

Organizing: Should the Employer Have a Say?

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*Israeli courts were recently faced with the question whether an employer is allowed to voice objections to unionization during an organizing drive. Since the legislation fails to provide an answer to this question, it was up to the courts to come up with a solution. The National Labor Court in *Histadrut v. Pelephone* held that employers have no say and must refrain from any communications whatsoever with the workers regarding the decision whether or not to join the union. The Supreme Court later affirmed this decision. This Article explores this legal question and examines whether this decision was justified, and whether it should be adopted in other countries as well. It first discusses the justifications for the conflicting freedoms in this scenario — the workers' freedom of association and the employer's freedom of speech — to appreciate their relative strength in the circumstances. It then examines whether it is possible to achieve a certain balance. To this end, the Article critically reviews the legal mechanisms adopted by other legal jurisdictions (the United States, Canada and the United Kingdom) in this regard, shedding light on their effectiveness and the difficulties of organizing in practice in each jurisdiction. The main argument advanced in this Article is that the solution has to be purposive — to advance the goals of labor law, specifically freedom of association — and that the purposive analysis must be contextual. A rule prohibiting the employer from voicing opinions is surely an infringement of freedom of speech, and strong reasons are needed to justify it. Whether strong enough reasons exist depends on several contextual factors. Essentially, the*

* Ryerson University, Toronto, and the Hebrew University of Jerusalem, respectively. For the sake of full disclosure, the second author assisted the *Histadrut* in the case discussed in this Article, *pro bono*. The authors would like to thank Adam Shinar, Barak Medina and the participants at the Tel Aviv University workshop on *Labor Organizing and the Law*, January 2015, for helpful comments, and Annice Blair for excellent research assistance.

question is whether it is possible, given the current context, to secure real freedom of association without such a rule. By context we mean two main things: first, the real-life current experience concerning the struggles of organizing; and second, the existence of alternative legal mechanisms that might address this problem.

INTRODUCTION

Israeli courts were recently faced with the question whether an employer is allowed to voice objections to unionization during an organizing drive. This was raised in the context of a fierce battle between the *Histadrut* — Israel's major labor union — and Pelephone, a major cellular company. Since the legislation fails to provide an answer to this question, it was up to the courts to come up with a solution. The National Labor Court shocked the business community by deciding that employers have no say and must refrain from any communications whatsoever with the workers regarding the decision whether or not to join a union. The Supreme Court later affirmed this decision.¹

One of the arguments of the employers' organizations before the courts was that a complete prohibition on employer speech during organizing is unprecedented (comparatively speaking). While this was somewhat exaggerated, given that the judgment fits the *spirit* of the law in other countries,² it is true that an *explicit* prohibition of this kind is without precedent. The goal of this Article is to consider this judgment at a normative level, and whether it would be justified to adopt it in other legal systems as well. The question has two components: is it the best/most justified legal arrangement? And is it within the legitimacy of courts to adopt such an arrangement? We focus for the most part on the first question, but will briefly discuss the second one as well toward the end.

The dilemma can be captured as a conflict of two fundamental freedoms: the workers' freedom of association versus the employer's freedom of speech. We realize, of course, that there is an ongoing debate about the usefulness of constitutionalizing employment and labor relations.³ However, we are

1 HJC 4179/13 Coordinating Chamber of Economic Organizations v. Nat'l Labor Court (July 7, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 25476-09-12 Nat'l Labor Court, *Histadrut v. Pelephone Comm'n Ltd.* (Jan. 2, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

2 As discussed in Part IV below.

3 See, e.g., DAVID M. BEATTY, *PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE* (1984); Harry Arthurs, *The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems*, 19 *Soc. &*

not concerned here with the strategic question whether a union should go to court and make a constitutional claim or not.⁴ The question we examine is normative: once the issue reaches the courts, what is the right solution to this conflict between the parties?⁵

Both parties in the *Pelephone* case indeed focused on fundamental freedoms, but attempted to frame the issue somewhat differently from a conflict between these two fundamental freedoms. The union argued that because there is no public interest in protecting antiunion speech, a prohibition on employers would not amount to an infringement of a protected freedom. We believe that the low value of the speech should be taken into account as part of the balancing, but prohibiting the employer from voicing an opinion *does* amount to a violation of freedom of speech.⁶ The employer, in contrast, wanted to

LEGAL STUD. 403 (2010); Ruth Dukes, *Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund and the Role of Labour Law*, 35 J.L. & SOC'Y 341 (2008); Geoffrey England, *The Impact of the Charter on Individual Employment Law in Canada: Rewriting an Old Story*, 13 CAN. LAB. & EMP. L.J. 1 (2006); Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?*, 29 COMP. LAB. L. & POL'Y J. 29 (2007); James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941 (1997).

- 4 The *Histadrut* decided to take this route, and succeeded, but we do not seek to examine this choice.
- 5 At this level there is no doubt that fundamental freedoms must play a key role in the analysis. Not only because the parties themselves have argued that their freedoms have been infringed, and this must be addressed, but also because the normative discussion must be based on justifications, and advancing fundamental freedoms such as freedom of association and freedom of speech is a strong justification for legal regulations.
- 6 We therefore adopt the common view which defines constitutional rights and freedoms very broadly and defers discussion on appropriate limitations to the next stage of the analysis (balancing against other rights and examining whether infringements are proportional). See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 19-21, 70-71 (2012); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 53 (1996); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981). For critiques of this approach, see GREGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTIONS: ON THE LIMITATIONS OF RIGHTS (2009); Bradley W. Miller, *Justification and Rights Limitations*, in EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 93 (Grant Huscroft ed., 2008). On the argument that employer speech (specifically captive audience speech) is inherently coercive and as such should not receive constitutional protection, see Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 365, 414-17 (1995).

put emphasis on the right to property alongside the freedom of speech. True, when employees attempt to unionize a workplace, employers are mainly concerned about the possible impact on profitability and managerial flexibility. At least indirectly, then, their main concern usually revolves around property rights. However, we do not see an arrangement prohibiting antiunion speech as violating property rights. At the end of the day, the employer might lose some money (or control) as a result of a collective agreement, or a strike, but this is too far removed from the speech during initial organizing. The laws allowing and supporting collective bargaining and strikes are not themselves part of the dispute here. And when one person acts legally, the fact that another person might lose some money or control indirectly as a result does not mean that the right to property has been infringed.⁷ The employer also argued that freedom of association is not infringed, because workers are free to make a decision on unionization after hearing all views. Such an analysis, however, is detached from the reality of employment relationships, in which the employer's "views" are usually determinative.

We therefore structure the analysis — as the Court in *Pelephone* did — as a conflict between freedom of association and freedom of speech. We start by briefly reviewing the case itself (Part I); we then discuss the justifications for freedom of association, and how they are applied in the current context (Part II); and we do the same with freedom of speech (Part III). The next step is to balance the two conflicting freedoms, and we examine the legal frameworks adopted in several other jurisdictions in this regard (Part IV), before suggesting how this balance should be struck in the Israeli context, the *Pelephone* case, and beyond (Part V).

I. THE PELEPHONE CASE

Pelephone Communications Ltd. is Israel's first cellular company and still one of the largest companies in the sector, employing some 4000 workers. Until 2012 it was nonunionized, just like all other workplaces in this sector at that time, and just like almost all other IT and "new economy" workplaces.⁸ Union density in Israel experienced the most dramatic decline among the

7 For example, when A opens a new business that will compete with B, the latter might lose money, but can hardly claim that her right to property has been infringed.

8 The term New Economy "describes aspects or sectors of an economy that are producing or intensely using innovative or new technologies" and "applies particularly to industries where people depend more and more on computers, telecommunications and the Internet to produce, sell and distribute goods and

OECD countries, from roughly eighty to eighty-five percent in the 1980s to about forty to forty-five percent in 2000, to twenty-five percent in 2012.⁹ Private-sector workplaces that remained unionized were almost entirely in the “old” industrial sector. But 2013 proved to be a turning point.

To explain the shift, we need to go back in time a little. In the last few years, the *Histadrut* intensified its efforts to organize workers in new sectors, with a newly-established organizing department, and has started to see results. A new union, *Ko'ach La'ovdim* (“Power to the Workers”), established in 2007, has managed to create grassroots excitement regarding unionism, to challenge the *Histadrut* to further improve its efforts, and has also seen some successes in organizing.¹⁰ Unions appeared to be bouncing back, to some extent.

However, employers were not going to accept this without a fight. Many of them have strongly resisted organizing attempts, including by using “union-busting” methods newly imported from the United States. Although the law made it clear, at least since the 1990s, that employers cannot interfere with freedom of association,¹¹ in practice this proved very difficult to enforce.¹² As a result, new organizing successes were very modest. While they received a lot of media coverage and created optimism among union-supporters, in practice the number of new members was relatively small, not exceeding the number

services.” *Glossary of Statistical Terms: New Economy*, OECD (Aug. 26, 2004), <https://stats.oecd.org/glossary/detail.asp?ID=6267>.

- 9 Yinon Cohen, Yitshak Haberfeld, Guy Mundlak & Ishak Saporta, *Unpacking Union Density: Union Membership and Coverage in the Transformation of the Israeli Industrial Relations System*, 42 *INDUS. REL.* 692 (2003); Israeli Central Bureau of Statistics, Selected Data from the 2012 Social Survey on the Organization of Workers, Press Release (June 9, 2013), http://147.237.248.50/reader/newhodaot/hodaa_template_eng.html?hodaa=201319151. For comparative OECD data, see *Trade Union Density*, OECD, http://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN (last visited May 28, 2015).
- 10 Hila Weissberg, Haim Bior & Tali Heruti-Sover, *Labor of Love: Israelis Get Organized, Flock to Union in Record Numbers*, *HAARETZ*, June 5, 2013, <http://www.haaretz.com/business/.premium-1.528022>.
- 11 See Collective Agreements Law, 5717-1957, § 33h, SH No. 221 p. 63, as amended (Isr.); File No. 4-10/98 Nat'l Labor Court, *Delek v. Histadrut* (Nov. 29, 1998), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 3-209 Nat'l Labor Court, *Mif'aley Tachanot Ltd. v. Yaniv* (Nov. 11, 1996), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
- 12 For examples of severe infringements of the right to organize prior to 2013, see File No. 33142-04-13 Nat'l Labor Court, *Electra v. Histadrut* (Apr. 10, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); and File No. 24-10 Nat'l Labor Court, *Hot Telecom Ltd. v. Histadrut Ha'Ovdim Ha'Leumit* (Mar. 16, 2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

of members lost due to retirement during the same period. And specifically, efforts to penetrate new industries and sectors have generally failed.

The struggles of the *Histadrut* culminated in the summer of 2012 with the organizing campaign at Pelephone. As part of the “new economy” service sector, and employing mostly young and relatively educated workers, the cellular sector was highly coveted by the union. The time was also ripe for organizing: wide-ranging reforms introduced by the government significantly intensified competition in the sector,¹³ cutting profit margins and creating an expectation for mass redundancies. Workers were thus particularly in need of protection. The company on its part was fearful of losing managerial flexibility and especially of jeopardizing its competitive stance in the nonunionized sector. This led to a bitter fight.

