan Paul, 1967), 162.

voluntary exchange: in the famous words of Cass Sunstein, 'part of *nature* rather than a legal construct'.[239]

There is, as often noted, an undeniable elegance to this vision.[240] A system governed by general and stable rules, insulated from the volatility of political intervention, appears to offer conditions conducive to individual freedom.[241] Yet legal history has never conformed to this ideal. As the American Legal Realists demonstrated, the assumption that the rule of law operates as a neutral constraint upon public authority obscures law's constitutive role in organising and stabilising private power.[242] If legal arrangements determine how the burdens and benefits of production are distributed, then legal legitimacy cannot be assessed solely by reference to procedural attributes such as generality, stability and predictability.[243] What appears, in Hayek's account, as a spontaneous and apolitical market order is, in fact, deeply structured by legal rules governing property, contract, and exchange.[244]

Rejecting the formalist belief that law is a neutral framework separable from the social and economic relations it regulates, Legal Realists exposed the instability of the public-private distinction on which such accounts depend.[245] For writers such as Holmes, Llewellyn, Hale and Cohen, law was not an autonomous system of abstract rules applied mechanically to facts, but a social institution embedded in - and shaped by - prevailing relations of power.[246]

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[239] C. R. Sunstein, 'Lochner's Legacy' (1987) 87 *Columbia Law Review* 873, 874.

[240] This is typical of proceduralist accounts of the rule of law, for a modern account see e.g. P. Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) 471-475.

[241] Ibid. In the context of the UK, for example, see Lord Hermer, 'The Rule of Law in an Age of Populism' (Bingham Lecture, 14 October 2024); see also HL Deb 26 November 2024, vol 841, cols 658-659.

[242] See, for example, R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470-478. The Legal Realists were a group of legal scholars whose scholarly contributions began in the 1920s and stretched through to the 1950s. On the nine common features this incredibly diverse catalogue of scholars shared see K. Llewellyn, 'Some Realism About Realism - Responding to Dean Pound', *Harvard Law Review*, 1222-1268.

[243] Ibid, 472. by means of its law of property, is the source of the relative bargaining power of the individuals who make up the community.'.

[244] This insight into law's role in structuring economic power was later historicised by Morton Horwitz whose account of how private law doctrines were reconfigured in the service of capitalist accumulation in eighteenth- and nineteenth-century America is echoed across the legal histories of industrialising societies during this period, see M. J. Horwitz, *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977).

[245] On the very 'real effects' of the public/private distinction and how it was in fact used in order to legitimate exclusionary political practice and sustain illegitimate social inequality see H. Dagan and B. Zipursky, *Research Handbook on Private Law Theory* (Edward Elgar Publishing, 2020), 135-137.

[246] O. W. Holmes Jr, *The Common Law* (Little, Brown, and Company, 1881), 1; K. N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, 1930), 5-8; J. Frank, *Law and the Modern Mind* (Brentano's, 1930), 127-153; F. S. Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 821-823.

As Llewellyn observed, 'the vital thing in the life of the law is its doing of work, its effect upon men's life'.[247] Law's significance lies not in its formal coherence, but in how it operates within, and structures, social life.[248]

On this view, the so-called private sphere is not a domain beyond law, but one constituted through it.[249] Property and contract are not natural or pre-political forms, but legal constructs that organise relations of dependency and control. The private order Hayek treats as self-regulating, 'typified as a regime of strong property rights that both sets the boundaries of protected domains and establishes strict rules for identifying valid transfer of entitlements', is therefore already juridical: constituted by rules that define entitlements, allocate bargaining power and stabilise relations of dependency.[250] As Robert Hale famously observed, 'when the state 'protects a property right'… '[p]assively it is abstaining from interference with the owner when he deals with the thing owned; actively it is forcing the non-owner to desist from handling it, unless the owner consents.'[251] The market, therefore, does not exist apart from law or according to some neutral framework where, as Scott Veitch puts it, there is no difference between, for example, state welfarism, and the state-backed legal coercion 'that allows market forces to operate as precisely that: *forces*'.[252] It is forged and maintained through state-backed entitlements that determine 'coercively organised distribution of coercion from state to private actors (be they individuals or corporations)'.[253] What Hayek presents as a neutral framework of general rules is revealed, instead, as a system that structures and legitimates particular distributions of power.[254] 'Given the public role of the state in licensing such coercion', Veitch shows how the sharp opposition between state coercion and 'market freedom' became increasingly difficult to sustain.[255] The distinction between coercion and freedom, public and private, is itself a product of legal ordering.[256]

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[247] Llewellyn, *The Bramble Bush*, 8.

[248] R. L. Hale, *Freedom Through Law: Public Control of Private Governing Power* (Columbia University Press, 1952), 473; S. Veitch, 'Law and the Public/Private Distinction' in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar, 2019), 135-150.

[249] On how Critical Legal Scholarship dissolved the 'autonomy debate' by showing that both the law and the social world in which it operates are mutually constitutive see Chapter 3.

[250] See Veitch, 'Law and the Public/Private Distinction', 135.

[251] Hale, *Freedom Through Law*, 471.

[252] Veitch, 'Law and the Public/Private Distinction', 140.

[253] Ibid, 141-142.

[254] Cohen, 'Transcendental Nonsense', 814-817, 821; Llewellyn, *The Bramble Bush*, 5.

[255] Veitch, 'Law and the Public/Private Distinction', 140-142.

Legal Realism thus reframes the rule of law.[257] As Cohen put it, the relevant question is not whether law conforms to abstract logical form, but '[h]ow does it work? How does it serve to mould men's lives?'.[258] As Holmes wrote, '[t]he life of the law has not been logic; it has been experience'.[259] Law must be understood in terms of its effects: how it structures power, distributes resources, and shapes relations of dependency; as a 'living tradition shaped by struggle, not logic reducible to a set of 'axioms and corollaries of a book of mathematics.'[260] The significance of this critique, however, is not merely that law is socially embedded.[261] It is that the public-private distinction obscures the extent to which legal rules organise and sustain power within the so-called private sphere.[262] What appears as neutral interpretation, particularly behind ostensibly objective terms like 'reasonable" or 'due process', is, in practice, constitutive, law not a neutral vessel, but an arena for 'continuing the fight over the right and possible forms of social life'.[263] If law is already constitutive of economic and social relations, then the problem is not whether legality extends into private power, but how it does so, and whether it operates to constrain power or merely reproduce it.[264]

2.3 Custom, Coordination, and the Limits of Formalism

In resisting the reduction of law to sovereign command, Hayek appears, at points, to approach the Legal Realist insight that law derives much of its force and character from its social function.[265] His well-known assertion that law is 'the result of human action, but not of human design' offers an important corrective to the assumption that law and the state are

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[256] K. Klare, 'The Public/Private Distinction in Labor Law' (1982) 130 *University of Pennsylvania Law Review* 1358, 1361.

[257] J. Frank, *Law and the Modern Mind*, 127-153.

[258] Cohen, 'Transcendental Nonsense', 821.

[259] Holmes, *The Common Law*, 1.

[260] Ibid.

[261] See R. Pound, *The Ideal Element in Law* (Stephen Presser ed, Liberty Fund 2002), 1.

[262] On how legal rules effectively serve as 'the rules of the game of economic struggle', asymmetrically empowering certain social groups over others see D. Kennedy 'The Stakes of Law, or Hale and Foucault!' (1991) Legal Studies, 328. For example M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (Guenther Roth and Claus Wittich eds, University of California Press 1978), 217-22.

[263] Ibid. Indeed, he emphasises that the 'technical' language used by legal professionals often conceals and legitimises hierarchies of 'social power'. See also Cohen, 'Transcendental Nonsense', 815.

[264] See M. Tushnet, 'Critical Legal Theory' in M. Golding and W. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2004) 80-84.

[265] J. Hasnas, 'Hayek, the Common Law, and Fluid Drive' (2005) 1 *NYU Journal of Law & Liberty* 79, 99.

synonymous.[266] In this respect, Hayek recognises that legal order may emerge independently of formal legislation, developing instead through processes of social coordination and practice that do not 'necessarily, and did not originally, consist in legislation' or 'rules consciously created by those in political authority'.[267]

However, this insight is ultimately made to serve a more problematic distinction.[268] Hayek's critique of statutory intervention depends upon treating the common law as if it were analogous to spontaneous order: evolved, decentralised, and relatively insulated from conscious design.[269] Labour law can then be characterised as a purposive statutory intrusion into an otherwise organic legal order. The difficulty, however, is that this argument depends upon an unstable 'amalgam' or 'conflation' of common law and customary law.[270] As Legal Realist critiques of formalism have long demonstrated, the common law has never operated as a detached or apolitical system, but has functioned at the centre of private governance, constructing the legal frameworks through which economic power is organised and sustained.[271] Sharpening this difficulty by 'grafting' the forward-looking, rule-making processes of the modern common law onto the spontaneous order of customary law, John Hasnas distinguishes the customary law Hayek invokes from the common law he celebrates.[272] Customary law, Hasnas argues, emerged not from formalised courts articulating abstract principles of justice, but through the pressures of social coordination and local conflict resolution in the 'stabilisation of interactional expectancies'.[273] ,[274]

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[266] Ibid. See also p. 101: Hasnas describes Hayek's view that rules evolve as 'solutions to coordination problems' rather than to achieve specific ends.

[267] Ibid; Hayek, *LLL 1*, 20-22.

[268] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 89-94, 99-105.

[269] Hasnas, 'Hayek, the Common Law, and Fluid Drive', see esp p. 104: Indeed, Hasnas explicitly notes that in this instance, Hayek is '[s]ounding something like a realist himself'.

[270] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 81, 98.

[271] Hale, *Freedom Through Law*, 471-473; Cohen, 'Transcendental Nonsense and the Functional Approach', 814-817.

[272] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 101-106; Thompson, *Whigs and Hunters*, 258-266. Thompson argues that the common law, once sufficiently embedded in popular consciousness to be invoked from below, became increasingly remote and inaccessible as it was professionalised and absorbed into elite control. As Peter Linebaugh argues in *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Verso, 1992), esp p. 7-11, drawing explicitly on Thompson's concept of the 'moral economy', the working class resisted elite attempts to commodify justice and impose draconian property laws, using legal institutions like the jury and benefit of clergy to assert alternative norms of fairness and necessity.

[273] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 81-86.

[274] Ibid, 82. Prior to the nineteenth century in Britain, Hasnas explains, customary law proper functioned as a decentralised system embedded in the lived experiences and practices of local communities, attuned to communal expectations and oriented toward resolving disputes according to localised, tacit understandings as

While Hayek correctly resists the idea that law is reducible to state command, he conflates two distinct legal traditions: the centralised, precedent-based common law, and the decentralised, socially embedded customary law he seeks to invoke.[275] Leading to an indistinct image of the alternative to legislation, this conflation allows Hayek to present the common law as both spontaneous and neutral, despite its historical development within institutional hierarchies and its entanglement with prevailing distributions of power.[276] In practice, as Hasnas shows, customary law did not emerge as a system of abstract, general rules applied by a central authority.[277] Rather, it developed through decentralised processes of social coordination, rooted in the lived practices and interactions of communities, developing inductively in Britain after the collapse of Roman rule through the demands of communal life and pressures of social coordination and contestation. [278] Describing the iterative process by which customary law emerged, Hasnas writes:

> 'Human beings live together without fixed, known rules of behaviour. No central authority exists with the power to establish and enforce such rules. Conflicts inevitably arise, often resulting in violence that disrupts normal life in the community and undermines cooperative activities. This creates strong social incentives to find an alternative method of resolving the conflicts…. The continued iteration of the dispute settlement process then gradually transforms these interactional expectancies into recognised rules of behaviour. This, in turn, allows the process itself to evolve from one of mediated bargaining into one of the enforcement of rules.'[279]

Customary law, on this account, is neither forward-looking nor doctrinal.[280] It does not depend upon judicial pronouncement or abstract reasoning, but arises inductively through repeated social interaction as 'is entirely backwards looking in its orientation'.[281] Its authority derives,

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what Hasnas defines (p. 85) as truly 'grown law'.

[275] Ibid, 98-99.

[276] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 98-106.

[277] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 81-86, 98-105.

[278] Ibid. As not the product of official enactment or legislation, it 'owes its force to the fact that it has found direct expression in the conduct of men toward one another', or at (p. 81) where he defines its foundation not by its antiquity, but by its origin in human interaction.

[279] Ibid, 99. See also M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19(1) *Journal of Legal Pluralism and Unofficial Law*, 24.

[280] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 85-86, 90-91; instead, there were just procedural rules for specific types of grievances (such as 'writ systems').

[281] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 85. In customary law, that is, the sole issue is what constitutes a resolution that is fair to the specific parties involved based on their past behaviour and legitimate

that is, not from formal enforcement, but from shared expectations, mutual recognition, and the practical need to resolve conflict and sustain cooperation within particular social contexts.[282] Drawing on Lon Fuller's influential work on the social function of law in *Human Interaction and the Law*, Hasnas shows how, in contrast to the common law that had become increasingly shaped by the institutional logic of elite judicial authority, customary law functioned, in Fuller's terms, as a 'language of interaction'.[283] Where common law judgments risked becoming alienated from the social experiences of those subject to them, customary law, formed not through state enactment but through patterned behaviour, as Fuller explains, retained its connection to the everyday realities and expectations of the community: '[w]e sometimes speak of customary law as offering an unwritten "code of conduct" that allows individuals to coordinate their behaviour through 'intermeshing anticipations'.[284]

This stands in marked contrast to the common law tradition Hayek invokes.[285] By the end of the nineteenth century, the common law had moved the focus of the legal process away from 'just resolution of particular disputes' according to custom and toward the 'maintenance of a consistent and coherent body of rules' derived from an increasingly centralised and professionalised judicial elites as the common law 'lost its character as a customary law'. Far from embodying a decentralised and spontaneously evolving order, it reflected the institutional logic of a hierarchical legal system, often reinforcing existing distributions of power and the 'normative beliefs of judges.[286] Fuller's account of customary law as a 'language of interaction', developed though tacit social adaption to 'coordination problems' and not an aspiration to universal principles, did not, however, apply to the modern institutionalised common law of which Hayek idealised in being '[j]anus faced', 'looking not just backward at the parties' expectations, but forward toward 'public policy' and 'progressive social ends'.[287] Hasnas' central claim, then, is that Hayek's account rests on a

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expectations.

[282] Ibid, 101; managed by judges under the modern common law it 'lost its character as a customary law'.

[283] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 79, 82, 96-99; L. Fuller, 'Human Interaction and the Law' in *The Principles of Social Order: Selected Essays of Lon L Fuller* (Duke University Press, 1981) 211, 213-214.

[284] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 82-83, quoting L. Fuller, 'Human Interaction and the Law' in *The Principles of Social Order: Selected Essays of Lon L Fuller* (Duke University Press, 1981), 211, 213-214.

[285] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 101: he explains that by the end of the 19th century, the convergence of the doctrine of stare decisis and the 'law as science' movement fundamentally transformed the common law. See more at Chapter 3.

[286] Ibid.

[287] Ibid, 82, 95, 104; Fuller, 'Human Interaction and the Law', 213-214.

mischaracterisation of legal history.[288] The form of law that most closely approximates Hayek's ideal - customary law - was not the common law he celebrates, but a distinct and historically prior mode of legal ordering which did not exist to achieve social goals per se, but, in the words of Fuller to 'facilitate peaceful human interaction' according to community expectations.[289] Over time, 'when… the parties have come to guide their conduct toward one another by these expectancies', legal norms 'then furnish a point of orientation for ongoing interactive responses'.[290] Conversely, the common law, once examined in its institutional context, does not exhibit the neutrality or spontaneity Hayek attributes to it but is a 'semi-legislative' process driven by conscious judicial design rather than spontaneous evolution.[291]

The significance of Hasnas' point is not merely historical. It exposes the fragility of the baseline against which Hayek judges (labour) legislation. As we saw, Hayek's contrast between common law and statute depends on treating judge-made law as if it were the neutral expression of evolved social practice. Hasnas challenges precisely that assumption. Once common law is understood not as customary coordination but as an institutionalised and partly legislative process, shaped by courts and professional legal actors, it can no longer bear the weight Hayek places upon it.[292] As Hasnas argues, Hayek's claim that the common law secures the rule of law is 'empirically false' because it assumed judges share his own liberal convictions is not merely historical.[293] Echoing and reinforcing the core insight Legal Realist insight that law cannot be understood as a neutral or autonomous system detached from social and economic relations as, where judges create rules, the law will naturally reflect the normative biases of the social class from which the judiciary is drawn.[294] As Hasnas concludes, 'if judges create rules on the basis of their extra-legal normative values, then a body of rules made by the wealthy, politically powerful, white males that make up the judiciary will tend to reflect the normative values of wealthy, politically powerful, white

[288] Importantly for Chapter 3, Hasnas also notes the rise of (p. 95) 'public-policy arguments,' where judges explicitly consider empirical data and social consequences rather than just past precedents.

[289] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 82-86; Fuller, 'Human Interaction and the Law', 213-214.

[290] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 96.

[291] Ibid, 82-86, 91. Echoing the Realists, he shows how a judge cannot 'make a rule without some conception of the purpose the rule is to serve'.

[292] Ibid, 99-105.

[293] Ibid, 104.

[294] Ibid, 103-104.

males.'[295] When judges move beyond merely 'discovering' custom and begin 'consciously creating rules', the point is not simply that judges may be biased, but that the common law cannot be treated as a spontaneous order standing outside politics, institutional power or social hierarchy.[296]

Hayek therefore captures an important intuition when he suggests that law may emerge through social processes rather than deliberate design.[297] Yet that insight cannot sustain the further claim that common law operates independently of institutional power or distributive consequence. Even Hayek himself admits that a frequent cause of 'unjust' rules is that 'the development of the law has lain in the hands of members of a particular class whose traditional views made them regard as just what could not meet the more general requirements of justice.'[298] In attempting to resolve this issue by asserting that when rules are recognised as unjust in light of 'more general principles of justice,' it may require the 'revision not only of single rules but of whole sections of the established system of case law', Hasnas shows the circularity to which Hayek 'simply gives away the game'.[299]

Ultimately, Hasnas shows that if the "law of liberty" simply imposes the 'normative preferences of unelected judges', and not any kind of spontaneous social coordination, it loses all claim to superiority over, at least democratically enacted, legislation.[300] The consequence for labour law is most direct; if the common law is itself institutionalised, court-centred and constitutive of market relations, then treating labour law as an 'intellectual dead end' in law or an artificial intrusion into an otherwise spontaneous legal order that could, in these instances, be corrected by legislation leaves him trying to 'be saved by appealing to the very form of law that it seeks to supplant'.[301]Its legitimacy, therefore, cannot be grounded solely in its formal attributes, but must be understood in relation to the functions it performs

[295] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 103-104.

[296] Ibid, 103.

[297] For a fuller explanation of this argument and the plurality of legal norms see Chapter 3.

[298] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 104. Hasnas quotes Hayek observing that in areas like 'the law on the relations between master and servant, landlord and tenant, creditor and debtor. the rules have been shaped largely by the views of one of the parties and their particular interests - especially where. it was one of the groups concerned which almost exclusively supplied the judges.'.

[299] Ibid.

[300] Ibid. See also M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19(1) *Journal of Legal Pluralism and Unofficial Law*, 24.

[301] Ibid.

and the power relations it structures.[302] Once this is recognised, the distinction between formal neutrality and social function begins to collapse, opening the way for a more historically grounded account of legality as a practice embedded in, and responsive to, shifting configurations of power, rather than insulated from them.

2.4 Legitimacy and Constraint: Law as a Practice of Justification in E.P. Thompson

Customary law, then, was not merely a neutral evolutionary precursor to state law, but a vernacular legal order through which communities negotiated and contested authority, particularly the economic power embedded in property relations and enclosure.[303] Writing in the twentieth century, E.P. Thompson offers a historically grounded account of legality that departs sharply from Hayek's idealised vision of spontaneous and apolitical legal evolution. In *Whigs and Hunters*, Thompson reframes the rule of law not as a static inheritance of neutral rules, but as a product of conflict, resistance, and evolving expectations of constraint on the exercise of power. [304]

For Thompson, the significance of the rule of law lies not in abstract generality or doctrinal coherence, but in its capacity to impose justificatory obligations upon those who exercise power. Its authority lies in its capacity to restrain arbitrariness precisely because, as Thompson writes, 'the notion of the rule of law itself imposed inhibitions upon power and conferred a certain legitimacy upon resistance.'[305] Law does not stand above social conflict; it is 'deeply imbricated in the very conflicts it was invoked to resolve'.[306] Its authority depends upon its ability to require those who govern - whether magistrates, landlords, or later employers - to act through forms that appear rule-bound, reasoned, and constrained.[307] As he writes, '[t]he essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just.'[308] Law must present itself as constrained.[309] In doing so, it generates expectations of justification

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[302] See below; Thompson, *Whigs and Hunters*: 258-260: on law's presence in taverns, workshops, and village custom.

[303] E. P. Thompson, *Customs in Common: Studies in Traditional Popular Culture* (The New Press, 1992), 1-15, 97-184.

[304] Thompson, *Whigs and Hunters*, 258-269.

[305] Ibid, 266.

[306] Ibid, 261.

[307] See also Wedderburn, *The Worker and the Law*, 4, 6-7, 10.

[308] Thompson, *Whigs and Hunters*, 263.

[309] Ibid, 261-267.

that cannot be entirely disregarded. It is this feature that enables it to constrain power.[310] The rule of law acquires its force, on this account, through the justificatory expectations it generates around the exercise of power.[311]

Thompson's account therefore reframes legality as a historically contingent practice.[312] Law is neither a neutral arbiter nor a simple instrument of domination.[313] It operates as a terrain of struggle in which competing interests are mediated through legal forms that both reflect and shape underlying relations of power.[314] As he puts it, 'law has not only been imposed from men above: it has also been a medium within which other social conflicts have been fought out'.[315] Its development is inseparable from the conflicts it organises, through which power is mediated and constrained.[316] This dual character is central to Thompson's argument. Law may function to stabilise existing hierarchies, but in doing so it must adopt forms that impose constraints upon their exercise.[317] The very rhetoric and procedures through which law legitimates power also create the conditions under which that power may be challenged.[318] As Thompson observes, 'the forms and rhetoric of law acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless'.[319] Constraint emerges not despite law's entanglement with power, but through it.

This dynamic is particularly visible in the transition from customary to centralised legal orders.[320] As the consolidation of capitalist property relations displaced earlier forms of

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[310] Ibid.

[311] Ibid. However, see also B, Fine, Democracy and the Rule of Law: Liberal Ideals and Marxist critiques (Pluto Press, 1984), 104-169. While Fine agrees with Thompson's account of law as shaped through historical struggle that impose constraints on arbitrary power and not inherited as a stable normative order, he critiques Thompson for what he sees as a residual liberalism that leads him to over-rely on a liberal conception of legality and overlook its role in legitimising and reproducing class domination. See also M. J. Horwitz, 'The Rule of Law: An Unqualified Human Good?' (1977) 86 *Yale Law Journal* 561.

[312] Thompson, *Whigs and Hunters*, 263-264.

[313] Ibid, 258-269.

[314] Ibid. Thompson refers here to the transformation of law in the service of landed power.

[315] Ibid, 266.

[316] Ibid, 189. See also Thompson, *Customs in Common*, 104-120; Thomson, The Poverty of Theory 85-88.

[317] Thompson, *Whigs and Hunters*, 21-29, 96-102. Thompson documents how, in pre-industrial England, customary law operated as a vital framework for governing social and economic life - not as an abstract legal order imposed from above, but as a living, community-embedded practice that evolved through use.

[318] Ibid, 266. See also E.P Thompson's defence of historical materialism in his polemical essay entitled 'The Poverty of Theory' (1978).

[319] Thompson, *Whigs and Hunters*, 21-29, 96-103; Thompson, *Customs in Common*, 97-184.

[320] For Thompson, the significance of these early legal orders lies not in some romanticised vision of stability, but in the expectations they cultivated: that power should justify itself, that governance should be constrained by obligation and reciprocity, and that legality takes root in the consciousness of those it governs.

communal regulation, law was reconfigured to support new distributions of economic power.[321] Yet the expectations cultivated within earlier legal orders - of justification, reciprocity, and procedural constraint - did not disappear.[322] They persisted as what might be understood as a residual legal consciousness, shaping how law was experienced, invoked, and contested as a means of 'curb[ing] that power and check[ing] its intrusions'.[323]

Thus, even as legal forms were deployed to facilitate enclosure and dispossession, they remained subject to demands framed in the language of legality itself.[324] As Thompson notes, 'mediation, through forms of law, is something quite distinct from the exercise of unmediated force.[325] This, he explains, is the 'paradox. at the heart' of his study of the rule of law.[326] The authority of law depends upon its recognition as a constraint, and it is this recognition that enables those subject to power to invoke legal form against power itself.[327] 'But, to turn the paradox around, these same occasions served to bring power even further within constitutional controls'.[328]

The Black Act provides a particularly stark illustration of this contradiction.[329] Enacted to consolidate elite control and suppress rural resistance, it imposed severe penalties, including capital punishment, for the violation of property rights.[330] Yet even here, the exercise of power was required to assume legal form.[331] Authority had to be justified through procedures, evidence, and public reasoning.[332] As Thompson emphasises, 'immense efforts were made...

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[321] Ibid, 21-102. See esp p. 31, 57: On how forest law created a contested legal space where local practices and formal legal authority intersected, shaping land use and access through disputes over turf-cutting and grazing rights for example.

[322] Ibid, 103, 259. See also *Customs in Common*, 185-253; Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century' *Past & Present* (50), 76-136. On legal consciousness and the lived experience of legality generally see also P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life*.

[323] Thompson, *Whigs and Hunters*, 205. See also p. 21-29, 96-103; Thompson, *Customs in Common*, 97-184.

[324] Thompson, *Whigs and Hunters*.

[325] Ibid, 206.

[326] Ibid, 207, 210; by enhancing the system's legitimacy and discouraging revolutionary movements.

[327] Ibid, 205-207.

[328] Ibid, 207.

[329] Ibid. To do so risks reabsorbing Thompson's argument into the liberal legalist tradition it critiques. Our interest lies not in the formal guarantees per se, but in how legality's performative demands - of justification, regularity, and constraint - generate unintended limits on power.

[330] Ibid, 103-107, 134-135. The case reflected not just legal reasoning but the lived conflict between foresters and officials over access, memory, and entitlement, illustrating a legal authority rooted in and responsive to material communal practices.

[331] Ibid.

[332] Ibid, 205-207.

to project the image of a ruling class which was itself subject to the rule of law'.[333] This performative commitment to legality generated internal constraints, creating openings through which legal expectations could be mobilised against arbitrary authority through the very forms that 'afforded to their hegemony the rhetoric of legitimacy.[334] Where rulers 'could not break those rules or the whole game would be thrown away', the law would be revealed as a 'sham', and its power as legitimating ideology would dissolve.[335]

Law, in this sense, produces what might be described as a form of normative inertia.[336] Once institutionalised, its procedures and justificatory demands acquire a force that cannot be wholly controlled by those who wield power.[337] Rulers become, in Thompson's well-known phrase, 'prisoners of their own rhetoric'.[338] If legal forms are abandoned, 'repudiat[ing] 150 years of constitutional legality' legitimacy is undermined; if they are maintained, they impose constraints that may be invoked by others.[339] In Thompson's terms, when the ruling class is challenged, they may either 'dispense with the rule of law' and rule by 'force,', or they can 'submit to their own rules and risk' domination being contested.[340] Law must therefore justify itself - publicly, procedurally, and discursively - even when deployed to sustain inequality, thereby constraining the terms on which power may be exercised.[341] Because law is grounded in the actual practices and 'habits' of people, that is, it gains a 'soil… of actuality.'[342]

What emerges from Thompson's analysis is a conception of legality grounded in practice rather than form.[343] The rule of law is not secured by the existence of general rules alone, but by the extent to which power is required to operate through justificatory frameworks rooted in social life. In this sense, 'law was often a definition of actual agrarian practice, as it has been pursued "time out of mind".[344] In the agrarian context, for example, he shows how the

[333] Ibid.

[334] Ibid, 210.

[335] Ibid, 206, 210.

[336] Ibid, 259-260, 262-263, 266.

[337] Thompson, *Whigs and Hunters*, 259-266. Thompson's account emphasises that law's legitimating force also depends on rulers respecting its procedures.

[338] Ibid, 206.

[339] Ibid, 202-210.

[340] Ibid, 210.

[341] Ibid, 206, 208.

[342] Ibid, 205.

[343] Ibid, 204, 208.

[344] Ibid, 204.

distinction between law and 'the actualities of productive forces' is untenable.[345] Here, law functioned as a lived constraint, upheld through habit, expectation, and the 'alternative norms' that foresters' own sense of legality or 'passionately supported values' that drove them into conflict with the formal 'law' of the ruling class.[346] Law's authority is internal to its operation: it is sustained through the expectations it generates and the practices, such as in foresters' belief in a 'popular right' that their land was intended to sustain the community's survival rather than elite sport.[347] Embedded in practice like this, it becomes, in Thompson's account a 'genuine forum within which certain kinds of class conflict were fought out'.[348]

His account, then, departs both from liberal legalist formalism and from reductive accounts of law as mere class domination.[349] Thompson acknowledges that law is 'very easily assimilated to [the interests] of the ruling class', yet insists that it cannot be reduced to this function.[350] It is not, he writes, a 'pliant medium' that rulers can twist at will, but must at least correspond enough to real world practices to be legitimate.[351] Its institutionalisation generates norms - of universality, justification, and procedural constraint -'endorsed by norms, tenaciously transmitted through the community', that cannot be entirely subordinated to power.[352] These norms provide a medium through which resistance can be articulated, 'through legal forms, which imposed, again and again, inhibitions upon the actions of the rulers', and through which authority must continually justify itself within legal forms that constrain its exercise.[353] Early English common law, whilst undeniably 'more pliant' to 'the common sense of the ruling class', for example, provided a 'medium through which social conflict could find expression.'[354] By bringing their own values or 'shared expectations' into the courtroom, the community's 'sense of "natural justice" could make itself felt' as jurors forced the law to move beyond formal 'statutes' and 'treatises,' turning the legal process into a site where the ruling class was challenged by the normative expectations or 'practices of the governed.[355]

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[345] Ibid.

[346] Ibid, 262. See also p. 146, 150.

[347] Ibid, 114, 146.

[348] Ibid, 207.

[349] Ibid, 258-269.

[350] Ibid, 260.

[351] Ibid, 205.

[352] Ibid, 261-262.

[353] Ibid, 263-264, 267.

[354] Ibid, 267.

[355] Ibid.

Yet, law, even ‘when considered as institution’, ‘with the class theatre and class procedures,’ and ‘the courts. the judges, the lawyers, and the Justices of the Peace’, had to operate through the very rules that sustained its authority.[356] This performative commitment to neutrality could therefore provide avenues through which popular resistance was articulated and generate constraints not easily ignored.[357] Its institutionalisation generates norms - of universality, justification, and procedural constraint - that cannot be entirely subordinated to power as they ‘acquire a distinct identity which may, on occasion, inhibit power and afford some protection to the powerless.’[358] Indeed, Thompson argues, ‘it is often from within that very rhetoric that a radical critique of the practice of the society is developed.’[359] Although law can be used to destroy customary rights, ‘crystailis[ing] unequal relations and mask[ing] injustice’, by operating through a ‘body of rules and procedures,’ it provides the rhetoric and a set of normative expectations that the powerless can use to articulate resistance and challenge arbitrary authority.[360] This is why Thompson’s account matters for the present argument. Law is not confined to statutes, courts or formal doctrine; it also operates through the shared expectations, practices and institutional forms through which authority is recognised and contested.[361]

Legality, on this view, is neither a neutral framework nor an ideological façade, but a contested and evolving practice without which productive relations would be ‘inoperable’.[362] Law, Thompson shows, is not just a secondary "superstructure" but is ‘at every level of society’, even contributes to one’s ‘self-definition or sense of identity’.[363] ‘ In ‘call[ing] in question the validity of separating off the law as a whole and placing it in some ‘typological superstructure’ determined by an economic ‘base’, Thompson shows law constrains power not because it stands apart from social relations, but because it is embedded within them - both in its class-bound function, but also in its independent logic and evolution.[364] As he writes, ‘[o]nly to the degree that this is seen to be so can law be of service in its other aspect,

[356] Ibid, 263, 264, 267.
[357] Ibid, 263, 264, 267.
[358] Ibid, 267.
[359] Ibid, 264.
[360] Ibid, 267-268.
[361] Ibid, 267.
[362] Ibid, 209, 202-210.
[363] Ibid, 260-261, 267.
[364] Ibid, 260, 267.

as ideology'.[365] Its institutionalisation generates 'logical criteria with reference to standards of universality and equity' that cannot be entirely subordinated to power where the 'essential precondition' for law to function as an ideology' in this way is that it must at least 'display an independence from gross manipulation' and 'seem to be just'.[366] The rule of law, therefore, cannot be understood solely through its formal attributes, or as formalists would have it, as an abstract top-down 'form' imposed on society, but is instead 'deeply imbricated' within the actual day-to-day productive relations 'at every level of society'. [367] 'Hence the ideology of the great struck root in a soil, however shallow, of actuality.'[368] Where there is a 'very large difference' between 'arbitrary extra-legal power and the rule of law', Thompson's claim that 'the notion of the rule of law is itself an unqualified good' should therefore be read in this limited but important sense: not because law guarantees justice, but because 'the defence of the citizen from power's all-intrusive claims' may itself impose 'effective inhibitions upon power'.[369]

2.5 Workplace Legal Pluralism and the Rule of Law

The argument that labour law belongs within the rule-of-law tradition requires a broader account of where law is found and how legal order is produced. If law is identified only with state commands, the workplace appears as a private sphere into which public regulation is later introduced from outside. On that view, labour law looks exceptional: a statutory intervention into a domain otherwise governed by contract, property and voluntary exchange. The difficulty with that account is that the workplace is never normatively empty. It is already structured by rules, expectations, procedures and institutions that allocate authority and organise obedience.[370]

Legal pluralism helps make this visible. Arthurs' account of legal pluralism challenges the assumption that law is exhausted by courts, statutes and state institutions.[371] In *Without the Law*, he showed how administrative justice and social ordering operated through institutions

[365] Ibid, 267.

[366] Ibid, 262.

[367] Ibid, 204.

[368] Ibid, 206.

[369] Ibid, 263, 266-267.

[370] H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985), 1-16.

[371] Ibid.

that were not reducible to the formal legal system.[372] His broader insight is that legality may be dispersed across multiple sites, including occupational communities, administrative bodies, private institutions and collective arrangements. Law, in this socio-legal sense, is not found only where the state speaks in its most formal voice.[373]

This matters for labour law because the workplace is a paradigmatic site of plural ordering. Workers are governed not only by statute and contract, but by managerial policies, disciplinary procedures, health and safety rules, collective agreements, workplace customs, HR codes, payroll systems, grievance mechanisms, rota practices, occupational norms and informal expectations about authority.[374] These sources do not all have the same legal status. Some are enforceable in courts or tribunals. Some operate through collective bargaining. Some arise from custom and practice. Some are organisational procedures with uncertain legal force. But together they form the normative environment within which work is performed.[375]

The rule-of-law question cannot therefore be answered by asking only whether state law formally recognises employment rights. We must ask how those rights interact with the plural normative orders of the workplace. A statutory right may be practically strengthened where it is supported by union representation, workplace custom, internal grievance structures and a shared understanding that breach is unacceptable. The same right may be weakened where internal norms discourage complaint, where HR systems individualise conflict, where managerial procedures control the evidential record, or where workers experience legal assertion as risky.[376] Legal pluralism therefore shifts attention from the existence of norms to their institutional environment.

Arthurs' work on industrial pluralism is especially useful because it treats collective labour relations as a form of workplace legal ordering. Collective bargaining does not merely produce terms and conditions. It creates a framework of rules, expectations and procedures

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[372] Ibid; H. W. Arthurs, 'Understanding Labour Law: The Debate Over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83.

[373] Dukes and Streeck, 'Labour Constitutions and Occupational Communities', 612.

[374] L. Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012), 29-48.

[375] Arthurs, 'Understanding Labour Law', 83.

[376] Ibid; Dukes and Streeck, 'Labour Constitutions and Occupational Communities', 612.

through which managerial authority is organised and contested.[377] A collective agreement may function as a constitution for the workplace, setting limits on managerial discretion, establishing procedures for grievance, and providing standards against which decisions can be challenged. In this sense, labour law has always operated through a plurality of legal and quasi-legal forms.

This is why the decline of collective bargaining has such significance. If collective agreements and workplace representation form part of the normative architecture through which employer power is made answerable, then their erosion weakens not only worker bargaining power but workplace legality itself.[378] The disappearance of collective institutions does not leave a legally neutral space. It allows managerial ordering to become more dominant. HR policies, individual contracts, unilateral procedures and compliance systems may fill the gap left by collective norms. The workplace remains rule-bound, but the authorship and purpose of those rules change.[379]

Galanter's image of 'justice in many rooms' helps capture this. Disputes are not resolved only in courts. They are processed in offices, committees, workplaces, associations, administrative bodies and informal settings.[380] The same is true of labour law. Many employment disputes never reach a tribunal. They are absorbed, reframed or resolved within the workplace. The key question is therefore what kind of 'room' the workplace is: whether it is one in which power must justify itself, or one in which managerial authority can define the terms of legality.[381]

This point also helps refine the thesis's critique of Hayek. Hayek was right to resist the idea that law is reducible to legislation. Law may emerge through practice, custom and institutional development. But Hayek's account risks romanticising non-legislative law as spontaneous, neutral and freedom-preserving.[382] Legal pluralism complicates that picture. Non-state normative orders are not necessarily emancipatory or non-coercive. Workplace custom may constrain power, but it may also normalise subordination. Collective bargaining

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[377] Arthurs, 'Understanding Labour Law'; R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *Journal of Law and Society* 612.

[378] Edelman, *Working Law*, 44-71, 113-122.

[379] Galanter, 'Justice in Many Rooms'.

[380] Ibid.

[381] J. Hasnas, 'Hayek, the Common Law, and Fluid Drive' (2005) 1 *NYU Journal of Law & Liberty* 79, 98-105.

[382] Arthurs, 'Understanding Labour Law', 83; Galanter, 'Justice in Many Rooms', 1.

may democratise workplace governance, but managerial procedure may entrench unilateral authority. The fact that a norm emerges outside statute does not make it free from power.[383]

This is why Hasnas' critique of Hayek's conflation of customary and common law matters. If common law is not simply the spontaneous expression of social practice, but is institutionalised through courts, doctrine and professional authority, then Hayek's opposition between evolved law and made law becomes unstable.[384] Legal pluralism extends that critique. The workplace contains many evolved or semi-evolved norms, but their rule-of-law significance depends on whether they discipline power or reproduce it. Custom is not enough. The relevant question is what custom does.

Dukes and Streeck's account of labour constitutions and occupational communities provides a useful contemporary framework for this point.[385] Work relations are shaped by the interaction of legal norms, social norms, economic structures and occupational expectations. Legal order at work is not produced by statute alone. Nor is it produced by market exchange alone. It emerges through the interaction of multiple normative sources, each of which may constrain, enable or legitimate power.[386] This reinforces the thesis's central methodological claim: labour law must be studied as a socio-legal institution embedded in social and economic contexts.

Edelman's account of organisational mediation adds another dimension. Even where state law supplies formal rights, organisations interpret and translate those rights through internal procedures and compliance structures.[387] HR professionals, managers and compliance actors therefore become important producers of workplace legality. They do not simply transmit law. They adapt it to organisational logics, often translating legal norms into policies, risk-management tools and procedural frameworks.[388] The workplace legal order is therefore not merely plural. It is mediated through organisational power.

This mediation matters because it can change the practical meaning of rights. A statutory right may be translated into a policy. A policy may be translated into a procedure. A

[383] Hasnas, 'Hayek, the Common Law, and Fluid Drive', 98-105.

[384] Dukes and Streeck, 'Labour Constitutions and Occupational Communities', 612.

[385] Ibid.

[386] Edelman, *Working Law*, 44-71, 113-122.

[387] Ibid, 113-122.

[388] Ibid, 206-217.

procedure may become the route through which a complaint is contained. The worker encounters law not as an abstract entitlement but as an organisational process. That process may help them. It may also discourage, individualise or neutralise their claim.[389] Legal pluralism therefore reveals why routine breach cannot be understood only as failure to enforce state law. It must also be understood as a failure within the plural normative orders that shape how law is experienced at work.

This is not to collapse all workplace norms into law. The thesis does not need to claim that every HR policy, informal custom or managerial instruction is law in the full doctrinal sense. The point is more restrained. These norms participate in the practical ordering of work, and they mediate the effect of formal law. They shape what workers think they can claim, what managers think they can do, what HR professionals understand compliance to require, and what institutions later recognise as reasonable or lawful.[390] They are therefore part of the socio-legal environment within which the rule of law operates.

Workplace legal pluralism also helps explain why labour law's rule-of-law function depends on institutional design. If the workplace is governed by plural rules, then the issue is not simply whether state law enters the workplace, but how it interacts with other orders. Does it strengthen workers' capacity to contest managerial power? Does it support collective norm-making? Does it make internal procedures answerable to public standards? Does it prevent organisational compliance from becoming a substitute for substantive legality? These are rule-of-law questions because they concern whether power is made answerable through law.

The argument also clarifies the importance of enforcement. Enforcement is not external to workplace legal pluralism. It is one of the mechanisms through which the hierarchy among norms is established. If statutory rights are weakly enforced, managerial rules may dominate. If collective bargaining is strong, workplace norms may be shaped by worker voice. If tribunals are accessible, internal procedures may be tested against public legal standards. If inspectors are present, organisational self-description may be challenged. Enforcement therefore determines not only whether legal norms are obeyed, but which norms govern the workplace in practice.[391]

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[389] P. Ewick and S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998), 15-20.

[390] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69.

[391] Edelman, *Working Law*, 113-122, 206-217; Arthurs, 'Understanding Labour Law', 83.

This provides an important bridge to the later chapters. Chapter 4 shows that the erosion of collective institutions, fragmentation of public enforcement and reliance on organisational compliance alter the plural legal order of the workplace. Chapter 5 then argues that this alteration has rule-of-law significance. If labour law's purpose is to render employer power answerable, then workplace legal pluralism matters because it determines whether law is experienced as constraint, resource, procedure, risk or symbol. Routine breach becomes possible where the plural normative order of the workplace allows formal legal norms to persist while managerial authority remains insufficiently constrained.

The conclusion to draw is not that workplace pluralism is good or bad in itself. It is that the rule of law operates through plural institutions and practices. Labour law must therefore be understood not merely as a body of statutory rights, but as part of a wider normative order that includes collective bargaining, workplace custom, organisational procedure and public enforcement. The question is whether that order enables power to be justified and contested. Where it does, labour law deepens the rule of law. Where it does not, legality may remain formally present while employer power continues to govern.

2.6 Law as a Responsive Institution: Selznick and the Extension of Legality

Like customary law before it, labour law did not claim neutrality but developed in response to unaccountable private power, structuring contestation by imposing justificatory expectations within the employment relationship and requiring managerial authority to account for itself.[392] As the capacity of customary law to constrain power eroded under the pressures of economic rationalisation, the justificatory expectations and norms of mutual obligation it had helped to cultivate did not disappear.[393] Rather, they persisted within the legal culture from which labour law emerged, resurfacing in reconfigured institutional forms as the terrain of contestation shifted from custom to contract, and from communal practice to formal labour regulation, as legality adapted to new sites of power.[394] If Thompson locates the authority of the rule of law in its rootedness in lived social experience and its capacity to impose justificatory obligations on those who exercise power, Philip Selznick extends this insight into the institutional conditions of modern industrial society.[395] Writing within a historical-

[392] P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969), 10-13, 30-33.

[393] Thompson, *Whigs and Hunters*, 258-269.

[394] Selznick, *Law, Society and Industrial Justice*, 52-56, 259-270.

[395] Ibid; Selznick, *Law, Society and Industrial Justice*, 10-13, 30-33.

institutionalist tradition, Selznick shows that law's continued legitimacy depends on its capacity to remain responsive to shifting social structures and emerging forms of governance. As economic power became increasingly concentrated within the 'private and institutional settings' of the workplace, the rule of law could no longer remain confined to the regulation of public authority if it was to retain its claim to constrain power.[396] Rather than treating the workplace as a private domain insulated from legal scrutiny, Selznick demonstrates that modern legality depends upon its ability to engage the internal governance of private institutions. Where 'much that "private institutions" do lies within [the] purview' of governance, such institutions must be 'subject to the rules of just governance' in ways analogous to public authority.[397] The workplace thus emerges not as an exception to the rule of law, but as a central site in which its principles must be realised.[398] In this sense, responsiveness is not a threat to legality but a condition of its capacity to constrain power.[399]

Selznick's core claim is that the authority of law cannot be sustained through adherence to formal rules alone.[400] Responsiveness without institutional competence risks opportunism, but formalism without responsiveness leads to stagnation and the erosion of legal credibility.[401] The rule of law is therefore maintained not through detachment from social forces, but through the capacity of legal institutions to engage them in a principled and purposive way, rather than retreat into formalism.[402]

This requires a reorientation of legality.[403] Where Hayek feared that responsiveness would collapse law into politics, Selznick shows that legal authority is sustained precisely through its capacity to adapt to new configurations of power while 'retain[ing] a grasp on what is essential to its integrity'.[404] In an environment shaped by organisational power and institutional complexity, law must internalise norms of accountability and justification within the structures through which authority is exercised. As he observes, there is 'a strain toward public accountability' wherever power becomes institutionalised, as organisations 'take on

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[396] Selznick, *Law, Society and Industrial Justice*, 71-79, 270-274.

[397] Ibid, 71-72, 274.

[398] Ibid.

[399] Ibid, 108.

[400] Ibid, 10, 78, 260-261.

[401] Ibid.

[402] Selznick, *Law, Society and Industrial Justice*, 10, 78.

[403] Ibid, 78.

