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Labour Movements and the Effectiveness of Legal Strategy: Three Tenets

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Social movements of every stripe have mobilized law in order to confront contemporary injustices and redetermine social experiences and expectations. The multiple disciplinary literatures that track and evaluate these strategies provide a rich picture of legal and political mobilization at different scales and relative successes. This article draws together the shared concern for strategic litigation of labour law and legal mobilization scholars in order to confront and rationalize the factors that determine its effectiveness for labour movements. This article sets out three core tenets of strategic litigation to provide a framework for analysing its potential effectiveness: Effective legal arguments; state law's institutional capacity; and political objectives. Drawing on interdisciplinary insights, these tenets present a sober conception of the ways that law is mobilized by labour movements, to provide a critical conception of the opportunities and limitations of their strategic uses of law.

Keywords: Legal Mobilization, Labour Movements, Institutional Capacity, Political Objectives, Employment Status, Uber Drivers, Limb B Workers

1 INTRODUCTION

Civil society groups mobilize legal resources for a variety of reasons and with varied levels of success. From fundamental rights to regulatory standards, law provides a language in which groups' normative demands (relating to their sociopolitical objectives and perceived injustices) can be articulated as causes of action and subjected to judicial adjudication. The idea that legal argument can be used as part of a social movement's political strategy is nothing new, but defining what counts as success opens up a vast but fragmented debate about the potential effectiveness of strategic litigation. At one end of the political spectrum, law is dismissed as part of a regime of liberal legalism that merely reproduces existing social structures, incapable of channelling any meaningful sociopolitical antagonism.[1] At the other end, law is the privileged site for presenting claims about (in)justice, cashing-in rights, and

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1 *See* e.g., Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press 2002); Michael Hardt & Antonio Negri, *Labor of Dionysus: A Critique of the State-Form* (University of Minnesota Press 1994).

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enforcing obligations.[2] Between the two extremes we encounter a range of theories that lend important insights about the motivations for launching legal actions,[3] law's capacity for doing justice,[4] and the range of material and structural factors that determine the success or otherwise of legal mobilization strategies.[5] This article draws on interdisciplinary insights and provides a framework for rationalizing and evaluating the potential effectiveness of strategic litigation by focusing on the effect of legal ordering on litigation strategies, the capacity of legal systems to enforce legal obligations, and the implications of such uses of law on political objectives.

Industrial relations is one such field, where both the opportunity and limitation of litigation as a tool for strategy become evident. The recent *Uber*[6] case, for example, concerning the employment status of drivers, underlines the role of law in confronting injustices that are rife in the so-called 'gig' or platform economy. The judgment dismisses the claim that drivers are self-employed, recognizes them as 'limb b' workers under section 230(3)(b) Employment Rights Act 1996 and confirms the drivers' entitlement to the rights and protections that Parliament had intended. This represents a critical interpretive move away from determining work status according to given contractual arrangements and toward purposive statutory interpretation, concerning the actual control exerted by businesses over workers.[7] For workers in the gig-economy, the judgment represents an important step toward the enforcement of statutory protections and the end of certain exploitative work practices that deny basic rights to vulnerable workers on the basis of bogus contractual relationships.

The *Uber* decision is an important step, but, when evaluating its effectiveness as a legal strategy, it is important not to overstate its impact. This a recent decision and it would be premature to draw definitive conclusions about its long-term impact. At the time of writing, it has not resolved the material challenges faced by gig-economy workers, nor conclusively redetermined the issue of employment status. This is reminiscent of a characteristic tension in legal mobilization scholarship between the opportunity to introduce new legal precedents and the limitations of litigation as a mechanism capable of bringing about fundamental legal and

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2 Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance* (Cambridge University Press 2007); Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (University of Michigan Press 2010).

3 Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press 1998).

4 Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2d ed., University of Chicago Press 2008).

5 Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & Soc'y Rev. 95 (1974); Ellen Ann Anderson, *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation* (MI: Univ of Michigan Press 2005).

6 *Uber BV v. Aslam* [2021] UKSC 5.

7 Joe Atkinson & Hitesh Dhorajiwala, *After Uber: Purposive Interpretation and the Future of Contract*, UK Labour Law (1 Apr. 2021), https://uklabourlawblog.com/2021/04/01/after-uber-purposive-interpretation-and-the-future-of-contract-by-joe-atkinson-and-hitesh-dhorajiwala/ (accessed 25 May 2021).

social transformation. In order to comprehend the capacity and effectiveness of litigation in shaping contemporary legal protections for workers, the challenge for legal scholarship is to rationalize and disentangle these opportunities and limitations, to take a holistic and nuanced perspective that does not focus solely on legal processes, and identify the various markers of effectiveness, legally and politically.

There is, of course, a range of scholarship that analyses the phenomenon of strategic litigation. For legal scholars, the most well-known is a variety of North American 'law and social movement' scholarship that has identified the opportunity of law as a tool of social justice, its limitations for achieving social transformation,[8] and, more recently, the nuanced motivations that lie behind 'legal mobilization' strategies.[9] Most notably, the 'legal mobilization approach' recognizes structural and material criticisms about law but cautions against a reactionary dismissal of litigation as a potentially effective site of struggle for social movements.[10] This approach is not homogeneous but, broadly conceived, it provides important insights about how social movements use law from the bottom-up[11] and pays attention to ways that strategic legal actions relate to and are benefitted by a movement's political and social mobilization, and vice versa.[12]

Notwithstanding important interventions by legal scholars, political scientists and political sociologists have carried the baton for law and social movement scholarship. A key insight from such studies has focused on 'legal opportunity structures', analysing judicial attitudes and the role of legal structures in making litigation more or less attractive and/or effective in different jurisdictions.[13] Lisa Vanhala has inserted an important caveat to this focus on structures by analysing the 'agency' of social movements in their legal mobilization strategies.[14] For Vanhala, it is important not to reduce the ways that social movements engage with law to the ostensible opportunities presented by law but to recognize how litigation strategies also confront and shape legal opportunity structures. Furthermore, there is a vast literature focusing on social movements and

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8 *See* Rosenberg, *supra* n. 4; Galanter, *supra* n. 5; Scheingold, *supra* n. 2.

9 For a detailed overview of the literature and its critical trajectories, *see* Scott L. Cummings, *The Social Movement Turn in Law*, 43 L. & Soc. Inquiry 360 (2018).

10 Michael McCann, *Litigation and Legal Mobilization*, in *The Oxford Handbook of Law and Politics* (Gregory Caldeira, Daniel Kelemen & Keith Whittington eds, Oxford University Press 2008).

11 Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 Ann. Rev. L. & Soc. Sci. 17, 24 (2006).

12 Lisa Vanhala, *Making Rights a Reality?: Disability Rights Activists and Legal Mobilization* 5–9 (Cambridge University Press 2010); Emilio Lehoucq & Whitney K. Taylor, *Conceptualizing Legal Mobilization: How Should We Understand the Deployment of Legal Strategies?*, 45 L. & Soc. Inquiry 166 (2020).

13 Vanhala, *supra* n. 12; Chris Hilson, *New Social Movements: The Role of Legal Opportunity*, 9 J. Eur. Pub. Pol'y 238 (2002).

14 Lisa Vanhala, *Legal Opportunity Structures and the Paradox of Legal Mobilization by the Environmental Movement in the UK*, 46 L. & Soc'y Rev. 523 (2012).

transnational activism.[15] It describes the multi-level nature of contemporary mobilization strategies and the opportunity structures created by the globalization of law and politics. This literature tends not to highlight specific legal doctrines or mechanisms but analyses the ways that social movements have engaged in contentious politics by mobilizing various processes in international institutions, formed transnational networks, organized mass protests, and the impact of such actions on domestic politics.

