Footnoted Footnotes Footnote:
An Examination of Footnote 7 in Judy Fudge's "Labour Rights as Human Rights: Turning Slogans into Legal Claims"

By Jacob Glover

Table of Contents

> 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets and to steal bread."
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> Anatole France, *The Red Lily,* cited in *Saskatchewan Labour Federation,* 1 SCR 245, at para 56.

> "The law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law."
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> H-G Gadamer, *Truth and Method*, 316.

1 INTRODUCTION

In Judy Fudge's article "Labour Rights as Human Rights: Turning Slogans into Legal Claims"[1] she provides an ostensibly clarifying footnote:

> It will become clear in this paper that I am neither a legal positivist nor an adherent of natural law (even the weak Lon Fuller variety). I do not believe that there exist "right" answers to legal questions, just answers that are more or less plausible in light of what are generally considered to be valid legal sources and forms of argument. I do not believe that there this is an over-arching normative "narrative" to labour law in particular or liberal law in general. Instead I believe that there is a limited universe of contested positions that vie for dominance at particular moments in time in specific places. Nor do I believe that there is an innate and immanent "legal" grammar that can be discerned and that will provide a "correct" answer to every legal question. While Lon Fuller's thin version of natural law, which emphasizes the constraints of "legality," is experiencing something akin to a revival, [*citation omitted*], legal theories are contentious, and there are several plausible accounts (including realist, positivist, pluralist, and constructivist accounts) on offer. It is methodologically suspect to defend a particular approach to interpreting a constitutional provision by asserting, and not justifying and defending, a legal theoretical position. It is equally unsound, although perhaps more persuasive, to use analogies (that legal anatomy is like human anatomy, for example) instead of arguments to establish a position. Thus, my position is very different from that endorsed by Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association," at 6-8 provided to me by the Dalhousie Law Journal, 23 September 2014. The version I was provided with differs in detail, but not substance, from the version available online: SSRN <http://papers.ssracom/sol3/papers.cfm?abstract id=2355976>.[2]

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[1] Fudge, Judy. 'Labour Rights as Human Rights: Turning Slogans into Legal Claims' (2014) 37 Dalhousie LJ 601 [Labour Rights as Human Rights]
[2] Fudge, *supra* nt. 1 at 604 nt. 7 [Footnote 7]

In this footnote Fudge frames the substance of her argument within a conversation between herself and Brian Langille and Benjamin Oliphant. She signals here that she is making an argument about labour law but also about law more generally.

There is a possible clue to the origins of this footnote in its concluding line in which Fudge re-iterates her intended interlocutors. In this line Fudge cites a paper which was published by the Queen's Law Journal in the fall of 2014.[3] Curiously, the Dalhousie Law Journal provided Fudge an earlier version of the paper in January of 2014. It is not unusual for law journals to intentionally create conversations between scholars within a given issue, but this is a particularly odd circumstance given that Langille and Oliphant's paper was ultimately published by the Queen's journal. One possible explanation relates to the circumstances surrounding Fudge's paper which is based on her Innis Christie Public Lecture delivered in 2013 at Dalhousie.[4] She was the fourth speaker in this series, and Brian Langille was the second.[5] Langille's lecture and a subsequent article have strong resonances with the later article he wrote with Oliphant. It is possible that the Dalhousie Law Journal provided Fudge an early draft of "Legal Structure" to give her the most recent version of Langille's arguments with which she was engaged as part of the Innis Christie Public Lecture Series.[6] This is particularly likely given that Fudge actually names Langille and Oliphant in the recorded version of her lecture the year before her paper was

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[3] Brian Langille & Benjamin Oliphant, "The Legal Structure of Freedom of Association" (2014) 40:1 Queen's LJ 249 [Legal Structure].
[4] Fudge, *supra* nt. 1 at 601, unnumbered footnote.
[5] Fudge, *supra* nt. 1 at 601, unnumbered footnote; Brian Langille, "Why the Right-Freedom Distinction Matters to labor Lawyers - And to All Canadians" (2011) 34:1 Dalhousie LJ [the Right-Freedom Distinction] at 143, unnumbered footnote.
[6] Interestingly, it is not the only time these two scholars find themselves juxtaposed. In *The Idea of Labour Law* (which Langille edited with Guy Davidov) Fudge's chapter on radicalizing labour follows Langille's article providing a new theory of justice for labour law. (*The Idea of Labour Law*, eds. Brian Langille and Guy Davidov (Oxford, Oxford University Press: 2011), ch. 7 and 8.)

published.[7] Fudge, then, might have included Footnote 7 to identify clearly with whom she had a proverbial bone to pick and what the shape of that bone might be. In this paper, I want to unpack Footnote 7's inter- and intra-textual dimensions. I will think through the role this footnote plays in Fudge's argument in her paper and her engagement with Langille and Oliphant. I will draw some conclusions about the philosophical and the legal theoretical differences between these three scholars based on these two papers and by drawing on some of their other work as well.

2 FOOTNOTE 7 AND FUDGE'S REALISM

Footnote 7 is appended to the following paragraph:

> Essentially I am interested in two questions. What does it mean to say that labour rights are human rights? What is the role of the courts in transforming a political manifesto into a legal claim?[8]

In relation to these guiding questions, Fudge finds it necessary to position her notion of legal theory, i.e. how she understands the law. It is as if she did not want these questions to trigger assumptions about her views on legal theory, and she uses Footnote 7 as a way of quashing those assumptions right away. This footnote, therefore, *emphasizes* (to the degree that a footnote can do so) that these questions are complex and rich philosophical questions which require a theoretical explanation. And this makes sense because the identification of human rights with labour rights is not straightforward. If done with some intellectual rigor, it demands considering, at least, the nature of international law, the impact of international law on domestic law, and the nature of rights (human or constitutional). But Fudge's question is more than just whether labour

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[7] Judy Fudge, "Labour Rights as Human Rights: Turning Slogans into Legal Claims" *The 4th Annual Innis Christie Symposium on Labour and Employment Law*, delivered on October 3, 2013 at Dalhousie University: https://www.youtube.com/watch?v=JpGIzUDHg04&ab_channel=SchulichLaw
[8] Fudge *supra* nt. 1, at 604.

rights *are* human rights. She is asking about the meaning and implications of this predication. That is to say, she is not focused on a purely legal or doctrinal question but a broader question, the context of which is expanded in the second question and Footnote 7.