Israeli labor law is based on exclusive union representation, but does not set any certification procedures. There is only one simple rule in legislation: to become a representative union, with the power to represent the workers in collective bargaining and strikes, a union must have at least a third of the workers in the bargaining unit as its members (and more than any other union).¹⁴ Bargaining unit rules were set by the courts; in most cases there is a single unit for the entire company. In Pelephone, the *Histadrut* and its supporters therefore had to sign up a third of the workforce, which was not an easy task given the dispersion of workers across the country. After an initial phase of signing some workers covertly, the organizing campaign became public, eliciting a prompt response from the company.

Although Pelephone enjoyed close legal advice from labor law experts, some of its actions were clearly illegal, and others highly questionable.¹⁵ Employees were not allowed to talk to union representatives. They received messages demanding that they refuse to sign membership forms. At another site, union membership forms held by employees were confiscated. Many employees were asked (even required) by direct supervisors to sign forms revoking union membership and objecting to the *Histadrut*. Other local managers were more subtle but initiated one-on-one meetings with employees to discuss the organizing drive and explain the company’s objections, and

13 Amitai Ziv, *Reforms Saved Cellphone Users NIS 4.5 Billion in 2011*, HAARETZ, Mar. 22, 2012, <http://www.haaretz.com/business/reforms-saved-cellphone-users-nis-4-5-billion-in-2011-1.420096>.

14 Collective Agreements Law, § 3. There are separate rules concerning sector-wide and nationwide bargaining, which are not relevant here.

15 The description is based on the judgment in File No. 25476-09-12 Nat’l Labor Court, *Histadrut v. Pelephone Commc’n Ltd.* (Jan. 2, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

sometimes also to promise personal favors. Other employees were compelled to sit as a “captive audience” in roundtables which were used to disseminate antiunion propaganda. At later stages of the struggle, Pelephone officials also tried to set up a “company union,” and pressure was put on employees to join this union.

The *Histadrut* petitioned the labor court against these actions, and received several injunctions. Some of them were even granted with the company’s agreement: Pelephone did not dispute that many of these actions were illegal, in contravention of legislation and case-law protecting freedom of association. However the company denied some of the facts, and in other cases insisted that the actions were initiated by local managers without its knowledge or direction.

There was also, however, another issue that raised a fundamental legal question. While it was clear (although as noted, difficult to enforce) that employers are not allowed to actively interfere with freedom of association, cannot threaten or otherwise pressure employees who decide to join a union, and so on — a related issue remained contentious: are employers allowed to voice their views against unionization, or more specifically against the *Histadrut*? Does the law allow an employer to deliver its stance against unions to its employees, to send information and views about the damage that will occur, in its view, as a result of organizing? Pelephone did all that, extensively. So the courts had to determine: if we put aside the illegitimate acts of pressure which are surely prohibited, and leave just the voicing of views and information against unionization, does the law allow that?

In its judgment of January 2, 2013, the National Labor Court decided in the negative: employers are prohibited from voicing their view against unionization.¹⁶ Employers have no say on this matter; even the delivery of information which they think is relevant or missing from the discussion is not allowed. The only grounds for exception are if an employer believes that the union is making factual misrepresentations; in such a case, it can petition a labor court and ask for permission to correct this misinformation. But the employer is not allowed to do so without a specific judicial permit.

The judgment was received by employers’ organizations with astonishment and even rage. They filed a petition to the Supreme Court of Israel to review the decision, which was recently denied.¹⁷ In the meantime, the results on the ground were transformative. Pelephone quickly had to accept the *Histadrut* and has signed a first collective agreement. The other two major cellular

16 *Id.*

17 HJC 4179/13 Coordinating Chamber of Economic Organizations v. Nat’l Labor Court (July 7, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

companies in Israel (Cellcom and Partner) soon followed suit. Quickly, successful organizing campaigns have spread to insurance companies, financial companies, fast-food chains, and even the information technology sector.¹⁸ Admittedly, the numbers are still not dramatic, and this general trend had started even before the *Pelephone* decision. But this was nonetheless a noticeable turning point. To be sure, many employers still oppose unionization, and some still fight it fiercely, even with illegal methods. Nonetheless, it appears that many employers have internalized the fact that they are not allowed to object and have to accept and work with the union. Organizing a new workplace is still a challenge, but a much more realistic one.

II. FREEDOM OF ASSOCIATION: JUSTIFICATIONS AND CONTEXT

Why do we (as a society) allow workers to join unions, and even consider this a fundamental human freedom? At the most general level, freedom of association is protected because it answers a human need to associate with others, and because people should have the autonomy to pursue such associations. But labor unions are not like any other association. They were given significant powers by legislatures: to represent workers, including some that would not like to be represented (at least in some countries, including Israel); to sign collective agreements, which are almost as powerful as legislation; and to initiate strikes, which are harmful to employers and often to third parties and society at large. In the context of labor relations, there is little point in giving workers just a passive freedom to associate, if the union is stripped of all of these powers. Freedom of association in the labor context is usually understood to include the right of the union to bargain collectively and strike.¹⁹ This also means that additional and more specific justifications are required.

18 In 2013, around 25,000 workers and above a hundred new workplaces became unionized. This represents a sixty percent increase in new unionized workplaces and a ninety percent increase in new unionized workers compared to 2012. Hila Weissberg & Haim Bior, *How 2013 Turned into the Big Unionization Year*, THE MARKER, Dec. 25, 2013, <http://www.themarker.com/career/1.2199164> (Isr.); see also Shay Niv, *Histadrut Sets Up High Tech Union*, GLOBES, June 15, 2014, <http://www.globes.co.il/en/article-histadrut-sets-up-high-tech-union-1000946450>; Gad Perez, *Partner Recognizes Histadrut Workers Committee*, GLOBES, Sept. 8, 2014, <http://www.globes.co.il/en/article-partner-recognizes-histadrut-workers-committee-1000969808>; Weissberg, Bior & Heruti-Sover, *supra* note 10.

19 This was the law in Israel even before the recent *Pelephone* decision. See, e.g., File No. 57-05 Nat'l Labor Court, *Histadrut v. Ministry of Transp.* (Mar. 3, 2005), Nevo Legal Database (by subscription, in Hebrew) (Isr.). This is also

Justifying freedom of association in the labor context can be done at different levels of abstraction, but all of them are based on the same basic (and well-known) background story: the employment relationship is not a regular contractual relationship; employees are in a position of vulnerability; employers generally have superior bargaining power. There are several solutions to this problem, most notably — in all advanced economies — legislation setting minimum employment standards and allowing workers to bargain collectively through unionization. In other words, forming and joining labor unions is one of the main solutions to the fundamental problem of employment relations. Workers need unions because without them, they would not have countervailing power *vis-à-vis* employers, i.e., sufficient power to protect their interests and prevent abuse of power by employers.

With this background story in mind, we can turn to considering several justifications for unionization. At the most general level, unionization is needed to protect the dignity of workers (or: ensure decent work); to achieve a degree of workplace democracy; to promote equality between different workers; and to advance distributive justice between capital and labor.²⁰ At a more concrete level, the protection and advancement of unions is justified because through collective bargaining it leads to the redistribution of resources from employers to employees; it creates a mechanism for workers to voice their views and concerns, as well as a structure of (relatively) democratic co-governance in the workplace; it prevents arbitrary decisions and ensures an internal “rule of law” in the workplace; and it can also (more controversially)

the view adopted by the ILO Freedom of Association Committee. See INT’L LAB. OFFICE, FREEDOM OF ASSOCIATION: DIGEST OF DECISIONS AND PRINCIPLES OF THE FREEDOM OF ASSOCIATION COMMITTEE OF THE GOVERNING BODY OF THE ILO chs. 10, 15 (5th rev. ed. 2006). The right to bargain collectively has recently been recognized as derived from freedom of association by the Supreme Court of Canada and by the European Court of Human Rights. See *Health Serv. & Support v. British Columbia*, [2007] 2 S.C.R. 391 (Can.); *Demir v. Turkey*, Eur. Ct. H.R. (2008) (respectively). The right to strike is broadly recognized as well, but still contested in some jurisdictions. In Canada it was recently held that the right to strike is constitutionally protected. See *Saskatchewan Fed’n of Labour v. Saskatchewan*, 2015 S.C.C. 4. At the ILO there was recently an attempt by employers’ representatives to challenge this right. See Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right to Strike*, 42 INDUS. L.J. 338 (2013).

20 On the general goals of labor law, applicable here as well, see Guy Davidov, *The Goals of Regulating Work: Between Universalism and Selectivity*, 64 U. TORONTO L.J. 1 (2014).

promote efficiency.²¹ The last justification is highly contested by employers, but empirical studies show that if they avoid an adversarial stance and agree to cooperate, employers stand to benefit from unionization through higher productivity and lower turnover.²² Overall, unions may be beneficial to us (as employees, employers, and as a society). Admittedly, real life is not always the same as the ideal just described; unions have their own problems. But these can (and should) be solved through targeted legislation and other means, without losing the crucial benefits.²³

Still, one might ask, isn't legislation enough for protecting workers? Why are unions needed *on top of* the many statutory employment protections? There are several possible answers. *First*, in theory, unions are not necessary; legislatures

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- 21 See Guy Davidov, *Collective Bargaining Law: Purpose and Scope*, 20 INT'L J. COMP. LAB. L. & INDUS. REL. 81 (2004), and references therein. On voice, see also Alan Bogg & Cynthia Estlund, *Freedom of Association and the Right to Contest: Getting Back to Basics*, in VOICES AT WORK: CONTINUITY AND CHANGE IN THE COMMON LAW WORLD 141 (Alan Bogg & Tonia Novitz eds., 2014) (justifying freedom of association by reference to a "right to contest," which is an important aspect of freedom — following Philip Pettit's idea of freedom as non-domination — and cannot realistically be materialized in the context of employment relations without joining forces with others); Virginia Mantouvalou, *Democratic Theory and Voices at Work*, in VOICES AT WORK, *supra*, at 214 (discussing democratic vs. human rights justifications for voice at work). On justifications for workplace democracy see also Guy Mundlak, *Workplace — Democracy: Reclaiming the Effort to Foster Public and Private Isomorphism*, 15 THEORETICAL INQUIRIES L. 159 (2014).
- 22 For summaries of the evidence, see RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? ch. 11 (1984); Peter Kuhn, *Unions and the Economy: What We Know; What We Should Know*, 31 CAN. J. ECON. 1033 (1998); Zafiris Tzannatos & Toke S Aidt, *Unions and Microeconomic Performance: A Look at What Matters for Economists (and Employers)*, 145 INT'L LAB. REV. 257 (2006). For additional recent evidence from Australia, Japan and Canada (respectively), see Stephen J. Deery & Roderick D. Iverson, *Labor-Management Cooperation: Antecedents and Impact on Organizational Performance*, 58 INDUS. & LAB. REL. REV. 588 (2005); Masayuki Morikawa, *Labor Unions and Productivity: An Empirical Analysis Using Japanese Firm-Level Data*, 17 LAB. ECON. 1030 (2010); Dionne Pohler & Andrew Luchak, *Are Unions Good or Bad for Organizations? The Moderating Role of Management's Response*, 53 BRIT. J. INDUS. REL. 423 (2015).
- 23 We do not examine critiques against unions here, as it is not the goal of this Article to defend unions or the right to organize. Rather, based on the starting point that this right is enshrined, we seek to understand its rationales, to be able to interpret it and balance it against other rights.