To explore the issue of effectiveness in the context of strategic litigation, this article will bring the socio-legal legal mobilization literature into conversation with legal theory. The contribution of legal theory to our understanding of strategic litigation aims to highlight the legal context of strategic litigation. There is a small but burgeoning literature that draws on interdisciplinary approaches to explore the use of strategic litigation to confront doctrinal legal concerns, or how certain areas of law have been targeted by social movements. For example, labour law issues have been analysed using methods and insights from socio-legal studies, empirical legal studies, and industrial relations scholarship.[16] Moreover, the potential impact of strategic litigation has been explored in fields with extensive case lists, including human rights law and issues ranging from arbitrary detention to land rights.[17] Indeed, we can identify numerous interdisciplinary analyses and categorize them as contributing to a wider discussion about the use of strategic litigation at the domestic and transnational level,[18] as well as reflexive debates about the nature and form of legal mobilization.[19] Despite such interdisciplinary insights and the breadth of concern for strategic litigation, it remains a challenge for contemporary *legal* scholarship to rationalize the factors that determine the success of litigation strategies and the reasons why social movements identify law as an important tool.

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15 *See* e.g., Sidney Tarrow, *The New Transnational Activism* (Cambridge: Cambridge University Press 2005); *Transnational Protest and Global Activism* (Donatella della Porta & Sidney Tarrow eds, Rowman and Littlefield 2005).

16 Eleanor Kirk, *Legal Consciousness and the Sociology of Labour Law*, Indus. L. J. (2020); Cécile Guillaume, *When Trade Unions Turn to Litigation: 'Getting All the Ducks in a Row'*, 49 Indus. Rel. J. 227 (2018); Manoj Dias-Abey, *Legal Mobilization and Identity Formation in British Trade Unions: Bridging the Spaces-In-Between*, in *Handbook on Law, Social Movements and Social Change* (Steve Boutcher, Corey Shdaimah & Michael Yarbrough eds, Edward Elgar Publishing 2022); Catherine Fisk & Diana Reddy, *Protection by Law, Repression by Law: Bringing Labor Back Into Law and Social Movement Studies*, 70 Emory L.J. 63 (2020).

17 Helen Duffy, *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing 2018).

18 Virginia Mantouvalou, *Is There a Human Right Not to Be a Trade Union Member? Labour Rights Under the European Convention on Human Rights*, in *Human Rights at Work: Perspectives on Law and Regulation* (Colin Fenwick & Tonia Novitz eds, Bloomsbury Publishing 2010); Tonia Novitz, *Multi-Level Disputes Relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources*, 36 Int'l J. Comp. Labour L. & Indus. Rel. 471 (2020).

19 Lehoucq & Taylor, *supra* n. 12; Paul Blokker, *Constitutional Mobilization and Contestation in the Transnational Sphere*, 45 J. L. & Soc'y S52 (2018).

This article draws together labour law and legal mobilization scholars' shared concern for strategic litigation alongside legal theoretical insights in order to confront and rationalize the factors that determine its effectiveness for labour movements. I argue that to better comprehend the practice and potential of strategic litigation, we must recognize how labour movements' legal arguments confront (and/or are subjected to) processes of legal ordering and are reliant upon the capacity of legal institutions to respond to their claims. This will provide insights about the articulation of legal arguments, the effects of legal ordering and law's normative boundaries on the political objectives that motivate litigation, as well as offering an opportunity to reflect on the institutional context of litigation. This is particularly pertinent in the labour law context for two reasons: First, the worker-protective aims of labour laws often come into conflict with the law's protection of freedom to contract, property rights, and other corporate interests. Second, in spite of these challenges, workers and trade unions rely upon law's capacity to redress grievances and enforce fundamental worker protections.

To be clear, while this article focuses upon the legal context of strategic litigation, the analysis is not guided by a formal, legalistic meaning of effectiveness, nor does it propose essential conditions for effective litigation. On the contrary, it recognizes the changing nature and importance of context in evaluating effectiveness. Effective litigation can be reduced to winning but, as we will explore in relation to political objectives, it can be effective in spite of losing. In this respect effective strategic litigation may promise legal protections and that which publicizes and politicizes a movement's aims, aiding in the formation of a movement's identity, power, and solidarity. The current literature on strategic litigation has provided important conceptions about these political aspects of litigation's effectiveness,[20] or what McCann has termed litigation's indirect effects.[21] While these insights inform the analysis which follows, the focus, and the specific contribution of this article to the question of strategic litigation's effectiveness, will be on legal theoretical conceptions which highlight the inclusionary and exclusionary effects of legal ordering and the capacity of legal institutions to reorder social relations. In other words, this article contributes to existing legal mobilization literature an understanding of the opportunities and limitations that can be found in the tension between the political demands of labour movements and the specific logics and functions of legal systems.

In what follows, this article presents three tenets of effective legal mobilization strategy: effective legal arguments; state law's institutional capacity; and

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[20] D. NeJaime, *Winning Through Losing*, Iowa L. Rev. 96 (2010).

[21] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (University of Chicago Press 1994).

political objectives. As tenets they are intended to be explanatory and evaluative. They do not reach the status of injunctions owing to the unexpected nature of strategic action which defies predetermination. They represent key issues which, using a set of legal theoretical and socio-legal insights, provide a framework for understanding strategic litigation in the labour law context. The first tenet sets out a conception of legal ordering as a process which places certain form and content requirements on the framing of legal arguments. We will see how the normative limits of the legal order shapes the opportunity of strategic litigation and indicates which types of legal arguments may be potentially effective. The second tenet analyses national law as the focal point of strategic litigation and re-emphasizes its role in strategic uses of law, even those that draw heavily upon international law norms and institutions. Tenet three reflects upon the implications of using law as a means to realize political demands and, importantly, how a labour movements' nomos may be lost or co-opted in the process of legal ordering.

2 TENET 1: EFFECTIVE LEGAL ARGUMENT

A legal argument that aims to reform the current law or secure legal protections for workers is reliant upon the articulation of a claim that the legal system can both recognize and respond to affirmatively. This orthodox position provides a starting point for understanding the importance and effect of legal ordering practices in the articulation of effective arguments in strategic litigation. Drawing on a conceptual framework, we will consider how legal argumentation is caught between interpretive opportunities in law and the limitations imposed by law's ordering processes and its normative boundaries. This will provide an understanding of the pressures and demands exerted by the legal system on argumentative strategies. In particular, the types of arguments that can be articulated and heard by law, the practical implications for the form of legal argumentation, and the specific effects of normative interests in the legal system in the labour law context. This is not an exhaustive account of legal argument; it contributes to an understanding of the strategic use of litigation by exploring how existing legal rules, procedural requirements, and entrenched interests construct the normative boundaries of the legal system and shape the opportunities and limitations in legal argumentation. The effectiveness of legal arguments will, of course, be dependent on a range of factors which cannot be covered here, not least the role of judicial attitudes and financial resources.

The act of framing involves the articulation of a legal claim.[22] This practice involves the formulation of routine and novel interpretations of law. The former includes cases that do not challenge but rely on existing rules and precedent to pursue a legal grievance. We are concerned with the latter which require legal arguments that contest the law's present determinations. These legal arguments draw on constitutional values and fundamental rights[23] claims to redetermine the present scope of rights and duties, as well as (and more often than not) alternative interpretations of what the law ought to be as they attempt to satisfy the conditions set out in a statute. At stake in the articulation of such legal claims is the potential to receive legal protections and redetermine what the law ought to be. Indeed, law recognizes some claims as legal and worthy of protections whilst others are illegal, excluded, and even punished.[24] This transforms the recognition and inclusion of legal claims into an essential battleground for social movements seeking to impose legal obligations or win new rights protections.[25] This means that movements seeking redress in law need to articulate legally cognisable claims and, as we shall see, imposes both procedural and normative limits upon on their legal arguments.