Fudge's second question trembles between legal theory and political theory and queries into a possible judicial avenue between these two frameworks of thinking. Hermeneutically, the second question elucidates aspects of the first question. The second question reminds us that part of the reason we must reflect at all on the meaning of saying labour rights are human rights is that to do so, in some ways, is not a purely legal or judicial determination. Put differently: it is not obviously a process of doctrinal or logical deduction to say these two legal mechanisms are the same. In fact, we could argue that such a declaration is political more than it is legal because it elevates and absolutizes labour rights to a higher status of protection which, in turn, inhibits the degree to which a government can change those rights based on shifting political ideologies. This is against the backdrop of the fact that typically rights and duties related to a state's domestic economy are at some level more vulnerable to political whims than human rights and constitutional rights. Thus, we could say, in the sense that doing so attempts to restrict political access to labour rights, deeming labour rights to be human rights is a political act. The enhanced legal protection afforded labour rights understood as human rights changes the way political institutions relate to one another vis-à-vis those rights.

Fundamentally, both of Fudge's questions trade on the fact that, to some degree, the Anlgo-Canadian legal tradition distinguishes the political from the legal[9], and we must give

[9] I am painting with a broad brush here, but, rather than provide several paragraphs of caveats about where and when and who might have more a nuanced or less severe version of this distinction, I wanted to continue on the trajectory of analyzing Fudge's realism which does, clearly, play upon this distinction.

special thought to activities which attempt to bridge this divide. I think that this question reveals Fudge's realism which is then confirmed in Footnote 7. Fudge is not asking doctrinal questions about whether it is possible or coherent or legal to say labour rights are human rights; nor is she asking those questions about whether judges ought to deem labour rights to be human rights. Instead, Fudge is asking about the implications of that claim and its legal actualization. She is asking broad justice questions about the legal system which demands a kind of boundary transgression.[10] It demands an interpretation of the legal system and the law which is not limited to untouchable and immutable formality.

Although these questions certainly point to Fudge's realism, we see it take shape most clearly in her words in Footnote 7. Fudge provides three positive descriptions of her understanding of law alongside several negative positional statements. Firstly, Fudge understands answers to legal questions in terms of plausibility based on conventional legal arguments with reference to agreed-upon legal sources. Secondly, she sees these legal answers as in a perpetual state of jostling for "dominance" – a dominance which is contingent on time and place. Fudge's third positive attestation follows closely from the second: legal answers or positions or theories are contentious and more than one may appear plausible at a given time. From these three characteristics we can derive a theory of law as contingent, dynamic, and mutable. It is a law that resists absolutism in favour of something more deliberative and iterative; we do not set out to find the "right" legal answers but select the one that makes the most sense given the available evidence and support.

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[10] I owe credit to Jennifer Llewellyn for this distinction.

Fudge provides further characteristics of her theory of law negatively. She says she is *neither* a natural lawyer *nor* a legal positivist; she does *not* believe in right legal answers, an over-arching normative narrative; nor an innate legal grammar.[11] By eschewing both positivism and natural law Fudge indicates strongly that she is taking an atypical middle way rather than picking one of the two traditional sides of the legal philosophy narrative (e.g. natural law vs. legal positivism). Held in relation to her two questions this is a particularly strong instruction *not* to read the rest of the essay anticipating a natural law or positivist conclusion about how law and politics relate to one another. She further specifies this alternative legal theory by discarding right answers which proponents of both positivism and natural law theory would be expecting. Right answers do not exist in the same way for a legal theory which finds value in plausibility rather than rightness or correctness. Plausibility is not about revealing the transcendent rules of the law nor about confirming internal coherence. Plausibility is about finding what works in a given situation.

The above formulation of law is, to me, a realist one. Raymond Wacks tells us that legal realism is "largely pragmatist and behaviourist, emphasizing 'law in action' (as opposed to legal conceptualism)." He goes on to say: "'Realism' is, therefore, an impatience with theory, a concern with law 'as it is', and a concern with the actual operation of law in its social context… it is deeply hostile to the formalism that in its view treats law as an inert phenomenon."[12] Fudge's emphasis on the particularity of law and its contingency on the current moment map on to what

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[11] It is, to me, remarkable that Fudge resorts to the language of belief (even using the word "adherent") in these lines because it suggests that for her these are not questions with verifiable or empirically observable answers. These are questions of belief – of faith. In some ways, it makes this section of Footnote 7 a kind of negative theology.
[12] Raymond Wacks, *Philosophy of Law: A Very Short Introduction* (Oxford: Oxford University Press, 2014) at 108 and 109.

Wacks is telling us here. Moreover, Brian Leiter, in a similar vein, explains legal realism in terms of adjudication which functions according to patterns between factual scenarios rather than applying rules.[13] On his view, realists understand judges as applying "uncodified norms" to "situation types" rather than applying immutable rules to the facts.[14] These characteristics of legal realism show up Fudge's insistence on plausibility as opposed to innate legal rules which provide answers to every question.

We can also see Fudge's 'hostility' (to use Wacks' word) toward formalists as a part of her realism. Unlike formalists, as we will see below, Fudge sees social reality as part of the project of law rather than a secondary consideration. There is less of a boundary between the idea of law and the way that law shows up in the world. Whereas for Langille and Oliphant, law can succeed in its own terms while fail on a normative evaluation, for Fudge, the internal success of law for itself is not as relevant as whether the argument seems plausible in light of the circumstances. Thinking back to the questions to which Fudge added Footnote 7: it is now hopefully clearer how allowing for the overlapping of politics into law is part of this realist project which disregards understandings of law based on a separate and pure concept of law as if it is not imbricated in a larger socio-political context.