could have chosen a different structure, with a higher level of protection in legislation. In practice, however, they preferred the dual-solution system, with a *minimal* level of protection in legislation, coupled with unionization as a method of giving workers the power (at least potentially) to achieve better conditions of employment. *Second*, unions are needed because of the inherent difficulties of enforcing employment legislation. Workers often lack the necessary knowledge and resources to sue. They are also fearful of the possibility of reprisals. The problem has been exacerbated in recent years, leading to a global compliance and enforcement crisis.²⁴ Empirical studies have shown that unions play a key role in enforcing legislated employment standards and accordingly are a crucial component of any attempt to solve this crisis.²⁵ *Third*, legislated solutions are limited, because they tend to be universal and insensitive to the “local” needs and special circumstances.²⁶ They are not sufficiently attuned to context, because the legislature cannot tailor its solutions to every “local” situation. Employers and unions are much better situated to do so, and through collective agreements can supplement the basic-level legislation with additional protections (or other solutions) tailored to specific needs. *Fourth* and finally, unionization is crucial for voice and codetermination. In theory, these can be achieved by other means; mechanisms mandated by legislation can attempt to give voice to employees even without unions, as well as give them some degree of power to influence employer decisions (or even make joint decisions in some contexts).²⁷ However, in practice unions are the best mechanism developed so far to achieve these

24 See Guy Davidov, *The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions*, 26 INT’L. J. COMP. LAB. L. & INDUS. REL. 61 (2010).

25 For a review of the evidence, see David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13 (Richard B. Freeman, Joni Hersch & Lawrence Mishel eds., 2004).

26 On the need to strike a balance between universalism and selectivity in labor law, see Guy Davidov, *Setting Labour Law’s Coverage: Between Universalism and Selectivity*, 34 OXFORD J. LEGAL STUD. 543 (2014).

27 For example, works councils are used in Europe for these reasons; however, they work alongside and not instead of unions. See, e.g., WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS (Joel Rogers & Wolfgang Streeck eds., 1995); John T. Addison, Lutz Bellmann, Claus Schnabel & Joachim Wagner, *The Reform of the German Works Constitution Act: A Critical Assessment*, 43 INDUS. REL. 392 (2004); Pnina Alon-Shenker, *Works Councils in Israel: Towards a Tripartite Channel of Employee Representation and Participation*, 30 TEL AVIV U. L. REV. 319 (2007) (Isr.) (on their possible adoption in Israel).

goals. These four explanations are independent of each other but can also coexist. They provide strong justifications for freedom of association in the labor context. Unions are necessary on top of employment standards for all of these important reasons.

It is, moreover, necessary to put this theoretical discussion of the justifications for unionization into context. In recent years labor markets have gone through dramatic (and well-documented) transformations.²⁸ Work relations are becoming increasingly precarious: numerous workers are engaged for short terms, often indirectly, on an hourly basis, with no security and no prospects. Such workers desperately need the protection of a union to improve their conditions and even just enforce the basic employment standards for them. At the same time, however, unionization is becoming ever more difficult: numerous workers work in smaller workplaces, often through outsourcing or subcontracting, some of them from home. Workers are thus spread out and separated from each other, making unionization more challenging.²⁹ Many are also immigrants who face language and cultural barriers.³⁰ Overall, the chances of successful organizing are getting smaller.³¹ How do these transformations affect the justifications for protecting workers' unionization? Unions appear to be needed even more than before. The justifications for workers' freedom of association are therefore strengthened, and the protection offered by the law should concurrently be strengthened.³²

28 See HARRY W. ARTHURS, *FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY* (2006); GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2011); KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* (2004); LEAH VOSKO, *MANAGING THE MARGINS: GENDER, CITIZENSHIP, AND THE INTERNATIONAL REGULATION OF PRECARIOUS EMPLOYMENT* (2010).

29 See Hila Shamir, *Unionizing Subcontracted Labor*, 17 THEORETICAL INQUIRIES L. 229 (2016).

30 See Einat Albin & Virginia Manouvalou, *Active Industrial Citizenship of Domestic Workers: Lesson Learned from Unionizing Attempts in Israel and the United Kingdom*, 17 THEORETICAL INQUIRIES L. 321 (2016); Margriet Kraamwinkel, *Organizing Domestic Workers in the Netherlands: At the Intersection of Labor and Immigration Law*, 17 THEORETICAL INQUIRIES L. 351 (2016).

31 Benjamin Sachs explains the difficulties of organizing by reference to the existence of "asymmetric impediments to unionization." Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 681 (2010). Our argument here is that these asymmetric impediments have grown in recent years.

32 Admittedly, some may argue that unions have been the cause of their own decline, specifically by using their power to insist on too-strong job security

III. EMPLOYERS' FREEDOM OF SPEECH: JUSTIFICATIONS AND CONTEXT

Freedom of speech is one of the most fundamental human freedoms in every democracy. Dating back to ancient Greece, it appears in almost every international human rights convention and states' constitutions.³³ Like other fundamental human freedoms, however, it is not unlimited. The relevance and strength of the various justifications for freedom of speech as well as of competing interests are considered in context and may justify the imposition of some limits on free speech.³⁴ Therefore this Part considers the main justifications for freedom of speech (in general) and then more closely examines their significance and application in the specific context of an employer's speech during an organizing drive.

There are three main justifications for freedom of speech. First, freedom of speech resonates with an essential human need to think freely, communicate ideas and express opinions openly in various ways and contexts. It is an instrument for self-fulfillment. It promotes individual autonomy, free choice and personality development. It is also embedded in the notion of human dignity.³⁵

A second justification is that freedom of speech allows people to communicate with each other, receive information and put forward their informed opinions. It thus contributes to the creation of a "marketplace of ideas" where people can learn new things and be exposed to a diversity of opinions. This exchange

arrangements. But unions hardly have too much power today, especially in private-sector settings. In recent years, Israeli unions have shown willingness to accept intermediate solutions to job security. *See* Guy Davidov & Edo Esher, *Intermediate Approaches to Unfair Dismissal Protection*, 44 *INDUS. L.J.* 167 (2015).

- 33 *E.g.*, U.S. CONST. amend. I; Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, s. 2(b); European Convention on Human Rights art. 10, Nov. 4, 1950, E.T.S. No. 005; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, art. 13; African Charter on Human and Peoples' Rights art. 9, Jun. 27, 1981, 1520 U.N.T.S. 217; Universal Declaration on Human Rights art. 19, Dec. 10, 1948, U.N. Doc. A/RES/217(III); International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171.
- 34 *See* Kent Greenawalt, *Free Speech Justifications*, 89 *COLUM. L. REV.* 119, 122 (1989).
- 35 *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. REV.* 964, 990-96 (1978); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877, 879-80 (1963); Martin H. Redish, *The Value of Free Speech*, 130 *U. PA. L. REV.* 591 (1982).

of thoughts and opinions ensures that the best ideas are enhanced and that the truth is discovered.³⁶ The understanding is that “if voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false.”³⁷ Furthermore, a marketplace of ideas stimulates the exposure of public wrongs, which may deter excessive use of power.³⁸

Finally, a third justification is that of self-governance or democracy. Freedom of speech encourages public discourse and debate and increases awareness of a variety of issues, all of which facilitate self-governance. That is, freedom of speech enables people to exercise free choice, make voluntary decisions and lead meaningful lives.

Freedom of speech is therefore perceived, first and foremost, as a political freedom, one of the building blocks of any democracy. It promotes the participation of people in the political process.³⁹ Furthermore, freedom of speech (and more specifically freedom of the press) is viewed as the watchdog of democracy.⁴⁰ Protection is specifically granted to dissent, i.e., opinions expressed by minorities, however unpopular they may be. The purpose of this guarantee is “to preclude the majority’s perception of ‘truth’ or ‘public interest’ from smothering the minority’s perception. The view of the majority has no need of constitutional protection; it is tolerated in any event.”⁴¹ This means that protection should be given not only against state interference but also against other powerful and resourceful actors who might dominate public debates. Given these important values, it is not surprising that some jurisdictions have developed a robust doctrine of prior restraint. This doctrine prohibits governments from adopting regulations which limit expressions *ex ante* and instead allows for imposition of *ex post* penalties on certain deleterious expressions. The rationale for deeming *ex ante* limits on speech unconstitutional is to protect politically controversial speech and to prevent a chilling effect that prior restraint might create.⁴²

36 Greenawalt, *supra* note 34, at 130 (arguing that truth discovery is the most familiar justification for freedom of speech which can be traced back to John Milton, Justice Oliver Holmes and John S. Mill).

37 *Id.* at 131.

38 *Id.* at 142-43.

39 *Id.* at 145.

40 Or the “guardian of our democracy.” See *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

41 *R. v. Zundel*, [1992] 2 S.C.R. 731, 753 (Can.).

42 See Ariel L. Bendor, *Prior Restraint, Incommensurability, and the Constitutionalism of Means*, 68 *FORDHAM L. REV.* 289 (1999); Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 *B.U. L. REV.* 685 (1978).

What is the relevance, or strength, of these justifications in the context of an organizing drive? Starting with the self-fulfillment justification, this rationale is rather weak in the context of employer speech during a union organizing campaign. Such speech is usually a form of profit-motivated commercial speech rather than political speech.⁴³ Employers who speak against a union do not usually do so to promote their autonomy or personality development, but simply to advance an economic interest in avoiding unions, which are perceived as a threat to business profitability and competitiveness.⁴⁴ In the large majority of cases, the employer fighting against unionization is a large corporation without autonomy and personality interests. Managers or shareholders in the corporation may have strong feelings against unions and in such cases their own autonomy and self-fulfillment interests are implicated, but the importance of antiunion speech for their self-fulfillment is somewhat muted by the separation between them and the corporation they serve. This justification is of greater importance in the small number of cases when the organizing attempt is made within a small business or when the owner is a specific person who is attached to the business and has strong feelings against union involvement in it.⁴⁵ In such cases it could certainly be the case that the ability to express these feelings is important to the autonomy and personality development of the owner. However, given the various barriers to unionization, which are stronger in small businesses, this scenario is likely to be rare.

The truth discovery and “marketplace of ideas” justification is also relatively weak in the particular context. The notion of a “marketplace of ideas” attaches an instrumental or societal value to speech and justifies free speech for its benefits to the *listeners* rather than to the *speaker*.⁴⁶ The idea is that by allowing employers to speak against unionization, employees’ free choice will be enhanced and they will be able to make informed decisions whether or not to join a union, similar to a political campaign.⁴⁷ However, it would be highly misleading to view the workplace as a free and competitive market of

43 See Story, *supra* note 6, at 395.

44 *Id.* To be sure, there is nothing wrong with a desire to make profits. The point is that such a desire is far from the core of personal self-fulfillment, which requires protection as part of freedom of speech.

