

From Labour Legislation and Public Policy towards a Flexible Labour Market: The Ambiguous Privatization of a Policy Area

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Paul Davies and Mark Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford University Press: 2007), xxv + 272pp., paperback £24.95, ISBN 978-0-19-921788-5; hardback £60, ISBN 978-0-19-921787-8.

Viewed from the perspective of political science or sociology, the contrasts in the core content of Paul Davies and Mark Freedland's two comprehensive studies of British labour legislation, public policy and regulation are extraordinary. *Labour Legislation and Public Policy*,¹ which covered the period 1945–90, was primarily a study of collective labour law and of the involvement of organized labour in major public questions of the period. While these themes reappear in *Towards a Flexible Labour Market (TFLM)*, which picks up the historical narrative where the earlier book left off and brings us to 2006, they are dwarfed both in extent of content and by the clear shift in the centre of gravity of public policy towards personal rather than collective issues. Whereas discussions of the former, or 'individual law' (as the authors then termed it), occupied only 17% of the 1993 book, those of what the authors now call 'personal law' take up 78% of the new volume.

In this perspective the Conservative governments of the 1980s were a Janus. Looking back they oversaw a certain culmination of the more than century-long struggle over the capacity of the British legal and political system to accommodate active, autonomous organizations of unpropertied labour interests. Looking forward they set the ground for

1. P. Davies and M. Freedland, *Labour Legislation and Public Policy: A Contemporary History* (Clarendon Press, Oxford: 1993).

a labour-market politics in which employee interests would increasingly be subsumed within a concept of human resource management. From the 1990s onwards both Conservative and Labour governments had this latter agenda as the clear centre of their priorities. The key components of the new approach are: (i) encouraging maximum participation in the labour force by the adult population; and (ii) ensuring that managements have maximal discretion and flexibility in how they deploy that labour force. As Davies and Freedland convincingly demonstrate in *TFLM*, if collective labour law is of any continuing interest to legislators, it is because it might serve those ends.

I shall, below, place this change in the context of the general shift from demand- to supply-side labour policy, of changes in the structure of the labour force, and of the implications of globalization. It can be interpreted as an extensive exercise in the privatization of the management of economic uncertainty. For reasons that will be explained, this project is quixotic, public policy and legal regulation remaining inextricably of central importance in contemporary economies and labour markets. The resulting mixed governance of those markets by employers and governments is currently producing some major changes in the structuring of the labour force and, ultimately, of social classes.

The idea of 'personal' labour law

Initially, a comment is required on the new preference of Davies and Freedland for speaking of 'personal' rather than 'individual' labour law. Their thinking on this is quite clear. 'Individual' is usually counterposed to 'collective' in order to indicate that the former gives more autonomy to individuals to make choices, a capacity that is removed from them when a collectivity, such as a union or nation-state, makes decisions on their behalf. As the authors repeatedly note, many changes in law that have decollectivized British labour arrangements have done so to the advantage of firms and other employing organizations, which gain more autonomy over their treatment of the collectivity of their work-force. It is not accurate to present these changes as a shift towards the 'individual' worker in the normally understood connotations of that term. The authors therefore prefer to refer to the 'personal', indicating that these developments relate to workers as persons, not necessarily imbued with all the political and philosophical implications that the word 'individual' has carried in post-Enlightenment thought.

The point they make is of fundamental importance to a correct understanding of the character of the changes taking place, but I am uneasy with the word chosen. 'Person' is itself redolent with associa-

tions, particularly in Catholic social thought, but also more widely. It implies a concern for that private, sensitive, complex bundle of thoughts and feelings that we usually understand when we envisage a unit of human life as a person. Indeed, one might well use 'personal' to denote a more complex and feeling creature than the maximizing, calculating machine with which economic science has led 'individual' to be associated.

Management practice at the end of the twentieth century has already given us the appropriate term for what Davies and Freedland are trying to capture: human resource, as in the phrase human resource management. This presents the concept of workers as material available for deployment by management. It conveys the negation of 'collective' (in the sense of workers' own collectivities) that is implied by individual, but also achieves Davies and Freedland's desire to remove the ideas of both autonomy and truly individual treatment which that word implies but which has little to do with most contemporary work relations. It also avoids the tendency of 'personal' to imply concern for the worker as a whole person. The change that has taken place in the focus of law is therefore a shift from collective labour law to human resource law, or human resource management law, given the priority accorded managerial concerns in most of the legislative interventions of the period.