To aid our understanding here, we can draw selectively on Hans Lindahl's account of normative boundary-setting in the legal system and the effects of legal recognition. Lindahl has presented a phenomenological account of the process of legal recognition that shows how something appears as law in the legal system.[26] This analysis will inform our understanding of the practice of legal ordering, the ways that legal orders determine 'who ought to do what, where, and when',[27] and how strategic litigation might effectively interrupt and reshape these normative practices. Lindahl's conception of legal ordering processes provides us with three pairs of terms that can guide our conception of effective legal argumentation:

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[22] There is a specific and well-developed analysis of 'framing processes' in the social movement literature that is distinct from our present concern. Framing processes analyse the ways that social movements construct and communicate meaning about their struggle. This will involve the fundamental processes of meaning-making through which movements make sense of the world and give meaning to their collective action, such as diagnosing the problem, attributing blame, and deciding which actions need to be taken. *See* further, Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Ann. Rev. Soc. 611 (2000). While we are indirectly concerned with how social movements understand themselves, the present concern is for the way that movements navigate the form of law, or how they can articulate their demands effectively in law.

[23] The recent UNISON case on tribunal fees draws upon the common law constitutional right of access to justice. *See* further, A. Bogg, *The Common Law Constitution at Work: R (on the Application of UNISON) v. Lord Chancellor*, 81(3) Mod. L. Rev. 509–538 (2018).

[24] On the debates about the nature of recognition in law, *see* further Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (1st ed., Cambridge University Press 2018); E. Christodoulidis, *The Objection that Cannot Be Heard: Communication and Legitimacy in the Courtroom*, in *The Trial on Trial Volume 1: Truth and Due Process* (A. Duff et al. eds, Hart 2004).

[25] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* 83 (Routledge 2007).

[26] Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press 2013).

[27] *Ibid*., at 3.

Recognized/unrecognized, included/excluded and legal/illegal. Accordingly, something that appears as *legal* is included within the legal system and that which is *illegal* is excluded. This is important for Lindahl because it explains how the determination of something as *legal* or *illegal* ((il)legal) is a process that sets the normative boundaries of a legal order. Moreover, the movement from legal claim to included or excluded as (il)legal is first dependent on the legal system's capacity to recognize that claim as something capable of belonging to the legal system.

The lesson for labour movements is that, when considering how to represent their demands as effective legal arguments, they must be articulated as something that can be recognized and included as legal. Legal ordering is a continual process of redetermination that presents an opportunity for movements to challenge the present content of law. However, the threat of being unrecognizable and/or excluded reveals a critical interaction between the boundaries of legal ordering and the framing of legal arguments. In other words, legally effective strategic litigation, or that which delivers legal reforms or protections, will need to draw selectively on legal rules, rights and values that are capable of being recognized as a *legal* argument that can be included within the normative boundaries of the legal system.

At one level, these are obvious reflections on the functioning of the legal system and litigation – a lawyer representing a group of workers will be required to present arguments that refer to a relevant and justiciable cause of action that can be recognized and adjudicated by the court or tribunal. At another, it brings into view the legal context of strategic litigation and, more specifically, the need to comprehend the ways that law's normative structure and ordering processes affects our understanding of effective legal argument. For instance, the recognition process exerts certain pressures and requirements upon argumentative strategies, which will require labour movements to either represent their political demands in ways that are likely to be recognizable and included, or not. From here we can see how litigation strategies are both shaped and constrained by existing legal norms and how strategic litigation attempts to take advantage of the interpretive opportunity in the interstice between recognizable arguments and their inclusion or exclusion. In other words, the demands of recognition and inclusion mean that litigation strategies will either frame arguments that are cognizable within the current boundaries of the legal order or, they will purposefully challenge them. This allows us to say, tentatively, that the effectiveness of strategic litigation is subject to and must be understood in relation to the normative boundaries of the legal order and, necessarily, the ordering processes which reproduce them.

We can illustrate the above by considering the legal form of different political claims about pay, discrimination, and for dignity at work. The first two claims have statutory protections attached for workers which aid their articulation as legal

claims which can be included as legal. For instance, inadequate or missing pay claims seek to define an employer's practices as illegal by applying statutory rules on minimum wages to certain working practices. While claims about dignity at work may be deployed in support of a legal cause of action, they may struggle to attach directly to a specific justiciable claim. Indeed, such claims need to be reframed as a legal dispute and attached to rules which correlate to a particular prohibition or legal protection which can be recognized and include as legal.

The demands of legal recognition and inclusion indicate why many contemporary labour disputes are centred – legally – around employment status disputes. Status claims are motivated by the potential to extend employment rights and legal protections. This is because, in the UK, the scope and application of individual and collective labour rights are subject to employment status. Therefore, legal arguments about worker protections or rights that fail to evidence employee or worker status are unlikely to succeed. For our purposes, this exemplifies how labour movements are drawn to legal arguments that allow them to articulate their political demands in the form of a recognizable legal argument. Employment status litigation captures this dynamic where exploited workers present their demands for legal protections through the lens of a status claim which can be recognized by law as a cause of action and permissible for consideration at first instance by a tribunal as something that can be in/excluded as il/legal. From the point at which the claim is recognized, the battleground turns to the weight of competing interpretations of the relevant statutes, past judgments, principles, public policy considerations and so on, with claims being included and others excluded as (il)legal.

The insight here is not simply that effective arguments rely upon statutory rules or existing common law precedents, but that strategic litigation in the employment law field comes to be dominated by a particular legal form or set of arguments and norms. Using our pairs of terms, we can see that a perceived injustice suffered at work by an individual who does not qualify as an employee or a worker – for example in the case of an unfair dismissal, the absence of holiday pay, or trade union recognition – will be effectively challenged by presenting a recognizable argument about their employment status which can be included as legal. While normative political arguments about the need for such rights at work are important, they need to be translated into a set of legally justiciable claims which can be recognized and included in order to redress injustice. The real dispute – minimum wages or trade union representation – is reshaped by the legal dispute and the effectiveness of a given argumentative strategy determined by the relevant and available legal norms.

This presents both opportunities and limitations. Uber drivers have been recognized and included as 'limb b' workers,[28] Gary Smith has continually

[28] *Uber BV*, *supra* n. 6.

challenged and redetermined his employment status at Pimlico Plumbers,[29] with a court recently recognizing his right as a limb b worker to backdated holiday pay.[30] Putting questions of enforcement aside, these are important 'wins' in UK employment law for litigation strategies targeting the opportunity of employment status legislation and case law. For example, recent employment status case law has indicated the potential effectiveness of arguments which focus on the purpose of statutory rules as opposed to the contractual agreement between parties. In *Uber*, the UK Supreme Court considered the factual context of the employment relationship and whether drivers ought to be protected by statute. This led the court to consider the purpose of statutory employment rights and recognize drivers as limb b workers owing to their vulnerability to exploitation and need for rights as subordinate and dependent workers.[31] And yet, recent claims by carer workers about their entitlement to additional pay have failed,[32] so too (for now) have Deliveroo riders' claims to be limb b workers for the purposes of trade union recognition.[33] These mixed fortunes indicate the interpretive challenges, and the factual and legal differences between cases which will affect the inclusion of employment status claims as legal. In order to access protections afforded by minimum wage legislation or the trade union recognition procedure for the purposes of collective bargaining, strategic litigation, in these employment status cases, attempts to articulate arguments that draw upon statutory rules, doctrines, and precedents which are capable of defeating carefully worded substitution clauses or satisfy other aspects of worker status. This raises questions about the interpretive opportunities that can be found in existing legal rules and how far these rules can be stretched to accommodate worker-protective claims.

