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POST-INDUSTRIAL JUSTICE?
NORMATIVITY AND EMPIRICISM IN A CHANGING WORLD OF WORK

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Abstract:

We revisit the theme of industrial justice developed by Philip Selznick in his 1969 study of Law, Society and Industrial Justice, asking, what can we learn or retain from Selznick's work? Any attempt to reconstruct industrial justice today will encounter very significant obstacles. In the course of the past half century, several of the pillars of industrial citizenship have crumbled; working relations have become increasingly casualized and precarious; for a growing number of workers, there are by now no employing organizations in the physical sense that Selznick envisaged: spaces where workers meet with co-workers and managers on a daily basis. For many, an important feature of the current Corona pandemic has been a move to working from home; a move that for some may not be reversed or wholly reversed when the pandemic comes to an end. Viewed through a wide lens, this may be understood as an acceleration, stimulated by the Corona containment measures, of already apparent trends towards home working and, more generally, the fissuring, outsourcing or even disappearance of workplaces. With an eye to these trends, and to the changing spaces and organizational forms of work today, we identify as particularly instructive Selznick's characteristic combination of normativity and empiricism, grounding everyday conceptions of justice in affective personal ties among socialized human actors.

Introduction

To read *Law, Society, and Industrial Justice* today is to step back into a world of apparently limitless optimism: the world of New Deal America, Wagner Act collectivism, and corporations with a conscience. Selznick's main theme is law and social progress, observed in the particular context of organizations that are in the process, we are told, of becoming civilized. In both the public and the private sector, organizations are tending *of themselves* towards bureaucratic, rule-bound forms of management that will leave them ripe for

development into sites of industrial democracy and industrial citizenship, provided only that trade unions give them a final push in the right direction. While there are strong echoes of structural functionalism in the mode of analysis, there is consideration, too, of questions of agency and of politics. This is postwar American sociology at its best.

Viewed in the light of what has happened since—the shareholder value revolution of the 1980s and the subsequent fissuring and fracturing of postwar systems of labor law and industrial relations—Selznick's optimism may appear not only limitless but misplaced. Working relations today are increasingly casualized and precarious; trade unions have been side-lined; new methods of production can obviate the need for employers to treat their workforces well in order to ensure their loyalty and committed engagement with the tasks assigned to them. Especially in the wake of Covid-19 and the mass move to working from home that it has occasioned, there are, for a growing number of workers, no employing *organizations* in the physical sense assumed by Selznick: places where workers meet with co-workers and managers on a daily basis. In such circumstances, the prospects for a reconstruction of industrial justice, of dignity for workers and post-industrial democracy, appear bleak indeed. Can anything be learned or retained from Selznick's study or is it by now a work of historical curiosity only?

In the first part of this chapter, we offer an extended discussion of *Law, Society, and Industrial Justice*, focusing on Selznick's vision of industrial justice and industrial citizenship, and on his discussion of social and legal change. In the second, we reconsider the work in the light of what we know today, arguing for a rediscovery of the capitalist nature of the contemporary political economy and its reinsertion in the study of work and industry, as a precondition of identifying, as we do in the third part, the very significant obstacles that stand in the path of industrial justice. In the fourth and final part, we take inspiration from Selznick to seek out latent values in currently existing social arrangements that might, in the right conditions, develop and be helped to develop in precisely the direction of a reconstruction of industrial justice, those obstacles notwithstanding (Krygier 2012, 137). Here we draw on recent ethnographic studies of occupational communities—groups of workers formed around a common position in work and employment—which reveal working life and relations between co-workers to be sources of normativity: sites of "incipient law," to recall Selznick's term. Even under the precarious working conditions characteristic of the post-industrial

economy, social identities and ideas of social justice form around work and employment relations. Social bonds among workers in the same occupation or workplace produce and sustain strong and enduring beliefs regarding fairness and justice at work. The primary task for law, we argue, is to help build institutions that facilitate the transformation of informal social norms into formally binding legal rules.

Law, Society, and Industrial Justice

In *Law, Society, and Industrial Justice*, Selznick famously addressed the question of whether the rule of law should apply to "the conditions of employment in modern industry" (1969, 3). On one reading, the book comprised the construction of an argument in favor of the extension of the rule of law from the field of government to employment relations, which resonated strongly with already well-established lines of reasoning in industrial relations and labor law (Webb and Webb 1897). The power that the employer wielded over the worker was analogous to the power wielded by the sovereign over the subject, so that reasoning went, and should be limited in similar ways and on similar grounds (Selznick 1969, 38, 70–71). For Selznick, the choice of topic was informed by a long-standing interest in the fate of values or ideals in the course of social practice and by his research in the fields of law and legal philosophy (Krygier 2012; Priban 2017). Here, as elsewhere, the *organization* was his primary unit of analysis, offering him an approach to his subject which blended elements of normative theory with sociology, and of natural law with legal positivism.