The current dominant trend in British employment law is for an elaboration of human resource practices that enable employers of labour to have as flexible an access as possible to a wide range of forms of tenure, patterns of working and levels and types of skill as can be reconciled with certain guarantees of human rights. These guarantees are of three kinds: those required by European Community (EC) directives; those required by past, and to some extent continuing, needs by Labour governments to offer unions something for continued support; and those required to ensure a continuing stream of labour-force participants. The last of these is the most interesting, as they indicate the limits of a 'workfare' strategy in a society in which labour is 'free' and in which the mass of the population has votes. It is therefore in this area that new compromises will be forged in labour-market and employment policy. There will be points of equilibrium where employers of various kinds balance their desire for flexibility against the working conditions that different sections of the population are prepared to accept. Government policy is driven by the search for those equilibrium points, which change over time as the terms of different labour markets, employers' capacities to find new rival labour markets in different parts of the world, and the expectations of populations, all vary.

The historical parabola of collective labour

Elsewhere² I have used the image of the parabola to describe what I see as having been the trajectory of democracy in many advanced countries: a rise from small and difficult beginnings, to the development of strong and extensive popular participation in politics, driven by autonomous organizations rooted in civil society rather than in the political elite itself, and then on to a period of growing disaffection, and a return of political agenda-setting to a specialized political class. It is a parabola because, while in some respects there is a return to an earlier historical position, the experience of the intervening decades does not disappear. It remains embedded in institutions, culture and consciousness. I therefore distinguished between pre-democracy and the trend I was trying to describe, post-democracy. 'Post-' periods – as in post-industrial, post-modern – continue to bear the imprint of the period that they are leaving behind, and have not yet acquired a definition of themselves to which they can give a name without reference to that immediate past.

The trajectory of collective labour and strategies for embedding it in law and institutions described by Davies and Freedland is not analogous to that of democracy; it is fully part of it. In fact, it could be argued that it is the area in which my parabola of democracy works best. The feminist, environmental and racist movements have, in their different ways, demonstrated that, despite the manipulations of spin and media control, civil society remains very capable of throwing up new movements with which the political elite has trouble dealing, refuting my hypothesis. What has really declined has been the capacity of groups defined by middle- and low-economic status to articulate their concerns through their own instruments and institutions. The organization of large numbers of workers into unions, political parties and other bodies remains the last and most important historical instance of such a phenomenon, even if the internal democracy of those organizations themselves was often very defective.

In *Labour Legislation and Public Policy* Davies and Freedland encountered collective labour as it was soaring towards the summit of the first limb of its parabola around the end of the Second World War, and tracked it through the long, flatter period where it exploited its position of strength until the 1970s. Then, what seemed at the time to be a new burst towards a higher summit proved to be the start of a downturn that was no minor fluctuation but the swoop down the

2. C. Crouch, *Post-Democracy* (Polity Press, Cambridge: 2004).

second limb of the parabola. Indeed, they themselves identify signs of the change back to the mid-1960s, when moderating union power alongside improving individual rights, and weakening labour against management, started to replace an earlier preoccupation of policy with reducing inequalities in bargaining power between capital and labour (p. 5).

The story can be told as one of classical (or Hegelian–Marxian) tragic hubris, and *Labour Legislation and Public Policy* can be read that way. Their starting point was ‘collective *laissez-faire*’, that formula devised by Otto Kahn-Freund, the great labour lawyer and judge of the Weimar Republic.³ Arriving in Britain as a refugee from Nazi Germany, he defined what he saw as the happy outcome available to the British, forging a creative compromise between the country’s liberalism and the aspirations of organized labour. Collective *laissez-faire* was thus at first the talisman that enabled the tragic hero (British organized labour) to avoid the horrors and entanglements of his continental European cousins. But it eventually became the curse (the seed of destruction embedded in the concept itself) that prevented organized labour from acting ‘responsibly’, leading it by the 1970s to be widely seen as a menace that had to be cut down. The series of events between the mining strike of 1974 and the so-called ‘Winter of Discontent’ of 1978–79, initially experienced as demonstrations of organized labour’s strength, were eventually perceived by business and political elites to be final proof of earlier suspicions that collective *laissez-faire* was not delivering its promise. There was a struggle between attempts to resolve the problem in either more collectivist (neo-corporatist) or more *laissez-faire* (neo-liberal) directions. By the end of the 1980s and the publication of *Labour Legislation and Public Policy* the issue had been resolved in the latter direction.