A further insight, and an arguably more interesting one, picks up the above question and concerns the specific normative limitations that are imposed on litigation strategies by labour movements. The overarching limitation has already been considered – the need to articulate arguments that are recognizable and capable of being included with respect to existing legal rules and precedents. In this respect, the existing and available norms (such as statute and common law) within a legal system delimit the scope of available argumentative strategies. However, it is also necessary to consider the normative interests which underpin the development and interpretation of rules in the legal system, especially in the

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29 *Pimlico Plumbers v. Smith* [2018] ICR 1511.

30 *Smith v. Pimlico Plumbers* [2022] EWCA Civ 70; *See* further, M. Ford, *Smith v. Pimlico Plumbers: Round Two* (2022), https://oldsquare.co.uk/smith-v-pimlico-plumbers-round-two/ (accessed 1 Mar. 2022).

31 *Uber BV*, *supra* n. 6, at 71–82.

32 *Royal Mencap Society v. Tomlinson-Blake and Shannon v. Rampersad & Another (T/A Clifton House Residential Home)* [2021] UKSC 8.

33 *IWGB v. CAC and Roo Foods Ltd [2021] EWCA Civ 952.*

labour law field.[34] These are obstacles to the effectiveness of certain arguments owing to their substantive and/or procedural opposition to worker-protective laws. In substantive terms, we can identify the law's protection of contractual freedoms, private property, social order, and the rights and expectations which reproduce the structures of political and economic power. Moreover, courts are committed to the status quo and the reproduction of settled legal expectations because their actions are constrained by the limitations of the judicial role in a parliamentary democracy, marked by respect for the separation of powers and the rule of law.

Labour lawyers will be all too familiar with the normative interests with which worker-protective legal arguments must compete. For instance, judicial recognition of managerial prerogative, the effects of contract law doctrines in the interpretation of employment relationships, corporate interests, and deference to margins of appreciation in the domain of collective labour rights.[35] To the extent that law (including labour laws) and judicial adjudication is committed to recognizing existing legal rules, it protects and reproduces the settled expectations of dominant social and economic interests and entrenches structural inequalities that work to the disbenefit of workers.[36] It is precisely these obstacles which need to considered and weighed alongside alternative interpretations of existing legal rules when assessing the potential effectiveness of a given litigation strategy.

In the Court of Appeal in *Kostal v. Dunkley*,[37] the court was presented with a dispute over the correct application of statutory rules relating to trade union members' rights not to be subjected to financial inducements and the specific issue of whether an employer's actions led to the prohibited result (under section 145B Employment Rights Act 1996) of a permanent surrender of collective bargaining over the terms of employment. In finding that the employer's actions did not represent a breach owing to their 'episodic' nature, the court sought to balance the need to protect fundamental collective bargaining rights with respect for the employer's managerial prerogative to exercise contractual flexibility.[38] As Ewing and Bogg highlight, the Court of Appeal's decision in *Kostal* was more about the values or interests that ought to be protected by the law than the proper

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[34] For a discussion of the tension between interpretive opportunities in law and normative interests in the legal system, *see* J. Meakin, *The Opportunity and Limitation of Legal Mobilisation for Social Struggles: A View from the Argentinian Factory Recuperation Movement*, Int'l J.L. Context (2022).

[35] For a discussion of the margin of appreciation in recent collective labour rights case law, *see* Alan Bogg & Ruth Dukes, *Article 11 ECHR and the Right to Collective Bargaining: Pharmacists' Defence Association Union v. Boots Management Services Ltd.*, 46(4) Indus. L.J. (2018).

[36] John Hendy, *Reflections on the Role of the Trade Union Lawyer*, Int'l J. Comp. Labour L. & Indus. Rel. 3–5 (2022).

[37] *Kostal UK Ltd v. Dunkley [2019] EWCA Civ 1009*.

[38] A. Bogg & K. Ewing, *Collective Bargaining and Individual Contracts in Kostal UK Ltd v. Dunkley: A Wilson and Palmer for the Twenty-First Century?*, 49(3) Indus. L.J. 448–449 (2020).

interpretation of statutory wording.[39] The role of such interests represents a particular challenge for the effectiveness of litigation strategies with worker-protective aims. The potential effectiveness of arguments is subject not just to their capacity to reinterpret statutory wording but also to defeat competing normative interests recognized in law, such as managerial prerogatives. Although the Supreme Court reversed the decision in *Kostal*,[40] finding that inducements need not permanently remove collective bargaining to constitute a breach under Article 145B, the challenge of competing normative interests remains a critical concern in evaluating the potential effectiveness of future strategic labour law litigation.

Employment status cases indicate how litigation has sought to redetermine current law and mitigate the effects of dominant normative interests in the legal system. For example, the effects of general contract law doctrines in the interpretation of employment status. Historically, common law doctrines such as freedom of contract worked on the presumption of equal bargaining power between contracting parties.[41] Contract law doctrines, particularly the 'fantasy of freedom of contract',[42] have underpinned and remained key to the interpretation of employment status in a manner which reflects the aims and interests of employers. Protective rights and remedies of statutory employment regulations have been available to judges only where an employment relationship could be identified with respect to the contractual agreement.[43] As a result, courts were not only unable to apply worker-protective regulations, but obliged to recognize and enforce the written agreement. Of course, the common law has not developed independently of certain social and economic interests. As Hendy and Ewing have pointed out, it is judges themselves who have 'created the common law to give maximum power to employers as a class over workers as a class'.[44] This favourable legal terrain has encouraged employers to call upon their lawyers to draft contractual agreements creatively to avoid liabilities, responsibilities, and costs by reframing employees or workers as independent contractors.

The common law of the personal employment contract has since developed to recognize the inequality of bargaining power as a key feature of the employment contract and statutory regulations have sought to provide rights which protect

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39 *Ibid*., at 437.
40 *Kostal UK Ltd v. Dunkley & Ors [2021] UKSC 47.*
41 *Kahn-Freund's Labour and the Law* 12–15 (P. L. Davies & M. R. Freedland eds, 3d ed., London, Stevens & Co 1983).
42 Hendy, *supra* n. 36, at 3–4.
43 P. Elias, *Changes and Challenges to the Contract of Employment*, 38 Oxford J. Legal Stud. 869 at 884–886 (2018).
44 K. Ewing & J. Hendy, *The Politics of Labour Law in the European Court of Human Rights*, Policy Exchange (2018).

vulnerable workers from the common law. The United Kingdom Supreme Court's (UKSC) decision in *Autoclenz*[45] shows how strategic litigation can be used to reinterpret and apply the common law in a manner which provides important worker protections. The court held that the employer could not rely on a substitution clause to defend a claim for worker status if it did not reflect the true agreement between the parties and was in that sense a sham.[46] The court sets out an approach to the construction of contracts which finds the real agreement between the parties by considering all circumstances of a working arrangement and not just the written agreement. Importantly, the judgment identified that contractual inequality was recognized at common law as a 'critical difference' between employment contracts and ordinary commercial contracts and should therefore be taken into consideration when determining the true agreement between parties.[47] As Bogg has put it, 'this was highly significant in its [USKC] repudiation of the common law assumption of contractual equality of parties to the employment contract'.[48] Indeed, in spite of worker-repressive elements in the common law, litigation strategies have targeted its interpretive opportunities to develop significant protections and precedents.