45 The U.S. Supreme Court has recently ruled that the religious beliefs of a private, closely held corporation owned and operated by a family of Christians with religious objectives were protected under the law (the Religious Freedom Restoration Act), although without addressing their claim for protection under the First Amendment. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014).

46 Story, *supra* note 6, at 378.

47 *Id.* at 383.

“willing, uncoerced buyers.”⁴⁸ Given the inherent imbalance of bargaining power between employers and employees, and the economic dependency of the latter on the former, it makes little sense to provide strong protection to the freedom of speech of the dominant actor who obviously has a strong influence on others. To the contrary, it might be more justifiable to limit this freedom to guarantee a meaningful “marketplace of ideas” and employee freedom of choice.

Presumably some of the workers will be against unionization and engage in discussions and debates with coworkers about whether or not to vote for a union. Also, presumably the workers are well aware of the employer’s opinion about unionization. Employers and governments have been provided with ample opportunity to express their opposition to unionization in various forms and contexts. Antiunion ideas are communicated to workers at all times through other forums inside and outside the workplace.⁴⁹ There is therefore no reason to assume that employer speech would be instrumental (let alone necessary) to the listeners for discovering the truth and advancing a marketplace of ideas during the organizing drive.

Furthermore, one might argue that the debate on whether or not to have a union may be of interest to the employer, but since the employer is not a party to that dispute, the employer should not have a say at all.⁵⁰ In this context it is worth noting that under “speech act theory,” which examines how people use language to perform acts, most employer speech during organizing drives is likely to be considered outside the scope of freedom of speech protection. This is because most expressions are usually not just “telling,” “affirming” and “disagreeing,” but are rather more “directive” and “coercive” in nature. They are not simply “communicative action” coordinating employee behavior, but rather more akin to “strategic action,” which uses communication to manipulate and coerce and should not be constitutionally protected as a valuable expressive speech.⁵¹

48 *Id.* at 383-88; Clyde W. Summers, *Questioning the Unquestioned in Collective Labor Law*, 47 CATH. U. L. REV. 791, 806 (1991). *But see* Matthew T. Bodie, *Information and the Market for Union Representation*, 25 AM. L. & ECON. ASSOC. ANNUAL MEETINGS 2, 3 (2007) (advocating viewing the election as “a collective economic decision about whether to engage in a certain kind of activity . . . a choice [whether] to ‘purchase’ union representation services.” This view is advanced as a new paradigm for addressing information gaps and deficiencies.).

49 *See* Story, *supra* note 6, at 389.

50 *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 530-31 (1993).

51 *See, e.g.*, Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1988-1989);

Finally, the self-governance and democracy justification is similarly not very strong in the context of employer speech during a union organizing drive. It could be argued that corporations should not be given rights to interfere in the democratic process at all (with the exception of the press).⁵² But even accepting the rights of corporations in principle, in the specific context protecting employer speech might actually impede democracy in the workplace: it may allow employers to unduly influence the true wishes of the employees, who might have voted for a union had they not been exposed to any, even implicit, resentment expressed by the employer. It would be wrong to assume that the union and the employer are equal parties competing over workers in a situation similar to political elections; this analogy does not appreciate the power relations in the workplace.⁵³ Furthermore, as noted above, unionization is viewed as promoting democracy in the workplace.⁵⁴ If employer speech is unlimited, unions are likely to lose power, and democracy in the workplace is less likely to be promoted. As Kate Andrias has argued, allowing employers to express their opinions against unions at the organizing drive stage “inhibits robust debate and collective self-governance . . . and thereby contravenes the fundamental purpose of the First Amendment,” which is to facilitate democracy and collective self-governance.⁵⁵

To be sure, freedom of speech is a cornerstone of any democracy and one of the most vital human freedoms. One might argue that at least intuitively freedom of speech is more fundamental than freedom of association. This is why generally speaking the employer’s freedom of speech should be protected. But as we have seen, context does matter. There are some contexts, such as the labor market and more specifically the workplace setting, where freedom

Ashley Messenger, *The Problem with New York Times Co. v. Sullivan: An Argument for Moving from a ‘Falsity Model’ of Libel Law to a ‘Speech Act Model,’* 11 *FIRST AMEND. L. REV.* 172 (2012); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, ‘Situation-Altering Utterances,’ and the Uncharted Zones,* 90 *CORNELL L. REV.* 1277 (2005).

- 52 In *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310 (2010), the U.S. Supreme Court held that the First Amendment bans the government from restricting campaign financing by corporations. The judgment was widely critiqued. See, e.g., Steven J. Andre, *The Transformation of Freedom of Speech: Unsnarling the Twisted Roots of Citizens United v. FEC*, 44 *JOHN MARSHALL L. REV.* 69 (2010); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 *HARV. L. REV.* 143 (2010).
- 53 See Becker, *supra* note 50, at 500, 577-85; Story, *supra* note 6, at 379-80.
- 54 See sources cited *supra* note 21.
- 55 Kate E. Andrias, *A Robust Public Debate: Realizing Free Speech in Workplace Representation Elections*, 112 *YALE L.J.* 2415, 2418 (2003).

of association becomes very central because it promotes important values and interests. Similarly, there are some contexts, such as employer speech in the initial stage of organizing, where the justifications for protecting freedom of speech become rather weak and partially irrelevant.

IV. BALANCING: A COMPARATIVE PERSPECTIVE

This Part provides a critical comparative analysis of how various legal jurisdictions — the United States, Canada, and the United Kingdom — have regulated employer speech during the initial union organizing drive. Employers' opposition to unionization in these three countries has been evident and widely documented in the literature. This comparative analysis therefore suggests that this phenomenon is widespread, shedding particular light on the difficulties of organizing in practice in each jurisdiction. Furthermore, this analysis provides insights into the various legal mechanisms developed in response to these difficulties and how these mechanisms balance between freedom of speech and freedom of association. While some jurisdictions promote (or promoted) a mechanism in which the employer's neutrality during an organizing drive was a major component, other jurisdictions have strongly protected employers' free speech, sometimes at the expense of employees' freedom of association.

A. The United States

The National Labor Relations Act of 1935, which covers the vast majority of private sector employers,⁵⁶ provides important statutory protections for workers, including the right to form and join a union. It bans retaliation against workers engaged in union activity and prohibits interference and coercion in exercising the right to “self-organization.”⁵⁷ During the first few years of the Act's operation, employers were generally not allowed to express their

56 Labor law is governed by both federal and state law. While many states pass legislation on various labor law issues, these laws cannot interfere with federal statutory law and cannot override the Constitution.

57 The National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000). See specifically *id.* § 157 [s. 7] (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”); and *id.* § 158 [s. 8] (prohibiting unfair labor practices, including interfering with, restraining or coercing employees in the exercise of the rights guaranteed in section 7).

opposition to union campaigns, as this was considered unlawful under the Act. The rationale was that due to the power imbalance between employers and workers, it is hard to distinguish between legitimate expression and illegal coercion. The National Labor Relations Board accordingly held that employers should “maintain complete neutrality” with respect to a union election.⁵⁸ However, this view has gradually changed and in 1945 the Supreme Court held that employer speech during a union campaign was protected under the First Amendment.⁵⁹ In response to strong pressure from businesses, Congress codified this ruling and since 1947 the Act includes section 8(c), which explicitly allows employer speech against unions, “if such expression contains no threat of reprisal or force or promise of benefit.”⁶⁰

Ten months after this legislative change, the Board used its power under section 9 of the Act to continue regulating employer (and union) speech during elections. In *General Shoe Corporation*, the Board developed the doctrine of “laboratory conditions” under which elections should be held to determine the “uninhibited desires of the employees.”⁶¹ Based on this doctrine, the Board may invalidate election results due to an objectionable employer expression which interferes with an employee’s ability to make a free choice, even though this expression might not amount to an unfair labor practice under the new amendment. The reasoning was that “an election can serve its true purposes only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.”⁶²

The “laboratory conditions” test has not been used frequently to overturn election results, but it can still potentially limit employer speech. This is important because an “objectionable conduct” which interferes with the laboratory conditions does not have to be so objectionable as to constitute an unfair labor practice, but may still lead to setting aside the result of a

58 *American Tube Bending Co.*, 44 N.L.R.B. 121, 129 (1942); Becker, *supra* note 50, at 535-40; Story, *supra* note 6, at 366-70.

59 *Thomas v. Collins*, 323 U.S. 516 (1945). For the background to this decision, see Story, *supra* note 6, at 370-76.

60 The Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187, § 158 (2000) reads:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit.

61 *Gen. Shoe Corp.*, 77 N.L.R.B. 124, 127 (1948), *enforced* 192 F.2d 504 (6th Cir. 1951), *cert. denied* 343 U.S. 904 (1952).

62 *Id.* at 126; see also Becker, *supra* note 50, at 547-52.

representation vote.⁶³ Some recent Board decisions have taken this approach and held for the union in a number of cases.⁶⁴ However, this remains an exception. Over the last few decades the Board has increasingly deferred to employers' freedom of speech and refused to overturn election results when, for example, the employer engaged in captive audience speech.⁶⁵ Furthermore, coercion and intimidation have often been allowed as the First Amendment began to play a pivotal role in the analysis of unfair labor practice cases.⁶⁶ In balancing the statutory protections assigned by the Act to employees against the employer's constitutional freedom of speech, the Supreme Court has made it clear in a number of decisions that employers can say almost anything and that employee protection is very limited.⁶⁷

The Court, at least in its rhetoric, was well aware of "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."⁶⁸ However, the general view of the Board and the courts is that protection of employer speech is critical to the promotion of "a marketplace of ideas." Furthermore, in their eyes, albeit controversially,⁶⁹ union representation

63 See *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782, 1786-87 (1962); *Heartland Hum. Serv. v. N.L.R.B.*, 746 F.3d 802, 804 (7th Cir. 2014).

64 See, e.g., *Purple Commc'n, Inc.* 361 N.L.R.B. 126 (2014) (ruling that an employer's statement prior to elections that it could improve employee working conditions only at facilities that did not have elections pending was objectionable, as were some implicit promises of benefits and implicit threats of lost bonuses); *Labriola Baking Co.*, 361 N.L.R.B. 41 (2014) (finding an employer's statement during a captive audience meeting that if the employees voted for the union, they would be pushed to go on strike and the employer would replace them with "legal" workers objectionable and coercive, because of the implicit threat to take action against undocumented immigrant employees).

65 While at first the laboratory conditions test did not require a finding of employer fault, this changed in the late 1960s. See *Becker*, *supra* note 50, at 558, 569; *Story*, *supra* note 6, at 409.

66 See *Becker*, *supra* note 50, at 548.

67 Most notably, the Supreme Court held that "an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a threat of reprisal or force or promise of benefit." *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 618-19 (1968); see also *Thomas v. Collins*, 323 U.S. 516 (1945); *N.L.R.B. v. Vir. Elec. & Powers Co.*, 314 U.S. 469 (1941) (ruling that workers are protected only against coercive speech); *Story*, *supra* note 6, at 376-78.

68 *Gissel Packing Co.*, 395 U.S. at 617.