Before moving on to discuss Langille and Oliphant's formalism, I want to say a few things about Fudge's admonishments at the end of Footnote 7. The portion I am referring to is:

> It is methodologically suspect to defend a particular approach to interpreting a constitutional provision by asserting, and not justifying and defending, a legal theoretical position. It is equally unsound, although perhaps more persuasive, to use analogies (that

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[13] Brian Leiter, "Legal Realism and Legal Positivism Reconsidered" (2001) 111 *Ethics* at 281.
[14] Ibid., at 282.

> legal anatomy is like human anatomy, for example) instead of arguments to establish a position.[15]

Fudge suggests here that Langille and Oliphant's interpretation of section 2(d) of the *Charter*[16] is insufficiently unpacked. To her, they interpret the provision within a specific legal theoretical framework (formalism) but do not justify that framework or defend it. She also takes issue with their use of analogy and specifically calls-out the analogy they use on pages 253 and 270. Ultimately, I'm not sure that these are fair criticisms of Langille and Oliphant. As we will see below, Langille and Oliphant do spell-out the theoretical premises on which they build their interpretation of freedom of association. Moreover, it is unclear to me what "methodologically suspect" even means.

However, in a later footnote, Fudge expands on this anxiety surrounding slippery rhetorical metaphors. In reference to Rothstein J.'s analogies in *Fraser* at paragraphs 184 and 211-212, Fudge writes:

> These analogies are bad because by abstracting from the social context they obscure power relations that are historically dependent. It is a style of reasoning that tends to predominate in analytic philosophy and analytical jurisprudence, and one that is typically closely aligned with positions that simply uphold the status quo. This type of reasoning appeals to litigators and debaters as it does not require a deep knowledge of a subject, but rather, the use of rhetorical tropes as persuasive devices. Political economy and sociological approaches to understanding and justifying laws, such as the type that appeal to me, tend to avoid decontextualized analogies and argue on the basis of historical and sociological evidence.[17]

Given that Langille and Oliphant support Justice Rothstein's position in *Fraser*[18], I think it is fair to say that in many ways this critique of Rothstein J. is an extension of Fudge's admonishment in Footnote 7. We get a clearer sense in Footnote 59 of why Fudge would prefer that Langille and

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[15] Fudge *supra* nt. 1 at 604, nt. 7.
[16] *Canadian Charter of Rights and Freedoms*, s. 2(d), Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11. [*Charter*]
[17] Fudge *supra* nt. 1 at 604, nt. 59.
[18] See for example: Langille and Oliphant, *supra* nt. 5 at 288, nt. 121.

Oliphant were more upfront about their philosophical positions. For Fudge, philosophical and legal theoretical positions have real-world implications. It is not enough to merely make an argument. Rather there is a methodological responsibility to be clear about what underpins your argument, so that readers can interpret the social consequences of that position. Therefore, inaccurate or imprecise analogies which fail to correspond to the totality of a situation, obscure and over-simplify the complexity of society and social relationships. They also give the illusion that legal arguments are not contingent on historical circumstance but can be applied to different situations via transitive logic along analogical chains without reference to social reality. Hence, although I think Fudge might be a bit harsh in her phrasing, the criticisms at the end of Footnote 7 and those in footnote 59 are helpful displays of her adherence to realism.

In this section my aim was to provide an over-view of how Fudge describes her understanding of law. I proposed that Fudge describes a realist definition of law. She does this in opposition to Langille and Oliphant's definition of law which I demonstrate in the next section follows from a formalist tradition.

3 LANGILLE AND OLIPHANT'S FORMALISM

Now we can turn to Langille and Oliphant's essay "Legal Structure" which is a continuation of the argument Brian Langille makes in "Right-Freedom Distinction" as well as an earlier article by Oliphant.[19] The argument advances on three premises:

1) Law is omnipresent, internally coherent, and answers primarily formal questions not substantive or moral ones.
2) There has always been law regulating the freedom of association of Canada; it developed from the common law, to the Wagner-Act Model, and now to the *Charter*.

[19] Benjamin Oliphant, "Exiting the Freedom of Association Labyrinth: Resurrecting the Parallel Liberty Standard under 2(D) & Saving the Freedom to Strike" (2012) 70:2 U Toronto Fac L Rev 36.

3) Although Langille and Oliphant seem to agree with the outcome of the cases, the reasoning of the Supreme Court of Canada in two freedom of association cases, *BC Health*[20] and *Fraser*[21], undermines premise 1 and ignores aspects of premise 2.

For Langille and Oliphant the Supreme Court of Canada's treatment of freedom of association in *BC Health* and *Fraser* reflects a deterioration of respect for a kind of legal grammar. For them there is a hyper-prioritization of a specific normative agenda over retaining coherency in the law.

In some ways it is helpful to begin by saying that Langille and Oliphant are formalists. Or, at the very least, they describe a theory of law that reflects formalist ideals. Brian Leiter provides a useful definition of legal formalism:

> "Formalist" theories claim that (1) the law is "rationally" determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus "autonomous" from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy.[22]

For their part, Langille and Oliphant work with an understanding of law which maps on to these ideas. As we will see below, they understand law as static and cohesive with singular answers based on logical rules and conceptual grammar. Furthermore, they resist any intermingling between the idea of pure law and legality and normative evaluative metrics. The most rigorous and pointed treatment of their understanding of the nature of law appears on pages 253 to 255. In this section of their essay, Langille and Oliphant combine the thinking of Lon Fuller with the "Neo-kantian formalism" of Arthur Ripstein.[23]

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[20] *Health Services and Support-Facilities, Subsector Bargaining Assn v British Columbia (BC Health)* 2007 SCC 27, [2007] 2 SCR 391 [*BC Health*].
[21] *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3 [*Fraser*]
[22] Brian Leiter, "Legal formalism and legal realism: what is the issue" (2010) 16:2 LEG 111.
[23] Langille and Oliphant *supra* nt. 5 at 253, nt. 11. They cite Arthur Ripstein, "Self-Certification and the Moral Aims of the Law" (2012) 25:1 Can J L & Jurisprudence 201 and Martin Jay Stone, "Planning Positivism and Planning

Langille and Oliphant begin their argument in reaction to the suggestion that labour law is "dead" or "over" which, as we will see in Fudge's essay, is part of the argument for introducing the *Charter* and international human rights law as a basis for protecting (and expanding?) labour rights in Canada. For Langille and Oliphant, however, this is a red herring because law is omnipresent, and the amount of law available can neither be reduced nor increased. Only the quality of law can change. In other words, we cannot justify using the *Charter* and international law to fill a hole that is simply not there. Langille and Oliphant's argument focuses on the mere presence of law--neither its function nor its effectiveness. While the possibility of a legal answer is eternal, the sources and relevant regime for that answer can shift over time.