[404] Ibid, 77-79.

the perspectives, and incorporate the goals and interests' of those whose lives they shape, thereby generating expectations of accountability within institutional power.[405]

Nowhere is this more evident than in the transformation of the modern enterprise.[406] As Selznick notes, the rise of large-scale organisations converts 'dominium' into 'imperium', transforming private ownership into a form of governance in which employers exercise powers of direction, discipline, and control over working life.[407] The employment relationship thus becomes a site of authority analogous, in many respects, to public governance. Yet, under classical liberal frameworks, this authority remained largely insulated from the justificatory demands that attach to public power, despite exercising comparable forms of authority.[408]

Selznick's intervention lies, thus, in demonstrating that this insulation is incompatible with the continued legitimacy of law.[409] As he argues, '[t]he rise of private, collective ownership creates a crisis of credibility' for legal systems that fail to regulate these new forms of power.[410] This, then, is not a claim about the content of the rule of law, but a functional account of how legal legitimacy is historically sustained by examining the relationship between legal forms and the organisation of power, rather than relying on abstract criteria of justice, it examines how law responds to the organisation of power.[411] Where legal forms no longer correspond to the organisation of authority in practice, they risk becoming hollow, preserving legality in appearance while conceding its substance to private command.[412] Law must therefore extend its reach into these domains, not as an external imposition, but as a condition of its own authority in constraining the exercise of private power.[413]

In this light, labour law appears not as a departure from the rule of law, but as one of its institutional expressions.[414] It represents a juridical response to the emergence of the

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[405] Ibid.

[406] Ibid, 71-72, 270-274.

[407] Ibid, 78.

[408] Ibid, 30-33, 71-72; Anderson, *Private Government*, 37-65.

[409] Selznick, *Law, Society and Industrial Justice*, 30-33.

[410] Ibid, 32-33.

[411] Ibid, 10, 78, 108.

[412] Ibid, 71-72, 260-261.

[413] Ibid, 270-274.

[414] Ibid, 71-79, 270-274.

workplace as a site of governance in which authority must be rendered intelligible, contestable, and subject to constraint.[415] As Nonet and Selznick observed, modern legality increasingly seeks 'to shape the internal governance of private associations and social institutions according to public values', examining 'how far power takes account of and is restrained by the interests of subordinates'.[416] The extension of legality into the workplace thus reflects a broader transformation in the rule of law itself.[417] No longer confined to the regulation of state power, it becomes a practice concerned with the governance of all forms of institutional authority.[418]

The task of law is not merely to enforce rules, but to structure the conditions under which power is exercised - requiring that it be justified and subject to accountability in the exercise of institutional power. Labour law emerges, on this account, as a necessary continuation of this development.[419] It is 'applied as needed wherever the functions of governance are performed', operating as a 'directional force' that mediates power and renders it 'accountable to the interests of others and to the enterprise itself as a continuing system'.[420] In doing so, labour law reworks the "free" contract of employment into a juridical form through which managerial authority can be made answerable.[421] Its significance, for the purposes of this chapter, then, lies not in abolishing hierarchy, but in altering the terms on which hierarchy must justify itself.

2.7 Private Power and Legal Form: The Workplace as a Site of Governance

The move from Thompson to Selznick is a move from customary legality to modern institutional power. If Thompson shows how legality acquired authority by requiring landed power to justify itself through legal forms, Selznick explains why that logic could not remain confined to older public or customary settings once economic power came to be exercised through large-scale private organisations.[422] The rise of the modern corporation, and later the

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[415] Ibid, 32-33, 108.

[416] P. Nonet and P. Selznick, *Law and Society in Transition: Toward Responsive Law* (Harper & Row, 1978), 56-60, 72-77.

[417] Selznick, *Law, Society and Industrial Justice*, 108, 270-274.

[418] Nonet and Selznick, *Law and Society in Transition*, 56-60, 72-77.

[419] Selznick, *Law, Society and Industrial Justice*, 108, 270-274.

[420] Ibid, 71-72, 274.

[421] Ibid, 183.

[422] Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969), 30-33, 71-79.

intensification of shareholder-value governance, globalisation and fissured production, did not simply relocate power from the state to the employer; it reorganised the institutional sites through which power was exercised.[423] The firm became not merely a party to private contract, but a site of governance in which authority over time, discipline, livelihood and collective organisation was exercised through legally constituted forms. Labour law's significance, on this account, lay in extending legality as the terrain of contestation shifted from custom to contract, and from communal practice to formal labour regulation.[424]

Selznick's account illuminates how labour law emerged not as a rupture with legal tradition, nor as the politicised intrusion Hayek feared, but as part of law's institutional evolution - 'contain[ing] the seeds of its own mitigation' - through its extension into domains of '*private government*' long shielded by the liberal assumption that the rule of law applies only to the state.[425] Nowhere is this more evident than in the legal construction of waged work, which reveals how economic and organisational power relocated beyond the reach of public authority, prompting legality's gradual extension into previously unregulated domains.[426] As economic life was reorganised under industrial capitalism, power shifted from agrarian relations to the factory and the firm.[427] The workplace emerged as a central site of governance: a legally structured domain in which employers exercised authority over time, conduct and livelihood.[428] Yet this authority operated largely beyond the procedural constraints and justificatory expectations associated with public power.[429] The resulting disjunction posed a problem not merely of regulation, but of legality itself.[430] If the rule of law

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[423] W. Lazonick and M. O'Sullivan, 'Maximizing Shareholder Value: A New Ideology for Corporate Governance' (2000) 29(1) *Economy and Society*, 13-35.

[424] Selznick, *Law, Society and Industrial Justice*, 52-56, 259-270. For a more modern account see E. Anderson, *Private Government*, 37-65.

[425] Ibid.

[426] Ibid. See also p. 52-62 where he discusses the 'tension between association and contract,' arguing that the classical contract model is 'wanting in realism', failing to grasp the division of labour within a firm, or the reality needed to maintain sustained co-operation.

[427] Ibid, 151-157, 259-267.

[428] Ibid, 71-72, 270-274.

[429] Ibid. For example at (p. 68) Selznick describes 'continuity of employment' as an 'interest of substance' that effectively becomes a property right in a job, shielding the worker's livelihood from arbitrary dismissal; S. Naidu and N. Yuchtman, 'Coercive Contract Enforcement: Law and the Labor Market in Nineteenth Century Industrial Britain' (2013) 103(1) *American Economic Review* 107, 108-110.

[430] Selznick, *Law, Society and Industrial Justice*, 67-68. See also D. Hay, 'Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries', in D. Hay and P. Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, 2004), 59, 65-68; S. Deakin and F. Wilkinson, *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005), 75-78.

is to constrain arbitrariness wherever power is exercised, it could not remain confined to the public sphere while leaving such domains untouched.[431]

In early industrial Britain, this disjunction was particularly stark.[432] The employment relationship, formally grounded in the contract of service, enabled employers to issue rules, impose discipline and organise working life without reciprocal legal accountability.[433] Master and Servant laws, rooted in earlier statutory frameworks and extended through the nineteenth century, criminalised breaches of contract by workers while imposing no equivalent obligations on employers.[434] The legal system thus lent its coercive force to a regime of unilateral authority, rendering worker disobedience punishable through fines, imprisonment and hard labour, while shielding employer conduct from comparable scrutiny.[435]

This asymmetry was reinforced by the wider statutory framework.[436] The Combination Acts of 1799 and 1800 criminalised collective worker organisation while permitting employers to coordinate freely,[437] suppressing avenues for contesting managerial authority and consolidating the employment contract as what Selznick describes as 'a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion'.[438] The result was not the absence of law, but a form of legality that structured and legitimised private power without subjecting it to meaningful constraint.[439] Waged work was thus organised through a legalised hierarchy: contract law institutionalised managerial authority

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[431] Selznick, *Law, Society and Industrial Justice*. See also p. 38 where Selznick famously notes that the loss of a job can be 'more hurtful than a term in jail,' creating a 'gap in the legal order' when such decisions are made arbitrarily.

[432] Steinfeld, *Coercion, Contract*, 201.

[433] Hay, 'Master and Servant in England', 59, 65-68; R. J. Steinfeld, *Coercion, Contract*,190-215; E. P. Thompson, *The Making of the English Working Class* (Penguin, 1980 [1963]), 519-536, 833-865.

[434] Steinfeld, *Coercion, Contract, and Free Labour*, 117-130.

[435] Steinfeld, *Coercion, Contract, and Free Labour*, 218-220, 234; Hay, 'Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries', in D. Hay and P. Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, 2004), 59, 65-68; Steinfeld, *Coercion, Contract, and Free Labour*, 84-90, 117-130.

[436] Hay, 'Master and Servant in England', 64-68; Thompson, *The Making of the English Working Class*, 204-207; D. Brodie, *A History of British Labour Law: 1867-1945* (Bloomsbury, 2003), 1-10.

[437] Thompson, *The Making of the English Working Class*, 204-207; Brodie, A History of British *Labour Law*, 1-10.

[438] Selznick, *Law, Society and Industrial Justice*, 136.

[439] Anderson, *Private Government*, 65; Naidu and Yuchtman, 'Coercive Contract Enforcement', 107.

not as a mutual regulator, but as a mechanism enabling what Anderson describes as 'sweeping, arbitrary, and unaccountable' power, 'not subject to notice, process, or appeal.'[440]

The internal organisation of the workplace further illustrates this dynamic.[441] The rise of the factory system brought with it increasingly detailed regimes of discipline and control. Employers issued workplace rules regulating time, conduct and productivity, functioning as de facto legislator, judge and enforcer within the factory.[442] Through internal rules, fines, dismissal, blacklisting and disciplinary codes, managerial authority operated as governance without the justificatory obligations ordinarily associated with public power.[443] As Steinfeld observes, employers 'insist[ed] that their workers were criminally bound for the entire term', with breaches of discipline - whether lateness, absence or perceived 'sloppiness' - exposing workers to both internal sanctions and legal penalties.[444] The authoritarian logic of factory discipline was captured starkly in one official workplace notice warning that 'all overseers and officials of the firm shall be obeyed without question… disobedience will be punished by dismissal'.[445]

These practices revealed a form of governance that was at once legal and unaccountable.[446] The workplace was densely regulated, yet lacked the procedural safeguards, reciprocity and justificatory norms associated with even formalist readings of the rule of law.[447] Even where employer authority extended beyond the factory - through forms of corporate paternalism governing housing, education and social life - it remained insulated from the kinds of legal scrutiny applied to public institutions.[448] In model villages such as Bournville, Port Sunlight and Saltaire, employers regulated not only labour, but also housing, education, temperance and religion, producing a social order dense with rule yet largely untouched by public law.[449]

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[440] Anderson, *Private Government*, 54.

[441] Steinfeld, *Coercion, Contract*, 67, 179-194; E. P. Thompson, 'Time, Work-Discipline, and Industrial Capitalism' (1967) 38 *Past & Present*, 56-97.

[442] Deakin and Wilkinson, *The Law of the Labour Market*, 71, 105-106, 115; Thompson, *The Making of the English Working Class*, 61-62, 72-75, 85-90; Hay, 'Master and Servant in England', 59.

[443] Deakin and Wilkinson, *The Law of the Labour Market*, 115; Steinfeld, *Coercion, Contract*, 67-68.

[444] Steinfeld, *Coercion, Contract*, 114-115.

[445] Ibid.

[446] Selznick, *Law, Society and Industrial Justice*, 33; Deakin and Wilkinson, *The Law of the Labour Market*, 71, 115.

[447] Steinfeld, *Coercion, Contract*, 227-230, 234, 244.

[448] Selznick, *Law, Society and Industrial Justice*, 57; Anderson, *Private Government*, 40, 125; Deakin and Wilkinson, *The Law of the Labour Market*, 105.

[449] T. Hunt, The Rise and Fall of the Victorian City (Weidenfeld & Nicolson, 2004), 187-226.

The result was a domain of power that was legally constituted but insufficiently constrained.[450]

It is precisely this disjunction that generated pressure for legal transformation.[451] As industrialisation intensified, the persistence of a regime in which employers exercised coercive authority without corresponding obligations increasingly undermined the credibility of the legal order.[452] Workers' grievances were not simply economic, but juridical: they exposed a tension between the formal commitments of a legal system premised on liberty and the realities of unaccountable power in the workplace. [453]

Labour law developed incrementally in response to this tension.[454] Its emergence was not the product of a single reformist moment, nor of an abstract commitment to fairness, but of sustained social conflict, political pressure and institutional adaptation.[455] Early interventions - including the Factory Acts and the gradual decriminalisation of breach of contract - did not displace managerial authority, but began to impose limits upon it by introducing elements of procedural oversight and public accountability into the employment relationship.[456] The establishment of minimum wage boards in 1909, unemployment insurance in 1911 and more expansive health and safety regulation marked further steps in the extension of legal constraint into a domain long shielded by 'a marriage of old master-servant notions to an apparently uncompromising contractualism'.[457] Over time, '[h]aving conceded in principle in 1867 that labour agreements should be treated as civil in character', trade unions became legally recognised associations under the Trade Union Act 1871, signalling an emergent willingness to incorporate collective worker action into the framework of rule-bound contestation.[458]

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[450] Selznick, *Law, Society and Industrial Justice*, 57; Anderson, *Private Government*, 40-65.

[451] Steinfeld, *Coercion, Contract*, 244; D. Thompson (ed), The Chartists: Popular Politics in the Industrial Revolution (Pantheon, 1971), 356-361.

[452] Steinfeld, *Coercion, Contract*, 207-210, 218-220.

[453] Ibid; Nonet and Selznick, *Law and Society in Transition*, 4, 56.

[454] Nonet and Selznick *Law and Society in Transition*, 26.

[455] L. Wedderburn, *The Worker and the Law* (3rd edn, Penguin, 1986), 221-225, 520-522.

[456] Steinfeld, *Coercion, Contract, and Free Labour*, 218-220; Wedderburn, *The Worker and the Law*, 221-225, 520-522.

[457] Wedderburn, *The Worker and the Law*, 221-225, 520-522; Trade Boards Act 1909; National Insurance Act 1911; Selznick, *Law, Society and Industrial Justice*, 78-79, 136.

[458] Steinfeld, *Coercion, Contract*, 210; Trade Union Act 1871.

These developments did not simply add isolated statutory protections to an otherwise private relationship. They reconfigured the workplace as a site of legal governance.[459] The employment relationship, once framed primarily through private contract, became increasingly subject to rule-bound forms of regulation in which employer authority could be challenged, justified and reviewed.[460] Trade union recognition, collective bargaining, statutory protections and specialised institutions further embedded this development, transforming the workplace into a domain in which power was mediated through legal forms.[461]

This transformation did not eliminate conflict or hierarchy.[462] Rather, it altered the terms on which they operated. As Selznick put it, 'management becomes more conscious of rules, more conscious of rights, and more capable of building that consciousness into the routines of institutional life.'[463] Managerial authority, no longer legitimated by status or tradition alone, was increasingly expected to 'offer reasons and justifications' for decisions as 'prerogative [gave] way to policy.'[464] This is the precise sense in which labour law belongs within the rule-of-law tradition: it did not abolish managerial power, but required that power to pass through institutional forms capable of justification and contestation.[465]

In the UK, this development was given a distinctive institutional form.[466] The post-war model of collective laissez-faire did not displace private ordering altogether; rather, it embedded workplace power within a plural architecture of collective bargaining, statutory rights, tribunals, inspectorates and specialised bodies.[467] This matters for the argument because it shows that labour law's rule-of-law significance lay not only in the creation of rights, but in the construction of institutions through which managerial authority could be tested.[468] The

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[459] Steinfeld, *Coercion, Contract, and Free Labour,* 207, 233; Selznick, *Law, Society and Industrial Justice*, 79, 136, 183.

[460] Selznick, *Law, Society and Industrial Justice*, 183.

[461] O. Kahn-Freund, 'Legal Framework', in A. Flanders and H. Clegg (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, 1954), 42-48; Kahn-Freund, *Labour and the Law,* 18; Wedderburn, *The Worker and the Law,* 520.

[462] Selznick, *Law, Society and Industrial Justice*, 151; Arthurs, *Without the Law,* 143, 164-165.

[463] Selznick, *Law, Society and Industrial Justice*, 183.

[464] Ibid.

[465] Selznick, *Law, Society and Industrial Justice*, 151, 183; Arthurs, *Without the Law,* 143, 164-165.

[466] Kahn-Freund, 'Legal Framework', 42-48; Kahn-Freund, *Labour and the Law,* 18.

[467] Ibid.

[468] H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press, 1992), 93-132; L. Dickens, *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012), 29-48.

creation of Employment Tribunals, for example, required employers to justify dismissal decisions according to procedural standards, enabling workers to challenge managerial authority through norm-governed processes.[469] Similarly, health and safety regulation, particularly following the Robens Report and the Health and Safety at Work Act 1974, introduced a model of internal responsibility supported by inspectorate oversight and worker representation.[470] These mechanisms did not remove managerial discretion, but they changed its legal character by making it answerable.[471]

The same point can be seen in the institutional architecture of the 1970s.[472] The Industrial Relations Act 1971 introduced a statutory right not to be unfairly dismissed and mandated grievance procedures, shifting dismissal from an act of private discretion into a legally reviewable decision.[473] The Trade Union and Labour Relations Act 1974 re-legitimised collective worker action, recognising that industrial legitimacy depended on enabling workers to contest power collectively as well as individually.[474] The Employment Protection Act 1975 then strengthened unfair dismissal protections, integrated maternity and redundancy rights, and created mechanisms through which managerial refusal to recognise collective voice could be scrutinised.[475] Most importantly for present purposes, the establishment of the Central Arbitration Committee gave institutional form to this logic.[476] As Employment Minister Michael Foot observed during the second reading of the Bill, the Act aimed to replace 'management by prerogative' with 'management by consultation.'[477]

The CAC, for example, exemplified Selznick's vision of law as a way of 'institutionalis[ing] principle[s] of accountability and restraint' in the exercise of power, by formalising the

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[469] Ibid; H. Collins, *Employment Law* (Oxford University Press, 2010), 157-160, 167-173.

[470] J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 94-97; D. Walters and T. Nichols, *Worker Representation and Workplace Health and Safety* (Palgrave Macmillan, 2007), 32; Health and Safety at Work etc Act 1974.

[471] Selznick, *Law, Society and Industrial Justice*, 183; Nonet and Selznick, *Law and Society in Transition*, 6, 56.

[472] Nonet and Selznick, *Law and Society in Transition*, 26; Wedderburn, *The Worker and the Law*, 528-530.

[473] Ibid; Industrial Relations Act 1971, Part V; Employment Protection Act 1975, s 57.

[474] Trade Union and Labour Relations Act 1974, ss 13-16; Wedderburn, *The Worker and the Law*, 529-530; Collins, Justice in Dismissal, 7-10.

[475] P. Davies and M. Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press, 1993),186-211; Employment Protection Act 1975, Parts II-VII.

[476] Davies and Freedland, *Labour Legislation and Public Policy*, 198-202; Employment Protection Act 1975, ss 99-101; T. Novitz and P. Skidmore, *Fairness at Work? Labour Law* and the Employment Relations Act 1999 (Hart Publishing, 2001).

[477] HC Deb 3 April 1974, vol 871, col 1286; P. Davies and M. Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press, 1993), 186-211.

threshold of worker support required for union recognition.[478] By formalising procedures for recognition, consultation and worker support, the CAC required employers to engage with organised labour through rule-bound and publicly recognisable processes. Britain's approach reflected a 'historically specific form of institutional accommodation', forged through 'struggle between capital and labour', state and society, and legal authority and its institutional inheritance of longstanding traditions of industrial self-regulation.[479] It did not abolish managerial authority or substitute the state directly for employer power. In requiring employers to engage with organised labour through rule-bound procedures that were both legally and publicly recognisable as legitimate grounds for contestation, it transformed collective voice into a proceduralised expectation, as labour law increasingly 'certified legitimacy' through institutions designed to channel and scrutinise authoritative acts.[480]

Where, as Selznick notes, 'rulers have only limited credibility as certifiers of their own legitimacy,' modern legality sought to bring private governance structures - employer associations and trade unions alike - 'under the discipline of law,' not simply to restrain them, but to secure authority through mechanisms of review and justification.[481] In requiring employers to engage with organised labour through legally structured procedures, it transformed collective voice into a recognised basis of institutional accountability.[482] In Selznick's terms, it brought private governance structures 'under the discipline of law' by creating mechanisms through which authority could be reviewed, justified and publicly certified as legitimate.[483]

The foregoing analysis enables a clearer account of the emergence of labour law within the rule-of-law tradition. If, as Thompson and Selznick show, law is constitutive of social relations and its legitimacy depends upon its capacity to constrain power through justificatory forms, then labour law cannot be understood as a departure from legality. It is better

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[478] Davies and Freedland, *Labour Legislation and Public Policy*, 157; Employment Protection Act 1975, ss 99-101.

[479] Selznick, *Law, Society and Industrial Justice*, 127; Deakin and Wilkinson, *The Law of the Labour Market*, 113; Davies and Freedland, *Labour Legislation and Public Policy*, 3-7.

[480] Selznick, *Law, Society and Industrial Justice*, 56; Davies and Freedland, *Labour Legislation and Public Policy*,198-202.

[481] Nonet and Selznick, *Law and Society in Transition*, 57, 59.

[482] The point is not that collective bargaining itself is enforcement, but that collective bargaining, statutory rights and specialised institutions formed part of an institutional ecology through which employer power was rendered contestable.

[483] Nonet and Selznick, *Law and Society in Transition*, 56-59.

understood as legality's extension into new domains of governance. As economic power became concentrated within the institutional structures of the workplace, the limitations of a legal order confined to public authority became increasingly apparent. Labour law emerged because the continued credibility of legality depended upon its ability to engage with the realities of industrial governance. It rendered employer authority more intelligible, more contestable and more answerable, even while leaving hierarchy intact. That is the sense in which labour law belongs within the rule-of-law tradition: not because it abolishes private power, but because it subjects that power to legal forms through which it may be justified, challenged and constrained.

2.8 Conclusion

This chapter has situated labour law within the rule-of-law tradition by reframing legality as a historically contingent and institutionally mediated practice concerned with constraining the exercise of power. Against formalist accounts that define the rule of law in terms of generality, predictability and autonomy, it has argued that law does not operate as a neutral framework standing apart from social relations, but as a mode of governance embedded within them.

Drawing on Legal Realism, the chapter challenged the assumption that law can be separated from the economic and social structures it organises, focusing in particular on the instability of the public-private distinction. Through Thompson, it showed that law's authority derives from its capacity to impose justificatory obligations upon those who exercise power. Selznick's institutional account extended this insight, showing that legality must remain responsive to shifting configurations of authority if it is to retain its claim to constrain power.

On this basis, labour law has been understood not as a departure from the rule of law, but as one of its institutional expressions. As economic power became concentrated within the workplace, legality was required to extend into this domain in order to preserve its credibility as a constraint on arbitrariness. Labour law thus emerged as a juridical response to the relocation of power within industrial society, structuring managerial authority through forms of justification, accountability and review.

This account also clarifies the stakes of the thesis as a whole. If labour law belongs within the rule-of-law tradition because it constrains private power, then its significance cannot lie

merely in its formal existence. Rights, procedures, tribunals, inspectorates and collective mechanisms may persist as legal forms; but the rule-of-law question is whether they continue to structure and limit the exercise of economic power in practice.

The persistence of labour law without effective constraint may therefore mark not simply an enforcement failure, but a transformation in legality itself. The question that follows is not whether labour law belongs within the rule-of-law tradition. This chapter has argued that it does. The question is whether labour law continues to function as part of that tradition under conditions of routine breach. The next chapter begins to address that question by examining how legal form may persist while its constraining function is weakened.

Chapter 3: Autonomy, Ideology, and the Risk of Capture

3.1 Introduction

Chapter 2 argued that labour law belongs within the rule-of-law tradition because it extends legal constraint into the workplace as a site of private power. This chapter examines the fragility of that claim. If legality constrains power through institutionalised forms of justification, then its effectiveness depends upon the relative autonomy of those forms. The question is therefore how law can both discipline power and legitimate it. This chapter reopens a question that sits at the core of this thesis: what kind of thing is law such that routine breach of worker-protective legislation can coexist with an ongoing projection of fidelity to the rule of law? The answer cannot lie in the liberal ideal discussed in Chapter 1, where legality was grounded in autonomy: a domain of general, impersonal rules insulated from politics and economics.[484] Nor can it lie in a simple Realist reduction of law to social power.[485] If law were nothing more than the direct expression of dominant interests, its continuing authority - its capacity to structure justification, command allegiance, and at times discipline domination - would be difficult to explain.

That was the significance of Chapter 2's engagement with Thompson. The tension runs deeper than the familiar opposition between formalism and Realism, extending into longstanding debates over ‘relative autonomy’ within Marxist and socio-legal theory.[486] The liberal legal tradition, encapsulated in Hayek’s conception of formal order and its defence of legality, depends upon autonomy to secure law’s moral authority.[487] Legal Realism unsettled that tradition by demonstrating law’s embeddedness in social relations and institutional practice. But if Realism dissolves the boundary between law and power entirely, it leaves unanswered the question of how the rule of law retains any distinctive authority.[488] The

[484] Chapter 1 showed that Hayek’s rule of law offered more than a theory of legal order; it supplied a constitutional imagination for the market age. By treating law’s neutrality as its highest virtue and locating freedom in the absence of collective choice, it cast legality as a technique of governance rather than a moral project. The argument that follows traces how that conception, once directed at the state, has been increasingly drawn upon to insulate the ‘free’ market economy and, in particular, corporate employer governance.

[485] See Thompson, *Whigs and Hunters*, 250, 265-266; I. D. Balbus, ‘Commodity Form and Legal Form: An Essay on the “Relative Autonomy” of the Law’ (1977) 11 *Law & Society Review* 571.

[486] See C. Tomlins, ‘How Autonomous Is Law?’ (2007) 3 *Annual Review of Law and Social Science* 45.

[487] For a contemporary defence of this conception, see P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ [1997] *Public Law* 467.

[488] This institutional focus anticipates the argument developed in Chapter 5.

problem, on that account, is not whether law is political; it is how legality remains meaningful once its political character is acknowledged.[489]

This chapter approaches autonomy not as a metaphysical claim, nor as an illusion to be discarded, but as a fragile and historically contingent social achievement, sustained through institutional practice and justificatory labour.[490] Law maintains a relative independence through stabilised routines of justification, professional vocabularies, and institutional practices that organise how reasons are given and recognised.[491] That relative independence can, at moments, discipline power by requiring it to justify itself in legal terms. But it can also harden into legalism or be reprogrammed through managerial rationalities, converting justification into administrative performance.[492] Autonomy, in this sense, is neither simply emancipatory nor merely ideological; it is a terrain of struggle.[493]

The argument proceeds in three movements. First, it reconstructs Isaac Balbus's critique of Legal Realism and his account of relative autonomy. Balbus recognised that law's internal categories and justificatory forms cannot be read directly off economic interests. Autonomy, in his account, is a structural feature of capitalist 'hegemony': law must appear to stand apart from power in order to legitimise it.[494] Yet this structural emphasis risks flattening the institutional and historical variability of autonomy in practice.

Second, the chapter turns to Critical Legal Studies. CLS accepts the realist insight into indeterminacy but reframes autonomy as contradictory. Legal forms can operate as resources for critique - organising reason-giving and occasionally unsettling domination. At the same time, however, those same forms can stabilise hierarchy by translating conflict into administrable procedures and metrics. Autonomy becomes ideological not because it is unreal, but because its appearance of neutrality masks the organisational conditions that

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[489] Nonet and Selznick, *Law and Society in Transition*, 51. See also p. 4-5, and Selznick, *Law, Society and Industrial Justice*, 14.

[490] C. Tomlins, 'How Autonomous Is Law?', 45.

[491] Ibid.

[492] See following chapters.

[493] For a recent expression of its continued importance in the UK context, see Lord Hermer KC, 'The Rule of Law in an Age of Populism' (Bingham Lecture, 14 October 2024) <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law>.

[494] See A. Gramsci, Selections from the Prison Notebooks (Q Hoare and GN Smith eds, Lawrence & Wishart 1971), 12-13. See esp Lettere dal carcere, edited by E. Fubini (Turin, 1965), 616.

shape its operation. Under contemporary governance, marked by managerial rationality and austerity, these elements are increasingly oriented toward performance rather than constraint.

The question that follows in the third part of the chapter is therefore practical: by what mechanisms is justificatory autonomy converted into symbolic compliance? This question sets the stage for Chapter 4. If this chapter clarifies the conceptual conditions under which autonomy can both discipline and legitimise power, the next examines how, in UK labour law enforcement, autonomy has been bureaucratised into ritual. Routine breach, on this account, is not the absence of legality but its reprogramming or 'managerialisation'.[495]

3.2 The Liberal Autonomy Assumption

Legal autonomy remains a central, if contested, feature of the rule of law tradition.[496] To the extent that law is expected to constrain arbitrary power, provide a framework for orderly social relations, and offer principled adjudication in the face of conflict, it must retain some capacity to distinguish itself from the political and economic forces it governs.[497] If law is to mediate power rather than simply reflect it, some notion of institutional independence, however modest, remains vital.[498]

Autonomy, in this sense, signals law's claim to speak in a different register: to decide according to reasons that purport to be general, public, and impersonal. Most systematically articulated within the liberal legalist tradition, autonomy operates as a structural safeguard against political expediency, economic interest, and the preferences of those who wield power.[499] Chapter 1 examined this assumption as the intellectual core of Hayek's liberal legalism. Here, I argue that it continues to underwrite the contemporary rule-of-law imaginary, which treats neutrality, predictability, and calculability as both the source and the proof of legality itself.[500] Within this vision, law appears as an impersonal technique that

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[495] See Chapter 1.

[496] T. R. S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001), 2.

[497] See H. L. A. Hart, *The Concept of Law* (2nd ed, Clarendon Press, 1994), 91-123.

[498] For a recent expression of its continued importance in the UK context, see Lord Hermer KC, 'The Rule of Law in an Age of Populism' (Bingham Lecture, 14 October 2024) <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law>.

[499] See Chapter 1.

[500] Craig, 'Formal and Substantive Conceptions of the Rule of Law', 467-487.

disciplines government, but not the economically powerful, and justice is secured through the suppression of discretion rather than the pursuit of particular ends.[501]

Historically, this conception of autonomy found analytic clarity in Max Weber's account of formal legal rationality and normative defence in Hayek's reconstruction of the rule of law. As noted earlier, 'questions of generality and autonomy deal with the extent to which our institutions approximate the rule of law'.[502] Autonomy thus serves as the primary restraint on arbitrariness, promising a buffer between governors and the governed and ensuring that decisions are made by reference to general, knowable rules rather than political whim or partisan interest.[503] In this formulation, as Weber puts it, '[t]he problematics of autonomy involve measurement of the extent to which decisions reflect general rather than specific interests'.[504] Law's claim to legitimacy rests on its capacity to treat like cases alike and to insulate decision-making from corruption or caprice, thereby providing a stable framework for social coordination. 'As most rule of law scholars would agree', Sanne Taekema wrote more recently, 'it is not meaningful to speak of non-arbitrariness without considering the fairness of procedure or the equal application of legal rules.'[505] In its embodiment of the rule of law, this 'modern conception of law', as Trubek observed, conceives of legal autonomy as the insistence that 'rules must be truly universal; residual particularisms must be suppressed; customary and special law must yield to "rationally" enacted law.'[506]

Weber's sociology gave this commitment one of its most systematic expressions.[507] Although not advanced as a normative theory, his ideal-typical account described a form of legality associated with bureaucratic modernity and capitalist exchange: a system whose authority

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[501] Ibid.

[502] D. M. Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529, 538.

[503] Ibid.

[504] Ibid, 547.

[505] S. Taekema, 'Two Realist Idealists Theorizing the Rule of Law' (2019) 11 *Hague Journal on the Rule of Law* 301, 305; M. Krygier, *Philip Selznick: Ideals in the World* (Stanford University Press, 2012), 175.

[506] D. M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1, 9-10.

[507] M. Weber, *Economy and Society* (G, Roth and C, Wittich eds, University of California Press 1978) 337-351, 882-886, 956-958.

rests on calculability and internal coherence.[508] *Formal legal rationality* prevailed to the extent that,[509]

> '(1) There are established norms of general application; (2) there exists a belief that the body of law is a consistent system of abstract rules, and that administration of law consists in the application of these rules to particular cases and is limited to these rules; (3) the "superior" is himself subjected to an impersonal order; (4) obedience is to the law as such and not to some other form of social ordering; and (5) obedience is owed only within rationally delimited spheres (jurisdiction).'[510]

In this paradigm, Weber, like Hayek, 'treat[s] autonomy and generality as a single dimension', in which legal legitimacy is preserved by converting political discretion into rule-governed procedure.[511] Political discretion is translated into rule-governed procedure. Authority is detached from personal will and relocated in impersonal normativity.

In this paradigm, law's distinctiveness lies in its claim to translate power into rule-governed, impersonal form.[512] Autonomous law therefore appears as the guarantor of predictability and impersonality, constraining power not by virtue of its ends but by virtue of its form.[513] As Hayek argued, the rule of law secures freedom precisely because it allows individuals to plan their affairs within a stable framework of abstract norms.[514] Yet Weber's account also hints at the fragility of this model: formal rationality depends upon institutional conditions that can erode when bureaucratic calculation displaces substantive

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[508] Ibid, 882-886.

[509] D. M. Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wisconsin Law Review* 720; D. M. Trubek, 'Complexity and Contradiction in the Legal Order' (1977) 11 *Law & Society Review* 529, 538-547. This formal-legal order was, for Weber, historically specific to modernity, and its apparent neutrality and proceduralism were instrumental not only in legitimising legal authority but in facilitating economic rationalisation. Unlike Hayek, Weber's account is not prescriptive, but identified formal legal rationality as a historically specific mode of domination, tracing the rise of calculable rule-based legality as a precondition for modern capitalism as part of a broader rationalisation process that resulted in 'an iron cage' of proceduralism. Indeed, it is precisely this feature - law's calculable form - that gave rise to its ideological function: concealing power within procedure.

[510] Weber, *Economy and Society*, 882-886, 956-958.

[511] See Trubek, 'Complexity and Contradiction', 538. Liberal legal thought tended to conflate these concepts, assuming that general rules, abstracted from particular interests, would necessarily preserve law's autonomy. The present argument challenges this assumption, suggesting that autonomy and generality are distinct - and that legal form alone cannot guarantee either neutrality or constraint.

[512] P. Craig, 'Formal and Substantive Conceptions of the Rule of Law' 467-471.

[513] See e.g. J. Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law*: Essays on Law and Morality (Oxford University Press, 1979), 210-229.

[514] Hayek, *Constitution of Liberty*, 205-224; Trubek, 'Complexity and Contradiction', 538-547.

justification.[515] A belief in coherence, neutrality, and impersonal rule-application is not self-sustaining; it is an institutional achievement that becomes harder to maintain once law is asked to do openly distributive work.

3.3 Autonomy as an Institutional Achievement

The point, then, is not that legal autonomy is illusory. A more convincing socio-legal account must avoid both the liberal legalist claim that autonomy inheres in legal form itself and the opposing reduction of law to the direct expression of social or economic power. Law does acquire a degree of independence from the forces it regulates. It develops a distinctive vocabulary, stabilised procedures, professional traditions, institutional routines, and standards of justification through which claims are made intelligible as legal claims. These features matter. They help explain why law can sometimes discipline power, why legal argument is not reducible to political preference, and why legal institutions may generate expectations that exceed the immediate interests of those who invoke them. The problem is that this autonomy is neither natural nor guaranteed. It is an institutional achievement: historically produced, professionally maintained, and socially contingent.[516] Weber's account is useful precisely because it shows that formal legal rationality is not simply a normative ideal, but a historically specific mode of authority. The modern legal order acquires its force through calculability, regularity and the separation of legal decision-making from personal domination. In this sense, formal rationality performs real constraining work. It channels the exercise of authority through rule-governed procedures, distinguishes office from person, and requires decisions to be justified by reference to impersonal norms rather than status, command or prerogative. This is why Weber's analysis remains so important for rule-of-law theory. It explains how law can become a medium through which domination is rendered legitimate, but also how that legitimation depends upon recognisable standards of regularity and restraint.[517]

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[515] Trubek, 'Max Weber on Law and the Rise of Capitalism', 720; Trubek, 'Complexity and Contradiction', 538-547.

[516] Trubek, 'Max Weber on Law and the Rise of Capitalism', 720; Tomlins, 'How Autonomous Is Law?', 45-49.

[517] M. Weber, *Economy and Society: An Outline of Interpretive Sociology* (G. Roth and C. Wittich eds, University of California Press, 1978), 882-886, 956-958; D. M. Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wisconsin Law Review* 720; C. Tomlins, 'How Autonomous Is Law?' (2007) 3 *Annual Review of Law and Social Science* 45.

Yet Weber's account also reveals the instability of the autonomy claim. The calculability of law is not the same as its neutrality. Formal rationality may constrain arbitrary discretion, but it may also organise domination in a more stable, predictable and administratively effective form. Law's autonomy, in this respect, is double-edged. It can prevent power from appearing as mere will, but it may also translate power into a form that appears impersonal, technical and necessary. The legal order's claim to stand apart from politics and economics is therefore not simply false. It is productive. It helps generate the conditions under which law can both discipline and legitimate the social relations it organises.

This point is developed with particular force by Trubek. Reading Weber against both liberal and Marxist accounts, Trubek shows that modern law's formal rationality cannot be understood merely as a reflection of capitalist interests, but nor can it be treated as an autonomous moral achievement standing above them. Its distinctiveness lies in the way legality becomes embedded in capitalist social organisation while retaining a form of internal coherence. Legal autonomy is therefore relational. It depends on law's capacity to present itself as a general and impersonal order, but that very presentation is shaped by the social and economic conditions in which law operates. The legal order is not simply caused by capitalism, but it helps make capitalist relations administrable, predictable and legitimate.[518]

This is why the question of autonomy cannot be resolved at the level of legal form alone. A rule may be general, prospective and formally equal in application, yet still organise unequal social relations. Conversely, a legal institution may be deeply embedded in social conflict and yet retain enough institutional independence to generate meaningful constraints on power. The question is therefore not whether law is autonomous in some absolute sense, but how much autonomy it has, how that autonomy is produced, and whether it functions in practice as a constraint on arbitrary power. That is the question obscured by liberal legalism. By identifying autonomy with generality and predictability, liberal legal thought assumes that legal form itself secures the rule of law. A socio-legal account must ask instead whether the institutional practices that sustain legal form actually discipline power in the settings where power is exercised.

[518] D. M. Trubek, 'Max Weber on Law and the Rise of Capitalism' [1972] *Wisconsin Law Review* 720; D. M. Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529, 538-547.

Tushnet's critique of Friedman is helpful here. Friedman's account of law as a mirror of society powerfully unsettled doctrinal formalism by insisting that law is shaped by social, economic and political forces. But, as Tushnet observed, an account that treats law simply as a reflection of society risks missing the distinctive work performed by legal institutions. Law does not merely register changes that occur elsewhere. It supplies concepts, categories and institutional routines through which social relations are organised and contested. Legal doctrine may be shaped by economic power, but it also has a professional and institutional history of its own. Judges, lawyers and legal institutions do not simply translate social interests directly into doctrine. They work through inherited categories, professional ideals, settled techniques of reasoning and assumptions about coherence, fairness and administrability.[519]

That insight is particularly important for this thesis. If law were only a mirror of social power, routine breach would be easy to explain but difficult to theorise as a rule of law problem. It would simply be another instance of power overwhelming law. The more difficult problem is that routine breach occurs under conditions in which legal form persists. Rights remain on the statute book. Employers maintain compliance procedures. Enforcement bodies continue to act through legal and administrative categories. Courts and tribunals continue to speak the language of legality. The relevant question is therefore not why law disappears, but how legal form can remain in place while its constraining force is weakened. That problem requires an account of autonomy as something real but fragile: capable of producing constraint, yet vulnerable to reorganisation.

Gordon's account of legal history provides the strongest way of formulating this point. Against both formalist and instrumentalist accounts, Gordon argues that law is neither an internally self-generating system nor a passive effect of external social forces. Legal categories are historically produced and socially embedded, but they also acquire a relative durability. They shape the imagination of legal actors, structure possible arguments, and make some social arrangements appear natural while rendering others difficult to conceive. Legal consciousness is therefore not a decorative supplement to law. It is one of the ways law operates. The categories through which people understand property, contract, employment, responsibility and authority help constitute the social world they purport

[519] M. Tushnet, 'Perspectives on the Development of American Law: A Critical Review of Friedman's *A History of American Law*' [1977] *Wisconsin Law Review* 81, 87-91.

merely to regulate.[520] This does not mean that law determines social life. Gordon's point is subtler. Legal forms become part of the social practices through which power is organised. They shape what actors understand themselves to be doing, what claims appear plausible, what forms of injury become cognisable, and what kinds of institutional response seem available. Law therefore has a constitutive role, but not an omnipotent one. It operates through inherited vocabularies, institutional settings and professional practices that are themselves open to contestation. Autonomy, on this view, is not a wall separating law from society. It is a patterned set of practices through which legal meaning is stabilised and through which social conflict is translated into recognisable legal form.

This formulation is important because it preserves the central insight of Chapter 2 without romanticising legality. Thompson and Selznick showed that law can constrain power because it requires authority to justify itself through recognised forms. But those forms do not operate automatically. They depend upon institutions capable of sustaining legal reasons as reasons, rather than collapsing them into administrative convenience, managerial preference, or economic necessity. The autonomy of law, in this sense, is the condition under which legal justification can exert pressure on power. Where that autonomy is weakened, power may still be required to speak in legal terms, but the content of legality may be redefined by the very actors it is meant to constrain.

This is the danger that becomes central in the chapters that follow. If legal autonomy is an institutional achievement, it can be eroded without being formally abolished. Law need not be openly rejected for its constraining capacity to weaken. It may instead be translated into organisational routines, performance indicators, risk-management systems and compliance procedures that preserve the appearance of legality while altering its practical operation. The question is not simply whether legal institutions continue to exist, but whether they retain the capacity to require power to account for itself in substantively meaningful ways. A tribunal, inspectorate, grievance procedure or compliance policy may all appear as legal or quasi-legal forms. The significance for the rule of law, the thesis argues, thus depends

Understanding autonomy as an institutional achievement therefore clarifies the thesis's broader claim. Labour law belongs within the rule-of-law tradition because it extends legal constraint into the workplace as a site of private power. But the capacity of labour law to

[520] R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 88-105.

perform that function depends upon the institutional conditions under which its norms are interpreted, enforced and recognised. Where those conditions are weakened, legality may persist as form while losing its practical authority as constraint. This is not a collapse of law into non-law. It is a transformation in legality's mode of operation. Legal norms remain, but the social and institutional practices through which they acquire force are reconfigured. And the significance of Critical Legal Studies (CLS), to which the next section turns, lies in its ability to analyse that reconfiguration. CLS did not merely repeat the Realist claim that law is indeterminate or socially embedded. It asked how legal form, despite its indeterminacy, continues to stabilise social hierarchy; how autonomy can function ideologically; and how legal consciousness makes relations of domination appear coherent, legitimate and inevitable. Those questions are essential for understanding routine breach. The problem is not simply that employers break the law. It is that breach can become normalised within a legal order that continues to present itself as intact. To explain that condition, we need an account of how autonomy is produced, how it legitimates, and how it may be captured.

3.4 The Socialisation of Law and the Limits of Neutrality

The expansion of what Duncan Kennedy referred to as 'Social law' did not simply enlarge law's domain; it destabilised the conditions under which autonomy could plausibly be maintained as insulation.[521] Once legal technique became the vehicle for welfare governance, economic coordination, and distributive justice - the 'rational development of law as a means to social ends' - its legitimacy increasingly depended not on separation from policy, but on the justification of its entanglement.[522] Law was openly purposive; embracing 'policy analysis', it came to rest on its capacity to justify its entanglement in normative terms.[523] Over

[521] Kennedy, 'The Role of Law', 961-962.

[522] Ibid.

[523] Kennedy, 'The Role of Law in Economic Thought', 961-962. As legal institutions became explicitly tasked with distributive and regulatory functions, the contradiction between law's formal self-image and its practical entanglement in governance could no longer be sustained without considerable ideological work. In the aftermath of the juridical collapse under Nazism and Stalinism, and the broader discrediting of authoritarian legal regimes across mid-20th century Europe, figures such as Hayek and Fuller, in very different registers, sought to reassert the ideal of law, rooted in much older traditions of formal equality and judicial neutrality as autonomous, see M. Krygier, 'Rule of Law (and Rechtsstaat)' (UNSW Faculty of Law Research Series No. 2013/52, August 2013), 6-10.

time, however, the very conditions that rendered law indispensable to post-war governance simultaneously revealed the fragility of its autonomous self-image.[524]

The institutionalisation of social insurance - unemployment benefits, workplace injury compensation, health provision, pensions - required differentiated assessments of status, vulnerability, and risk.[525] Entitlements could not be adjudicated through abstract universality alone. Law was drawn into administration.[526]

This account captures law's embeddedness, but risks reducing legality to reflection. As law's remit expanded beyond the policing of jurisdiction and procedure into the governance of welfare, labour, and social risk, autonomy could no longer plausibly mean insulation from politics, but had to be reimagined as a claim about the legitimacy of political entanglement.[527] What emerged was a growing recognition of liberal legality's failure to grapple with 'fundamental questions about the social, political and economic functions of the legal order'.[528] Culminating in what came to be understood as a broader 'crisis of law' by the close of the twentieth century, the foundational assumptions underpinning the ideal of autonomous law were increasingly called into question by a new wave of socio-legal scholarship, emerging from the law and society movement,[529] that sought to reorient legal analysis around law's social foundations.[530] No longer confined to the role of neutral umpire policing the boundaries of a self-regulating market, law came to be recognised as constitutive of the economic order itself - a normative and institutional response to the structural conflicts at the

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[524] D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000' in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 19, 56-57. Kennedy describes the post-war development of nationally and internationally regulated market economies and the globalisation of the Bretton Woods system.

[525] Kennedy, 'Three Globalizations of Law and Legal Thought', 54. For a critique of the emphasis on law's interpretative malleability and functional underdetermination, see S. Moyn, 'Reconstructing Critical Legal Studies' (2024) 134 *Yale Law Journal* 77, 91, 96.

[526] Moyn, 'Reconstructing Critical Legal Studies', 91, 96. Moyn questions the emphasis on indeterminacy and interpretative malleability and stresses the constraints of social life.

[527] Under the pressures of mass industrialisation, the institutionalisation of organised labour, and Keynesian economic management, law was drawn explicitly into the governance of the employment relationship and the ideal of autonomy persisted less as a descriptive claim than as a legitimising aspiration increasingly out of step with practice.

