

Introduction: Labor Scholarship in an Era of Uncertainty

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For labor scholars, and for those interested in “labor organizing and the law” more broadly, the early twenty-first century has been a time of uncertainty and dislocation. Trade unions, the institutions at the core of labor scholarship for generations, are in precipitous decline across the globe. In the United States, trade union density in the private sector is hovering around seven percent; in the 1950s, that figure was thirty-five percent. In fact, the United States has not seen union membership statistics as low as the current figures since the years that predate the New Deal and passage of the Wagner Act.¹ The United States, of course, is far from alone in this trend: in Israel, union density has fallen even more dramatically, from about eighty percent in the 1980s to twenty-five percent in 2012.²

As severe as these numbers are, there is little reason to expect that we have hit bottom. In part, this is due to labor market trends unfriendly to unionization and collective bargaining, but in part it is due to the fact that the two subjects of this issue of *Theoretical Inquiries in Law* — “law” and “organizing” — have become antagonists. Or, to put it more bluntly, it is increasingly the case that law is an enemy of organizing.

A case in point can be found in recent labor law developments in the United States. In just the last handful of years, the United States Supreme Court has entertained several challenges to unionization rights that can aptly be described as existential threats to unionism. One of these cases, *Unite HERE Local 355 v. Mulhall*,³ challenged the ability of unions and employers to negotiate

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1 National Labor Relations Act, 49 Stat. 452, 29 U.S.C. §§ 151-169 (1935); see Jefferson Cowie, *Reframing the New Deal: The Past and Future of American Labor and the Law*, 17 THEORETICAL INQUIRIES L. 13 (2016).

2 See Pnina Alon-Shenker & Guy Davidov, *Organizing: Should the Employer Have a Say?*, 17 THEORETICAL INQUIRIES L. 63, 66-67 (2016).

3 *Unite HERE Local 355 v. Mulhall*, 667 F.3d 1211 (11th Cir. 2012), cert. dismissed as improvidently granted, 134 S. Ct. 594 (2013).

their own ground rules for union organizing campaigns. Because almost all successful union organizing campaigns in the United States today are run pursuant to these types of agreements, the case was effectively a challenge to union organizing itself. And although the Court eventually dismissed the case before deciding it, the fact that at least four Justices of the United States' highest court believe the challenge was meritorious enough to warrant review suggests severe trouble ahead.

Another group of these cases involves public sector unions, where, until recently, union density has remained stronger. These cases challenge the ability of public unions to collect agency fees, or "fair share fees." In the U.S. labor relations system, unions have an obligation to represent equally all workers in every unionized bargaining unit, whether or not the workers choose to become members of the union. In order to avoid the obvious free-rider problem inherent in a system that demands representation but does not require membership, the law allows unions to collect a fee — the fair share fee — to cover the costs of collective bargaining and contract administration (though not the costs of political activity). In *Knox v. SEIU*,⁴ a case decided in 2012, the Supreme Court called into question the permissibility of these fees, on the ground that they constitute "compelled speech" and thereby might violate the constitutional right to free speech.⁵ Then, last year in *Harris v. Quinn*,⁶ the Court cabined the range of workers from whom fair share fees might be collected, ruling that homecare workers were not quite public employees "enough" to warrant application of the rule.⁷ And, finally, on the last day of its 2015 term the Court decided to hear yet another challenge to fair share fees in the public sector. Although always difficult to predict, it is very possible that by June of 2016, the Court will hold in *Freidrichs v. California Teachers Association*⁸ that fair share fees are flatly unconstitutional in the public sector.

With such a rule in place, public sector unions in the United States will face a legal regime that requires them to represent all workers in any bargaining unit they have organized, but that prohibits them from requiring any of those workers to pay anything for that representation. This is a regime that would confront unions with a profound free-rider threat. As Justice Kagan put it in her *Harris* dissent, "Does the [*Harris* Court] majority think that public employees are immune from basic principles of economics? If not, the majority

4 *Knox v. SEIU*, 132 S. Ct. 2277 (2012).

5 *Id.* at 2289.