Langille and Oliphant continue their description of the nature of law by suggesting that the static quantity of law means that law cannot be "a tool or an empty vessel at hand to attain other goals or extraneous goods."[24] They argue that because law is comprehensive in its capacity to answer all legal questions, then it is not exclusively open to instrumentalization. That is an option for law but not its primary characteristic. Primarily law answers the question: "Who governs?" which is related to the "formal problem" that "not everyone can tell everyone else what to do about everything".[25] Their formalism lies in the sense that law is not primarily about the content of governance but about the form or shape or structure of authority. The law's job, for Langille and Oliphant, is to indicate, in every situation, who is in charge. There is an

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Natural Law" (2012) 25:1 Can J L & Jurisprudence 219. The citation they give for Stone, however, is basically glossing the citation they give for Ripstein. It is not necessarily redundant, but it is not an additional perspective or position. Igor Shoikhedbrod characterizes Ripstein as a Neo-Kantian formalist in his essay "Private Law's Estranged Bedfellows: Why Pashukanis Should Worry Contemporary Formalists" (2020) 33:2 Can J L & Jurisprudence 461.

[24] Langille and Oliphant *supra* nt. 5 at 253.

[25] Ibid., at 254; Citing Ripstein supra nt. 16 at 206.

assemblage of implicated jural relations which might flow from the context surrounding that answer, but the law always already exists to answer that fundamental question about the form of authority.[26] Moreover, because law comes with this fundamental formal purpose it cannot be hijacked as a means to some other end because then it would no longer be law.

This idea of internal constraints of law brings us to Langille and Oliphant's inclusion of Lon Fuller's idea of legality. They argue that insofar as law provides a "comprehensive solution" to the "formal problem" described above, it must contain the principles of legality proposed by Fuller.[27] This reference to Fuller's principles which inform and define the legality of a law further emphasize the formalism of Langille and Oliphant. We see here again that there is an idea of law which, for Langille and Oliphant (and Ripstein), is fundamentally about the structure of authority in a given situation. They are adding to this notion of law some principles in which any law worth its salt must participate. Law, in other words, is not about whether it works or whether it is morally good but about whether it fits a specific definitional formula.

After introducing Fuller's ideas of internally constrained law which exists formally and eternally, Langille and Oliphant can turn with more precision to their problems with Supreme Court of Canada's jurisprudence around freedom of association and labour rights. Langille and Oliphant see the law as always already complete and comprehensive in its answers to legal questions, so it is logically incoherent, to them, to introduce on the one hand a "utterly new set of

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[26] See Ripstein *supra* nt. 16 at 206 for helpful emphasis on authority in this conception of law.
[27] Langille and Oliphant *supra* nt. 5 at 253 citing Lon Fuller, *The Morality of Law* (revised edition) (New Haven: Yale University Press, 1969). The principles are: generality, publicity, non-retroactivity, feasibility, congruence, consistency, comprehensibility, and constancy.

rules" or, on the other hand, partial answer to the question of who governs in a specific situation.[28]

We can now see how the above understanding of law resembles Leiter's definition of formalism. Langille and Oliphant understand the law as providing an answer to every question and each answer is accessible in and through the law itself without recourse to any other sources or systems of thinking. Law, in its most general sense, has a form which dictates its function notwithstanding its substance. This is the aspect of law which, for Langille and Oliphant, answers the questions: who governs and what are my rights and freedoms vis-à-vis that authority?[29]

4 SUBSTANTIVE ARGUMENTS

Now that we have unpacked Fudge's realism and Langille and Oliphant's formalism, it is time to turn to their substantive arguments to understand how their philosophical frameworks underpin those arguments. These summaries are not meant to include every facet of their arguments. I merely want to draw out the authors' philosophical conceits as they manifest in their respective arguments.[30]

4.1 Fudge's Argument: Judges ought to allow political maxims to become legal claims

Fudge's essay has three parts: a historical section, a doctrinal analysis, and a realist prescription. In the historical section Fudge describes the development of the relationship between labour rights and tort law with specific reference to Innis Christie. She notes that the

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[28] Langille and Oliphant *supra* nt. 5, at 255.
[29] Langille and Oliphant *supra* nt. 5, at 255-4.
[30] This is particularly true for Langille and Oliphant's article because it is actually double the length of Fudge's paper. This is likely due to the fact that Fudge's paper began as a lecture whereas Langille and Oliphant's is really a sequel to several earlier papers.

beginning of statutory labour rights regimes, in the 1930s and 1940s, did not replace the common law but was layered on top of it. At its inception statutory labour rights to strike and bargain were traded off against a formal freedom to strike.[31] What she means is that under the common law a worker was formally free to refuse to work but so were their employers free to enforce the employment contract and cease paying them. That is to say, workers could stop work, but they had no immunity from common law retaliation and no guarantee that their employers would bargain with them. Labour rights legislation provides these workers with a trade wherein they give up the freedom to strike whenever they want in exchange for a right to bargain with their employers and to stop work if those negotiations fail.[32] Fudge notes that the model adopted in this era was built for the large-scale industrial sector and, therefore, did not apply well to other industries or employment scenarios.[33]

Fudge then details the waxing and waning of union density and union demographics in Canada between the 1960s until the 2010s. She explains that where union members were originally mostly industrial blue-collar workers in the 1960s by 2012 the proportion switched to being mostly public-sector employees and public opinion of unions was generally negative.[34] Fudge's thesis in this section seems to be that the issues of inapplicability of the statutory regimes of labour rights in the 1930s and 1940s have led to a co-optation of unions by the public

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[31] Fudge *supra* nt. 1, at 605.
[32] In interesting ways, this brief part of Fudge's essay demonstrates a recognition of the "building blocks" Langille and Oliphant expand on at length which is to say that Fudge, to some extent, does see the law functioning in terms of precise conceptual definitions, i.e. the differences between rights and freedoms. See Langille and Oliphant *supra* nt. 5 at 256ff and at nt. 18 they specifically say that Fudge agrees with them that these building blocks make legality possible.
[33] Fudge *supra* nt. 1 at 606.
[34] Ibid, at 606-7.

sector and an undermining of the purpose and spirit of labour rights by the private sector. This, in turn, means that unions will continue to seem ineffective and toothless as government continues to restrict rights of public sector employees and the private sector continues to find ways of avoiding labour regulations.