The *Uber* decision appears to signal a further shift, with a move away from a contractual to a statutory approach to employment status. The court is now likely to consider whether statutory employment rights are at issue by asking whether the individuals are vulnerable workers in a potentially exploitative and subordinate employment relation as opposed to first considering the agreement between the parties. While the effects of *Uber* on employment status cases remains to be seen, it is important to note that, despite its seemingly positive impact, it does not exorcize the worker-repressive effects of contract law on employment status cases. If the court does not see fit to recognize a working arrangement as falling under statutory protections, it will be obliged to uphold the express terms of the contractual agreement even where this realizes exploitative conditions that do not trigger other worker-protective rights and remedies. Hendy is quite clear that we ought not to view landmark authorities as an 'antidote to the poison of the common law of contract which infects so much of labour law'.[49] For every such 'victory', there are numerous injustices which are not remedied owing to the inadequacies and bias which is both latent and explicit within the common law and statute. From a strategic perspective, lawyers are left to grapple with and construct arguments

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45 *Autoclenz Ltd v. Belcher* [2011] UKSC 41.
46 *Ibid*., at 35.
47 *Ibid*., at 34; For analysis of the implications of the judgment on the common law of the personal employment contract, *see* A. Bogg, *Sham Self-Employment in the Supreme Court*, 41(3) Indus. L.J. (2012).
48 A. Bogg, *Can We Trust the Courts?*, Int'l J. Comp. Lab. L. & Indus. Rel. 15 (2022).
49 Hendy, *supra* n. 36, at 4.

which attempt to avoid the repressive effects of the common law and draw on the protections offered by statutory regulations and worker-protective precedents.

Legal systems are necessarily constructed around specific rules, precedents, and doctrines which reflect specific social interests in a given time and space. To the extent that strategic litigation attempts to challenge the present interpretation of legal rules and reshape the protections afforded to dominant socio-economic interests, effective litigation strategies will need to draw upon both interpretive opportunities within the law and evaluate their capacity to dislodge and redetermine legal structures which protect entrenched interests and settled expectations. Or, in the terms presented in this tenet, labour movements must identify the normative interests and relevant legal rules which relate to their demands, shape the terrain of legal argumentation, and attempt to articulate arguments which can be recognized and included as legal. This account of effective legal argumentation does not discourage creative engagement with law in favour of safe strategies that cede to law's present boundaries. On the contrary, strategic litigants and lawyers are necessarily engaged in reconstructing and reinterpreting the present determinations of law.

3 TENET 2: STATE LAW'S INSTITUTIONAL CAPACITY

The modern state monopolized law for the purpose of maintaining control over social conflicts within its territorial boundaries.[50] Since modernity national legal systems have been the principal legal authority in their jurisdiction and continue to be chiefly responsible for regulating our social experiences and expectations. The rise of plural legal orders and more radical, autonomous forms of social organizing[51] asks key questions about where strategic litigation ought to be located, the effectiveness of different sites of action, their capacity to order social conflicts, and their relationship with national law. This tenet will explore the specific capacity of national law, how this displaces pluralist thinking, and its implications for strategic action.

The changing role of law and the use of litigation raise important questions in the labour regulation and industrial relations context. Indeed, concerns about the capacity of legal institutions to resolve conflicts have a particular and wider significance in labour law and industrial relations scholarship. In Britain, the voluntarist tradition of trade union recognition and the collective *laissez-faire*

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[50] Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction* 1 (Stanford University Press 1992).

[51] *See* e.g., Negri's conception of the multitude and the constitution of dystopia in Antonio Negri, *Insurgencies: Constituent Power and the Modern State* 313–324 (University of Minnesota Press 1999); and Santos' subaltern cosmopolitan legality in Santos, *supra* n. 1. For an insightful critique of radical legal pluralisms *see* Mariano Croce & Marco Goldoni, *A Sense of Self-Suspicion: Global Legal Pluralism and the Claim to Legal Authority*, 8 Ethics & Global Pol. 1 (2015).

approach to collective bargaining envisioned a limited role for the state and legislation in the regulation of work, with the state supporting the practice of collective bargaining but with agreements reached privately between employers and trade unions.[52] There has been extensive debate about the autonomy of collective bargaining from the state and the extent to which law has and ought to regulate industrial relations.[53] While the decline of union membership since the late 1970s and effects of anti-union legislation has changed the regulatory landscape with collective bargaining now playing a limited role in labour market regulation and an increase in statutory intervention.[54] Moreover, trade unions have sought to engage with the opportunities presented by statutory regulation, including their capacity to complement bargaining strategies.[55] And yet, there has also been scepticism about trade unions using litigation strategically with concerns about the lack of statutory protections and difficulties translating complex legal claims for the purposes of organizing.[56]

In light of concerns about the role of law in regulating work and the rise of plural legal orders, it is important to reassess the capacity of state law and the reasons why trade unions turn to litigation to challenge and reshape labour regulations. This tenet will highlight the capacity of different legal sites to determine and enforce legal obligations and its implications for the effectiveness of a litigation strategy. I will propose the general rule that effective legal mobilization is dependent upon legal institutions that have the capacity to enforce their decisions. Subject to the caveat that, in circumstances where a national legal system offers limited means of redress, effectiveness may become contingent upon engagements with plural legal institutions. Plural legal orders provide important normative standards, not least in the labour law context, but our principal concern here is not which institutional setting is receptive to worker-protective claims but where they can be enforced.

Recent legal mobilization scholarship has focused on the opportunity presented by the plurality of legal regimes beyond the national level. Rachel Cichowski has examined how civil society groups have drawn on the rules and procedures in European Union Law and the European Convention on Human

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52 Zoe Adams, Catherine Barnard, Simon Deakin & Sarah Fraser Butlin, *Deakin and Morris' Labour Law* 12 (7th ed., Oxford: Hart 2021).

53 *See* R. Dukes, *Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone?*, 72 Mod. L. Rev. 220 (2009).

54 Adams, Barnard, Deakin & Butlin, *supra* n. 52, at 26–34.

55 Edmund Heery, *Debating Employment Law: Responses to Juridification*, in *Reassessing the Employment Relationship* (P. Blyton, E. Heery & P. Turnbull eds, Basingstoke, Palgrave 2010).

56 T. Colling, *¡Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom*, Warwick Papers in Industrial Relations, 91 (2009).

Rights.[57] For Cichowski, these plural legal orders have provided opportunities to reinterpret treaty provisions, gain new rights that would otherwise be unavailable at the national level, and give civil society a voice in EU politics.[58] Others have been more reserved in their assessment of supranational litigation's democratic credentials. Conant et al have analysed the opportunities presented by competing legal regimes at the European Level (e.g., the EU and Council of Europe).[59] The authors argue that European law (broadly defined) is largely mobilized in national courts, providing social movements with a set of normative standards that may or may not be enforceable at home. Moreover, the complex relations between the Charter of Fundamental Rights of the EU, European Convention of Human Rights, and national law, as well as the limitations imposed by national standing rules and the availability of financial resources are all identified as significant hindrances to social movements' engagement with available mechanisms at the supranational level.[60] Yet, Conant et al caution against drawing grand normative conclusions 'about whether European legal mobilisation is a positive or negative development for democracy or rights'.[61] Instead, they encourage a nuanced approach that recognizes the reasons why different parties will choose (not) to mobilize law and how neither access to supranational mechanisms nor the receptiveness of national judges to European legal arguments will be experienced uniformly.[62] This provides an understanding of the potential of plural legal regimes and the need to reckon with the multiple factors that shape litigation strategies. This tenet adds institutional capacity to this strategic calculation, and that of state law in particular.