[528] Trubek, 'Complexity and Contradiction in the Legal Order', 529; L. Mazor, 'The Crisis of Liberal Legalism' (1972) 81 *Yale Law Journal* 1032, 1032, 1051.

[529] See e.g M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' *Law & Society Review.* 1974 (9)(1), 95-160. On how this was later consolidated through socio-legal reform of legal education see W. Twining, *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997); Roger Cotterrell, Law's Community: Legal Theory in Sociological Perspective (OUP 1995).

[530] Mazor, 'The Crisis of Liberal Legalism', 1032, 1051.

heart of capitalist democracy.[531] It is in this context that instrumental accounts of law acquired their appeal.[532]

3.5 Friedman and the Early Instrumentalisation of Law

If legality was visibly entangled in distributive choice, then law appeared less as an independent order of reasons than as a mechanism through which social conflict was administered.[533] Lawrence Friedman's intervention crystallised this perspective. Law, he argued, was 'not a kingdom unto itself… not a set of rules and concepts… but a mirror of society.'[534] It took 'nothing as historical accident, nothing as autonomous, everything as relative and moulded by economy and society.'[535] Even if some technical aspects were internally adjustable, law in its operative sense was shaped by political priorities, economic structures, and cultural norms.[536] It was a 'mindless machine, steered by those in power.'[537]

Friedman's mirror thesis may have marked a decisive break from doctrinal formalism.[538] Yet, in collapsing law into reflection, it generated a dilemma.[539] A legal order that merely indexes prevailing interests cannot explain why legality persists as a distinct institutional vocabulary, why it exhibits patterned continuity across political transitions, or why it continues to

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[531] Kennedy, 'The Role of Law in Economic Thought', 961-962. Kennedy argues that 'property (which is just the legal name for a commodity)' and 'free contract' are not sufficient to generate a unique or neutral legal regime, because 'different legal regimes will generate "wealth effects" on the allocation of resources'; legal rules are thus 'a constitutive dimension of the wealth that factor endowments define'.

[532] D. M. Trubek, 'Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law' (1977) 11 *Law & Society Review* 529, 529-538.

[533] By the 1970s, the liberal legalism that had regained prominence in the post-war period began to unravel, not only because its institutional premises were strained, but because its foundational assumptions about law's autonomy, neutrality, and generality were increasingly perceived as inadequate to the realities they were meant to explain.

[534] L. M. Friedman, *A History of American Law* (Simon & Schuster, 1973), 10, 13.

[535] Friedman, *A History of American Law*, 10, 13. See also L. M. Friedman, 'Legal Culture and Social Development' (1969) 4 *Law & Society Review* 29, 34, on the values and attitudes through which members of a society understand their legal order and its legitimacy.

[536] Where Legal Realists had already exposed the fragility of the autonomy claim by revealing the indeterminate nature of legal reasoning and that adjudication was unavoidably shaped by social context and the contingencies of institutional purpose, they had focussed their efforts primarily on judicial decision-making and the limits of legal formalism, see D, Kennedy, 'Form and Substance in Private Law Adjudication', 1685-1778. Kennedy shows that where the Realists concentrated their fire on courts, they paid relatively little attention to the construction of legal fields or the political and ideological work done by doctrinal structures.

[537] Friedman, *A History of American Law*, 10, 13; Friedman, 'Legal Culture and Social Development', 34.

[538] See C. Tomlins, 'How Autonomous Is Law?' 45, 48-49.

[539] See Moyn, 'Reconstructing', 91, 94. However, see below Unger 'The Critical Legal Studies Movement', 579.

structure justificatory expectations even when outcomes are skewed.[540] Legal norms, as Robert Gordon put it, are not wholly 'plastic', and do not 'alter every time another set of interests gets its paws on them.'[541] What marks them as legal is, at least to some extent, their 'long-run structural characteristics that make legal practices out-last short-term swings in political pressure.'[542] Law carries 'some long- or medium-term continuity of inner structure.'[543] That continuity does not vindicate liberal insulation; it reflects institutional density - inherited categories, professional routines, interpretive traditions, and norms of coherence that stabilise patterns of reasoning over time.[544]

3.6 From Reflection to Mediation: Tushnet and the Limits of Determinism

Whilst marking an important shift beyond the doctrinal preoccupations of Legal Realism, Friedman's intervention ultimately retained a residual instrumentalist logic.[545] In recasting law as the passive reflection of external social forces, he reproduced a form of structuralist historiography reminiscent of orthodox Marxist accounts that reduced law to a "superstructure" built upon the material forces of production. Law became intelligible only as an effect.[546] It is precisely this reduction that Mark Tushnet resists.[547] In his extended critique of legal instrumentalism, he characterises Friedman's approach as entirely overlooking the possibility that 'the legal order may become an active influence, to some degree, on the social

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[540] Gordon, 'Critical Legal Histories', 88-105; Tushnet, 'Perspectives on the Development of American Law', 83-91.

[541] Gordon, 'Critical Legal Histories', 88-99, 102. Gordon approaches legal autonomy through 'historicism', a method emphasising how legal concepts evolve through layered contestation and inherited professional traditions. This frames law as neither formally autonomous nor merely instrumental, but as temporally contingent and ideologically structured, evolving through sedimented contestation, conceptual inheritance, and professional tradition.

[542] R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 88, 99-102. Gordon approaches legal autonomy through 'historicism', a method emphasising how legal concepts evolve through layered contestation and inherited professional traditions. This frames law as neither formally autonomous nor merely instrumental, but as temporally contingent and ideologically structured, evolving through sedimented contestation, conceptual inheritance, and professional tradition.

[543] Ibid. Importantly, Gordon does not imply coherence or neutrality in the formalist sense, nor does it insulate law from power; rather, its uneven persistence, its institutional patterning, and its capacity to constrain as well as express power enables law to function as a historically contingent terrain of struggle and rearticulation.

[544] Ibid, 81, 100-105.

[545] G. M. Hodgson, 'The Enforcement of Contracts and Property Rights: Constitutive versus Epiphenomenal Conceptions of Law' (2003) 13 *International Review of Sociology* 373 (author's manuscript, 2-3). Hodgson questions the ontological priority assigned to material relations over legal relations in Marx and Engels' account.

[546] Tushnet, 'Perspectives on the Development of American Law', 83-88.

[547] Tushnet, 'Perspectives on the Development of American Law', 87. Tushnet argues where this may have resonance in the move from feudalism to capitalism generally, it cannot be 'improperly generalised into a whole outlook on legal development' (p. 88).

and economic order.'[548] Law cannot be collapsed into either its social determinants or its social effects.[549] Economic relations shape legal form; but legal form, in turn, shapes the terrain upon which economic relations are organised and contested.[550]

Friedman, Tushnet argues, 'ignores the influence of autonomy on the legal order': he fails to recognise that some doctrinal developments may be explicable 'solely in terms of the autonomous internal dynamics of the legal process,' and that the legal order may at times act back upon the social and economic order.[551] This is not a defence of insulation.[552] Law is not 'responsive exclusively to the rationalistic urges' of judges or legislators.[553] But it is not simply the product of material interest either.[554] It emerges from the interaction of 'rules' and 'counter-rules', from inherited conceptual traditions and institutionalised argumentative practices that structure legal reasoning over time.[555]

'[M]aterial conditions,' Tushnet writes, 'are the source of both material interests and conceptualisations of those conditions… [and] at least on some issues at some times, those conceptualisations have an important influence on the shape of the law.'[556] What distinguishes law from a mere mirror, therefore, is not detachment from power, but the patterned and internally rational ways in which it mediates that power.[557] The legal order must be conceived as 'relatively autonomous': responsive directly in some instances, indirectly in others, and at times not responsive at all.[558] Its professionalised norms of 'coherence' and 'consistency',

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[548] Tushnet, 'Perspectives on the Development of American Law', 84-87.

[549] Tushnet, 'Perspectives on the Development of American Law', 88. See also Friedman's reliance on Weber overlooks the fact that rationalisation is, in important part, the result of historical circumstances which supported the development of an autonomous legal system (p. 88-89: 'notions of fairness, entirely independent of material interests and rooted in a sense of tradition, affected both the content of doctrine and the outcome of the cases'). (more below).

[550] Tushnet, 'Perspectives on the Development of American Law', 89-90. He also argues that Friedman's reliance on Weber overlooks the fact that rationalisation is, in important part, the result of historical circumstances which supported the development of an autonomous legal system.

[551] Tushnet, 'Perspectives on the Development of American Law', 89.

[552] Tushnet, 'Perspectives on the Development of American Law'.

[553] Tushnet, 'Perspectives on the Development of American Law', 89-91.

[554] Tushnet, 'Perspectives on the Development of American Law', 91.

[555] Tushnet, 'Perspectives on the Development of American Law', 89. See also p. 84, 91, 103-104.

[556] Tushnet, 'Perspectives on the Development of American Law', 89.

[557] Tushnet, 'Perspectives on the Development of American Law', 84. See also 90-99, 104.

[558] Tushnet, 'Perspectives on the Development of American Law', 84.

though historically situated, are the product of 'enormous intellectual effort' and can 'delay the emergence of new rules long enough for social forces to change substantially.'[559]

Autonomy, on this account, is neither illusion nor insulation.[560] It is institutional density.[561] It consists in the inherited routines, doctrinal continuities, and justificatory expectations that give legal development its distinctive texture. [562] These path-dependent structures confer on legal form a fragile capacity to mediate, and at times to discipline, social power.[563]

Yet Tushnet's contribution is not only structural.[564] In his analysis of nineteenth-century labour injunctions, in fact, capital turned to law not merely as coercion, but as legitimacy.[565] Legal institutions were effective precisely because they were believed to constrain.[566] 'Law in its ideological aspect' does not reflect neutrality but projects it by persuading the dominated that their domination is justified.[567] To correct Friedman's reductionism, then, is not to restore liberal insulation.[568] It is to recognise that the legal order must be understood in terms of mediation and ideology rather than reflection.[569] The task becomes to explain how law can be socially embedded without being socially reducible - how the rule of law can function as a language of constraint precisely because it also functions as a language of legitimacy.[570]

The employment relationship illustrates this point with particular clarity. Contract law did not merely describe an already existing relationship of exchange between formally equal parties. It supplied the legal categories through which subordination could be understood as consent,

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[559] Tushnet, 'Perspectives on the Development of American Law', 88, 93, 103. Tushnet identifies the profession's "guild interests", including an ideology of specialist expertise and institutional inertia, while also explaining how professional norms can delay legal change.

[560] Tushnet, 'Perspectives on the Development of American Law', 99, 104. At 99, Tushnet explains that workers' regard for legal institutions could diminish resistance to an injunction, while capitalists' belief in their independent value could make legal process preferable to military force.

[561] Tushnet, 'Perspectives on the Development of American Law'.

[562] Balbus, 'Commodity Form and Legal Form', 574-577, 585-586.

[563] Tushnet, 'Perspectives on the Development of American Law', 88-89, 93, 103.

[564] See Tushnet, 'Perspectives on the Development of American Law', 109. See also Chapter 5.

[565] Tushnet, 'Perspectives on the Development of American Law', 99-100.

[566] Tushnet, 'Perspectives on the Development of American Law', 90-99, 104.

[567] Tushnet, 'Perspectives on the Development of American Law', 100.

[568] Tushnet, 'Perspectives on the Development of American Law', 101. See also p. 87: 'the ideology of the legal order helps to reconcile the dominated segments of the society with the fact of their domination and helps to reconcile the dominant elements with the fact that they are dominant.'.

[569] Tushnet, 'Perspectives on the Development of American Law', 104.

[570] See Chapter 5.

managerial direction as contractual authority, and dependence as private ordering. Labour law's later development therefore did not introduce law into an otherwise non-legal domain. It reworked an already juridified field by contesting the legal forms through which employer power had been naturalised. The question is therefore not whether law enters the workplace, but what kind of legality governs it: one that renders managerial authority accountable, or one that translates that authority into formally lawful, administratively manageable, and socially normalised practices.[571]

3.7 The Structural Logic of Autonomy: Balbus and the Conditions of Capitalist Reproduction

If Legal Realism unsettled liberal claims of insulation, it remained to be explained, why law under capitalism take a specifically legal form at all.[572] Why does domination appear in the idiom of rights, equality, and rule? Orthodox Marxist accounts treated law as superstructure; commodity-form theorists located legal abstraction in exchange. [573] Isaac Balbus intervenes not to deny structural determination, but to explain why autonomy must nevertheless appear real.[574] Balbus rejects both the liberal insistence on autonomy as independence and the instrumentalist reduction of law to prevailing interest.[575] Both, he argues, misunderstand the role of legal form.[576]

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[571] R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 102-105; C. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993), 260-292; H. Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon Press, 1992), 93-132.

[572] This question had long preoccupied Marxist legal theory. For a foundational account see, E, Pashukanis, The General Theory of Law and Marxis. For structuralist revisions emphasising law's relative autonomy, see N, Poulantzas, *Political Power and Social Classes* (1968). For a contemporary survey of later debates between commodity-form, structuralist, and relative-autonomy approaches see N, Holdren, and E, Tucker. 'Marxist Theories of Law *Past and Present*: A Meditation Occasioned by the 25th Anniversary of Law, Labor, and Ideology', 1142-1169. Balbus' intervention may be read as relocating the problem from economic expression to ideological legitimation.

[573] See generally, E, Pashukanis, The General Theory of Law and Marxis. For structuralist revisions emphasising law's relative autonomy, see N, Poulantzas, *Political Power and Social Classes* (1968). For a contemporary survey of later debates between commodity-form, structuralist, and relative-autonomy approaches see N, Holdren, and E, Tucker. 'Marxist Theories of Law *Past and Present*: A Meditation Occasioned by the 25th Anniversary of Law, Labor, and Ideology', 1142-1169. Balbus' intervention may be read as relocating the problem from economic expression to ideological legitimation.

[574] I, E, Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law'*Law & Society Review*, 11(3), 571-588.

[575] Ibid, 572.

[576] See A, Gramsci, Selections from the Prison Notebooks (Q Hoare and GN Smith eds, Lawrence & Wishart 197,1) 12-13.

In Balbus' formulation, the rule of law becomes the ideological linchpin of capitalist hegemony not because it constrains arbitrary power, but because formality, generality, and neutrality enable capitalism to reproduce legitimately.[577] Autonomy should not be measured by detachment from extra-legal preference, nor should its absence be inferred from law's embeddedness in class structure.[578] The autonomy of law from 'the preferences of even the most powerful social actors,' he contends, is not an obstacle to domination but 'rather a prerequisite for the ability of Law to contribute to the reproduction of the conditions that make capitalism possible.'[579]

If commodity-form accounts locate legal generality in the abstraction of exchange, Balbus makes a more pointed claim about autonomy's political work.[580] The distinctive ideological force of the rule of law, Balbus argues, lies in its capacity to translate structurally unequal relations into a universal idiom.[581] 'The formality, generality and "autonomy" of the law,' he argues, 'preclude the qualitatively different interests and social origins of individuals from entering into the calculus of political exchange.'[582] The juridical form operates through abstraction: it suppresses the salience of class position and renders hierarchy governable through categories that purport to apply to all alike.[583]The consequence is not simply hypocrisy but reproduction through form itself,[584] where 'the systematic application of an equal scale to systemically unequal individuals necessarily tends to reinforce systemic

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[577] See A, Gramsci, Selections from the Prison Notebooks (Q Hoare and GN Smith eds, Lawrence & Wishart 197,1) 12-13.

[578] Ibid.

[579] Ibid, 585. Drawing on Louis Althusser's theory of ideological state apparatuses and Marxist structuralism, that is, Balbus argued that law plays a dual role in capitalist societies, facilitating exploitation while simultaneously legitimating the underlying relations through the illusion of generality and impartiality. L, Althusser, 'Ideology and Ideological State Apparatuses (Notes towards an Investifation)' in *Lenin and Philosophy and Other Essays* (Ben Brewster tr, Monthly Review Press 1970),136-140; Louis Althusser's theory of ideological state apparatuses (ISAs) distinguishes between repressive state apparatuses (such as the police and military) and ISAs (such as law, education, and media). Structuralist Marxism, as developed in this way by Althusser, rejects economistic or voluntarist accounts of power and instead emphasises the relative autonomy of ideological structures in reproducing capitalist relations.

[580] Balbus, 'Commodity Form and Legal Form', 576-577; Klare, 'Labor Law as Ideology', 464-465.

[581] Balbus, 'Commodity Form and Legal Form'. In this way, Balbus reconceives the rule of law as kind of a material ideology: not a mask concealing domination, but a medium through which domination is rendered plausible, legitimate, and legally intelligible.

[582] Ibid, 576. Similarly, commodities appear equivalent by abstracting from their concrete use values and the labour that produces them.

[583] Ibid, 582, 585-586. See also I Balbus, *The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts* (New York: Russell Sage Foundation, 1973). For a critique of Balbus' generalisation of insights drawn from the context of the 1960's ghetto riots to broader claims about legal consciousness and capitalist legality See Trubek, 'Complexity and Contradiction', 529, 532-533.

[584] Ibid, 577.

inequalities'. Balbus invokes Anatole France's irony that the law 'forbid[s] the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.'[585] Law's promise of equal treatment produces a field in which domination can be experienced as legality, as rule rather than command, and thereby becomes capable of commanding allegiance.[586] In this sense, the rule of law does not merely regulate conflict; it organises the terms on which conflict can even be recognised.[587]

The further consequence, for Balbus, is ideological not because law simply conceals inequality, but because legal abstraction reorganises political perception.[588] Autonomy, understood as such, 'functions to mask and occlude class differences and social inequalities,' contributing to a 'declassification' of politics that militates against class consciousness.[589] Consent is secured not solely through coercion, but through the production of legal consciousness: the expectation that power is constrained by impersonal rule, even where the distribution of power that rule protects remains structurally unequal.[590] In this sense, Balbus departs from both vulgar instrumentalism and strict commodity-form derivation by foregrounding ideology as a mediating mechanism rather than a mere epiphenomenon.[591] Balbus thus reframes autonomy not as insulation from domination but as the form through which domination becomes legitimate.[592] Autonomy is neither metaphysical separation nor ethical achievement, but a mode of governance whose generality and impersonality secure legitimacy precisely because they translate hierarchy into the appearance of universal rule.[593]

3.8 The Workplace and the Translation of Authority

If Balbus theorises the ideological work of autonomy at the level of social form, one way to see the institutional consequences of that argument is to follow legality into the workplace.

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[585] Ibid.

[586] Ibid.

[587] Balbus, 'Commodity Form and Legal Form', 576-577.

[588] Ibid, 576-577. Although Balbus may not frame it in these terms, his account implies that law's ideological power lies in its capacity to organise social perception: it legitimates domination not by denying it, but by translating it into a language of neutral rules and impersonal procedures.

[589] Ibid, 577.

[590] Ibid.

[591] Moyn, 'Reconstructing Critical Legal Studies', 77-79.

[592] Tomlins, 'How Autonomous Is Law?', 45-49.

[593] Kennedy, 'Form and Substance in Private Law Adjudication', 1712; G. Lukács, *History and Class Consciousness: Studies in Marxist Dialectics* (R. Livingstone tr, Merlin Press, 1971), 83-110.

Here, the rule of law does not arrive as an external restraint upon private power so much as a mode of rendering that power *juridically intelligible* - translating hierarchy into authority, and authority into rule.[594] Shifting the analytical lens from abstract reproduction to the everyday structuring of private power, Karl Klare provides a more contemporary account of the rule of law's ideological force in the workplace in *Labour Law as Ideology* which traces the 'institutionalisation of management's power by the introduction of "the rule of law" into the workplace' in the post-war labour constitution.[595] On this account, the infusion of legality into industrial relations did not simply discipline managerial authority.[596] The rule of law, so conceived, legitimated 'the existing allocation of authority within the enterprise' by cloaking hierarchy within the 'technical, content-neutral process' of contract.[597] The private contract, presented as a neutral legal form, 'justifies, first, industrial hierarchy… and, second, private lawmaking by powerful groups.'[598] The abstraction of legal form translates structurally unequal relations into an idiom of universal rule.[599] Managerial domination is recoded as contractual consent and authority appears as agreement, coercion rendered as legally valid 'choice.'[600] The rule of law enters the workplace not necessarily to displace hierarchy, but to stabilise it within a framework that appears impartial and rational.[601]

Even where labour law emerged, particularly in its post-war settlement, to 'protect employees from the unilateral and arbitrary dictates of management'. It readdirmed the procedural terms through which that authority was justified.[602] As Klare observes, grievances were, then, often 'remov[ed] from their context,' treated as neither 'a function of class domination' nor as 'implicat[ing] questions of the fundamental political and economic organisation of society.'[603]

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[594] K. E. Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law' (1981) 4 *Industrial Relations Law Journal* 450; K. V. W. Stone, 'The Post-War Paradigm in American Labor Law' (1981) 90 *Yale Law Journal* 1509.

[595] Klare, 'Labor Law as Ideology', 464-465.

[596] Ibid.

[597] Ibid.

[598] Ibid.

[599] Ibid, 480-481. This offered a crucial precursor to what later scholarship - particularly in sociolegal and regulatory theory - described (see Chapter 4) as 'symbolic compliance' in which constraint was displaced by formality, enforcement by appearance.

[600] Ibid.

[601] K. E. Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law', *Industrial Relations Law Journal* (4)(3) (1981), 450-482. See also K, Stone, 'The Post-War Paradigm in American Labour Law' (1981). Klare's argument. Like Trubek, Klare foregrounds contradiction, contingency, and the unstable nature of legal consciousness. See also 'Complexity and Contradiction', 531-538.

[602] Ibid, 453.

[603] Ibid.

The ideological force of autonomy here is subtle but powerful; legality does not simply mask domination but organises the terms through which domination is experienced. The presence of procedure - grievance mechanisms, contractual formalities or disciplinary codes - stands as evidence of constraint that without 'implicat[ing] questions of the fundamental political and economic organisation of society.'[604] Yet, the substantive allocation of authority, 'industrial hierarchy… and… private lawmaking by powerful groups' remains intact. Legal form, then, does not necessarily displace domination; it reorganises it. The introduction of legality into the workplace may discipline managerial power in some respects, but it also translates hierarchy into procedure, authority into contract, and coercion into choice. The rule-of-law idiom becomes a grammar through which private government can appear as lawful order.

3.9 Critical Legal Studies and the Ideological Structure of Legal Autonomy

Where Legal Realism had dismantled the illusion of law as a closed, self-referential system, the Critical Legal Studies (CLS) movement reoriented the autonomy debate altogether.[605] For CLS, legal autonomy was not a quality to be measured but a social fact to be explained.[606] If the Realists demonstrated that judicial reasoning was often indistinguishable from political choice, CLS revealed that the appearance of neutrality was not merely misleading but productive.[607] Law and society are not discrete realms whose interaction can be traced from a distance, but *mutually constitutive* domains.[608] What liberal thought treats as fixed boundaries - between public and private, coercion and consent, state and society - CLS treats as historically produced distinctions, the outcome of hegemony and reification rather than ontological truth.[609] Law does not merely reflect these divisions; it participates in producing them.[610]

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[604] Ibid.

[605] See Tomlins, 'How Autonomous Is Law?', 47.

[606] Ibid.

[607] Moyn, 'Reconstructing', 77.

[608] Gordon, 'Critical Legal Histories', 103; Trubek, 'Where the Action Is', 608-610. Trubek describes the reciprocal constitution of law and social relations.

[609] See Kennedy, 'Form and Substance', 1712. Kennedy draws on Lucaks' concepts of reification argue that the apparent 'naturalness' and 'neutrality' of legal outcomes function to mystify and legitimise constructed social arrangements and power dynamics as inherent, objective or inevitable. Susan Sibley, a key sociologist in this argument, argues that limiting the conception of 'law' to doctrine and institutions misses 'a key feature of how law participates in the social construction of reality' A, Sarat and S. Silbey, "The Pull of the Policy Audience," 10 *Law & Policy* 97 (1988), 100-104.

[610] Trubek, 'Where the Action Is', 589. On law schools, legal education and hierarchy, see D. Kennedy, 'Legal Education and the Reproduction of Hierarchy' (1982) 32 *Journal of Legal Education* 591-615.

In rejecting both liberal formalism and classical Marxist reductionism, CLS sought to transcend the base/superstructure dichotomy altogether.[611] Where neither ideas nor social structures are the sole 'reality', and each shapes and is shaped by the other in complex and multidirectional processes, CLS refused the premise of a fixed external world that law could either mirror or distort.[612] As one formulation put it, 'there is no real world which is mirrored, directly, or indirectly, in legal ideas.'[613] The resulting systems of action and order must be understood as a 'totality', in which legal world-views can in a strong sense be said to 'constitute' social order.[614] The 'transcendence of this dichotomy' between 'an intellectual and a material realm of human existence' was, as Trubek and Esser observed, 'one of the central features of Critical Legal thought.'[615] Legal processes are not mere conduits for power but sites of cultural production; legal meaning 'flows through' and becomes embedded in 'perceptions and interests,' generating a shared public discourse.[616] Autonomy, on this account, is not metaphysical insulation from politics, nor merely ideological misdirection.[617] It is a historically contingent achievement: the appearance of coherence and neutrality sustained through doctrinal reasoning, cultural belief, and institutional practice.[618]

3.10 Gordon: The Historical Construction of Coherence

It is this insight - that legal form is not given but produced - that Robert Gordon developed in his critical legal historiography.[619] What appears as law's internal coherence, its autonomy, neutrality, or logical development, is, in fact, 'the outcome of thousands of tiny contingent practices,' retroactively presented as though they expressed a universal historical force.[620] Legal meaning is not inherited intact; it is historically constructed, sedimented through

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[611] Trubek, 'Action Is', 608-609.

[612] Ibid.

[613] Trubek, 'Where the Action Is', 609; Trubek and Esser, 'Critical Empiricism', 17-19. The interpretive account treats action as a synthesis of behaviour and social meaning rather than separating ideas from behaviour.

[614] Trubek, 'Where the Action Is', 588-591, 609. See also K. Klare, 'Critical Theory and Labor Relations Law' in D. Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982), 73, 76, discussed in Trubek, 'Where the Action Is', 589-590.

[615] Trubek, 'Where the Action Is', 609.

[616] Trubek, 'Critical Empirism', 76-77. New patterns of meaning are then constructed for both law and society which then 'redefine the boundaries of legal and social institutions and the relations between them' (p. 79).

[617] Trubek and Esser, 'Critical Empiricism', 17-19.

[618] See Kennedy, 'Legal Education and the Reproduction of Hierarchy', 591-615.

[619] Ibid, 69-70, 93-94, 103-111, 114-115.

[620] Ibid, 84.

institutional labour and professional narration.[621] Rupture is rewritten as continuity; struggle is recoded as doctrine.[622] Gordon's intervention, then, repositions Balbus's structural insight by relocating autonomy from a formal property of legal form to a historically assembled coherence.[623] What liberal legalism presents as the rational evolution of neutral principles is revealed as a retrospective construction that obscures its origins in conflict and contingency.[624] The rule of law's apparent internal logic is not discovered but fashioned through what Gordon terms an 'internal professional agenda'- a repertoire of distinctions, interpretive conventions, and inherited categories that organise what can count as a reason, and therefore what can count as legitimate power.[625]

The work of producing neutrality stabilises expectations and narrows the intelligible forms of conflict.[626] Law's power lies 'less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.'[627] Legal distinctions - public and private, contract and coercion - structure not only behaviour but imagination, shaping what appears reasonable, naïve, or even possible.[628] Both Formalist and Realist traditions, Gordon argues, retained an 'autonomy assumption': the division between 'society' as the primary realm of real life and 'law' as a secondary, specialised instrument called into being to serve it. In different ways, both schools treated law as auxiliary - either faithfully applying externally given rules or rationally adjusting doctrine to social needs.[629] In

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[621] Ibid, 62, 69-70, 100-104. See esp p. 62 where Gordon notes that '[l]awyers once played a moderately important role in actually writing these histories'.

[622] Ibid. See also p. 61, 71, 101, 114.

[623] Ibid, 69-70, 70, 93-94, 103-111, 114-115, 125.

[624] Ibid, 62, 69. See also p. 98: 'The discourse of law-its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals-fits into a complex of discursive practices that together structure how people perceive and that therefore act to reproduce or to try to change people's social reality'.

[625] Ibid, 97-98. For Gordon's critique of 'evolutionary functionalism' see esp. p. 66-70, 99, 107-11 as the view that legal doctrines develop in response to external social needs or functional imperatives. This mode of thought, present in both Formalist and Realist traditions, obscures the extent to which law actively constructs the very social realities it claims only to regulate.

[626] Ibid, 62, 69. See also p. 98: 'The discourse of law-its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals-fits into a complex of discursive practices that together structure how people perceive and that therefore act to reproduce or to try to change people's social reality'.

[627] Ibid, 109-110.

[628] Ibid, 70, 103.

[629] Ibid, 103-107, 109-112. Although Gordon acknowledges that Realist functionalism has been valuable for moving legal thought away from sterile, abstract studies and for exposing the Formalist fantasy of neutral rules and as such a 'politically progressive and intellectually liberating force' (p. 68).

either case, law remained derivative.[630] Gordon's critique exposes this as a residual evolutionary functionalism that obscures law's constitutive force.[631] Law does not merely respond to social needs; it shapes the very terms in which those needs are defined.

3.11 Law and Labour: Constituting the Employment Relation

The constitutive character of legal form becomes especially visible in the terrain of labour law. As Gordon observes, it is 'just about impossible to describe any set of "basic social practices" without describing the legal relations among the people involved.'[632] Law does not merely condition behaviour; it defines the constitutive terms of (working) relationships - 'employer' and 'employee' no less than 'master and 'servant'.[633] These categories are not descriptive labels but juridically encoded statuses that determine entitlement, obligation, and hierarchy.[634] The very first words used to describe persons in the workplace - "owner," "partner," "senior associate," "contractor," "temp" - function as legal artefacts that organise command and subordination.[635] This process, he shows, 'collapses the distinction' between law's instrumental and symbolic functions as law's power comes from its capacity to persuade people that its depicted world is the only reasonable one, making its actions seem like 'expressions of sound pragmatic common sense' rather than exercises of power.[636] Law thus shapes not only outcomes but the conditions of intelligibility within which power and subordination are rendered legible.[637]

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[630] Ibid, 103, 108-109, 110-111. Gordon illustrates this point with a 19th-century Wisconsin lumber-lien statute, showing how laws reflect prevailing ideologies - such as enterprise as private and labour as subordinate - while simultaneously reinforcing them. Such laws do not merely express existing beliefs but help render alternative social arrangements less imaginable by shaping what individuals perceive as possible or desirable.

[631] Ibid, 102-104. Just as in slave or feudal societies.

[632] Ibid, 103. On his critique of the' two determinist' narratives of neoclassical theories of the firm and 'transaction cost' economic and for Marxist accounts of industrial capitalism (following Harry Braverman's work) see p. 84-86.

[633] Ibid, 102-104.

[634] Ibid, 103-104.

[635] Gordon, 'Critical Legal Histories', 103-104 and n 104. Gordon's discussion of slavery identifies the legal rights and duties constituting social status and addresses Orlando Patterson's account of "social death".

[636] Ibid, 110-111.

[637] Gordon, 'Critical Legal Histories', 110-111. Gordon's hypothetical 'lumber-lien' law, a statute designed to ensure loggers received payment when employers lacked liquid capital, illustrates how a statute is not simply an instrument to secure wages but also affirms and stabilises the product of certain political consciousness in which enterprise is private, labour is formally free yet subordinate, and alternative models of economic organisation are made 'just a tiny bit more unthinkable'.

3.12 Tomlins: Law, Wage Labour, and the Construction of Hierarchy

Christopher Tomlins' historical-materialist account of early American labour law renders this dynamic concrete.[638] In *Law, Labor, and Ideology in the Early American Republic*, Tomlins demonstrates 'how law was integral to the process of establishing factitious categories for work relations in an industrialising society.'[639] Early master-servant statutes and the ideology of freedom for contract under work did not reflect pre-existing social relations; they constituted them.[640] By reworking 'generic' master-servant doctrine into a 'single paradigmatic legal form,' law 'mystified the existence and exercise of power in the employment relationship,' naturalising hierarchy 'in the voluntarist language of contract.'[641] The emerging order of industrial employment, Tomlins insists, was not the rational outcome of market necessity but 'an expression of historically contingent purposes.'[642] Critically, law was 'the most important conveyance for the constitution of those relations.'[643] Acts of resistance were rendered not only criminal but legally incoherent or incomprehensible within the prevailing legal imaginary, 'maiming or death of employees at work simply [blending] into the topography of industrialism'.[644] Employers were constituted as private legislators; resistance - such as combinations to raise wages - was rendered criminal because, as John Taylor of Caroline observed, "[a] code of laws draws around [the mechanic] a magick circle,

[638] C. L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993), xviii; Tomlins, 'How Autonomous Is Law?', 45.

[639] Tomlins, 'How Autonomous Is Law?'. Tomlins argues that even Gordon, and CLS more broadly, struggle to relinquish the ontological autonomy it critiques. While his materialist challenge raises important questions about the ontological status of law, and the dangers of reinscribing its distinctiveness, such debates lie beyond the scope of the present analysis.

[640] Tomlins, *Law, Labor, and Ideology in the Early American Republic*, xiv: in an attempt to 'establish how the postrevolutionary legal order was constitutive of social relations', Tomlins presents law as neither epiphenomenal nor relatively autonomous, but rather as 'the modality of a particular vision of rule'. Master-servant law, he shows, did not arrive to regulate a pre-existing labour market but was integral to the very constitution of wage labour as a social form (p. 260-292).

[641] Ibid, 260, 269. Tomlins examines this process across several legal domains, showing how criminal conspiracy laws criminalised collective wage demands (p. 112-119, 129-132), master-servant doctrine encoded subordination as contract (p. 260-269), and tort law immunised employers from liability for industrial accidents, rendering the violence of wage labour intelligible as natural, voluntary, and private (p. 295-297). In this framework, attempts by workers to resist subordination - through combination, withdrawal of labour, or collective negotiation - were not only denied recognition but cast as criminal conspiracy, threats to a legal order that equated hierarchy with legitimacy.

[642] Ibid, 10, 17, 20, 295-297.

[643] Ibid, 295-297. A particularly strong disciplinary mechanism was the 'entire contracts' doctrine (p. 272).

[644] Ibid, 295. See also p. 188, 280, 324.

by making mechanical combinations punishable, lest they should check capitalist combinations."[645]

Law's greatest power lay, then, not in overt coercion but in constructing a world in which hierarchy appeared normal and alternatives increasingly unthinkable.[646] Crucially, in sharing Gordon's refusal of functionalist explanation, the emerging order of industrial employment was not the inevitable outcome of market ordering: law remained 'a characteristic of particular times and place'.[647] To return to Gordon, then, is to recall that the subjugation of labour to capital under capitalism followed no predetermined legal path. It emerged through contingent legal and political choices, consolidated into institutional form and legitimated through legal ideology and prevailing consciousness.[648] Workplace injury and death could be absorbed as 'ordinary, if regrettable, occurrences' under the ideology of 'freedom' of contract for work.[649] What appeared inevitable was, in fact, the product of institutional consolidation and ideological saturation.[650] There was 'no inexorable logic to the process'; only contingent legal and political choices, stabilised through legal form and legitimised through prevailing consciousness.[651]

3.13 Legal Consciousness at Work: Translation, Vulnerability and the Ordinary Life of Rights

The account of autonomy developed in this chapter requires one further step. If legal autonomy is neither a metaphysical property nor a simple illusion, but an institutional achievement produced through doctrine, professional practice and habits of justification, then the question becomes how that achievement is experienced in ordinary legal life. Law's capacity to constrain power depends not only on what courts say, or on how legal categories are arranged internally. It also depends on how those categories are recognised, invoked,

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[645] Ibid, 107, citing Tyranny Unmasked.

[646] Ibid, 85-86. See also p. 188, 280, 324.

[647] Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 10, 17, 323; Gordon, 'Critical Legal Histories', 71. Tomlins expressly rejects treating legal discourse as a functional response to the needs of capitalism.

[648] Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 85-86. See also 103, 109, 111-112, 195.

[649] Gordon, 'Critical Legal Histories', 81, 101-102, 105-107.

[650] Gordon, 'Critical Legal Histories', 71. See also S. Moyn, *Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times* (Yale University Press, 2023), 10, 186, 192; Moyn, 'Reconstructing Critical Legal Studies', 94-96. Moyn argues that CLS's theoretical trajectory hindered the development of an effective radical understanding of law and domination. The argument developed below is that Trubek's and Gordon's insights can sustain, rather than foreclose, such an account.

[651] Gordon, 'Critical Legal Histories', 71.

avoided, translated and lived by the actors who encounter them. This is the terrain of legal consciousness.[652]

Legal consciousness scholarship is especially valuable because it refuses to treat law as something that only appears at the moment of formal adjudication. It asks how people understand legality in everyday settings, how they imagine the authority of legal norms, and how legal categories shape what appears possible or impossible. Ewick and Silbey's insistence that law is part of the 'common place' of everyday life is important in precisely this sense. Law is not merely a command issued by the state or a remedy activated at the end of a dispute. It is a repertoire of meanings, expectations and practical orientations through which people understand their position in social life.[653] Hertogh's account of legal alienation adds a further caution: the existence of legal rights does not mean that those subject to law experience it as their own. People may know that law exists while regarding it as remote, inaccessible or irrelevant to the ordinary problems they confront.[654]

This is why legal consciousness is not merely an empirical supplement to the doctrinal analysis. Gordon's formulation is especially valuable because it captures the imaginative force of legal categories: the "discourse of law - its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals" helps structure how people perceive social reality. Tushnet makes the same point more sharply in ideological terms, observing that law may "help to persuade the dominated elements" that their domination is justified. In labour law, this means that routine breach is not sustained only by weak inspection or weak sanctions. It is also sustained where legal and organisational categories make breach appear as payroll error, contractual choice, managerial discretion or procedural irregularity rather than as a failure of legality itself.[655]

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[652] E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405, 405-433.

[653] P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998), 15-20, 45-53.

[654] M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018), 1-14.

[655] R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 97-98, 103-104; M. Tushnet, 'Perspectives on the Development of American Law: A Critical Review of Friedman's *A History of American Law*' [1977] *Wisconsin Law Review* 81, 87-91, 104.

Eleanor Kirk's work is particularly important because it brings this tradition directly into labour law. Her argument that legal consciousness has a special place within a sociology of labour law gives the thesis a sharper way of understanding routine breach.[656] The point is not simply that workers lack knowledge of employment rights, though that problem is real. It is that workers, employers, advisers, HR practitioners, regulators and tribunals participate in the construction of workplace legality. They do so through the categories they use, the risks they perceive, the remedies they imagine, and the institutions they trust or distrust. Legal consciousness is therefore not an optional sociological supplement to labour law. It concerns the ordinary conditions under which labour law becomes meaningful at all.[657]

This matters because labour law has often been described as a field marked by juridification. Employment relations have become increasingly saturated with legal norms, rights, procedures and claims. Yet juridification does not necessarily mean effective legal constraint. A workplace may be highly legalised in language and documentation while remaining weakly constrained in substance. Workers may sign contracts, receive handbooks, complete compliance training, attend disciplinary meetings and read grievance policies, while still lacking the practical capacity to challenge underpayment, excessive hours, misclassification or retaliation. Legal consciousness helps explain this paradox. It shows that law's formal presence may coexist with practical distance, fear or resignation.[658]

Kirk's analysis of the employment tribunal system is revealing here. The tribunal is often imagined, within formal legality, as the institutional route through which employment rights become enforceable. Yet empirical work with Citizens Advice Bureaux clients shows that the tribunal system is experienced by many workers not as an accessible public forum, but as an intimidating, costly and uncertain process.[659] The crucial point is not only that workers encounter practical barriers. It is that those barriers shape their understanding of what law is. If the law appears to require time, confidence, documentation, advice, emotional resilience

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[656] Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.

[657] R. Dukes and E. Kirk, 'Law, Economy and Legal Consciousness at Work' (2021) 72 *Northern Ireland Legal Quarterly* 741, 741-770.

[658] Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433; E. Kirk, 'The "Problem" with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens Advice Bureaux' (2018) 32 *Work, Employment and Society* 975, 975-991.

[659] Kirk, 'The "Problem" with the Employment Tribunal System', 975-991; N. Busby and M. McDermont, 'Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal' (2020) 49 *Industrial Law Journal* 159, 159-198.

and exposure to employer hostility, then the worker's consciousness of legality is inseparable from vulnerability. A right may be known and still not be usable. A breach may be recognised and still not be claimed.

This has direct implications for the rule of law focus of the thesis. The rule of law is often associated with publicity, knowability and access to adjudication. But in labour law, knowledge of a right is not equivalent to practical legal capacity. A worker may know they are owed holiday pay, but fear losing hours. They may know that dismissal or other reprisals for asserting a statutory right are unlawful, but lack evidence of retaliatory motive or doubt that a legal remedy will arrive before the harm is done. They may know that misclassification can be challenged, but decide that the risk of income loss, retaliation or future exclusion from work is not worth taking. Legal consciousness is therefore structured by dependency. The worker does not encounter law as an abstract bearer of rights but as someone situated within an ongoing relationship of economic and organisational power.[660]

This is why the absence of claims cannot be taken as evidence of compliance. One of the most dangerous assumptions in labour law enforcement is that a low volume of claims or complaints indicates a low level of breach. In fact, complaint data may measure the capacity to complain rather than the incidence of violation. Silence may reflect fear, confusion, fatigue, lack of advice or the reasonable calculation that asserting rights is not worth the risk. Legal consciousness scholarship gives conceptual precision to this point: people do not simply move from injury to claim. They must name an experience as legally salient, blame another actor for it, and claim a remedy through an available institution.[661] At each stage, power may intervene.

The relevance of this to routine breach is considerable. Routine breach is sustained not only by employer incentives or weak public enforcement, but by the ordinary interpretive practices through which breach is made less visible. Underpayment may be framed as a payroll problem. Excessive hours may be framed as flexibility. Misclassification may be framed as entrepreneurial choice. Retaliation may be framed as performance management. Bullying

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[660] G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61, 65-70; Kirk, 'The "Problem" with the Employment Tribunal System', 975-991.

[661] W. L. F. Felstiner, R. L. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15 *Law & Society Review* 631, 631-654.

may be framed as personality conflict. In each case, legal categories compete with organisational categories. The question is not simply whether law exists, but whether the worker, adviser, regulator or tribunal is able to perceive the problem as legal in a way that can be acted upon.[662]

Kirk's later work on HR practitioners as quasi-legal professionals sharpens this point from the organisational side.[663] HR actors do not merely implement employment law. They participate in the production of legality at work. They interpret legal requirements, translate them into policy, advise managers, draft procedures, manage grievances and decide how risk should be recorded. This does not mean that HR practitioners are simply cynical agents of managerial power. The point is subtler, and more important. HR may understand itself as law-facing, fairness-oriented and procedurally responsible, while also translating legal obligations into organisationally manageable forms. In doing so, HR becomes a site where legality is produced, filtered and sometimes narrowed.

This analysis sits closely alongside Edelman's account of legal endogeneity. Edelman shows how organisational structures developed in response to legal ambiguity may later be treated by courts and regulators as evidence of compliance.[664] Kirk shows how this process is lived and reproduced by actors within the workplace. HR professionals become, in her terms, quasi-legal because they mediate between formal law and organisational practice. The result is a complex legal consciousness in which legality appears as procedure, documentation, risk assessment and reasonableness. Legal constraint becomes closely associated with whether the organisation can show that it has acted through recognisable forms.[665]

This has a direct bearing on the thesis's critique of symbolic compliance. An employer may be legally conscious in the sense of being highly aware of legal risk, yet that consciousness may not produce substantive compliance. It may produce defensive documentation, procedural layering or managerial caution designed to reduce exposure. Similarly, a worker may be legally conscious in the sense of knowing that rights exist, yet that consciousness may

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[662] Edelman, *Working Law*, 44-71, 113-122.

[663] E. Kirk, 'Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals' (2021) 50 *Industrial Law Journal* 583, 583-609.

[664] Edelman, *Working Law*, 113-122, 206, 214-217.

[665] Kirk, 'Law and Legalities at Work', 583-609; Dukes and Kirk, 'Law, Economy and Legal Consciousness at Work', 741-770.

not produce legal mobilisation. It may produce strategic silence. Legal consciousness is therefore not inherently emancipatory. It can enable claims, but it can also organise resignation. It can make law visible, but it can also make power appear procedurally legitimate.[666]

This is where legal consciousness links back to Gordon's argument about the historical construction of coherence. Gordon's account shows that law's categories do not merely reflect social life; they help constitute what social life can be imagined to be. Legal consciousness brings that argument into the everyday workplace. The categories of contract, consent, reasonableness, flexibility, status, procedure and managerial prerogative do not simply describe employment relations. They shape what workers and employers understand those relations to permit. They define which injuries appear exceptional and which appear ordinary. They influence whether breach is understood as illegality, misfortune, misunderstanding or simply how work is.[667]

There is therefore an important difference between legal consciousness and legal knowledge. Legal knowledge concerns whether a person knows the content of a rule. Legal consciousness concerns the practical and imaginative relationship between law and social life. A worker may know the law and still feel unable to use it. An employer may know the law and translate it into risk. A regulator may know the law and prioritise only what can be administratively processed. A tribunal may know the law and still encounter the dispute through the evidential record produced by the employer. In each case, legal meaning is mediated by institutional position.