With that background in mind, Fudge suggest that it makes sense that labour rights advocates altered strategies "to elevate [labours rights'] moral appeal".[35] In order to accomplish such elevation, advocates argue that labour rights are human rights. According to Fudge, the most effective forum to make this argument is in constitutional litigation wherein litigants can bring international law standards to bear on Canadian *Charter* jurisprudence.[36] For Fudge there are clear arguments which "create a human rights framework for the right to collective bargaining that imposes no particular model of collective bargaining."[37] Thus, for Fudge, the question of whether labour rights are human rights has a plausible solution. Internationally they are certainly recognized as such and, in Canada, there is a doctrinal pathway to such a conclusion which is affirmed in *BC Health* and *Fraser*.[38]

This then leads us to the final section of Fudge's article regarding the role of the court "in giving the claim that labour rights are human rights legal effect".[39] For Fudge this is explicitly a

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[35] Ibid., at 609.
[36] Ibid., at 610.
[37] Fudge *supra* nt. 1 at 610-11. Fudge cites Kevin Bank's work beginning from Dickson J.'s maxim that the "Charter should be presumed to provide at least as great a level of protection as is found in human rights documents that Canada has ratified" for this argument. See *Reference re Public Service Employee Relations Act (Alta),* [1987] 1 SCR 313 and Kevin Banks, "The Role and Promise of International Law in Canada's New Labour Law Constitutionalism" (2012) 16 CLELJ 233 at 271-272.
[38] It is notable that Fudge seems almost agnostic on whether *she* thinks labour rights are human rights. In this section of the article there is no definitive affirmation of the political maxim by Fudge. She seems to defer to the ILO, to Banks, and to Dickson J., rather than take a position on the issue.
[39] Fudge *supra* nt. 1 at 611.

normative argument. The question for her is not whether the courts can give the claim legal effect; it is how *should* they. To that end, Fudge begins this analysis by arguing that because labour rights transgress the boundary between political/civil rights and social/economic rights and because they are inherently collective constitutional courts must engage in a kind of rights balancing which inspires discontent and disagreement.[40] One side of this disagreement promotes a particular vintage of judicial neutrality whereby judges treat groups and individuals symmetrically which results in a formal obfuscation of the boundaries labour rights supposedly transgress. That is to say that this formal neutrality does not attend to the substantive distinctions between civil/political rights and economic/social rights; nor does it prioritize employer rights to trade over employee rights to strike (or vice versa); nor does it give rights to groups which the members would not enjoy as individuals.[41] This means that judges ought not allow labour rights to take on a special human rights status and be used to change the background common law rules which apply to everyone equally.[42]

This is where Fudge explicitly invokes Langille and Oliphant in reference to this argument with which she clearly disagrees. She writes that they provide two reasons for why we should follow the symmetrical approach: 1) it avoids "gassing around in the abstract", and 2) it does not give groups greater protection than individuals.[43] Fudge summarizes Langille and Oliphant's argument by saying that they think courts should not force legislatures to change the common law with regards to labour relations and that because the common law already applies equally to

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[40] Fudge *supra* nt. 1 at 611-12.
[41] Ibid., at 613.
[42] Ibid. Again, more on this below, but I think that Langille and Oliphant's claim is more complicated than just blanket reliance on the common law.
[43] Ibid.at 613. Citing Brian Langille, "What is a Strike?" (2009-2010) 15 CLELJ 355 at 372.

everyone, it is not the place to inject new values.[44] For Fudge, formal symmetrical treatment fundamentally misunderstands the background power relations which hold up the law and structure its application.[45]

Before moving on to think through Fudge's riposte to Langille and Oliphant's argument we should take stock of this engagement between Fudge's realism and their formalism. For Langille and Oliphant, as Fudge sees it, judges ought to focus on the formal application of the law not its substantive implications. Or, perhaps, it is that judges ought to focus on maintaining the formal integrity of the law in a way that excessively diminishes the importance of how the law affects people. Although she does not say it explicitly, it seems one of Fudge's largest disagreements with Langille and Oliphant is the way in which their formalism eschews history and focuses on supposedly a-temporal or even *a priori* formal building blocks of the law. Fudge's realism, as we saw in Footnote 7, takes seriously the relevance of a given time and space because those two characteristics participate in determining the plausibility of a given legal answer.

In response to Langille and Oliphant, Fudge provides a conceptual counter-argument and a normative one. Conceptually she says that their argument relies on bad analogies. Where Langille and Oliphant say that collected workers should not be afforded greater rights than if they were individual, Fudge says that the question is not of quantity of workers but of quality of rights. "Striking workers do not want to be treated as individual employees: what they need is a

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[44] Ibid.at 613.
[45] Ibid. at 613-14: "Of course, this latter assertion assumes that the common law of employment is a manifestation of the "virtue" of formal equality and, in so doing, ignores how master and servant law, which was based on legal inequality, infused the common law of employment and continues to do so through the duty to obey and the damage limitation rule of reasonable notice."[citations omitted]

special liberty immunizing their concerted action from contractual actions by employers."[46] Fudge argues with reference to the historical development of labour rights that the point of these rights has always been to escape the common law regime which can render collective work action unlawful.[47] Fudge frames her normative argument in terms of evidence of a contribution to social justice by trade unions. She says that such evidence would justify judges promoting or enhancing the protection of trade unions and labour rights. If for example, there was evidence that trade unions contribute to substantive equality then this would be in-keeping with the *Charter* values and, therefore, a valid justification for elevating labour rights to human rights status. Fudge then re-iterates her earlier point that part of the purpose of labour rights is to correct the failures of the substantively inequal common law.[48] For her the justification of judges deeming labour rights as human rights is inherently a historical position insofar as the way the law is implicated in changing historical circumstances is relevant to this judicial determination.[49]

Fudge concludes her article by suggesting that not only are there coherent conceptual and normative arguments for how courts ought to deem labour rights human rights, but there is a democratic reason. The elevated protection of labour rights by courts puts pressure on governments to re-imagine the labour relations regimes in place. In other words, rather than hopelessly latibulate in the face of the decline of labour law, Fudge recommends that labour rights advocates bring arguments to constitutional courts so that governments are encouraged to engage in further deliberation about the nature and purposes of labour rights regimes and to

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[46] Fudge *supra* nt. 1 at 615.
[47] Ibid.
[48] Ibid., at 615-16.
[49] Ibid., 616-17.