Although the die was now cast for a decline in the role of organized labour and, in consequence, in the priority of collective labour law and indeed the role of *organized* employer interests, taking down the structures that had developed to assert and ramify their role was itself a major political task. The Thatcher governments continued the preoccupation of their predecessors for many years with the edifice of collective labour relations, but only because they were dismantling it. For that reason collective issues remained at the heart of Davies and Freedland’s 1993 volume even when dealing with their most recent period. Only one chapter, ‘Industrial Justice and the Individual Worker, 1968–1974’, and parts of others, such as ‘The Restructuring of the Indi-

3. Davies and Freedland, *Labour Legislation and Public Policy*, pp. 8–36.

vidual Employment Relationship' and on training legislation, deal with 'personal' (or human resource) issues. However, by the 1990s there was little left to do in the collective field, apart from some final dismantling, offset by some minor reassertions of co-operative collectivism almost solely at the insistence of the EC (this latter indicating quite a change since Kahn-Freund's day).

But the decline of British organized labour and its consequences for labour law and regulation were neither solely the product of union hubris nor limited to this country. Even 'well-behaved' union movements such as the Austrian and German, to a lesser extent the Nordic and Dutch, have seen important reversals in their socio-political position, while the idea of free trade unions long held out to Eastern Europe as a feature of capitalist democracy has so far played a very minor role in those countries following the collapse of state socialism. It is therefore necessary to appreciate the implications of a more general context.

The implications of supply-side labour policy

A fundamental force generally at work in labour markets and economies has been the shift, well captured by Davies and Freedland,⁴ away from demand-management economic policy that took place, primarily during the 1980s. The end of the Second World War did not witness a high point of collective *laissez-faire* solely because of developments in labour law. The authors rightly set their account in the context of the rise of Keynesian ideas of demand management. Taken together with the quite unrelated changes introduced by Fordist mass production, these had signified recognition by decision-makers that both economic growth and social stability could be based on sustained strong demand for goods by the mass of working people. This had not been perceived by nineteenth-century elites. For them, mass prosperity would rise with the growth of trade, but very slowly, and it would be subject to occasional major reversals as the trade cycle underwent major fluctuations, bringing periodic high unemployment. This imparted a strong zero-sum sense to labour conflicts and the consequent frequent recourse to repression of workers' organizations and their activities. Exceptions occurred when only small, superior sections of craft labour were organized, concessions to whom would not add significantly to costs, particularly in countries where much wealth

4. *Ibid.*, ch. 10.

derived from imperial exploitation. The United Kingdom (or, rather, Britain, Ireland being in labour-market terms more part of the Empire than of the home country) had both these characteristics, which enabled a reasonably benign public policy to be adopted towards craft unions.

The experiments in the Ford Motor Company in the United States in the early twentieth century suggested a different model. If unskilled workers could be put to work at production lines that greatly increased their productivity, their wages could rise, and the prices of the goods they produced could be reduced. This would lead to higher sales and even higher production as these goods came within the reach of those on modest incomes. Ever richer workers buying ever cheaper goods could turn the zero-sum game into a positive-sum one, either in a way that might reduce labour discontent, and hence inhibit the spread of unions, or in a manner that would make it easier to make concessions to union demands where they could not be prevented. Much of the potential socio-political effect of this possibility was nullified by the exceptional trade fluctuations of the inter-war years, which brought mass unemployment as well as insecurity and uncertainty to all classes. This of course is where policies for government demand-management, worked out by John Maynard Keynes and a number of Swedish economists⁵ in the heart of the slump itself, provided the second limb of an economy based on mass consumption. If government used its fiscal and spending policies to stabilize demand, firms would have the confidence to keep investing and maintaining the supply of goods to mass markets and thus to employ workers; and households would have enough confidence in their future economic security and employment prospects to spend to acquire the goods. Crucially also, the public spending that formed part of the government's demand management would provide services to households that would further improve their security and welfare, and thus their confidence to spend on private consumption, and would also create additional employment in public services themselves into the bargain.