This helps explain why routine breach is so difficult to capture through formal legal analysis alone. Doctrinal analysis may establish that a worker is entitled to the minimum wage, holiday pay or protection from unfair dismissal. It may identify the relevant statutory provision and the conditions of liability. But doctrinal analysis cannot, by itself, show whether the worker will recognise the breach, whether they will complain, whether they will be believed, whether the employer's explanation will be accepted, or whether the

[666] Edelman, *Working Law*, 214-217; Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.
[667] R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 88-105.

enforcement body will regard the matter as a priority. The life of the legal norm depends on these mediating processes.[668]

The point is not to replace legal analysis with sociology. It is to recognise that labour law's rule-of-law function is socio-legal in character. If the rule of law requires power to justify itself, then the question is whether the institutional and social conditions exist through which that justificatory demand can be made. Legal consciousness is one of those conditions. It concerns whether workers can imagine law as a resource, whether employers understand compliance as constraint rather than image, whether advisers can translate private grievance into public claim, and whether institutions can distinguish procedural legality from substantive legal discipline.[669]

This also explains why collective organisation mattered so much to the older enforcement ecology. Trade unions did not merely provide representation after disputes arose. They shaped legal consciousness within the workplace. They helped workers name breach as breach. They made individual problems visible as collective patterns. They reduced the isolation that makes legal mobilisation risky. They supplied a counter-language to managerial accounts of flexibility, performance, error or choice. In this respect, the decline of collective representation weakened not only bargaining power but the interpretive infrastructure of legality.[670]

The same point applies to advice agencies. Citizens Advice, law centres and other intermediaries do more than assist with claims. They translate experiences into legal categories and sometimes translate private disputes into matters of public concern. Where such institutions are absent, underfunded or inaccessible, workers may never reach the point at which a violation becomes a legal claim. Law may remain formally available while socially unreachable. The rule-of-law problem is therefore not only the closure of courts or

[668] R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12; Kirk, 'The "Problem" with the Employment Tribunal System', 975-991.

[669] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69.

[670] Kahn-Freund, *Labour and the Law*, 18-19; R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *Journal of Law and Society* 612, 612-636.

the scarcity of inspectors. It is the thinning of the institutions through which legal consciousness is formed and legal mobilisation becomes possible.[671]

Seen in this light, legal consciousness completes the argument of this chapter. Autonomy is not secured by doctrine alone. It is produced through the practices by which legal categories are recognised as reasons, invoked in disputes, and used to criticise power. But those same practices may be absorbed into organisational routines or shaped by vulnerability. Legal consciousness can sustain legality's authority, but it can also reveal its weakness. Where workers know rights but cannot use them, where employers perform compliance without constraint, and where institutions treat formal procedure as sufficient evidence of legality, law's autonomy persists as appearance while its critical force is diminished.

The relevance to routine breach is therefore direct. Routine breach is not merely a pattern of non-compliance. It is a pattern of legal consciousness: a recurring arrangement of meanings, expectations and institutional habits through which breach becomes ordinary, silence becomes rational, and formal legality continues to appear intact. If labour law is to operate as part of the rule-of-law tradition, it must do more than announce rights. It must sustain the social and institutional conditions in which those rights can be recognised, invoked and made consequential. Without those conditions, law remains present, but its capacity to rule is weakened from within.[672]

3.14 Conclusion

This chapter has traced the fate of autonomy after liberal formalism. Whereas Hayek treated autonomy as insulation from political will, and Legal Realism dissolved that insulation in practice, subsequent socio-legal and critical scholarship refused both metaphysics and reductionism. Autonomy survives neither as pure independence nor as mere illusion. Rather,

[671] Busby and McDermont, 'Fighting with the Wind', 159-198; Kirk, 'The "Problem" with the Employment Tribunal System', 975-991.

[672] Dukes and Kirk, 'Law, Economy and Legal Consciousness at Work', 741-770; Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.

it emerges as institutional density: stabilised routines of justification, inherited categories, and professionalised expectations that give legal development its patterned continuity.

Balbus revealed autonomy's structural function within capitalist hegemony; Tushnet demonstrated its mediating character; CLS and Gordon historicised its coherence as the sediment of ideological labour; Tomlins showed how legal form constitutes the very relations it purports to regulate. In each account, autonomy is neither ethical achievement nor epiphenomenon, but a terrain upon which power is translated into legality.

The question is no longer whether law is autonomous, but how that autonomy operates under contemporary conditions. If legality depends upon institutional practices that render domination intelligible as rule, the problem is not simply that law may fail to constrain power, but that its justificatory forms may be repurposed. The autonomy of law, when imagined as insulation, becomes vulnerable to bureaucratic reprogramming.

The next chapter examines such reprogramming in the concrete setting of UK labour law enforcement. If autonomy is sustained through patterned routines of justification, Chapter 4 asks how those routines have been bureaucratised into performance, and how routine breach can coexist with the continuing projection of fidelity to the rule of law.

Chapter 4: The Enforcement Crisis and the Reconstitution of Labour Law

4.1 Introduction

Chapter 3 showed that legal autonomy is not a fixed property of law, but a fragile institutional achievement capable of both constraining and legitimating power. This chapter examines how that fragility is manifest in the contemporary enforcement of labour law in the United Kingdom. It argues that the enforcement crisis is not merely a problem of institutional weakness but of a reconstitution of the conditions through which legality is produced and recognised. Breach of labour law is known to be widespread and the many shortcomings of existing enforcement institutions and procedures are well-documented. It is not an exaggeration, therefore, to speak of a *crisis* in enforcement.[673] Where the crisis is addressed, it is often framed in institutional or technical terms: declining trade union power, under-resourced inspectorates, fragmented regulatory authority, and increasing reliance on individualised, complaint-driven mechanisms.[674] That framing is necessary but incomplete. Enforcement arrangements are not merely administrative machinery; they express assumptions about what labour law is for, whose agency it depends upon, and how the relationship between employer power and legal constraint is to be organised.[675]

This chapter argues that the contemporary enforcement crisis reflects a deeper transformation in the institutional and ideological conditions through which labour law is realised. In the United Kingdom, the restructuring of institutions governing work from the 1980s extended not only to the mechanisms through which labour law was enforced but also to the conditions under which compliance was recognised, produced and made institutionally legible. Unlike many European counterpart jurisdictions, which retained elements of social partnership, the UK underwent a particularly extensive restructuring of its systems of legal governance at work, systematically weakening collective safeguards and embedding increasingly market-oriented regulatory frameworks.[676] The result was not the disappearance of worker-protective

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[673] G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61; G. Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016), 224; G. Davidov, 'Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges' (2021) 3 *Soziales Recht* 111.

[674] Ibid.

[675] F. Flanagan and S. Clibborn, 'Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?' (2023) 45 *Sydney Law Review* 337, 340-341.

[676] J. Waddington, 'United Kingdom: A Long-Term Assault on Collective Bargaining' in T. Müller, K. Vandaele and J. Waddington (eds), Collective Bargaining in Europe: Towards an Endgame (ETUI, 2019), vol III, 605; R.

labour law but its reorganisation within an enforcement landscape increasingly shaped by fragmentation, individualisation, administrative constraint and organisational mediation.

Methodologically, this chapter does not seek to generate new empirical findings about the incidence of non-compliance. It draws instead on existing empirical research, institutional reports, policy documents, parliamentary materials and socio-legal scholarship to examine the conditions under which worker-protective labour law is enforced, translated and made practically available. The methodological point is therefore inseparable from the substantive one: the existing empirical record is not used here simply to show that employment rights are under-enforced but to analyse how enforcement itself has been institutionally reimagined.[677]

To understand the implications of this transformation, the chapter proceeds in four stages. It begins by situating the analysis within Lauren Edelman's account of legal endogeneity, which provides a framework for understanding how legality may persist as an institutional form even where its substantive effects are attenuated.[678] It then reconstructs the post-war enforcement settlement, characterised by a relatively dense institutional ecology in which compliance was sustained through the interaction of collective organisation, workplace-level oversight, and public regulation. The point is, as we saw in Chapter 2, not that collective bargaining itself entailed enforcement in the strict legal sense, but that collective organisation, workplace representation, inspectorates, Wages Councils and tribunals formed part of a wider ecology through which employer power could be monitored, contested and, at times, disciplined.[679] The chapter next traces the neoliberal restructuring of this settlement, showing how the erosion of collective power, the weakening of sectoral and public enforcement mechanisms, the fragmentation of regulatory oversight, and the increasing reliance on individualised forms of enforcement reconfigured the conditions under which labour law operates.

Dukes and W. Streeck, *Democracy at Work: Contract, Status and Post-Industrial Justice* (Polity Press, 2022), 105-107.

[677] S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *Journal of Industrial Relations* 735; L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023); E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019).

[678] Edelman, *Working Law*, 19, 113-122, 206; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406.

[679] Kahn-Freund, *Labour and the Law*, 18-19; Dukes, *The Labour Constitution*, 69-91; Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968).

Building on this analysis, the chapter examines how these developments produced an enforcement architecture in which formal rights are preserved while their practical realisation becomes increasingly dependent on individual workers, trade unions and other worker organisations. That shift, it argues, is not merely semantic. It marks a change in the institutional imagination of enforcement: away from the vindication of worker-protective legal norms and towards the management of employment-related risk, regulatory burden, business compliance and administrative efficiency.[680] The chapter concludes by returning to Edelman's framework in order to argue that this crisis cannot be understood solely in terms of declining compliance or institutional weakness. Rather, it reflects a reconstitution of legality itself, as legal norms are increasingly mediated through organisational practices, managerial logics and institutionalised routines.

4.2 Reframing the Enforcement Crisis: Legal Endogeneity and the Production of Compliance

When considering questions of labour law compliance today, Edelman's account of 'legal endogeneity' provides a particularly useful analytical point of departure.[681] Rather than treating law as an external command imposed upon organisations, Edelman directs attention to the ways in which legal norms are interpreted and operationalised within organisational settings.[682] Law, in this account, does not operate solely **on** organisations, but is mediated through the internal practices and interpretive frameworks through which organisations respond to legal regulation.[683] Those responsible for implementing legal norms adapt ambiguous legal requirements to organisational needs, reframing legal concepts in ways that align more closely with managerial priorities.[684] Legal meaning is therefore not merely received by organisations; it is produced, stabilised and sometimes transformed through organisational practice.[685]

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[680] D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018); D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2019/20 (HMSO, 2019); Dukes, 'Neoliberalism and the Rule of Law', 12.

[681] L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406; Edelman, *Working Law,* 113-122.

[682] Edelman, *Working Law,* 113-122.

[683] Ibid, 120.

[684] Ibid, 29.

[685] Ibid, 113-122, 214-217; Edelman, 'Law at Work: The Endogenous Construction of Civil Rights' in L. B. Nielsen and R. L. Nelson (eds), *Handbook of Employment Discrimination Research: Rights and Realities* (Springer, 2005), 337-338.

This methodological orientation is important because the object of analysis is not breach as an isolated event, but the institutional conditions that determine whether legal norms acquire practical force. A purely doctrinal account can identify the existence of statutory rights, remedies and enforcement bodies, but it cannot explain why those rights may remain formally intact while becoming practically difficult to invoke. Nor can it account for the ways in which enforcement institutions, organisational practices and regulatory strategies reshape the meaning of compliance itself. The chapter therefore treats enforcement not as a secondary administrative question, but as part of the legal architecture through which labour law is made real.

This is not to collapse labour law into enforcement. The claim is more precise. Worker-protective norms retain doctrinal significance but their capacity to discipline employer power depends upon the institutional arrangements through which breach is detected, attributed, contested and remedied. Where those arrangements are weakened, responsibility is fragmented, or enforcement is displaced onto individual workers, the legal norm does not disappear. Rather, its practical relationship to power changes. The chapter therefore uses existing empirical and institutional material to trace how that transformation has occurred in the United Kingdom.[686]

This perspective is especially significant in the context of labour law, where enforcement increasingly depends upon organisational systems rather than continuous external oversight, and where the meaning of compliance is therefore shaped by the institutional forms through which legal obligations are processed.[687] For Edelman, organisational actors do not merely implement legal norms; they translate them.[688] As she observes, those responsible for implementing legal norms within organisations adapt ambiguous legal requirements to organisational needs, reframing legal concepts in ways that are more compatible with managerial priorities.[689] That process of translation is closely associated with the development

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[686] S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *Journal of Industrial Relations* 735; L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 30-40; E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019), 6-8.

[687] Edelman, *Working Law*, 44-71, 113-122, 214-217. See also Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750.

[688] Edelman, *Working Law*, 113-122.

[689] Ibid, 44-71, 156.

of formal compliance structures.[690] Grievance procedures, equality policies, training programmes, audit systems, and other bureaucratic mechanisms come to function as the primary sites through which organisations demonstrate adherence to legal norms. These structures adopt the language and form of legality, providing visible and institutionally recognisable indicators of compliance.[691]

Their significance lies not only in their operation but in their interpretive role.[692] The presence of such structures does not merely reflect compliance; it contributes to defining what compliance is taken to entail. As Edelman observes, when 'compliance professionals bring law into the organisational realm, they tend to be influenced by the organisational setting in which they work, by their training and… thus they adapt ambiguous legal requirements to the needs of the organisation or reframe legal constructs in terms more conducive to managerial interests.'[693] It is in this sense that Edelman's concept of legal endogeneity acquires its explanatory force. Organisational responses to law, initially developed as pragmatic strategies shaped by managerial concerns, may gradually become incorporated into legal understandings of compliance itself.[694] Courts and regulatory bodies, operating under conditions of limited information and institutional constraint, may treat the existence of formal procedures as evidence of legal adherence, even where their substantive effects remain uncertain.[695] As Edelman and her collaborators demonstrate, organisational structures that mimic legal form may be recognised and legitimated as compliance, conferring legal and institutional benefits upon practices that began as gestures of conformity.[696]

The result is a recursive dynamic in which organisational practices shape legal interpretation and legal interpretation in turn validates those practices.[697] Law is not simply applied; it is co-produced through this interaction between organisations, regulators, and courts.[698] Over time,

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[690] Ibid, 35-40, 44-71.

[691] Ibid; Edelman, *Working Law*, 113-122.

[692] L. B. Edelman and M. C. Suchman, 'The Legal Environments of Organizations' (1997) 23 *Annual Review of Sociology*, 496.

[693] Edelman, *Working Law*, 29.

[694] Edelman, Uggen and Erlanger, 'The Endogeneity of Legal Regulation', 406-407.

[695] Edelman, *Working Law*, 206, 214-217.

[696] Edelman, *Working Law*, 206-217; Edelman, Uggen and Erlanger, 'The Endogeneity of Legal Regulation', 406-407.

[697] Edelman, *Working Law*, 156, 214-217.

[698] L. B. Edelman, 'Legal Ambiguity and Symbolic Structures: Organisational Mediation of Civil Rights Law' (1992) 97 *American Journal of Sociology* 1531.

this process contributes to a redefinition of legality itself, as compliance becomes increasingly associated with the existence of formalised procedures rather than with the substantive realisation of legal norms in practice.[699] The consequence is not simply non-compliance but a partial decoupling of legal form from regulatory effect.[700] Compliance becomes linked to the presence of organisational structures - policies, procedures, documentation - rather than to their effectiveness in addressing the conduct that legal rules are intended to regulate.[701]

Legality is therefore not displaced but reconstituted in a form that prioritises visibility, standardisation, and procedural adequacy.[702] In this way, organisations may maintain outwardly compliant structures as demonstrations of attentiveness to legal mandates while preserving underlying managerial prerogatives.[703] Importantly, Edelman's argument does not suggest that compliance structures are inherently insincere or purely symbolic.[704] Many such mechanisms are developed with genuine regulatory intent and may produce meaningful improvements in workplace governance.[705] Nevertheless, the process through which organisational responses become institutionalised within legal evaluation means that the existence of compliance structures can gradually come to stand in for substantive regulatory effectiveness.[706] The difficulty, then, is not that organisational compliance structures are always empty but that legal and regulatory evaluation may come to privilege their visible presence over their practical effect.

Edelman's account therefore provides the conceptual hinge for this chapter.[707] It explains how legality may persist as an institutional form where legal norms are translated into organisational practices that render compliance visible and recognisable, even when those practices do not reliably secure substantive compliance.[708] In regulatory environments characterised by limited inspection capacity, fragmented oversight, and reliance on complaint-driven mechanisms, this

[699] Edelman, *Working Law*, 35-40, 214-217.

[700] Ibid, 44-71, 206.

[701] Ibid, 156, 214-217.

[702] Edelman, *Working Law*, 35-40, 44-71.

[703] Ibid.

[704] Ibid, 55-60.

[705] Edelman, *Working Law*, 113-122, 206.

[706] L. B. Edelman, 'Legal Endogeneity and the Limits of Equal Opportunity' (unpublished conference paper, 2004), 16-19.

[707] Edelman, *Working Law*, 113-122.

[708] Edelman, *Working Law*, 44-71, 206, 214-217.

organisational mediation assumes heightened importance.[709] Where external oversight is weak, the organisational production of compliance becomes more significant, because law is increasingly encountered through the systems, policies and procedures by which employers represent themselves as compliant.[710]

Compliance is not secured primarily through continuous external monitoring, but through organisational systems that mediate the relationship between legal rules and workplace practices.[711] Under such conditions, the persistence of legality alongside routine breach becomes more intelligible. Legal norms continue to circulate, but they do so through institutional forms that do not necessarily ensure substantive compliance.[712] To understand how these conditions emerged, it is necessary to examine the transformation of the institutional architecture through which labour law has historically been enforced. The following section therefore reconstructs the post-war enforcement settlement, before tracing the erosion of the collective and institutional supports upon which effective enforcement once depended.

4.3 The Post-War Enforcement Settlement

In the mid-twentieth century, labour law enforcement in the United Kingdom did not depend primarily on atomised, individualised claims-making. For the purposes of this chapter, the significance of the post-war settlement lies less in its normative theory than in its institutional form: labour standards were embedded within a wider ecology of collective organisation, workplace representation, public inspection, sectoral wage-setting and specialist adjudication.[713] This distinction matters because collective bargaining did not itself entail enforcement in the strict legal sense. Its significance lay rather in the workplace presence, information, representation and leverage it supplied to a wider enforcement ecology.[714]

In an era of Fordist production, the concentration of workers in large industrial workplaces facilitated collective organisation and the negotiation of labour standards through trade unions,

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[709] Kahn-Freund, *Labour and the Law*, 18-19; Dukes, *The Labour Constitution*, 69-91.

[710] Edelman, *Working Law*, 113-122, 206; Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750.

[711] Ibid; *Enforce for Good*, 30-40.

[712] Edelman, *Working Law*, 35-40, 214-217.

[713] Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1972), 18-19; Dukes, *The Labour Constitution*, 69-91.

[714] See Chapter 2.

employers' associations and collective procedures.[715] Collective organisation created the workplace presence, information flows and background leverage through which breaches of agreed or statutory standards could be identified, challenged and, where necessary, escalated.[716]

At the centre of this system were trade unions. Their role extended beyond the negotiation of terms and conditions to encompass the day-to-day monitoring and enforcement of collectively agreed rules, workplace standards, and statutory protections. At workplace level, shop stewards and union officials functioned as a continuous point of contact between workers and management, embedding the observance of these norms and standards within the ordinary routines of working life.[717] Positioned within the labour process itself, they were able to identify breaches of statutory protections and collective agreements as they arose and raise them directly with employers through established grievance and negotiation procedures.[718] The point is not that shop stewards possessed formal enforcement authority equivalent to that of an inspectorate or tribunal. It is that their ordinary workplace presence made breach more visible, enabled grievances to be collectivised, and reduced the extent to which enforcement depended upon isolated individual complaint.[719] In this sense, collective organisation supplied much of the social power and workplace information which effective enforcement depended. As Kahn-Freund put it,

> 'Law has important functions in labour relations but they are secondary if compared … with the spontaneous creation of a social power on the workers' side to balance that of management… *Even the most efficient inspectors can do but little* if the workers dare not complain to them about infringements of the legislation they are seeking to enforce.'[720]

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[715] C. Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000*(Princeton University Press, 2005), 7-14; H. Collins, K. D. Ewing and A. McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2019), 14-44.

[716] Kahn-Freund, *Labour and the Law*, 18-19; Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968).

[717] Ibid; O. Kahn-Freund, *Labour and the Law* (P. Davies and M. Freedland eds, 3rd edn, Stevens & Sons, 1983), 16, 21-22.

[718] C. Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton University Press, 2005), 7-14; H. Collins, K. D. Ewing and A. McColgan, *Labour Law* (2nd edn, Cambridge University Press, 2019), 14-44.

[719] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), paras 96-110, 623-635, 638-643.

[720] Kahn-Freund, *Labour and the Law*, 18-19.

Kahn-Freund's point was therefore double-edged. Collective organisation made legal standards more practically enforceable, but it also revealed the fragility of any enforcement model that depended upon workers having sufficient organisation, confidence and protection to complain.[721] This emphasis on collective power did not, however, imply the complete absence of the state. Rather, as Dukes has shown, the system of 'collective laissez-faire' depended upon a legally structured framework that supported and stabilised collective bargaining, even where the direct enforcement of agreements was left primarily to industrial relations practice.[722] Alongside this workplace-level monitoring and collective pressure, labour law compliance was also supported by public and sectoral forms of regulation.[723] Labour inspectorates provided a mechanism through which statutory labour standards, especially in the field of health and safety, and later sectoral wages orders, could be monitored and enforced through inspection and investigation.[724]

In practice, the work of inspectors frequently operated in conjunction with that of trade unions and workplace representatives, who were often best placed to observe breaches and bring them to regulatory attention. The inspectorate therefore formed part of a broader enforcement architecture in which public oversight complemented, rather than replaced, the monitoring capacities of organised labour.[725] This relationship was particularly important because inspection alone could rarely substitute for the continuous presence of workers' representatives within the workplace.

The state also played a significant role in sectors where collective bargaining was weak. The Wages Councils Act 1945 and the sectoral orders made under it provided legally enforceable minima in low-paid sectors and inspectors oversaw compliance with those orders.[726] State regulation therefore supplemented collective enforcement capacities, particularly in sectors where organised labour lacked sufficient strength. This matters for the present chapter because

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[721] Ibid; O. Kahn-Freund, *Labour and the Law* (P. Davies and M. Freedland eds, 3rd edn, Stevens & Sons, 1983), 16, 21-22.

[722] *The Labour Constitution*, 69-91; K. D. Ewing, 'The State and Industrial Relations: "Collective Laissez-Faire" Revisited' (1998) 5 *Historical Studies in Industrial Relations* 1.

[723] Wages Councils Act 1945; F. J. Bayliss, *British Wages Councils* (Blackwell, 1962); Dukes, 'Neoliberalism and the Rule of Law', 8-9.

[724] Dukes, *The Labour Constitution*, 69-91.

[725] O. Kahn-Freund, 'Labour Law' in M. Ginsberg (ed), Law and Opinion in England in the Twentieth Century (Stevens & Sons, 1959), 215; R. Dukes, 'Neoliberalism and the Rule of Law: Employment Rights Enforcement in the UK' (working paper intended for publication in the *German Law Journal*, April 2026), 8-9.

[726] Kahn-Freund, *Labour and the Law*, 18-19; Kahn-Freund, 'Labour Law', 215.

it shows that the post-war settlement did not rely on one enforcement mechanism alone. It combined collective pressure, public inspection, sectoral wage-setting and legal adjudication in ways that made labour standards more practically available to workers.

Alongside these mechanisms, and particularly as the statutory regulation of the employment relationship expanded, employment tribunals emerged as a more formalised institutional forum for the adjudication of individual rights. Initially conceived as a specialist and accessible mechanism, tribunals were designed to resolve disputes more quickly and informally than the ordinary courts, reflecting the increasing role of the state in regulating terms and conditions of employment.[727] Importantly, however, tribunals did not displace existing collective and regulatory forms of enforcement. Their institutional significance lay in supplementing, rather than replacing, workplace and regulatory mechanisms: they offered a specialist and relatively accessible forum for individual rights, but they were not designed to perform the continuous monitoring function supplied by workplace representatives or inspectorates.[728] Workers frequently relied on trade union support or representation in tribunal proceedings, while inspectorates continued to monitor compliance with statutory standards.[729] Adjudication therefore operated as one element within a wider institutional framework. The importance of this point is that the practical enforceability of labour standards did not depend upon a single route to redress. In sectors where trade unions were strong, collective organisation supplied day-to-day monitoring and bargaining power. In sectors where union presence was weaker, Wages Councils and inspection mechanisms provided a more public and sectoral form of protection. Where disputes became individualised, tribunals supplied a specialist forum through which statutory rights could be asserted. None of these mechanisms was complete in itself. Their significance lay in their interaction.[730]

This matters for the argument of the thesis because it shows that labour law's rule-of-law function was institutionally mediated from the outset. Labour standards constrained employer

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[727] Wages Councils Act 1945; F. J. Bayliss, *British Wages Councils* (Blackwell, 1962); Dukes, 'Neoliberalism and the Rule of Law', 8-9.

[728] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), paras 569-586; L. Wedderburn, 'From Here to Autonomy?' (1987) 16 *Industrial Law Journal* 1, 24; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

[729] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), para 568; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

[730] F. J. Bayliss, *British Wages Councils* (Blackwell, 1962); Wages Councils Act 1945; L. Wedderburn, 'From Here to Autonomy?' (1987) 16 *Industrial Law Journal* 1, 24; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

power not simply because Parliament enacted them, but because workers, unions, inspectors, Wages Councils and tribunals formed part of a practical architecture through which employer conduct could be monitored and challenged. The post-war settlement was therefore not a world in which legal rights simply existed and were then enforced from outside. Rather, legality was embedded in a wider set of social and institutional practices that helped translate worker-protective norms into workplace constraint.

This also explains why the later transformation of that ecology was so significant. If labour law's effectiveness depended upon overlapping forms of collective, sectoral, administrative and adjudicative support, then the weakening of any one element placed pressure on the others. The decline of collective bargaining increased the burden on individual rights and public enforcement. The weakening of public inspectorates increased the burden on individual complaint. The proceduralisation and restriction of tribunal access increased the burden on workers themselves. What changed, therefore, was not simply the quantity of enforcement activity, but the distribution of responsibility for making law effective.[731]

4.4 Collective Laissez-Faire as Enforcement Ecology

The post-war enforcement settlement is often described through the language of collective laissez-faire. That phrase is useful, but it can also mislead. It risks suggesting that the state simply withdrew from the regulation of work, leaving labour standards to be secured by industrial power alone. The more accurate point is subtler. Collective laissez-faire did not mark the absence of law. It described a particular distribution of legal and social authority, in which law supported, recognised and stabilised collective institutions without ordinarily displacing them as the primary means through which workplace norms were generated, interpreted and enforced.[732] Its significance, for the purposes of this thesis, lies not in any idealised claim that the system secured universal protection, but in the institutional ecology it created. Trade unions, shop stewards, collective bargaining, Wages Councils, Fair Wages

[731] Dickens (ed), *Making Employment Rights Effective*; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection' (2020) 62 *Journal of Industrial Relations* 735, 744-750.

[732] Kahn-Freund, *Labour and the Law*, 18-19; Dukes, *The Labour Constitution*, 69-91.

Resolutions, labour inspectorates and tribunals formed overlapping sites through which employer power could be observed, contested and, at least sometimes, disciplined.[733]

This point matters because the enforcement of labour law was not imagined primarily as the isolated act of an individual worker invoking a legal right after breach had occurred. The enforcement ecology was more dispersed and more socially embedded. Workplace representatives could detect grievances before they became legal claims. Trade unions could aggregate individual problems into collective disputes. Collective agreements could establish workplace standards that were not necessarily legally enforceable as contracts, but which were nonetheless treated as binding within the industrial relations system.[734] Inspectors could rely upon workplace knowledge and worker complaint, while sectoral mechanisms such as Wages Councils provided public minima in low-paid sectors where collective bargaining was weak.[735] Tribunals, when they emerged, were intended to supplement this ecology rather than replace it.[736]

Kahn-Freund's account is central because it captures labour law's dependence on social power. For Kahn-Freund, law in the field of labour relations could not be understood as a self-sufficient apparatus of state command. Its function was not to impose industrial order from above, but to create and sustain conditions in which countervailing power could operate. This is the sense in which he famously treated law as a kind of "midwife" to collective bargaining: not the creator of industrial justice in itself, but a facilitating structure through which workplace norms could be born, stabilised and made effective.[737] Law's significance lay partly in its restraint. It did not need to juridify every collective obligation or translate every workplace standard into an enforceable individual right. It could support institutions capable of generating and maintaining norms through industrial practice.

That approach reflected Kahn-Freund's broader understanding of labour law as a response to inequality of bargaining power. The central problem of labour law, in his view, was the

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[733] O. Kahn-Freund, *Labour and the Law* (P. Davies and M. Freedland eds, 3rd edn, Stevens & Sons, 1983), 13-14, 19, 21-22; R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *Journal of Law and Society* 612.

[734] Kahn-Freund, 'Industrial Relations and the Law-Retrospect and Prospect' (1969) 7 British Journal of Industrial Relations301, 304-316.

[735] Wedderburn, *The Worker and the Law*, 520-530.

[736] L. Wedderburn, 'From Here to Autonomy?' (1987) 16 *Industrial Law Journal* 1, 24.

[737] Kahn-Freund, 'Industrial Relations and the Law-Retrospect and Prospect', 304-316.

imbalance between management and labour. Legal rules could matter, but their effectiveness depended on the creation of social power on the workers' side sufficient to balance managerial power.[738] This is why his warning about inspectors remains so important. As Kahn-Freund put it, "even the most efficient inspectors can do little" where workers are afraid to complain.[739] The point is not simply practical. It is jurisprudential. Law's capacity to constrain employer power depends upon institutional conditions that enable breach to be seen, voiced and acted upon. A legal norm that exists without such conditions may remain formally valid but practically inert.

Collective organisation supplied part of those conditions. Trade unions were not merely bargaining agents concerned with wage determination. They were also institutions of legal visibility. They enabled workers to recognise breach as breach, to connect individual grievances to collective patterns, and to challenge managerial conduct without bearing the full burden of confrontation alone.[740] Shop stewards and workplace representatives were particularly important because they were located within the workplace itself. They observed the ordinary operation of managerial power. They could identify deviations from collective agreements, challenge unfair treatment, and translate diffuse dissatisfaction into institutionalised grievance. Their significance was not that they possessed formal public authority, but that they made employer power more continuously observable.[741]

This has direct implications for how enforcement should be understood. Enforcement is sometimes imagined as an activity undertaken by courts, tribunals or state agencies after a legal breach has already crystallised. But the post-war settlement reveals a broader conception. Enforcement also includes the social and institutional processes through which legal and quasi-legal norms become part of the ordinary expectations of workplace life. A collective agreement may not be enforceable in the same way as a statutory right, but it may nonetheless structure conduct, shape expectations, provide standards of justification and generate consequences for breach.[742] It may make managerial authority more answerable even without immediate recourse to litigation.

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[738] Kahn-Freund, *Labour and the Law*, 18-19.

[739] Kahn-Freund, *Labour and the Law* (3rd edn), 13-14, 19, 21-22.

[740] Dukes, *The Labour Constitution*, 69-91.

[741] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), paras 568-586.

[742] Kahn-Freund, 'Industrial Relations and the Law-Retrospect and Prospect', 304-316; Dukes and Streeck, 'Labour Constitutions and Occupational Communities', 612.

This is one reason why collective agreements were not generally treated as ordinary contracts. Kahn-Freund's concern was that juridifying collective bargaining too heavily would distort its function. Collective agreements expressed industrial policy, moral obligation and workplace compromise; they were embedded in an ongoing relationship rather than reducible to discrete legal promises.[743] To impose ordinary contractual sanctions risked hardening a flexible system of industrial governance into a rigid legal form. This did not mean that collective agreements lacked normative force. Rather, their force derived from their place within a wider ecology of industrial relations: union strength, workplace organisation, grievance procedures, bargaining expectations and the possibility of collective pressure.[744]

The Fair Wages Resolutions illustrate the same point. They were not individual employment rights in the modern sense, enforceable by workers through ordinary legal proceedings. Yet they formed part of a public framework through which the state sought to influence labour standards among government contractors.[745] Their significance lay in the interaction between public procurement, collective standards and administrative oversight. They showed that law could shape labour standards indirectly, by attaching expectations to institutional relationships rather than simply creating individual claims.[746] This was not the absence of law. It was law operating through a different mode: not primarily as individualised adjudication, but as a background framework of public and collective norm-setting.

Wages Councils performed a related function in sectors where collective bargaining was weak. They supplied sectoral minima for workers who were unlikely to benefit from strong union organisation, and their standards were supported by inspectorate oversight.[747] Their presence is important because it prevents any simplistic account of collective laissez-faire as pure voluntarism. The post-war settlement did not assume that collective bargaining could reach everywhere. It recognised, however unevenly, that some sectors required public wage-setting and inspection because social enforcement through organised labour was insufficient.[748] This made the enforcement ecology layered rather than uniform. Strongly

[743] Kahn-Freund, *Labour and the Law* (3rd edn), 13-14, 19.

[744] Ibid, 13-14.

[745] Kahn-Freund, 'Industrial Relations and the Law-Retrospect and Prospect', 304-316.

[746] Wedderburn, *The Worker and the Law*, 520-530.

[747] Ibid.

[748] Ibid; Kahn-Freund, *Labour and the Law* (3rd edn), 21-22.

organised sectors relied heavily on collective bargaining and workplace representation; weaker sectors required more direct public support.

Tribunals added another layer to this ecology. Wedderburn's account of employment tribunals as the possible 'nucleus' of a labour court system is significant because it captures the aspiration that adjudication in the employment field should not simply reproduce the procedures and assumptions of ordinary civil litigation.[749] Tribunals were intended to be specialist, accessible and attentive to the practical realities of employment relations. They were not meant to replace collective bargaining or inspectorate activity, but to provide a forum in which statutory rights and individual disputes could be resolved without the full formality and cost of the ordinary courts.[750] Their emergence therefore reflected the increasing juridification of employment relations, but within an institutional form that still acknowledged the distinctiveness of labour law.

This is why Wedderburn's later anxiety about the trajectory of tribunals matters. If tribunals became absorbed into the procedures and habits of common law institutions, they risked losing the informality and accessibility that justified their creation.[751] The concern was not merely procedural. It reflected a deeper anxiety that labour law's institutions might be drawn away from their social and industrial purposes and into forms of legality less sensitive to the structural realities of employment. A tribunal system may continue to exist while becoming less accessible, less specialised, or less capable of giving practical effect to worker-protective norms. This anticipates the later argument in *Unison*: rights may become a "dead letter" where the means of enforcing them are practically obstructed.[752]

Read in this way, collective laissez-faire is best understood as an enforcement ecology rather than a doctrine of non-intervention. Its characteristic feature was not the absence of law, but the dispersal of legal authority across multiple institutional sites. The state did not simply command compliance from above. Nor did it leave the governance of work entirely to private ordering. It structured, supported and sometimes supplemented forms of social enforcement. It recognised the capacity of trade unions and collective bargaining to generate workplace

[749] Wedderburn, 'From Here to Autonomy?', 24.

[750] L. Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012), 29-48.

[751] See Edelman, *Working Law*, 55-60 (n 710).

[752] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

norms. It used Wages Councils and Fair Wages mechanisms to reach sectors where collective organisation was weak. It developed tribunals as specialist forums for emerging individual rights. The legal order operated through plural institutions, each of which contributed to the practical visibility and contestability of employer power.[753]

This ecology was imperfect and exclusionary. It was strongest where workers were unionised, concentrated and able to exert collective pressure. It left many workers - especially women, migrant workers, domestic workers, casual workers and those in poorly organised sectors - with far weaker protection.[754] It also depended on a particular industrial structure: relatively stable workplaces, identifiable employers, sectoral bargaining patterns and social expectations of organised labour. It should not, therefore, be romanticised as a lost golden age of labour law enforcement. Its significance lies elsewhere. It shows that labour law's effectiveness historically depended on an institutional architecture that extended beyond formal rights and individual claims. That insight is crucial to the thesis. If labour law operates as part of the rule of law by rendering employer power answerable, then the institutions through which that answerability is produced matter. Collective bargaining, workplace representation, Wages Councils, inspectorates and tribunals were not simply policy instruments. They were part of the practical constitution of legality at work. They made legal and quasi-legal norms visible, enforceable and socially meaningful. They created channels through which workers could challenge power without always having to stand alone as individual litigants.

As collective bargaining coverage declined, trade union power weakened, sectoral mechanisms were removed or reduced, and tribunals became increasingly formalised and burdensome, the responsibility for activating labour law shifted towards individual workers and under-resourced public agencies.[755] Rights did not necessarily disappear. In some respects, individual statutory rights expanded. But the social and institutional supports that had made those rights practically contestable were weakened. This is the point at which

[753] Dukes, *The Labour Constitution*, 69-91; Dukes and Streeck, 'Labour Constitutions and Occupational Communities', 612.

[754] S. Fredman, Women and the Law (Clarendon Press, 1997); L. Hayes, Stories of Care: A Labour of Law (Palgrave Macmillan, 2017).

[755] J. Waddington, 'United Kingdom: A Long-Term Assault on Collective Bargaining' in T. Müller, K. Vandaele and J. Waddington (eds), Collective Bargaining in Europe: Towards an Endgame (ETUI, 2019), vol III, 605; Dickens, 'Employment Tribunals and Alternative Dispute Resolution', 29-48.

enforcement failure becomes a rule-of-law problem. The legal norm remains, but the ecology through which it constrains employer power is thinned.

The post-war settlement therefore matters not because it provides a model to be restored wholesale, but because it reveals the institutional preconditions of labour law's rule-of-law function. Worker-protective law cannot be made effective by formal enactment alone. It requires institutions capable of making breach visible, enabling workers to speak, collectivising grievances, attributing responsibility, and imposing consequences. The dismantling of collective laissez-faire did not merely change industrial relations, it changed the way labour law could rule.

4.5 Neoliberal Restructuring and the Fragmentation of Enforcement

This institutional architecture did not disappear. It was reconfigured. The central change was not the formal abolition of worker-protective labour law, but the weakening and reorganisation of the collective, sectoral and public supports through which labour standards had been made practically effective. From the late 1970s onwards, successive governments reoriented the relationship between state, market and labour along increasingly market-oriented lines.[756] The election of the Conservative government in 1979 marked a decisive shift in the institutional configuration of labour law. As noted above, the Thatcherite settlement did not simply reduce law's role in governing work. It reoriented legal intervention around the preservation of market ordering, treating collective labour institutions less as mechanisms of industrial democracy or workplace discipline than as impediments to flexibility, competition and economic freedom.[757]

This transformation did not take the form of a simple withdrawal of legal regulation. Rather, it involved a reconfiguration of both the substance of the law and the mechanisms through which labour standards were monitored, interpreted, and enforced.[758] Legislative reforms during this period significantly curtailed the capacity of trade unions to organise, to take industrial action,

[756] Dukes and Streeck, *Democracy at Work*, 139-180. Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 15-18.

[757] Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 15-18; R. Dukes, 'Neoliberalism and the Rule of Law: Employment Rights Enforcement in the UK' (working paper intended for publication in the *German Law Journal*, April 2026), 5-7.

[758] Ibid.

and to operate as effective monitors of workplace standards.[759] As collective bargaining coverage declined and workplace representation weakened, the continuous, embedded oversight that had previously supported compliance was correspondingly eroded.[760] This was an indirect but significant transformation of enforcement: the law did not abolish inspection or adjudication, but it weakened the workplace organisation and collective leverage on which those mechanisms had often depended.[761]

Where compliance had previously been sustained through collective organisation and embedded workplace oversight, it increasingly depended on more fragmented and indirect forms of intervention.[762] The dense ecology of collective organisation, public oversight, and the Employment Tribunal system that had underpinned compliance began to fragment, as the mechanisms through which labour standards were monitored, enforced, and reproduced were progressively dismantled or restructured, recast as 'unique privileges' that undermined economic freedom.[763] As Wedderburn incisively demonstrated in his penetrating analysis of the influence of Hayek in particular, and neoliberalism in general, labour law was 're-regulated by a state determined to protect the market order'.[764] Framing trade unions as antithetical to economic freedom, the distinctly Hayekian 'rhetoric of deregulation' was encapsulated in the Thatcherite reforms, which treated unions as obstacles to competitive markets and as threats to individual liberty and private property.[765] Legislative measures, such as the Employment Act 1980 and the Trade Union Act 1984, imposed new constraints on industrial action, introduced balloting requirements, and increased the legal and financial exposure of trade unions.[766] '[W]ith the stated objective of deregulating or "freeing" the UK economy, Conservative

[759] J. Waddington, 'United Kingdom: A Long-Term Assault on Collective Bargaining' in T. Müller, K. Vandaele and J. Waddington (eds), Collective Bargaining in Europe: Towards an Endgame (ETUI, 2019), vol III, 605; Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 17-19, 23-24, 29-33.

[760] C. Howell, *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton University Press, 2005), 139-180; R. Hyman, *The Political Economy of Industrial Relations: Theory and Practice in a Cold Climate* (Macmillan, 1989), 202-253.

[761] Kahn-Freund, *Labour and the Law* 18-19; S. Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspectio', 744-749.

[762] Dickens (ed), *Making Employment Rights Effective*; Judge and Slaughter, *Enforce for Good*, 30-40.

[763] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), para 568; Dickens, *Making Employment Rights Effective*, 29-48.

[764] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), para 568.

[765] Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 15-18.

[766] Employment Act 1980; Trade Union Act 1984; Wedderburn, 'Freedom of Association and Philosophies of Labour Law', 17-19, 23-24, 29-33.

governments regulated trade unions' practice and activity on a scale not matched elsewhere in Western Europe'.[767]

As unions grappled with legislative constraints and declining membership, the regulatory void left by the erosion of 'social' enforcement necessitated alternative enforcement mechanisms, and led to increasing reliance on employment tribunals and administrative bodies.[768] These institutions, however, were not designed to provide continuous oversight of workplace practices and, constrained by limited resources and jurisdiction, were unable to replicate the embedded monitoring functions previously carried out by trade unions and workplace representatives.[769] At the same time, the Thatcherite period also witnessed significant changes to the formal institutions responsible for the direct enforcement of labour standards. Existing systems of regulatory oversight continued to operate, but within an increasingly constrained institutional environment. As collective organisation weakened, the complementary relationship between social and statutory enforcement diminished, reducing the effectiveness of both.[770] Sector-specific mechanisms were curtailed or dismantled. The Wages Councils, which had combined wage-setting powers with inspection and enforcement functions in low-paid sectors, were abolished, removing a key institutional site through which labour standards had been actively monitored.[771] This was a more direct alteration of the enforcement architecture than the anti-union legislation alone: it removed a sectoral mechanism through which low-paid workers, often beyond the reach of effective collective bargaining, had been protected by legally enforceable minima and inspection.[772]

When Labour returned to power in 1997, it did not restore the earlier enforcement ecology. It accepted much of the market-oriented framework it inherited, while supplementing it with new individual rights and targeted enforcement bodies.[773] Embracing the prevailing market-

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[767] Waddington, 'United Kingdom', 605.

[768] Dukes, *The Labour Constitution*, 92-122; P. Davies and M. Freedland, Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s (Oxford University Press, 2007), 111.

[769] Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), para 568.

[770] National Minimum Wage Act 1998; Gangmasters (Licensing) Act 2004; Dukes, 'Neoliberalism and the Rule of Law', 11-12; Dickens (ed), *Making Employment Rights Effective*, 29-48.

[771] Wages Councils Act 1945; F. J. Bayliss, *British Wages Councils* (Blackwell, 1962); Trade Union Reform and Employment Rights Act 1993, s. 35; Dukes, 'Neoliberalism and the Rule of Law', 8-9.

[772] Wages Councils Act 1945; F. J. Bayliss, *British Wages Councils* (Blackwell, 1962); Trade Union Reform and Employment Rights Act 1993, s. 35; R. Dukes, 'Neoliberalism and the Rule of Law: Employment Rights Enforcement in the UK' (working paper intended for publication in the *German Law Journal*, April 2026), 8-9.

[773] Dukes, *The Labour Constitution*, 92-122; P. Davies and M. Freedland, Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s (Oxford University Press, 2007), 111.

oriented framework, 'New' Labour sought to move beyond earlier accounts of structural conflict between capital and labour, advancing a model in which the employment relationship was framed as a site of cooperation between formally equal actors.[774] While this period did see the creation of new enforcement bodies - including the Gangmasters Licensing Authority and the National Minimum Wage enforcement function within HM Revenue and Customs - these developments did not restore the earlier system of embedded, collective enforcement. Rather, they operated within, and reinforced, a more fragmented enforcement landscape.[775] The result was not deregulation in the sense of legal absence, but a thinner and more selective enforcement settlement: statutory rights expanded, while the institutional capacity to make those rights effective remained limited and uneven.[776]

In its application of 'third way' thinking to the field of work relations, New Labour advanced a narrative in which 'economic efficiency' was compatible with 'fairness' and the relationship between employer and worker was to be viewed more as a *'partnership'*.[777] In place of the earlier recognition of structural conflict between capital and labour, the contract for work was increasingly depicted as a site of voluntary cooperation between formally equal actors, within which economic efficiency and worker protection were said to be mutually reinforcing. Within this framework, economic efficiency and a minimum level of worker protection were presented as mutually reinforcing.[778] Legal intervention was correspondingly repositioned as a residual mechanism, operating as a 'last resort' where cooperative arrangements failed.[779] In practice, however, the institutional capacity required to sustain effective collective enforcement was not restored, limiting the practical significance of this 'last resort'.[780]

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[774] Dukes, *The Labour Constitution*, 111-120; T. Novitz and P. Skidmore, *Fairness at Work? A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart Publishing, 2001).

[775] National Minimum Wage Act 1998; Gangmasters (Licensing) Act 2004; Dukes, 'Neoliberalism and the Rule of Law', 11-12; Dickens (ed), *Making Employment Rights Effective*, 29-48.

[776] R. Dukes, *The Labour Constitution*, 111-120; T. Novitz and P. Skidmore, *Fairness at Work? A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart Publishing, 2001); Dickens, *Making Employment Rights Effective*.

[777] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998), paras 1.8, 1.12, 4.12, 6.1; Dukes, *The Labour Constitution*, 111-120.

[778] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998).

[779] Dukes, *The Labour Constitution*, 111-120; T. Novitz and P. Skidmore, *Fairness at Work? A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart Publishing, 2001).

[780] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998), para 1.8; Dukes, *The Labour Constitution*, 111-120; Novitz and Skidmore, *Fairness at Work?*.