6 *Harris v. Quinn*, 134 S. Ct. 2618 (2014).

7 *Id.* at 2638.

8 *Freidrichs v. Cal. Teachers Ass'n*, 2014 WL 10076847 (9th Cir. 2014), *cert. granted* 135 S. Ct. 2933 (2015) (mem.).

can have no basis for thinking that absent a fair-share clause, a union can attract sufficient dues to adequately support its function.”⁹

In the United States then, at the time of this symposium, existential threats to unions in both the private and public sectors are looming. As if these developments weren’t enough to create a sense of dislocation among labor scholars, however, it is also the case that the very nature of work and employment is changing so rapidly as to be increasingly unrecognizable. Supriya Routh usefully defines the model of traditional employment as one characterized by “a long-term relationship with comprehensive benefits emanating from that relationship,” where “the employer is the principal entity responsible for the workers’ wellbeing, [and in which] the state monitors the relationship and regulates it to conform to its politics.”¹⁰ This definition may now better describe history than the contemporary landscape. We have moved into a world defined in large part by the kind of subcontracted relationships that Hila Shamir describes in her contribution to this issue,¹¹ and that David Weil describes in his book on *The Fissured Workplace*. As Weil puts it,

[t]he modern workplace has been profoundly transformed. Employment is no longer the clear relationship between a well-defined employer and a worker. The basic terms of employment — hiring, evaluation, pay, supervision, training, coordination — are now the result of multiple organizations. Responsibility for conditions has become blurred. Like a rock with a fracture that deepens and spreads with time, the workplace over the past three decades has fissured.¹²

If anything, though, Shamir and Weil *understate* the profundity of the recent changes in the nature of employment. We can see this by turning back to Routh’s contribution and contrasting his definition of formal employment — what I’ve called history — and his description of *informal* employment relationships in India, which is the subject of his study. Routh opens his article by quoting from Ela Bhatt’s work on self-employed women in India:

A small farmer works on her own farm. In tough times, she also works on other farms as a laborer. When the agriculture season is over, she goes to the forest to collect gum and other forest produce. Year round, she produces embroidered items either at a piece rate for a contractor

9 *Harris*, 134 S. Ct. at 2657 (Kagan, J., dissenting).

10 Supriya Routh, *Informal Workers’ Aggregation and Law*, 17 THEORETICAL INQUIRIES L. 283, 286 (2016).

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

12 DAVID WEIL, *THE FISSURED WORKPLACE* 7 (2014).

or for sale to a trader who comes to her village to buy goods. Now, how should her trade be categorized? Does she belong to the agricultural sector, the factory sector, or the home-based work sector? Should she be categorized as a farmer or a farm worker? Is she self-employed or is she a piece-rate worker? Because her situation cannot be defined and contained neatly in a box, she has no work status and her right to representation in a union is unrealized.¹³

According to Routh, more than ninety percent of the Indian workforce is informal; more than ninety percent of Indian workers “cannot be defined” and thus have “no work status.”¹⁴ India is not alone here either. Indeed, among the most prominent developments in the U.S. labor market is the emergence of the so-called gig — or sharing, or on-demand — economy defined by firms like Uber, Lyft, Instacart and Handy. The questions that Bhatt asks about self-employed women in India might be asked about gig workers in the United States as well.¹⁵ Most of the firms in the gig economy refuse to treat gig workers as employees, classifying them instead as independent contractors. The question of whether these workers can be “contained neatly in a box”¹⁶ is the subject of intense debate.

In sum, then, the traditional union is in dramatic decline and faces — at least in some jurisdictions — threats to its continued existence. At the same time, employment relationships look different than they have historically, which has critical implications for the reach and structure of employment law. It is against this backdrop that the current issue of *Theoretical Inquiries in Law* is written.

This kind of moment, as unsettling for labor scholars as it is, is also one that frames critical questions and that can thus be significantly generative of new ideas. Indeed, the context I’ve described offers to the issue’s contributors (at least) two questions at the foundation of the discipline: (1) what is the nature of work and employment today; and (2) what is the nature of workers’ collective action and workers’ collective organizations today?