For the first time in recorded history both economic and political stability came to depend on the secure growth of the prosperity of the mass of the people. Central to Karl Marx's conception of history had been the idea that, at particular moments, the special interest of a particular class also represented the interest of society as a whole; it is at that point that the class concerned would become the ruling class. There were important elements of this in the way that the prosperity of

5. Rudolf Meidner and Ernst Wigforss among others.

the mass of ordinary workers and their families became central to the economic model of the third quarter of the twentieth century in advanced western democracies. This enabled collective *laissez-faire* to come into its own in British industrial relations, as the conflicts that were endemic to it were capable of positive-sum resolution. However, this lasted for little more than what Davies and Freedland termed 'The Easy Decade' (1951–61).⁶ The seed of destruction encompassed almost *per definitionem* in the concept of collective *laissez-faire* was set to become the hubris of the entire demand-management model. The discipline of the true *laissez-faire* economy depended on people being unable to challenge the rule of the market; while the whole purpose of collective labour action was to pose precisely such a challenge. Demand management could cope with that contradiction only during times of expansion. But also it could only smoothe trade cycles, not abolish them altogether: there were bound to be mildly deflationary episodes, and during these the lack of self-discipline within collective *laissez-faire* became glaring, and mainly resulted in an inability of governments to control inflation.

Marx had believed that, because the working class constituted the vast mass rather than a small elite, the period of its ascendancy as the special interest standing for the general interest would mark a terminal point in the history of conflict between class interests and the end of classes as such. It is at that point that the association between demand management and Marx's idea ends. The ascendancy of the mass ushered in by demand management and mass consumption was not of the kind that he had had in mind. The working class concerned was that in a few rich countries, not the world as a whole; and demand management was a technique with, as we have seen, inbuilt weaknesses. The very time in the 1970s when these weaknesses were being revealed, and government demand-management being regarded as a device for creating uncontrollable inflation, was also one when capital was on the threshold of a major global expansion. Mass consumption would remain central to the model of economic success, even more so, but its possibilities were increasingly seen as dependent, not on government policies to maintain full employment, but on multi-national enterprises being able to deploy capital, labour and other resources in whatever ways and at whatever points across the globe were most profitable to them in order to deliver keenly priced goods and services to mass consumers. Fundamental to the new model was the ability of deregulated finance capital to operate globally according to models of share-

6. *Ibid.*, ch. 3.

holder-value maximization in individual firms and to trade in terms of such instruments as futures and derivatives that spread risks, enabling the market to smooth its own fluctuations without help from inflation-prone governments. Finance capital, not labour, was becoming the class interest that could present itself as that which stood for the general interest.

At the same time employment in manufacturing industry and in mining, which had forged the main points of strength of organized labour, was declining steadily within the advanced economies as a result of increased productivity in manufacturing itself, globalization and the rise of private-sector services. Unions found it difficult to establish strong bases in most parts of this sector. Not only did this combination of developments produce a decline in organized labour, it also meant that the vanguard role within it passed increasingly to public-service employees. While this enabled unions to reach deeper into non-manual and professional occupations than before, it tied them increasingly to the demand-management model that was in decline, since public employees were heavily dependent for their employment and incomes on continuation of the expansive episodes of the Keynesian cycle.

Government demand-management did not disappear, but it increasingly gave way to action on the side of labour supply. Supply-side economic theory as such is concerned with stimulating the economy through cuts in taxation rather than through increases in public spending, but it is also possible to describe a labour-supply approach that also contrasts with demand management. This argues that, rather than try directly to support workers' economic security, governments should ensure that workers are as useful as possible to the investors and corporations that produce the wealth, which, in the long run, is considered to be the only guarantor of that security. It is further argued that, given the new global mobility of capital, both workers and national labour institutions need to be refashioned to make them attractive to employers who might otherwise go elsewhere.

This thinking ushered in the whole raft of policy measures that form the bulk of the content of *TFLM*. To some extent the earlier project of dismantling, or at least restraining, the old collectivist model remained part of the new approach: weakening unions would be one way of making labour forces more attractive to global investors. But the key *Leitmotiv*, captured in Davies and Freedland's title, is 'flexibility': the more flexible labour is, the more use investors can make of it. This includes revising the concept of 'employee' itself, to make available to employers a variety of forms of using labour, which may or may not involve a standard employment contract. Employers with varying

needs for full- or part-time, casual or committed, day-time or nocturnal, skilled or unskilled employment should all be able to find these within the British adult population. Testimony to the success of the policy has been the low rate of unemployment and high level of labour-force participation that the UK has achieved. The authors describe the cross-party continuity of these policies across the transition from Conservative to New Labour governments in the later 1990s, but credit New Labour with a better understanding than their predecessors of the context of transition to a post-industrial economy, and one in which private and public forms of employment were deeply intertwined (p. 11).