By framing the workplace as a 'win-win' or a site of shared interest, public policy under New Labour emphasised voluntary compliance and organisational responsibility and underemphasised the importance of collective or public enforcement.[781] Voluntary agreement and flexibility were prioritised, while the erosion of collective enforcement limited workers' capacity to contest non-compliance.[782] As Tombs has argued, the shift of responsibility for compliance from state enforcement to employers themselves rested on assumptions of voluntary adherence that did not reflect the economic incentives shaping workplace behaviour.[783] Voluntary agreement, individual choice and 'flexibility' were elevated as guiding principles of labour law enforcement, while severe restrictions on collective labour law confined the possibility of a 'win' for workers to exceedingly exceptional cases, where, in the absence of the collective leverage once provided by trade unions and that enforcement mechanisms had long ceased to address, rare instances of superior bargaining power eclipsed that of employers.[784] By recasting the regulation of work within a framework of partnership and voluntarism, it became possible to maintain formal legal protections while limiting the institutional conditions necessary for their effective enforcement. This allowed Britain to maintain what Blair himself described as 'the most lightly regulated labour market of any leading economy in the world'.[785] The limits of this model are now visible in the contemporary enforcement crisis: formal rights remain in place, but their practical realisation is weakened where collective organisation is limited, public enforcement is fragmented, and responsibility for asserting rights is shifted onto individual workers.[786]

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[781] H. Collins, 'Regulating the Employment Relation for Competitiveness' (2001) 30 *Industrial Law Journal* 17, 18-24; Department of Trade and Industry, Fairness at Work (Cm 3968, 1998), paras 1.8, 1.12.

[782] D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 60-72; G. Ioannou and R. Dukes, 'Anything Goes? Exploring the Limits of Employment Law in UK Hospitality and Catering' (2021) 52 *Industrial Relations Journal* 255; J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

[783] S. Tombs, Social Protection After the Crisis: Regulation Without Enforcement (Policy Press, 2016), 107-136. See also S. Tombs and D. Whyte, 'Transcending the Deregulation Debate? Regulation, Risk, and the Enforcement of Health and Safety Law in the UK' (2013) 7 *Regulation & Governance* 61.

[784] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998); Davies and Freedland, Towards a Flexible Labour Market, 111; Novitz and Skidmore, *Fairness at Work?*; Dukes, *The Labour Constitution*, 110-120.

[785] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998), foreword by Tony Blair.

[786] Judge and Slaughter, *Enforce for Good*; Cockbain, Scott, Pósch and Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? (HMSO, 2019), 6-8; Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 735-757.

The significance of the post-1979 period, for the purposes of this chapter, is not simply that collective labour law was weakened. It is that the weakening of collective institutions altered the practical conditions under which statutory labour standards could operate.[787] Trade unions had supplied information, representation and pressure within the workplace. As union density and collective bargaining coverage declined, those capacities were not replaced by an equivalent expansion of public enforcement. Instead, the legal system increasingly relied upon individual workers to identify breaches, understand their legal significance, initiate claims, withstand retaliation and sustain proceedings. This reallocation of enforcement responsibility is easily obscured because it did not necessarily require the repeal of worker-protective norms. Rights could remain formally present while the institutional supports necessary to make them effective were diminished.[788] In that sense, the transformation was not simply deregulatory, if deregulation is understood as the removal of legal rules. New Labour's settlement in the UK, as we saw in the previous chapter, did not reverse this trajectory. Although it introduced important individual rights and restored some limited collective protections, its broader employment policy remained framed around partnership, competitiveness and flexibility in employment.[789] The employment relationship was increasingly presented not as a site of structural conflict requiring collective counter-power, but as a relationship capable of being stabilised through individual rights, minimum standards and cooperative managerial practice. This left intact much of the institutional settlement produced by earlier neoliberal reforms. The result was a labour law framework in which formal rights expanded in some respects, while the collective and public mechanisms necessary to secure their practical realisation remained fragile.[790]

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[787] R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work' (2020) 47 *Journal of Law and Society* 612, 613-614; D. Weil, *The Fissured Workplace*, 60-72.

[788] S. Tombs, Social Protection After the Crisis: Regulation Without Enforcement (Policy Press, 2016), 107-136; A. Bogg, 'The Common Law Constitution at Work: R. (on the application of UNISON) v Lord Chancellor' (2018) 81 *Modern Law Review* 509, 524; L. Dickens, 'The Coalition Government's Reforms to Employment Tribunals and Statutory Employment Rights: Echoes of the Past' (2014) 45 *Industrial Relations Journal* 234.

[789] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998); P. Davies and M. Freedland, Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s (Oxford University Press, 2007), 111; T. Novitz and P. Skidmore, *Fairness at Work? Labour Law* and the Employment Relations Act 1999 (Hart Publishing, 2001); R. Dukes, *The Labour Constitution*, 110-120.

[790] Department of Trade and Industry, Fairness at Work (Cm 3968, 1998); P. Davies and M. Freedland, Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s (Oxford University Press, 2007), 111; T. Novitz and P. Skidmore, *Fairness at Work? Labour Law* and the Employment Relations Act 1999 (Hart Publishing, 2001); R. Dukes, *The Labour Constitution*, 110-120.

4.6 Deregulation by Default and the Administrative Reframing of Enforcement

The weakening of labour law enforcement in the United Kingdom was not produced only by the decline of collective bargaining or by the formal removal of particular institutions. It was also produced through a broader administrative reorientation in which enforcement came to be understood through the language of regulatory burden, risk, efficiency and prioritisation. This is an important distinction. To say that labour law enforcement was weakened is true but incomplete. The more significant point is that the institutional meaning of enforcement changed. Enforcement was increasingly treated not as a necessary condition of legality but as a regulatory activity whose intensity had to be justified, targeted, measured and constrained.[791]

This shift did not necessarily require open hostility to labour standards. Indeed, many worker-protective norms remained formally intact and in some respects individual statutory rights expanded. The transformation lay elsewhere. Legal obligations were increasingly placed within a regulatory vocabulary that treated inspection, intervention and enforcement as potential burdens on business. The question was no longer simply whether legal standards were being observed, or whether employer power was being made answerable. It was whether intervention was proportionate, risk-based, administratively efficient and compatible with reducing burdens on compliant firms.[792] This administrative reframing made it possible for formal labour standards to survive while the institutional willingness and capacity to enforce them was progressively narrowed.

The language of ‘Better Regulation’ is central to this development. It presented itself as a rational and pragmatic programme: regulation should be targeted, proportionate, accountable, consistent and transparent. In abstract terms, these principles are difficult to oppose. No regulatory system should waste resources, pursue trivial breaches at the expense of serious ones, or impose unnecessary costs without justification. But in the labour law context, the language of better regulation had a particular ideological effect. It shifted attention from the structural vulnerability of workers to the administrative burden on employers.[793] The primary

[791] S. Tombs, Social Protection After the Crisis: Regulation Without Enforcement (Policy Press, 2016), 107-136; S. Mustchin and M. Martínez Lucio, ‘The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain’ (2020) 62 *Journal of Industrial Relations* 735, 744-753.

[792] Hampton Review, Reducing Administrative Burdens: Effective Inspection and Enforcement (HM Treasury, 2005), 2; Tombs, Social Protection After the Crisis, 107-136.

[793] Tombs, Social Protection After the Crisis, 107-136.

object of anxiety became not the under-enforcement of legal norms, but the possibility that enforcement might impose unnecessary costs on business.

This is why Tombs' description of 'regulation without enforcement' is useful.[794] The phrase captures a condition in which law may remain present as formal standard, policy commitment and regulatory aspiration, while the institutional machinery necessary to secure compliance is hollowed out. The point is not that regulation disappears. On the contrary, legal rules, guidance, strategies and compliance expectations may proliferate. But they are increasingly detached from robust mechanisms of inspection, sanction and public accountability. The result is not deregulation in the crude sense of legal absence, but deregulation by default: legal norms are retained, while the practical likelihood that they will be enforced is reduced.

Deregulation by default is especially important in labour law because legal standards are often least self-enforcing where they are most needed. Workers in low-paid, insecure, migrant-heavy or fissured sectors may be least able to identify breach, complain, access advice or sustain legal proceedings. In such settings, the absence of proactive enforcement does not leave a neutral space. It leaves employer power less constrained. A legal order that relies heavily on individual complaint while reducing the visibility and presence of public enforcement will tend to under-detect precisely those breaches that workers are least able to raise themselves.[795]

The administrative reframing of enforcement also changes the status of inspection. Inspection is not merely a technical exercise in detecting discrete breaches. At its strongest, it creates regulatory presence. It signals that legal standards are public obligations, not optional matters of internal managerial discretion. It allows enforcement bodies to build sectoral knowledge, identify recurrent practices, and distinguish isolated mistakes from systemic patterns of non-compliance.[796] Where inspection becomes rare, reactive or heavily dependent on available intelligence, those functions are weakened. The state may retain formal enforcement powers while losing the practical capacity to know what is happening in workplaces.

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[794] Ibid.

[795] E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019), 3-8, 16-19; L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 30-43.

[796] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-753.

Mustchin and Martínez Lucio's work is important because it shows that this transformation has affected not only the resources available to enforcement bodies, but the organisation and meaning of enforcement work itself. Labour inspection has been reshaped by fragmentation, resource constraint and managerial forms of control.[797] Enforcement staff are increasingly required to operate within frameworks of prioritisation, targets, performance management and administrative rationalisation. This does not simply mean that fewer inspections occur. It means that enforcement judgment is increasingly structured by what can be measured, processed and justified within resource-constrained systems.[798]

That matters because labour law enforcement often requires contextual judgment. Inspectors must understand sectors, workplace practices, employer strategies, worker vulnerability and the informal ways in which breach may be concealed. A purely administrative model of enforcement risks missing this. If regulatory activity is assessed primarily through outputs -cases processed, penalties issued, arrears recovered, inspections completed - then the deeper question of whether employer power has been effectively constrained may disappear from view.[799] Enforcement activity may be measurable without being transformative. Institutions may demonstrate work without demonstrating legal discipline.

The empirical material therefore matters because it shows not simply weak enforcement, but weak legal visibility. A strikingly low proportion of workers say they would approach an enforcement body if their rights were breached, while survey evidence records a "widespread lack of knowledge and understanding" of employment rights. Metcalf's strategy similarly emphasised that vulnerable workers may be least able to complain, and that complaint-led enforcement will therefore under-detect the most serious patterns of breach. These figures are not merely background evidence. They show why routine breach can become institutionally normalised: if workers do not know their rights, do not trust the routes available, or fear the consequences of using them, the formal legal norm cannot realistically operate as a constraint on power.[800]

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[797] Ibid, 744-750.

[798] Ibid, 531-534, 540.

[799] Ibid, 540.

[800] L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 8, 30-43; D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41, 67; E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? (HMSO, 2019), 16-19; Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7, 10.

The fragmentation of enforcement bodies intensifies this problem. Responsibility for labour standards in the UK is divided across multiple institutions with different mandates, legal powers and institutional cultures. Minimum wage enforcement, agency standards, gangmaster licensing, health and safety enforcement and employment tribunal adjudication are not organised as parts of a single coherent labour law system.[801] Each body may perform important work. Yet the overall architecture processes non-compliance with labour law through separated categories. Breach that is experienced by workers as a cumulative condition of vulnerability is divided into discrete administrative problems.

This fragmentation is not merely inconvenient. It affects the ability of law to understand power. A worker may be underpaid, misclassified, denied holiday pay, exposed to unsafe work, dependent on an agency, uncertain of immigration status and afraid of retaliation at the same time. But the institutional response may divide these matters across different routes, each with its own evidential requirements, priorities and limitations.[802] Under such conditions, law may see particular legal issues without seeing the broader relation of domination in which they are embedded. Enforcement becomes segmented, while employer power is experienced as cumulative.

The emergence of the Director of Labour Market Enforcement model can be understood as a response to this problem. Its creation acknowledged that the enforcement landscape was fragmented and required strategic coordination.[803] Even the very language of ‘labour market enforcement’ is, however, ambiguous. On one reading, it could be seen to broaden the field of concern, recognising that employment rights violations are shaped by the organisation of employment relations rather than isolated employer misconduct. On another reading, it risks reframing worker-protective rights within a broader strategy of managerial governance of work, where the central concerns become risk, prioritisation, fair competition and efficient allocation of limited enforcement resources.[804]

This ambivalence is important. Strategic enforcement may be necessary and valuable. Where resources are limited and breach is widespread, enforcement bodies must prioritise. They

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[801] L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 30-43.

[802] D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41, 67.

[803] Ibid, 40-41.

[804] D. Weil, ‘A Strategic Approach to Labour Inspection’ (2008) 147 *International Labour Review* 349, 351, 357.

must use intelligence, target high-risk sectors and seek interventions capable of altering behaviour beyond individual cases.[805] But strategic enforcement becomes problematic where strategy is shaped less by worker vulnerability than by administrative manageability. If risk is defined through available data, complaint volumes, reputational visibility or ease of intervention, then the most vulnerable workers may again become least visible.[806] The problem is not risk-based enforcement as such. It is risk-based enforcement within an under-resourced and business-facing regulatory environment.

The Resolution Foundation's work on the enforcement of employment rights illustrates the scale of the problem. Its analysis points to a system in which enforcement responsibilities are fragmented, resources are limited and the likelihood of inspection remains extremely low.[807] This matters because deterrence depends not only on the formal severity of sanctions but on the credible possibility of detection and consequence. Where inspection is rare and sanctions are limited or delayed, non-compliance may become a rational organisational risk. For some employers, the expected cost of breach may be lower than the cost of compliance.[808]

Metcalf's Labour Market Enforcement Strategy similarly recognised the need for better coordination and intelligence-led enforcement.[809] Yet its reliance on strategic prioritisation also reflects the underlying scarcity of enforcement capacity. Strategy becomes necessary because the system lacks the resources to provide routine coverage. In that sense, strategic enforcement can operate both as a reform and as an accommodation to weakness. It may improve targeting, but it may also normalise the assumption that only certain breaches, sectors or risks can receive meaningful attention.

This has significant rule-of-law implications. A legal system in which enforcement is necessarily selective does not automatically contravene the rule of law. All enforcement systems involve discretion and prioritisation. But where selectivity is produced by chronic under-resourcing, fragmented authority and political pressure to reduce burdens on business, it raises a deeper question. Are legal norms being enforced according to a principled account

[805] Cockbain et al, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed?, 16-19.

[806] Judge and Slaughter, *Enforce for Good*, 30-43.

[807] Ibid.

[808] Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19, 40-41, 67.

[809] D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41, 67.

of labour law's protective purpose, or according to administrative necessity? If the latter, legality risks becoming contingent on managerial capacity rather than legal obligation.[810]

The TUC evidence to the Director of Labour Market Enforcement makes this point in institutional terms. It emphasises the inadequacy of enforcement capacity and the difficulty of expecting under-resourced bodies to uphold even those rights that fall within their remit.[811] That evidence is important because it draws attention to the gap between formal enforcement architecture and practical enforcement reach. A worker-protective regime may contain several enforcement bodies, but if those bodies lack the staffing, resources and powers necessary to intervene proactively, their existence may offer more symbolic reassurance than practical constraint.

The question of inspector numbers is especially revealing. If workers have too few inspectors to provide credible oversight, legal standards depend increasingly on complaint, self-reporting and voluntary compliance. That is precisely the terrain on which routine breach becomes possible. The lower the likelihood of inspection, the greater the burden placed on individual workers to activate law. The weaker the worker's practical capacity to complain, the more the formal right depends on an institutional fiction: that rights can enforce themselves through the agency of those least able to bear the risks of enforcement.[812]

The administrative reframing of enforcement therefore has a double effect. First, it reduces the practical visibility of breach by limiting proactive inspection and dispersing responsibility. Secondly, it changes the criteria by which enforcement success is evaluated. Instead of asking whether labour law effectively constrains employer power, institutions may ask whether they have met strategic objectives, processed cases efficiently, targeted high-risk sectors or reduced burdens on compliant business.[813] These are not irrelevant questions. But they are secondary to the rule-of-law question: whether legal norms actually make power answerable.

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[810] Mustchin and Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection', 531-534, 540.

[811] Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7, 10.

[812] Judge and Slaughter, *Enforce for Good*, 30-43; Cockbain et al, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed?, 16-19.

[813] Mustchin and Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection', 540.

This is where the analysis connects to the wider argument of the thesis. Routine breach is not simply a consequence of weak enforcement. It is partly produced by the way enforcement is institutionally imagined. If enforcement is understood as a limited, targeted, risk-based activity that must be justified against burdens on business, then the routine under-enforcement of labour standards can appear administratively rational rather than legally troubling.[814] Breach becomes something to be prioritised, managed and measured, rather than a challenge to the legal order's claim that employer power is subject to law.

The danger is therefore not open illegality, but normalisation. Legal standards remain in place. Enforcement bodies continue to operate. Strategies are published. Data are collected. Cases are brought. Yet the system as a whole may come to tolerate a background level of non-compliance as unavoidable. Under such conditions, law does not cease to exist. It becomes selective, managerial and episodic. It appears when triggered by complaint, when identified through intelligence, or when selected as a strategic priority. But it does not provide a continuous framework of constraint within employment relations.

This is why 'deregulation by default' is a useful description. The state need not abolish labour rights in order to weaken them. It can leave rights formally intact while reducing the conditions under which they are likely to be enforced. It can shift responsibility onto workers, organisations and fragmented agencies. It can present regulatory restraint as efficiency. It can treat enforcement as a burden rather than as part of legality's constitutional infrastructure.[815] The result is not the disappearance of labour law, but its reconstitution as a set of formal norms dependent on highly uneven and selective mechanisms of activation.

For the thesis, the significance of this development is clear. If labour law is part of the rule of law tradition by rendering private economic power answerable, then enforcement cannot be treated as a peripheral administrative issue. The administrative reframing of enforcement affects the substance of legality itself. Where legal obligations are interpreted through risk, burden, prioritisation and measurable performance, law's capacity to require justification is weakened. Employer power remains formally subject to legal standards, but the institutional likelihood that those standards will be applied, tested and made consequential is reduced.

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[814] Tombs, Social Protection After the Crisis, 107-136; Hampton Review, Reducing Administrative Burdens, 2.

[815] Supiot, *Governance by Numbers*, 145-147, 154-156.

The enforcement crisis is therefore not merely a shortage of inspectors or a problem of agency design. It is a transformation in the way labour law is governed. Better Regulation, risk-based targeting, fragmented enforcement and under-resourcing together create a legal environment in which worker-protective norms persist but operate unevenly. This is not law's absence. It is weakened legality: law present as rule, strategy and institution, but thinned as constraint. That is why the contemporary enforcement crisis must be understood not only as a policy failure, but as part of the thesis's wider rule-of-law argument.

4.7 Legal Consciousness, Complaint Dependence and the Hidden Scale of Breach

The administrative reframing of enforcement has a further consequence that is easily missed if the enforcement crisis is understood only through institutional design. It changes what the state is capable of knowing. Complaint-led systems do not simply produce fewer cases. They produce a particular picture of legality: one in which breach appears only when workers are able and willing to translate an experience of injury into a legal complaint. In labour law, that is a demanding assumption. It requires not merely knowledge of rights, but confidence, security, evidence, time, advice and a willingness to risk the continuing employment relationship. The resulting data therefore cannot be treated as a neutral measure of compliance. It is also a measure of legal capacity.[816]

This is why Kahn-Freund's warning that 'even the most efficient inspectors can do but little' if workers are afraid to complain remains so resonant.[817] The point is not simply that inspectors need information. It is that fear alters the legal system's field of vision. If workers are unwilling to complain because they fear dismissal, reduced hours, victimisation, immigration consequences or reputational harm, then non-compliance becomes institutionally invisible. The law may still exist, and the enforcement body may still have formal powers, but the route through which breach becomes legally cognisable is blocked before any formal process begins.

The problem is intensified by workers' uncertain knowledge of their rights. The raw figures are striking because they show not just under-enforcement, but the fragility of legal

[816] E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019), 3-8, 16-19; D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41.

[817] Kahn-Freund, *Labour and the Law*, 18-19.

consciousness itself. Metcalf's strategy recorded serious gaps in workers' knowledge of basic employment entitlements, including holiday pay among zero-hours and temporary workers.[818] The TUC's evidence to the Director of Labour Market Enforcement similarly emphasised that many workers do not know where to turn when rights are breached.[819] Such evidence matters because worker-protective norms rely, under a complaint-led model, on workers' ability to recognise breach, identify the relevant institution, and believe that complaint is worth the risk. Where those conditions are absent, rights may remain formally universal while becoming practically selective.

Eleanor Kirk's work is again especially important in this context, then, because it shows that lack of mobilisation cannot be explained simply as ignorance. In her study of Citizens Advice Bureaux clients, workers' encounters with the employment tribunal system were shaped by rhetoric, reform and lived experience.[820] The tribunal was not encountered as a neutral and accessible forum in the abstract. It was encountered through cost, complexity, stress, evidential uncertainty, advice scarcity and the emotional burden of confrontation. For workers already vulnerable within the employment relationship, the tribunal's formal availability did not necessarily translate into practical legal power. A legal route may exist and still be experienced as unreachable.

This matters for the thesis because the enforcement crisis is also a crisis of legal subjectivity. The legal order imagines a worker capable of naming the wrong, blaming the employer, claiming a remedy and sustaining the process through to conclusion.[821] Yet the workers most exposed to routine breach are often least able to inhabit that legal role. They may be insecurely employed, dependent on fluctuating hours, unsure of employment status, isolated from union support, or fearful that asserting rights will mark them as difficult. The problem is therefore not merely that individual enforcement is inefficient. It is that individual

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[818] Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19, 40-41, 67-68.

[819] Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7, 10.

[820] E. Kirk, 'The "Problem" with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens Advice Bureaux' (2018) 32 *Work, Employment and Society* 975, 975-991.

[821] W. L. F. Felstiner, R. L. Abel and A. Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming' (1980) 15 *Law & Society Review* 631, 631-654; N. Busby and M. McDermont, 'Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal' (2020) 49 *Industrial Law Journal* 159, 159-198.

enforcement presupposes a worker who is institutionally stronger than many workers actually are.

The Supreme Court's reasoning in Unison gives this point constitutional form. Lord Reed's warning that rights may become 'a dead letter' where access to adjudication is practically obstructed is not confined to tribunal fees.[822] It expresses a more general rule-of-law principle: legal rights must be practically enforceable if they are to constrain power. Tribunal fees made that principle visible by placing a direct financial barrier between workers and adjudication. But the same logic applies to fear, complexity, ignorance, lack of representation and the absence of collective support. Each can convert formal right into practical silence.

The Resolution Foundation put the point in deliberately stark terms: basic employment rights are not worth the 'paper (or screen)' on which they are written if non-compliant employers are not identified and required to remedy breach.[823] This formulation is rhetorically powerful because it refuses the comfort of formal legality. It insists that a legal right cannot be assessed only by its doctrinal existence. The question is whether the system can identify the employer who breaches it, require redress, and alter the conditions that made breach possible. If not, the right persists as text but weakens as constraint.

This is why complaint dependence has such significance for routine breach. A complaint-led system sees only those wrongs that are transformed into legal action. It does not see the breach that workers tolerate because the job is too insecure. It does not see the unpaid hours normalised as workplace culture. It does not see misclassification that workers cannot risk challenging. It does not see holiday pay denied to workers who do not know they are entitled to it. It does not see the retaliatory reduction in shifts that is never recorded as retaliation. The absence of claims, in this context, is not evidence of compliance. It is often evidence of the difficulty of converting injury into law.[824]

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[822] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

[823] L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 4.

[824] D. Weil and A. Pyles, 'Why Complain? Complaints, Compliance and the Problem of Enforcement in the U.S. Workplace' (2005) 27 *Comparative Labor Law & Policy Journal* 59, 63-66; Kirk, 'The "Problem" with the Employment Tribunal System', 975-991.

This point also explains the danger of enforcement strategies that focus too narrowly on severe exploitation. Serious coercion, trafficking and egregious abuse plainly require urgent regulatory attention. But if enforcement is organised around exceptional severity, ordinary and repetitive labour law violations may recede from view. Davies' distinction between severe and routine labour exploitation is useful here because it shows how migrant workers may experience forms of routine abuse that are not always captured by frameworks designed around the most extreme cases.[825] The rule-of-law problem lies precisely in this normalisation. Breach becomes ordinary, diffuse and administratively unremarkable.

The deeper issue is that the legal system may mistake visibility for incidence. Available complaints, tribunal claims and enforcement cases become the evidence base from which priorities are formed. Yet the very workers least likely to complain are often those whose rights are most vulnerable. This circularity is central to the contemporary enforcement crisis. Under-resourcing produces selectivity; selectivity produces limited visibility; limited visibility makes routine breach appear less systemic than it is; and the apparent absence of systemic breach justifies continued selectivity. In this way, weakened enforcement reproduces the conditions that make its own weakness appear administratively rational.

Kirk's legal consciousness work helps explain why this circularity is not simply empirical but juridical. Law's authority depends partly on whether those subject to it experience it as meaningful, accessible and capable of action.[826] Where workers learn that legal rights are risky to assert, employer compliance is unlikely to be checked, and complaints may produce little practical benefit, the legal system's authority is altered. It is not that workers necessarily cease to believe in law. Rather, they may come to understand law as formally present but practically distant: something that exists, but not necessarily for them.

The rule-of-law implication is clear. If legality is to constrain employer power, it must be capable of seeing breach independently of the most vulnerable worker's willingness to complain. That requires more than formal rights and individual remedies. It requires advice infrastructures, collective representation, proactive inspection, sectoral intelligence,

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[825] J. Davies, 'From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry' (2019) 19 *Criminology and Criminal Justice* 294, 294-310.

[826] E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405, 405-433.

protection against retaliation and institutional mechanisms capable of detecting patterns. Without those supports, labour law's visibility depends on those least able to bear the cost of making it visible. That is not merely an enforcement design flaw. It is a weakening of legality's capacity to make power answerable.

4.8 The Managerialisation of Enforcement: The Transformation of UK Inspectorates

The weakening of collective and public enforcement in the UK coincided with broader transformations in the organisation of work. Fissuring, subcontracting, franchising, agency work and platform-mediated labour have made responsibility for compliance more difficult to identify and contest.[827] These developments do not displace the specifically British story traced above; rather, they intensify its consequences. A fragmented enforcement architecture is placed under greater strain when work itself is organised through fragmented chains of contractual and managerial control.[828] Where labour law enforcement depends not only on the formal existence of rights, but on the institutional conditions through which breach can be detected, attributed and remedied, and responsibility is increasingly dispersed across organisational chains so that workers are required to initiate enforcement themselves, the weakening of public and collective enforcement assumes particular significance.[829]

In this context, the erosion of labour law need not take the form of formal legislative repeal. It may occur through the gradual weakening of the mechanisms that make legal rights practically enforceable.[830] This is the sense in which the weakening of labour law enforcement has increasingly taken the form of reform by stealth.[831] Rather than removing worker-protective rights from the statute book, successive governments have weakened their practical effect through less visible measures: procedural complexity, cost barriers, fragmented

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[827] Tombs, Social Protection After the Crisis, 107-136.

[828] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-753; Judge and Slaughter, *Enforce for Good*, 30-43.

[829] Guided by a distinctly neoliberal commitment to 'non-interference' in the realm of the 'market'.

[830] Successive governments' neoliberal 'assault' on labour law enforcement agencies - marked by dismissing collective bargaining and trade unions as 'unwanted rigidities' - precipitated a steep decline in union density from 54.5% in 1980 to 23.2%, with collective bargaining coverage falling from 70% to 26% over the same period.

[831] S. Tombs, Social Protection After the Crisis: Regulation Without Enforcement (Policy Press, 2016), 107-136; L. Dickens, 'The Coalition Government's Reforms to Employment Tribunals and Statutory Employment Rights: Echoes of the Past' (2014) 45 *Industrial Relations Journal* 234; *R (Unison) v Lord Chancellor* [2017] UKSC 51.

institutional responsibility and chronic underfunding of enforcement bodies.[832] The result is an enforcement framework in which those with the least bargaining power - often workers in precarious or insecure work, and those most vulnerable to retaliation - bear much of the burden of identifying breach, initiating complaint and sustaining legal action.[833]

The shift toward individualised enforcement is especially problematic because it assumes a worker who is legally informed, economically secure, procedurally capable and sufficiently protected from retaliation. That assumption bears little resemblance to the position of many workers most exposed to routine breach. Low-paid, migrant, agency, zero-hours and otherwise precarious workers are often least able to identify breach, least able to risk confrontation with an employer, and least able to sustain legal proceedings. The very workers most dependent upon labour law's protection are therefore frequently those least able to activate it.[834]

This is why complaint-led enforcement cannot be treated as a neutral enforcement design. It distributes the burden of legality unevenly. Where workers fear dismissal, loss of hours, immigration consequences or informal retaliation, the absence of complaints cannot be read as evidence of compliance. It may instead indicate the practical insulation of breach from challenge. The result is a structural mismatch between the form of enforcement and the social conditions in which breach occurs. Labour law continues to announce rights, but the mechanisms through which those rights are vindicated depend upon capacities that many workers do not possess.[835]

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[832] These developments were reinforced in later periods through policies that increased reliance on individual enforcement see.e.g. The Employment Tribunal Fees Order 2013 which introduced significant barriers to accessing legal remedies, further limiting the practical enforceability of labour rights see e.g. A. Bogg, 'The Common Law Constitution at Work: R. (on the application of UNISON) v Lord Chancellor' (2018) 81 *Modern Law Review*, 524.

[833] In the American context, see e.g. J. Fudge, 'Illegal Working, Migrants and Labour Exploitation in the UK' (2018) 38 *Oxford Journal of Legal Studies*, 558-562.

[834] D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41, 67; E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? (HMSO, 2019), 3-8, 16-19; J. Fudge, 'Illegal Working, Migrants and Labour Exploitation in the UK' (2018) 38 *Oxford Journal of Legal Studies* 557, 558-562.

[835] D. Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, 351, 357; Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7, 10; L. Judge and H. Slaughter, *Enforce for Good*, 8, 30-40.

This difficulty is compounded by the fragmented architecture of labour law enforcement in the UK. Responsibility for labour standards is dispersed across multiple bodies with different mandates, powers, resources and institutional cultures. Minimum wage enforcement, employment agency regulation, gangmaster licensing, health and safety oversight, immigration enforcement and local authority responsibilities do not form a single coherent system of worker protection. Yet violations of employment rights rarely respect those institutional boundaries. Underpayment may coincide with unsafe conditions, insecure immigration status, subcontracting, agency work, excessive hours and fear of retaliation. Fragmentation therefore weakens law's capacity to apprehend breach as a pattern of employer power rather than as a series of isolated regulatory issues.[836]

Under-resourcing deepens this problem. Where inspectorates lack sufficient personnel, sectoral knowledge, investigatory capacity or strategic coordination, public enforcement becomes increasingly reactive. This alters the character of regulatory work itself. Inspectors are less able to build sustained relationships with sectors, develop workplace knowledge, or identify patterns of breach before they become entrenched. Enforcement becomes organised around complaint handling, risk prioritisation and administrative triage. In this setting, routine breach can become normalised not because law is absent, but because legal institutions lack the practical capacity to make non-compliance visible and consequential. The language of regulatory burden reinforces this transformation.[837]

Labour standards are increasingly framed not as legal constraints on employer power, but as costs to be managed, simplified or reduced. The Better Regulation agenda, the Red Tape Challenge and related deregulatory initiatives did not merely affect the volume of enforcement activity. They also reshaped the institutional imagination of enforcement by treating legal constraint as a potential obstacle to growth, competitiveness and administrative efficiency. Within that framework, the enforcement of labour standards is vulnerable to being recast as excessive intervention, while non-enforcement can appear as pragmatic restraint.[838]

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[836] L. Judge and H. Slaughter, *Enforce for Good*, 10-12, 30-43; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-749; S. Mustchin and M. Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work Inside the British State' (2023) 44 *Economic and Industrial Democracy* 528, 531-534, 540.

[837] S. Mustchin and M. Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection', 530-534, 540; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection', 749-750; L. Judge and H. Slaughter, *Enforce for Good*, 37-40.

The consequences of these developments are reflected in the growing disjunction between formal legal rights and their practical realisation.[839] As recent reports have observed, statutory protections - including minimum wage, paid holiday, and workplace safety - risk becoming largely formal guarantees where non-compliance is neither detected nor remedied.[840] While the UK retains a formal framework of labour protections, the effectiveness of these rights is undermined by systemic barriers to enforcement, contributing to persistently high levels of non-compliance.[841] Even allowing for underreporting, available evidence suggests that employer non-compliance remains widespread.[842] Indeed, the 2023 Report of the Resolution Foundation observed that, even with the true scale of violations obscured and grossly underestimated by these systemic barriers, levels of employer non-compliance with labour law remain disturbingly and 'unacceptably high'.[843] Consistently cast by policymakers[844] and the media[845] as burdensome 'red tape',[846] law enforcement remains fragmented and under-resourced, limiting its capacity to address the scale of the problem.[847] Fragmentation matters not only because responsibility is divided between bodies, but because violations of employment rights frequently cut across legal categories: underpayment, unsafe conditions, immigration vulnerability, agency work and subcontracting may appear together, while enforcement authority remains institutionally dispersed.[848] The problem is therefore not

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[838] S. Tombs, Social Protection After the Crisis, 107-136; M. Lodge and K. Wegrich, 'Crowdsourcing and Regulatory Reviews: A New Way of Challenging Red Tape in British Government?' (2014) 9 *Regulation & Governance* 30; S. Coulter and B. Hancké, 'A Bonfire of the Regulations, or Business as Usual? The UK Labour Market and the Political Economy of Brexit' (2016) 87 *Political Quarterly* 148.

[839] Judge and Slaughter, *Enforce for Good*, 30-40; Scott, Krisztián and Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed?, 6-8.

[840] Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41, 67; E. Cockbain, Scott and Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? 16-19, 40-41.

[841] Ibid.

[842] Mustchin and Martínez Lucio, 'The Fragmenting Occupation', 530-534; T. Nichols, *The Sociology of Industrial Injury* (Mansell, 1997), 213.

[843] Judge and Slaughter, *Enforce for Good*, 4.

[844] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750; Mustchin and Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection', 530-534.

[845] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750; Mustchin and Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection', 530-534.

[846] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 735 (author's accepted manuscript, 11).

[847] Mustchin and Martínez Lucio, 'The Fragmenting Occupation', 530-534; T. Nichols, *The Sociology of Industrial Injury* (Mansell, 1997), 213.

[848] L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 10-12, 30-40; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *Journal of Industrial Relations* 735, 744-749; J. Fudge, 'Illegal Working, Migrants and

simply the absence of legal protection, but the weakness of the institutional mechanisms through which those protections are made effective.

Policies prioritising flexibility and cost reduction have reshaped enforcement institutions, reducing their capacity for sustained and proactive oversight. Mustchin and Martínez Lucio describe this as part of a broader transformation in the organisation of enforcement work in Britain, in which labour inspection has been subjected to resource constraints, fragmentation and managerial forms of performance control.[849] Over time, 'staff cuts, reviews, market testing, efficiency gains, and government-induced alarms about deregulation,' have significantly weakened the UK's inspection and enforcement workforce.[850] Budgetary constraints and organisational restructuring have reduced both the scale and effectiveness of labour inspection.[851] As recent evidence from the TUC indicates, enforcement bodies now lack the capacity to 'effectively uphold even the limited employment rights within their remit.'[852] The result is not merely fewer inspections, but a narrowing of the institutional capacity to identify patterns of non-compliance, build sectoral expertise and sustain relationships with workers and employers.[853]

The scale of the problem is reflected in the UK's inspection capacity. Inspection capacity is therefore not a merely technical measure. It is one indicator of whether the state retains a practical capacity to detect breach independently of individual worker complaint.[854] With approximately 0.29 labour inspectors per 10,000 workers, enforcement remains far below international benchmarks.[855] In practice, the likelihood of inspection is extremely low, limiting the deterrent effect of regulatory oversight.[856] In such conditions, proactive

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Labour Exploitation in the UK' (2018) 38 *Oxford Journal of Legal Studies*, 558-562.

[849] Ibid.

[850] Ibid; Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750.

[851] T. Nichols, *The Sociology of Industrial Injury* (Mansell, 1997), 213, quoted in Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 735 (author's accepted manuscript, 7).

[852] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750.

[853] Mustchin and Martínez Lucio, 'The Fragmenting Occupation', 540; 'The Evolving Nature of Labour Inspection', 744-750.

[854] D. Weil, 'A Strategic Approach to Labour Inspection' (2008) 147 *International Labour Review* 349, 351, 357; D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19 (HMSO, 2018), 40-41.

[855] Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7; Judge and Slaughter, *Enforce for Good*, 8, 37-40.

[856] Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24 - TUC Response, 3-7; Judge and Slaughter, *Enforce for Good*, 8, 37, 39-43.

enforcement is minimal, and compliance becomes unlikely to be externally verified.[857] Globally, this is particularly significant in work settings already characterised by fissuring, subcontracting, insecure work and low levels of collective organisation. Where workers are unlikely to complain, and inspectors are unlikely to inspect, formal rights can remain in place while routine non-compliance goes undetected.[858]

Fissuring is important because it separates legal responsibility from economic control. [859] Lead firms may retain substantial influence over price, pace, quality, staffing and working conditions while formally allocating employment responsibilities to subcontractors, agencies, franchisees or platform intermediaries. This makes breach harder to detect and harder to attribute. Workers may experience managerial control as diffuse, shifting between the entity that sets commercial terms, the entity that issues instructions, and the entity that appears as the formal employer. Enforcement mechanisms premised upon a stable bilateral employment relationship are poorly equipped to address that distribution of power.

In this setting, compliance itself becomes easier to displace.[860] Lead firms can present themselves as purchasers of services rather than employers, while subcontractors operate under commercial pressures that may make non-compliance more likely. Legal responsibility is formally located somewhere within the chain, but the economic conditions that produce breach may be generated elsewhere. The result is not simply a factual difficulty in identifying the correct defendant. It is a deeper problem of legal architecture: labour law's capacity to constrain employer power is weakened where the organisation of production allows power to be exercised through contractual distance.[861]

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[857] Judge and Slaughter, *Enforce for Good*, 37-40; Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 749-750.

[858] D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 60-72; G. Ioannou and R. Dukes, 'Anything Goes? Exploring the Limits of Employment Law in UK Hospitality and Catering' (2021) 52 *Industrial Relations Journal* 255; D. Metcalf, United Kingdom Labour Market Enforcement Strategy 2018/19, 40-41, 67.

[859] D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 60-72; C. Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010), 27-52; R. Dukes and W. Streeck, 'Labour Constitutions and Occupational Communities', 613-614.

[860] G. Ioannou and R. Dukes, 'Anything Goes? Exploring the Limits of Employment Law in UK Hospitality and Catering' (2021) 52 *Industrial Relations Journal* 255; D. Weil, *The Fissured Workplace*, 60-72.

[861] G. Ioannou and R. Dukes, 'Anything Goes? Exploring the Limits of Employment Law in UK Hospitality and Catering' (2021) 52 *Industrial Relations Journal* 255; D. Weil, *The Fissured Workplace*, 60-72.

Platform work and algorithmic management intensify these difficulties.[862] Where allocation of work, monitoring, discipline and termination are mediated through digital systems, managerial authority may appear less as an identifiable decision and more as a technical output. This can obscure both the locus of control and the reason for adverse treatment. For workers, the problem is not merely that decisions are automated, but that contesting them requires access to information, procedural routes and legal categories that may be unavailable or unclear. For regulators, algorithmic and platform-mediated work complicates inspection by making workplace governance less visible, less territorially bounded and less easily attributable to a single employer.[863] Technological and organisational changes further complicate this picture.[864] Platform-mediated work, algorithmic management and subcontracted labour can obscure the locus of managerial authority, making it harder for workers and regulators to identify responsibility for breach.[865] These developments do not create the enforcement crisis, but they sharpen its consequences by making individualised and complaint-led enforcement even less capable of addressing diffuse and ongoing forms of non-compliance.[866]

Indeed, within the UK in which we concentrate, recent calls for increased funding and a unified enforcement body reflect the extent of this institutional contraction,[867] and have resulted very recently in the creation of a new Fair Work Agency.[868] The proposed consolidation of labour law enforcement functions through the Fair Work Agency may

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[862] J. Adams-Prassl, 'What If Your Boss Was an Algorithm? The Rise of Artificial Intelligence at Work' (2019) 41 *Comparative Labor Law & Policy Journal* 123, 136, 144-145; B. Rogers, *Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class* (MIT Press, 2023), 27-31; J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

[863] J. Adams-Prassl, 'What If Your Boss Was an Algorithm? The Rise of Artificial Intelligence at Work' (2019) 41 *Comparative Labor Law & Policy Journal* 123, 136, 144-145; B. Rogers, *Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class* (MIT Press, 2023), 27-31; J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

[864] B. Rogers, *Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class*(MIT Press, 2023), 27-31.

[865] J. Adams-Prassl, 'What If Your Boss Was an Algorithm? The Rise of Artificial Intelligence at Work' (2019) 41 *Comparative Labor Law & Policy Journal* 123, 136, 144-145.

[866] J. Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

[867] Dukes, 'Neoliberalism and the Rule of Law', 17.

[868] Edelman, *Working Law*, 113-122.

appear to respond to these concerns. Yet the significance of these reforms will depend less on institutional rebranding than on whether enforcement bodies possess the resources, powers and strategic orientation necessary to detect and remedy non-compliance in practice.[869]

These developments do not simply weaken enforcement capacity. They alter the institutional conditions through which legality is produced and recognised. Where external inspection is rare, collective organisation is weak and legal mobilisation depends heavily on individual workers, compliance is increasingly mediated through internal procedures, audit systems and managerial practices rather than secured through direct regulatory intervention.[870] Labour law may therefore persist as a formal framework while its capacity to constrain employer power is significantly reduced. It is at this point that Edelman's account of legal endogeneity becomes especially important: it explains how legal norms may continue to circulate through organisational forms that make compliance visible and recognisable, even where their substantive regulatory effect remains uncertain.

4.9 Legal Endogeneity and the Reconstitution of Legality

The preceding analysis shows that the enforcement crisis is not simply a decline in institutional capacity. It is also a shift in the institutional sites at which legality is produced. As collective, sectoral and public forms of oversight weaken, the practical meaning of compliance is increasingly mediated through organisational systems, regulatory targets and managerial routines.[871] If the enforcement crisis reflects not only declining compliance but a transformation in the conditions under which labour law operates, it becomes necessary to examine how legal norms are produced and sustained in practice. At this level, the question of enforcement gives way to a more fundamental enquiry into how legal norms are interpreted and translated within institutional settings. The issue is not simply whether a legal rule is complied with or breached, but what compliance is understood to require, how it is demonstrated, and who is institutionally

[869] Dukes, 'Neoliberalism and the Rule of Law', 17.

[870] Edelman, *Working Law*, 113-122; Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 744-750.

[871] *Working Law*, 113-122, 214-217; Mustchin and Martínez Lucio, 'The Fragmenting Occupation', 530-534, 540.

authorised to recognise it.[872] As the preceding sections have shown, the erosion of collective enforcement mechanisms, and the increasing reliance on individualised and complaint-driven processes have fundamentally reconfigured the institutional environment in which labour law operates. Legal meaning is not simply applied within this environment; it is mediated through the organisational and regulatory practices that make compliance visible.[873]

It is precisely within these conditions that the dynamics identified by Lauren Edelman assume particular significance. As compliance with labour law is increasingly mediated through managerial practices - including metrics, performance indicators, and procedural routines - the criteria through which legality is recognised are continuously redefined.[874] This has significant implications for the operation of labour law, not only in facilitating symbolic compliance, but in reshaping how compliance is evaluated in practice.[875] The point is not that managerial practices simply displace law, but that they increasingly provide the institutional forms through which law is made visible, auditable and recognisable as compliance.[876] Indeed, as Mustchin and Martínez Lucio have shown in particular, the managerialisation of labour inspection and enforcement has shifted enforcement work towards quantifiable metrics and proceduralised targets, including inspections performed, tasks completed and performance indicators.[877] This marks a movement away from relational, discretionary and context-sensitive forms of enforcement towards modes of oversight that privilege measurable activity over substantive regulatory effect.[878] As they observe, '[p]erformance and management processes increasingly judge inspectors based on outputs rather than outcomes, reducing their ability to engage meaningfully with employers or workers.'[879]

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[872] Edelman, 'Law at Work', 337-338; Edelman, *Working Law*, 214-217.

[873] *Working Law*, 113-122.

[874] Edelman, *Working Law*, 19, 120, 123-149.

[875] For present purposes, the significance of the post-war settlement lies not in its normative status, but in its institutional form. Labour standards were not left to individual workers to vindicate alone. They were supported by collective organisation, workplace representation, inspectorates, Wages Councils and specialist adjudication.

[876] Ibid, 35-40, 44-71, 206.

[877] S. Mustchin and M. Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work Inside the British State' (2023) 44 *Economic and Industrial Democracy*, 540.

[878] Ibid, 530, 430, 542.

[879] Mustchin and Martínez Lucio, 'The Evolving Nature of Labour Inspection', 750.

As Mustchin and Martinez Lucio demonstrate, economic pressures on British inspectorates have driven a shift toward numerical targets and measurable indicators of efficiency, significantly constraining their capacity to secure substantive improvements in working conditions.[880] Where sustained external oversight is limited and collective forms of workplace regulation have receded, the task of mediating legal norms shifts inward, to organisational structures and practices.[881] The significance of this shift is not only that enforcement agencies have fewer resources, but that the work of enforcement itself is increasingly organised through managerial criteria of efficiency, standardisation and measurable performance.[882] In that sense, resource scarcity and managerialisation should not be treated as separate problems.[883] Scarcity helps justify managerial control, while managerial control translates scarcity into priorities, targets and routines that redefine what counts as successful enforcement.[884]

The increasing reliance on standardised procedures over professional judgment limits inspectors' ability to address complex, context-specific workplace issues or to engage in relational enforcement strategies capable of tackling systemic violations.[885] The managerialisation of inspection work sidelines specialised expertise, reducing enforcement to bureaucratic compliance rather than proactive investigation.[886] Read through Edelman's account of legal endogeneity, these developments do not merely signify a weakening of enforcement capacity. They also indicate a transformation in the institutional form through which legality is produced and recognised.

Returning to Edelman's framework, the significance of these developments is that legality is not simply weakened from outside. [887] It is reorganised through the institutional forms that come to count as compliance. Where enforcement bodies lack capacity, where

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[880] Mustchin and Martínez Lucio 'The Evolving Nature of Labour Inspection', 744-750.

[881] Edelman, *Working Law*, 113-122, 123-149.

[882] Edelman, *Working Law*, 19, 120, 123-149.

[883] See Supiot, *Governance by Numbers*, 10, 146, 186.

[884] S. Mustchin and M. Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work Inside the British State' (2023) 44 *Economic and Industrial Democracy*, 530-534, 540; S. Mustchin and M. Martínez Lucio, 'The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain' (2020) 62 *Journal of Industrial Relations* 735, 744-750.

[885] *Working Law*, 35-40, 206, 214-217.