In the articles that follow, the authors provide important contributions to these foundational questions. Some of the issue’s contributions come in the form of descriptive work — developing new understandings of what work,

13 Routh, *supra* note 10, at 284 (quoting ELA R. BHATT, WE ARE POOR BUT SO MANY: THE STORY OF SELF-EMPLOYED WOMEN IN INDIA 17 (2006)).

14 *Id.*

15 For a good description of work life in this sector of the labor market, see Nick Hanauer & David Rolf, *Shared Security, Shared Growth*, 37 DEMOCRACY 6, 8-11 (2015).

16 BHATT, *supra* note 13, at 17.

and workers, look like now, and showing how more and more sectors of the labor market are getting excised from labor and employment law's protections. Thus, Shamir describes subcontracted work relationships and the impact that these arrangements have on bargaining power, stability of contracting, and our ability to discern meaningful bargaining units.¹⁷ Ilda Lindell and Christine Ampaire offer a rich description of market vendors in Kampala, Uganda in a picture that reveals the blurred lines between “workers” or “employees,” on the one hand, and “owners,” “employers,” and “independent contractors” on the other — a blurring reminiscent, again, of the sharing economy developments that are roiling labor markets in the United States and Europe.¹⁸ Nathan Lillie reports on the emergence of yet another category of workers with severely limited access to legal protections: the “posted workers” of the European Union. These are “workers sent by their employer to a foreign country” who, as a result of this employment and immigration status, “are quite explicitly not protected by equal treatment provisions, and have only limited rights to trade union representation.”¹⁹ Among the striking aspects of Lillie’s account is that posted workers are actually in a more precarious position than the migrant workers who have been the subject of so much previous writing.

Margriet Kraamwinkel, and Einat Albin and Virginia Mantouvalou, describe domestic work: Kraamwinkel in the Netherlands, Albin and Mantouvalou in Israel and the United Kingdom.²⁰ Again, the theme is law’s *exclusion* of important groups of workers: as Kraamwinkel explains bluntly, “Dutch law excludes domestic workers from full protection of labor and social security law.”²¹ And, again, Routh offers a window into the work lives of those he describes as “invisible” — invisible, that is, to the formal apparatus of labor employment law. Thus, we learn about waste pickers in Pune, Maharashtra and in Kolkata and about self-employed women across India.²²

17 Shamir, *supra* note 11.

18 Ilda Lindell & Christine Ampaire, *The Untamed Politics of Urban Informality: “Gray Space” and Struggles for Recognition in an African City*, 17 THEORETICAL INQUIRIES L. 257 (2016).

19 Nathan Lillie, *The Right Not to Have Rights: Posted Worker Acquiescence and the European Union Labor Rights Framework*, 17 THEORETICAL INQUIRIES L. 39, 40 (2016).

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

21 Kraamwinkel, *supra* note 20, at 353.

22 Routh, *supra* note 10.

In addition to these important descriptive contributions, the issue also contains normative arguments about emerging forms of work and types of workers. Here, Albin and Mantouvalou's article is a central example. They ground their argument in theories of citizenship — industrial citizenship in particular — and contend that the activism of domestic workers in Israel and the United Kingdom ought to confound our understanding of what active industrial citizenship consists of today. In particular, drawing on feminist and migration scholars' critiques of active citizenship models, they argue that trade union participation can no longer be the *sine qua non* of active citizenship and that its definition must take into account other forms of activity — those that “lie at the periphery of what is perceived to be important for an active worker.”²³ Thus, although domestic workers are often excluded from participation in unions, their struggle for rights, including rights to work visas, participation in NGOs, and even litigation of individual cases can be an “active form of citizenship.”²⁴