Maximizing labour-force participation

From this point it is useful to give separate consideration to the two main wings of the policy approach: maximizing labour-force participation, and maximizing managerial flexibility as such.

In the first years of New Labour government (1997–99) some elements of the collectivist agenda, and an individual agenda based on rights as countervailing power against the employer, remained in play. Then began the shift which Davies and Freedland analyse as one from treating workers' rights as a form of countervailing power against employers to that of devices designed to maximize labour-force participation. Rights increasingly took the form of increasing labour-market 'inclusion' rather than the granting of substantive rights (p. 81). The late nineteenth-century idea of government as 'model employer' shifted from referring to government wages practice to meaning encouraging the disabled, single parents and other groups to enter employment (pp. 202–3). Within a context of weakening employee rights in general, those of some groups were enhanced – again, groups like parents of young children who might be inclined otherwise to leave the labour force (p. 64). The minimum wage can be seen as a necessary palliative for elements of compulsion in the policy of getting people into work (p. 182), as in principle it could not be argued that people were being forced to work at 'starvation wages'. Employment services continued the move already begun in the 1980s away from helping those having trouble finding work towards cajoling those who did not necessarily see themselves as in the labour market (p. 174).

If Davies and Freedland see a difference in the approach of the UK's two governing parties, it is that Labour has been more concerned than Conservatives with providing positive as well as negative incentives to get people to work. But it is difficult to tell whether this is a true difference of policy or merely one of timing: comparative policy analysis

within one country over time is always made difficult by the fact that parties govern over different time-periods. Had the Conservatives remained in office after 1997, would they eventually have followed policies for helping single parents with child care and improving access to training by the unemployed? They might have done so if, like New Labour, they had come to see them as helpful to a labour-force maximization strategy.

The replacement of the pursuit of full employment by that of maximal labour-force participation that has marked the shift from demand to labour-supply economic management is a clear but subtle one. At one level it might be seen as just a reinterpretation of the same phenomenon. When work-forces were largely male, disability payments poor, and general welfare support only developing, there were very strong incentives for men (especially breadwinners) to find jobs. The emphasis of all labour-policy demands emerging from the inter-war years of truly mass unemployment was on achieving the right to work, and the duty of government to ensure that jobs were available for all who wanted them. True, there was always concern that welfare benefits might provide disincentives to work, but these were largely subordinate to claims for the right. And no one would have suggested that mothers had a duty to join the paid work-force; rather, the opposite was the case. Indeed, there were frequently formal bars to the employment of married women, including in the Civil Service. Changed gender expectations and the growth of generous disability rights almost inevitably promoted concerns over a *duty* to work to rank at least equally to the idea of the *right* to do so.

Workers in different kinds of status or social situation have had very different experiences, with some categories acquiring new levels of security and others becoming more insecure as a result of legislative interventions. Davies and Freedland do not bring these together in a summary way, but their work makes it possible for those who want to tease this out to do so. The pattern that emerges is often initially perplexing. Why, for example, to take a case that the authors do develop, 'did the voluntary principle continue to play a greater part in the arrangements for lone parents [in labour-force participation] as compared with the disabled, especially as moving lone parents into work was seen as the main mechanism for relieving child poverty?' (p. 179). The reason seems to be that the former had been more adept at getting into jobs without much policy support, so needed less pressure. This ceases to be problematic if one sees that the priority of government policy has been, not to provide a regime of overall balanced rights based on entitlements *per se*, but to maximize labour-force participation.

Providing employers with an abundant supply of labour was by no means the sole motive for trying to increase labour-force participation. In the UK and elsewhere, particularly across Europe, growing longevity among pensioners and earlier trends to early retirement and increased use of disability allowances, as well as higher proportions of young people remaining in education, have been reducing the share of the total population in work; though it is a trend that has been strongly offset by the steady rise in female participation. This decline means in turn a decline in the tax-paying population and an increase in those who in various ways depend on public transfers and services. Reversing this trend has become a major objective of both fiscal and social policy, quite apart from any concern with making supplies of labour available to employers.