[886] Ibid, 744.

[887] Mustchin and Martínez Lucio, 'The Fragmenting Occupation', 530, 540, 542.

workers are required to initiate claims, and where organisations demonstrate legality through policies, procedures and internal systems, the meaning of compliance becomes increasingly mediated by managerial forms. This does not mean that compliance structures are necessarily empty or cynical. Rather, it means that legal evaluation may come to privilege visible organisational arrangements over the practical constraint of employer power.[888] What is at stake is not only the diminished effectiveness of enforcement, but a shift in how legal compliance is constituted and recognised within institutional practice.

As law is internalised within organisational and regulatory settings structured by managerial imperatives, compliance comes to be assessed through the production of standardised, auditable indicators rather than through the substantive realisation of legal norms.[889] Compliance is thus redefined: attention shifts from outcomes to processes, and from the protection of workers to the demonstration of procedural adequacy.[890] The persistence of labour law as an institutional framework, despite widespread and routine non-compliance, is therefore rendered more intelligible. Legality endures not necessarily because it is effectively enforced, but because it is continually reproduced through organisational and regulatory practices that give it visible and recognisable form.[891] The analytical payoff is therefore not that managerial practices are external distortions of law. It is that, under conditions of weak external oversight, those practices may become the very media through which legality is recognised. This is why routine breach can coexist with the continued projection of legal order: law remains present, but its practical operation is filtered through institutional forms that privilege demonstrability over constraint.[892]

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[888] Edelman, *Working Law*, 35-40, 44-71, 113-122, 206, 214-217; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406.

[889] Edelman, *Working Law*, 19, 120, 123-149.

[890] The post-war settlement examined in the context of the UK in Chapter 2 mattered here not because it provided perfect enforcement, but because labour standards were embedded within a wider set of collective, administrative and adjudicative institutions. Compliance did not depend solely on individual workers identifying, funding and pursuing legal claims.

[891] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

[892] *Working Law*, 35-40, 206, 214-217; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology*, 406-407.

4.10 Conclusion

The significance of these developments extends beyond the question of enforcement capacity. If legal norms are increasingly mediated through managerial practices, organisational routines, and performance metrics, the persistence of labour law in formal terms may coexist with its attenuation in practice. The difficulty, then, is not simply that labour law is breached, but that the criteria through which compliance is recognised have themselves been transformed.

The contemporary enforcement crisis therefore cannot be adequately understood through the conventional distinction between "law on the books" and "law in action" alone. It requires closer scrutiny of the processes through which legality is produced, interpreted and stabilised within institutional practice.[893] The question that follows is therefore not only whether labour law is effectively enforced, but how legality itself is constituted under conditions in which its operation is mediated by organisational and managerial imperatives. Under these conditions, legality may persist as an institutional framework while losing its capacity to subject employer authority to effective scrutiny or restraint. What is at stake is whether labour law continues to function as a meaningful constraint on the exercise of economic power, or whether it persists primarily as an institutional form through which compliance is represented rather than secured. This does not mean that labour law has ceased to matter, or that enforcement institutions are merely symbolic. The point is more precise: where compliance is increasingly demonstrated through procedures, metrics and organisational forms, legal constraint may be weakened even as legal form remains intact.

This is why the contemporary enforcement crisis cannot be understood solely as a gap between law and practice. The more difficult point is that law may continue to appear operational while its constraining function is displaced. Employers retain policies. Regulators retain procedures. Workers retain rights. Yet the institutional pathways through which those rights discipline power become increasingly fragile. Routine breach therefore reveals not the disappearance of legality, but its reconstitution: a condition in which legal form persists while the practical capacity of law to make employer power answerable is weakened.

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[893] R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12; Edelman, *Working Law*, 113-122, 214-217.

The problem, therefore, is not simply one of enforcement failure, but whether labour law continues to operate as part of a rule-of-law order in which power must be justified and constrained in practice. Where routine breach can persist without requiring such justification, legality is reconstituted in a form that no longer reliably subjects employer authority to scrutiny or restraint. It is this question - whether, and under what conditions, legality can function as a genuine constraint on economic power - that the next chapter takes as its starting point.

Chapter 5: Routine Breach and the Rule of Law: Justification, Governance, and Constraint

5.1 Introduction: Legality, Governance and the Institutional Conditions of Enforcement

The preceding chapters have situated labour law within the rule-of-law tradition by examining both its exclusion from liberal legalist accounts and its historical development as a response to private forms of power. Chapter 4 showed that routine breach cannot be understood solely as a failure of enforcement, because legal norms may remain formally present while their practical operation is mediated through fragmented institutions, managerial practices and organisational compliance structures. This chapter returns to the rule-of-law question directly: if legality persists in form while its capacity to constrain employer power is weakened, does routine breach constitute a failure of the rule of law?

The significance of routine breach therefore extends beyond legal or regulatory capacity. The point is not that every breach of labour law is, in itself, a rule of law failure, but that where non-compliance becomes sufficiently ordinary, institutionally tolerated, or practically insulated from challenge that legal norms, eases to operate, as effective constraints on power. This chapter argues that routine breach reveals a transformation in the conditions under which legality operates. Under contemporary systems of governance, legal norms are increasingly mediated through organisational practices, administrative routines and managerial techniques that reshape how obligations are interpreted, demonstrated and applied. Labour law may therefore persist institutionally while its capacity to structure and constrain power is weakened in practice.

This transformation has been widely recognised within socio-legal scholarship, albeit often in different vocabularies. As we saw in chapter 4, Edelman demonstrates how organisations translate legal obligations into internal compliance structures that reshape the meaning of legality within managerial frameworks. [894] These dynamics are reinforced by broader developments in public governance. As Alain Supiot has argued, *'governance by numbers'* increasingly replaces legal judgment with systems of quantification, performance measurement and evaluation. In this setting, legal norms are translated into technical instruments of management, displacing the justificatory discipline traditionally associated

[894] Edelman, *Working Law*, 113-122, 206, 214-217.

with law.[895] Read together, these accounts point to a broader shift: legal norms are not simply under-enforced, but increasingly rearticulated through institutional practices that privilege visibility, measurability and administrative legibility over justificatory constraint.

The operation of labour law cannot, therefore, be assessed by reference to doctrinal form alone. Legality must be examined within the institutional contexts through which legal norms are operationalised, translated and contested. This chapter adopts that socio-legal orientation. It proceeds from the methodological premise that the relationship between legal norms and social outcomes cannot be inferred from the existence of doctrine alone. Understanding the rule of law under contemporary conditions requires attention to the environments in which legal meaning is produced: courts and tribunals, enforcement agencies, workplaces, compliance systems, regulatory strategies and organisational routines.

The chapter proceeds in three stages. It begins by returning to Krygier's teleological account of the rule of law, arguing that legality must be assessed by its capacity to reduce arbitrariness and constrain power in practice.[896] It then turns to Selznick's account of legality as institutionalised justification, showing how law constrains authority by requiring power to give reasons, submit to review and become answerable within public standards.[897] The chapter then examines the fragility of that justificatory model under contemporary governance, drawing on Supiot's account of governance by numbers and the critical legal insight that legal form may legitimate power even where it appears to constrain it.[898] The final section draws out the methodological implications of this argument: if legality is produced through institutional practice, then the rule of law must be studied, empirically, in the settings where legal norms are translated into action.[899]

The argument developed here is therefore neither that labour law has ceased to exist, nor that the rule of law has disappeared. It is more precise. Routine breach becomes a rule-of-law problem where worker-protective norms remain formally valid but no longer require

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[895] Supiot, *Governance by Numbers*, 9-10, 145-147.

[896] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

[897] Selznick, *Law, Society and Industrial Justice*, 30-33, 80-82; Nonet and Selznick, *Law and Society in Transition*, 56-61, 72-77.

[898] Supiot, *Governance by Numbers*, 9-10, 145-147.

[899] H. W. Arthurs, 'Understanding Labour Law: The Debate over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83; S. F. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719.

employer power to justify itself before institutions capable of imposing effective constraint.[900] The question is not simply whether labour law is present, but whether it continues to perform the rule-of-law function that justified its emergence: rendering private economic authority intelligible, contestable and answerable.

5.2 Krygier and the Teleological Rule of Law: Routine Breach and Constitutional Constraint

'For even if the structures are just as we want them, if the law doesn't rule, we don't have the rule of law'.[901]

When labour law is rendered ineffectual and employer authority operates without meaningful constraint, the issue is not merely one of regulatory lapse but of legality itself. Foundational accounts of labour law have long treated it as performing a constitutional function within capitalist societies, extending legal constraint into sites of consequential private authority and subjecting managerial prerogative to institutional discipline.[902] As Ruth Dukes puts it, through labour law the state 'sets limits' to the powers of employers.[903] Routine breach therefore matters not simply because legal rules are broken, but because it raises the question whether labour law continues to perform this limiting function in practice. The legal gains traced in the preceding chapters - won through institutional struggle and forged in response to private government - have, as the preceding chapter showed in detail in the contemporary UK context and beyond, become progressively attenuated.[904] What once helped discipline managerial discretion through norms of justification, representation and procedural constraint may harden into legal form without corresponding practical force. The question is therefore no longer simply whether labour law belongs within the rule-of-law tradition, but whether that tradition remains viable where its most socially responsive elements are weakened in practice.

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[900] Edelman, *Working Law*, 113-122, 206, 214-217.

[901] Krygier, 'Four Puzzles About the Rule of Law', 64-104; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

[902] Dukes, *The Labour Constitution*, 5, 12-32; Kahn-Freund, *Labour and the Law*, 18-19.

[903] Dukes, *The Labour Constitution*, 5.

[904] Krygier, 'Four Puzzles About the Rule of Law', 64-104.

This concern extends beyond labour law itself. As socio-legal and labour scholars alike have long observed, the effectiveness of legal rights depends upon institutional arrangements capable of translating legal norms into lived constraint.[905] Labour law has historically operated not merely through statutory entitlements but through institutional mechanisms - collective bargaining, workplace representation, labour inspection - that embed legal standards within everyday economic governance.[906] Where those arrangements weaken, the distance between law on the books and law in action grows increasingly difficult to ignore or treat as merely an administrative problem.[907] Its central point, on this account, is the reduction of arbitrary power.[908]

That move matters because it prevents the rule of law from being reduced to a checklist of familiar institutional features. Courts, formal rules, publicity, prospectivity and generality may be important, but their significance is instrumental rather than self-validating.[909] Krygier's critique of the 'anatomical' approach is not that legal form is irrelevant. Rather, it is that legal form cannot be treated as conclusive of legality's success. The question is not simply whether rule-of-law institutions exist, but whether they help produce the social condition the rule of law is meant to secure: power effectively constrained by law.[910]

This distinction is especially important in the labour law context. Formal labour standards, tribunal rights and regulatory bodies may remain in place while employer power is, in practice, weakly constrained. If workers cannot realistically invoke legal norms, if breaches are unlikely to be detected or remedied, and if enforcement institutions lack the capacity to make employer power answerable, then the formal presence of legal rights cannot by itself establish that the rule of law is functioning. Krygier's point is precisely that the rule of law is a 'social… outcome, not a merely legal one'.[911] Between law in books and law in action

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[905] Dickens, 'Employment Tribunals and Alternative Dispute Resolution', 29-48; Davidov, 'The Enforcement Crisis', 61-82; H. Collins, K. D. Ewing and A. McColgan, *Labour Law* (Cambridge University Press, 2019), 71-76.

[906] Kahn-Freund, *Labour and the Law*, 18-19; Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968), paras 568-586; Dukes, *The Labour Constitution*, 69-91.

[907] R. Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12; D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 577-578, 588-589.

[908] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

[909] Krygier, 'Four Puzzles About the Rule of Law', 64-104; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69.

[910] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45; Krygier, 'Four Puzzles About the Rule of Law', 64-104.

lies a complex terrain of institutional practice, political structure and social organisation.[912] The legal features commonly associated with the rule of law therefore require supporting circumstances - social, political, cultural and institutional at least- if they are to operate as any kind of effective restraints upon power.[913]

Krygier's discussion of rule-of-law promotion illustrates the danger of confusing institutional replication with legal effect. Courts, codes and training programmes may be established, yet the outcomes associated with legality fail to materialise.[914] Institutions may look the part while the rule-of-law effects expected of them 'do not eventuate'.[915] In such cases, the appearance of legality may mask a deeper failure: the reproduction of legal forms without the corresponding capacity to constrain power. Krygier describes this as a form of 'goal displacement', where means are substituted for ends and institutional design replaces reflection on the purpose of the rule of law.[916] The lesson for labour law is clear.The existence of statutory rights, tribunals or enforcement bodies cannot itself answer the rule-of-law question. What matters is whether those arrangements enable labour law to operate as a practical restraint on employer authority.

This is why Krygier's insistence on effects is so important. "No amount of internal elegance of design is worth a bean" if legality does not reach the social relations in which power is exercised. The rule of law's claim in a society, he argues, depends on "the extent and quality of its reach and effects" not only in relations between citizens and the state, but also "between citizens themselves". That formulation is particularly apt for labour law. The employment relationship is one of the central relations between citizens in which power is exercised; a rule-of-law analysis that stops at public legality therefore misses a central site of modern domination.[917]

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[911] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 64-65. For the formal desiderata against which Krygier is positioning his account, see L. L. Fuller, *The Morality of Law* (rev edn, Yale University Press, 1969), 33-94; J. Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law* (Oxford University Press, 1979), 210.

[912] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 61-65.

[913] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 52-54, 61-65.

[914] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 52-54.

[915] M. Krygier, 'What's the Point of the Rule of Law?' (2019) 67 *Buffalo Law Review* 743, 751-753.

[916] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 54; Krygier, 'Four Puzzles About the Rule of Law' (author's manuscript, 2010), 10-11.

[917] Krygier, 'Four Puzzles About the Rule of Law', 64-104 (author's manuscript, 2010, 31-32).

Krygier's account also confirms why the rule-of-law question cannot be confined to public power. As Chapter 2 argued, drawing on Selznick, labour law historically emerged as part of the rule-of-law tradition's response to concentrated private power, extending legal constraint beyond the state into the governance of the workplace.[918] Krygier's teleological approach similarly directs attention not simply to the source of power, but to its effects. Where 'great threats and realisations of unconstrained arbitrary exercise of power can have nothing to do with the state', the relevant question is, as he puts it, 'what about the other sources of power? Shouldn't the test be what they are liable to do, not where they come from?'[919] Institutions of restraint must therefore be capable of reaching 'those who matter', including non-state actors.[920]

And, of course, this is where Krygier's account becomes especially important for labour law. Employers and corporations may exercise authority with profound consequences for livelihood, dignity, time, discipline and access to collective organisation. The critical question is therefore 'not where they sit but what they can do'.[921] Whether arbitrary power is exercised by public officials or by private actors makes little difference to those subject to it if law cannot impose meaningful restraint.[922] Where the workplace constitutes a central site of private authority, the rule-of-law question becomes whether labour law succeeds in rendering that authority accountable in practice.

The teleological perspective thus fixes the constitutional standard against which routine breach must be assessed. Routine breach does not become a rule-of-law problem merely because individual employers break the law. It becomes one where breach is sufficiently ordinary, tolerated or practically insulated from challenge that labour law no longer operates as an effective restraint on employer authority. The issue is not simply whether labour law exists, but whether it renders employer power answerable in practice.[923] Determining whether that condition holds requires attention not only to legal doctrine, but to the institutional

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[918] P. Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969), 30-33, 71-79; Nonet and Selznick, *Law and Society in Transition*, 60, 72-77; Dukes, *The Labour Constitution*, 5, 69-91.

[919] Krygier, 'Four Puzzles About the Rule of Law' (author's manuscript, 2010), 30-31.

[920] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 59.

[921] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 59.

[922] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 59 and n 47.

[923] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 54-59, 64-69; Dukes, *The Labour Constitution*, 5.

arrangements through which legal norms are implemented, invoked and enforced.[924] The question that follows is therefore institutional: how does legality generate and sustain the justificatory mechanisms through which power is constrained? It is to Selznick's account of institutionalised justification that the chapter now turns.

5.3 Philip Selznick and Justification as the Mechanism of Public Constraint

If teleology fixes the standard - if the rule of law is to be assessed by whether it reduces the possibility of arbitrary power - then the next questions become more institutional. What would it take for legality to operate as a constraint in practice? Selznick's analysis helps to answer that question by showing how law acquires authority not simply through formal validity, but through 'a sustained justification of its use'.[925] For Selznick, the answer is not to be found in insulation from politics, nor in the self-certifying elegance of form, but in justificatory discipline: the institutionalisation of reason-giving as a standing condition of authority.[926] The rule of law, or 'autonomous law', is therefore understood not as a metaphysical separation of law from society but as an 'internal basis for criticism and reconstruction', through which a legal order 'seeks progressively to reduce the degree of arbitrariness in positive law and its administration'.[927] Legality deepens where power is required to explain itself in a language capable of contestation.

Selznick's account shifts the locus of legitimacy from the mere attribution of authority to the manner of its exercise. As he observed, 'in principle a system of debatable reasons stands behind every act of official power.'[928] Once reasons are demanded, authority becomes conditional: prerogative must 'give way to policy', defended in terms capable of explanation, contestation and review.[929] The decisive shift is therefore from authority certified by its source to authority justified in its use: 'from a blanket certification of the source of power to a sustained justification of its use.'[930] Legality deepens not because rules exist, but because the

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[924] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 61-65; Davidov, 'The Enforcement Crisis', 61-82; Dickens (ed), *Making Employment Rights Effective*, 29-48.

[925] Nonet and Selznick, *Law and Society in Transition*, 56.

[926] Selznick, *Law, Society and Industrial Justice*, 30-31; Nonet and Selznick, *Law and Society in Transition*, 52-57.

[927] Selznick, *Law, Society and Industrial Justice*, 12; Nonet and Selznick, *Law and Society in Transition*, 52-57.

[928] Selznick, *Law, Society and Industrial Justice*, 30.

[929] Selznick, *Law, Society and Industrial Justice*, 182. See also Chapter 2.

[930] Nonet and Selznick, *Law and Society in Transition*, 56.

exercise of power must be rendered intelligible and accountable in relation to institutional purposes.[931]

In this sense, justification operates as an institutional mechanism rather than a moral aspiration. Selznick's crucial insight is that reason-giving restructures authority itself: '[f]or reasons invite evaluation and evaluation encourages the development of objective standards.'[932] Once officials must explain their decisions, those explanations generate criteria against which power can be assessed by others. Justificatory practices therefore do more than accompany authority; they create the conditions under which authority can be criticised, revised and constrained.[933] Where reasons prove defective, Selznick argues, authority is 'to that extent weakened and even destroyed'.[934] The obligation to justify thus introduces a continuous pressure toward standards capable of disciplining discretion. Legality moves beyond obedience to authority only where decision-making can be explained, criticised and defended in relation to publicly acknowledged ends.[935]

Yet this justificatory discipline cannot be sustained by those who exercise power alone. As Nonet and Selznick emphasise, rulers possess 'only limited credibility as certifiers of their own legitimacy.'[936] Where legitimacy depends on justification in use, claims based solely on source become insufficient.[937] At this point, legitimation becomes 'a distinct social function': the evaluation of power must be institutionally differentiated from its exercise.[938] This is the sense in which 'legitimation breeds legal differentiation'.[939] Courts, arbitrators and other legal forums derive their authority not from proximity to power but from what Selznick and Nonet describe as a 'peculiar competence': the capacity to frame decisions in a distinctive idiom of reason-giving and to evaluate them against publicly acknowledged ends.[940] Such institutions

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[931] Selznick, *Law, Society and Industrial Justice*, 30-31; Nonet and Selznick, *Law and Society in Transition*, 52-57.

[932] Selznick, *Law, Society and Industrial Justice*, 30.

[933] Ibid, 30-31, 44, 100.

[934] Selznick, *Law, Society and Industrial Justice*, 30.

[935] Ibid. See also p. 17, 30-31, 75, 78, 85, 117. See also Nonet and Selznick, *Law and Society in Transition*, 19-24, 34, 78, 112, 115.

[936] Nonet and Selznick, *Law and Society in Transition*, 56-57.

[937] Nonet and Selznick, *Law and Society in Transition*, 56.

[938] Nonet and Selznick, *Law and Society in Transition*, 56.

[939] Nonet and Selznick, *Law and Society in Transition*, 56-57.

[940] Nonet and Selznick, *Law and Society in Transition*, 57.

do not displace power. They create the conditions under which power may be required to account for itself.

As Chapter 2 argued, the development of labour law in the twentieth century offers a clear illustration of this 'dynamic toward legality'.[941] Extending scrutiny to 'particular acts and policies' allows power to be evaluated in light of performance and delegated responsibility.[942] Where managerial authority is required to 'meet the test of dialogue', prerogative is no longer exercised as discretion alone but must be articulated in terms capable of explanation and review.[943] Collective bargaining and grievance arbitration, as Selznick showed, exemplify institutional forms through which managerial decisions become 'always open to question' and 'may be addressed by resort to an institutionalised procedure'.[944] Collective agreements therefore 'regulate or restrict the exercise of management functions' without displacing management from the performance of those functions.[945] Managerial authority persists, but it is reframed within a justificatory structure in which decisions must be defended as policy rather than privilege.[946] As Nonet and Selznick observed, 'Legality, understood as close accountability to rules, is the promise of autonomous law; legalism is its affliction'.[947] The practices that enable law to discipline prerogative may also narrow its horizon, confining legal evaluation to what can be justified within procedural forms.[948] Legality may therefore persist as structured justification even where the underlying organisation of authority remains largely unchanged.[949]

Courts, the paradigmatic institution of autonomous legality, illustrate this tension.[950] Their insulation from immediate political pressure and fidelity to rule-bound reasoning render them both institutionally independent and structurally limited.[951] While the model of rules may 'fix

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[941] Selznick, *Law, Society and Industrial Justice*, 26.

[942] Nonet and Selznick, *Law and Society in Transition*, 56; Selznick, *Law, Society and Industrial Justice*, 30.

[943] Selznick, *Law, Society and Industrial Justice*, 182.

[944] Selznick, *Law, Society and Industrial Justice*, 155.

[945] Selznick, *Law, Society and Industrial Justice*, 182, quoting United Steelworkers v Warrior & Gulf Navigation Co 363 US 574 (1960), 583.

[946] Selznick, *Law, Society and Industrial Justice*, 182.

[947] Nonet and Selznick, *Law and Society in Transition*, 64.

[948] Nonet and Selznick, *Law and Society in Transition*, 61, 64.

[949] Nonet and Selznick, *Law and Society in Transition*, 58-61. Nonet and Selznick describe 'autonomous law' as purchasing procedural autonomy at the price of substantive subordination.

[950] Nonet and Selznick, *Law and Society in Transition*, 58-64, 104-107.

[951] Nonet and Selznick, *Law and Society in Transition*, 54, 58-64.

with precision the scope and limit of official authority', that same precision may substitute procedural correctness for purposive restraint.[952] The result is a persistent tension within legality's institutional integrity: law may adopt a 'self-protective, self-limiting, and conservative stance', preserving its form while narrowing its capacity to guide institutional purpose.[953]

Nonet and Selznick put the point sharply: 'in none of these ways can law address the problem of making purpose effective in guiding institutions.'[954]

Where the rule of law, on this account, is sustained through continuing justificatory performance supported by institutions capable of evaluation, this is the vulnerability that matters for the thesis' argument.[955] In this sense, the rule of law depends not simply on the existence of rules, nor even on the formal demand that reasons be given, but on the continuing institutional capacity to test those reasons against publicly intelligible purposes. Where such scrutiny persists, prerogative is forced to appear as policy and becomes exposed to criticism in terms that others may contest.[956] Where it narrows into procedural craft, legality may endure while its critical force diminishes.[957] The question, then, is not whether the rule of law can generate reasons, but whether it can preserve critical purchase once reason-giving becomes routinised, managerialised or confined to administratively legible forms. It is at this point that the chapter must turn from autonomous legality to the problem of reconstruction.

5.4 Reconstruction after Autonomy: CLS and the Problem of Legitimacy

If Nonet and Selznick reveal the internal tension of autonomous legality, the question that follows is how legality can retain its critical force once that tension becomes visible. The vulnerability of formalist readings of the rule of law lies not merely in the risk that procedure may narrow purpose, but in the possibility that the very idiom of justification - rules, reason-giving, institutional restraint - can harden into a self-contained professional practice.[958] In

[952] Nonet and Selznick, *Law and Society in Transition*, 61.

[953] Nonet and Selznick, *Law and Society in Transition*, 70.

[954] Nonet and Selznick, *Law and Society in Transition*, 105.

[955] Selznick, *Law, Society and Industrial Justice*, 156, 181-183.

[956] Nonet and Selznick, *Law and Society in Transition*, 60-61, 66-68, 105-107; Selznick, *Law, Society and Industrial Justice*, 67-73.

[957] Selznick, *Law, Society and Industrial Justice*, 30-31; Nonet and Selznick, *Law and Society in Transition*, 61, 64-70.

[958] Nonet and Selznick, *Law and Society in Transition*, 54, 58-61, 67-71.

such circumstances legality may continue to discipline arbitrariness in particular decisions while leaving intact the organisational distributions of authority that generate arbitrariness in the first place. The problem, therefore, is not that reason-giving disappears. It is that reason-giving may persist as an institutional demand while being narrowed into procedurally defensible and administratively legible forms. Nonet and Selznick uncovered a paradox: proceduralist legality may provide an 'internal basis for criticism and reconstruction', even as the forms through which legality operates narrow its capacity to guide institutional power.[959] This vulnerability provides the point of departure for Critical Legal Studies: not because CLS rejects legality altogether, but because it exposes the conditions under which legal form may legitimate power even while appearing to constrain it.[960]

Autonomy, on this account, is neither a timeless guarantee nor a simple illusion; it is a historically contingent institutional accomplishment that both constrains and legitimates power.[961] As Chapter 3 showed, CLS recast autonomy not as distance from politics but as a historically contingent practice of legitimation, sustained through professional craft, institutional routine, and ideological labour. The task here, then, is not to repeat that critique, but to ask what follows once those practices are increasingly mediated through administrative routines, managerial metrics and organisational forms.

Roberto Unger reframes the issue as a problem of legitimacy within what he describes as 'postliberal society': whether legal institutions retain the capacity to re-imagine and reorganise the social arrangements they encounter, rather than merely rationalising them.[962] The classical image of law as general, prospective and impersonal once provided a stabilising ideal for liberal political order.[963] For Unger, however, the rule of law seeks to secure 'the impersonality of power', yet this aspiration is repeatedly undermined by the structural conditions of liberal society itself.[964] The commitment to general, impersonal rules rests on the belief that political power can be centralised in the state and constrained by norms that

[959] Selznick, *Law, Society and Industrial Justice*, 12; Nonet and Selznick, *Law and Society in Transition*, 61, 64-70.

[960] Nonet and Selznick, *Law and Society in Transition*, 58-61. Nonet and Selznick describe autonomous law as purchasing procedural autonomy at the price of substantive subordination.

[961] See Chapter 3; Gordon, 'Critical Legal Histories', 94-101; Trubek, 'Where the Action Is', 588-589, 601.

[962] R. M. Unger, *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976), 193-200, 238-239.

[963] Unger, *Law in Modern Society*, 52-54, 176-178.

[964] Unger, *Law in Modern Society*, 178-181.

‘cut across distinctions of class and rank’; but that belief is ‘falsified by the reality of life in liberal society’, where the state is ‘forever caught up in the antagonism of private interests and made the tool of one faction or another.’[965]

The result is a persistent tension between law’s claim to impartiality and the social conditions within which it operates.[966] Unger’s point is not simply that liberal legality is hypocritical. It is that legality both responds to, and is destabilised by, the crisis of justification that arises once inherited hierarchies can no longer legitimate themselves.[967] Legal legitimacy emerges through the interaction between the organisation of power and the beliefs through which it is justified.[968] The rule of law therefore appears as a historically contingent mode of organising authority: one that stabilises the social order while drawing upon ideals that exceed its institutional realisation.[969]

Unger’s account is distinctive in refusing to treat law either as a passive reflection of social structure or as a mere ideological veil.[970] Domination is real and pervasive, yet its forms remain underdetermined.[971] For this reason, legal form both stabilises and destabilises power. Liberal legality does not simply conceal inequality; it responds to the need for justification in a society where hierarchy can no longer be treated as natural.[972] That is why the rule of law can be both conservative and generative. It may rationalise existing distributions of power, but it also supplies ideals - generality, impersonality, justification and contestability - that can be turned against those distributions.[973]

This is the significance of Unger’s account for the present chapter. In earlier social orders sustained by shared moral understandings, hierarchy could appear natural or inevitable.[974] By contrast, liberal societies organise individuals across hierarchies of wealth, power and knowledge that may be ‘only loosely connected’, in which status appears contingent rather

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[965] Unger, *Law in Modern Society*, 69, 181.
[966] Unger, *Law in Modern Society*, 178-181.
[967] Unger, *Law in Modern Society*, 170-174.
[968] Unger, *Law in Modern Society*, 166-174.
[969] Unger, *Law in Modern Society*, 52-54, 69, 171-174.
[970] Unger, *Law in Modern Society*, 52-54, 69, 171-174, 238-239.
[971] Unger, *Law in Modern Society*, 171-174.
[972] Unger, *Law in Modern Society*, 69, 171-174.
[973] Unger, *Law in Modern Society*, 69, 173-174, 238-239.
[974] Unger, *Law in Modern Society*, 166-170.

than pre-ordained.[975] As we saw, under such conditions, the very ideals that animate the rule-of-law project - generality, impersonality, institutional differentiation - also render its full realisation structurally fragile as the 'need to find a basis for the exercise of power' becomes 'most urgent' when authority can no longer rely on inherited legitimacy. As traditional[976] sources of legitimacy recede, that is, liberal society is left with what Unger famously describes as 'consensus without authority, stability without belief, order without justification.'[977]

Law, as a scheme of human association that must be justified, therefore depends not only on ideological force but on its capacity to order and distribute power in a way that can be justified, contested, or at least widely tolerated.[978] The rule-of-law functions simultaneously as aspiration and mystification. It seeks to guarantee the *impersonality of power* while operating within social arrangements - private property, wage labour and bureaucratic organisation - that repeatedly frustrate that aspiration.[979] Law is therefore pulled in two directions: toward the conservation of existing hierarchies and toward their potential transformation.[980] It is precisely this tension that renders legal form politically generative.[981]

5.5 Instrumentalism and the Technocratic Turn in Legal Governance

David Trubek's analysis of liberal legal thought illuminates the intellectual trajectory that follows this crisis of legitimacy.[982] Once the autonomy of law was placed in doubt, socio-legal thought increasingly sought to reconstruct authority not through doctrine but through method.[983] If Unger shows that liberal legality is haunted by a crisis of justification, Trubek shows how post-Realist legal thought attempted to manage that crisis by relocating neutrality

[975] Unger, *Law in Modern Society*, 170-172.

[976] Unger, *Law in Modern Society*, 173.

[977] Unger, *Law in Modern Society*, 170.

[978] Unger, *Law in Modern Society*, 69, 167.

[979] Unger, *Law in Modern Society*, 178-181.

[980] Unger, *Law in Modern Society*, 69.

[981] Unger, *Law in Modern Society*, 69, 238-239.

[982] D. M. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1, 19; Trubek, 'Where the Action Is', 588-589.

[983] Trubek, 'Where the Action Is', 588-589; Unger, *Law in Modern Society*, 39. See also p. 34-40, 54-64, 174-176, 181, 191, 200, 274.

from legal form to social-scientific technique.[984] If the rule of law is to be evaluated, as Krygier suggests, by reference to the purposes it serves, the difficulty Trubek identified is indeed that liberal legal thought so often treats those purposes themselves as self-evident rather than in need of justification.[985] The result is a form of reasoning in which the normative foundations of legality are never independently examined but instead appear as self-validating premises.[986]

In this sense the problem of legitimacy becomes tautological. The rule of law is said to secure values such as equality, individuality and community, yet those values are defined through the very legal order whose legitimacy is in question. Liberal legalism therefore risks overlooking the gap between its ideals and its social outcomes, treating the achievement of legal order as 'tantamount to the achievement of these values themselves'.[987] This is precisely the gap that a teleological account of the rule of law refuses to close in advance. If legality is to be judged by whether it reduces arbitrary power, its purposes and effects cannot simply be presumed from its form.

Whereas Chapter 3 established how autonomy can both constrain and legitimate power, the present analysis considers how that fragile autonomy is reconfigured when justificatory practices are translated into method, administration and performance under contemporary forms of governance. Tracing this difficulty through contrasting the trajectory of 'constructive' post-Realism with the early law-and-society movement, Trubek and John Esser show how legal thought therefore sought to ground law in 'the real facts', 'the real objective forces' and 'the real functional necessities of social life'.[988] Where socio-legal scholars had 'jettisoned the objectivity of legal formalism' in the wake of Legal Realism, their turn toward legal instrumentalism, as Trubek had warned, had 'quite the opposite effect': eroding the legitimacy of autonomous legal thought by leaving judges and lawyers with no 'valid premise

[984] Unger, *Law in Modern Society*, 61, 68; Unger, *Knowledge and Politics*, 69; D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1, 19; Trubek, 'Where the Action Is', 577-578, 595.

[985] D. Trubek and J. Esser, '"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?' (1989) 14 *Law & Social Inquiry* 3, 9-12.

[986] Trubek, 'Toward a Social Theory of Law', 1, 19; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

[987] Trubek and Esser, 'Critical Empiricism', 9, 12; Trubek, 'Where the Action Is', 584.

[988] Trubek, 'Where the Action Is', 577, 584; Trubek and Esser, 'Critical Empiricism', 9-12, 26-29.

for decision-making other than that of implementing state policy'.[989] Shorn of independent normative foundations, law risks becoming a 'handmaiden of policymakers', its critical potential displaced by an ostensibly apolitical stance.[990]

The irony of this development lies in its claim to neutrality. The turn to method promises to avoid the indeterminacy and contestation revealed by Legal Realism, yet does so by relocating neutrality from form to technique.[991] The 'pretence that social science methods lead to objective and value-neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic façade'.[992] Neutrality-by-method may therefore obscure contested questions of value and social vision even as it claims to resolve them.[993]

A legal science, modelled on the natural sciences, would 'point to the needs that law must meet and the functions it must perform' so as to provide 'a rational grounding for the operation and reform of the legal order.'[994] What begins as a critique of formalist autonomy may therefore harden into an instrumental understanding of law in which method displaces purpose. Once the rule of law relinquishes its normative foundations, the question of purpose is displaced by the techniques of administration.[995] Where classical legal thought grounded law's authority in doctrine, 'constructive' post-Realism relocated neutrality in method.[996] That relocation did not dissolve the ideological problem identified by critical legal and Marxist accounts of legal form; it recast it.[997] The distributive and political stakes of legal ordering could now be obscured not by formal doctrine alone, but by the language of expertise, function and social-scientific objectivity.[998] In this sense, the turn to method risked reproducing what Balbus and other critical theorists had identified as one of the rule of law's

[989] Trubek, 'Where the Action Is', 584 n 26; Trubek, 'Toward a Social Theory of Law', 19.

[990] Trubek and Esser, 'Critical Empiricism', 9-10.

[991] Trubek, 'Where the Action Is', 584; Trubek and Esser, 'Critical Empiricism', 10-11.

[992] Trubek and Esser, 'Critical Empiricism', 9, 12; Trubek, 'Where the Action Is', 584.

[993] Trubek, 'Where the Action Is', 577, 584; Trubek and Esser, 'Critical Empiricism', 9-12, 26-29.

[994] Trubek, 'Where the Action Is', 618.

[995] Trubek, 'Where the Action Is', 616, 620-621; Trubek and Esser, 'Critical Empiricism', 9-12, 26-29; Trubek, 'Toward a Social Theory of Law', 19-21.

[996] Trubek and Esser, 'Critical Empiricism', 11-12.

[997] Trubek, 'Toward a Social Theory of Law', 5, 19, 39; Trubek and Esser, 'Critical Empiricism', 9-12.

[998] See Chapter 3.

central ideological effects: the presentation of contingent social arrangements as neutral, necessary or technically given.[999]

The implication is central to this chapter. Where, as Trubek and others emphasise, instrumentalism 'cannot supply its own goals', the how of administration risks bypassing the why of legality.[1000] Surveys, metrics and models may come to stand in for ends, 'erod[ing] the legitimacy of autonomous legal thought' as law becomes an instrument for implementing policy rather than a framework for critically assessing it.[1001] The result is not the disappearance of legality, but a transformation in the way legality is justified: from public reason-giving oriented toward contestable purposes, to administrative technique oriented toward measurable performance.

5.6 From Governance by Numbers to the Study of Legality in Practice

If the displacement of purpose by method marked the intellectual trajectory of post-Realist legal thought, contemporary systems of governance increasingly institutionalise this shift. As Alain Supiot argues, modern regulation acts as a hallmark of what he describes as the emergence of *'governance by numbers'*, which translates normative purposes into numerical targets and performance indicators, transforming law from a framework of justification into a technology of management.[1002] In this emerging model, individuals are no longer guided primarily by general rules but are instead expected to 'react in real time to the multiple signals they receive, in order to meet the targets they are assigned'.[1003] Law, in this sense, ceases to operate primarily as a normative order constraining power through publicly articulated rules and instead becomes an instrument for implementing programmes and calibrating behaviour through quantifiable outputs.[1004] As Supiot puts it, 'governance by numbers replaces government by laws', as 'the digital revolution and the cybernetic imaginary reduce human action to reacting to signals and meeting pre-assigned targets, thereby eliminating the freedom to act independently within the limits of the law.'[1005]

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[999] Trubek, 'Toward a Social Theory of Law', 12-21; Trubek and Esser, 'Critical Empiricism', 10.

[1000] Trubek, 'Toward a Social Theory of Law', 19.

[1001] Trubek, 'Toward a Social Theory of Law', 19.

[1002] Supiot, *Governance by Numbers*, 9-10.

[1003] Ibid, 145-147.

[1004] Supiot, *Governance by Numbers*, 138-147.

[1005] Ibid, 145-147, 154-156.

Supiot illustrates how this transformation marks a significant departure from the rule-of-law tradition explored in the preceding chapters. Rather than constraining arbitrary power through general norms capable of guiding institutional conduct, governance increasingly operates through quantifiable targets, standardised outputs and performance indicators.[1006] Modern systems increasingly replace rule-based authority with techniques derived from managerial governance, including 'management by objectives' and the use of 'performance indicators' designed to measure and calibrate institutional behaviour.[1007] By reducing regulation to a calculative exercise, governance by numbers subordinates law to a logic of metrics, replacing justificatory authority with a technocratic model that privileges efficiency, prediction and performance over legal accountability.[1008]

Operating as an extension of the neoliberal rationality explored in Chapter 4, this shift embeds what Supiot describes as the 'three commandments of neoliberalism': cost-cutting, market efficiency and privatisation.[1009] Public authorities increasingly adopt techniques of corporate management, while regulatory functions once exercised by the state are devolved to private or semi-private actors.[1010] The result is a legal and regulatory order in which social coordination is organised through quantification, benchmarking and performance techniques rather than through the articulation of any kind of general norms.[1011] Within this framework, the labour law enforcement crisis examined in Chapter 4 appears not simply as a failure of implementation, but as part of a broader transformation in the relationship between law, governance and economic power.[1012]

This transformation matters because quantification does not merely measure enforcement. It can reshape what enforcement is understood to be. Under conditions of governance by numbers, labour standards are increasingly interpreted and monitored through targets, indicators and auditable outputs. Enforcement becomes, in Supiot's terms, a 'battle of performance', while policy is reduced to missions and programmes measured by 'objective

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[1006] Ibid, see also P.160; Trubek, 'Toward a Social Theory of Law', 19.

[1007] Supiot, *Governance by Numbers*, 105.

[1008] Ibid, 154.

[1009] Supiot, *Governance by Numbers*, 284-285.

[1010] See also R. Dukes, 'The Economic Sociology of Labour Law' (2019) 46 *Journal of Law and Society* 396; Dukes, 'Neoliberalism and the Rule of Law'.

[1011] Supiot, *Governance by Numbers*, 138-142, 154-155.

[1012] Ibid, 138-142, 154-160.

indicators'.[1013] Regulatory practice is thereby embedded within a framework structured by market-oriented imperatives.[1014] Where legal qualification traditionally depends upon argument over the meaning of norms, statistical qualification translates heterogeneous social realities into comparable numbers. Contestation is not necessarily abolished, but it is relocated into technical processes that often operate behind the scenes and outside the justificatory procedures associated with law.[1015]

The analysis developed throughout this thesis suggests that routine breach of worker-protective labour law cannot be understood simply as a problem of enforcement. Rather, it raises a deeper question about the institutional conditions under which legality operates. The persistence of routine breach reflects not merely failures of compliance, but a transformation in the environments through which legal norms are interpreted, translated and applied. In this sense, the rule of law may continue to exist in form even as its capacity to structure and constrain power becomes increasingly attenuated in practice.[1016] Indeed, if governance by numbers reveals how legality can persist while its normative foundations are displaced by techniques of calculation and management, the question that follows is not simply doctrinal but methodological. If legality is increasingly mediated through institutional practices rather than formal norms alone, the rule of law cannot be understood solely through doctrinal analysis. Instead, it must be examined within the environments in which legal norms acquire meaning and are translated into action: administrative agencies, professional organisations, workplaces, compliance systems and other sites concerned with 'the construction of meaning and its relationship to action at all levels of society'.[1017]

Legal norms remain formally present, yet the practices through which they are operationalised increasingly reflect managerial priorities of optimisation, evaluation and risk management. The crisis of labour law enforcement examined throughout this thesis therefore appears not simply as a problem of institutional capacity, but as a transformation of the conditions under which legality operates.[1018] Under the increasing 'managerialisation of law',

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[1013] Ibid, 138-142, 154-160.

[1014] Ibid, 9-10. On legal and statistical qualification, see ibid, 67-77, 92.

[1015] Supiot, *Governance by Numbers*, 67-77, 92.

[1016] Trubek, 'Where the Action Is', 612.

[1017] Trubek, 'Where the Action Is', 612.

[1018] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 61-65; Krygier, 'Four Puzzles About the Rule of Law', 64-104.

as Edelman puts it, legality may persist as an institutional form even as the justificatory discipline through which law constrains the exercise of power becomes weakened in practice.[1019] It is here that the methodological insights of critical legal scholarship become especially significant. The refusal of both formalism and determinism in CLS did not entail abandoning the study of law. It demanded a more precise inquiry into how legality is produced, interpreted and mobilised within institutional practice.

5.7 Symbolic Compliance and the Trouble with Legal Form

The significance of Edelman's account, for the purposes of this thesis, is that it reveals how legality can be transformed without being openly repudiated. Organisations do not simply obey or disobey legal rules. They interpret them, translate them and institutionalise them through internal structures. Policies, grievance procedures, equality statements, training programmes, audit systems and compliance offices become the forms through which legal obligations are received and made operational within organisations.[1020] The point is not merely that such structures may be ineffective. It is that they may come to define what effectiveness, reasonableness or compliance is taken to mean.[1021] This is where the thesis contend that legal endogeneity inevitably eventuates the rule of law.

If law constrains power by requiring authority to justify itself, then the crucial question is whether organisational forms of compliance subject power to meaningful scrutiny, or whether they merely provide recognisable signs of legality. A grievance procedure may require reasons to be given, but that does not mean those reasons are independently tested. A policy may express legal commitment, but that does not mean the underlying practice has changed. A training programme may communicate rights, but that does not mean workers can safely invoke them. Legal form may therefore be present, visible and institutionally recognised while its constraining function is weak.

Edelman's concept of legal endogeneity captures this dynamic. Organisational structures developed in response to legal ambiguity may acquire legal significance over time, as courts, regulators and other legal actors treat them as evidence of compliance.[1022] The organisation's

[1019] Edelman, *Working Law*, 113-122, 123-149, 206, 214-217.

[1020] Edelman, *Working Law*, 44-71, 113-122.

[1021] Ibid, 113-122, 206, 214-217.

[1022] Edelman, *Working Law*, 206, 214-217.

own interpretation of law then feeds back into legal meaning. What began as a managerial response to uncertainty becomes a legal marker of reasonableness. Law is not simply imposed on the organisation from outside; it is partly reconstructed through the organisation's own practices.[1023] In this sense, legality becomes endogenous to the organisational field.

The difficulty is not that organisational compliance structures are necessarily cynical or empty. They may be created in good faith, and they may sometimes improve workplace practices. Their ambiguity is precisely what makes them powerful. They can operate both as mechanisms of protection and as instruments of legitimation. They may create channels through which workers can complain, while also containing conflict within managerial processes. They may provide documentary evidence of legal attentiveness, while displacing attention from the substantive experience of those subject to managerial authority.[1024] Symbolic compliance is therefore not simply false compliance. It is compliance whose institutional form may be more legible than its practical effect.

This matters because the rule of law is concerned with the relationship between legal form and power. If employer authority can be represented as lawful through policies, procedures and documentation, without those structures being tested against workplace reality, then legal form may legitimate power without constraining it. The organisation appears to have submitted to law because it has adopted the language and apparatus of legality. Yet the underlying distribution of authority remains largely intact. The employer still controls discipline, time, classification, pay systems, grievance processing and the evidential record. The worker may have a route to complain, but the route itself is designed and administered by the organisation whose power is being challenged.

The force of Edelman's account is clearest where organisational form is treated as legal substance. In *Working Law* she notes that "judges often defer to the presence of organizational structures, treating them as evidence of compliance, regardless of their effectiveness", and elsewhere describes how "internal programs become judicially equated with compliance to civil rights legislation". These are small phrases, but they name the central danger for this thesis. If the presence of a policy, grievance route or compliance

[1023] Ibid, 206-217.

[1024] Edelman, Uggen and Erlanger, 'The Endogeneity of Legal Regulation', 406-407.

programme becomes evidence of legality without serious inquiry into its operation, then the legal order begins to recognise the symbol of constraint as though it were constraint itself.[1025]

Edelman, Uggen and Erlanger's account of grievance procedures as 'rational myth' is especially useful here.[1026] The phrase captures the way in which internal procedures may acquire legitimacy not because they reliably resolve underlying power problems, but because they conform to institutional expectations of rational organisation. A grievance procedure signals fairness, due process and legal attentiveness. It makes the organisation appear rule-governed. But the existence of the procedure does not by itself show that workers can use it safely, that grievances are fairly determined, or that structural patterns of breach are addressed. The myth is not that the procedure exists. The myth is that its existence is equivalent to legal accountability.