69 Among other differences, union elections do not occur periodically on fixed dates.

elections are considered analogous to political elections, in the sense that employers (akin to political parties participating in a contest) are presumed equal to unions and should therefore be allowed to communicate directly with voters and to negate any undue influence by unions to ensure that voters make fully informed decisions.⁷⁰ Based on this understanding, the Board and the courts focus on explicit expressions of coercion and impose only minor limits on employer speech. For example, employers are permitted to make “predictions” of what might happen if employees vote for the union (e.g., plant closure or layoffs). Such predictions are usually not considered a “threat.”⁷¹

Moreover, the onus of proof in unfair labor practice cases rests on the union,⁷² which struggles to provide evidence of coercive speech when threats are often made verbally and implicitly. Also, penalties for retaliation are very limited and enforcement is weak and too slow to effectively deter antiunion campaigns.⁷³ The Board may order a second election (which often ends with the same results) and in a very limited number of cases may certify the union without an election (which rarely leads to meaningful collective bargaining). But it often takes years to reach such a resolution, rendering the Board’s order ineffective.⁷⁴

Consequently, many workers remain with no protection, intimidated and penalized for their involvement with the union.⁷⁵ Furthermore, employers are often successful in delaying elections and hire external companies to execute antiunion campaigns. The services provided by consultants and law firms on how to avoid unionization are described as “a multi-million dollar industry that has helped employers to circumvent the intent of the National Labor Relations Act (NLRA) through a vast array of union-busting tactics.”⁷⁶ It is

Unlike citizens, workers can elect not to be represented at all. Also, prior to an election, unions lack any formal representation in the workplace, and can be denied authority in and access to the workplace. Furthermore, an elected union does not gain any sovereignty in the workplace. *See* Becker, *supra* note 50.

70 *See id.* at 499, 516-23, 542-47; Story, *supra* note 6, at 376-80.

71 *See Gissel Packing Co.*, 395 U.S. at 619.

72 *See* Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-187, §160 (2000).

73 *See* Andrias, *supra* note 55, at 2437.

74 *See* Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers’ Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 318, 322-26 (2008).

75 *See* Andrias, *supra* note 55, at 2418 (“[O]ver the past half-century, reprisals suffered by workers who engage in pro-union speech have increased dramatically to well over 10,000 documented cases per year.”); *see also id.* at 2437.

76 John Logan, *Consultants, Lawyers, and the “Union Free” Movement in the*

no surprise that union density is constantly declining in the United States.⁷⁷ While there are multiple reasons for this decline,⁷⁸ organizing new workplaces has become much harder, and employer opposition plays a significant role in this struggle.⁷⁹ An empirical study for American Rights at Work found in 2005 that the “impact of employer anti-union campaigns on the success of union organizing drives has been substantial.”⁸⁰ Employers’ freedom of speech has become the unfettered power to control and limit the ability of employees to unionize.⁸¹ Attempts to amend the Act, improve enforcement mechanisms and strengthen employee choice have so far failed.⁸² And the legal analysis seems to have been dominated by freedom of speech discourse, thus neglecting to strike an appropriate balance between this freedom and freedom of association.⁸³

USA Since the 1970s, 33 INDUS. REL. J. 196, 198 (2002); see also John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651 (2006).

- 77 In 1983, the union membership rate was 20.1%. It dropped to 11.1% in 2014. Union density in the private sector was only 6.6% in 2014. While the number of members increased from 2013 to 2014, this was not enough to keep pace with the overall growth of the American workforce. See *Economic News Release*, U.S. BUREAU OF LAB. STATISTICS (Jan. 23, 2015), <http://www.bls.gov/news.release/union2.nr0.htm>.
- 78 See, e.g., Jefferson Cowie, *Reframing the New Deal: The Past and Future of American Labor and the Law*, 17 THEORETICAL INQUIRIES L. 13 (2016).
- 79 See, e.g., Morris M. Kleiner, *Intensity of Management Resistance: Understanding the Decline of Unionization in the Private Sector*, 22 J. LAB. RES. 519 (2001); Specter & Nguyen, *supra* note 74, at 312; see also Steven Mellor & Lisa M. Kath, *Fear of Reprisal for Disclosing Union Interest: Assessing the Effectiveness of Perceived Anti-Unionism*, 23 EMP. RESP. RTS. J. 117 (2011) (psychological exploration of the impact of threat of reprisal for forming a union).
- 80 CHIRAG MEHTA & NIK THEODORE, A REPORT FOR AMERICAN RIGHTS AT WORK: UNDERMINING THE RIGHT TO ORGANIZE — EMPLOYER BEHAVIOR DURING UNION REPRESENTATION CAMPAIGNS 5 (2005) (showing that in 2002, only thirty-one percent of the 179 petitions with the Board to represent nonunionized workers in Chicago were successful, although the majority of workers supported unionization before elections took place; employers who use multiple legal and illegal antiunion tactics are more likely to be successful).
- 81 See Paul Weiler, *Promises to Keep: Securing Workers’ Rights Under the NLRA*, 96 HARV. L. REV. 1769 (1983); Specter & Nguyen, *supra* note 74, at 321-22.
- 82 See Employee Free Choice Act of 2009, H.R. 1409/S 560, 111th Congress (2009).
- 83 See, e.g., *Harris v. Quinn*, 134 S. Ct. 2618 (2014) (the Supreme Court holding that an act which allows for union security arrangements violated the freedom

This legal framework and its consequences have been heavily criticized by many American scholars.⁸⁴ Alan Story argues that many expressions made by employers during an election are overlooked by the Board although they are coercive in nature, and that the Board should not examine the content of the expression outside of its context — the identity of the speaker and the hierarchical nature of the workplace as a forum.⁸⁵ He is specifically critical of the captive audience meetings and the distinction drawn by adjudicators between unlawful “threats” and acceptable “predictions” about the possible effects of unionization.⁸⁶ Along similar lines, Craig Becker argues that “employers should be stripped of any legally cognizable interest in their employees’ election of representatives.”⁸⁷ For example, he proposes that captive audience meetings be grounds for overturning the results of an election.⁸⁸ He does not suggest that employers should be prohibited from campaigning in the workplace, but rather that employers be subject to the same rules which restrict employees and unions. Kate Andrias similarly proposes barring captive audience meetings and requiring equal time for pro-union and antiunion messages.⁸⁹ Andrias advances another proposal, which would require “total employer neutrality within the workplace with respect to unionization” but limited in terms of time, place and manner, where employers “could still voice opposition to unions through other forums outside the coercive setting of the workplace”

of speech of non-member employees without any serious discussion of freedom of association in contrast). Cf. Mitchel Lasser, *Fundamentally Flawed: The CJEU’s Jurisprudence on Fundamental Rights and Fundamental Freedoms*, 15 THEORETICAL INQUIRIES L. 229 (2014) (criticizing the Court of Justice of the European Union for not treating freedom of association as “truly fundamental” and establishing “a hierarchy of norms that allows fundamental market freedoms to trump fundamental rights”).

84 Note that there is also a group of scholars who argue that employer speech should be granted broader protection. See, e.g., Peter J. Caldwell, *Campaign Promises in NLRB Elections: Advancing Employer Speech Through Political Elections Law and the First Amendment*, 56 LAB. L.J. 239 (2005); Michael J. Bennett, *Excessive Restriction on Employers’ Predictions During Union Representation Campaigns*, 66 MARQ. L. REV. 785 (1983); Ian M. Adams & Richard L. Wyatt, Jr., *Free Speech and Administrative Agency Deference: Section 8(c) and the National Labor Relations Board — An Expostulation on Preserving the First Amendment*, 22 J. CONTEMP. L. 19 (1996).

85 Story, *supra* note 6, at 405-14.

86 *Id.* at 415-32.

87 Becker, *supra* note 50, at 500.

88 *Id.* at 592.

89 Andrias, *supra* note 55, at 2456.

and employees “could speak out against unions within the workplace.”⁹⁰ Most recently, Benjamin Sachs advanced several proposals to amend the current legal regime — such as a card-check mechanism and rapid elections — that would maximize employee choice, minimize employer intervention in the organizing drive to a reasonable extent, and overall serve to correct asymmetries.⁹¹

Note that many scholars take issue with a particular point: the fact that employers under the current legal regime can force employees to attend antiunion meetings during working hours prior to an election.⁹² Under the First Amendment and the doctrine of employment-at-will, employers are allowed to compel employees to listen — with no ability to respond, ask questions or have the union join in and present opposing views — to their antiunion propaganda. If an employee fails to attend or if he or she leaves such a meeting, they may be subject to discipline or dismissal.⁹³

Many scholars view these “captive audience” meetings as inherently coercive and violating human rights, although they usually take the free speech of employers during the organizing drive as a given.⁹⁴ That is, aside from banning captive audience meetings, American scholars usually do not argue against employer antiunion speech during the organizing drive, but rather focus on alternative proposals to minimize the harsh consequences of such speech. However, one might ask, what is so uniquely problematic about coercing employees to sit in a room and listen during working hours?

90 *Id.* at 2456-57.

91 Sachs, *supra* note 31.

92 As long as it is not within twenty-four hours of a scheduled election. *See* Peerless Plywood Co., 107 N.L.R.B. 427, 429 (1953).

93 *See, e.g.*, Babcock & Wilcox Co., 77 N.L.R.B. 577 (1948); N.L.R.B. v. United Steelworkers of Am., 357 U.S. 357 (1958).

94 *See, e.g.*, David J. Doorey, *The Medium and the “Anti-Union” Message: “Forced Listening” and Captive Audience Meetings in Canadian Labor Law*, 29 COMP. LAB. L. & POL’Y J. 79 (2008); Matthew W. Finkin, *Captive Audition, Human Dignity, and Federalism: Ruminations on an Oregon Law*, 15 EMP. RTS. & EMP. POL’Y J. 355 (2011); Roger C. Hartley, *Freedom Not to Listen: A Constitutional Analysis of Compulsory Indoctrination Through Workplace Captive Audience Meetings*, 31 BERKELEY J. EMP. & LAB. L. 65 (2010); Paul M. Secunda, *The Contemporary ‘Fist Inside the Velvet Glove’: Employer Captive Audience Meetings Under the NLRA*, 5 FLA. INT’L U. L. REV. 385 (2009-2010); Paul M. Secunda, *The Future of NLRB Doctrine on Captive Audience Speeches*, 87 INDUS. L.J. 123 (2012); Paul M. Secunda, *Toward the Viability of State-Based Legislation to Address Workplace Captive Audience Meetings in the United States*, 29 COMP. LAB. L. & POL’Y J. 209 (2008) [hereinafter Secunda, *Viability*].