Two different socio-political regimes have been associated with such policies. In the USA and Australia they have mainly been part of 'workfare' policies designed to reduce welfare dependence among those claiming social benefits of various kinds, and hence to reduce the overall fiscal burden of the economy. In the Nordic countries they have for many years been part of a social contract in which the population enters a commitment to participate in the tax-paying, paid labour-force, in exchange for high levels of public services and social welfare funded by the broad fiscal base to which their incomes contribute. It amounts to a concept of social citizenship rights as being dependent on labour-force participation (including past participation among the retired) rather than that of political citizenship being based on military participation as in the original Athenian model, and also in contrast with the modern conception of universal adult political citizenship as a right of birth or naturalization irrespective of social contribution. The tests of which model, the US or the Nordic one, is dominant in a particular situation are the balance between negative and positive incentives to join the work-force and the level of public services. The UK today seems on a cusp between the two concepts. It clearly moved in the latter direction with the election of the New Labour government in 1997, as both public spending and the positive incentive components of active labour-market policy grew after that time. The levels of both remain, however, in an intermediate position, and New Labour statements, while often referring to US origins of policies, rarely acknowledge any Nordic parentage.

Maximizing managerial flexibility

The second central preoccupation of policy has been to ensure that managers can have maximum control over their work-forces, deploying

them over the timetable most convenient to them, on terms and conditions determined by them, and with whatever rights of consultation they choose to give or deny to their workers. This is generally seen as required by a general national interest in competitiveness, which is deemed to be best left in the hands of managers responding to the maximization of shareholders' interests. In this model there is no room for the idea of employment as a right, but considerable space for that of employment as a duty. Davies and Freedland point to a number of occasions when elaborations of worker rights were not being pursued where they might compromise that goal. For example, attempts to extend rights to atypical workers were diluted when they were seen to restrict managerial flexibility (pp. 57–8; 88). The 1999 White Paper *Fairness at Work*⁷ did not specify collective bargaining or recognition of unions as the government's preferred means of employee representation, leaving employers free to choose whatever system they deemed best (p. 119). And although government spokesmen advocated 'partnership' between management and employees in workplaces, it was left entirely to employers whether to take an interest in that theme or not (p. 159).

The authors pass from legal to shrewd and perceptive political analysis when they demonstrate that government responses to the exposure of wrongs requiring a remedy on workers' behalf have often taken the form of a large amount of political noise, the establishment of elaborate processes and procedures, with at the end of the day very minor extensions of substantive rights. They call this 'light regulation': a response to a specific, publicized problem, a carefully circumscribed solution, and more process than substance (pp. 67–71). And they point to the paradoxical conclusion that, as a result of these developments, employers feel they have been subject to a major increase in regulation (because of all the new procedures), while employees experience very little improvement in their rights – a negative-sum game for the social partners, if initially a means to a gain for legislators. This analysis eventually leads Davies and Freedland (pp. 242–7) to adumbrate six of what they term 'methodologies' of de- and re-regulation: deregulation *per se*; simple non-regulation; minimal regulation (as in response to EC minimum requirements); individualizing and liberalizing regulation; light regulation; and re-regulation.

A further element of the ascendance of managerial flexibility concerns the gradual rise of atypical and especially precarious forms of

7. Department of Trade and Industry, *Fairness at Work*, Cm 3968 (DTI: 1998).

work – labour contracts falling short of actual contracts of employment. Here it is difficult to track a consistent strand in policy, as at certain points the twin goals of maximizing managerial flexibility and maximizing labour-force participation conflict: the more precarious a labour status becomes, the more reluctant are workers to occupy it. We therefore find an appropriately mixed pattern, with at certain points the rights of such workers being advanced (the minimum wage) and at others their vulnerability being intensified (relaxation of protection from dismissal rules). Often the former have resulted from requirements on British governments to adopt EC directives.

As is well established in the economics and sociological literature,⁸ flexibility is itself a flexible term. In its crudest, and most common, use in relation to labour markets it refers to the ease with which employers can fire workers, or redeploy them on different tasks without consultation, or deal generally with them as they please without needing to follow externally imposed procedures. Another meaning, however, relates to flexibility as an attribute of the worker, enabling him or her to exercise choice in the labour market and thus strengthen his or her position within it. This is generally considered to be achieved through education and training. Since employers are also considered to want an improvement in the quality of the labour force available to them, this is potentially a strong field for the development of consensus and positive-sum solutions in supply-side politics. But Davies and Freedland find (pp. 211–16), as they did before,⁹ that the strength of government rhetoric about the importance of this area is not matched in practice. It is in fact one of those fields referred to immediately above, where a good deal of procedural ‘noise’ by government, implying that it is granting extensive rights to workers, conceals a policy of letting employers have the bulk of the initiative. If employers want to up-grade the quality of their labour forces, there are policy

