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The Worker and the Law Revisited: Conceptualizing Legal Participation, Mobilization and Consciousness at Work

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Situating legal mobilization within a wide-ranging conceptual framework of worker activity that goes beyond recent interest in 'strategic litigation' and related organizing in the gig economy, this contribution explores the fundamental relationship between 'laypeople,' i.e. the non-professional subjects of law, and labour law. Notwithstanding a growing interest in empirical labour law research, there remains a lack of conceptual clarity and rigorous evidence pertaining to how workers, activists and employers think about law and how this has evolved over time. The idea, often implicit within policy discourses, that we have become increasingly 'legally-minded', and the implications of this, remain particularly underexplored. This paper develops understanding of what legal mobilization is, does, or potentially can do, mapping the range of ways in which 'laypeople' may invoke or engage with law at work, distinguishing between activities defined as (1) legal participation; (2) mobilization; and (3) consciousness. This schema goes beyond the more obvious ways in which laypeople engage formal legal institutions, 'strategically' or otherwise, towards everyday processes of constructing 'legalities.' The concept of legalities, meaning taken-for-granted assumptions about what is 'legal,' provides a lens through which to view the ideological processes involved in the constitution of society and economic institutions through law and vice versa. Revisiting the theme of the worker and the law, this schema focuses as much on how the worker understands and acts upon the conceptions of law as much as how the law characterizes and protects the worker, and how the interrelations between the two may have evolved over time.

Keywords: Legal Participation, Mobilization, Consciousness, Juridification, Individual Employment Rights, Employment Tribunals

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1. INTRODUCTION

Writing in 1965, the prominent British labour lawyer, Lord Wedderburn, noted that the situation for over half of the last century was that, 'most workers want nothing more of the law than it should leave them alone.'[1] By his third edition in 1986, he would qualify this statement by adding that: 'If there is still a preference to be left alone… there is now a stronger, though not necessarily justified, expectation that the law can be of help in time of trouble at work.'[2] In intimating this shift, Wedderburn spoke to one aspect of what has become known as 'juridification.' This ominous yet usually vaguely conceived process has been viewed as one of the hallmarks of late modernity. Among many of the most influential social theorists, including Weber, Habermas, Luhmann, Althusser and Poulantzas, we find variations of the thesis that state law has become an increasingly central feature of advanced democracies.[3] In the sphere of employment relations, juridification has been described by some scholars as *the* key trend in recent decades, transforming relations between workers, employers, trade unions and civil society organizations.[4] The idea appears in particular forms within contemporary policy discourses on 'regulatory burden,' often tied to attacks on 'overly generous' employment rights, which have decried the growing 'litigiousness' of society, with workers being too ready to file claims to employment tribunals and labour courts[5] The threat of litigation has been represented as discouraging hiring, therefore stifling employment growth, and managerial prerogative more generally. While such representations have been used to justify a range of measures intended to suppress the ease of access to justice, and hence the ability to enforce employment rights, and thus to deregulate the labour market, there is a lack of conceptual clarity and rigorous evidence pertaining to how workers actually think about law and what they want or

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[1] Lord Kenneth William Wedderburn, *The Worker and the Law*. 1st ed. (Harmondsworth: Pelican, 1965). 1.

[2] Lord Kenneth William. Wedderburn, *The Worker and the Law*. 1st ed. (Harmondsworth: Pelican, 1986). 1.

[3] Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law.* (London: Routledge, 1993).
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[4] Edmund Heery, 'Debating Employment Law: Responses to Juridification' in P. Blyton, E Heery and PJTurnbull (eds). *Reassessing the Employment Relationship*. (London: Palgrave Macmillan, 2010).

[5] For critical reviews see Linda Dickens, 'The Coalition Government's Reforms to Employment Tribunals and Statutory Employment Rights – Echoes of the Past' *Industrial Relations Journal* 45 (2014) 234; Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford: Oxford University Press, 2015); and Eleanor Kirk, 'The 'Problem' with the Employment Tribunal System: Reform, Rhetoric and Realities for the Clients of Citizens' Advice Bureaux.' *Work, Employment and Society* 32 (2018) 975.

need from it, and hence the degree to which there is growing legal-mindedness, and to what precise effects. The related though quite distinct concern about whether individual rights are displacing collective ones, and with it, further undermining trade unions and collective bargaining has also troubled labour lawyers.[6]

Most academic discussions of juridification have focused solely upon legal development and proliferation rather than the degree of their embeddedness or reverberations within societal norms and consciousness. Indeed, while opening *The Worker and the Law* with an intriguing question of legal consciousness, Wedderburn's main concern was the legal characterization, constitution and protection of the worker through law.[7] Crucial though this contribution was, subsequently, there has been a relative neglect of work specifying the concrete ways in which people have responded, particularly in terms of the cultural significance of law, and its evolution over time. The concern is to understand and illuminate the rule of law and access to justice broadly defined, as intersecting with law's co-constitutive relations with society and economic structuring, situating legal mobilization as one form of lay engagement with law. As such, this paper considers the worker and the law through the other end of the telescope, taking the perspective of laypeople as they seek to navigate their working lives. The argument developed nevertheless shares the broad thesis outlined by Wedderburn, that half a century ago most workers wanted little of law, though now many take it as given that it be of assistance in times of trouble at work. It also shares Wedderburn's caution however, regarding what the nature of evolving consciousness could mean for workers' power and the realization of the normative aims of labour law, i.e. that trust in labour law may not be entirely warranted. Two broad research questions are posed in arriving at this conclusion: How do workers engage with law and the legal system, and how might this have evolved in concert with legal development? From this vantage, we are better able to consider the lessons for legal mobilization as a concept, and in terms of implication for practice any activists and social movements who seek to draw upon and consciously leverage law.

The paper is structured around five main sections. First, I set out a clearer definition of juridification, particularly in the context of labour law and its implementation. Second, building upon those who have addressed juridification with respect to the field of work and employment relations, I consider the historical evolution of labour law as legal development, drawing out how this speaks to a certain definition of juridification but leaves unanswered questions regarding any co-evolution of legal consciousness. Third, to help address these conceptual and empirical gaps, I present a map

[6] Michelle O'Sullivan, Thomas Turner, Mahon Kennedy, Joseph Wallace, 'Is Individual Employment Law Displacing the Role of Trade Unions?' *Industrial Law Journal* 44 (2015) 222.

[7] As note 2.

of the varying ways in which 'laypeople' engage with labour law, highlighting in particular the more mundane reproduction of legalities within everyday life. This draws upon three concepts of activity in relation to law: legal participation, mobilization and consciousness. These heuristic constructs span the more obvious and formal ways in which 'the laity' engage with law, to increasingly diffuse and symbolic means, that despite their informality are means of (re)producing society and its structures. Fourth, I draw together available empirical evidence, limited though it is, that helps us sketch some preliminary answers. Fifth and finally, I suggest ways in which engaging with this perspective can help us unpick complexities regarding law's mobilizing and counter-mobilizing potential and questions of any displacement effects of the law, particularly individually-based rights, on trade unionism and collective action. The contribution of this work it to develop a more expansive, and detailed picture of laypeople's, particularly workers,' engagement with law, and to consider available evidence to clarify the nature and extent of juridification in respect of the world of work, as a preliminary step towards a future, cross-disciplinary research agenda.

2. JURIDIFICATION, THE WORKER AND THE LAW

Though the idea that state law has become an increasingly prominent organizing force within society has preoccupied social and legal theorists for more than a century, the nature and extent of juridification is complex and far from agreed upon.[8] Across the political spectrum and schools of thought, there is broad agreement that within advanced democracies, 'law has become more important or central' as 'an expanding mechanism for the regulation of social life.'[9] While it is viewed by some optimists as a democratizing force, it is viewed by pessimists as pathology, a sign of troubled times and overreach by the state. Juridification is talked of as a general tendency in societies, or at least accompanying the growth of the 'activist welfare state.'[10] Juridification can relate to the proliferation of law on the books, or the increasingly formal character of legal system, e.g. of the procedural rules of employment tribunals, the nature of hearings and demeanour of judges and clerks.[11] Statements about purported juridification usually refer to as 'evidence', one or more of

[8] Hunt, as n.3.
[9] *Ibid* at p92**.**
[10] Alan Bogg, 'Juridification in industrial relations.' In G Gall (ed). *Handbook of the Politics of Labour, Work and Employment.* (Cheltenham: Edward Elgar, 2019); Gunther Teubner, *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law*. (Berlin: Walter de Gruyter, 1987).
[11] Susan Corby and Paul Latreille, 'Employment Tribunals and the Civil Courts: Isomorphism Exemplified.' *Industrial Law Journal,* 41 (2012) 387.

the following: legal proliferation;[12] increasing legal complexity;[13] or the expansion of regulatory intervention into new spheres of activity or relations.[14]

In understanding what law is and how it relates to our lives, law and society theorists have distinguished the growing body of 'law in the books,' very strongly from legal normalisation or 'law in action.'[15] I am concerned here with the more concrete sense in which socio-economic relations are co-constituted by law.[16] Juridification is more fully apprehended, as described by Alan Hunt in the epic, *Explorations in Law and Society,* as a two-fold process whereby, in response to legal proliferation, 'wider areas of social life become subject to legal regulation and control and social relations themselves come to be treated and regarded in legalistic terms.'[17] How these dual processes are interrelated must be spelled out much more clearly in terms of the intervening processes and mechanisms between law on the books and normalization. We might question if legal proliferation is juridification at all, but rather a necessary precondition of the processes or effects specified as the second part of the two-fold process. If law remains only on the books without constitutive effects, it may merely be elegant prose or blunt rules without legitimation.