If the contemporary nature of work is the first question the issue's contributors confront, then the nature of contemporary workers' collective action and workers' collective organizations is the second. Here, again, the work is both descriptive and proscriptive. Starting with the most traditional of structures, Ingrid Landau and John Howe explore empirically the relationship between trade union provision of services to members — in particular, union enforcement of employment standards law — and union success in organizing new members.²⁵ Their context is contemporary Australia, but the study shines an important light on debates ongoing in other nations — most prominently the United States and the United Kingdom — regarding how unions do, and how unions ought to, use the law. Thus, their article provides some testing of Trevor Colling's concepts of “inspirational effects” and “legal mobilization,”²⁶ with clear implications for the American “law and organizing” literature.²⁷ Guy Mundlak, in his article, describes traditional union organizing in a fairly nontraditional context: what he calls “hybrid industrial relations systems,” or systems defined by high coverage of collective bargaining agreements and

23 Albin & Manouvalou, *supra* note 20, at 349.

24 *Id.*

25 Ingrid Landau & John Howe, *Trade Union Ambivalence Toward Enforcement of Employment Standards as an Organizing Strategy*, 17 THEORETICAL INQUIRIES L. 201 (2016).

26 Trevor Colling, *Court in a Trap? Legal Mobilization by Trade Unions in the United Kingdom* (Warwick Papers in Industrial Relations, Working Paper, 2009), https://www2.warwick.ac.uk/fac/soc/wbs/research/irru/wpir/wpir_91.pdf.

27 *See, e.g.*, Jennifer Gordon, *We Make the Road by Walking*, 30 HARV. CIV. RTS. & CIV. LIBERTIES REV. 407 (1995).

low membership rates in trade unions.²⁸ As he argues, the growing divergence between coverage rates and membership levels is a threat to the stability of these systems. Mundlak focuses on four such hybrid systems — Austria, Germany, Israel, and the Netherlands — and shows both similarities in the trend toward new organizing and differences in organizing strategies that arise from institutional differences across these nations.

Moving from description to proscription, Shamir provides a comprehensive argument as to why traditional modes of collective bargaining are inapt in a labor market defined by subcontracting, and she offers a sketch of an alternative mode that is better suited to the contours of a fissured economy. In essence, she proposes a move away from “bilateral” agreements and towards what she names a “multilateral structure of collective agreement bargaining.”²⁹ As she writes,

the most promising path would require a sharp departure from existing models of collective bargaining — a shift from bilateral to multilateral collective bargaining. . . . [T]he lead company needs to be rethought of, not as merely a neutral party but as a joint employer in a thick sense. Unless the threat of workers’ collective action is an effective threat to the lead company (the brand), as well as the subcontractor (or franchisee), collective bargaining and collective action will be almost meaningless.³⁰

Intriguingly, Shamir argues that assigning joint-employer status to the lead company in a subcontracting relationship — a move often heralded as the right approach — is an insufficient fix for the problem of subcontracted collective bargaining. In part, this assessment stems from her view that some of the joint-employer doctrine and legislation regulating subcontracting relationships protects only minimum rights and does not adequately shift employment responsibility to the lead company. She also finds insufficient the recent decision of the National Labor Relations Board (NLRB) to pursue unfair labor practices against firms like McDonald’s — as a joint employer — because such a move “puts no obligation on the lead company to take responsibility for its role in shaping subcontracted workers’ working conditions.”³¹ In addition to the McDonald’s cases, Shamir suggests, the NLRB’s recent decision in

28 See Guy Mundlak, *Organizing Workers in “Hybrid Systems”: Comparing Trade Union Strategies in Four Countries — Austria, Germany, Israel and the Netherlands*, 17 THEORETICAL INQUIRIES L. 163 (2016).

29 Shamir, *supra* note 11, at 236.

30 *Id.* at 251.

31 *Id.* at 247 n.62; see Press Release, N.L.R.B., NLRB Office of the General Counsel Authorizes Complaints Against McDonald’s Franchisees and Determines McDonald’s, USA, LLC is a Joint Employer (July 29, 2014), <https://www.nlrb.gov>.

*Browning-Ferris Industries*³² might succeed in moving U.S. labor law in the direction that she urges: the Board's new definition of joint employer might, in conjunction with the bargaining obligation set in section 8(a)(5) of the National Labor Relations Act,³³ require the kind of multilateral bargaining that Shamir outlines in her article.