In line with Selznick's broader interests in the "embodiment of ideals in institutions, the infusion of group life with the aspirations and constraints of a moral order," the extension of the rule of law to industry was viewed by him as a process of what he called "moral and legal evolution" (1969, 3). His focus lay with the internal dynamics of organizations rather than with either external pressures for change or real world outcomes. At the time of writing, he felt able to identify an immanent strain within organizations towards "legality"[1] (ibid., 11): "an evolution from arbitrary power to self-help to accommodation to the beginnings of a rule of law" (ibid., 22). To be sure, there was nothing inevitable about such progression. In this specific case, as more generally, the embodiment of ideals in institutions was likely to be "partial and incomplete … born of confusion and sustained in struggle" (ibid., 3). Rather than predicting a particular future, the primary aim of Selznick's endeavor was to understand, "the

values themselves … the characteristic ways they are elaborated and extended … the social circumstances that invite or resist them" (ibid.). As he put it in later work, he wished to develop, "a theory of institutional change and response whose intellectual function is to identify potentials for change in a specified range of situations" (Nonet and Selznick 1978, 23).

In the United States in the late 1960s, employment relations were shaped within organizations primarily by management, and by trade unions bargaining collectively with management. In *Law, Society, and Industrial Justice*, Selznick devoted a chapter to each, identifying in these elements of the "inner order" of industrial organization the origins of the evolutionary strain towards legality (1969, 212). Referring to Max Weber, he first emphasized the impulse to formal rational law and to the rule of law that was contained within bureaucratization as a social process (ibid., 75–82). As the management of firms had become more bureaucratic, so those firms had evinced a strain toward internal legality (ibid., 82). Human resource management techniques and the "managerial need to take account of human needs and aspirations" could also tend towards rule-governed decision-making but only where they were supplemented by a "political dimension": the creation of trade unions, the struggle for recognition and power, the demand for new foundations of authority and new forms of participation (ibid., 75, 121). Trade union recognition and collective bargaining could serve to constitute a particular method of management, synonymous in this case with a particular form of government. "Management becomes more conscious of rules, more conscious of rights, and more capable of building that consciousness into the routines of institutional life" (ibid., 154). Decent treatment of the worker was no longer in the gift of human resource managers but was now the workers' due: "a claim of right" (ibid., 120). The endpoint of the pathway of "moral evolution"—not inevitable but foreseeable—was, then, a constitutional order within the organization, the organization now understood to be a polity, and the worker a rights-bearing member of that polity. Adolf Berle spoke at the time of an emerging "corporate conscience," and here he was cited with approval (ibid., 71).

> So, it seems, the corporations have a conscience, or else accept direction from the conscience of the government. This conscience must be built into institutions so that it can be invoked as a right by the individuals and interests subject to the corporate power. (Berle 1954, 113f)

Law, Society, and Industrial Justice could be read in large part, wrote Selznick, as a "quest for corporate conscience: its origins, its locale, its sustaining forces, its legal implications, its troubles and limits" (1969, 71).

In charting the course of the moral evolution of employing organizations, a particular point of interest for Selznick was the role played by law in mediating social change (ibid., 122). In a chapter entitled "The Quest for a Law of Associations," he reviewed "the competence of Anglo-American law to grasp the associational reality of industrial life," and found it wanting (ibid., 35). In respect of employment relations, he argued that to conceive of such relations as contractual, and as consisting simply of the sale of labor in return for a wage, was highly reductive: "a radical abridgment of the true legal and social situation" (ibid., 135, 52–62). More accurate and more useful was to recognize that contract was supplemented, in this case, by *status*: by a set of rules imposed upon the parties rather than agreed by them voluntarily. From early modernity until as late as the nineteenth century, workers had had the status of "servants" employed by a "master" (ibid., 122–37). In the late twentieth century, as organizations evolved into constitutionalized polities, the worker assumed the status of *industrial citizen*, with industrial citizenship conceived of here as particular to a single organization.[2] The collective agreement—known in the US as a "collective contract"—was, meanwhile, a *constitutive* contract: "an instrument of government," which provided for the recognition of the trade union and the participation of the employees, through their union, in the continuing process of rule-making and administration (ibid., 153, 137; Cox 1958, 22).