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8. J. Atkinson and N. Meager, *Changing Working Patterns: How Companies Achieve Flexibility to Meet New Needs* (Institute of Manpower Studies, National Economic Development Office: 1986); H. Chung, ‘Labour Market Flexibility, for Employers or Employees? A Multi-dimensional Study of Labour Market Flexibility across European Welfare States’, paper presented at 2006 Annual ESPAnet Conference, Shaping European Systems of Work and Welfare, Bremen, Germany, September 2006; M. Jepsen and U. Klammer, ‘Editorial’, *Transfer* 10 (2004), pp. 157–9; A. Pollert (ed.), *Farewell to Flexibility?* (Blackwell, Oxford: 1991); P. Reilly, *Flexibility at Work: Balancing the Interests of Employer and Employee* (Gower, Aldershot: 2001).
 9. Davies and Freedland, *Labour Legislation and Public Policy*, pp. 599–614.

instruments available to help them. But if they are content to stay with a relatively low-skilled work-force, government will not interfere. In keeping with this and its general stance, government has provided a minimal role for tripartism in training administration, usually preferring solely employer-led policies (p. 214). Behind this lies a fact rarely recognized in public debate, that employers' demand for labour is by no means limited to the highly educated and trained persons that feature in iconic representations of the 'new economy'. Much employment in personal services is menial and unskilled. Finally, Davies and Freedland (p. 23) also interpret public-service reform (primarily contracting-out and marketization) as being in part motivated by a desire to increase managerial flexibility and the avoidance of standard public-service employment relations.

The impossibility of a total privatization

In many respects the changes in the role and stance of labour law traced between Davies and Freedland's 1993 and 2007 books can be seen as another of several stories of privatization that characterize the passage from the 1970s to the present day. The labour market and the risks associated with it have been privatized in a number of respects. Used strictly, the term 'risk' should apply to calculable uncertainties. That which is calculable (or at least reduced to odds) can be traded; there are therefore markets in risk: insurance, futures markets, trading on. Residual uncertainty that cannot be calculated or even gambled against known odds cannot be traded, as no prices can be attached to it. It therefore remains outside the market, in the first instance falling on the truly 'private' sector, the non-tradeable aspects of the lives of individual persons, families and households, unless the adverse consequences are successfully defined in the political system as a collective problem, in which case government intervention of some kind is to be expected.

The *de facto* extent of this non-tradeable uncertainty is likely to be considerably higher than its theoretical level. The prices that can be placed on risks in order to trade in them can usually only be calculated by highly sophisticated, professionally advised organizations, such as the firms that operate in the financial sector. That kind of calculation is not easily made by even moderately wealthy households, which therefore encounter only uncertainty where a bank or hedge-fund operator would see a potentially profitable risk. In some areas of life the financial institutions have enough incentive to offer terms to households for converting uncertainty into risk, as in insurance or private pensions, but this coverage is by no means universal. An important

example concerns skills and training. In a pure market for training and skills, individuals would be prepared to pay for their own education and training in expectation that they would be able to earn more as a result of the training than if they had not undergone it. But this level of payment would be very heavily discounted by individuals' uncertainty whether the careers for which their training would prepare them would, over the long term, deliver the hoped-for rewards. In theory, specialized firms that would make loans to individuals to finance their training might be expected to emerge, with repayment rates tied to anticipated subsequent earnings, the firms' skill resting in their ability to make calculations of the risks that certain levels of remuneration would not be achieved. In practice such arrangements exist in only a very small number of highly predictable occupations; in general the field of education and training is one of market failure. Since the issue of the supply of skilled persons for the labour force is deemed to be a collective issue, the field is one subject to considerable government action, with legal requirements that children are educated to a certain age, and with extensive state funds allocated to reduce or eliminate costs to individuals. However, as noted above, in the field of vocational training there remains considerable reliance on employers, and hence extensive market failure, with burdens of uncertainty being borne by households.