Within the sphere of work and employment, of the multiple ways in which relations are thought to have changed over the last half century, juridification is one trend, if not the 'single most important' one.[18] The first uses of the term 'juridification' are thought to have been in relation to German industrial relations, to describe the trend towards the de-politicization and neutralization of labour disputes through law.[19] More broadly, and while definitions vary, in this context juridification is most commonly used to refer to some notion of changing modes of regulation involving legal proliferation at the same time as, or even at the expense of, the relatively informal or voluntary social organization. In the context of employment relations, particularly since the 1960s, observers note a 'progressive juridification of the employment relationship as an increasing volume of statutory

[12] Marc Hertogh, *Nobody's Law: Legal Consciousness and Legal Alienation in Everyday Life.* (London: Palgrave Macmillan, 2018).
[13] Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance.* (London: Bloomsbury, 2012).
[14]Jon Clark, and Lord Kenneth William Wedderburn, 'Juridification – a universal trend? The British experience in labour law' in Teubner, as n.10; Bogg, as n.10; and see Susan Corby, 'British employment tribunals: from the side-lines to centre stage.' *Labour History.* 56, (2015) 161 for an alternative schema of juridification.
[15] Roscoe Pound, 'Law in Books and Law in Action.' *American Law Review* 44 (1910) 12.
[16] Ruth Dukes, 'The Economic Sociology of Labour Law.' *Journal of Law and Society* 46 (2019) 396.
[17] Hunt, as n.3 92.
[18] Heery, as n.4 15.
[19] Teubner, as n.10.

employment law has set the terms on which labour is hired, performed and managed.'[20]

In the UK, policy discourses grew during the 1990s, culminating in a crescendo around the 2010s just prior to the imposition of fees for employment tribunal claims, in which notions of juridification were linked to notions of growing 'litigiousness', including assumptions about workers' proclivity for raising of 'weak and vexatious' claims. This was read-off from rising instances of litigation,[21] rather than the empirical examination of the workings of law in society or popular consciousness. With the decline of formal institutions of collective interest representation and bargaining, and increasing legal intervention in employment, some authors believe that we are seeing legal norms supplant 'industrial relations norms and values.'[22] Yet, while the Employment Tribunal (ET) system within the UK and elsewhere may have become increasingly court-like,[23] it is less clear how far the legal norms that are adjudicated within the system have seeped into popular consciousness. Survey studies repeatedly demonstrate that detailed knowledge and understanding of law and rights is low, not least in relation to employment, but that people are often aware of the vague contours of our rights.[24]

We can begin to learn more about why this might by the case by considering how labour law has developed. Rather than a summary doctrinal analysis, in the next section, I review the historical development of labour law with an eye to how the manner of change may have impacted societal understandings and orientations towards law over the *longue durée*.[25] In other words, how might we expect legal development to be imprinted on work-related legal consciousness? The resulting conceptual framework sharply distinguishes juridification as a growth of positive law from the evolution of the 'living law,' meaning everyday understandings and norms that guide actions and decisions.[26] So armed, the focus moves towards an exploration of what people want from law with respect to their working lives? How do they seek to invoke it? The debate about juridification ultimately concerns social

[20] Heery, as n.4 15.

[21] e.g. for a critical review of policy discourses surround the employment tribunal system, see Kirk as n. 5.

[22] Corby and Latreille, as n.11, 388.

[23] Susan Corby and Paul Burgess, *Adjudicating Employment Rights: A Cross-National Approach.* (Basingstoke: Palgrave-MacMillan, 2014).

[24] Pascoe Pleasance, Nigel Balmer and Catrina Denvir, 'Wrong about Rights: Public Knowledge of Key Areas of Consumer, Housing and Employment Law in England and Wales.' *Modern Law Review* 80 (2017) 836.

[25] Fernand Braudel, 'History and the Social Sciences: The Longue Durée.' Immanuel Wallerstein translation) *Review* (Fernand Braudel Center) 32 (1958/2009) 171.

[26] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*. (Cambridge, MA: Harvard University Press, 1936).

theory,[27] involving questions of consciousness, morality, processes of normalization, and whether we should conceive of society as progressing inevitably. As such, debates about juridification must go beyond the proliferation of law on the books and litigation rates which may respond to it, and should connect with and be informed by the wider resources and traditions of the sociology of law. Coming full circle, the sociology of law itself requires development in this direction. When we look to it to assist with gap-filling with respect to understanding labour law, we find, puzzlingly, that:

> although the 'founding fathers' of social theory all had much to say about law, it was significant that the sociology of law has not subsequently associated any significant place within the sociological imagination.[28]

While a small but growing research community of sociological scholars has 'found a home' within law schools, it is 'insecure and often marginalized.'[29] Socio-legal work in the UK has yet to make use of and develop a conversation with the very rich North American tradition of law and society research, and the sociological concepts at its core, such as legal consciousness.[30] Such perspectives could help UK scholars grapple with the complexity of labour law's impact on society, and to connect more powerfully with much empirical research on work and employment. Building upon earlier work,[31] the contribution of this paper is to synthesize and situate available concepts and evidence to clarify the nature and extent of juridification in respect of the world of work, pointing towards lines of further research inquiry.

In reviewing how the field of industrial relations (IR) has responded to juridification, Heery noted a movement away from the "the perennial discussion of particular laws - how good or bad they are and what effects they generate – to examine more general areas of debate over law.'[32] Heery provides a useful review of debates over, for example, the desirability of regulation, drawing largely from debates within mainstream IR that focus on

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[27] Heery, as n.4. 15.

[28] Hunt, as n.3. 5.

[29] *Ibid* , see also DameHazel Genn, Martin Partington, and Sally Wheeler, *Law in the Real World — Improving Our Understanding of How Law Works*: *Final Report and Recommendations.* (London; Nuffield Foundation, 2006); Amy Ludlow and Alysia Blackham (eds). *New Frontiers in Empirical Labour Law Research*. (London: Hart, 2015).

[30] Dave Cowan, 'Legal Consciousness: Some Observations.' *Modern Law Review.* 67 (2004) 929.

[31] Eleanor Kirk, 'Legal consciousness and the sociology of labour law.' *Industrial Law Journal* 50 (2021) 405; Ruth Dukes and Eleanor Kirk, 'Law, economy and legal consciousness at work. *Northern Ireland Legal Quarterly*, 72 (2021),741.; Eleanor Kirk, 'Contesting 'bogus self-employment' via legal mobilisation: the case of foster care workers.' *Capital and Class*, 44 (2020) 531; Kirk as n.5.

[32] Heery, as n.4. 15.

issues of the mediation and enforcement of employment rights. However, we might draw more extensively from the sociology of law in order to delve further into questions of what law is and how it relates to the co-constitution of society and economy generally. Here, conceptual resources, particularly in relation to legal consciousness, offer a lens by which to magnify the minutiae of how workers mobilize, formulate their grievances and come to acquire a sense of injustice.[33] This is distinct from, but interrelated with, the historical development of labour law in its black letter form.