Selznick's consideration of the role of law in organizational evolution began with a set of observations regarding the nature of law; its generic quality and occupation of a *realm of value*. Drawing on the work of both the legal positivist H.L.A. Hart and the natural law theorist Lon Fuller, Selznick reached the conclusion, of central importance to his wider project, that law should be seen as endemic in all institutions that relied for social control on "formal authority and rule-making" (Selznick 1969, 7). He then turned to consider law from the perspective of moral evolution, asking what it meant to "legalize" an institution (8). Law was not only a functional necessity, he emphasized, it was also infused with normativity, with value (8–11). When we progress from thinking simply about "law" to thinking about the additional attributes that would warrant the designation "*good* law," he suggested, it becomes

clear that the concept of law contains within it the connotation of a "special kind of order," namely, *the rule of law*, or as we might otherwise refer to it, *legality* (10–11).

In later chapters, and especially in the course of his analysis of collective bargaining, Selznick went on to discuss the relation between social change and legal change in a manner that recalled Eugen Ehrlich's work on the importance of "living law." "The center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself" (Ehrlich 1936, xv; cited in Selznick 1969, 34).[3] While he recognized that legal change could occur in a variety of ways, Selznick was particularly interested in instances where new laws grew up out of people's associations; where social change, and the "realities of group life," caused expectations of or demands for legal change (ibid., 32, 274–76). In the context of employment relations, a key example was of course the negotiation by trade unions and management of rules, set down in collective agreements (Dunlop 1970). In some circumstances these rules could rightly be characterized as "incipient law," which Selznick defined as "a stabilized public sentiment or pattern of organization; … a compelling claim of right or a practice so viable and so important to a functioning institution as to make legal recognition in due course highly probable" (1969, 32). Quite apart from the actions of their trade unions, employees' opinions and beliefs might also be relevant to questions of legal change, casting light on the meaning of fairness and the claims of rights associated with modern industry: "if public opinion among employees crystallizes, taking some forms rather than others, it will in the long run decisively affect the evolutionary process" within organizations (ibid., 183). Once called into action, legal change could facilitate social change, confirming rights, for example, and extending them to other actors or contexts. "Law works best when appropriate social foundations exist, but those foundations do not obviate the need for legal support and direction" (ibid., 275).

Considering the *manner* of legal change in addition to its instigation, Selznick demonstrated the importance of legal concepts and legal principles as effective tools for "bringing existing authoritative materials to bear on new situations" (ibid., 143). The study of the law of associations mentioned above and of the application of the concept of "contract" to union–management collective agreements provided important case studies of social and legal dynamics, revealing how legal concepts could strain against social conditions and relations. It had to be borne in mind, cautioned Selznick, that legal concepts were not to be assessed only

by the extent to which they fit with reality. Concepts involved cognitive judgments but had also to serve the purpose of maintaining continuity with established ideas and lines of legal reasoning: the integrity of the legal system (ibid., 143). When it came to legal principles, the challenge was to work out the relation between a particular principle and the changing structure of society. "The ideal is to be realized in history, not outside of it; and history makes its own demands, offers its own opportunities" (ibid., 28). New circumstances did not necessarily alter *principles*, but they could require that new *rules* of law be formulated or old ones changed. As this "evolution" progressed, the line between the legal and the political became blurred (ibid.).

Bringing Capitalism Back In

Why does Selznick's world, with its optimistic depiction of the benevolence of social evolution, appear so far removed from us today? When he wrote *Law, Society, and Industrial Justice*, Selznick's view was shaped by mainstream American sociology, then dominated by structural functionalism.[4] The study of society meant the study of institutions, organizations, and normative social integration; of a unidirectional path of social development toward the progressive inclusion of spheres of social life into society's evolving normative unity. Political economy was almost entirely absent, as was the central theme of classical sociological enquiry: capitalism, capitalist development, and their tensions with society and social development. There was still a capitalist economy but it was now firmly integrated in the normativity of the social. To the extent that it gave rise to special interests, just as other sectors of society did, these were governed in a pluralist polity by a democratic state upholding society's legitimate normative order. Social development had integrated capitalist development and turned capitalism into a mere method of wealth creation, an institutional arrangement ruled by society rather than ruling it—like socialism in the USSR but better. There was even a prospect of peaceful global convergence with socialist planning, in a joint search for the optimal organization and best institutions for modern industrialism (Kerr et al. 1960).

By the late 1960s, the dominant social science paradigm—as authoritatively articulated by Talcott Parsons in *The Social System* (1951)—comprised the economy, capitalist or not, as one of four societal "subsystems," tamed by and embedded in society's normative order. As

such, the economy was charged with what Parsons called "adaptation"—adapting society and its resources to changing internal and external conditions. "Goal attainment," including the choice of goals for collective pursuit, was for the political system alone. What had earlier been conceived as a self-driven, or profit-driven, unruly and potentially destructive mode of economic development, came to be defined as subservient to social goals set for society as a whole by politics and the state in accordance with social values held by all. In "organized society"—considered identical to "modern society"—capitalism became a landscape of large corporations with dispersed "public" ownership, under the control of professional managers, with oligopolistic market power and cost-plus pricing; quasi-utilities regulated by government, seeking steady growth rather than short-term profit. In the epochal book by Berle and Means (1933)—for many years the uncontested foundational account of the structure and function of large firms—the take-home message was that the modern corporation was not so much capitalist as it was an organization, subject to the dynamics of organizational rather than capitalist life, driven by social norms rather than competitive markets, by the general development of society as a normative entity. It was, in other words, something like a public institution charged by "society," as represented by a pluralist polity, with responsible stewardship of its collective resources.