Employees are “coerced” into numerous other similar actions and situations during work. They do not choose what to do with their time during work. So, arguably, the problem of the different commentators is not really with the mere fact that workers have to sit in these meetings against their will; the problem is actually with the interference with the free choice regarding the decision whether or not to elect a union. Thus, it is not very different from any other employer speech on this matter — which the workers cannot really escape — with perhaps just a small difference in the degree of coercion. As Becker explains:

The realities of employer authority and employee dependence, so obvious in the captive audience meeting, exist during the entire work day and in every site at the workplace. As the Board observed about the employment relations, employers have the “ability to control [employee] actions during working hours.” Any time, then, that employers campaign during work time, they necessarily use their “control” to influence the outcome of union elections. Dependent on their jobs, employees are no more free to leave the work site to avoid employer speech than they are to depart from a captive audience meeting. In either case they are subject to discharge or at least a loss of pay.⁹⁵

The Israeli experience of the last several years, in which a system similar to card-check proved insufficient in terms of giving workers a realistic opportunity to organize, provides further support for this argument.

B. Canada

In Canada, labor relations are governed by federal and provincial laws. Each of the eleven legal jurisdictions has its own legal framework, although there are many similarities. Federal and provincial statutes protect the right of workers to join or form a union and impose limits on antiunion activities during the organizing drive.⁹⁶ All jurisdictions prohibit an employer’s interference with the selection or formation of a union.⁹⁷ Most jurisdictions protect employers’ freedom to express their views and opinions on unions, so long as it does not amount to coercion, intimidation, threats, promises or undue influence, all of which are considered unfair labor practices.⁹⁸ In most jurisdictions there

95 Becker, *supra* note 50, at 561.

96 See, e.g., Ontario Labour Relations Act, S.O. 1995, c. 1, Sched. A, § 5 (Can.); Canada Labour Code, R.S.C. 1985, c. L-2, § 8(1) (Can.).

97 See, e.g., Ontario Labour Relations Act, § 70; Canada Labour Code, § 94(1)(a).

98 See, e.g., Ontario Labour Relations Act, § 70; Canada Labour Code, § 94(2);

is a reverse onus of proof, so that when a union files an unfair labor practice complaint, the employer has to show that its actions or statements did not amount to unfair labor practice.⁹⁹

While the prohibition on interference can be broadly interpreted, only the federal Canada Labour Relations Board (CLRB) views this prohibition as a requirement for employer neutrality during the organizing drive, which resulted, for example, in a ban on captive audience meetings.¹⁰⁰ The Board held that while this ban infringes employers' freedom of speech, it is justifiable under section 1 of the Canadian Charter of Rights and Freedoms.¹⁰¹ The Board's rationale goes beyond captive audience situations:

Any involvement by the employer in the exercise by the employee of his/her basic right to join a union puts unfair pressure on the employee. . . . Either the right is recognized or it is not; if it is, it must be exercised in full light and without fear. The employer's right to communicate with its employees must be strictly limited to the conduct of the business. The employer is only permitted to respond to unequivocal and identifiable, adversarial or libelous statements; by this we do not consider as being adversarial the fact that an employee wishes or does not wish to join a union.¹⁰²

In contrast, in most other Canadian jurisdictions captive audience meetings are considered lawful, so long as their content does not amount to unfair labor practice.¹⁰³ Moreover, labor relations boards have indicated that "when

Alberta Labour Relations Code, R.S.A. 2000, c. L-1, § 148(2) (Can.); Manitoba Labour Relations Act, 1987 C.C.S.M. c. L10 (Can.).

99 See, e.g., Ontario Labour Relations Act, § 96(5). Quebec has a different arrangement where a reverse onus of proof does not apply in the context of a plant closure. See *Plourde v. Wal-Mart Canada Corp.*, [2009] S.C.C. 54 (Can. S.C.).

100 See Doorey, *supra* note 94, at 85.

101 *Bank of Montreal*, [1985] C.L.R.B.R. (N.S.) 129 (Can.). Freedom of expression and freedom of association are both guaranteed under the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, §§ 2(b), (d). Constitutional protection for freedom of expression is interpreted very broadly to include any activity that "conveys or attempts to convey a meaning," as long as it does not involve violence. *Irwin Toy Limited v. Quebec*, [1989] 1 S.C.R. 927, 968 (Can.). While limits on expression are acceptable when they are demonstrably justified and for a reasonable extent under section 1 of the Charter, the constitutionality of limits on employer speech in the context of organizing drives has not been fully explored.

102 *Am. Airlines Inc.*, [1981] 3 Can. L.R.B.R. 90, 133 (C.L.R.B. no. 301) (Can.).

103 See Doorey, *supra* note 94, at 87.

exercising its freedom of expression, an employer is entitled to express its opposition to a trade union” even if in a negative way.¹⁰⁴ In the *West Elgin* case, the Ontario Labour Relations Board even held that “the mere fact that the employer has made statements about the consequences of unionization that are false does not, by itself, bring the employer in violation of the Act.”¹⁰⁵

Still, there are significant differences from U.S. law. While employers are generally free to speak to employees and persuade them to vote against unions, they must not make predictions regarding the impact of unionization in the abstract or that are speculative in nature.¹⁰⁶ Furthermore, in another case the Ontario Labour Relations Board held that a “no comment statement” by Wal-Mart management, in response to an employee inquiry whether Wal-Mart would close its store if the union won the certification vote, amounted to unfair labor practice because of the implicit threat to job security.¹⁰⁷ Finally, the general and broad “undue influence” prohibition — which some jurisdictions have introduced in their legislation — allows adjudicators to consider a great variety of actions and comments as unfair labor practice. This includes, for example, multiple one-on-one meetings with employees, even if the content of the meetings does not amount to “threat” or “intimidation.”¹⁰⁸ That is, both the content and method of communication are under scrutiny.¹⁰⁹

Generally, labor relations boards have broad discretion with regard to remedies in a case of unfair labor practice. These may include an order to an employer to pay damages, to provide the union with information about the employees and with access to the workplace, to post the board decision in the workplace, and to apologize to the union.¹¹⁰ The boards may also order the holding of a second representation vote. In some jurisdictions, the boards have the power to order a remedial certification (i.e., the union is certified without a vote) where, for example, other remedies would not be sufficient to

104 *Labourers’ Int’l Union of N. Am. v. W. Elgin Constr. Ltd.*, [2005] O.N. L.R.B. ¶ 16 (Can.).

105 *Id.* ¶ 17.

106 *Id.* ¶ 20.

107 *United Steelworkers of Am. v. Wal-Mart Can., Inc.*, [1997] O.L.R.D. 207 (O.L.R.B.), *aff’d* [1997] O.J. 3063 (Can. Div. Court), *perm. app. denied* [1999] O.J. No. (C.A.). The Board found this implicit threat so strong as to justify an order of remedial certification. Wal-Mart appealed and argued that its freedom of expression had been infringed, but the Court refused to address this issue because it was not raised before the Board.

108 *See, e.g., Wal-Mart*, O.L.R.D. No. 207; *K-Mart Can. Ltd.*, [1981] 60 Rep. 70 (O.L.R.B.).

109 *See, e.g., RMH Teleservices Int’l Inc.*, [2005] B.C.L.R.B. No. B188 ¶ 61.

110 *See, e.g., Baron Metal Indus. Inc.*, [2001] O.L.R.D. 12, 10 ¶ 140.

ensure that a second vote reflects the true wishes of the employees or where the employer engaged in a pattern of misconduct.¹¹¹ In practice, however, this power has been used very cautiously.

Furthermore, employer conduct and expression often fall off the judicial radar and significantly impact the ability of workers to exercise their free choice. Many jurisdictions (e.g., Ontario, British Columbia, Alberta and Saskatchewan) have shifted during the last three decades from a card-check system to a mandatory certification vote system, which increases employers' opportunity to impact free choice.¹¹² True, some jurisdictions have created an expedited mechanism where elections are to be held within five to ten days from the certification application date to reduce that impact. But there are still some delays. Employers are able, now more than before, to campaign against unions prior to the vote and this change has negatively affected union density,¹¹³ especially as employees and unions are generally prohibited from organizing workers during working hours and on the employer's premises.¹¹⁴

C. The United Kingdom

The Trade Union and Labour Relations (Consolidation) Act, 1992 (TULRCA) governs union recognition in the United Kingdom. In 1999, a new statutory

111 See, e.g., Ontario Labour Relations Act, S.O. 1995, c. 1, Sched. A, § 11(c); British Columbia Labour Relations Code, R.S.B.C. 1996, c. 244 § 14(4)(f); Manitoba Labour Relations Act, 1987 C.C.S.M. c. L10, § 41; New Brunswick Industrial Relations Act, R.S.B.C. 1973, c. 388 § 106(8)(e); Nova Scotia Trade Union Act, R.S.N.S. 1989, c. 475 § 25(9); Canada Labour Code, R.S.C. 1985, c. L-2, § 99.1.

112 See Chris Riddell, *Union Certification Success Under Voting Versus Card-Check Procedures: Evidence from British Columbia, 1978-1998*, 57 *INDUS. & LAB. REL. REV.* 493 (2004); Sara Slinn & Richard W. Hurd, *Fairness and Opportunity for Choice: The Employee Free Choice Act & the Canadian Model*, 15 *JUST LAB.* 104 (2009).

113 The union membership rate has declined from thirty-eight percent in 1981 to thirty percent in 2012. In the private sector only about sixteen percent were union members in 2012. See DIANE GALARNEAU & THAO SOHN, *LONG-TERM TRENDS IN UNIONIZATION*, STATISTICS CANADA (2013), <http://www.statcan.gc.ca/pub/75-006-x/2013001/article/11878-eng.pdf>; see also Karen Bentham, *Employer Resistance to Union Certification: A Study of Eight Canadian Jurisdictions*, 57 *RELATIONS INDUSTRIELLES* 159 (2002); Doorey, *supra* note 94; Slinn & Hurd, *supra* note 112; Terry Thomason & Silvana Pozzebon, *Managerial Opposition to Union Certification in Quebec and Ontario*, 53 *RELATIONS INDUSTRIELLES* 750 (1998).

114 See Doorey, *supra* note 94, at 114. See, e.g., Ontario Labour Relations Act, § 77; Canada Labour Code, § 95(d).

procedure for securing trade union recognition, which was influenced by the North American model, was adopted.¹¹⁵ Since then, unions can be recognized as bargaining agents either through a voluntary agreement with the employer or, if there are at least twenty-one workers in the workplace,¹¹⁶ through an application to the Central Arbitration Committee (CAC). Under the second option, the union has to show, through a secret ballot or the number of members, that it has the support of a majority of workers in the bargaining unit. If fifty percent or fewer employees (but more than ten percent) are union members, the CAC will hold a secret ballot.¹¹⁷ The CAC will then award recognition only if a majority of the voters (and at least forty percent of all workers in the bargaining unit) voted in favor of the union.¹¹⁸ A ballot will not be required if the union can demonstrate more than fifty percent membership when applying for recognition.¹¹⁹ Unlike in the United States and Canada, once the CAC notifies the parties that a ballot will be held, the employer is required to provide the union with reasonable access to the workplace to hold meetings and seek workers' support.¹²⁰

Responding to increasing incidents of antiunion actions by employers,¹²¹ the Employment Relations Act, 2004, amended Schedule A1 to provide and extend protection against discipline, dismissal and other detrimental treatments of employees which aim at influencing ballot results.¹²² The amendment also included a prohibition on offering employees financial inducement for the purpose of preventing them from joining a union.¹²³ Finally, an undue influence provision was added to provide broader protection against unfair practices.¹²⁴ The parties are prohibited from engaging in "unfair practices,"

115 Employment Relations Act, 1999, sched. A1 (U.K.), amending TULRCA; see also Michael Dohery, *When You Ain't Got Nothin' to Lose . . . Union Recognition Laws, Voluntarism and the Anglo Model*, 42 *INDUS. L.J.* 369, 370-71 (2013).