3. THE HISTORICAL DEVELOPMENT OF LABOUR LAW

If there has been a general juridification of society, some have argued that the sphere of working life has been a key domain. It is beyond doubt that labour law 'on the books'[34] has become increasingly voluminous, although the precise character of developments and their consequences are far from clear. Reviewing 40 years of labour law up to 2008, Wedderburn described a juridified subject matter, noting the literal proliferation of labour law, particularly with regard to individual rights. By way of example, Wedderburn pointed to how Butterworth's *Employment Law Handbook*, a rather 'modest volume in its first edition of a few hundred pages,' had increased by its fifteenth edition to just under 3,000 pages.[35] Kahn-Freund had famously observed that in 1950s Britain:

> there is, perhaps, no major country in the world in which the law has played a less significant role… and [in] which to-day the law and the legal profession have less to do with labour relations.' Collective bargaining had, instead, developed by way of 'industrial autonomy', such that 'employers and employees have formulated their own codes of conduct and devised their own machinery for enforcing them.[36]

Within a period of around four to five decades, Britain had moved towards a system of industrial relations 'whose legal framework was minimal to one where law progressively reaches into every nook and cranny of relations between employers and trade unions'[37] as with workers directly.

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[33] For a broad invocation of injustice, and how workers attain a sense of it, as the heart of industrial relations, see John Kelly, *Rethinking Industrial Relations: Mobilization, Collectivism and Long Waves.* (London: Routledge, 1998).
[34]Pound, as n. 15.
[35]Lord Kenneth William Wedderburn, 'Labour Law 2008: 40 Years On.' (2008) *Industrial Law Journal*, 36, 397.
[36] Otto Kahn-Freund, 'The Legal Framework.' In Alan Flanders. and Hugh Clegg (eds*) The System of Industrial Relations in Britain*. (Oxford, Basil Blackwell, 1954) 44.
[37] John McIlroy, *The Permanent Revolution?: Conservative Law and the Trade Unions* (Nottingham: Society of Industrial Tutors, 1991). 1.

Clark and Wedderburn,[38] and more recently Bogg,[39] have evaluated the juridification of employment relations 'against the historical development of British labour law,'[40] drawing from the classic definition of labour law's functions as provided by Kahn-Freund, and refined by Wedderburn.[41] This conception of labour law's functions is used as a lens through which to explore the changing nature of legal interventions in industrial relations. Bogg follows Kahn-Freund's 'sophisticated theory of legal norms' which allows exploration of the evolution of legal intervention, conceived of as the steer that labour law gives the industrial relations system.[42] Kahn-Freund differentiated 'norms according to their specific functions,' rejecting 'the tendency to regard law as 'monotypic.' Laws could be differentiated and catalogued in terms of their specific functions in the legal framework of industrial relations.'[43]

From Kahn-Freund's and Wedderburn's work can be drawn four functional norm-types: the regulatory, restrictive, auxiliary, and negative. These functional types 'highlight the diverse ways in which legal regulation interacted with the industrial relations system during the 'voluntarist' period of collective laissez faire.'[44] Labour law's regulatory functions involve detailed codes regarding employment standards and the means of their enforcement. The restrictive function governs, and often restrains, the powers of the parties to the employment relationship. The auxiliary function provides 'norms and sanctions to stimulate the bargaining process itself, and to strengthen the operation, that is promoting the observance of concluded agreements.'[45] The negative function refers to immunities and 'privileges' afforded as negative freedoms from common-law liabilities for unions in respect of restraint of trade, criminal and civil conspiracy, and inducing breach of employment contracts.[46]

Surveying legal development, it is the major expansion of the regulatory function, particularly in the form of individually-based rights, such as the national minimum wage and working-time restrictions, that most likely captures what is meant by juridification.[47] The impact of regulatory intervention in a worker-protective direction is complicated, however, by how labour law has, with few breaks in its history, become increasingly hostile to trade unionism, through more restrictive law, and withdrawal of auxiliary

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[38] As n. 14.
[39]As n.11.
[40] *Ibid* 180.
[41] *Ibid,* also see Trevor Colling, 'Trade Union Roles in Making Employment Rights Effective,' in Dickens as n. 13.
[42] As n.10. 182.
[43] *Ibid.*
[44]*Ibid.*
[45] *Ibid.* see also Colling as n.43. 188.
[46] Bogg as n.10 182.
[47] Colling, as n.41. 189.

support to collective bargaining. Labour law has resultantly 'shrugged off its laissez-faire character.' [48] Collective bargaining has 'diminished substantially,' by the count or proportion of workers covered and the range of issues over which negotiation occurs. This development is not solely down to legal intervention, reflecting several conjunctural factors including the nature of work, occupational structures and workplaces, and intensifying competition within global markets,[49] but labour law 'has done little to prevent them and much to facilitate' this development.[50] The cumulative effect of the development of labour law has been to cut out trade unions as the mediators of legal regulation at workplace level, while simultaneously 'the influence of law has become much more prominent and direct.'[51] Labour law has more to say about an increasing array of activities and scenarios.

One final aspect of juridification as formal legal development concerns the manner in which change has occurred. We need to be attentive, as Keith Ewing argues, to the 'competing tendencies' in how labour law been developed.[52] Scholars differ over whether there has been a straight line of juridification,[53] or more contradictory and complex trajectories which may be reversible. [54] Thus, Bogg charts periods of progress and reversal of juridification. There are numerous examples of measures passed to blatantly weaken workers' legal protections, particularly their collective power, such as the Trade Union Act 2016, 'a comprehensive statutory measure focused specifically on the repression of union activity,' which 'reveals an increasing emphasis on the use of direct coercion by the state to repress unions.'[55] More subtle, though still pernicious, has been that labour law has evolved in ways that may leave legal ideals and principles much more symbolic than real, meaning that understanding law's regulatory power is extremely complex. Governments have 'engaged in strategies of indirect deregulation, leaving the core primary rights untouched but attacking the procedural and enforcement mechanisms that support those primary rights.' [56] Such '[I]ndirect deregulation… avoids the simple repeal of statutory protections. Instead, statutory rights are formally retained, but the enforcement of those rights was undermined through a stealth attack on access to justice.'[57] We must also note that many regulations are largely an irrelevance to the growing proportion of 'self-employed' to whom they do not apply, at least for their time in this status.

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[48] Dennis Martin Davis, 'The functions of labour law.' *The Comparative and International Law Journal of Southern Africa.* 13 (1980) 213.
[49] Kelly as n.33.
[50] Colling, as n.41 190
[51] *Ibid* 189.
[52] Keith Ewing, 'The Death of Labour Law?' *Oxford Journal of Legal Studies* 8, (1988)296.
[53] see Spiro Simitis in Clark and Wedderburn as n.14.
[54] Clark and Wedderburn as n.14; Bogg, as n.10. 191.
[55] Bogg, 195, as n.10.
[56] *Ibid.*
[57] *Ibid* 196.

Deregulation by default has also been allowed to emerge because of the lack of regulatory response to the emerging new wild west frontier of employment relations in the form of the so-called ‘gig-economy,’ allowing platforms to evade labour laws, resulting in a growing swathe of people labouring under bare minimal legal protections.

Over the last half century, broadly speaking, legal development has involved the ‘proliferation of individual workplace rights, combined with successive attempts to deter individuals from enforcing them.’[58] Such attacks on enforcement reflect ‘a new strategy of neo-liberal deregulation that simultaneously achieves the functional goal of deregulation whilst evading the political and industrial resistance that usually meets the deregulation of substantive labour standards.’[59] Thus there was a ‘remarkably brief’ ‘historical window during which the “floor of rights” was underpinned by strong state support,’ making it difficult to assess law’s ‘utility as a tool for achieving workplace justice for individual employees.’[60] What concerns us here, is the related question of not only the changing character of positive law and the manner of its intervention, but the extent to which it has led to an evolution of, or even paradigm shifts in ‘public discourse’[61] and widely held understandings, values and norms among working people, the majority of whom are non-expert subjects of law,[62] as workers, employers, trade unionists, managers, activists and so on. The process of juridification (as legal development) has not been an irreversible or necessarily progressive process.[63] The temporality, as well as directional or functional trajectories of evolution, matters too. What has the stop-start and non-linear ‘development’ of labour law meant for how laypeople understand and orientate themselves towards law? In what ways, if any, might societal consciousness bear this imprint? The concern here is the cumulative effect of the historical development of labour law on popular consciousness and normalization, which in turn has feedback loops into legal activism or its lack, demands for change, or their absence. In other words, what of the residues of particular ‘juridical concepts,’[64] on societal, and particularly worker consciousness? In what follows, I draw in particular from the concept of ‘legalities’ within legal consciousness research to act as an intermediate concept bridging law and lay consciousness. Such conceptions of legality, as taken for granted assumptions of what is fair and must surely be ‘legal’, are basic building blocks of society,

[58] Barmes, as n.5. 257.
[59] Bogg, as n.10 196.
[60] *Ibid* 187.
[61] *Ibid,* 193.
[62] Patricia Ewick and Susan Silbey, ‘Common Knowledge and Ideological Critique: The Significance of Knowing That the "Haves" Come out Ahead. *Law & Society Review* 33 (1999) 1026.
[63] Bogg, as n.10. 180.
[64] Simon Deakin, ‘Juridical Ontology: the Evolution of Legal Form’ *Historical Social Research* 40 (2015) 170.

pervading legal activity and inactivity, including litigation, collective organisation and the broader repertoire of more or less formal actions.