For mainstream sociologists, the concept that offered itself for the analysis of organizations of this sort was *bureaucracy*. This was a frequent theme in the work of Weber, who used it almost synonymously with *organization*. In the postwar United States, the concept, and Weber generally, was received in two different ways. On the west coast, under the influence of the German émigré Reinhard Bendix, the Weber of class, status, and party ruled supreme, with conflict and struggle understood as central categories of sociological theory. But it was in its east coast reception, as represented above all by Parsons at Harvard, that the notion of bureaucracy became a cornerstone of American Weberianism, understood however in a strikingly benign way. In place of Weber's culturally pessimistic view of bureaucratization as the emergence of an "iron cage" subjecting human life to ever more detailed rules, stifling entrepreneurialism, creativity, and human liberty, what was now emphasized was the connection Weber also made between bureaucracy and the rule of law, administrative predictability, and public accountability. Weber considered these central civilizational achievements in the course of occidental rationalization, provided that bureaucracies were governed by strong political, non-bureaucratic leadership. By the late 1960s, Selznick had

moved all the way from the "pessimistic" to the "optimistic" account. In *TVA and the Grassroots* (1949), his view of large organizations was that of Robert (later Roberto) Michels, a student of Weber's. In his book on political parties ([1911]1989), Michels had proposed what he called an "iron law of oligarchy": that political movements, as soon as they become organized, inevitably become dictatorships of small oligarchic elites, even if set up in pursuit of democracy and all the more so if they are movements of the working class. (Michels ended as a supporter of Mussolini and Italian fascism.) Selznick published *Law, Society, and Industrial Justice* in 1969, more than twenty years after he had turned away from the Trotskyite "rank-and-file" leanings of his youth and had become, as of 1948, a Truman Democrat (Selznick 1995), that is to say, a New Deal reformist. By then, he was celebrating the social benevolence of a rule-governed way of life and ascribing to large corporations a civilizing dynamic capable in the right circumstances of superseding capitalist class conflict, precisely in the critical battle zone where capital and labor meet to contract for work (Krygier 2012, 16–21).[5]

In the late 1920s, Werner Sombart had presented an earlier variant of the capitalism vs. bureaucracy, or normative society, antinomy in his concept of "late capitalism." Sombart believed more firmly than Weber in the historical inevitability of socialism, even in the United States (Sombart [1906] 1976). Socialism, he thought, would arise out of what he called "late capitalism," which would materialize first and foremost in the large organizations employing wage labor, conceived along the same lines as by Berle and Means. The parallels between Sombart's "late capitalism" and Selznick's emerging future of industrial justice are striking enough to justify a longer quotation (Sombart 1930, 207):

> Freedom from external constraint characteristic of the period of full capitalism is superseded in the period of late capitalism by an increase in the number of restrictions until the entire system becomes regulated rather than free. Some of these regulations are self-imposed—the bureaucratization of internal management .... Others are prescribed by the state—factory legislation, social insurance, price regulation. Still others are enforced by the workers—works councils, trade agreements. The relation between employer and employee becomes public and official. The status of the wage worker becomes more like that of a government employee: his activity is regulated by norms of a quasi-public character ... his wage is determined by extra-economic, non-commercial factors …. By and large, flexibility is being replaced by rigidity ….

"Late capitalism" did not turn into socialism, nor did it last. The moment American sociology forgot capitalism for good, redefining capitalist society as a "social system," was precisely the moment when the neoliberal anti-bureaucratic revolution began to take shape, aimed at a rejuvenation of capitalism. Neoliberalism was a movement to end capitalism's institutional confinement and recreate it as a structural constraint on political action and social rule-making. It was a movement to restore profitability to its rightful capitalist place beyond and above social development, inclusion, and integration—the central tenets of "late capitalism" and structural functionalist sociology alike. As such, neoliberalism amounted to the resurgence of a second, temporarily submerged logic of institutional and social change, disruptive rather than continuous, destructive rather than evolutionary, creative in the sense of unpredictable, unruly, and subversive of extant rules—a logic of capital accumulation claiming precedence over the logic of normative evolution, believed by American sociology to govern modern society.