(hopefully!) create some new alternative that maps more accurately on to our current labour realities.[50]

It should be clear by now that Fudge's argument sees law as something deeply embedded in politics and society. The pure concept of law ought not hamstring the capacity of the courts to create pathways to more equitable justice. Rather, the law ought to be thought of in terms of its substantive development over time, the implication of that development, and its real-time effects on people today in light of that development and, perhaps, notwithstanding it. Now we can turn to Langille and Oliphant's argument to see the formalist contrary position.

4.2 Langille and Oliphant: The law must be legal first

I have already elaborated on Langille and Oliphant's philosophical position with which they begin their article, but, to reiterate for convenience: law cannot be created or destroyed it can only change quality; law's primary function is to answer the formal question of who governs in a given situation; and, finally, law is constrained internally by a set of principles which determine legality. After laying out their conception of law, Langille and Oliphant provide a summary of specific legal concepts: freedoms, rights, duties, and derivative rights drawing on Hohfeldian analysis of jural relations. The aim of this part of their paper is to flesh-out what they call a legal conceptual grammar. These "building blocks" are "inert", so "[i]t falls to lawmakers to create a structure which stands up by deploying them in a way such that each is compatible with the others, with attention the logic of their own structure."[51] Again, here, we see Langille and Oliphant rely on a kind of internal coherence of substance-less forms. The purpose of this section

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[50] Fudge *supra* nt. 1 at 618-19.
[51] Langille and Oliphant *supra* nt. 5 at 255.

of their article is to provide the framework with which they will critique *BC Health* and *Fraser* decisions.

Interestingly, after reviewing the dynamics in these grammatical forms, Langille and Oliphant tell a story about labour law and labour right which is very similar to the one that Fudge tells. The development of labour rights begins with the common law and then moves to statutory regimes and, now, finally, we are in an age of constitutionally protected rights with some influences from the international law community.[52] One difference between Langille and Oliphant's and Fudge's retellings of this story is that in the former the common law's formal equality is lauded[53] whereas in the latter the common law's substantive inequality is criticized[54]. To their credit, Langille and Oliphant note that although the common law structure may be "unappealing from a normative perspective" it is, nevertheless "a complete and coherent legal structure".[55] It is not that case therefore that Langille and Oliphant are blind to the historical realities of the common law's substantive inequality it is that in their understanding of law, the coherence and formal structure of legality is more important than normative appeal.

Langille and Oliphant's main argument focuses on the decisions in *BC Health* and *Fraser*. For them it comes down to a fundamental confusion exemplified by the line: "[t]he freedom to do a thing, when guaranteed by the Constitution interpreted purposively, implies a right to it."[56] For Langille and Oliphant this is completely ungrammatical. Freedoms are activities which the state cannot prohibit us from doing whereas a right is something the state must ensure we are

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[52] Langille and Oliphant *supra* nt. 5 at 257-265
[53] Langille and Oliphant *supra* nt. 5 at 258.
[54] Fudge *supra* nt. 1 at 613-14.
[55] Langille and Oliphant *supra* nt. 5 at 259.
[56] Ibid., at 267 citing *Fraser*, *supra* nt. 21 at para 67.

able to do.[57] Those are very different ideas, and one does not necessarily imply the other. For Langille and Oliphant this confusion manifests when the Court, in *BC Health*, decides that there is a right to meaningful collective bargaining derived out of the freedom of association.[58] This means that there is now an obligation on the government to protect this right to collective bargaining for private and public employers when before there was only an obligation to allow citizens to collectively bargain.[59]

Related to its grammatical inaccuracies, another aspect of Langille and Oliphant's issue with this decision is that it undermines the completeness of labour rights regime and law in general. To them, by creating a derivative right to collective bargaining but without specifying any process or procedure, the Court has created a lacuna in the otherwise complete legal model. This is unsustainable given their definition of law which requires completeness and the capacity to have always have an answer to: who governs.[60] We must, therefore, be able to determine who has this new right to bargain and who has the corresponding duty.[61] For Langille and Oliphant, after *BC Health*, there is no certainty about who has access to this constitutional right. Under the current labour rights regime, only a certified union would have putative access to labour rights at all, but constitutional rights are supposed to be available to everyone.[62] There is uncertainty then about the form of the constitutional freedom of association, the nature and extant of the statutory

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[57] Langille and Oliphant *supra* nt. 5 at 267.
[58] Ibid., at 269.
[59] Ibid.
[60] Ibid., at 272.
[61] Ibid., at 273
[62] Ibid., at 274-5: In a moment which smacks of realism, Langille and Oliphant reflect on the complexity of determining the bearer of the new duty to bargain in good faith which comes alongside of the right to collective bargaining. They note that this duty is hard to pin down given the reality of the modern labour market and the fissuring of the workplace.

rights to collective bargaining, and the interaction between them. This kind of uncertainty or hole in the form of the law is unacceptable to Langille and Oliphant.