4. TOWARDS A CONCEPTUAL SCHEMA OF LAY ENGAGEMENT WITH LABOUR LAW

In order to better understand the reach, experience and constitutive effects of law at work, we need to consider how laypeople engage with or invoke labour law. This can be grouped into three broad categories which span the more obvious ways, settings or circumstances in which people invoke or interact with law towards less apparent, more expansive means of invocation, encountering more open understandings of 'law' and the 'legal'. This broad conceptualization of engagement with law has implications for how we understand pervasive yet powerful legal discourses and ideologies, how we are shaped by and reformulate them in turn. From across studies of employment relations, socio-legal studies and more general sociological literatures on law, work and knowledge, we can sketch numerous ways in which people can be found invoking or engaging with law in the course of their everyday lives: through legal participation and enactment, legal mobilization and mediation, and finally, via the (re)production of legal consciousness. These three concepts are explored with a view to highlighting how doctrinal analysis, focused on legal texts, or law as mooted in the most formal of institutions in the land, in parliaments, in the higher appellate courts, and even the relatively accessible employment tribunal, is a world away from most people's everyday experience of 'law.'
Yet law does have a long reach into our lives, structuring cognitive schema, both leading and responding to social norms. Legal actors and perhaps 'quasi-lawyer' trade unionists,[65] or 'quasi-legal' HR professionals,[66] 'bargain in the shadow of the law,'[67] anticipating likely legal outcomes if matters were taken to court.[68] There are also more subtle ways in which laypeople, consciously or unconsciously, utilize law, attempt to participate in it, may be inspired by

[65] Trevor Colling, 'Court in a trap? Legal Mobilisation by Trade Unions in the United Kingdom.' Warwick Papers in Industrial Relations. (2009) Available at: https://warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir_91.pdf [Last accessed 10 March 2022]

[66] Eleanor Kirk,' Law and legalities at work: HR practitioners as quasi-legal professionals. *Industrial Law Journal*, 50, (2021) 583.

[67] Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce,' *The Yale Law Journal* 88, (1979) 950.

[68] They also bargain in the shadow of other social institutions such as norms about gender, parenting and work-life balance, which Albiston has shown can influence and moderate the take up of rights like parent leave. Catherine Albiston, 'Bargaining in the Shadow of Social Institutions: Competing Discourses and Social Change in Workplace Mobilization of Civil Rights,' *Law & Society Review* 39 (2005) 11.

it to take action, or to mobilize others in collective campaigns or protests. Studying how non-experts interact with and reformulate law can give voice to perspectives that are not often represented in legal judgments or opinions, sometimes referred to as professional legal consciousness or judicial reasoning.[69] Lay conceptions can reveal and illuminate how juridical concepts influence everyday life (or not), beginning with bottom-up, 'non-state' law.[70] Importantly though, how 'law' and the 'legal' are understood within these different perspectives varies from conscious to more subconscious acknowledgement, and from more formal to informal and prosaic norms and centres of authority. We can consider within such categories what evidence there may be of 'juridification,' or at least what this means in these contexts. As will be seen, these forms of activity are not mutually exclusive, but while legal consciousness, as the (re)production of legalities occurs within courts 'in a particularly condensed fashion,'[71] and legal mobilization may bring people there, and radiate a sense of injustice to a wider audience, legal consciousness provides a finer-grained understanding of law and power, and the outer-reaches of their operation.

Formal Legal participation

The most apparent way in which workers engage with labour law is when they embark upon some formal legal proceedings, whether initiating litigation, appearing in court or acting as a lay-judge. Workers may invoke law when they seek formal justice in courts and employment tribunals, where they 'have their day in court.' Drawing on the notion of a ladder of legal participation akin to degrees of political participation, workers, as laypeople generally, may have varying opportunities and capacities to engage in formal legal proceedings and to access justice without legal representation.[72] The ability of individuals to represent themselves, and of the courts and tribunals to uphold their human right to a fair trial depends both upon individual capacities and various forms of capital, as well as the design of institutional processes and supports, how 'judgecraft' is deployed, the provision of public legal education and the availability of accessible legal advice and information.[73]Effective participation concerns how far people are able to engage in and influence their hearings. Within a 'victim-complains' system

[69] See Karl Klare, 'Law-making as Praxis.' *Telos* 44 (1979) 123; Duncan Kennedy, 'Toward an Historical Understanding of Legal Consciousness: the Case of Classical Legal Thought in America, 1850-1940.' *Research in Law and Sociology* 3 (1980) 3.
[70] See Hertogh as n.12; Kirk as n.31.
[71] Hunt as n. 3.
[72] Gráinne McKeever, Lucy Royal-Dalton, Eleanor Kirk and John McCord, 'The snakes and ladders of legal participation: litigants in person and the right to a fair trial under Article 6 of the European Convention on Human Rights.' *Journal of Law and Society,* 49 (2022) 71.
[73] *Ibid.*

of rights enforcement,[74] legal participation then crucially relies on the legal mobilisation, and we will see, consciousness of workers. From the early studies of Genn[75] and Weekes et al,[76] we have considerable evidence of experiences attempting to access justice via the ET. More recent studies, build on this picture and share the key finding that claimants tend to report fairly positive evaluations of ET hearings, and judges can be observed going to great lengths to understand and adjudicate disputes. The problem is that so few justiceable claims get this far.[77]

Workers may also participate *within* the legal system making attempts to enact new laws via the method of legal enactment as distinct from mutual assurance and collective bargaining,[78] either as statutes or by attempting to take strategic cases that would set precedents in common law or offer wider demonstration effects to bolster a cause. Here we begin to stray from direct legal participation to what has been deemed 'legal mobilization.'

Legal mobilization and mediation

Within the sociology of law, a narrow definition of legal mobilization as litigation or 'claiming,'[79] can be contrasted with the use of the term to denote wider, usually collective mobilization of people behind a cause.[80] Legal mobilization can then refer to relatively informal or dispersed activities, i.e. garnering support and solidarity, or more formal, in the case of recruiting new members to a union or ensuring employment rights are implemented in a workplace. Hence, in some instances, formal litigation is initiated 'with the hope of securing the kind of negotiated settlement characteristic of organic enforcement' of workers' ends that were traditionally achieved through collective bargaining.[81] 'Strategic litigation,' at the more formal end of legal mobilization, and patently involving legal participation, is usually defined as aiming at a point of law that would impact many, or support or deny an important principle of significance beyond the specific case.[82]

[74] Dickens as n.13.

[75] Hazel Genn, *Paths to Justice* (Oxford: Hart, 1999);

[76] Brian Weekes, Michael Mellish, Linda Dickens and John Lloyd, *Industrial Relations and the Limits of the Law,* (Oxford: Blackwell, 1975).

[77] Barmes; and Kirk, as n.5; David Renton, *Struck Out: Why Employment Tribunals Fail Workers and What Can Be Done.* (London: Pluto, 2012);

[78] Sidney Webb and Beatrice Webb, *Industrial Democracy*. (London: Longmans, Green, 1898).

[79] Herbert M Kritzer, 'Claiming Behavior as Legal Mobilization.' In Peter Cane and HerbertM Kritzer (eds). *The Oxford Handbook of Empirical Legal Research.* (Oxford: Oxford University Press, 2012).

[80] Michael McCann *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization.* (Chicago: Chicago University Press. 1994); Colling as n.69.

[81] Colling, as n. 41, 197.