As it happened, among the primary targets of the neoliberal revolution was the corporation. In September 1970, the economist Milton Friedman opened fire in an article published not in an academic journal, but in *The New York Times Magazine*: "The Social Responsibility of Business is to Increase its Profits." In what was widely considered somewhat frivolous at the time, but later became a landmark document in the history of twentieth century political economy, Friedman reminded his audience that the capitalist corporation was owned, not by society, but by shareholders. This was a direct attack on Berle and Means, with their separation of ownership and control, the former irrelevant and the latter exercised by management in subservience to the state. Businessmen speaking about the "social responsibilities of business," wrote Friedman (1970, 17),

> believe that they are defending free enterprise when they declaim that business is not concerned "merely" with profit but also with promoting desirable "social" ends; that business has a "social conscience" and takes seriously its responsibilities for providing employment, eliminating discrimination, [and] avoiding pollution .... In fact they are preaching pure and unadulterated socialism ... unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades.

According to Friedman, managers who pretend to act socially responsibly are in fact pursuing a-social special interests, namely their own. By not devoting themselves to the maximization of profit, avoiding the hardships of market competition, they steal from their principals, the shareholders. Using shareholders' money to buy social reputation for themselves as stewards of the common good and to pay themselves high salaries, they make the capital entrusted to them less productive than it could be, while arrogating to themselves the right to decide what is and is not in the public interest. Only the market with its strict principles of ruthless competition on penalty of elimination keeps business honest, and only maximized profits ultimately serve a society that depends on a capitalist economy. Neoliberalism is built on the premise that what really serves the interest of all in a capitalist economy-cum-society is an optimal allocation of capital, which can only be the result of intense competition; under neoliberalism, the highest form of moral development is accepting profit-making as a moral commandment, and the optimal contribution to public prosperity is the relentless optimization of private gain.

The neoliberal revolution, then, involved a re-privatization of the corporation, extricating it from its social entanglement and public status. Instead of society governing the economy, the economy, responsible to capital rather than the public interest, was to govern society. What managerial do-gooders were offering society on behalf and at the expense of their shareholders—"providing employment, eliminating discrimination, avoiding pollution"—was not ruled out; but it could only be justified to the extent that it contributed to the supreme objective of profit-making (or as Marx called it: "plus-making") in the service of capital accumulation. A capitalist society, Friedman reminded his readers, does not flourish on "social responsibility" but on profitability, which may sometimes be enhanced if acts of profit-making appear to be motivated by moral progress. When, in the 1980s and 1990s, globalization created an unprecedented degree of both capital mobility and competition, the profit constraint on businesses became increasingly tight, and with it the constraints on governments trying to impose social responsibilities on national economies other than the maximization of profits in increasingly global markets and global "value chains."

Industrial Disorganization and the Law

The neoliberal revolution changed not only the *status* of the corporation but also its *structure*. With re-privatization through the renewed emphasis on private property rights came de-bureaucratization, the decomposition of chains of command into contractual chains, and a paradigmatic shift from hierarchies to markets (Williamson 1975; 1985). Privatization was accompanied by disorganization (Lash and Urry 1987). Rather than Sombart's—and Selznick's—growth of secure long-term employment in stable industrial combines, the 1980s saw the emergence of production regimes increasingly based on more or less "sharp in, sharp out" subcontracting. As industrial society began its transformation into post-industrial society, the number of large, consolidated corporations with commensurately large workforces decreased, and a growing proportion of workers became dependent on increasingly diverse and casualized forms of employment in the predominantly small firms of an expanding service sector.

In the field of working relations, scholars observed the emergence of a "core" of workers with job security and employment rights, and a "periphery" of casualized and highly precarious labor. Corporations would shrink their permanently employed workforce and use a variety of contractual mechanisms—agency work, zero hours contracts—to grow it again as demand dictated; or they would limit the number of functions performed in-house (design, marketing, brand management) and contract the others out, instigating the creation, in many cases, of long contractual supply chains. Even the core of workers who continued to be employed directly, however, could no longer be rightly thought of as "industrial citizens," in the sense envisaged by Selznick. Without the political influence of trade unions and collective bargaining (Selznick 1969, 121)—as Lauren Edelman (2016, 25) demonstrated in her studies of the "legalization" of organizations—legal rules come to be filtered through managerial lenses alone. In the process, rules (including employment laws) are reconceptualized so that they become more consistent with the principles of efficient management and the overriding obligation to maximize shareholder value. Over time, this "managerialization" of the law spills over into legal fields—as, for example, when the judiciary or legislature pays deference to organizations' symbolic compliance with the law (ibid., 27).