Scott Veitch succinctly captures the capacity of state law when he states that 'legal normativity brings with it a socially effective institutionalized force and the claim that this force is right or just'.[63] For Veitch, institutional force and a claim to right enables law to set the terms of legally enforceable responsibility and the ascription of legal responsibility, or not, that shapes the various legal obligations owed by different social groups and individuals.[64] In other words, the institutional capacity of law determines legal obligations and social expectations about how

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57 Cichowski, *supra* n. 2.
58 *Ibid*., at 6.
59 Lisa Conant et al., *Mobilizing European Law*, 25 J. Eur. Pub. Pol'y 1376 (2018).
60 *Ibid*., at 1379.
61 *Ibid*., at 1378.
62 *See* further, concerns about the role of litigation in promoting negative integration across Europe and the liberalization of markets Fritz W. Scharpf, *The Asymmetry of European Integration, or Why the EU Cannot Be a 'Social Market Economy'*, 8 Socio-Econ. Rev. 211 (2010); cf. the ways that supranational courts have been used to secure social rights protections Lisa Conant, *Individuals, Courts, and the Development of European Social Rights*, 39 Comp. Pol. Stud. 76 (2006).
63 Veitch, *supra* n. 25, at 26.
64 *Ibid*., at 45–49.

someone or a definable group of persons ought to act. This means that the distribution of legal responsibility and how this constitutes social relations ensures that national law remains a key site of struggle for social movements whose strategic aims seek to insert new legal protections, impose duties and/or reconstitute legal relations. For workers, we can see how the *implementation* and *enforceability* of labour standards shapes the relation between employers and employees, and the relation between capital and labour generally.

To develop an understanding of the elements of state law's institutional capacity and its role in strategic litigation, I will stay with Veitch and unpack his account of the juridical architecture's three characteristics: Coercion, correctness and social priority.[65] The first guarantees law's efficacy by ensuring rules are implemented according to the rule of law. At the national level legal institutions have a monopoly over the legitimate exercise of violence due to an efficient coordination between the legal system and enforcement agencies. Compare this to transnational or supranational legal institutions which lack the coercive power to enforce their claims and must rely on the political and legal acceptance of their judgments at the national level.[66] Correctness refers to the inherent 'truth' of legal declarations. Law is not merely the embodiment of power, but it makes a claim about what is 'right'[67]:

> The nature of the status of this 'truth' – that it [law] 'must be taken for established truth' – captures precisely the nature of the claim to correctness: that it is a combination of the normative and the factual, according to which the legal norm's implicit claim to correctness stands as correct, and impacts as such on the wider normative and factual world.[68]

This claim to correctness underpins law's symbolic power. As Goldoni and Croce emphasize, the social priority of law is key to distinguishing the supremacy of a legal order from other normative orders[69]:

> [The] state's monopoly on force is not as important in terms of menace and dissuasion as it is in terms of people's perception of something as law. In other words, a pivotal element for a normative ordering to be legal is the general perception of its pre-emptive character.[70]

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65 The first two are drawn from Robert Alexy, *The Nature of Legal Philosophy*, 17 Ratio Juris 156 (2004).

66 Jiří Přibáň, *Sovereignty in Post-Sovereign Society: A Systems Theory of European Constitutionalism* 2 (Routledge 2016).

67 Veitch draws on Robert Alexy's understanding of the claim to correctness as that which distinguishes a mere norm from a law.

68 Veitch, *supra* n. 25, at 25.

69 *See also* Sally Engle Merry, *Legal Pluralism*, 22 L. & Soc'y Rev. 869, 879 (1988).

70 Croce & Goldoni, *supra* n. 51, at 14.

Accordingly, law is relied upon to determine and guarantee social expectations not simply because they will be physically enforced but because the claims on which rules and sanctions are grounded are viewed as the right-ordering of social relations. The third characteristic flows from the effects of the first two: The capacity of law to make and enforce normative claims about correctness elevates it to a level of social priority or prominence.[71] Legal normativity sits at the top of a hierarchy of social norms, and legal institutions maintain social order by enforcing its declarations of right. Therefore, the institutional capacity of state legal systems means that they have the capacity to enforce obligations, provide regulatory standards and redetermine social relations unlike other normative orders or social practices.

In the context of struggles for economic and social rights, Katherine Young encourages movements, and scholarship, to take seriously law's capacity to institutionalize socially transformative regulations and impose certain minimum standards:

> [A]n antistate, antilaw agenda provides no resources with which to counteract the further evisceration of the state. Indeed, the relegation of the aspiration to material security to an 'extra-legal' space would do nothing to halt the diminishing access to certain goods and services and would probably accelerate it.[72]

Katherine Young captures the important role law plays in guaranteeing rights protections. For Young, national legal systems have the capacity to guarantee economic and social rights and regulate relations between private actors, whereas alternatives lack the necessary resources to challenge current trends toward deregulation or provide direct legal protections. Legal pluralism may promise a more receptive normative landscape with fewer compromises imposed by the demands of legal recognition, but national law's institutional capacity remains necessary for the implementation and enforcement of legal obligations in society. Despite the fact that engaging with national law means operating within a structure that upholds certain entrenched normative interests (e.g., property rights and capital accumulation) and existing power relations, not least the subordination of labour to capital, labour movements still mobilize national law because wages, pensions, employment and dignified working conditions are at stake.

Returning to labour, we can see how both its mobilization and general experience of law is inextricably tied to the institutional capacity of state law. First, labour is always already situated within the context of a national legal system's jurisdictional competence which limits its ability to choose the scale of legality. A labour movement that challenges legal rules will be brought into conflict with the

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71 Veitch, *supra* n. 25, at 26.

72 Katharine G. Young, *Constituting Economic and Social Rights* 245 (Oxford University Press 2012).

legal system that is immediately responsible. For example, if a trade union in the United Kingdom organizes ad hoc industrial action outside the parameters of the Trade Union Act 2016, an employer is likely to initiate legal proceedings against them.

Second, labour, along with most disenfranchised social movements that mobilize law, does not enjoy the same degree of mobility as social groups that engage in 'forum-shopping'. Forum shopping refers to the practice of searching for legal systems that are more likely to provide claimants with a favourable regulatory landscape and judgment.[73] Labour cannot realistically choose to exit its position in society, and is unlikely to want to, in the same way that chief executive officers and shareholders opt to relinquish their collective social obligations and 'relocate' offshore. For labour, the institutional capacity of national law offers an opportunity to fix an employer in one place and enforce legal obligations on them. While corporations will 'shop-around' for low-regulatory standards and minimal legal obligations, labour movements challenge such avoidance of legal responsibility. We can see how passing over state law as a key site of action risks not only excluding tools of struggle but misunderstanding the reality of labour movements' strategic engagements with law.

Contrary to the general argument presented thus far, there will be circumstances where movements have to seek out alternative mechanisms offered by the plurality of contemporary legal regimes. For instance, where there are no mechanisms of legal redress or they have been exhausted. While they may have limited institutional capacity, alternative sites of action may still be capable of contributing toward a movement's strategic objectives.[74] For example, drawing on favourable supranational judgments to exert pressure on and highlight the deficiency of national regulations, or attempts to incrementally develop norms and favourable jurisprudence.[75]

Notwithstanding the effects of such supranational rulings on national law, the normative force of the rights guaranteed by the European Convention on Human Rrights (via the Human Rights Act 1998), and the authoritative normative standards issued by the International Labour Organization; transnational litigation strategies are likely to remain directed toward the national regulatory sphere in order to draw on its institutional capacity, albeit indirectly. The enforcement of a

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[73] The idea of forum-shopping was initially coined in private international law, *see* Keebet von Benda-Beckmann & Bertram Turner, *Legal Pluralism, Social Theory, and the State*, 50 J. Legal Pluralism & Unofficial L. 255, 260 (2018).