[82] See IER,'Strategic Legal Challenges: Pushing Back Against Attacks on Access to Justice.' Online Seminar. https://www.ier.org.uk/events/access-to-justice/ 2020. [Last accessed 10 March 2022]

The notion of legal mobilization leads us towards the more quotidian ways in which law can be used to inspire and radiate a sense of injustice, underpinning collective action, protest and attempts to use law to make strategic gains for shared causes.[83] Drawing inspiration from the civil rights movement, and the social movement scholarship inspired by it, Colling has drawn the attention of scholars of work and employment to the predominantly North American legal mobilization literature, applying these concepts to how trade unions may galvanize support from others or may campaign on the basis of individual rights or in relation to particular acts of strategic individual litigation.[84] This concept has received relatively little attention from sociologists of work, despite being arguably increasingly central to much of what social movement actors and trade unions do, and having complementarities with widely applied IR frameworks, such as Kelly's mobilization theory.[85] In demonstrating juridification, the way in which trade unions may be reluctantly forced to rely increasingly on individual rights to service individual members is often pointed to.[86] This has taken the form of documenting unions changing orientation towards law and/or member demands for legal advice and representation.[87] At the same time, recent examples of strategic litigation over employment status demonstrate the potentially inspirational effect of law to draw new members to causes, and the unions leading them, as demonstrated by the IWGB,[88] and the UVW.[89] Litigation is but one tactic to be deployed within a much broader conception of the political strategies of social movements and we should not confuse the politics of rights with litigation.[90]

Legal mobilization then relates to a much broader sphere of activity than legal participation, as it may refer to forms of action away from the courts such as protests, strikes, or simply expressions of workplace solidarity. Indeed, the need for, and potential of legal mobilization relates to the limited remedies

[83] McCann as n.80. Colling, as n.41.

[84] See also Cécile Guillaume, 'When Trade Unions Turn to Litigation: 'Getting all the Ducks in a Row.' *Industrial Relations Journal*, 49 (2018) 227; Kirk as n.32.

[85] Kelly as n.34; Colling as n 43. and Eleanor Kirk, 'The (re)organisation of conflict at work: Mobilisation, counter-mobilisation and the displacement of grievance expressions.' *Economic and Industrial Democracy* 39 (2018) 639.

[86] O'Sullivan et al as n.6.

[87] Stephen Williams, 'The nature of some recent trade union modernization policies in the UK.' *British Journal of Industrial Relations* 35 (1997) 494; Nick Bacon and John Storey, 'Individualism and collectivism and the changing role of unions.' In: Peter Ackers, Chris Smith and Paul Smith (eds) *The New Workplace Unionism*. (London: Routledge, 1996).

[88] Kirk, as n.31. See also Manoj Dias-Abey, 'Bridging the Spaces in-between? The IWGB and Strategic Litigation.' Law Research Paper Series Paper. (University of Bristol, 2021). https://www.bristol.ac.uk/media-library/sites/law/research/Dias-Abey%20BLRP%20No.%201%202021%20-%20merged.pdf [10 March 2022]

[89] See Camille Barbagallo and Katie Cruz, 'Dancers win at work: unionization and Nowak v Chandler Bars Group Ltd,' *Studies in Political Economy*, 102 (2021) 354.

[90] Hunt, as n.3.237.

available via formal legal participation. Within the UK, there are no formal 'diffusion mechanisms,' such as a legal basis to extend collective agreements or to bring 'class actions.'[91] As such, social movements rely upon broader strategies. However, informally, people may take inspiration from litigation and the 'rights' at stake within them. The campaign of foster carers to be recognized as workers is a particularly good example.[92] This group were inspired by gig or platform economy battles over employment status, i.e. 'bogus self-employment,' drawing together broad solidarities in inventive ways, and challenging definitions in law of status and rights. Ultimately, when participating in formal legal institutions or action, laypeople are wielding law in some explicit way. However, the broader sense of legal mobilization attends to ways in which people contribute to the creation of law, and the reproduction or transformation of social structures.

The boundaries of the concept of legal mobilization become blurred when we begin to consider appeals to 'natural justice' and consider the dividing line between formally legal and social norms, and state-law and non-state law. When discussing legal mobilization, writers and activists have often drawn upon notions of social rights that are,

> not dependent on the content of legal provision; they are advanced as claims on the legal system and/or other agencies of decision… The most characteristic forms of this invocation of 'justice' is as a condemnation of capitalist society as 'unjust' and the sketching out of the possibility of the essential justice of the future socialist society.[93]

The British socialist politician, Tony Benn, drew rhetorically from 'the idea of inherent rights implanted by the very fact of human existence.'[94] The further we move from invocations of rights that are categorically and consciously legal, the more we stray from legal mobilization towards something else. Using this schema brings the idea of legal consciousness to the fore. Both legal participation and mobilization relate to the relatively rare circumstances in which people litigate, mobilize, or even contemplate such acts, or are privy to such intentional, purposive action by others. Legal consciousness relates to a more subtle yet fundamental way in which laypeople engage law, involving a much wider gamut of diffuse activity and increasingly capacious understanding of 'law' and the 'legal.' Legal consciousness, as shown below, suffuses all legal activity, i.e. participation and mobilization, but also inactivity. Despite the name, the concept suggests that much of our activity, whether it acts to support or challenge existing legal

[91] Colling, as n.41. 199.
[92] Kirk, as n.31.
[93] Hunt, as n.3. 107-8.
[94] Tony Benn 1979 cited in Hunt, as n.3. 104.

orders, is unconscious in the sense of being taken-for-granted or unreflective.[95]

Legal consciousness

A rich North American literature on legal consciousness grew from out of the critical legal studies movement.[96] Building upon the likes of Marx, Gramsci, Bourdieu, and Foucault, legal consciousness research (LCR) looks at notions of law and legality in everyday life and how these form social structures. The key proponents of LCR were concerned to explore why, in general, people display a remarkable faith in the law and legal system, despite evidence of the persistent inequalities it produces or reinforces.[97] More than subjective experiences, ideas, or attitudes as individual-level variables, legal consciousness is used to denote ways of participating in the processes of social construction.[98] Thus, legal consciousness names the fact and forms of 'participation in the process of constructing legality.'[99] Laypeople are here front and centre as agents in the (re)constitution of law. As with those who have studied how people understand and deploy language,[100] LCR concerns less whether people are vastly knowledgeable about law *per se,* or even whether their understandings are accurate so much as how their conceptions of law and the legal system shape their activity as well as inactivity, and how they may reproduce or transform the structures of their lives and institutions around them.

People participate in the construction of legality, maintaining or challenging the existing legal order, whether or not they ever set foot in a courtroom or file a formal complaint. Formal legal experience, such as appearing in court, is 'not irrelevant in shaping legal consciousness, but neither is it necessary.'[101] The 'professional command of law,' does not capture all that law is; 'we need to know not only how and by whom the law is used, but also when and by whom it is not used.'[102] The range of legal activity by laypeople is therefore treated as extensive. Analogous to the way in which 'economic phenomena are associated with stock exchanges or factories,' what we generally consider to be 'law' and 'legal' activity, 'is to be found in a particularly condensed

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[95] On the latter, see Douglas Litowitz, 'Gramsci, Hegemony, and the Law.' *Brigham Young University Law Review* 2 (2002) 515.

[96] Simon Halliday, 'After Hegemony? The Varieties of Legal Consciousness Research.' *Social and Legal Studies* 28 (2019) 859.

[97] Patricia Ewick and Susan Silbey, *The Common Place of Law: Stories from Everyday Life.* (Chicago: University of Chicago Press, 1998).

[98] *Ibid* 45.

[99] *Ibid.*

[100] See John Patrick Leary, *Keywords: The New Language of Capitalism*. (Chicago, IL: Haymarket Books, 2018).

[101] Patricia Ewick and Susan Silbey, 'Conformity, Contestation, and Resistance: An Account of Legal Consciousness' (1992) *New England Law Review* 26 (1992) 736.