Then, moving beyond collective bargaining entirely, Routh's article shows us three worker organizations — which he calls “informal worker aggregations” and which Catherine Fisk, in her contribution, might name worker centers³⁴ — that engage in a wide range of advocacy and collective actions on behalf of their members.³⁵ Thus, as Routh describes, the Self Employed Women's Association engages in legal advocacy, provides policy and financial education, runs cooperative associations (including a bank), offers healthcare and childcare, lobbies the government, and conducts picketing and other forms of direct action. The KKKPKP — an organization of waste-pickers — does direct political action, offers group insurance, and provides literacy education. Lindell and Ampaire's article describes vendors who organized through the Kampala District Market Vendor's Association, staged collective demonstrations, and engaged in explicit forms of political organizing and advocacy.³⁶ These vendors — again, showing the blurred lines of the “worker” — also developed forms of collective ownership designed to advance vendors' rights by securing land leases, managing, and redeveloping the markets where the vendors operate.

Fisk's contribution is to ask how a related type of worker aggregation — the worker center — ought to be governed.³⁷ She asks, more particularly, how law ought to regulate the internal governance of such organizations. In part, Fisk's article is an important rereading of Seymour Martin Lipset et al.'s 1956 work, *Union Democracy: The Internal Politics of the International Typographical Union*. But the article also reveals why the internal governance regime that applies to traditional trade unions may not make sense for the kind of worker centers we have today. Fisk's first point in this regard is that law does a poor job in imposing democracy on organizations, and may actually be counterproductive.

gov/news-outreach/news-story/nlrb-office-general-counsel-authorizes-complaints-against-mcdonalds.

32 *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (Aug. 27, 2015).

33 National Labor Relations Act, 29 U.S.C. § 158(a)(5).

34 Catherine L. Fisk, *Workplace Democracy and Democratic Worker Organizations: Notes on Worker Centers*, 17 THEORETICAL INQUIRIES L. 101 (2016).

35 Routh, *supra* note 10.

36 Lindell & Ampaire, *supra* note 18.

37 Fisk, *supra* note 34.

Fisk then compellingly shows why there is a mismatch between the law governing internal *union* affairs and the structure of contemporary *worker centers*. As she demonstrates, federal labor law in the United States “regulates the internal affairs of labor organizations far more intensively than the internal affairs of almost any other private organization except a publicly traded corporation.”³⁸ The rationale for this intensive internal regulation is “exclusivity,” that is, unions in the United States can obtain a legal right to represent sets of workers who do not desire — and indeed vote against — such representation. Given this constraint on workers’ ability to avoid union representation, the argument for legal intervention to ensure democratic accountability is strengthened. But, as Fisk points out, worker centers, as currently constituted anyway, do not have the ability to represent dissenting nonmembers. Thus, “[p]rotections for individual or minority rights within the union are justified only because of the principle of exclusive representation, which worker centers do not have and may never claim.”³⁹ To be clear, Fisk is an advocate for internal democracy for worker centers. But she is skeptical about the call for legal regulation of the internal affairs of these emerging aggregations of workers.

Finally, there are three articles that stand as important reminders — or notes of caution — to readers of the issue, and to the author of this Introduction. I have structured the Introduction so as to highlight consistent questions and themes that run across these articles — who is a worker; what is a workers’ organization — but Graciela Bensusán’s article forces us to remember how critical cross-national *differences* are to the development and nature of labor union capacities, labor organizing models, and worker organization.⁴⁰ Bensusán shows that differences in institutional design across Argentina, Brazil, Chile and Mexico have produced significant differences in the way that unionism has developed. The “soft corporatism” in Brazil contributed, for example, to a very different form of contemporary union practice and power than the “rigid corporatism” of Mexico has produced.⁴¹

I have also stressed here, as many of the contributors do in their articles, the decline of traditional unionism and the historical nature of the traditional “employee.” This leads to a focus on new forms of organizing and new types of worker organizing. But I read Pnina Alon-Shenker and Guy Davidov’s article as a reminder that union organizing, in the traditional mode, still persists

38 *Id.* at 116.

39 *Id.* at 130.