In jurisdictions including the US and the UK, moreover, the enforcement of employment law has come to rely primarily, in the absence of unions, on individual rights of action and,

therefore, on the ability of wronged employees to "name, blame," and bring a legal "claim" against their employer (ibid., 38). While naming and blaming can be inhibited by symbolic structures of compliance within organizations, which give the impression of legality or fairness, taking legal action will likely involve significant risks and costs to the employee, financial and emotional (Kirk 2018). In many—easily the majority of—cases, therefore, the breach of employment rights goes unchallenged. Nor do core employees anymore enjoy the degree of job security that would afford them the kind of "membership" of the employing organization that Selznick associated with industrial citizenship (1969, 273). In the course of a highly individualized career, an employee is expected to work for several organizations and be always on the lookout for better opportunities elsewhere (Gershon 2017). For an employer, the barriers to terminating an employment relationship are rarely insurmountable and, on the part of an employee, too great a measure of firm-loyalty may be taken as a marker of a lack of ambition. In a context of more or less fluid labor markets, workers might more readily choose "exit" over "voice" as a response to breach of their employment rights (Hirschman 1970).

As for what used to be called "peripheral" workers, the experience of precariousness at work has become too generalized for the descriptor to distinguish anymore between two distinct groups. Even in respect of workers with multiple degrees and many years' experience, it is increasingly commonplace for organizations to manipulate the terms of contracts for work so that protective employment laws either don't apply or become near impossible to enforce (Dukes and Streeck 2020b). Many employment rights apply only to "employees" in the strict legal sense of the term, and workers may be characterized in their contracts instead as self-employed, dependent, or independent contractors. In addition to cutting some of the costs associated with employing workers, careful drafting can minimize the risks to the employer of substandard work, periods of absence, or other acts of resistance by the worker, allowing management to wield simultaneously the stick of the threat of lay-off and the carrot of the promise of better terms and conditions (Bloodworth 2018). Whether they are self-employed or not in the eyes of the law, workers may be encouraged to think of themselves as entrepreneurs, with the notion of entrepreneurship performing the ideological function of legitimizing the expropriation of the workers' employment rights.

In the small businesses that make up a growing section of today's service economies, the kind of bureaucratic management structures and procedures analyzed by Selznick, and later by Edelman, are likely to be largely or entirely absent. For an increasing number of workers, there is no employing organization at all in the physical sense, meaning a building or other place in which workers meet with co-workers and managers on a daily basis. Technological advances have enabled modes of managerial supervision and control, as well as methods of providing goods and services to customers, that can obviate the need for office space and shop space (Moore 2018). The so-called gig economy provides prominent examples of work that is done in public spaces (Uber, Deliveroo) or private homes (Amazon Mechanical Turk, TaskRabbit). In recent months, the corona virus crisis has occasioned a mass move towards working from home which looks set in many cases to become permanent, or at least to be only partially reversed when the crisis is eventually resolved (Starling 2020). Wherever work is performed outside of dedicated work*places*, information technology offers highly effective means of control—mandating, enforcing, and even ruling out certain behaviors on the part of the workers.

Homeworking can bring benefits to workers, especially to those who thereby avoid a long and costly commute. It can also undermine the workers' sense that work involves a shared "team" effort, however, leaving them with the impression, instead, that they are working on their own—even on their own account. Workers who work from home also risk losing important opportunities to form enduring human relations—friendships and relations of solidarity with co-workers—something that is well understood by employers, who may introduce homeworking for precisely that reason.[6] Even in physical workplaces, the work may be organized so as to keep co-workers from interacting with one another (Holland 2020). At a societal level, working from home on a large scale has implications for the integration of communities and societies, since it is likely to reduce collegial interactions between people of different racial and ethnic backgrounds, religious belief, social class, age group, and so on (Estlund 2003).

Post-Industrial Justice

In this neoliberal world, in which employment relations are characterized by impermanence and precarity, by the release of managerial action from the strictures of collective bargaining

and employment law, what relevance, if any, does *Law, Society, and Industrial Justice* retain? Social development, the evolution of normatively based sociability, has not disappeared but it no longer figures as the only game in town. Capitalist development interferes with and distorts but cannot eliminate social development. In the powerful imagery proposed by Karl Polanyi ([1944] 1957), there is not only movement but also countermovement, not only capitalism but also society, the two intertwined in dynamic conflict. The unipolar, normatively integrated world of structural functionalism, presupposed as a matter of course in the 1960s, has revealed itself to be bipolar, structurally conflict-ridden. Polanyi's countermovement of society against the movement of the self-regulating market builds on the same forces that account, for Selznick, for the rise of industrial justice: the norms of fairness and egalitarian reciprocity that evolve when human beings interact and cooperate. These must assert themselves, however, against the structural pressures of markets and competition, of profit-making for its own sake, deriving from the allocation and nature of property rights underlying the capitalist social organization. How successful that assertion can be depends on the distribution, not just of economic capital, but also of political power and the outcome of an ongoing struggle over it.[7]