[102] *Ibid* 737

fashion in law courts and lawyers offices.'[103] Yet, if we focus only on the most obvious 'spatial and institutional location of social phenomena' such as law, we risk replicating 'the inference that these phenomena are not present in other locations.'[104] In a seminal work, Ewick and Silbey explored the questions: what is law to laypeople, and what roles does it appear to play in their lives? The notion of legalities, 'the meanings, source of authority, and cultural practices that are commonly recognized as legal, regardless of who employs them or for what ends,' provides a construction of what law is to non-experts and may or may not correspond closely to positive law.[105]

Just as political economists and philosophers have mused on structures of consciousness in relation to the mobilization of social and political power, scholars working on LCR consider domination and resistance in relation to legalities and law, rather than class positioning or socio-economic status *per se*, although such structures are seen to be interlocking. Within popular consciousness, Ewick and Silbey find three central 'metastories' of law. These 'metastories' are narratives

> that represent and shape how people experience legality. People draw upon these frames in constructing and interpreting their own experiences and accounts of law... Each frame or schema draws upon different cultural images to construct a picture of how the law works. Each invokes a different set of normative claims, justifications, and values to express how the law ought to function.[106]

The metastories involve reverence to state law seen as transcendent, impartial and magisterial ('before the law'), a game-playing approach ('with the law'), and a cynical/critical response ('against the law'). Most people express combinations of the metanarratives as they represent their worldviews, often in contradictory ways, often within the same breath as they describe their actions or justify their opinions. Such complexity and contradiction is what affords law its ideological power. If law were entirely monolithic, simply god or gimmick, it would be prone to collapse. Instead it gives a promise of reform and being put to better use of which we remain optimistic.[107] When we talk of legal domination therefore, the complexity of legal structures imagined, against false consciousness, highlights that 'it is necessary to insist on the contradictory nature' of popular consciousness.[108] Legal ideologies which may dominate consciousness are not unitary entities but draw power from

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[103] Hunt, as n.3. 329.
[104] *Ibid.*
[105] Ewick & Silbey, as n.97. 20.
[106] Ewick and Silbey as n.62. 1027-8.
[107] Susan Silbey, 'After Legal Consciousness.' *Annual Review of Law and Social Science* 1 (2005) 323.
[108] Hunt, as n.3. 93.

their 'ability to connect and combine diverse mental elements (concepts, ideas) into combination that influence and structure the perception and cognition of social agents.' [109] The beauty of the concept of legal consciousness is that it assists us in appreciating the fullest reaches of law into society and to engage in questions of legal domination and hegemony without falling into hopeless traps of overdetermination by law, treating it as merely an 'ideological cloak' of class power that blinds and overwhelms people who are then powerless to resist.[110] Law simultaneously serves and constrains, reflecting accommodations by the state of demands emanating from society, and is constitutive of relations which both constrain and enable social actors and social justice. The concept of legal consciousness, particularly the notion of 'legalities' better equips us to explore how our vague notions of our rights relates to the law on the books, and how these contribute to the reproduction or more rarely transformation of the existing order, linking to notions of legal domination and hegemony.

5. KEY INSIGHTS CONCERNING LAY ENGAGEMENT WITH LABOUR LAW

What do we know of these forms of activity and how they have evolved over the last half century, in tandem with labour laws that have decollectivized, and indirectly deregulated? To this rather sweeping question, I now offer an equally broadly sketched response. In brief, we have seen rising legal participation, increasingly innovative forms of strategic ligation combined with organizing, in the wider sense of legal mobilization among diverse groups and new industries as well as older trades and professions. Indeed, such legal mobilization in the gig or platform economy has placed a spotlight on employment rights and the limits of law on the books as it stands, inspiring many to take legal action as well as join trade unions. However, there are also signs that our trust in law to 'be there' in the event of problems at work forms for many non-union workers a sense that they are insured, and do not require the mutual assurance of trade unionism. Related tendencies that may lead to the counter-mobilization of workers' power and self-organization additionally draw power from a seemingly innate bias towards assuming that the law will reflect our own sense of justice or natural justice. This leaves the vast majority of us unprepared to enforce our rights effectively, and worse, with rights as supposed insurance, we tend not to undertake other means of protection, such as the mutual insurance of trade unionism.

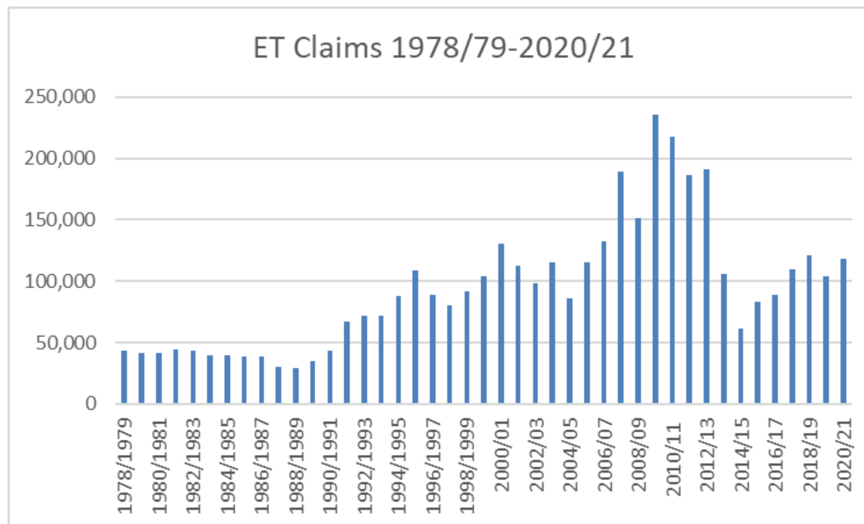
[109] *Ibid* 121.
[110] *Ibid* 13.

5.1 Legal participation

One of the places in which assumptions of juridification can be amply observed is in policy discourses around employment law generally, and the use of the tribunal system particularly. In the last two to three decades, we have seen attempts by successive governments to restrict the legal participation of laypeople, both as litigants and as lay-judges. The fairly steady rise in ET claims since around 1980 has been interpreted as excessive by successive governments since around the 1990s, although claims were to continue climbing and peak around 200,000 per year prior to the Great Recession.[111] Discourses centred upon restricting the ease of claim-filing, with the argument put forward that the costs of running the system were too high, the disincentive to hiring too great, and that many claims were in any event of dubious merit. By the 1990s, governments were fretting that the number of claims were unacceptably high.[112] The momentum behind these discourses mounted, culminating in the imposition of fees in 2013. Though these were ruled as unlawful in 2017, the number of claims submitted per year has yet to reach anywhere close to pre-fees levels.[113] In 2020-21 there were 117,926 claims compared with 191,541 in the year before imposition of fees, and of a peak of 236,100 in 2009-10.[114] The number of claims submitted in the year following the imposition of fees was nearly half the pre-fees figure.[115]

Figure 1. Claims to the Employment Tribunal: 1978/79-2020-21

[111] See Kirk, as n. 5.
[112] *Ibid.*
[113] GOV.UK, Tribunal Statistics Quarterly: January to March 2021. https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-january-to-march-2021 [Last accessed 10 March 2022]
[114] *Ibid.*
[115] *Ibid.*



The ET system was originally intended to facilitate workers' (unrepresented) participation, by offering a speedy, accessible and affordable means of resolving workplace disputes, particularly individual cases that may lead to collective stoppages.[116] The ET is seen to have undergone a significant formalization, becoming more court-like in its rules and procedures.[117] The presence of lay judges from 'both sides of industry' was intended to bolster the informality of the ET in the UK, also appearing in some first-instance labour courts in other countries.[118] Their participation assists judicial decision-making, offering a lay perspective on what is deemed fair, reasonable within the workplace context, i.e. rather than the decision being limited to legal considerations by specialist employment judges. Controversy has risen in the UK and Ireland regarding lay participation in ETs because of the removal of lay judges from all but the most complex cases. A single judge sits alone in the majority of cases. The full panel now sits for certain types of claims such as discrimination or cases that are considered particularly complex. This is itself considered an aspect of increasing legalism, as ETs are increasingly guided by professional lawyers rather than laypeople.[119] Between the 2013 and 2018 surveys of ET applications, the proportion of worker-claimants represented at hearing increased from 33% to 41%. Employers were represented in 77% of hearings in 2018 compared with 67% in 2013.[120]

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[116] Renton, as n. 77.
[117] Corby and Latreille, as n. 11.
[118] Corby and Burgess, as n.23.
[119] As n.19.
[120] SETA (2020) Survey of ET Applications. https://www.gov.uk/government/publications/survey-of-employment-tribunal-applications-2018 [Last accessed 10 March 2022]

Numerous studies of the workers' experience of ETs show hearings and judges in a positive light. Judges are shown to go to extraordinary lengths to assist unrepresented parties in articulating their claims or responses, and to spend a great deal of time and effort getting to the heart of workplace disputes.[121] The overwhelming problem is that so few justiceable claims are raised,[122] with workers discouraged by real and imagined difficulties they will encounter, with some abandoning valid claims due to the stress and pressure.[123] In examining access to justice, researchers have moved towards progressively closer examination of experiences of access to justice provided by the ET system.[124] Such studies have examined claim formation and advice-seeking behaviour in response to problems at work,[125] in addition to experiences of formal legal proceedings, such as tribunal hearings.[126] Importantly, this has extended backwards through claim mobilization processes, and has considered within longitudinal research, why collective mobilization may fail or even be counter-mobilized. This is returned to in greater depth in relation to workers' legal consciousness.