[74] Effie Fokas & Dia Anagnostou, *The 'Radiating Effects' of the ECtHR on Social Mobilizations Around Religion and Education in Europe: An Analytical Frame*, 12 Pol. & Religion S9 (2019).

[75] Mantouvalou, *supra* n. 18; Novitz, *supra* n. 18; *see also* critical reflections on the ECtHR's post-Demir trajectory and their receptiveness to collective labour rights claims from British workers in K. D. Ewing & J. Hendy QC, *The Trade Union Act and the Failure of Human Rights*, 45(3) Indus. L.J. (2016).

workers' rights by the European Court of Human Rights is not an end in and of itself but can be seen as an attempt to redetermine national labour law regimes.

In sum, effective legal mobilization ought to target national law's material and symbolic power to enforce legal obligations and determine social relations, but where legal opportunities at the national level are closed off the effectiveness of a legal strategy will be dependent on the use of more innovative legal and political practices. The focus on institutional capacity in this tenet has not sought to dismiss the opportunities presented by legal pluralism or reify the nation state as a site of social emancipation. On the contrary, it has sought to contextualize the use of multi-level litigation strategies by labour movements in light of state law's superior ordering capacity. The stake of strategic litigation is intimately tied to this capacity to redetermine social experiences and expectations through legal regulation. Indeed, the absence of regulation, Veitch has warned, means the absence of the sort of legal obligations that protects workers and prevents employers from imposing unnecessary suffering for economic gain.[76] Therefore, state law represents a strategic battleground over the legality of undignified work practices and the transformation of current legal protections.

4 TENET THREE: POLITICAL OBJECTIVES

This tenet explores the ways that social movements engage with law without surrendering their political aims and objectives to the process of legal ordering. We will consider the complex relationship between a movement's political demands and their engagements with law, exploring the danger of co-optation and the continued opportunity presented by law for political strategies.

The danger of co-optation and the extent to which social movements can resist it are a central issue for the potential effectiveness of legal mobilization. Broadly defined, the danger of co-optation refers to the potential loss or subversion of a movement's political objectives in the act of engaging with law. There are a range of concerns that can be understood as relating to 'co-optation', from general critiques of legal reformism to practical concerns about the limitations of tactical litigation. These criticisms provide both a rejection of strategic litigation as an effective tool for radical political struggle[77] and an internal critique of the practice of legal mobilization. While the former provides important insights about the normative boundaries of law and what type of sociopolitical transformation can and cannot be attained through law, we will focus on the challenges legal action poses to labour movements' political objectives.

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[76] Veitch, *supra* n. 25, at 2.
[77] Hardt & Negri, *supra* n. 1, at 308–313.

Internal critiques of legal mobilization, drawn mostly from socio-legal and political science literatures, highlight the ways that 'legal reform narrows the causes, deradicalizes the agenda, legitimizes ongoing injustice, and diverts energies away from more effective and transformative energies'.[78] In order to clarify what we mean by the danger of co-optation, we can follow Orly Lobel's[79] rationalization of the literature into six key concerns:

First, litigation is an expensive process that could consume a movement's available resources at the expense of other potentially effective political tactics and the more immediate concerns of its members.[80] Second, litigation involves framing a political dispute in legal terms. As we have seen in tenet one, this means articulating political demands as legal arguments that are recognizable and includable as something which belongs to the legal system. Third, the role of lawyers in translating and representing political demands as legal claims introduces the risk of misrepresenting political aims and objectives. The legal language in which political demands are presented may be unrecognizable to a movement's constituents and could alienate members and have demobilizing effects.[81] Fourth, even when courts issue favourable judgments, there is no guarantee of immediate enforcement or wider judicial or legislative reform.[82] The judiciary's lack of an enforcement function means that the effectiveness of litigation is contingent on a synchronicity between all branches of government. Fifth, legal mobilization can dominate social movement strategy. Law's authoritative role in social ordering means that political forms of action may be viewed as deviant[83] or less effective,[84] which can lead to legal action being preferred over more effective political actions. Moreover, the juridification of political conflicts can have a demobilizing effect on a political movement. This is particularly acute where legal processes come to an end and are assumed to have resolved the associated political conflict.[85] Sixth, litigation may fail to tackle the root cause of social injustice and instead legitimize the legal and political systems that bring about such injustices. For example, a labour movement may expend vast financial resources and energy in critiquing the legal system only

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78 Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, Harv. L. Rev. 120 (2007) 937.

79 *Ibid*., at 949–959.

80 David M. Trubek, *The Costs of Ordinary Litigation* (University of Wisconsin-Madison Law School, Disputes Processing Research Program 1983).

81 Clark D. Cunningham, *Lawyer as Translator Representation as Text: Towards an Ethnography of Legal Discourse,* 77 Cornell L. Rev. 1298 (1991).

82 Rosenberg, *supra* n. 4, at 338.

83 Michael McCann & Helena Silverstein, *Rethinking Law's 'Allurements': A Relational Analysis of Social Movement Lawyers in the United States*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* (Austin Sarat & Stuart Scheingold eds, Oxford University Press 1998).

84 Rosenberg, *supra* n. 4, at 341.

85 Karl Klare, *Law-Making as Praxis*, 1979 Telos 123 (1979).

to receive limited tangible legal protections whilst providing an opportunity for the legal system to order a social conflict and confirm its social legitimacy as the supreme ordering authority.

The question that motivates this tenet is, how can labour movements, in light of the limitations set out above, engage strategically with law and hold onto their political aims? Our aim, in answering this question, is neither to deny the dangers of co-optation nor dismiss law as an effective tool, but to acknowledge the tensions and challenges faced by labour movements when they engage in strategic litigation. In particular, the challenge of holding onto their telos and political demands when the legal system becomes the terrain in which demands are presented and redress sought. In order to comprehend the dynamic and complex relationship between labour movements' political demands and their use of litigation, we will turn to two guiding insights: Michael McCann's conception of the in/direct effects of legal mobilization and the distinction between tactics and strategy.

For McCann, the *direct* effects of litigation provide 'short-term remedial relief for victims of injustice or to develop case law precedents capable of producing long term institutional change'.[86] In this respect social movements are understood to harness the potentially direct effects of law by drawing on legal remedies, new precedents that contribute to their political objectives, or indeed, any direct legal protection that stems from litigation. However, for McCann, direct effects do not exhaust the potential effectiveness of legal action. Instead, the effectiveness of legal mobilization must be evaluated broadly, which means taking into consideration its possible contributions to the achievement of political objectives. We should note here that McCann is focused on the broader category of 'legal mobilization' as opposed to the narrower act of litigation. This shifts the focus onto the various ways that law and legal resources can be mobilized and pays close attention to the importance of concurrent political mobilization by social movements.

Some examples of the potential *indirect* effects of legal mobilization are: First, the capacity for legal language to provide a frame for movements in which to articulate their perceived injustices. The language of rights, for example, enables movements to formalize their grievances and present concrete demands. Second, a movements' identity can be developed and mobilized around specific legal demands, with rights claims serving as both the 'articulation and mobilisation of collective identities'.[87] For Alan Hunt, the universal nature of rights language enables social movements to formulate and put into action their political struggle and attract wider support for their normative claims. It is, of course, difficult to draw definite conclusions about

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[86] Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* 10 (University of Chicago Press 1994).