Market failure has led, albeit imperfectly, to government intervention to relieve the burden of uncertainty on households in a number of aspects of labour and employment policy, offsetting any tendency towards privatization and government withdrawal. A major example can be seen in what can be interpreted as a privatization of the risks of demand management with the limits of that privatization. Rather paradoxically, consumer demand has been considerably stronger during the past decade or so than it was during the decades when it was being sustained largely through government spending. What happened, mainly in the UK and US markets, was that almost continuously rising house prices enabled households to raise mortgage-funded credit in order to increase their personal spending even if (as was often the case in the USA) incomes themselves were not rising. This has been a kind of 'privatized Keynesianism', the spending and the risks of debt to fund that spending being passed from government to households. But households could not accept this risk without assistance from governments, which have therefore had to sustain the housing market by various interventions to make house purchase easier or cheaper, and even to prevent crises of confidence in individual finance and mortgage firms which in other areas of the economy might have been left to the mercy of market forces. Even then, families have often found themselves in considerable difficulties when at various intervals severe

market corrections can no longer be postponed. While this example itself lies beyond the scope of labour law, we see here all the elements of contemporary uncertainty management in action. Firms in the financial sector trade in risk and sell risk-management products to households; but the market corrections that would in a pure case occur fairly frequently cannot be allowed to happen, because there is a perceived collective interest in the demand management being secured by sustained expansion of the housing market; as a result government finds itself back in the frame after all, with some collateral damage to households.

A similar process is at work within the labour market in legislation for flexibility, making it easier for employers to set working conditions suitable for their needs, and not tied to the concept of 'standard' employment that had earlier emerged from the shared interests of mass-production employers and trade unions in having straightforward, simple, legally supported sets of conditions of employment. Guarantees by either law or collective bargaining of these arrangements signified a certain collective interest in reducing the uncertainty that would attend both employers and employees in having a wide variety of such terms that could change and vary at short notice. Employers have sought, successfully, for a loosening of these conditions as they confront the more unstable markets of the globalizing and post-Keynesian economy. The burden of bearing the uncertainty is therefore thrown onto workers and their families. However, governments have found it politically difficult to accept the dangers of instability that might arise from pressing this strategy to the full and allowing labour contracts to be governed solely by market conditions. Deregulation has therefore been accompanied by various forms of re-regulation, even if sometimes this has been minimal or light regulation. This in fact relates back to the new demand-management model discussed immediately above: workers are also the consumers whose confidence and credit-worthiness are needed to fuel economic growth. Government therefore has to impose certain floors to the uncertainty implied by labour-market flexibility.

The world of labour law that Davies and Freedland describe is therefore not a simple one of deregulation and flexibilization, but one with trends and counter-trends. The net outcome of such a process at any one moment is likely to fall differently in different parts of the labour market. A move to increased self-employment (one consequence of the decline of the standard employment model) will affect very differently a television producer setting up her own company, rather than being an employee of a large broadcasting organization, and a building worker unable to find secure employment but having to move from firm

to firm at the completion of contracts. People at different educational levels, living in different parts of a country, working in different sectors, having different demographic profiles, will find themselves typically affected in very diverse ways by the resulting mix.

It is at this point that sociologists have to take over the analysis from labour lawyers, for it is not the job of the latter to answer the question of the overall social impact of the complex and sometimes contradictory changes in progress, though students of the UK are at an advantage in having sociologically and historically sensitive legal studies such as that by Davies and Freedland to help them in their task. To what extent is differential exposure to labour-market uncertainty becoming a form of stratification within contemporary labour forces? It was in the late 1970s that some observers already began to talk about a segmentation of the labour force according to different publicly or privately established rights to security that might rival traditional stratification based on concepts of different types of work (such as manual/non-manual).¹⁰ Since that time, not only has segmentation increased massively but the declining role of manufacturing employment has been reducing the significance of traditional stratification.

We are here dealing with new definitions of categories of persons according to their labour-market status: the securely tenured, the self-employed, the precariously employed, and so on. But these often overlap with existing social categories, such as gender, age-group or ethnic group, as members of these find themselves differentially located in different forms of work relation. The result is a combined economico-legal and socio-demographic social definition. At one level there is official concern that this might happen, even though legislators are, in the interests of maximizing flexibility, busy defining the diversity of different labour-market statuses that enable it to happen. As Davies and Freedland report, much contemporary labour legislation is therefore concerned, not to provide protection against certain categories of precarious employment, as these are part of the flexibility, but to try to prevent certain social categories from being identified with such categories, as that way lie dangers of weak social cohesion. The field is therefore one of considerable social struggle and deep ambiguity, and well worth study.

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10. S. Berger and M. Piore, *Dualism and Discontinuity in Industrial Societies* (Cambridge University Press: 1979); F. Wilkinson, *The Dynamics of Labour Market Segmentation* (Free University, Berlin: 1981).