5.2 Legal mobilization

Beyond individual claims, legal mobilization in its broader sense of invoking the politics of rights has long been a tactic of workers' collective organizations and networks. New causes, sectors and injustices have emerged or taken on increased significance as struggles, not least the increasingly embattled frontier of employment status. Misclassification, denying workers' attendant rights, has been repeatedly trounced in courts in many jurisdictions, but few have legislated, allowing employers, posing as 'intermediary' platforms to continue to side-step labour law obligations.

While difficult to quantify in its broader form, there has been an uptake in academic interest in mobilizing around legal battles, and considering the reach of 'strategic litigation' to recruit, organize and mobilize workers with mounting examples of innovative campaigns and cases.[127] Trade unions have been pushed, sometimes reluctantly, to become more

[121] Barmes, as n.5.
[122] *Ibid.*
[123] Kirk as n.5.
[124] E.g. Nicole Busby and Morag McDermont, 'Fighting with the wind: Claimants' experiences and perceptions of the Employment Tribunal', *Industrial Law Journal,* 49 (2020) 159. Kirk, as n. 5.
[125] E.g. Jane Holgate, Janroj Keeles, and Leena Kumarappan, 'De-collectivization and employment problems: the experiences of minority ethnic workers seeking help through Citizens Advice.' *Work, Employment and Society,* 26 (2012) 772.
[126] E.g. Busby and McDermott, as n.124.
[127] Kirk, as n.32. IER 2020 as n.82, ; Dias-Abey 2021 as n.88; irel, 'Litigation (Collective) Strategies to Protect Gig Workers' Rights: A Comparative Perspective.' Online Seminar. (2021). https://player.vimeo.com/video/644714860?h=d9b8ff7142

legally conversant. New 'indie unions' like the IWGB have gained considerable success in recruiting and organizing several sectors, often focused around the extension and bridging of employment status misclassification as it impacts an array of workers including charity workers, cleaners, cycling instructors, nannies, au pairs and yoga instructors, as well as the more familiar couriers, drivers and riders who have attracted media attention.[128] The IWGB have been highly conscious and explicitly strategic litigators who advocate unions development of litigation strategies in aid of collective organizing by instilling rights consciousness.[129] There remains, however, an understandable reticence among many trade unions, particularly more traditional ones, to encourage litigation for fear of instituting member passivity. At the same time, advice agencies, and civil society organizations have also emerged as necessary 'new actors' in the sphere of legal advice and representation, [130] responding to the void of trade unionism in many workplaces and sectors. Such services, largely staffed by volunteers, are recognized as vital bastions of support for unorganized workers. They have nevertheless sometimes attracted criticism for perpetuating an individualized conception of problems at work, rather than channelling grievances towards collective mobilization. [131] Anna Pollert has raised the difficult but apt question of whether weak and under-resourced support is better than none, if governments are able to deflect responsibility for strengthening rights enforcement by being able to point to the existence of an infrastructure, albeit threadbare, to assist people in asserting claims.[132]

Tensions between activist-led and atomizing rights consciousness go to the core of unions' uneasy relationship with state law and the courts. Much work remains to be done in understanding and potentially measuring the effects of legal mobilization and for example, the organizing capacity of strategic litigation and the divergent strategies of different organizations and groups Researchers could draw lessons particularly from North American literature, such as McCann's study of the movement for equal pay,[133] but also

[128] https://iwgb.org.uk/en/branches/

[129] Jason Moyer-Lee and N Kountouris, 'The "Gig Economy": Litigating the Cause of Labour.' In *Taken for a Ride: Litigating the Platform Model.* iLaw. (2021). https://www.ilawnetwork.com/wp-content/uploads/2021/03/Issue-Brief-TAKEN-FOR-A-RIDE-English.pdf

[130] Edmund Heery, Brian Abbott and Stephen Williams, ' The Involvement of Civil Society Organizations in British Industrial Relations: Extent, Origins and Significance.' 50 *British Journal of Industrial Relations,* (2012) 47.

[131] Anna Pollert, *The Unorganised Vulnerable Worker: The Case for Union Organising.* Liverpool: Institute of Employment Rights, 2007).

[132] *Ibid.*

[133] McCann. As n. 80.

from more general concepts of frames and framing as it relates to the politics of rights at work.[134]

5.3 Legal Consciousness

Through the lens of legal consciousness, though less often attended to, there are perceptible indications of how labour law is invoked, and how this might have traced the legal development and proliferation over several decades. Here, I draw mainly from two studies for illustration. One, conducted with colleagues at the Universities of Strathclyde and Bristol, examined the live dispute trajectories of workers, who were generally not union members and could not easily afford a lawyer, as they contemplated disputes. Accessed through Citizens Advice Bureau, the study followed workers through their contemplation and pursuit of ET claims and attempts to enforce awards where they eventuated. The second, more recent study, conducted at the University of Glasgow, explored the legal consciousness of HR professionals, investigating how they understood law at work, how it should be implemented and how to respond to workers' mobilization of it.

Refuting myths about nuisance litigants bringing 'weak and vexatious' claims against employers at the drop of a hat, reflecting a 'compensation culture,' the CAB-EMP study showed workers reticent to raise claims and not 'in it for the money,' although they had little option but to seek to make employers figuratively pay for their failure to grant rights, people sought justice, and reached for the law relatively far down the path of dispute trajectories and mounting grievances.[135] While multifaceted representations of law appeared among workers' narratives, there was a common, generalized trust in law to 'be there' in times of trouble at work.[136] The study observed many workers receiving advice that claims were unlikely to succeed in some cases who were disappointed when they learned of qualifications of rights, such as the two-year qualifying period for unfair dismissal, the off-putting prospect and experienced difficulty involved in enforcing their rights, and actually going the distance in sustaining a case, even where they had a high degree of assistance from CAB advisers or even representation at ET. Few were prepared for how much time, effort and evidence would be required, or the limited nature of remedies available. Such findings are backed by survey evidence on rights consciousness. Knowledge of rights with respect to

[134] E.g. Robert D Benford & David A. Snow (2000) 'Framing processes and social movements: An overview and assessment', *Review of Sociology*, 26: 611–39; Doug McAdam, 'Micro-mobilization Contexts and Recruitment to Activism.' *International Social Movement Research* (Greenwich, CN., JAI Press, (1988). 125; William A Gamson, *Talking Politics,* (Cambridge: Cambridge University Press, 1992).

[135] Kirk as n.5.

[136] Eleanor Kirk and Nicole Busby, 'Led Up the Tribunal Path? Employment Disputes, Legal Consciousness and Trust in the Protection of Law.' *Oñati Socio-Legal Series* 7 (2017) 1397.

employment, as well as consumer and housing rights, is low, and we tend to operate on a 'need-to-know' basis.[137]

Additionally, we must carefully consider the operation of legal ideology, and justificatory policy discourses in law are presented to the public as they circulate within society and are disseminated, as much as the instrumentality of any particular piece of legislation or judicial ruling in an immediate or short-run sense. CAB-EMP participants recounted and shaped discourses circulating at the time about the need for fees to curb vexatious claims deemed to be burdensome to the taxpayer. This added a deterrent weight to the scales of whether to proceed with the fraught process of disputing for many potential claimants.[138]

What the CAB-EMP study suggests is that employment rights often live in our minds as an unread insurance policy cited as a reason for not seeking mutual insurance of trade unionism.[139] Workers often belatedly regretted not having been members of a union. Few had previously been actively hostile towards trade unionism; they simply thought that as rights bearers within a civilized society, they did not require union membership in order to deal with their employers. This related to a more generalized bias, which perhaps reflects what 'law' is to us as laypeople: we are reverential and optimistic enough of law to continually engage with it, assuming that which is egregious will be illegal, and that the law will be on our side in the event of a dispute.[140] Without formal legal training, we naturally draw upon an assemblage of multiple reference points including conscious formal legal knowledge and research of varying degrees of accuracy, word-of-mouth, political discourses, cultural representations of law, the organizational practices and policies of current, previous employment or that of others.[141] As such we imbue this assemblage with a sense of hope, at least if we attempt to engage it. *Cruel Optimism,* we may say.[142]

Connecting with the earlier discussion of juridification as legal proliferation, it is important to underscore that this significant gap between expectation and legal reality may be deepening because of the peculiar historical development of labour law. [143] Generous sounding rights have been reduced to 'paper tigers,' as Bob Hepple, and subsequently Anna Pollert, have

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[137] Pleasance et al, as n.24.

[138] Kirk as n.5; E Rose and N Busby, 'Power in Employment Disputes.' *Journal of Law and Society* 44 (2017) 674.