"Today's industrial practice will not truly foretell our legal future unless it reflects the fundamental nature of modern enterprise and the enduring aspirations of employees," wrote Selznick (1969, 211). The nature of the enterprise is contested, we would add, between market and society, between private ownership and public purpose, and the aspirations of those who supply it with labor power are formed under the constraints of their work situation and legal status, as well as the wider political and economic context. If we are to identify, today, latent values in existing social arrangements that might, in the right conditions, develop and be helped to develop in the direction of democracy and justice at work, then the first necessary step is to shift the focus from the organization to the group of workers: to the "occupational community," to use another term taken from postwar sociology (Lipset et al. 1956). Group life can no longer be identified straightforwardly with company life; the challenge is rather to carve out a space for normatively productive group life *apart from* and, if need be, *in contestation with*, the life—the logic—of the employing organization.

Occupational communities are collectivities of workers who share a common position in work and employment that gives rise to relations of solidarity and shared social practices and

beliefs. They continue to exist today, even in the new service sector with its small firms, ostensibly low-skilled work, precarious and on-demand employment, and ambiguous work relations between contracting parties (Dukes and Streeck 2020a, 2020b). Indeed, they can even form where workers are without a workplace and communicate with one another through social media, supplementing online chats with occasional real life meetings (Cant 2020). While occupational communities perform important functions for the successful discharge of work duties—for example, supporting cooperation among workers and transmitting tacit skills to new recruits (Adams, Robert, and Maben 2013)—they can also serve as a social substructure for the formulation and articulation of the collective interests of workers against their employer (Korczynski 2003; Cant 2020). They can function as sites of social norm creation, of *incipient law*, fostering, if the circumstances are right, "acts of direct resistance to management directive," and nurturing trade union organization (Korczynski 2003).

As wellsprings of worker solidarity, occupational communities might, in the right circumstances, provide a social foundation for the countermovement against the intensified commodification of labor, and for the restoration of a normative order above and beyond the dictatorship of marginal costs and relative prices. They might serve as agents of social self-regulation and legal renewal, standing in opposition to the self-regulating market as it tries to rule social life. Against the grain of the neoliberal transformation of the corporation and of society as a whole, they might take first steps towards the recovery of industrial citizenship and industrial justice. If occupational communities are to perform these roles, however, they must be protected and empowered by suitable legal institutions. Occupational communities can be vulnerable to obstruction or capture by employers intent on capitalizing on group dynamics to foster worker loyalty and deference. Formal law should enable workers to foster and take advantage of their social relations at work without being hindered either by managerial co-optation or by an organization of work that inhibits the formation of ties of worker solidarity (Dukes and Streeck 2020a).

What we have in mind here is, in essence, the restoration of industrial justice from below, driven by collective agency on the ground: in legal terms, a re-imagined principle of freedom of association with broad application to all workers, including the self-employed. Interpreted widely with reference to the purpose of fostering social bonds and community-building,

freedom of association should be understood to encompass a right to free and private communication among co-workers. Where workers rarely meet in person because of the way the work is scheduled, they could benefit from a right to privacy in respect of communications among themselves via social media. Similarly, trade unions should have the right to communicate securely with workers, and to enter workplaces for meetings with workers and workgroups. Freedom of association should also encompass a right to a measure of job security. As mentioned above, contracts for work are increasingly used to render working relationships precarious, with the result that workers become willing to accept what they feel is unfair treatment, for fear that they risk their position if they speak up. In the case of zero-hours or other ultra-precarious arrangements, disciplinary or retaliatory action by an employer can take the form of a simple—and in some jurisdictions currently entirely lawful—decision not to offer any future shifts or gigs: in the jargon of platform work, to "deactivate" the worker's account. In such circumstances, a right to free association, including a right not to be disciplined or discriminated against for exercise of that freedom, means little without an ancillary or accessory right to some form, at least, of security of employment.

Given the diversity of occupational communities and the fissuring of workplaces, where workers doing the same job may have different contractual terms and rates of pay, the construction of an industrial polity at the workplace with the support of effective procedural rules is not a straightforward matter. Different communities may require different sets of rights and procedures if they are to be able to turn shared beliefs about work and working relations into concrete demands and bargaining agendas; and thereafter to engage effectively in processes of bargaining, rule-making, and rule enforcement. The policy priority would be to institute decentralized forms of collective action and collective bargaining, understood here as *mechanisms of discovery*: the discovery of interests, action potential, new procedural and substantive rules that are effective on the ground; more easily enforceable for being grounded in the workers' occupation- and location-specific sense of justice.