40 See Graciela Bensusán, *Organizing Workers in Argentina, Brazil, Chile and Mexico: The Authoritarian-Corporatist Legacy and Old Institutional Designs in a New Context*, 17 THEORETICAL INQUIRIES L. 131 (2016).

41 *Id.*

and that it might be revitalized through fairly traditional changes to the legal regime.⁴² Their article, that is, might be understood as a reminder that law need not be an enemy of union organizing — as it so often is today — but can be a significant aid to the union effort. Alon-Shenker and Davidov explore the question whether employers ought to have a say in the question whether their employees will, or will not, form a union. Their article provides a rich theoretical examination of the question, but also a telling example from Israel.

In January 2013, as the authors describe, the Israeli National Labor Court ruled in the *Pelephone* decision that “employers are prohibited from voicing their view against unionization. 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.”⁴³ The legal significance of such a ruling will not be lost on any readers of this issue, particularly those familiar with the U.S. labor law regime, in which employer voice enjoys robust protection.⁴⁴ And, as the authors point out, “the results on the ground [in Israel] were transformative.”⁴⁵ Indeed, *Pelephone* itself and the two other major cellular telephone firms in Israel signed collective bargaining agreements quickly on the heels of the court’s decision, and “successful organizing campaigns have spread to insurance companies, financial companies, fast-food chains, and even the information technology sector.”⁴⁶ This is not to say that labor law reform is easily achieved anywhere: under current political circumstances, it is almost impossible to imagine a *Pelephone*-type decision in the United States. What the Alon-Shenker and Davidov article does evidence, however, is that such legal reform, *when possible*, can be powerful and immediately relevant to the prospects for union organizing.

That brings us to the question of what actually might be possible in the current historical moment, and so it makes sense to close by touching briefly on the issue’s historical contribution, the wonderful article by Jefferson Cowie. Cowie delivers a stern message to labor scholars and to those interested in the future of the labor movement: do not await, nor expect, a new New Deal. For, as Cowie sees it, the New Deal — and the raft of labor legislation it produced — was the product of extraordinary historical circumstances that we should not expect to recur. Thus, for Cowie, the New Deal and the surge of

42 Alon-Shenker & Davidov, *supra* note 2.

43 *Id.* at 69 (citations omitted).

44 For the U.S. context, see Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 701-06 (2010).

45 Alon-Shenker & Davidov, *supra* note 2, at 69.

46 *Id.* at 70.

labor organizing it generated are neither a pragmatic model nor an appropriate political metaphor for revitalization of the labor movement. Put more bluntly, Cowie's article suggests that "advancing large-scale federal labor law reform has been and will probably continue to be a failure."⁴⁷

But Cowie does not end with pessimism, and neither will I. Although he is deeply skeptical about calls for a new New Deal, he is optimistic about two things. First, Cowie argues that if we "free ourselves" from the attempt to restore the past — from the effort to rebuild or redo the policy innovations of the 1930s — we will thereby open ourselves to a wider vision of political possibility. As he puts it, understanding that the New Deal era was an exception and not the rule "allows us to look beyond the static political solutions that emerged in the uniquely traumatic circumstances of the Roosevelt years and begin to consider what Barrington Moore has called 'suppressed historical alternatives.'"⁴⁸ Second, Cowie hints that there are in fact some tangibly useful suppressed historical alternatives from the first decades of the twentieth century. Cowie concludes by writing:

A return to the pre-Depression, pre-trauma outlines of progressive-style politics, albeit updated for the global age, would suggest a politics of reform and regulation both moral and pragmatic; spurred by local and state sites of innovation; bolstered by cross-class alliances and enlightened elite leadership; focused on immigrant rights, consumer safety, corporate regulation, and occupational justice; advocating gas and water (and perhaps health care) socialism; and even promoting the types of militant voluntarism that originally grew in the shade of a state hostile to the collective interests of workers.⁴⁹

Cowie's conclusion is a good one for this Introduction too. Indeed, for labor scholars working in an era of uncertainty and dislocation, his call for historical recovery is a powerful, promising, and optimistic suggestion for the way forward.

47 Cowie, *supra* note 1, at 11.

48 *Id.* at 36.

49 *Id.* at 37.