116 See Trade Union and Labour Relations (Consolidation) Act, 1992, sched. A1 ¶ 7 (U.K.).

117 See *id.* ¶¶ 14, 23.

118 See *id.* ¶ 29.

119 See *id.* ¶ 22.

120 See *id.* ¶ 26; see also Bob Simpson, *Trade Union Recognition and the Law, A New Approach: Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992*, 29 *INDUS. L.J.* 196 (2000).

121 See Alan Bogg, *The Mouse That Never Roared: Unfair Practices and Union Recognition*, 38 *INDUS. L.J.* 390, 391 (2009).

122 See Trade Union and Labour Relations (Consolidation) Act, ¶¶ 27A(2)(c)-(f).

123 *Id.* ¶¶ 27A(2)(a)-(b).

124 *Id.* ¶ 27A(2)(g).

once the CAC has informed them of the arrangements for the ballot.¹²⁵ The CAC administrates the unfair practice complaints. In a case of unfair practice, the CAC may order a second ballot or, in extreme cases, recognize the union as the bargaining agent.¹²⁶

The new statutory procedure and unfair practice rules have been subject to continuous criticism for various reasons. First, the burden of proof is on the union to demonstrate that such actions as inducements, dismissal or other detrimental treatments were for the purpose of altering the ballot result and not for other work-related issues. Specifically problematic is the requirement that “the use of that practice changed or [is] likely to change” the voting intention or behavior of a voting employee, as it is difficult to provide explicit evidence to meet this requirement.¹²⁷

Second, while freedom of speech is not explicitly mentioned or emphasized in this legislative arrangement, it can certainly be recognized in the background. As Alan Bogg stresses, the law and the CAC rulings are built on the assumption that the statutory recognition procedure is “inherently a partisan activity,” where the parties are not expected to “put across a completely balanced message to the workforce, and some overstatement or exaggeration may well occur.”¹²⁸ This assumption advances a requirement for state “neutrality towards the competing positions of unions and employers,” similarly to the assumption under the U.S. law.¹²⁹ Bogg provides several examples of clear-cut complaints that were nonetheless dismissed by the CAC. In one case, an employer used captive audience meetings to convey an antiunion message and told immigrant employees that union members would pressure them into strikes. In another case, an employer encouraged workers in a letter to vote against recognition and announced a generous annual bonus payment in that same letter.¹³⁰ In the first case, the CAC focused on the content of the communication (which might be incomplete but not inaccurate), while ignoring the context (manipulative tactics used by a resourceful employer

125 *Id.* ¶ 27A(1); *see also* Dohery, *supra* note 115 at 372-73.

126 Trade Union and Labour Relations (Consolidation) Act, ¶¶ 27C, 27D; *see also* Bogg, *supra* note 121 at 392.

127 Trade Union and Labour Relations (Consolidation) Act, ¶ 27B(4)(b); *see also* Bogg, *supra* note 121, at 392, 398.

128 CODE OF PRACTICE: ACCESS AND UNFAIR PRACTICES DURING RECOGNITION AND DERECOGNITION BALLOTS para. 65 (2005), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/245547/05-1463-code-of-practice-recognition-derecognition-ballots.pdf (cited by Bogg, *supra* note 121, at 400).

129 Bogg, *supra* note 121, at 399.

130 *Id.* at 393-94.

on vulnerable migrant workers).¹³¹ The latter case was dismissed because the CAC required the proof of an *explicit linkage* between the bonus and the outcome of the ballot, apart from the fact that they were both mentioned in the same letter.¹³² As Bogg summarizes, “[l]egal entrenchment of the employer’s democratic right to oppose unionisation makes the legal protection of employer free speech one of the central objectives of recognition campaign regulation. This corresponds with an unfair practice jurisdiction that can be invoked only in the most extreme cases.”¹³³

Third, the TULRCA creates a window of opportunity for employers to enhance antiunion campaigns. Ballots are usually held within twenty working days from the date the CAC appointed a qualified independent person to run the ballot.¹³⁴ During that time, unfair practice is unlawful, but employers have ample opportunity to use a variety of implicit tactics to influence employee choice. Furthermore, unfair practices which are committed *before* or *after* the ballot period are not considered unlawful.¹³⁵

The reality is that employers have been increasingly hostile to unions and use U.S.-style antiunion consultants to avoid union recognition.¹³⁶ When employers resist unions they are usually successful in avoiding union recognition.¹³⁷ Also, it seems that very few disputes make it to the CAC, and those that do are generally dismissed.¹³⁸ Furthermore, in the vast majority of unfair practice

131 *Unite the Union v. Kettle Foods Ltd.*, CAC Case No. TUR1/557/ (2007) (cited and critiqued by Bogg, *supra* note 121, at 397).

132 *CWU v. Cable & Wireless*, CAC Case No. TUR1/570/ (2007) (cited and critiqued by Bogg, *supra* note 121, at 396-97).

133 Bogg, *supra* note 121, at 400.

134 Trade Union and Labour Relations (Consolidation) Act, ¶ 25.

135 See Bogg, *supra* note 121, at 392; see also Alan Bogg, *The Death of Statutory Recognition in the United Kingdom*, 54 J. INDUS. REL. 409 (2012); Gregor Gall, *Union Recognition in Britain: The End of Legally Induced Voluntarism?*, 41 INDUS. L.J. 407 (2012).

136 See Bogg, *supra* note 121, at 401-02; Edmund Heery & Melanie Simms, *Constraints on Union Organising in the United Kingdom*, 39 INDUS. REL. J. 24, 34 (2008).

137 See Edmund Heery & Melanie Simms, *Employer Responses to Union Organising: Patterns and Effects*, 20 HUM. RESOURCE MGMT. J. 3 (2010); see also Gregor Gall, *The First Ten Years of the Third Statutory Union Recognition Procedure in Britain*, 39 INDUS. L.J. 444 (2010) (finding that in 2000-2010 unions were successfully recognized, either voluntarily or through the statutory procedure, in about fifty percent of the applications filed with the CAC, which means that only around 56,000 workers were brought under union recognition in ten years through this new procedure).

138 See Bogg, *supra* note 121, at 392.

complaints, the union lost the ballot despite having strong employee support when it applied for recognition, suggesting that unfair practice complaints are not only unsuccessful but might also be deleterious.¹³⁹

Overall it can be seen that while all three legal systems examined in this Part have legislated protections, these often prove to be ineffective. The more employers' freedom of speech is protected, the less it is possible as a matter of practice to prevent coercion and intimidation and to allow workers to unionize. Detailed mechanisms designed to minimize employer interference, adopted in Canada and the U.K., have probably been somewhat useful, but certainly not sufficient (at least as applied by the relevant judicial and quasi-judicial bodies).

V. A CONTEXTUAL-PURPOSIVE SOLUTION FOR *PELEPHONE* AND BEYOND

In this Part we wish to go back to the concrete facts of the *Pelephone* case and argue for the appropriate balance in that context between the competing freedoms. But we also draw some general conclusions which could be applicable to other cases and other jurisdictions.

Israeli collective labor law is almost entirely judge-made. For historical reasons (especially the strong political stance of the *Histadrut* during the 1950s, when labor legislation was introduced), legislatures left considerable autonomy to the parties to settle their own disputes.¹⁴⁰ However, this has proven insufficient in recent years: quite often, the *Histadrut* no longer has the power to protect its interests through strikes (or the threat thereof), so it seeks help from the courts. Moreover, the legislature has mostly remained silent, leaving to labor courts the task of developing the law and finding solutions to the many new problems that have emerged.¹⁴¹ The method of interpretation advanced by Israeli courts, as in many other countries, is purposive: legislation is interpreted in light of its purpose — the goals it was designed to achieve. The same method is used for the development of solutions in case of lacunas:

139 *Id.* at 394-95.

140 For a through discussion see GUY MUNDLAK, *FADING CORPORATISM: ISRAEL'S LABOR LAW AND INDUSTRIAL RELATIONS IN TRANSITION* (2007).

141 Some of the judicial developments in the context of collective labor law are described in Guy Davidov, *Judicial Development of Collective Labour Rights — Contextually*, 15 CAN. LAB. & EMP. L.J. 235 (2010); see also MUNDLAK, *supra* note 140.

such solutions have to be based on the purpose of related legislation and the legal system as a whole.¹⁴²

The legal question at the center of this Article — whether an employer is allowed to voice objections to unionization during an organizing drive — has no answer in existing Israeli legislation. On the one hand, the Collective Agreements Act clearly stipulates that workers have the right to organize.¹⁴³ There are also several provisions in the Act designed to prevent specific kinds of interference, for example, an employer cannot dismiss a worker, or change employment conditions, because of organizing. However, employer speech against organizing is not mentioned in the Act. There is no reasonable way to interpret existing provisions as either prohibiting or allowing such speech. There is thus a lacuna in the law, and the parties in the *Pelephone* case needed an answer. The courts had to provide one.

Employers, of course, would argue that absent a different solution in legislation, they should enjoy freedom of speech.¹⁴⁴ In other words, that freedom of speech is the default position, and any limitation on this freedom has to be based in legislation. However, workers can answer in much the same way: freedom of association is a fundamental human right, and any limitation has to be based in legislation. Admittedly, if the default is that we can all do whatever we want, then the employer's position is entrenched in this default: workers can organize and employers can say what they want about this organizing. But there is no reason to suppose that such a “state of nature” default exists within a functioning legal system. Sometimes exercising one freedom or right would have an adverse impact on the ability to exercise the other freedom or right. And when two individuals are claiming to use their freedoms or rights in ways that conflict with each other — a conflict not solved by legislation — it is for the courts to do the balancing and fill this lacuna. Israeli courts therefore had to decide the law based on what they thought is right — by asking what the law *should* be — in light of the general principles for filling lacunas.¹⁴⁵

142 See Guy Davidov, *Articulating Labour Law's Goals: Why and How*, 3 EUR. LAB. L.J. 130 (2012) and references therein.

143 See Collective Agreements Law, 5717-1957, § 33h, SH No. 221 p. 63, as amended (Isr.).

144 Similar arguments were made in File No. 25476-09-12 Nat'l Labor Court, *Histadrut v. Pelephone Commc'n Ltd.* ¶¶ 32, 35 (Jan. 2, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

145 By contrast, at least in the context of the United States and Canada, it seems as though it would have to be done through legislative amendment, as the relevant legislation explicitly allows employer speech during organizing campaigns.