This is a particularly acute problem in labour law because the employment relationship is already structured by managerial authority. Internal procedures operate within that authority. They may moderate it, but they do not stand outside it. A worker who complains must often complain to, or through, the employer. The evidential record may be controlled by management. The legal categorisation of events may already have been shaped by HR. Underpayment may appear as payroll error. Overwork may appear as flexibility. Misclassification may appear as contractual choice. Retaliation may appear as performance management. Each translation matters because it converts a possible breach of worker-protective law into an administratively manageable organisational issue.

This is not merely a matter of language. It alters the institutional pathway through which law becomes effective. If breach is translated into organisational procedure, then the question becomes whether that procedure can make employer power answerable. Where the procedure is internal, individualised and controlled by the employer, that capacity is uncertain. The procedure may allow the worker to speak, but not necessarily to alter the terms on which their complaint is heard. It may process the grievance without making the organisation confront

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[1025] Edelman, *Working Law*, 206, 214-217; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406, 406-407; L. B. Edelman, 'Legal Ambiguity and Symbolic Structures: Organisational Mediation of Civil Rights Law' (1992) 97 *American Journal of Sociology* 1531.

[1026] L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406, 406-407.

the broader pattern that produced it. It may produce a decision, but not necessarily accountability.

The same dynamic applies at the level of external legal institutions. Courts and tribunals may look to organisational structures as evidence of reasonableness, fairness or compliance.[1027] This is understandable. Legal actors often lack direct access to the daily life of organisations. Policies and procedures provide visible, documentary and administratively convenient evidence. They allow legal institutions to assess whether an employer has taken steps to comply with the law. Yet the danger is that the presence of structure becomes a proxy for the reality of constraint. The legal system may ask whether a policy existed, whether a procedure was followed, whether training occurred, or whether a complaint route was available. Those are important questions, but they do not exhaust the rule-of-law inquiry.

The deeper question is whether employer power was actually made answerable. Did the worker have a meaningful opportunity to challenge the decision? Could they complain without fear of retaliation? Were the reasons given by the employer tested against the substantive purpose of the legal norm? Did the procedure expose a pattern of breach, or contain the complaint as an isolated incident? Did the organisational response alter the conditions under which similar breaches would occur? If the answer to these questions is no, then legal form has been preserved without legal constraint being secured.

This is why symbolic compliance is not simply a problem of employer strategy. It is an institutional problem. The meaning of compliance is produced through interaction between organisations, legal professionals, courts, regulators, HR departments and compliance specialists.[1028] Organisations develop structures to respond to legal uncertainty. Legal professionals advise on those structures. Regulators may encourage or accept them. Courts may treat them as evidence of legality. Over time, the structures become part of the legal environment itself.[1029] The result is a recursive process in which organisational practices shape legal meaning and legal meaning validates organisational practices.

Edelman and Suchman's account of the 'legal environments of organisations' is helpful in this respect because it makes clear that organisations do not encounter law as a single

[1027] Edelman, *Working Law*, 113-122, 206, 214-217.

[1028] Edelman, *Working Law*, 113-122, 214-217.

[1029] Edelman, *Working Law*, 113-122, 206-217.

external command.[1030] They encounter multiple legal signals, professional interpretations, institutional expectations and normative pressures. Law is part of the organisational environment, but organisations also help construct the meaning of that environment. Compliance is therefore not only a matter of obedience. It is a process of translation and institutionalisation.

For the rule of law, the central problem of this thesis is then that translation may thin legality. The legal norm may begin as a demand that power be constrained: do not underpay; do not dismiss unfairly; do not discriminate; do not retaliate; do not expose workers to unsafe conditions. Once translated into organisational compliance, however, the norm may appear as a requirement to maintain documentation, provide training, operate procedures, record decisions and manage risk. Those practices may be necessary, but they are not identical to legal constraint. The administrative form of legality may become detached from its justificatory purpose.

This helps explain how routine breach can coexist with extensive legal infrastructure. A workplace may have contracts, handbooks, HR systems, disciplinary procedures, grievance routes, payroll software, training modules and compliance audits, and yet worker-protective norms may still be routinely breached. The existence of legal infrastructure may even make breach more difficult to contest, because it allows the organisation to present itself as already governed by law. The worker who complains may be told that there is a procedure. The regulator may be shown that systems exist. The tribunal may be invited to infer reasonableness from documentation. Legal form becomes the medium through which legality is displayed.

The phrase ‘symbolic compliance’ should therefore not be misunderstood as suggesting that law is merely symbolic. The thesis’s argument is the opposite. Law matters precisely because symbolic legality can have real effects. It shapes expectations, creates evidential presumptions, organises dispute resolution and affects how institutions perceive employer conduct. Symbolic compliance is powerful because it allows organisations to appear legally responsive while controlling the terms of that responsiveness.[1031] It is a way of preserving legitimacy while limiting disruption.

[1030] L. B. Edelman and M. C. Suchman, ‘The Legal Environments of Organizations’ (1997) 23 *Annual Review of Sociology* 479, 479-515.

[1031] Edelman, *Working Law*, 214-217.

This is where Edelman's account intersects with Selznick's. Selznick understood legality as a discipline of justification: authority becomes legalised when it must give reasons, submit to review and act within standards that can be criticised.[1032] Edelman shows how that justificatory discipline can be organisationally absorbed. The demand for reasons becomes a procedure for recording reasons. The demand for accountability becomes an internal complaints process. The demand for compliance becomes a risk-management system. The form of justification remains, but its critical force is weakened.

The rule of law's erosion, it is argued, lies in that weakening. Where compliance structures are treated as evidence of legality without adequate scrutiny of their effects, the rule of law is reduced from a constraint on power to a performance of legal attentiveness. Employer authority is no longer required to justify itself in a way that exposes it to effective challenge. It is required to show that the organisation has adopted recognisable forms. Law's authority is not openly denied. It is absorbed, translated and rendered manageable.

This also helps explain why routine breach is so difficult to name. If an employer openly rejects legal obligations, the rule-of-law problem is obvious. But if the employer maintains policies, follows procedures, engages HR advice, documents decisions and speaks the language of compliance, breach may appear as error, exception or failure of implementation rather than as evidence of weakened legality. The organisation can be legally sophisticated and still fail to constrain power. Indeed, legal sophistication may sometimes make breach more defensible, because it equips the organisation with the vocabulary through which its conduct can be rationalised.

The concept of legal endogeneity therefore strengthens the thesis's answer to its research question. Routine breach of worker-protective labour law constitutes a rule-of-law failure not simply where employers violate legal rules, but where the institutional forms through which legality is recognised no longer reliably test whether power has been constrained. Symbolic compliance shows how that can happen. Legal form remains visible. Organisational structures multiply. Courts and regulators may recognise those structures. Yet the worker-protective norm may be deprived of practical force.

[1032] Selznick, *Law, Society and Industrial Justice*, 30-31; Nonet and Selznick, *Law and Society in Transition*, 56-57.

The lesson is not that policies and procedures should be discarded. The lesson is that they must be evaluated by reference to their capacity to make employer power answerable. A grievance procedure matters if it allows workers to contest authority without fear and produces reasons that can be independently tested. A compliance policy matters if it changes organisational practice. An audit matters if it exposes breach rather than merely documenting systems. A training programme matters if it alters conduct and supports workers' capacity to invoke rights. Without such effects, compliance structures risk becoming symbols of legality rather than instruments of legal constraint.

This is why the rule-of-law analysis cannot stop at formal rights or institutional presence. It must examine how legal norms are mediated through organisational life. The workplace is not simply the site where law is applied. It is one of the places where the meaning of legality is produced. If that production is dominated by managerial rationality, risk management and symbolic compliance, then the rule of law is weakened from within. Labour law continues to exist, but its capacity to require employer power to justify itself is reduced. In this sense, legal endogeneity is not only a socio-legal account of compliance. It is a theory of how legality can survive as form while failing as constraint.

5.8 Institutional Pluralism and the Limits of Legal Autonomy as Public Legal Constraint

The difficulty, then, is methodological as well as normative. If legality is increasingly mediated through institutional practices, administrative routines, workplace governance and managerial forms, it most definitely cannot be understood as the product of a single legal site. What follows from these insights, and from Chapter 3's account of autonomy as a fragile institutional achievement rather than formal insulation, is, then, that the rule of law must be studied across the settings in which legal norms are interpreted, translated and mobilised.[1033] The question is not only whether legal doctrine contains worker-protective norms, but how those norms acquire practical meaning when they move through courts, agencies, workplaces, professional organisations and regulatory bodies.[1034]

[1033] D. Trubek, 'Where the Action Is: Critical Legal Studies and Empiricism' (1984) 36 *Stanford Law Review* 575, 577-578, 588-589, 612; R. W. Gordon, 'Critical Legal Histories' (1984) 36 *Stanford Law Review* 57, 94-101.

[1034] Trubek, 'Where the Action Is', 601, 612; D. Trubek and J. Esser, '"Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?' (1989) 14 *Law & Social Inquiry* 3, 9-12.

Once legal meaning is recognised as emerging through the interpretive practices of multiple institutional actors, legality appears as a dispersed phenomenon produced across a plurality of organisational settings. [1035] Courts, administrative agencies, workplaces, professional organisations and regulatory bodies all participate in the interpretation and operationalisation of legal norms. Yet this dispersion also introduces a significant tension for the rule of law. If legality is justified primarily through methodological technique rather than through publicly contestable purposes, the normative foundations of legal authority risk disappearing from view.[1036] What began as a critique of formalist autonomy may therefore culminate in a different form of depoliticisation, in which law's authority derives less from justificatory discipline than from technical procedures, performance indicators and administratively legible outputs.

The implications here are therefore methodological as much as theoretical. If law's autonomy lies not in formal neutrality but in its *constitutive* role within social practices, then the study of legality must move beyond functionalist explanations that treat legal institutions as the necessary reflection of social structures. It must instead attend to the interpretive practices through which legal ideas are connected to social action and institutional order.[1037] This requires what critical scholars described as 'genealogical investigations' into the ways in which legal institutions and social structures are shaped by purpose and interest, rather than by any 'invisible hand of objective necessity'.[1038] Research into legal consciousness at the field level, sensitive to time, place and institutional practice, for example, therefore becomes essential. It leaves open, rather than assumes in advance, whether legal ideology legitimates existing arrangements or supplies resources through which relations of power may be contested.[1039]

This point matters because instrumental legal thought is not politically innocent. As Trubek warned, efforts to render legal thought more instrumental 'may make the legal order increasingly dependent on state apparatus, and when authoritarian groups seize control of that apparatus, such dependence will strengthen their position'.[1040] Where pluralist politics are

[1035] Trubek, 'Toward a Social Theory of Law', 19-20.

[1036] Trubek, 'Where the Action Is', 601.

[1037] Trubek, 'Toward a Social Theory of Law', 21; Trubek and Galanter, 'Scholars in Self-Estrangement', 1075.

[1038] Gordon, 'Critical Legal Histories', 94, 122.

[1039] Trubek, 'Toward a Social Theory of Law', 19.

[1040] Ibid, 19-20, 43-47.

absent or fragile, instrumentalism makes law more dependent on the goals of those who control the institutional machinery through which it operates.[1041] Trubek's defence of autonomy is not a retreat into formalism, but a crucial warning that law must retain some institutional capacity to stand apart from immediate political or managerial direction if it is to perform its rule-of-law function**.**[1042] Where he argues that, in some circumstances, 'legal thought relying on formalistic or traditional arguments may be a more effective way to resist authoritarian measures', the point is not to canonise formalist ideals, but to preserve law's capacity to resist capture.[1043]

The significance of this analysis lies not only in its diagnosis of authoritarian legality, but in its implications for the study of labour law today. Once legality is examined across the institutional settings through which legal norms are interpreted and operationalised, the unity of the legal order gives way to a more complex picture of institutional pluralism.[1044] Legal norms circulate through regulatory agencies, professional practices, organisational governance structures and workplace regimes that mediate their practical meaning. In such settings, the authority of law is rarely exercised through the direct application of doctrinal rules alone**.** It is translated through institutional routines, professional judgments, organisational procedures and workplace practices that reshape how legal standards operate in practice.

As Chapter 2 argued, the post-war labour law settlement provides one historical illustration of this plural institutional landscape. Multiple sites of authority - unions, inspectorates, tribunals, workplace representation and collective bargaining - could, however imperfectly, test private power against legal standards and reduce the extent to which workers had to bear the risks of enforcement alone.[1045] Where those channels thin, however, neutrality-by-method ceases to function as restraint and may become a stabilising device. The language of expertise substitutes for the language of justification, and legality's critical force is translated into administrative craft.[1046] Trubek is not arguing that instrumentalism inevitably expands state

[1041] Ibid, 12-21; Trubek and Esser, 'Critical Empiricism', 9-12.

[1042] Trubek, 'Toward a Social Theory of Law', 19-21.

[1043] Trubek, 'Toward a Social Theory of Law', 21.

[1044] Trubek, 'Where the Action Is', 601, 612; Arthurs, *Without the Law*, 18-21.

[1045] H. W. Arthurs, 'Developing Industrial Citizenship: A Challenge for Canada's Second Century' (1967) 45 *Canadian Bar Review* 786, 800; Arthurs, *Without the Law*, 18-21.

[1046] Trubek, 'Toward a Social Theory of Law', 19-21.

power or leads to authoritarianism. Rather, its effects depend upon the institutional conditions within which it operates. Where pluralist contestation remains robust, instrumental techniques may be channelled through the compromises produced by that contestation. Where those channels weaken, instrumentalism becomes unmoored: techniques that promise administrative efficacy may instead stabilise existing distributions of power.[1047]

This insight is especially important for worker-protective labour law. Worker-protective norms are rarely enforced solely through courts or statutory interpretation. Legal norms circulate through a dispersed array of workplace governance mechanisms - human resources handbooks, grievance procedures, disciplinary codes, compliance programmes, corporate codes of conduct and other internal systems - through which legal obligations are translated into managerial procedure. Arthurs' account of industrial pluralism captures this point: the workplace is governed not only by the formal commands of the state, but also by rules created and administered within the enterprise itself.[1048] Collective agreements in particular establish 'a system of private law governing the workplace', illustrating how legal norms may operate through institutional structures within the enterprise.[1049]

These institutional artefacts do not simply implement legal rules, they participate in the production of legality. They are structured through multiple normative systems - managerial rules, organisational procedures, informal practices and professional routines - which operate alongside, and sometimes independently of, state law.[1050] Employee handbooks, disciplinary codes, grievance procedures and internal compliance mechanisms therefore function as important sites through which labour standards are interpreted and applied.[1051] The result is not the disappearance of legality, but its dispersion across the institutional structures through which labour relations are governed.[1052] The rule-of-law question is therefore whether that dispersion strengthens legal constraint, or whether it allows legal form to persist while effective constraint is weakened.

[1047] Trubek, 'Toward a Social Theory of Law', 19-21.

[1048] H. W. Arthurs, 'Understanding Labour Law: The Debate over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83, 88-89; Edelman, *Working Law*, 113-122, 123-149.

[1049] Arthurs, 'Understanding Labour Law', 88-89.

[1050] Arthurs, *Without the Law*, 18-21; S. F. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719, 720-723.

[1051] Arthurs, *Without the Law*, 18-21; S. F. Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review*, 720-723.

[1052] Arthurs, *Without the Law*, 15-21; Edelman, *Working Law*, 113-122, 123-149.

The pluralisation of legality thus reveals both insight and danger for the socio-legal study of labour law and the rule of law. On the one hand, it offers a more plausible account of how legal authority operates than the autonomous image of law as a self-executing body of rules. On the other, it exposes the ways in which the dispersal of legality across multiple institutional arenas may weaken the capacity of legal norms to constrain power.[1053] To return to Edelman, then, is to see the way in which organisational compliance structures may become evidence of legality themselves, increasingly having influence over what legal institutions come to recognise as compliance.[1054]

This does not mean that law is merely ideological, or that legal form has no critical force. Karl Klare's account is useful precisely because it resists that reduction. Law is not simply an alienated external force, but 'a form of expressive social practice in which the community participates in shaping the moral, allocative, and adjudicatory texture of social life'.[1055] If legality is understood in this way, it cannot be reduced to a simple transmission-belt model in which doctrine produces social outcomes directly. Nor, however, can it be assumed in advance that legal ideology either secures hegemony or furnishes effective resources of resistance.[1056] As Gordon observed, legal forms are 'manufactured, reproduced and modified for special purposes by everyone, at every level, all the time'.[1057] Law is therefore double-edged: it may legitimate existing social arrangements, but it may also provide resources through which those arrangements are contested.[1058]

Two lessons follow. First, instrumentalist conceptions of legality - whether framed as policy design, social-scientific expertise or managerial performance - cannot by themselves secure the rule-of-law function of constraining power. As Trubek's analysis suggests, instrumental reasoning may operate compatibly with legality where pluralist contestation remains robust, but it provides no internal guarantee against political or managerial capture where those conditions weaken.[1059] Secondly, even a critical account of the rule of law need not abandon

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[1053] Arthurs, *Without the Law*, 15-21; Edelman, *Working Law*, 113-122, 123-149.

[1054] Edelman, *Working Law*, 113-122, 156, 206, 214-217; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406-407.

[1055] K. Klare, 'Law-Making as Praxis' (1979) 40 *Telos* 123, 132.

[1056] Klare, 'Law-Making as Praxis', 132-133; I. D. Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11 *Law & Society Review* 571.

[1057] Gordon, 'Critical Legal Histories', 94.

[1058] Ibid, 94-95.

[1059] Trubek, 'Toward a Social Theory of Law', 19-21.

the value of justification. Tushnet's recent account of CLS and the rule of law is helpful here: even where social orders diverge over how arbitrariness is to be assessed, the rule of law's demand that action not be arbitrary creates at least a justificatory culture.[1060] In its weakest form, this culture requires authority to explain itself to those affected by it. That is a modest claim, but it is not an empty one.

Divorced from rigid rule-formalism, the rule of law can therefore be understood as contributing to a legal culture that may provide a context and moral basis for resistance to arbitrary power.[1061] If there remains a difference between the rule of law and the rule of absolute, arbitrary force, as Thompson urged, the task is not to abandon legality, but to understand the conditions under which it retains critical force.[1062] Klare's formulation of the critical task remains apposite: legal scholars must unmask law's pretensions to fairness where law perpetuates injustice, while resisting the illusion that legal solutions alone can resolve the social and political problems of class society.[1063] For this thesis, that means neither romanticising labour law nor treating routine breach as merely administrative. It means asking whether the institutional conditions through which worker-protective norms operate still enable law to require employer power to justify itself.

In its refusal of both determinism and formalism, Critical Legal Scholarship therefore supplies a methodological discipline. It rejects the assumption that legal ideas simply determine social outcomes, but it also rejects the assumption that law merely reflects social power. Gordon's account of Klare's analysis of the post-war labour settlement in the US typified in the Wagner Act thesis is here instructive. Judicial decisions did not determine the course of labour history in isolation, but contributed to the formation of elite understandings of the 'labour problem', which in turn shaped the terms through which labour conflict was interpreted across institutional settings.[1064] And still, as Gordon puts it, '[c]omparable social conditions… have generated contrary legal responses, and comparable legal forms have produced contrary social effects'.[1065]

[1060] M. Tushnet, 'Critical Legal Studies and the Rule of Law' in J. Meierhenrich and M. Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), 328-339.

[1061] Thompson, *Whigs and Hunters*, 266.

[1062] Thompson, *Whigs and Hunters*, 266.

[1063] Klare, 'Law-Making as Praxis', 132-133.

[1064] Gordon, 'Critical Legal Histories', 99-101.

[1065] Gordon, 'Critical Legal Histories', 68.

That the rule of law's effects must be studied rather than presumed is therefore the methodological conclusion on which the thesis rests. As Gordon put it, we can 'never understand the power that legal forms hold over our minds unless we see them at work up close, in the most ordinary settings'.[1066] The 'project of critical understanding' must therefore be extended to the study of 'the construction of meaning and its relationship to action at all levels', moving beyond doctrinal analysis to investigate how legality is interpreted and mobilised within institutional practices.[1067] Empirical inquiry, on this view, does not aim to uncover deterministic laws of social behaviour. Rather, recognising that the relationship between legal norms and social practice cannot be presumed in advance, it requires what Trubek described as 'a ruthless contrast of legal ideals with legal and social behaviour'.[1068] Only through such inquiry can we determine whether labour law's formal presence continues to operate as a constraint on employer power, or whether legality has become increasingly symbolic: visible as form, but weakened as discipline.

5.9 Legal Consciousness at Work and the Sociology of Labour Law

The preceding section argued that legality is produced across a plurality of institutional sites. That claim requires one final refinement. Legal pluralism explains where legal meaning is produced; legal consciousness helps explain how it is experienced. This distinction matters because worker-protective labour law does not operate only through courts, inspectorates or statutory texts. It operates through the beliefs, expectations and practical calculations of workers, employers, HR practitioners, advisers, regulators and judges. Law's rule-of-law function therefore depends partly on whether these actors experience legal norms as capable of making power answerable.[1069]

Legal consciousness scholarship begins from the premise that law is not confined to official institutions. Ewick and Silbey's description of law as part of the 'common place' of everyday life is important because it directs attention to ordinary practices of interpretation.[1070] People do not encounter law only when they litigate. They encounter it when deciding whether a

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[1066] Gordon, 'Critical Legal Histories', 124.

[1067] Trubek, 'Where the Action Is', 612.

[1068] Trubek, 'Complexity and Contradiction in the Legal Order', 545.

[1069] E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405, 405-433; P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998), 15-20.

[1070] Ewick and Silbey, *The Common Place of Law*, 15-20.

problem is legal, whether an institution can be trusted, whether a complaint is worth the risk, and whether a remedy is possible. Hertogh's account of legal alienation adds an important warning: formal legal inclusion may coexist with practical estrangement from law.[1071] People may live under law while experiencing it as remote, technical or unavailable.

Eleanor Kirk's contribution is to bring this insight directly into labour law. In arguing for the importance of legal consciousness to the sociology of labour law, Kirk shows that employment rights cannot be understood only as doctrinal entitlements.[1072] They must be studied as norms whose meaning is constructed in workplaces, advice settings, HR departments and tribunal processes. The significance of a right depends not only on its legal formulation, but on whether workers understand it, whether they believe it can be invoked, whether institutions appear accessible, and whether employers internalise it as constraint rather than risk.

This perspective is particularly important because labour law is a field in which legal consciousness is shaped by dependency. A worker who asserts a right does not do so from outside the employment relationship, but from within it. They may depend on the employer for income, references, immigration security, hours, future opportunities or simply tolerable working conditions. The decision not to complain may therefore be entirely rational. It may reflect not ignorance, but a sober assessment of the risks attached to legal mobilisation. In this context, the rule-of-law problem cannot be measured only by whether a remedy exists. It must also ask whether the worker can realistically use it.[1073]

Kirk's empirical work on tribunal reform makes this point concrete. The tribunal system, formally designed as a route to accessible labour justice, is often experienced through delay, stress, uncertainty, complexity and fear.[1074] The result is a gap between formal legal architecture and lived legal possibility. A right that must be enforced through a process workers experience as intimidating or inaccessible does not constrain employer power in the

[1071] M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018), 1-14.

[1072] Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.

[1073] Kirk, 'The "Problem" with the Employment Tribunal System', 975-991; Busby and McDermont, 'Fighting with the Wind', 159-198.

[1074] Kirk, 'The "Problem" with the Employment Tribunal System', 975-991.

same way as a right supported by collective representation, proactive enforcement or robust advice infrastructures. The route to law becomes part of the substance of legality.

This is where legal consciousness reconnects with Selznick's account of justification. Selznick's central insight is that legality is not merely the possession of authority but its 'sustained justification'.[1075] Reasons matter because, as he puts it, 'reasons invite evaluation'.[1076] But in labour law, reasons invite evaluation only where there is an institution, representative or worker capable of evaluating them. A dismissal letter, grievance outcome or policy document may contain reasons, but those reasons do not constrain power unless they can be challenged. Legal consciousness is therefore part of the justificatory infrastructure of the rule of law. It concerns whether reasons are heard as contestable or accepted as managerial fact.

This also explains why HR practitioners matter to the sociology of labour law. Kirk's account of HR practitioners as 'quasi-legal professionals' shows that legal meaning at work is often produced by actors who are neither judges nor regulators.[1077] HR practitioners translate legal obligations into workplace policies, advise managers, frame grievances, assess risk and generate documentation. They may genuinely seek to ensure fairness and legality, but their work is located within organisational structures shaped by managerial priorities. They are therefore mediators of legality, not neutral conduits of law.

Kirk's work is therefore useful not simply because it adds another empirical actor to the story, but because it shows how legality is made inside the workplace before any tribunal or inspector sees it. HR practitioners decide which facts are recorded, which language is used, whether an issue is framed as misconduct, capability, grievance, risk, welfare or legal exposure, and whether the worker's complaint is treated as an assertion of right or as a managerial problem to be contained. In that sense, legal consciousness is institutional as well as individual: organisations themselves develop patterned ways of seeing law.[1078]

[1075] Nonet and Selznick, *Law and Society in Transition*, 56.

[1076] Selznick, *Law, Society and Industrial Justice*, 30.

[1077] E. Kirk, 'Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals' (2021) 50 *Industrial Law Journal* 583, 583-609.

[1078] E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50 *Industrial Law Journal* 405, 405-433; E. Kirk, 'Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals' (2021) 50 *Industrial Law Journal* 583, 583-609.

Edelman's theory of legal endogeneity explains the institutional consequences of that mediation. Organisational structures created in response to legal ambiguity may come to be recognised by legal actors as evidence of compliance.[1079] Kirk helps show how this occurs in practice: legal norms are filtered through HR expertise, organisational procedure and risk management. The legal question becomes whether the employer has a policy, followed a process, recorded a reason or offered a grievance route. Those questions matter, but they may displace the deeper inquiry into whether employer power has actually been constrained.

This is why legal consciousness cannot be treated as a merely subjective matter. It is not simply what workers feel about law. It is a social and institutional process through which legality is made meaningful or hollow. Workers may experience law as distant. Employers may experience law as risk. HR practitioners may experience law as procedure. Regulators may experience law as priority-setting. Tribunals may experience law through documentary traces created by organisations. Each consciousness participates in the production of legality. Together, they shape whether labour law operates as constraint, resource, symbol or administrative routine.[1080]

This analysis also clarifies the thesis's use of legal endogeneity. Edelman's claim is not merely that organisations influence legal compliance. It is that organisational interpretations of law can become part of legal meaning itself. Grievance procedures, compliance programmes and internal policies operate as what Edelman, Uggen and Erlanger call 'rational myth'.[1081] They signal legality, rationality and fairness even where their actual capacity to constrain power remains uncertain. Kirk's labour law sociology gives this insight a workplace-specific form. It shows how these organisational signs of legality are produced by actors who understand themselves as working with law, even as they translate it into managerial practice.

[1079] Edelman, *Working Law*, 113-122, 206, 214-217.

[1080] R. Dukes and E. Kirk, 'Law, Economy and Legal Consciousness at Work' (2021) 72 *Northern Ireland Legal Quarterly* 741, 741-770.

[1081] L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406, 406-407.

The danger for the rule of law is that the appearance of legality becomes easier to recognise than its operation. A worker's story may appear subjective, emotional or insufficiently evidenced; the employer's procedure appears documented, rational and legally advised. A claim of retaliation may appear speculative; a performance management record appears objective. A complaint about unpaid time may appear informal; payroll records appear authoritative. Legal consciousness is therefore not merely a question of belief. It is tied to evidential authority and institutional credibility. Some accounts of legality travel more easily through legal institutions than others.[1082]

This has direct consequences for routine breach. Routine breach persists where the ordinary consciousness of law permits breach to be reframed as something else: error, misunderstanding, flexibility, individual grievance, operational necessity, or managerial discretion. The more such translations are accepted, the less law appears to be breached at all. The rule-of-law failure is therefore not only that employers sometimes violate legal rules. It is that the institutional and organisational consciousness of legality may render those violations less visible, less claimable and less troubling.

The final point is methodological. A rule-of-law analysis that ignores legal consciousness risks mistaking legal form for legal authority. It sees the right, the tribunal, the inspectorate, the policy and the grievance procedure, and concludes that legality is present. But the sociology of labour law asks whether those forms are lived as usable and constraining. Do workers believe the law can protect them? Do employers believe breach will be detected? Do HR practitioners translate rights into substantive obligations or procedural risk controls? Do regulators see routine breach or only complaints? These questions are not peripheral. They determine whether law rules.

Krygier's teleological account supplies the standard: 'if the law doesn't rule, we don't have the rule of law'.[1083] Kirk's legal consciousness scholarship helps identify one of the mechanisms through which law may fail to rule while remaining formally present. Law may fail not only because it is repealed or ignored, but because it is experienced as too distant to invoke, too risky to mobilise, too procedural to challenge, or too managerialised to constrain.

[1082] Edelman, *Working Law*, 44-71, 113-122; Kirk, 'Law and Legalities at Work', 583-609.

[1083] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45.

That is why legal consciousness is central to the thesis's final answer. Routine breach is a rule-of-law problem because it marks not only the violation of rights, but the erosion of the social and institutional conditions under which rights can be understood, invoked and made consequential.

5.10 Conclusion

This chapter has argued that the contemporary crisis of labour law enforcement cannot be understood solely as a technical failure of regulatory institutions. Inadequate enforcement resources, fragmented regulatory frameworks and the individualisation of labour rights undoubtedly contribute to patterns of non-compliance.[1084] Yet these factors do not fully capture the rule-of-law significance of routine breach. The deeper problem is that worker-protective norms may remain formally present while their practical operation is increasingly mediated through administrative routines, compliance systems and organisational procedures oriented toward efficiency, risk management and reputational protection. Under such conditions, legality may persist as a formal framework even as its capacity to constrain the exercise of power becomes progressively attenuated.[1085]

The argument developed in this chapter therefore returns to the thesis question. Historically, the extension of legal regulation into the employment relationship represented an attempt to subject private economic power to publicly articulated legal norms. Labour law emerged not as an exception to the rule of law, but as part of legality's development in response to industrial capitalism and the emergence of private government within the workplace.[1086] Its significance, in terms of the rule of law, lay in its capacity to render employer authority more visible, more contestable and more answerable. The persistence of routine breach therefore raises a question that extends beyond labour law's immediate domain. If legal norms remain formally in place while their practical operation is mediated through institutional practices that dilute their disciplinary force, then the issue is not merely that enforcement has failed. It is that legality may continue to operate symbolically while no longer reliably performing its function as a constraint on arbitrary private power.

[1084] Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions', 61-82.

[1085] Ewick and Silbey, *The Common Place of Law*; M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018); Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.

[1086] Selznick, *Law, Society and Industrial Justice*, 30-31, 80-82, 99-101; Nonet and Selznick, *Law and Society in Transition*, 52-57, 60-61.

Krygier's teleological account makes this point unavoidable. If the rule of law is judged by whether it reduces arbitrary power, then its presence cannot be inferred from the existence of formal rules alone. Selznick's account of justification explains why: legality constrains power by requiring authority to give reasons, submit to review and become answerable within institutional forms capable of criticism. And where Edelman's account of legal endogeneity previously explained how organisational practices may reshape what law comes to recognise as compliance, Supiot's account of *governance by numbers* shows how law's justificatory discipline in general may be displaced by systems of quantification, targets and managerial evaluation. Read together, these accounts show why routine breach is not simply a gap between law on the books and law in action. It is a problem concerning the institutional production of legality itself.

This possibility reinforces the methodological lessons developed by socio-legal and critical legal scholarship. As Trubek and Gordon emphasised, the relationship between legal norms and social outcomes cannot be inferred from doctrinal structure alone.[1087] Understanding the operation of legality requires attention to the institutional settings within which legal norms are interpreted, translated and applied: administrative agencies, regulatory organisations, workplaces, professional communities and internal compliance systems.[1088] The issue is therefore not simply whether legal rights exist on paper, but whether the institutional conditions necessary for those rights to constrain power remain intact. Seen in this light, routine breach raises a constitutional question about the contemporary operation of the rule of law. Where legal norms are translated into managerial techniques of governance rather than publicly contestable standards of justification, law's capacity to require and sustain justification is weakened.

The answer to the thesis question must therefore be carefully stated. Not every breach of worker-protective labour law is a breach of the rule of law. Nor does routine breach show that labour law has ceased to exist, or that legality has disappeared. The claim is narrower, but more serious. Routine breach becomes a rule of law issue where non-compliance is sufficiently widespread, normalised or institutionally tolerated so that worker-protective norms no longer operate as effective constraints on employer power**.** In those circumstances,

[1087] Trubek, 'Where the Action Is', 601, 612; Gordon, 'Critical Legal Histories', 94-101.

[1088] Arthurs, 'Understanding Labour Law', 88-89; Moore, 'Law and Social Change', 719, 720-723; Edelman, *Working Law*, 113-122, 123-149.

law remains formally valid but loses part of its practical capacity to make private economic authority answerable. The problem for those concerned with protecting the rule of law, it thus argues, is not simply in illegality by individual employers, but the systemic erosion of the institutional conditions through which legality disciplines power.

This conclusion also clarifies the thesis's contribution. The problem of routine breach cannot be resolved by doctrinal reform alone, nor by invoking the rule of law as an abstract ideal of generality, predictability or formal validity. If the rule of law is to remain meaningful in the labour law context, it must be assessed through the institutional arrangements that make legal norms usable, contestable and enforceable in practice. That requires attention to enforcement agencies, tribunal access, workplace representation, collective organisation, compliance systems, managerial routines and the legal consciousness of the actors through whom labour standards are interpreted and applied. It also requires vigilance about the ways in which legal form may be preserved while its constraining function is displaced by metrics, procedures and organisational displays of compliance.

The routine breach of worker-protective labour law therefore matters because it reveals a condition in which legality may survive as form while weakening as constraint. That condition is not merely a problem for labour lawyers. A legal order that formally recognises worker-protective norms, but tolerates their routine practical disregard, risks leaving (employer) power insufficiently answerable to publicly articulated standards. To ask whether routine breach constitutes a breach of the rule of law is therefore to ask whether legality continues to perform its historic function of subjecting power to justification. Where worker-protective norms are routinely breached without effective detection, challenge or remedy, that function is compromised.

The final claim of this thesis is therefore this: routine breach of worker-protective labour law constitutes not just a failure of the rule of law. Where it reflects not isolated illegality, but the systemic weakening of law's capacity to constrain arbitrary private economic power, the rule of law is not secured by the formal presence of labour standards alone. It depends upon institutional conditions capable of making those standards real: conditions in which workers can invoke law without fear, breaches can be detected and remedied, organisational compliance can be tested against substantive effect, and employer authority can be required to justify itself before institutions capable of imposing constraint. Where those conditions are

absent, legality persists, but the promise of the rule of law, if it is to remain at all, is persistently diminished.

Conclusion

1. Reframing the Problem: From Enforcement Failure to Legality in Question

This thesis set out to examine whether the routine breach of worker-protective labour law constitutes a breach of the rule of law. It began from a familiar observation: that statutory labour protections, though formally intact, are widely disregarded in practice. Conventional accounts have treated this as an enforcement problem, attributing persistent non-compliance to institutional weaknesses such as under-resourced inspectorates, declining trade union power, and fragmented regulatory frameworks. While these explanations are well-founded, the analysis developed in this thesis has sought to demonstrate that they are incomplete. The preceding chapters have approached routine breach from historical, conceptual, empirical and normative perspectives. Taken together, they show that the routine breach of worker-protective labour law cannot be understood merely as a failure to enforce otherwise stable legal norms. It reveals a deeper problem concerning the conditions under which legality continues, or fails, to constrain power.

The central argument advanced by the thesis is that routine breach cannot be understood solely as a failure of enforcement. Rather, it reflects a transformation in the conditions under which legality operates. Labour law continues to exist as a system of rules, institutions, and procedures, yet its capacity to function as a meaningful constraint on the exercise of economic power has been significantly weakened. The persistence of legality alongside routine non-compliance therefore raises a more fundamental question: not simply whether labour law is enforced, but whether the rule of law itself continues to operate as a constraint on power within the legal governance of work.

To answer this question, the thesis adopted a teleological understanding of the rule of law, drawing on the work of Martin Krygier. On this view, the rule of law is not defined by a fixed set of formal characteristics, but by its purpose: the reduction of arbitrariness in the exercise of power. Legal norms and institutions derive their significance from their capacity to render authority accountable, to structure justification, and to constrain the exercise of power in practice. The question, therefore, is whether labour law continues to perform this function.

The answer offered by this thesis is that labour law's capacity to perform this function has become increasingly attenuated. Routine breach of labour law constitutes a breach of the rule

of law not because legal rules have disappeared, but because the institutional conditions required for those rules to constrain power have been eroded or transformed. The rule of law is compromised where legality persists in form while failing to render authority meaningfully answerable in practice.

2. What the Thesis Has Shown

The argument developed across the thesis has been that routine breach can only be understood once labour law is situated within a broader account of legality and power. The first step in that argument was to show why labour law appears problematic within liberal legalist accounts of the rule of law. In Hayek's framework, legality is associated with general, abstract and impersonal rules, and labour law appears as a purposive intervention into the market order. On that view, labour law is difficult to reconcile with the rule of law because it differentiates between legal subjects, pursues social and economic objectives, and alters the conditions of market coordination.

The thesis has challenged that framing by arguing that labour law is better understood as part of the historical development of legality itself. Drawing on Legal Realism, and on the work of Thompson and Selznick, it has shown that the rule of law should not be understood solely as a formal framework standing apart from social relations. Rather, legality has historically operated through practices that require power to justify itself within publicly intelligible and institutionally recognised forms. As industrial capitalism generated new forms of concentrated private authority within the workplace, labour law extended this justificatory discipline into the employment relationship. Its significance lay not simply in protecting vulnerable workers or redistributing economic resources, but in rendering managerial authority answerable to legal standards, institutional scrutiny and forms of contestation.

That capacity, however, is neither automatic nor secure. The thesis has argued that law's ability to constrain power depends on institutional conditions that sustain its relative autonomy. Legal autonomy is not a fixed property of law, nor a guarantee of justice. It is a contingent institutional achievement, produced through professional practices, justificatory routines and legal forms that can both discipline and legitimate power. Critical legal scholarship therefore reveals the double-edged character of legality: legal forms may require power to explain themselves but they may also translate hierarchy into procedure, and domination into apparently neutral forms of rule.

The empirical analysis of labour law enforcement in the United Kingdom demonstrated how these vulnerabilities have been realised in practice. The erosion of collective bargaining, the weakening of trade unions, the fragmentation of enforcement bodies and the increasing reliance on individualised claims-making have altered the institutional conditions through which labour law operates. At the same time, legal norms have increasingly been mediated through organisational practices, compliance structures and managerial techniques. Drawing on Edelman's account of legal endogeneity, the thesis has shown how compliance may come to be associated with the presence of formal procedures rather than the substantive realisation of legal norms. Legality is not displaced, but reconstituted.

The final stage of the argument returned to the rule of law itself. Drawing on Krygier, Selznick and Supiot, the thesis argued that if the rule of law is understood teleologically, as concerned with the reduction of arbitrariness in the exercise of power, then the persistence of legal form is insufficient. Legal norms must be assessed by their capacity to structure justification and constrain power in practice. Contemporary forms of governance, however, increasingly translate legality into administrative routines, performance metrics and systems of quantification. Under such conditions, law may continue to operate institutionally while its justificatory force is weakened. The result is not the disappearance of legality, but its transformation into a form that may provide a semblance of compliance more readily than it secures constraint.

3. Routine Breach as a Breach of the Rule of Law

Against this background, the significance of routine breach becomes clearer. It does not simply indicate that legal rules are being violated. Rather, it reveals a disjunction between the formal existence of legal norms and their practical operation as constraints on power.

Routine breach constitutes a breach of the rule of law in a specific sense. It reflects the weakening of the institutional conditions required for legality to function as a meaningful constraint on the exercise of authority. Where employer power can be exercised without meaningful risk of scrutiny, challenge or justification, the condition of non-arbitrariness that the rule of law seeks to secure is undermined.

This conclusion does not depend on demonstrating perfect compliance, nor does it require that law eliminate all forms of arbitrary power. Rather, it turns on whether legal institutions

and practices are capable of rendering power sufficiently answerable to publicly articulated standards. Where this capacity is systematically weakened, the rule of law is compromised.

The challenge posed by routine breach is therefore not adequately captured by existing categories of legal failure. It is neither a temporary breakdown in enforcement nor a marginal deviation from otherwise effective legality. It reflects a more structural condition in which the relationship between legal form and legal effect has been reconfigured. Under these conditions, the persistence of legal norms, institutions and procedures may obscure the extent to which their capacity to constrain power has diminished.

4. Contributions of the Thesis

The thesis makes three principal contributions.

First, it reframes routine breach of labour law as a rule-of-law problem. Existing accounts have tended to treat non-compliance primarily as a matter of enforcement design, institutional capacity or regulatory strategy. This thesis has argued that these explanations, while important, do not exhaust the significance of routine breach. Where worker-protective norms persist formally but fail to constrain employer power in practice, the issue is not merely regulatory weakness but the attenuation of legality as a mode of constraint.

Second, the thesis contributes to rule-of-law theory by placing labour law at the centre of debates about legality and power. It has challenged accounts that treat the rule of law primarily as a set of formal legal attributes, arguing instead that legality must be assessed in relation to its capacity to reduce arbitrariness in practice. Labour law is a particularly important site for this enquiry because it reveals the limits of rule-of-law theories that focus primarily on public power while paying insufficient attention to private economic authority.

Third, the thesis contributes to socio-legal and labour law scholarship by developing an account of legality as institutionally mediated. By bringing together Legal Realism, Thompson, Selznick, Critical Legal Studies, Edelman, Krygier and Supiot, it has shown how legal norms may persist as formal structures while their practical operation is reshaped by organisational routines, managerial logics and governance techniques. This provides a framework for understanding how legality may remain visible and institutionally recognised even as its capacity to discipline power is weakened.

5. Implications

The implications of this argument extend beyond the immediate problem of labour law enforcement. For labour law, the thesis suggests that reforms directed solely at improving individual access to remedies or increasing formal rights are unlikely to be sufficient unless they address the institutional conditions through which those rights are made effective. The history of labour law enforcement indicates that legal constraint has depended not only on statutory standards, but on collective organisation, workplace-level oversight, public enforcement and specialised institutions capable of making legal norms operative in practice.[1089]

This does not mean that doctrinal reform, better funding for enforcement bodies, or improved access to tribunals are unimportant. They are necessary. But they are insufficient if detached from the wider institutional architecture through which labour law constrains power. Where enforcement remains fragmented, individualised and mediated through managerial systems, reforms may preserve the appearance of legality while leaving the underlying conditions of routine breach intact.

For rule-of-law theory, the thesis suggests that formal accounts of legality are inadequate where legal norms persist without producing effective constraint. If the rule of law is understood solely in terms of its formal attributes, then the continued existence of statutes, procedures and institutions may be taken as evidence of its persistence. Yet the analysis advanced here suggests that such an approach risks mistaking the appearance of legality for its operation. The rule of law cannot be identified with institutional form alone. It must be assessed in relation to its capacity to structure and constrain power in practice.

For socio-legal scholarship, the thesis reinforces the need to study legality within the institutional environments through which it is produced. Contemporary systems of governance increasingly operate through organisational practices, administrative routines and techniques of quantification that reshape how legal norms are interpreted and applied. As legality becomes embedded within these practices, its operation may shift from a framework of justification to a technology of management. Understanding whether law continues to

[1089] See also *R (Unison) v Lord Chancellor* [2017] UKSC 51, [68] (Lord Reed).

constrain power therefore requires attention to how legal norms are translated, interpreted and stabilised within organisational and regulatory settings.

6. Limitations and Future Research

The argument developed in this thesis has necessarily been limited in scope. It has focused primarily on the United Kingdom, where the transformation of labour law enforcement has been particularly pronounced. While many of the dynamics identified here are observable in other jurisdictions, especially those marked by declining collective bargaining, fragmented enforcement and managerialised governance, further comparative research would be required to assess how far the argument travels across different institutional contexts.

The thesis has also drawn on existing empirical research rather than conducting original empirical fieldwork. This has allowed it to integrate a wide range of socio-legal, theoretical and empirical scholarship, but it limits the extent to which it can offer detailed accounts of how legality is experienced and enacted within particular workplaces, sectors or enforcement bodies. Future research could build on this argument by examining how workers, employers, regulators and compliance professionals understand legal obligations in practice, and how those understandings shape the capacity of labour law to constrain power.[1090]

These limitations do not weaken the central claim of the thesis. Rather, they point to the need for further socio-legal investigation into the institutional life of legality. If routine breach is not simply a failure of enforcement but a transformation in the conditions under which law operates, then future research must examine not only what legal rules provide, but how they are translated into action, resisted, neutralised or made effective in practice.

7. Why This Is Not Merely Enforcement Failure

The thesis has repeatedly returned to enforcement, but it has not treated enforcement as a merely technical or administrative problem. This distinction is central to the argument. It would be possible to describe routine breach simply as the consequence of weak enforcement: too few inspectors, insufficient penalties, fragmented institutions, limited

[1090] P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998); M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018); E. Kirk, 'Legal Consciousness and the Sociology of Labour Law' (2021) 50(3) *Industrial Law Journal* 405.

tribunal access and declining collective representation. Those factors are essential. Yet if they are treated only as defects in implementation, the deeper significance of routine breach is missed. Enforcement is not external to legality. It is one of the ways in which legality is made real.[1091]

Legal norms do not constrain power by existing in the abstract. They constrain power through institutions, practices and relationships that make them usable. A statutory right may be formally clear, but it becomes legally meaningful only when it can be invoked, interpreted, applied and enforced within institutional settings capable of affecting conduct. Enforcement is therefore not a secondary matter that comes after law. It is part of the institutional process through which law becomes capable of ruling. To say that labour law is under-enforced is therefore not merely to say that legal machinery is defective. It is to say that one of the conditions of legality's practical authority has been weakened.[1092]

This point is especially important in labour law because the employment relationship is not an encounter between formally equal legal actors in any simple sense. Employer power is exercised within a relationship of dependency, hierarchy and organisational control. The worker's ability to invoke law is shaped by fear of dismissal, loss of hours, immigration precarity, uncertainty of status, lack of representation, limited access to advice and the practical costs of legal action. A system that depends heavily on individual enforcement therefore builds into legality a demanding image of the legal subject. It assumes that the worker can act as a rights-asserting claimant in circumstances where doing so may be materially dangerous.[1093]

The enforcement crisis is therefore also a crisis of legal subjectivity. Labour law often appears formally universal, but its practical availability depends on the worker's capacity to activate it. Where that capacity is unevenly distributed, rights become stratified in practice. Workers with greater security, knowledge, representation or resources are better placed to

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[1091] G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 61; L. Dickens, 'Employment Tribunals and Alternative Dispute Resolution' in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012), 29-48.