[139]As n.136.

[140] Silbey as n.107.

[141]As n.136 and n.138. See also McKeever et al as n.72. and Pleasance et al as n.24.

[142] I thank my friend, Kendra Briken for bringing L Berlant, *Cruel Optimism.* (London and Durham, Duke University Press, 2011), to my attention. Berlant suggests that there is a tendency for us to remain stubbornly attached to unachievable fantasies of 'the good life' despite consistent evidence to the contrary since at least the 1980s in terms of social mobility and job quality.

[143] Barmes, as n.5. Bogg, as n.10.

argue: ‘fierce in appearance but missing in tooth and claw.’[144] Adding to this, connecting with the work of labour lawyers such as Lizzie Barmes and Alan Bogg, it looks as though legal consciousness bears the imprint of the peculiar way in which labour law has been developed, with big headline assurances in the form of basic rights - to a minimum wage, protection from unfair dismissal and so on - the enforcement of which have been steadily undermined by success governments. It is little wonder that when we are only vaguely aware of the details of our rights, we tend to overestimate the level of protection and underestimate the difficulty we will have enforcing them.[145]

Finally, while unions have declined, very partially replaced by advice agencies and civil society organizations as assistors and advocates, employers, and HR people as their agents also mobilize the law in the wider sense of drawing on its concepts in order to confer legitimacy upon themselves and their actions.[146] While this may in some contexts assist in bridging the law into the workplace, it also may act as a form of legal counter-mobilization where it subverts the normative aims of labour law,[147] helps organizations ‘sail close to the wind,’ and thwart disputes, strengthening the employers’ hand and more broadly quelling wider social critique and unrest.[148] As institutions mediate the law,[149] they can frustrate that translation process as it is embedded.

6. CONCLUSIONS

Available evidence suggests that Wedderburn’s neat encapsulation of juridification as ushering in an era in which workers increasingly look to law to rectify problems at work may have some grounding. Unfortunately, so too does his pessimism regarding what this development has achieved so far. While access to ‘justice’ in terms of ability to raise a legal claim individually is vital, there are ways in which workers’ generalized trust in the current system (at least prior to encountering it) appears misplaced. As much as legal mobilization can be an effective tool in workers’ struggle, our trust in law can be a weakness when the system fails us in terms of enforcement meaning that

[144] Bob Hepple, ‘Enforcement: The Law and Politics of Cooperation and Compliance,’ in B Hepple (ed.) *Social and Labour Rights in a Global Context: International and Comparative Perspectives. (*Cambridge: Cambridge University Press, 2003); Anna Pollert, ’Britain and Individual Employment Rights: ‘Paper Tigers, Fierce in Appearance but Missing in Tooth and Claw.’ *Economic and Industrial Democracy.* 28 (2007) 110.
[145] Bogg as n.10. Barmes, as n.5.
[146] Kirk, as n.66; Dukes and Kirk, as n.31.
[147] David Doorey, ‘What Is Human Resources Law?’*LLRN Draft paper*, June 2021.
[148] See Luc Boltanski and Eve Chiapello, *The New Spirit of Capitalism.* (London: Verso, 2018).
[149] Linda Dickens, ‘Women—A Rediscovered Resource?’ *Industrial Relations Journal* 20 (1989) 167; Heery, as n. 4, 9.

our rights, while not exactly 'mythical' as Scheingold put it, are often inaccessible, or unenforceable.[150] Broadly speaking, we have seen increasing recourse to law to resolve problems at work (participation) and increasingly innovative campaigns involving strategic litigation and the invocation of rights to recruit union membership and galvanise those already in membership (mobilization). When we consider legal consciousness, we are reminded of how our taken for granted assumptions about law have for many workers limited activism as well as inspired it

Moving towards a closer knowledge of the contours of such conceptions of legality, the concern of the paper has been the rule of law and access to justice very broadly defined. The road to the tribunal and court is long and, given that so few cases ever get that far, it is worth broadening our perspective on access to justice. Even for those contemplating disputes actively, which many are disinclined to do despite a ferocious sense of injustice, it is an obstacle race as David Renton so vividly portrayed it.[151] But there are significant barriers as well as the more obvious hurdles of costs, stresses, difficulties of maintaining a dispute, or feeling that this outweighs, for example 'business needs' to shed labour in a downturn. In understanding how effective campaigns, tactics, avenues of communication and dissemination take root, the concept of legalities drawn from legal consciousness research can help us understand how workers obtain a sense of injustice and can be mobilized around it, which may or may not tally neatly with what the law in the books ostensibly offers.[152] Understanding workers (and employers) sense of legalities can help us understand where the 'snakes' and where the 'ladders' are in the legal system as we go about attempting to mobilize the law, and organize around it.[153] Exploring and understanding the mundane reproduction of legal and social norms can allow us to analyse how this quotidian process connects with the relatively rare moments of individual strategic challenges and explicit collective legal mobilisation activities. The concept of 'legalities' provides a way of thinking about what non-experts see as, or assume to be law, and how such conceptions are produced. Inaccurate understandings of law can lead to audacious or irreverent optimism in spite of law, but trust in the protection of law can act as a significant barrier to justice where people overestimate its protections and underestimate the difficulties of enforcement.

Labour law is not only mobilized by workers, unions, advice agencies, civil society organizations and activist lawyers, but also by capital, including, perhaps most comprehensively and studiously, by the HR function, who both implement aspects of law, and also bend and twist it in ways that can act to

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[150] Stuart Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Social Change*. (New Haven: Yale University Press, 1974),

[151] Renton as n.77.

[152] Kelly as n.33 on collective mobilisation.

[153] The analogy of legal snakes and ladders come from Barmes, as n.5, 119.

counter-mobilize workers and subvert the normative aims of labour law.[154] As law is translated and encoded into organizations it is 'managerialized,'[155] tending to lose its normative integrity.'[156] HR practitioners as an emergent 'compliance profession,'[157] have capitalized on legal proliferation in the employment sphere. As part of a professionalization project, they have sought to claim legal expertise in order to legitimize the occupation.[158] In turn, their corporate support, while implementing law at work after a fashion, also ultimately strengthens the hand of the employer to act in ways that are compliant, but 'sail close to the wind' legally. They tend to implement a narrow version of labour law,[159] reminiscent of a political current that Nancy Fraser has called 'progressive neoliberalism.'[160] More subtly though, they impact conceptions of legality among workers, and their ability to mobilize the law. The work of the HR function blends law as it translates and encodes it with managerial prerogative, making it hard to distinguish which is which in organizational policies and procedures. A particularly pertinent example is how the law is communicated to workers in the course of industrial disputes, where employers state what workers and trade unions may or may not do. This is a subtle art, but needs to be more fully understood in order to appreciate the context within which workers act, and how they may be counteracted.

As Adams, Adams-Prassl and Adams-Prassl have stressed in a recent paper, increasing moves toward 'open justice,' whether based on the open sourcing of legal information, or the public availability of ET judgments, offers potentially emancipatory impacts to non-experts (as well as researchers).[161] 'Open justice' is not the same thing as access to justice though.[162] There are also great perils of expecting non-expects to navigate these increasingly law-thick terrain, with dwindling support of advice, whether from unions, advice agencies, or increasingly scarce legal aid. More research is needed on how this situation is unfolding, both of a richly detailed ethnographic kind, and of a broad, large-scale type on the knowledge,

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[154] On 'counter-mobilization' see Kelly as n.33.
[155] Lauren Edelman *Working Law: Courts, Corporations, and Symbolic Civil Rights.* (Chicago: Chicago University Press, 2016).
[156] Barmes as n.5.
[157] See Kirk as n.66.
[158] Eleanor Kirk and Esme Terry, '(De)professionalisation and the role of 'law': Evolving Professional Projects in HR and legal services.' BUIRA Online Paper Development Session. September 2021.
[159] Doorey as n. 147.
[160] Nancy Fraser, 'The End of Progressive Neoliberalism. *Dissent.* (2017) http ://www.bresserpereira.org.br/terceiros/2017/fevereiro/17.02-End-of-Progressive-Neoliberalism.pdf [Last accessed 10 March 2022]
[161] Zoe Adams, Abigail Adams-Prassl and Jeremias Adams-Prassl, 'Online tribunal judgments and the limits of open justice.' *Legal Studies* (2021) 1.
[162] I am grateful to my colleague, Nicole Busby, for bringing this point out in a discussion of this paper.

capabilities, understandings and orientations of societies towards law, across contexts, and ideally longitudinally.