[87] Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J. L. & Soc'y 309 (1990).

the 'effectiveness' of the relationship between legal actions and identity-formation. Law might provide a set of claims around which a movement can formalize experiences of injustice and precarity, but issues of identity-formation and the trajectory of movements are delicate, unpredictable, and often intangible.[88]

Third, the indirect effects of public support that flow from engagements with law. McCann emphasizes that 'legal mobilization does not take place in a social vacuum'[89] and a movement gathers momentum (or not) when its legal arguments have traction with the social experience of others. Therefore, the publicization of a legal action is directed toward generating vital social support, for example, at demonstrations, picket lines, and in the provision of financial or other assistance.[90] Fourth, the leveraging capacity of law can become an important resource for social movements with the threat of potentially damaging legal action used as a bargaining chip in negotiations. The discursive capacity of rights means that leverage does not require winning and it may not even require going to court.[91] Instead, there is an interplay between the formal act of initiating litigation and the informal bargaining that occurs between parties that can compel concessions from adversaries.

Importantly, for our purposes, McCann's conception of in/direct effects insists on the importance of incremental developments when evaluating the effectiveness of mobilization strategies; as opposed to evaluating legal mobilization according to its ability to achieve grand social transformations.[92] A legal engagement that does not deliver legal protections or constitute a reform is not necessarily an example of co-optation. Instead, we can see how a failed attempt at legal reform can serve to generate political support and mobilize resources in the longer term. To emphasize the point, we can identify a temporal dimension to litigation's potentially indirect effectiveness. From the perspective of law, a legal claim is either included or excluded. In the event of a negative litigation strategy, a legal claim expires as legal time draws a line under a legal action. Whereas, for a political movement, their political demand and associated struggle are ongoing, they are not exhausted by law's determinations. Even negative legal outcomes can contribute, in the long term, to a movement's strategic objectives (political demands), but we can only see this when the effectiveness of strategic legal action is divorced from the outcome and (direct) effect of legal decisions. This is, of course, subject to strategic decision-making that weighs the damaging effects of launching expensive litigation which may fail to deliver key worker protections and have a demoralizing and demobilizing effect with the long-term indirect effects that strategic litigation could deliver.

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88 *See* further, Dias-Abey, *supra* n. 16.
89 McCann, *supra* n. 85, at 137.
90 *Ibid*., at 110–111.
91 *Ibid*., at 139.
92 *Ibid*., at 307.

Our second guiding insight develops the above by considering the distinction between legal tactics and political strategy. The danger of co-optation appears when political objectives become over-reliant or indistinguishable from legal tactics and political demands are subordinated to law's determinations. The distinction between strategy and tactics is, therefore, important because it shows how a movement's wider political strategy is not exhausted by the outcome of tactical engagements with law. Robert Knox has drawn attention to the tendency to blur the lines between long-term strategic objectives and tactical engagements with law:

> [S]trategy concerns the manner in which we achieve and eventually fulfil our long term aims or objectives, whereas tactics concerns the methods through which we achieve our shorter term aims or objectives.[93]

Applying Knox's distinction, the 'manner' of a strategic engagement with law (litigation) does not submit to the terms of legal argument set by the legal system but holds onto a wider critique of the law itself, whereas tactical engagements with law involve instrumentalizing existing legal provisions. A problem arises, according to Knox, where tactical methods are misunderstood as strategy. This refers to a scenario where a 'strategic' engagement with law uses the terms set out in law without having a longer-term political aim. This does not mean that the instrumentalization of law cannot deliver important protections, but we must acknowledge how tactical engagements cede to law's form, organizing assumptions and commitments to offer a limited scope for internal critique of law's structures on its own terms. Therefore, strategic litigation may serve instrumental, tactical purposes in spite of the form and requirements of legal argument (see tenet 1) giving the appearance that political demands have been replaced, or co-opted, by law.

An important element of tactical engagement, for Knox, is 'principled opportunism'.[94] The presence of a critique of the legal system and a long-term aim to challenge its organizational interests are the markers of principled opportunism, whose objectives are not limited to reproducing the legal system along its current structural and substantive lines. The aim may be to subvert the legal order but the practices that are taken in its name may involve 'everyday legal struggles'[95] that appear, ostensibly, to present a limited political critique. For our purposes, we can see how law might offer certain protections for a labour movement that do not challenge the legal structures which reproduce capital-labour relations but do, nonetheless, provide an opportunity to pursue either a wider political aim or insist on specific legal remedies. Therefore, a tactical engagement with law offers the opportunity of greater, and much

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93 Robert Knox, *Strategy and Tactics*, 21 Finnish Y.B. Int'l L. 193, 197 (2012).
94 *Ibid*., at 224–227.
95 *Ibid*., at 228.

needed, legal protection in the short-term but should also carry with it a wider critique of law's normative objectives and an understanding of the relationship between legal action and political demands.[96]

Tactical use of litigation may deliver important protections, but state law is no panacea for social injustice. The important insight for labour movements is that, in order to caution against the danger of co-optation, tactical engagements with law ought to be paired with a broader strategic aim that is not reducible to legal language and legal processes. In other words, contemporary labour movements need to come to law as principled opportunists, with an awareness of law's limitations, political objectives, and a mobilization strategy that is not totally captured by legal frames.

5 CONCLUSION

In the absence of responsive political mechanisms, strategic litigation has become an important tool for labour movements. It is a means through which political demands can be represented in an institutional context where they have the possibility of redetermining social experiences and expectations. A fundamental and primary challenge for this approach is to represent workers' demands as legal arguments, a process which often fails to hold onto the suffering, exploitation, and irreducibly human experience to which they respond. From translating political demands and material grievances into legal claims to navigating legal processes, evaluating the effectiveness of litigation strategies presents particular challenges, in both theory and practice. This article contributes to understanding this practice by providing a framework of three tenets that work through and rationalize the central issues that determine the effectiveness of strategic litigation.

Tenet one contributes an understanding of the specific challenges presented by legal ordering for effective argumentative strategies in the labour law context. The procedural and substantive requirements of form and fit make it necessary to consider how litigation strategies confront and engage with the legal system's existing normative commitment to legal rules, doctrines, and other entrenched interests. Accordingly, labour movements seeking to benefit from direct legal protections must articulate claims that are both recognizable within existing normative structures and capable of redetermining them. This places legal argumentation within the context of a legal system with pre-existing normative boundaries that necessarily shape the horizon of and possibilities for effective strategic litigation. Tenet two focuses on the particular importance of state law in effective

[96] *See* further, Honor Brabazon, *Occupying Legality: The Subversive Use of Law in Latin American Occupation Movements: Occupying Legality*, 36 Bull. Latin Am. Res. 21 (2017).

strategic litigation. In recognizing the institutional capacity of national law, we focus on the role of material and symbolic power in ordering social relations and imposing legal obligations. Labour movements engage with national legal systems because its supreme ordering capacity presents an opportunity to enforce legal obligations on capital that would otherwise benefit from the absence of regulation. This insight does not dismiss the role of plural legal orders or the fact that national law may not offer any suitable mechanism of redress. On the contrary, recognizing the importance of institutional capacity provides a standard for evaluating the strategic use of law by labour movements and distinguishing the potential effectiveness of national legal mechanisms from alternative institutional contexts.

The final tenet confronts concerns about the maleffects of strategic litigation on political objectives. Adopting a textured approach, this article recognizes the dangers of co-optation but cautions against claims that legal mobilization necessarily co-opts a movement's political nomos. To comprehend how movements might hold onto their political objectives, we can learn from insights about the range of in/direct effects that benefit political objectives and the productive relation between tactics and strategy. Some movements will aim to re-present their political demands in a legally cognizable form; others will refuse to frame their claims within law's existing normative boundaries, preferring to politicize the current state of legal regulations with the aim of mobilizing a wider movement for social transformation. The former might not secure direct legal protections, but, with the latter, their use of law can provide indirect benefits to their wider, longer-term political objectives.