[1092] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68]; Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69.

[1093] Kirk, 'The "Problem" with the Employment Tribunal System', 975-991; Busby and McDermont, 'Fighting with the Wind', 159-198.

make law effective. Workers most exposed to breach may be least able to complain. This produces a form of practical inequality that is not captured by the formal content of rights. The right exists for all, but its enforceability is socially patterned.[1094]

This is why the decline of collective organisation has such significance. Trade unions and workplace representatives did not merely bargain for better terms. They altered the enforcement ecology by supplying information, representation, confidence and collective pressure. They made breach more visible. They reduced the burden on individual workers. They converted private grievance into collective issue. They provided a degree of workplace presence that tribunals and inspectorates cannot easily replicate. The erosion of collective bargaining therefore did not simply weaken one institution among others. It shifted the burden of legal activation onto individual workers and public agencies that were not equipped to replace the monitoring and contestatory functions of organised labour.[1095]

Public enforcement bodies face parallel constraints. Inspectorates do not simply punish breaches after the fact. They produce legal visibility. They enter workplaces, gather intelligence, identify patterns, build sectoral knowledge and make legal norms present before individual workers have to bear the risk of complaint. Where inspection is rare or reactive, breach becomes harder to see. The problem is not merely that employers are less likely to be sanctioned. It is that law loses one of the institutional mechanisms through which it knows the social world it claims to govern.[1096]

This matters because routine breach often occurs in forms that are dispersed, incremental and administratively difficult to capture. Underpayment may arise through unpaid overtime, unlawful deductions, holiday pay failures, misclassification or complex subcontracting chains. Working time breaches may appear as flexibility or personal choice. Retaliation may be disguised as performance management. In each case, the breach may not present itself as a discrete legal event. It may be embedded in ordinary organisational practice. The legal system

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[1094] E. Kirk, ‘Legal Consciousness and the Sociology of Labour Law’ (2021) 50 *Industrial Law Journal* 405, 405-433.

[1095] Kahn-Freund, *Labour and the Law,* 18-19; Dukes, *The Labour Constitution*, 69-91.

[1096] S. Mustchin and M. Martínez Lucio, ‘The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain’ (2020) 62 *Journal of Industrial Relations* 735, 744-753.

can only respond to such patterns if it has institutions capable of detecting and interpreting them.[1097]

The language of enforcement failure is therefore too thin. It suggests that law exists on one side and practical implementation on the other. But the thesis has argued that this separation cannot be maintained in labour law. Labour law's meaning is shaped by the conditions of its use. A right that cannot realistically be invoked against employer power does not operate in the same legal way as a right supported by collective representation, public inspection and accessible remedies. The difference is not simply quantitative. It concerns the quality of legality.[1098]

This argument does not deny the importance of doctrinal validity. Formal legal rights matter. Statutory minima, unfair dismissal protection, equality rights, health and safety standards and working time rules all provide essential legal standards. But the rule-of-law question is not answered by identifying their formal existence. The question is whether those standards impose practical discipline on the exercise of power. Lord Reed's warning in Unison that rights may become a 'dead letter' if access to enforcement is denied captures this point with particular force.[1099] The right may remain in the statute book, but law's authority is diminished where the route from right to remedy is practically blocked.

Nor does the argument imply that only perfect enforcement would satisfy the rule of law. No legal system secures full compliance. Breach is inevitable. The thesis's claim is narrower and more demanding. Routine breach becomes a rule-of-law problem where non-compliance is sufficiently patterned, persistent and institutionally absorbed that the legal norm no longer reliably structures conduct. This is why the word routine matters. It directs attention away from isolated illegality and toward the institutional conditions that allow breach to become ordinary.[1100]

[1097] D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014), 60-72; E. Cockbain, S. Scott, K. Pósch and B. Bradford, How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (HMSO, 2019), 16-19.

[1098] Davidov, 'The Enforcement Crisis', 61; Dickens, 'Employment Tribunals and Alternative Dispute Resolution', 29-48.

[1099] *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

[1100] J. Davies, 'From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry' (2019) 19 *Criminology and Criminal Justice* 294, 294-310.

The empirical material considered in Chapter 4 illustrates this condition. Tribunal fees made individual enforcement materially harder. The fragmentation of public enforcement limited institutional visibility. The better regulation agenda reframed enforcement through burden, risk and proportionality. Fissured work dispersed responsibility across contracting chains. Organisational compliance structures translated legal obligations into policies and procedures. Each development can be described separately as a matter of enforcement design. Together, however, they show a broader transformation in the way labour law operates as law.[1101]

This transformation is not simply one of state withdrawal. It is also a transformation in legal form. Under managerialised conditions, compliance may be demonstrated through documentation, audit, training, grievance procedures and risk management. These forms may be valuable, but they may also substitute visible legal attentiveness for substantive constraint. The employer appears law-abiding because it has procedures. The regulator appears active because it has strategies. The legal system appears available because tribunals exist. Yet the practical question - whether employer power is made answerable - may remain unresolved.[1102]

This is where Edelman's account of legal endogeneity becomes crucial to the thesis's conclusion. Organisations do not simply receive legal norms. They interpret them and institutionalise them. Over time, organisational structures may feed back into legal meaning, as courts and regulators treat policies, procedures and compliance programmes as evidence of legality.[1103] The result is not law's disappearance but its absorption. Law becomes present inside the organisation, but in a form shaped by managerial priorities. Compliance becomes something that can be displayed, documented and defended, even where the underlying distribution of authority remains substantially unchanged.

[1101] L. Judge and H. Slaughter, *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023), 30-43; S. Mustchin and M. Martínez Lucio, 'The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work Inside the British State' (2023) 44 *Economic and Industrial Democracy* 526, 531-534, 540.

[1102] Edelman, *Working Law*, 44-71, 113-122, 206-217.

[1103] Ibid, 113-122, 206, 214-217; L. B. Edelman, C. Uggen and H. S. Erlanger, 'The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth' (1999) 105 *American Journal of Sociology* 406, 406-407.

Supiot's critique of governance by numbers reveals the parallel development at the level of public governance. Legal judgment is displaced by measurement, targets and performance indicators. Administrative success is assessed through what can be counted: cases processed, arrears recovered, penalties issued, inspections completed, burdens reduced. These measures are not meaningless. They may matter greatly. But they do not exhaust the rule-of-law question. The reduction of arbitrariness cannot be measured only through institutional outputs. It requires attention to whether legal norms actually discipline power in the social contexts where that power is exercised.[1104]

The thesis's contribution is therefore to join three levels of analysis that are often kept apart. At the first level, labour law scholarship identifies the enforcement crisis: weak inspection, complaint dependence, tribunal barriers, fissuring, retaliation and low worker knowledge. At the second level, socio-legal scholarship shows how law is mediated through organisations, consciousness, professional practice and institutional routines. At the third level, rule-of-law theory asks whether legality reduces arbitrariness. The central claim is that these are not separate questions. The enforcement crisis matters jurisprudentially because it reveals a weakening in the conditions under which legality constrains private economic power.[1105]

This also clarifies what the thesis is not claiming. It is not claiming that every breach of labour law is a breach of the rule of law. It is not claiming that labour law must achieve social justice in order to be law. It is not claiming that legality requires a particular model of social democracy or collective bargaining. Its claim is more precise. If the rule of law is concerned with constraining arbitrary power, and if labour law is one of the principal ways in which modern legal systems constrain employer power, then the routine inability of labour law to perform that function raises a rule-of-law problem.

The point can be put another way. Labour law belongs to the rule-of-law tradition because it renders private government answerable. It subjects managerial authority to standards, reasons, procedures and institutions that workers can invoke and others can evaluate. Routine breach weakens this function. It allows employer power to remain legally framed but insufficiently disciplined. Under such conditions, the employment relationship continues to

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[1104] Supiot, *Governance by Numbers*, 9-10, 145-147, 154-156.

[1105] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69; Davidov, 'The Enforcement Crisis', 61; Edelman, *Working Law*, 113-122.

be governed by law, but the legal norms that should constrain managerial authority operate unevenly, selectively or symbolically.[1106]

The danger is therefore not a simple return to pre-legal authority. The contemporary workplace is saturated with law. Contracts, policies, disciplinary procedures, equality duties, health and safety rules, payroll systems, employment status categories, tribunal forms and compliance documents all structure workplace life. The problem is rather that legality may be present in forms that do not require power to answer in any meaningful way. This is the distinctive pathology identified by the thesis: the persistence of legal form without corresponding legal discipline.[1107]

Legal consciousness is central to this final point. Workers may understand that law exists but perceive it as too risky, technical or remote to use. Employers may understand law as risk to be managed rather than constraint to be internalised. HR practitioners may understand themselves as quasi-legal actors while translating legal norms into organisational procedure. Regulators may understand enforcement through targets, intelligence and prioritisation. In each case, law's meaning is produced in practice. The rule of law therefore depends not only on doctrinal rules but on the social and institutional consciousness through which those rules become usable, resistible or symbolic.[1108]

This is why the thesis has insisted on the phrase legal constraint. Constraint is not the same as punishment, nor is it exhausted by adjudication. It includes the ability of law to make power visible, to require reasons, to create standards, to support contestation, to enable collective voice, to detect breach and to impose consequences. Enforcement is part of this architecture, but so too are legal consciousness, organisational practice and institutional design. When those elements are weakened, labour law may remain formally valid while its rule-of-law function is diminished.

[1106] Selznick, *Law, Society and Industrial Justice*, 30-33, 71-79, 108.

[1107] Edelman, *Working Law*, 206-217; Nonet and Selznick, *Law and Society in Transition*, 54, 58-61, 67-71.

[1108] P. Ewick and S. S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998), 15-20; M. Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018), 1-14; Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433.

The practical implication is that reform cannot be confined to more efficient case processing. Better funding, stronger inspection, accessible tribunals and meaningful sanctions are all necessary, but they must be understood as part of a broader project of rebuilding legality at work. The question is not only how to enforce existing rights more often, but how to reconstruct the institutional ecology that allows those rights to operate as constraints on employer power. This may require collective mechanisms, participatory enforcement, sectoral strategies, stronger advice infrastructures and scrutiny of organisational compliance structures. It also requires a conceptual shift: enforcement must be treated as constitutional infrastructure rather than administrative afterthought.[1109]

The thesis therefore ends where it began, with the problem of routine breach. Routine breach is not simply the aggregate of unlawful acts. It is a condition in which breach becomes socially and institutionally normal while legality remains formally present. It reveals that the rule of law can be weakened without being abolished, and that legal form can endure while legal authority thins. To name this as a rule-of-law problem is not rhetorical inflation. It is to recognise that legality is measured not by its self-description but by its capacity to require power to justify itself and to make that justification consequential.[1110]

8. Final Reflections

The routine breach of worker-protective labour law presents a challenge that extends beyond the boundaries of labour law as a field. It raises a fundamental question about the contemporary operation of the rule of law. If legality can persist as a formal framework while failing to constrain the exercise of power in practice, then the rule of law cannot be understood solely in terms of institutional form.

The analysis developed in this thesis suggests that this is one of the central difficulties of contemporary legality. Law may remain present as rule, procedure, institution and vocabulary, while the conditions that allow it to discipline power are progressively weakened. Under such circumstances, the danger is not law's disappearance, but its reconstitution as a

[1109] L. Vosko, E. Tucker and M. P. Thomas, 'Strengthening Participatory Approaches to Labour Standards Enforcement' in L. Vosko, E. Tucker and M. P. Thomas (eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020), 423-456.
[1110] Krygier, 'The Rule of Law: Legality, Teleology, Sociology', 45-69; *R (Unison) v Lord Chancellor* [2017] UKSC 51, [66]-[68].

form of symbolic legality: visible, recognisable and procedurally organised, yet increasingly unable to require power to justify itself in ways that carry practical consequence.

This is why routine breach matters. It reveals the possibility that legality may endure without reliably ruling. It also raises questions of legal consciousness: how workers and the wider public understand the authority of labour law where highly visible breaches provoke public condemnation, but routine breach remains institutionally tolerated.[1111] In exposing the gap between law's formal presence and its practical authority, it shows that the rule of law is compromised not only when power acts outside law, but also when law remains present while no longer compelling power to answer.

The challenge for labour law, and for legal scholarship more broadly, is therefore to confront this transformation directly. The question is not only how labour law can be better enforced, but how the institutional conditions of legal constraint can be restored, sustained or reimagined. If the rule of law is to remain more than an institutional self-description, it must be assessed by whether it continues to reduce arbitrariness in the exercise of power. Where that function is weakened, the persistence of legal form should not be mistaken for the continued operation of legality.

The question, ultimately, is not whether law remains, but whether it still rules.

[1111] Kirk, 'Legal Consciousness and the Sociology of Labour Law', 405-433; Ewick and Silbey, *The Common Place of Law*, 15-20.

Bibliography

Books

Allan, T. R. S., *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

Althusser, L., *Lenin and Philosophy and Other Essays* (B. Brewster tr, Monthly Review Press, 1971).

Anderson, E., *Private Government: How Employers Rule Our Lives* (and Why We Don't Talk About It) (Princeton University Press, 2017).

Arthurs, H. W., *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth-Century England* (University of Toronto Press, 1985).

Balbus, I. D., *The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts* (Russell Sage Foundation, 1973).

Bayliss, F. J., *British Wages Councils* (Blackwell, 1962).

Braithwaite, J., *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002).

Brodie, D., *A History of British Labour Law: 1867-1945* (Hart Publishing, 2003).

Collins, H., *Employment Law* (2nd edn, Oxford University Press, 2010).

Collins, H., Ewing, K. D. and McColgan, A., *Labour Law* (2nd edn, Cambridge University Press, 2019).

Collins, H., *Justice in Dismissal: The Law of Termination of Employment* (Oxford University Press, 1992).

Dagan, H. and Zipursky, B. (eds), *Research Handbook on Private Law Theory* (Edward Elgar Publishing, 2020).

Davidov, G. and Langille, B. (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006).

Davidov, G. and Langille, B. (eds), *The Idea of Labour Law* (Oxford University Press, 2011).

Davidov, G., *A Purposive Approach to Labour Law* (Oxford University Press, 2016).

Davies, P. and Freedland, M., *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press, 1993).

Deakin, S. and Wilkinson, F., *The Law of the Labour Market: Industrialization, Employment, and Legal Evolution* (Oxford University Press, 2005).

Dicey, A. V., *An Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan, 1959).

Dickens, L. (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012).

Dukes, R. and Streeck, W., *Democracy at Work: Contract, Status and Post-Industrial Justice* (Polity Press, 2022).

Dukes, R., *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford University Press, 2014).

Durkheim, É., The Division of Labour in Society (1893, Free Press, 1997).

Edelman, L. B., *Working Law: Courts, Corporations, and Symbolic Civil Rights* (University of Chicago Press, 2016).

Estlund, C., *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (Yale University Press, 2010).

Ewick, P. and Silbey, S. S., *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998).

Ewing, K., *The Right to Strike* (Oxford University Press, 1989).

Fine, B., *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (Pluto Press, 1984).

Frank, J., *Law and the Modern Mind* (Brentano's, 1930).

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

Friedman, L. M., *A History of American Law* (Simon and Schuster, 1973).

Fuller, L., *The Morality of Law* (Yale University Press, 1969).

Gramsci, A., *Selections from the Prison Notebooks of Antonio Gramsci* (Q. Hoare and G. N. Smith eds and trs, Lawrence & Wishart, 1971).

Greenhouse, C. J., Yngvesson, B. and Engel, D. M., *Law and Community in Three American Towns* (Cornell University Press, 1994).

Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (W. Rehg tr, Polity Press, 1996).

Hale, R. L., *Freedom Through Law: Public Control of Private Governing Power* (Columbia University Press, 1952).

Hart, H. L. A., *The Concept of Law* (2nd edn, Clarendon Press, 1994).

Harvey, D., *A Brief History of Neoliberalism* (Oxford University Press, 2005).

Hayek, F., *Law, Legislation and Liberty, vol 1, Rules and Order* (Routledge, 1982).

Hayek, F., *Law, Legislation and Liberty, vol 2, The Mirage of Social Justice* (Routledge, 1982).

Hayek, F., *Law, Legislation and Liberty, vol 3, The Political Order of a Free People* (Routledge, 1982).

Hayek, F., *The Constitution of Liberty* (R. Hamowy ed, University of Chicago Press, 2011).

Hayek, F., *The Road to Serfdom* (University of Chicago Press, 1944).

Hertogh, M., *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life* (Palgrave Macmillan, 2018).

Holmes Jr, O. W., *The Common Law* (Little, Brown, and Company, 1881).

Horwitz, M. J., *The Transformation of American Law, 1780-1860* (Harvard University Press, 1977).

Howell, C., *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (Princeton University Press, 2005).

Hunt, T., *Building Jerusalem: The Rise and Fall of the Victorian City* (Weidenfeld & Nicolson, 2004).

Hyman, R., *The Political Economy of Industrial Relations: Theory and Practice in a Cold Climate* (Macmillan, 1989).

Kahn-Freund, O., *Labour and the Law* (P. Davies and M. Freedland eds, 3rd edn, Stevens & Sons, 1983).

Kahn-Freund, O., *Labour and the Law* (Stevens & Sons, 1972).

Kairys, D. (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982).

Krygier, M., *Philip Selznick: Ideals in the World* (Stanford University Press, 2012).

Lautenbach, G., *The Concept of the Rule of Law and the European Court of Human Rights* (Oxford University Press, 2013).

Linebaugh, P., *The London Hanged: Crime and Civil Society in the Eighteenth Century* (Cambridge University Press, 1992).

Llewellyn, K. N., *The Bramble Bush: On Our Law and Its Study* (Oceana Publications, 1930).

Lukács, G., *History and Class Consciousness: Studies in Marxist Dialectics* (R. Livingstone tr, Merlin Press, 1971).

Marx, K. and Engels, F., *The German Ideology* (1845-46).

Marx, K., *A Contribution to the Critique of Political Economy* (1859).

Moyn, S., *Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times* (Yale University Press, 2023).

Nichols, T., *The Sociology of Industrial Injury* (Mansell, 1997).

Nonet, P. and Selznick, P., *Law and Society in Transition: Toward Responsive Law* (Harper & Row, 1978).

Novitz, T. and Skidmore, P., *Fairness at Work? A Critical Analysis of the Employment Relations Act 1999 and Its Treatment of Collective Rights* (Hart Publishing, 2001).

Pashukanis, E. B., *The General Theory of Law and Marxism* (B. Einhorn tr, C. Arthur ed, Transaction Publishers, 2002).

Polanyi, K., *The Great Transformation* (Beacon Press, 2001 [1944]).

Poulantzas, N., *Political Power and Social Classes* (1968).

Pound, R., *The Ideal Element in Law* (Liberty Fund, 2002).

Pound, R., *The Spirit of the Common Law* (Marshall Jones Company, 1921).

Prassl, J., *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (Oxford University Press, 2018).

Raz, J., *The Authority of Law* (Oxford University Press, 1979).

Rogers, B., *Data and Democracy at Work: Advanced Information Technologies, Labor Law, and the New Working Class* (MIT Press, 2023).

Selznick, P., *Law, Society and Industrial Justice* (Russell Sage Foundation, 1969).

Selznick, P., *The Moral Commonwealth: Social Theory and the Promise of Community* (University of California Press, 1992).

Steinfeld, R. J., *Coercion, Contract, and Free Labor in the Nineteenth Century* (Cambridge University Press, 2001).

Supiot, A., *Governance by Numbers: The Making of a Legal Model of Allegiance* (S. Brown tr, Hart Publishing, 2017).

Tamanaha, B., *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004).

Thompson, E. P., *Customs in Common: Studies in Traditional Popular Culture* (The New Press, 1992).

Thompson, E. P., *The Making of the English Working Class* (Penguin, 1980 [1963]).

Thompson, E. P., *The Poverty of Theory and Other Essays* (Merlin Press, 1978).

Thompson, E. P., *Whigs and Hunters: The Origin of the Black Act* (Penguin, 1975).

Tombs, S., *Social Protection after the Crisis: Regulation without Enforcement* (Policy Press, 2016).

Tomlins, C. L., *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993).

Twining, W., *Law in Context: Enlarging a Discipline* (Oxford University Press, 1997).

Unger, R. M., *Knowledge and Politics* (Free Press, 1975).

Unger, R. M., *Law in Modern Society: Toward a Criticism of Social Theory* (Free Press, 1976).

Walters, D. and Nichols, T., *Worker Representation and Workplace Health and Safety* (Palgrave Macmillan, 2007).

Webb, S. and Webb, B., *Industrial Democracy* (Longmans, Green, 1897).

Webb, S. and Webb, B., *The History of Trade Unionism* (rev edn, Longmans, 1894).

Weber, M., *Economy and Society: An Outline of Interpretive Sociology* (G. Roth and C. Wittich eds, University of California Press, 1978).

Weber, M., *The Protestant Ethic and the Spirit of Capitalism* (T. Parsons tr, Routledge, 2001).

Wedderburn, L., *The Worker and the Law* (3rd edn, Penguin, 1986).

Weil, D., *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

Journal Articles

Adams, Z., Bishop, L., Deakin, S., Fenwick, C., Martinsson Garzelli, S. and Rusconi, G., 'The Economic Significance of Laws Relating to Employment Protection and Different Forms of Employment: Analysis of a Panel of 117 Countries, 1990-2013' (2019) 158(1) *International Labour Review* 1-35.

Adams-Prassl, J., 'What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' (2019) 41(1) *Comparative Labor Law & Policy Journal* 123-146.

Allen, P. and Matthews, N., 'New Labour and Political Myth' (2024) Journal of Political Ideologies 1-19.

Arthurs, H. W., 'Developing Industrial Citizenship: A Challenge for Canada's Second Century' (1967) 45(4) *Canadian Bar Review* 786-830.

Arthurs, H. W., 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34 *Comparative Labor Law and Policy Journal* 585-604.

Arthurs, H. W., 'Understanding Labour Law: The Debate over "Industrial Pluralism"' (1985) 38 *Current Legal Problems* 83.

Balbus, I. D., 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11(3) *Law & Society Review* 571-588.

Barnard, C., Ludlow, A. and Fraser Butlin, S., 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' (2018) 47 *Industrial Law Journal* 226-262.

Bogg, A. and Estlund, C., 'Workplace Governance: Between Power, Rights and Participation' (2023) 44(3) *Comparative Labor Law and Policy Journal* 575.

Bogg, A., 'The Common Law Constitution at Work: R. (on the application of UNISON) v Lord Chancellor' (2018) 81(3) *Modern Law Review* 509-538.

Busby, N. and McDermont, M., 'Fighting with the Wind: Claimants' Experiences and Perceptions of the Employment Tribunal' (2020) 49 *Industrial Law Journal* 159-198.

Cohen, F. S., 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809.

Collins, H., 'Regulating the Employment Relation for Competitiveness' (2001) 30(1) *Industrial Law Journal* 17-47.

Coulter, S. and Hancké, B., 'A Bonfire of the Regulations, or Business as Usual? The UK Labour Market and the Political Economy of Brexit' (2016) 87(2) *Political Quarterly* 148-156.

Craig, P., 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467-487.

Dagan, H. and Dorfman, A., ‘Just Relationships’ (2016) 116(6) *Columbia Law Review* 1395-1460.

Davidov, G., ‘Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges’ (2021) 3 *Soziales Recht* 111.

Davidov, G., ‘Setting Labour Law’s Coverage: Between Universalism and Selectivity’ (2014) 34 *Oxford Journal of Legal Studies* 543.

Davidov, G., ‘The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions’ (2010) 26(1) *International Journal of Comparative Labour Law and Industrial Relations* 61-82.

Davies, J., ‘From Severe to Routine Labour Exploitation: The Case of Migrant Workers in the UK Food Industry’ (2019) 19(3) *Criminology & Criminal Justice* 294-310.

Dukes, R. and Kirk, E., ‘Law, Economy and Legal Consciousness at Work’ (2021) 72(4) *Northern Ireland Legal Quarterly* 741-770.

Dukes, R. and Kountouris, N., ‘Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door?’ (2016) 45(3) *Industrial Law Journal* 337-362.

Dukes, R. and Streeck, W., ‘Labour Constitutions and Occupational Communities: Social Norms and Legal Norms at Work’ (2020) 47(4) *Journal of Law and Society* 612-638.

Dukes, R., ‘Identifying the Purposes of Labour Law: Discussion of Guy Davidov’s *A Purposive Approach to Labour Law*’ (2017) 16(1) *Jerusalem Review of Legal Studies* 52-67.

Dukes, R., ‘The Economic Sociology of Labour Law’ (2019) 46 *Journal of Law and Society* 396.

Dukes, R., ‘The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?’ (2008) 37(3) *Industrial Law Journal* 236-267.

Dworkin, R., ‘Philosophy, Morality, and Law, Observations Prompted by Professor Fuller’s Novel Claim’ (1965) 113 *University of Pennsylvania Law Review* 668-690.

Edelman, L. B. and Cabrera, J., ‘Sex-Based Harassment and Symbolic Compliance’ (2020) 16 *Annual Review of Law and Social Science* 361-383.

Edelman, L. B. and Suchman, M. C., ‘The Legal Environments of Organizations’ (1997) 23 *Annual Review of Sociology* 479-515.

Edelman, L. B., Uggen, C. and Erlanger, H. S., ‘The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth’ (1999) 105(2) *American Journal of Sociology* 406-454.

Edelman, L. B., ‘Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law’ (1992) 97(6) *American Journal of Sociology* 1531-1576.

Edelman, L. B., ‘Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality’ (2004) 38(2) *Law & Society Review* 181-198.

Estlund, C., ‘Labor Law Reform Again? Reframing Labor Law as a Regulatory Project’ (2013) 16 *New York University Journal of Legislation and Public Policy* 383.

Ewing, K. D., ‘The State and Industrial Relations: “Collective Laissez-Faire” Revisited’ (1998) 5 *Historical Studies in Industrial Relations* 1-31.

Felstiner, W. L. F., Abel, R. L. and Sarat, A., ‘The Emergence and Transformation of Disputes: Naming, Blaming, Claiming’ (1980) 15 *Law & Society Review* 631-654.

Fine, J., Galvin, D. J., Round, J. and Shepherd, H., ‘Wage Theft in a Recession: Unemployment, Labour Violations, and Enforcement Strategies for Difficult Times’ (2021) 37(2) *International Journal of Comparative Labour Law and Industrial Relations* 107-132.

Flanagan, F. and Clibborn, S., ‘Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?’ (2023) 45(3) *Sydney Law Review* 337.

Friedman, L. M., ‘Legal Culture and Social Development’ (1969) 4 *Law & Society Review* 29.

Fudge, J., ‘Illegal Working, Migrants and Labour Exploitation in the UK’ (2018) 38(3) *Oxford Journal of Legal Studies* 557-584.

Fuller, L., ‘Human Interaction and the Law’ (1969) 14 *American Journal of Jurisprudence* 1.

Galanter, M., ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’ (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1.

Galanter, M., ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law & Society Review* 95-160.

Gordon, R. W., ‘Critical Legal Histories’ (1984) 36 *Stanford Law Review* 57.

Hale, R. L., ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470.

Hasnas, J., ‘Hayek, the Common Law, and Fluid Drive’ (2005) 1 *NYU Journal of Law & Liberty* 79-110.

Hasnas, J., ‘The Myth of the Rule of Law’ [1995] *Wisconsin Law Review* 199.

Hay, D., ‘Controlling the English Prosecutor’ (1983) 21(2) *Osgoode Hall Law Journal* 165-186.

Hodgson, G. M., ‘The Enforcement of Contracts and Property Rights: Constitutive versus Epiphenomenal Conceptions of Law’ (2003) 13 *International Review of Sociology* 373.

Holdren, N. and Tucker, E., ‘Marxist Theories of Law *Past and Present*: A Meditation Occasioned by the 25th Anniversary of Law, Labor, and Ideology’ (2020) 45(4) *Law & Social Inquiry* 1142-1169.

Horwitz, M. J., ‘The Rule of Law: An Unqualified Human Good?’ (1977) 86 *Yale Law Journal* 561.

Hunt, A., ‘The Theory of Critical Legal Studies’ (1986) 6 *Oxford Journal of Legal Studies* 1.

Ioannou, G. and Dukes, R., ‘Anything Goes? Exploring the Limits of Employment Law in UK Hospitality and Catering’ (2021) 52(3) *Industrial Relations Journal* 255-269.

Kahn-Freund, O., ‘Industrial Relations and the Law, Retrospect and Prospect’ (1969) 7(3) *British Journal of Industrial Relations* 301-316.

Kennedy, D., ‘Form and Substance in Private Law Adjudication’ (1976) 89 *Harvard Law Review* 1685.

Kennedy, D., ‘Legal Education and the Reproduction of Hierarchy’ (1982) 32(4) *Journal of Legal Education* 591-615.

Kennedy, D., ‘The Role of Law in Economic Thought: Essays on the Fetishism of Commodities’ (1985) 34 *American University Law Review* 939-1001.

Kirk, E., ‘Law and Legalities at Work: HR Practitioners as Quasi-Legal Professionals’ (2021) 50 *Industrial Law Journal* 583-609.

Kirk, E., ‘Legal Consciousness and the Sociology of Labour Law’ (2021) 50(3) *Industrial Law Journal* 405.

Kirk, E., ‘The “Problem” with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens’ Advice Bureaux’ (2018) 32(6) *Work, Employment and Society* 975-991.

Klare, K. E., ‘Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law’ (1981) 4(3) *Industrial Relations Law Journal* 450-482.

Klare, K., ‘Law-Making as Praxis’ (1979) 40 *Telos* 123.

Klare, K., ‘The Public/Private Distinction in Labor Law’ (1982) 130(6) *University of Pennsylvania Law Review* 1358.

Kliemt, H., ‘The Nature and Significance of the Political Ideal of the Rule of Law: Hayek, Buchanan, and Beyond’ (2024) 77(4) *Kyklos* 1084-1102.

Krieger, L. H., Best, R. K. and Edelman, L. B., ‘When “Best Practices” Win, Employees Lose: Symbolic Compliance and Judicial Inference in Federal Equal Employment Opportunity Cases’ (2015) 40(4) *Law & Social Inquiry* 843-879.

Krygier, M., ‘What’s the Point of the Rule of Law?’ (2019) 67 *Buffalo Law Review* 743-791.

Lazonick, W. and O’Sullivan, M., ‘Maximizing Shareholder Value: A New Ideology for Corporate Governance’ (2000) 29(1) *Economy and Society* 13-35.

Lewis, R., ‘Kahn-Freund and Labour Law: An Outline Critique’ (1979) 8(1) *Industrial Law Journal* 202-221.

Llewellyn, K. N., ‘Some Realism About Realism, Responding to Dean Pound’ (1931) 44(8) *Harvard Law Review* 1222-1264.

Lodge, M. and Wegrich, K., ‘Crowdsourcing and Regulatory Reviews: A New Way of Challenging Red Tape in British Government?’ (2015) 9(1) *Regulation & Governance* 30-46.

Lyutov, N. and Voitkovska, I., ‘Labour Inspections in Post-Soviet Countries: Reform or Collapse?’ (2021) 37(2/3) *International Journal of Comparative Labour Law and Industrial Relations* 269-300.

Mazor, L., ‘The Crisis of Liberal Legalism’ (1972) 81 *Yale Law Journal* 1032-1053.

Merritt, A., ‘The Nature of Law: A Criticism of E. P. Thompson’s *Whigs and Hunters*’ (1980) 7 *British Journal of Law and Society* 194.

Moore, S. F., ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7(4) *Law & Society Review* 719-746.

Moyn, S., ‘Reconstructing Critical Legal Studies’ (2024) 134 *Yale Law Journal* 77.

Mustchin, S. and Martínez Lucio, M., ‘The Evolving Nature of Labour Inspection, Enforcement of Employment Rights and the Regulatory Reach of the State in Britain’ (2020) 62(5) *Journal of Industrial Relations* 735-757.

Mustchin, S. and Martínez Lucio, M., ‘The Fragmenting Occupation of Labour Inspection and the Degradation of Regulatory and Enforcement Work inside the British State’ (2023) 44(2) *Economic and Industrial Democracy* 526-546.

Naidu, S. and Yuchtman, N., ‘Coercive Contract Enforcement: Law and the Labor Market in Nineteenth Century Industrial Britain’ (2013) 103 *American Economic Review* 107-144.

Rogers, B., ‘The Law and Political Economy of Workplace Technological Change’ (2022) 6 *Georgetown Law Technology Review* 455.

Sarat, A. and Silbey, S. S., ‘The Pull of the Policy Audience’ (1988) 10(2-3) *Law & Policy* 97-166.

Sood, A., ‘Deregulating Capital, Regulating Labour: The Dynamics in the Manufacturing Sector in India’ (2017) 52(26) *Economic and Political Weekly* 59.

Stone, K. V. W., ‘The Post-War Paradigm in American Labor Law’ (1981) 90 *Yale Law Journal* 1509-1580.

Taekema, S., ‘Two Realist Idealists Theorizing the Rule of Law’ (2019) 11 *Hague Journal on the Rule of Law* 301-306.

Thompson, E. P., ‘The Moral Economy of the English Crowd in the Eighteenth Century’ (1971) 50 *Past & Present* 76-136.

Thompson, E. P., ‘Time, Work-Discipline, and Industrial Capitalism’ (1967) 38 *Past & Present* 56-97.

Trubek, D. M. and Esser, J., ‘“Critical Empiricism” in American Legal Studies: Paradox, Program, or Pandora’s Box?’ (1989) 14(1) *Law & Social Inquiry* 3-52.

Trubek, D. M., ‘Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law’ (1977) 11 *Law & Society Review* 529-570.

Trubek, D. M., ‘Max Weber on Law and the Rise of Capitalism’ [1972] *Wisconsin Law Review* 720-753.

Trubek, D. M., ‘Toward a Social Theory of Law: An Essay on the Study of Law and Development’ (1972) 82 *Yale Law Journal* 1-50.

Trubek, D. M., ‘Where the Action Is: Critical Legal Studies and Empiricism’ (1984) 36 *Stanford Law Review* 575-622.

Tucker, E., ‘Renorming Labour Law: Can We Escape Labour Law’s Recurring Regulatory Dilemmas?’ (2010) 39(2) *Industrial Law Journal* 99-138.

Tushnet, M. V., ‘Perspectives on the Development of American Law: A Critical Review of Friedman’s *A History of American Law*’ [1977] *Wisconsin Law Review* 81.

Unger, R. M., ‘The Critical Legal Studies Movement’ (1983) 96 *Harvard Law Review* 561.

Waldron, J., ‘Is the Rule of Law an Essentially Contested Concept (in Florida)?’ (2002) 21 *Law and Philosophy* 137.

Waldron, J., ‘The Concept and the Rule of Law’ (2008) 43 *Georgia Law Review* 1.

Wedderburn, Lord, ‘Freedom of Association and Philosophies of Labour Law’ (1989) 18 *Industrial Law Journal* 1-38.

Wedderburn, Lord, ‘Labour Law: From Here to Autonomy?’ (1987) 16 *Industrial Law Journal* 1-29.

Weil, D., ‘A Strategic Approach to Labour Inspection’ (2008) 147(4) *International Labour Review* 349-375.

Chapters in Edited Collections

Althusser, L., ‘Ideology and Ideological State Apparatuses (Notes towards an Investigation)’, in Althusser, L., *Lenin and Philosophy and Other Essays* (B. Brewster tr, Monthly Review Press, 1971).

Arthurs, H. W., ‘Landscape and Memory: Labour Law, Legal Pluralism and Globalization’, in Wilthagen, T. (ed), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (North-Holland, 1998), 21-34.

Dickens, L., ‘Employment Tribunals and Alternative Dispute Resolution’ in L. Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012), 29-48.

Edelman, L. B., ‘Law at Work: The Endogenous Construction of Civil Rights’ in L. B. Nielsen and R. L. Nelson (eds), *Handbook of Employment Discrimination Research: Rights and Realities* (Springer, 2005), 337-352.

Fuller, L. L., ‘Human Interaction and the Law’ in K. I. Winston (ed), *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Duke University Press, 1981), 211.

Hamowy, R., ‘Introductory Essay’ in F. Hayek, *The Constitution of Liberty* (R. Hamowy ed, University of Chicago Press, 2011).

Hay, D., ‘Master and Servant in England: Using the Law in the Eighteenth and Nineteenth Centuries’ in D. Hay and P. Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press, 2004), 59.

Hyde, A., ‘What Is Labour Law?’, in Davidov, G. and Langille, B. (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Hart Publishing, 2006), 37-58.

Hyman, R., ‘The Historical Evolution of British Industrial Relations’, in Edwards, P. (ed), *Industrial Relations: Theory and Practice in Britain* (Blackwell, 1995), 27-49.

Hyman, R., ‘The Rise and Decline of Collective Bargaining as a Mechanism of Employment Regulation in Britain’, in Alaluf, M. and Prieto, C. (eds), *Collective Bargaining and the Social Construction of Employment* (European Trade Union Institute, 2001), 187-204.

Kahn-Freund, O., ‘Legal Framework’, in Flanders, A. and Clegg, H. (eds), *The System of Industrial Relations in Great Britain* (Basil Blackwell, 1954).

Kennedy, D., ‘Three Globalizations of Law and Legal Thought: 1850-2000’ in D. M. Trubek and A. Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006), 19-73.

Klare, K., ‘Critical Theory and Labor Relations Law’ in D. Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon Books, 1982), 73.

Knox, R., ‘Neoliberalism, Labour Law and New Labour’s Turn to Constitutionalism’, in Gordon, M. and Tucker, A. (eds), *The New Labour Constitution: Twenty Years On* (Hart Publishing, 2022), 323-344.

Krygier, M., ‘Four Puzzles About the Rule of Law: Why, What, Where? And Who Cares?’, in Fleming, J. E. (ed), *Getting to the Rule of Law: NOMOS L* (New York University Press, 2011), 64-104.

Krygier, M., ‘The Rule of Law: An Abuser’s Guide’ in A. Sajó (ed), *Abuse: The Dark Side of Fundamental Rights* (Eleven International Publishing, 2006), 129-161.

Krygier, M., ‘The Rule of Law: Legality, Teleology, Sociology’ in G. Palombella and N. Walker (eds), *Relocating the Rule of Law* (Hart Publishing, 2009), 45-69.

Tushnet, M., ‘Critical Legal Studies and the Rule of Law’ in J. Meierhenrich and M. Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press, 2021), 328-339.

Tushnet, M., ‘Critical Legal Theory’ in M. P. Golding and W. A. Edmundson (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2004), 80.

Veitch, S., ‘Law and the Public/Private Distinction’ in E. Christodoulidis, R. Dukes and M. Goldoni (eds), *Research Handbook on Critical Legal Theory* (Edward Elgar, 2019), 135-150.

Vosko, L., Tucker, E. and Thomas, M. P., ‘Strengthening Participatory Approaches to Labour Standards Enforcement’, in L. Vosko, E. Tucker and M. P. Thomas (eds), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020), 423-456.

Waddington, J., ‘United Kingdom: A Long-Term Assault on Collective Bargaining’, in Müller, T., Vandaele, K. and Waddington, J. (eds), *Collective Bargaining in Europe: Towards an Endgame, Volume III* (ETUI, 2019), 605-624.

Reports / Online Sources / Manuscripts

Burton, L., ‘Rayner’s Workers’ Rights Plan Is Sparking Panic in Corporate Britain’, The Telegraph, 20 January 2025 <https://www.telegraph.co.uk/business/2025/01/20/rayners-workers-rights-plan-is-sparking-panic/> accessed 4 May 2026.

Citizens Advice, Written Evidence to the Work and Pensions Committee, Self-employment and the Gig Economy Inquiry, WOW0035, 16 December 2016.

Cockbain, E., Scott, S., Pósch, K. and Bradford, B., How Can the Scale and Nature of Labour Market Non-Compliance in the UK Best Be Assessed? Final Report of a Scoping Study for the Director of Labour Market Enforcement (Director of Labour Market Enforcement, 2019).

Department for Business and Trade, ‘Smarter Regulation Unveiled to Cut Red Tape and Grow the Economy’ (10 May 2023) <https://www.gov.uk/government/news/smarter-regulation-unveiled-to-cut-red-tape-and-grow-the-economy> accessed 4 May 2026.

Dukes, R. and Streeck, W., ‘Labour Law and Political Economy’ (LPE Project, 26 September 2022) <https://lpeproject.org/blog/labour-law-and-political-economy/> accessed 3 May 2026.

Dukes, R., ‘Neoliberalism and the Rule of Law: Employment Rights Enforcement in the UK’, forthcoming *German Law Journal*, [manuscript on file with author].

Edelman, L. B., ‘Legal Endogeneity and the Limits of Equal Opportunity’ (unpublished conference paper, 2004).

Fairness at Work, Cm 3968 (1998).

Hampton, P., Reducing Administrative Burdens: Effective Inspection and Enforcement (HM Treasury, 2005).

Hayek, F., The Political Ideal of the Rule of Law (National Bank of Egypt, Fiftieth Anniversary Commemorative Lectures, February 1955, Cairo).

Hermer KC, Lord, ‘The Rule of Law in an Age of Populism’ (Bingham Lecture, 14 October 2024) <https://www.gov.uk/government/speeches/attorney-generals-2024-bingham-lecture-on-the-rule-of-law> accessed 3 May 2026.

Illing, S. S. and Coombes, H., ‘Back to the Future of Paternalistic Capitalism?’ (Lewis Silkin, 31 March 2016) <https://www.lewissilkin.com/our-thinking/future-of-work-hub/insights/2016/03/31/back-to-the-future-of-paternalistic-capitalism> accessed 3 May 2026.

Judge, L. and Slaughter, H., *Enforce for Good*: Effectively Enforcing Labour Market Rights in the 2020s and Beyond (Resolution Foundation, 2023).

Krygier, M., ‘Rule of Law (and Rechtsstaat)’, UNSW Faculty of Law Research Series No. 2013/52, August 2013.

Labour Party, Let Us Face the Future: A Declaration of Labour Policy for the Consideration of the Nation (Labour Party, 1945).

López-Andreu, M., Papadopoulos, O. and Jamalian Hamedan, M., How Has the UK Hotels Sector Been Affected by the Fissuring of the Worker-Employer Relationship in the Last 10 Years? (Department for Business, Energy & Industrial Strategy, 2019).

Martin, D., 'Firms to be Freed from Elf 'n' Safety Red Tape in Bid to Release Us from Nannying State', Daily Mail, 22 November 2011 <https://www.dailymail.co.uk/news/article-2067016/Firms-freed-elf-n-safety-red-tape-bid-release-nannying-state.html> accessed 4 May 2026.

Metcalf, D., UK Labour Market Enforcement Strategy 2018/19: Full Report (Director of Labour Market Enforcement, 2018).

Metcalf, D., UK Labour Market Enforcement Strategy 2019/20: Full Report (Director of Labour Market Enforcement, 2019).

Ogden, K., Phillips, D. and Sion, C., What's Happened and What Next for Councils? (Institute for Fiscal Studies, August 2021) <https://ifs.org.uk/books/whats-happened-and-whats-next-councils> accessed 4 May 2026.

Royal Commission on Trade Unions and Employers' Associations, Report (Cmnd 3623, 1968).

Trades Union Congress, Director of Labour Market Enforcement: Call for Evidence 2023/24, TUC Response (TUC, 2023).

TUC, 'Workers "Cheated" out of £2bn of Holiday Pay Last Year under Tories' (TUC, 2024) <https://www.tuc.org.uk/news/workers-cheated-out-ps2bn-holiday-pay-last-year-under-tories> accessed 4 May 2026.

Whyte, D. and Dukes, R., 'Briefing: The Government's Fair Work Agency Risks Becoming a "Toothless Watchdog"' (Institute of Employment Rights, 7 April 2026) <https://www.ier.org.uk/publications/briefing-the-governments-fair-work-agency-risks-becoming-a-toothless-watchdog/> accessed 3 May 2026.

World Justice Project, 'What is the Rule of Law?', <https://worldjusticeproject.org/about-us/overview/what-rule-law> accessed 3 May 2026.

Cases

Brown v Board of Education 347 US 483 (1954).

R (Unison) v Lord Chancellor [2017] UKSC 51.

Parliamentary Materials

HC Deb 3 April 1974, vol 871, col 1286.

Legislation

Black Act 1723 (9 Geo 1 c 22).

Combination Act 1799 (39 Geo 3 c 81).

Combination Act 1800 (39 & 40 Geo 3 c 106).

Conspiracy and Protection of Property Act 1875 (38 & 39 Vict c 86).

Deregulation Act 2015.

Employers and Workmen Act 1875 (38 & 39 Vict c 90).

Employment Act 1980.

Employment Protection Act 1975.

Employment Relations Act 1999.

Employment Rights Bill 2024.

Employment Tribunal Fees Order 2013, SI 2013/1893.

Enterprise and Regulatory Reform Act 2013.

Factory Act 1833 (3 & 4 Will IV c 103).

Factory Act 1844 (7 & 8 Vict c 15).

Factory Act 1847 (10 & 11 Vict c 29).

Fair Wages Resolution 1909.

Fair Wages Resolution 1946.

Gangmasters (Licensing) Act 2004.

Health and Morals of Apprentices Act 1802 (42 Geo 3 c 73).

Health and Safety at Work etc. Act 1974.

Industrial Relations Act 1971.

Industrial Training Act 1964.

National Insurance Act 1911.

National Minimum Wage Act 1998.

Trade Boards Act 1909 (9 Edw 7 c 22).

Trade Union Act 1871 (34 & 35 Vict c 31).

Trade Union Act 1984.

Trade Union and Labour Relations (Consolidation) Act 1992.

Trade Union and Labour Relations Act 1974.

Trade Union Reform and Employment Rights Act 1993.

Wages Councils Act 1945.

Working Time Regulations 1998, SI 1998/1833.