For the sake of brevity, I will not rehearse the rest of Langille and Oliphant's detailed critiques of the implications of the syntactical nightmare (to them) created by *BC Health* and *Fraser*. It is a fair summary to say that each of their criticisms logically evolve out of their formalistic definition of law which demands law take a specific shape in order for it to be coherent and legal. To them *BC Health* and *Fraser* resist the demands of legality in ways which undermine the rule of law.[63] The rule of law represents a kind of formal neutrality of application and access to law which is more appealing to Langille and Oliphant than what they represented by the Court's disregard for legal grammar, namely: "the idea that the task of the Supreme Court is primarily to figure out, according to some view of good public policy, what we wish to achieve as a society".[64] They believe the Court and the law should support the framework and structure of the freedoms, rights, and duties and confirm that laws enacted and enforced conform to that structure, but the Court should not impose a normative narrative on to the law in ways which disrupt the structure of the rule of law. To do so would be to allow ephemeral particularities destroy the static and absolute. Law, properly understood, is separable from the notions of social good because it is the structure by which people work toward social good without being necessarily productive of it. They conclude by saying:

> Lawyers and judges, of course, have opinions about how things should go, and how society should operate. However, their margin of professional advantage, and real contribution to society, is knowing how to get there, legally.[65]

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[63] Langille and Oliphant *supra* nt. 5 at 280.
[64] Langille and Oliphant *supra* nt. 5 at 298.
[65] Ibid., at 299.

The law is, in other words, a structuring mechanism for our society which assists citizens in achieving a vision of social good. Contrary to Fudge, then, the role of judges is not to break with the structure because of some evidence of social good but to encourage citizens to use law's structure to legally achieve that social good.[66]

4.3 An Argument about Symmetry

It is worthwhile now to pause and think through Fudge's main disagreement with Langille and Oliphant. For Fudge, the symmetrical approach of treatment between groups and individuals misses the point. The symmetrical approach is a kind of formalism as we discussed above, and it relates to another aspect of Langille and Oliphant's argument with Fudge disagrees. She says:

> … Brian Langille and Benjamin Oliphant, explicitly argue that courts should not impose a positive obligation on the state to change the background rules of the common law that enable employers to dismiss or in other ways penalize workers who engage in these activities. They claim that because the common law applies to everyone equally courts should not interfere with the background legal rules simply to promote particular interests or values.[67]

I think Fudge might be overstating Langille and Oliphant's argument. They certainly do think we can healthily rely on the common law's formal equality, but I do not think that is *why*, for Langille and Oliphant, the court should not interfere with common law.

First of all, Langille and Oliphant agree with a case called *Pepsi-Cola* wherein the Court *did* change the background common law rules with regards to secondary picketing.[68] It is not the case, therefore, that they do not think it is every appropriate to do so. Rather, they argue that in

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[66] It is reminiscent of the modern distinction between reform vs. revolution. Langille and Oliphant seem content to reform the status quo in incremental and non-radical ways, while Fudge is much more open to revolution and radical change which disrupts the status quo.
[67] Fudge *supra* nt. 1, at 613.
[68] Langille and Oliphant *supra* nt. 5, at 290; *R WDSU, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8, [*Pepsi-Cola*].

BC Health the court was not actually asked to change the background common law rules, but it did so anyway. In *BC Health* the Supreme Court of Canada needed to decide if a new law infringed the free association of health workers. For Langille and Oliphant this is a direct vertical application case which asks a simple question: Did the government act infringe the *Charter*? The problem, for them, is that the Court answers this question not by saying that the freedom was infringed, but by saying the law infringed a derivative right sufficient to the exercise of the freedom to associate. This problem is then exacerbated in *Fraser* when the Court is actually asked to decide if the government ought to be obligated to change the common law. The Court confirms in *Fraser* that there is a right to collective bargaining implied by our freedom to association which now means that any government act or omission which does not protect said right is in violation of the *Charter*. This means that by leaving the common law in place which does not create a right to collectively bargain, the government is, in theory, in violation.

For Langille and Oliphant it is not the fact that the common law is formally equal that makes the creation a derivative right a problem; it the possible hole in the overall coherence in the law that existed before the Court's decisions. Fudge's criticism of Langille and Oliphant emphasizes her overarching concern with their position which is that it fails to attend to the way that the law and historical contingency weave together, but it is important to see that Langille and Oliphant's argument is not as much about preserving the common law as it is about maintaining the formal shape of the law itself.

5 CONCLUSION

In this conclusion I want to briefly draw out some possible foundations for Fudge's concerns reflected in the second half of Footnote 7 and, to some degree, in Footnote 59. I will begin with

reflections on another essay written by Fudge and another written by Langille. This comparison offers us a clear window into how Fudge and Langille understand the potential for labour law and, thereby, another look at how they see law itself.

In 2016 Brian Langille published a chapter entitled "The Narrative of Global Justice and the Grammar of Law" which relates in interesting ways to Fudge's chapter published in 2011, "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law".[69] Both chapters are organized around the idea of re-formulating or re-imagining labour law in a way which might mitigate what Langille calls its "identity crisis"[70] and what Fudge calls its "decline".[71] I want to note that even those ways of describing the state of labour law reveals their philosophical positions. Langille refuses to acknowledge a change in quantity with regards to the law. For him it is simply the case that labour law needs to find itself again. While Fudge, on the other hand, is comfortable admitting that the nature of labour law, what it does in the world, and who it helps, is now so substantially different from how it started that, perhaps, it is more precise to say labour law as we know it is over or declining.[72] What is particularly remarkable about Fudge's and Langille's chapters is that they both engage Amartya Sen's ideas around expanding people's

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[69] Brian Langille, "The Narrative of Global Justice and the Grammar of Law", in Yossi Dahan, Hanna Lerner, and Faina Milman-Sivan eds, *Global Justice and International Labour Rights* (Cambridge: Cambridge University Press, 2016); and Judy Fudge, "Labour as a 'Fictive Commodity': Radically Reconceptualizing Labour Law", in Guy Davidov and Brian Langille eds, *The Idea of Labour Law* (Oxford: Oxford University Press, 2011). I recognize that in order to make this comparison I'm leaving Oliphant out of the equation a bit, but I think it is safe to say that Fudge and Langille are the main interlocutors here given their seniority to Oliphant. That is not to say that Oliphant isn't a major name in the labour rights world– just that the conversation I'm pulling apart here is primarily between Fudge and Langille.

[70] Langille, *supra* nt. 68.

[71] Fudge, *supra* nt. 68.