The purpose of freedom of association, and the right to organize, is to allow workers a free choice with respect to joining a union — for all the important reasons mentioned in Part II. If this can be achieved without limiting the employers' freedom of speech, then we should not limit the employers' rights gratuitously. But if free choice cannot be ensured without limiting the employers' speech, then it seems quite obvious — in light of the discussion in Part III — that freedom of association should trump. For the workers, this is crucial; and society supports their organizing. The speech, in contrast, is protected but has very limited value in the particular context. A purposive and contextual analysis of the two conflicting freedoms therefore leads to this conclusion: if organizing is not truly free, because of the employer's speech, then the speech should be prohibited.¹⁴⁶ This is not to suggest that freedom of speech is in principle inferior to freedom of association; only that in the current context, when the speech is not so important, if it renders freedom of association meaningless the latter should trump.

The question thus becomes an empirical one: is it possible to ensure free choice by employees even when they are advised by the employer not to join a union? From a formalistic point of view, the problem can be "solved" with a legal rule preventing coercion. If the goal is to ensure free choice, on the face of it a rule preventing the employer from intervening in the free choice of employees (but allowing the mere voicing of an opinion) might seem sufficient. Such an analysis, however, entirely ignores the context: it ignores the inherent vulnerability of employees in the relationship, the inequality of power, the difficulties of enforcement, the significant (and growing) barriers to unionization, and the reality of aggressive union-busting tactics.

Assume that a worker has been intimidated not to join a union. There are several possible scenarios: (a) she will be afraid to disobey the employer and avoid joining the union; (b) she will ignore the employer and join the union or otherwise make a free choice; (c) she will notify the union about the intimidation, and the union will take this to court and ask for an injunction. In this last scenario, there are several ways in which the story can unfold: (c1) the union cannot prove the intimidation (even though it has occurred) and fails; (c2) the union gets an injunction, but the damage is already done, workers have been intimidated; (c3) the union gets an injunction and sufficient

146 Compare also to employer speech directed at employees telling them who to vote for in national elections, or whether they should follow certain religious commands, etc. Even if we assume that this kind of speech is in principle constitutionally protected, we would obviously refuse to allow it when the employer uses its power to pressure employees and violates their autonomy to make their own personal choices.

protection for individual workers to feel secure to make an entirely free choice. A rule against coercion by employers will suffice, by itself, only if scenarios (b) and (c3) are the ones expected to materialize in the large majority of cases.

Is this a realistic expectation? That depends on the additional/supporting legal mechanisms to protect organizing, including mechanisms of enforcement. Absent any other mechanisms to protect the right to organize, options (a), (c1) and (c2) are just as likely, to say the least. We do not have direct empirical evidence to support this claim, only logic, based on the understanding of the context; and there is plenty of evidence from the United States (and anecdotal evidence from Israel) showing that joining a union could be risky for employees and lead to reprisals.¹⁴⁷ A court of law cannot assume, in these circumstances, that the choice about unionization can be free in the face of antiunion speech by the employer.¹⁴⁸ This indeed is the situation in Israel. There are no significant tools or legislated mechanisms to ensure that scenarios (b) and (c3) will be the dominant ones in real life. The Israeli National Labor Court was therefore right to conclude that coercion is quite possible, indeed likely, even with a rule against coercion in place. The solution of the court — a sweeping ban on employer speech against unionization during an organizing campaign — does not ensure a full free choice.¹⁴⁹ It does, however, create a

147 In the United States see, for example, Sachs, *supra* note 31, at 681-87. In Israel, see, for example, File No. 3-209 Nat'l Labor Court, *Mif'aley Tachanot Ltd. v. Yaniv* (Nov. 11, 1996), Nevo Legal Database (by subscription, in Hebrew) (Isr.); and File No. 50409-11-12 Nat'l Labor Court, *The Histadrut v. Pelephone Commc'n Ltd.* (Jan. 2, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

148 Another way to make this point is by reference to the difficulty of changing the default: in practice, it is much more difficult to opt-in (when the default rule is no union) than to opt-out (if the default rule would have been the existence of a union). Therefore, if we want to maximize free choice, the solution could be to change the default to opt-out, or alternatively to correct this asymmetry by other means, removing as much as possible any impediments to opt-in. See Sachs, *supra* note 31.

149 Even if the ban is successful in the sense that employees are free to vote for the union, one might argue that this would simply delay the problem of aggressive employer opposition to a later stage. That is, if a large and resourceful employer is determined to avoid unionization, it will likely (unfortunately) be successful. Take, for example, the case of Wal-Mart in Canada. Although the United Food and Commercial Workers Union (UFCW) has been certified in a number of stores across the country in the last decade, all attempts have failed to prosper. In one case Wal-Mart decided to close the store. In other cases negotiations have failed and unfair labor practice allegations were made. In some cases this led to compulsory first contract arbitration and to decertification of the union.

rule that is much easier to enforce. Violations are easier to detect and easier to prove; there are no gray areas. This can be expected to minimize coercion significantly.

Very recently, a regional labor court decided not to settle for an injunction against severe antiunion tactics by the employer, adding a one million Israeli Shekels damages award (approximately \$255,000) in favor of the *Histadrut*.¹⁵⁰ Such decisions are likely to add some degree of deterrence, to ensure that employers will think twice before intimidating workers during organizing campaigns. Still, even this sum — which was several times higher than anything previously awarded by labor courts in these contexts — is very minimal, indeed negligible, for any large company determined to avoid unionization. So this additional measure cannot be a sufficient solution instead of the ban on employer speech.¹⁵¹

Should there be exceptions? The most problematic aspect of the ban concerns factual claims made by the union that the employer believes to be false, and wishes to refute. The *Pelephone* judgment allows such speech only after getting exceptional authorization from a labor court. There is perhaps room to make this less burdensome for the employer, possibly by giving authority to some governmental agency to give this authorization. But the basic idea of creating a clear-cut rule and avoiding gray areas is justified in this context. A rule allowing an employer to refute any factual claims made by the union without prior authorization will open the door for all kinds of

See, e.g., *Plourde v. Wal-Mart Canada Corp.*, [2009] S.C.C. 54 (Can. S.C.); *UFCW, Local 503 v. Wal-Mart Canada Corp.*, [2014] 2 S.C.R. 323, 2014 S.C.C. 45 (Can.); *UFCW, Local 1400 v. Wal-Mart Canada Corp.*, 2012 SKCA 131 (Can.). We believe that while banning employer speech at the organizing drive stage is not the panacea to all forms of opposition to unions, it is one important step toward a better legal arrangement. Indeed, in the case of *Pelephone* and several other Israeli companies, once the union was certified, the employer recognized the union as the bargaining agent of the employees and chose to cooperate and work together toward an agreement.

150 File No. 15478-05-14 Labor Court (TA) *Histadrut v. Hot Mobile Ltd.* (Sept. 23, 2014), *Nevo Legal Database* (by subscription, in Hebrew) (Isr.).

151 On appeal to the National Labor Court, the *Histadrut* agreed, under pressure from the Court, to reduce the award to 300,000 NIS. The Court noted in recommending this settlement that it took into account the fact that this was one of the first cases following the *Pelephone* judgment. Moreover, the Court stressed that if such antiunion practices appear to spread in the future, it will not see itself bound by the level of award recommended in the current case. File No. 11460-10-14 Nat'l Labor Court, *Hot Mobile Ltd. v. Histadrut* (May 26, 2015), *Nevo Legal Database* (by subscription, in Hebrew) (Isr.).

antiunion speech, and if the burden is on the union to prove non-coercion or that the speech involved more than a dispute about facts, we are almost entirely back to square one (of having no ban at all).

CONCLUSION

The conclusion advanced here (supporting the conclusion of the Israeli courts) is based on a purposive-contextual analysis. First, it asks what legal rules are needed to advance the goals of the legislation (the Collective Agreements Act) and the goals of labor law more generally. Second, it takes into account two crucial contextual factors: the real-life current experience concerning the struggles of organizing, and the surrounding legal rules designed to make such organizing possible. It should be clear, therefore, that the conclusion is sensitive to time and place. A sweeping ban on employer speech may not have been necessary in Israel a few decades ago, when the barriers to organizing were much less daunting. Similarly, such a ban might not be necessary in other legal systems, if they have alternative legal measures designed to protect organizing that are sufficiently successful. In Canada, for example, as we have seen, other mechanisms such as reverse onus of proof and remedial certification have proved to be somewhat effective (though only to a certain extent given the increasing use of union-busting tactics by large and resourceful employers). Such detailed arrangements can be adopted in legislation, but not by courts, so the Israeli Court could not rely on their existence when considering which arrangement is necessary for effective freedom of association.

Another way to put the dilemma is by asking whether it is possible — and realistic — to achieve “laboratory conditions” for the decision-making process of employees (whether it culminates in an election, as in some countries, or simply signing-up of new members as in Israel). Such “laboratory conditions” — free of any employer coercion — have been required by the National Labor Relations Board in the United States, at least in theory.¹⁵² There seems to be a broad consensus among American commentators, however, that such conditions have not been secured in practice, leading to (or at least significantly contributing to) the decline in union density.¹⁵³ Given the contextual factors just described, the prospects of “laboratory conditions” in organizing drives in present-day Israel are not high. The ostensibly extreme measures therefore become necessary to give organizing a chance. Again, it is important to

152 See *supra* note 61.

153 See, e.g., Andrias, *supra* note 55; Sachs, *supra* note 31; Secunda, *Viability*, *supra* note 94; Weiler, *supra* note 81.

emphasize that we are not claiming that the wholesale ban is the only possible or acceptable solution. Many other solutions have been proposed for the same problem;¹⁵⁴ but they all require legislative intervention. The National Labor Court in the *Pelephone* case, in contrast, was not in a position to create a detailed arrangement. The ban on employer speech was therefore necessary.¹⁵⁵

Note that this conclusion is not only a recommended possibility of balancing between the competing freedoms, but is rather the *essential* response to the problem at stake. That is, a ban on employer speech during organizing is not only justified in the circumstances, but also constitutionally *required*, in legal systems that have no additional, meaningful measures to ensure compliance with less extreme rules. Let us explain. Assume that freedom of association and freedom of speech are both constitutionally entrenched. Any legal arrangement that involves an infringement of these constitutional rights has to be justified, usually by reference to the goal (which must be legitimate and worthy) and especially the means (which have to stand up to the principle of proportionality). In light of the discussion above, if the legislature bans employer speech this would be easy to justify. But the opposite is not so clear. If legislation and case-law *do not* ban employer speech, the infringement of freedom of association is difficult to justify. Given the contemporary contextual factors, allowing an employer to speak against the union during an organizing drive amounts to a serious infringement of freedom of association. This can be justified only by showing alternative meaningful measures that minimize this harm.

154 See, e.g., sources cited *supra* note 153; see also Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753 (1994).

155 One might argue that this solution may negatively affect the rights of those who do not want to be associated with a union. These employees might be frightened to voice their opposition in a reality where unions are powerful and are allowed to speak to workers without constraints while employers are banned from doing so. While this is a possibility, it cannot serve as a justification for promoting employer speech during organizing campaigns. We do not believe that these employees need their employer to represent them and provide information that would inform their decisions. There are certainly some other ways to protect their rights either directly or through some (already existing) limits on union actions. Moreover, even if there are some costs to the solution promoted here, we believe it is the “lesser evil” and overall required and justified based on a contextualized and purposive analysis.