Like other social groups, occupational communities can become exclusionary—exclusionary, in particular, of those who do not share certain of the characteristics of existing group members: gender, race, age, and so on (Cant 2020, 94–97). Social norms and shared beliefs that are shaped by the self-interests of a particular group may not take adequate account of, or

may be detrimental to, the interests of "outsider" groups. As procedural law empowers groups to participate in law creation and enforcement, however, it also sets limits to their authority or capacity to do so—limits that may be drawn precisely so as to take account of prevailing equality and human rights norms. Freedom of association does not encompass an unlimited freedom to discriminate against others.[8]

Ultimately, of course, overcoming sectionalism in a more than formal sense is not something that can be brought about by legal means alone. The amalgamation of particularistic into general values and interests is for the politics of the society as a whole, and, in particular, for social movements struggling to renew and expand collective societal perceptions of fairness and justice (Mouffe 2018). Linking individual grievances into a broader program of social reform—building coalitions between groups differently affected by the same societal deficiencies—is the very essence of democratic-reformist politics. Workplace politics must be embedded, in the final instance, in a more encompassing class politics. Selznick understood this well: corporations could be sites of social progress only because they had become public rather than private institutions, and industrial justice could be achieved only with the involvement of trade unions. Formal institutional design cannot substitute for collective mobilization, nor for the political translation into action of the very sentiments that Selznick had hoped would be realized through an evolutionary logic of benevolent social development, in an age that believed it had turned capitalism into a collective utility.

Conclusion

The central insight of Selznick's industrial sociology is deeply humanistic: that human work gives rise to human bonds, to collective identification and solidarity, sustaining shared principles of justice. It was this dynamic of community formation that Selznick identified in the moral evolution of large organizations, believed at the time to be unimpeded by a capitalist political economy that had been tamed by the institutions of the New Deal. While Selznick's American society now lies in the distant past, the humanizing, community-building, justice-seeking force of productive cooperation to which he drew attention has not disappeared. It requires, however, to be set free and reinforced in the context of a political countermovement to protect social from capitalist development, empowered by democratic institutions in society at large.

It is here that extant law can and must be mobilized in the service of incipient law, for the creation of safe spaces in which civilizational solidarity can arise, as a force against the infinite commodification of human labor. It has long been recognized, by scholars of labor law and industrial relations alike, that procedural rules can open up the regulation of working relations to the participation of workers and employers, correcting the tendency of contract law to obscure its collective nature, the neoliberal repossession of the organization of work by capital, and the important public interests at play. With his notion of legal development as problem-solving and inchoate, Selznick can help us still today to bridge the gap between normative arguments, centering on principles and policy objectives, and the perspectives of sociological realism and theories of collective agency, in particular of social and political countermovement to the commodification of work and life. For public policy and legislation, what this points to is the need for the broadening and strengthening of workers' freedom of association, rethought to fit with changing social and economic circumstances. As Selznick says, "new circumstances do not necessarily alter principles, but they may and do require that new rules of law be formulated and old ones changed" (1969, 28). In a contested political economy such as ours, this is categorically as much a matter of politics as it is of law.

[1] Legality is used synonymously with the rule of law (Selznick 1969, 11).
[2] Cf. conceptions of industrial citizenship as a—public, not organizational—status shared by all workers in a particular jurisdiction (Dukes and Streeck 2020b).
[3] In correspondence with Martin Krygier in 2007, Selznick reflected that he had not just been influenced by reading Ehrlich's work but had found himself agreeing with it (Krygier 2012, 141).
[4] Functionalism, wrote Selznick in a review of essays on Talcott Parsons, was "what we were doing all along" (1961, 934).
[5] There are strong parallels between Selznick's conception of industrial justice and those of the labor law scholar Otto Kahn-Freund. As Selznick had been a Trotskyite in his youth, so Kahn-Freund would once have described himself as a Marxist. As with Selznick, work written in Kahn-Freund's later years is striking for its consensual brand of pluralism and its narrow conception of class conflict. Here we find an insistence upon the *universality* of conflicts of interest that downplays the distinction between private and public sector employers and, even, capitalist and socialist economies (see also Dahrendorf 1959). The claim to universality follows the circumscription of conflicts of interest quite narrowly, as arising between "management" and "labor" over the division of profits, and the desired measure of flexibility—or, alternatively, stability and security—in working arrangements (Davies and Freedland 1983, 66).

[6] For an historical example, see Steedman 2007, 37: "Combing in the later eighteenth century was usually done in workshops, not at home, as it involved the use of charcoal fires on which the combs were heated. The move to home was a stratagem by spinning factory owners of the early nineteenth century to break the power of combers working together."
[7] Note that the concept of power is almost entirely absent from the sociology of the 1960s, which distinguished between outdated relational power—"power over"—and modern systemic power—"power to," the latter owned and operated by normatively integrated society as a whole.
[8] For discussion of this aspect of freedom of association see the decision of the European Court of Human Rights in *ASLEF v UK* [2007] ECHR 184.

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