[72] This disagreement regarding how to describe the state of labour law reminds me of the philosophical thought experiment about Theseus' ship. Cf. https://open.library.okstate.edu/introphilosophy/chapter/ship-of-theseus/#:~:text=The%20ship%20of%20Theseus%2C%20also,from%20the%20late%20first%20century.

capabilities as a pathway to freedom .[73] Fudge reads Sen through a feminist lens and adds to his ideas democratic equality and a relational theory of equality.[74] While Langille focuses more on the interaction between Sen and Martha Nussbaum in relation to producing individual human freedom.[75] The difference between their conclusions with regards to how labour law ought to be reimagined relate primarily to how each author understands how people are in the world, but we can also see how these readings re-iterate their philosophical positions elucidated above.

For Fudge people are embedded in networks of relationships which require, at least at some level, some people to care for others.[76] For her, a primary piece of radically reconceiving labour law requires expanding the conception of labour to include care and domestic work. She argues that this follows a logic similar to Sen's ideas regarding improving capabilities, but, importantly, she incorporates a feminist understanding of our inherent collectedness.[77] For Fudge, as long as care workers and domestic labour remain excluded from the idea of legally regulated (and hopefully protected) labour then those workers will remain oppressed in the sense that they will never have access to protections and guarantees for improved economic positioning.[78] In this way, Fudge provides a Marxist and feminist critique of the current state of labour law and offers a realist (as opposed to formalist) description of how to broaden its effect. This position is realist insofar as it describes the relationship of law as embedded in our social realities and not as a separate or inert phenomenon independent from human interaction.

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[73] Fudge, *supra* nt. 68 at 132; and Langille, *supra* nt. 63, generally but cf. 196ff.
[74] Fudge, *supra* nt. 68 at 132.
[75] Langille, *supra* nt. 68 at 196ff
[76] Fudge, *supra* nt. 68 at 130.
[77] Fudge, *supra* nt. 68 at 132-33.
[78] Ibid., at 135.

Langille, on the other hand, is much more concerned with the liberal individual. He values human freedom in an individualistic sense which is about removing barriers, so that individuals can be fully-fledged agents in the world.[79] Thus, Langille reimagines labour law as a way of regulating the "deployment of human capital" as a way of achieving individual human freedom to lead a life each can value.[80] Part of Langille's argument in this chapter is about eschewing what he thinks of as normative and not empirical maxims such as "labour is not a commodity" and "inequality of bargaining power".[81] Rather than organize labour law around these structures, he suggests we should organize it around the idea of a state which develops capabilities of its people and then provides them opportunities for exercising those capabilities.[82] On my reading this re-formulation of labour law's principles reveals Langille's formalist tendencies in a simple way. Basically he is arguing for a version of labour regulation which creates equality of opportunity grounded in a sense of formal equality rather substantive equality. And he explicitly disregards the idea that some employment relationships are oppressive in order to focus on a kind of formal freedom to create one's own life. Again this second principle ignores historical and social realties which would make such freedom very different person to person based on their situation.

Langille's re-definition of labour law in his chapter reveals a commitment to formalism which is apparent in "Legal Structure". This commitment to formalism is also, I think, the inspiration of Fudge's concern hinted at in Footnote 7 and stated explicitly in Footnote 59

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[79] Langille, *supra* nt. 68 at 194-96.
[80] Ibid., at 189.
[81] Ibid., at 190-1.
[82] Ibid., at 196ff.

(regarding Rothstein's bad analogies). Ultimately, formalism and an over-emphasis on the individual obscures social realities. It also allows writers to make arguments claiming analytical clarity and absoluteness without explaining their underlying normative motivations. As Aditi Bagchi puts it: "exaggerating the determinacy of existing rules by obfuscating deep disagreement about the principles that motivate rules and guide their extension…" can "undermine" the rule of law.[83] Langille and Oliphant's pre-occupation with separating normativity from legality is in itself a choice pregnant with normativity and politics. By arguing for a severe separation between the realm of law and the realm of normativity Langille and Oliphant double-down on the status quo – or at least leaves less room for change.

There is another aspect of this critique of formalism which is that it inhibits understanding of class domination. Igor Shoikhebrod provides an analysis of Arthur Ripstein (one of Langille and Oliphant's sources). Shoikhebrod says that Ripstein's formalism, which is premised on the formal notion discussed above that no one can tell another person what to do, is so intensely focused on the interactions between individuals and resisting personal domination that it fails to engage with the reality of impersonal dominations of one class by another.[84] We can apply this same critique to Langille and Oliphant. They argue for the symmetrical treatment of individuals and groups which as Fudge points out misses the point.[85] Formal equality of treatment in the case of labour regulation ignores the reality of inequal bargaining power and erroneously assumes that

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[83] Aditi Bagchi, "The Contingent Politics of Legal Formalism" in Shyamkrishna Balganesh, Ted M. Sichelman, & Henry E Smith (eds.) *Wesley Hohfeld a Century Later* (Cambridge: Cambridge University Press, 2022).
[84] Shoikhebrod *supra* nt. 19.
[85] See Fudge *supra* nt. 1 at 615. And Langille and Oliphant *supra* nt. 5 at 287-8.

all people come to the negotiation table in a position to execute perfect autonomy and individual freedom.

When we think about these two chapters side-by-side we see another aspect of Fudge's realism and Langille's formalism. In this case, we can now see that those philosophical commitments are not simply related to the way these authors see the law but how they understand human interaction and society more generally.

I started this paper with Fudge's Footnote 7 which I called "ostensibly" clarifying. I used the word ostensibly because typically footnotes are meant to provide a citation, add context, or to clarify. Fudge, indeed, begins Footnote 7 with the phrase "It will become clear". However, Footnote 7 is a thick and complex signal to readers that her essay is about much more than labour rights and human rights. It is about more than Innis Christie. It is about a philosophical disagreement about the very nature of law and even about how scholars of labour law ought to argue about the subject and see the world. This is not to say that the footnote does not clarify in some sense, but, more than anything else, Footnote 7 tells Fudge's readers that she is not a formalist, and she is concerned, to some degree, with the broader implications of Langille and Oliphant's formalist ideas and how they express them.

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