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THEORETICAL INQUIRIES IN LAW is a biannual English-language law journal published by the Cegla Center for Interdisciplinary Research of the Law at the Buchmann Faculty of Law, Tel Aviv University. The journal, founded by Prof. Ariel Porat in 2000, specializes in the application to legal problems of insights developed in other disciplines, such as moral and political theory, epistemology, history, cultural studies, social sciences, economics and game theory, probability theory, and cognitive psychology. The range of issues dealt with by the journal is virtually unlimited, in line with its commitment to the cross-disciplinary cultivation of ideas. Contributors to the journal are distinguished legal scholars working in different “law and . . .” areas. The journal also strives to offer a forum for contributions to legal theory by scholars working in disciplines outside of law.

The previous issues of the journal have been devoted to the following topics: Restitution and Unjust Enrichment; Judgment in the Shadow of the Holocaust; Contemporary Legal Scholarship: Achievements and Prospects; Protecting Investors in a Global Economy; Economic Analysis of Constitutional Law; Negligence in the Law (Parts 1 & 2); Writing Legal History; Liberty, Equality, Security; The Palestinian Refugees and the Right of Return: Theoretical Perspectives; The Role and Limits of Legal Regulation of Conflicts of Interest (Parts 1 & 2); The Excessive Use of Force; Personal Bankruptcy in the 21st Century: Emerging Trends and New Challenges; Critical Modernities: Politics and Law Beyond the Liberal Imagination; Why Citizenship?; Moral and Legal Luck; Legal Pluralism, Privatization of Law and Multiculturalism; Community and Property; Histories of Legal Transplantations; Money Matters: The Law, Economics, and Politics of Currency; Comparative Tax Law and Culture; Copyright Culture, Copyright History; Rights and Obligations in the Contemporary Family: Retheorizing Individualism, Families and the State; Back to the State? Government Investment in Corporations and Reregulation; International Courts and the Quest for Legitimacy; Public and Private, Beyond Distinctions?; New Approaches for a Safer and Healthier Society; Sovereignty as Trusteeship for Humanity: Historical Antecedents and Their Impact on International Law; Labor Organizing the Law; The Constitution of Information: From Gutenberg to Snowden; Law, Economy and Inequality; Sovereignty and Property; Fifty Years of Class Actions – A Global Perspective; The Tragedy of the Commons at 50: Context, Precedents, and Afterlife; The Problem of Theorizing Privacy; Freedom, Choice & Contracts; Elder Law and its Discontents; Historical Justice in the Israeli-Palestinian Context; Legal Discontinuity; How Law Changes What You Want: Positive and Normative Effects of Law on Values and Preferences; The Global Law Market; Bilateral Labor Agreements.

Forthcoming issues will include: Regionalism: Shifting Scales Beyond Cities and States; Controlling Minority Shareholders; Third Party Litigation Funding.

An online version of the journal, as well as comments on articles published in the journal, are available on the *Theoretical Inquiries in Law* website (<http://en-law.tau.ac.il/til>). All articles are also indexed and available on HeinOnline, LegalTrac, Lexis-Nexis, and Westlaw.

Contact Information: Theoretical Inquiries in Law, The Cegla Center for Interdisciplinary Research of the Law, The Buchmann Faculty of Law, Tel Aviv 6997801, Israel. Tel.: 972-3-6406697; Fax: 972-3-6405849; email: cegla@tauex.tau.ac.il.

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INTRODUCTION

Lawyers learn from an early stage that workers and their unions have opted to rely on the principles of public law for protection in the workplace. Turning away from private law and perceiving it as unhelpful, legal minds typically consider employment contracts to be separate, unique agreements that do not fall under private law, since they do not meet the standards set for typical contracts. In this issue of *Theoretical Inquiries in Law*, comprised of nine articles, we seek to engage in an encompassing, multidisciplinary academic conversation on the connection between private law theory and labor law. Bringing together experts from the fields of labor and private law, this issue assesses, analyzes, and clarifies the nature and potential of protecting workers through private law in the modern age. We wish to enable the establishment of a common theoretical and empirical basis for the study of the emancipatory aspects of private law in relation to labor law.

In the opening contribution to the volume, Aditi Bagchi attempts to bridge the gap between employment and private law. In her article, she focuses on a kind of domination that is usually overlooked—domination as an individual wrong, rather than as wrongs between groups. She first addresses the current discourse about domination found in theories like republican theory and anti-subordination theory, specifying where they fall short. Bagchi presents private law and its approach to domination as an answer to the problems previously addressed. To do so, she presents her own interpretation of domination via private law, which is mainly concerned with domination as an individual wrong. Lastly, she addresses the ongoing debate between the two perspectives, which respectively view employment law as a branch of either private or public law. She suggests we should instead see both perspectives as different interpretations of employment law, differing from each other mostly in the way they treat domination as either an individual wrong (private interpretation) or as class relations (public interpretation). She then demonstrates the difference between the two interpretations through examples of bullying, off-site speech, and nondisclosure agreements. Bagchi suggests that the two interpretations can be seen as complementary tools in a toolbox, rather than separate frameworks. That is, the different understandings of domination complement one another, although in some cases one interpretation should be prioritized over the other.

Hugh Collins, on the other hand, delves into which principles of justice should be applied to work law. Whereas in the past the foundations for a theory of justice in work typically were sought in theories of distributive justice, it is argued that they should be sought instead in the moral standards of interpersonal justice. Collins first makes a distinction between distributive and relational justice. He then demonstrates how each of these moral theories of justice can give rise to different attitudes toward workspace justice. Principles of justice that are suitable for contracts in general are not necessarily appropriate for employment contracts. To deal with interpersonal principles of justice, as Collins argues, one must construct a model based on a critical analysis of practices in the interpersonal workspace. Employment

contracts are incomplete by design. Both parties are therefore obligated to good faith. Additionally, in an employment contract, the performance of the position requires teamwork as part of a productive organization. Consequently, principles of justice such as desert, treatment as an equal member, protection from unfair exclusion, and a right to voice and participation are applied. Collins concludes by arguing that the use of private law is not enough, and that further regulation must be applied.

While the dominant theories have primarily analyzed contract and employment law separately, Hanoch Dagan and Michael Heller believe that these two branches of law can be united in a way that completes and improves the law of work. Contract and employment law have drifted apart. The dominant contract theories have long focused on widget transactions. As a result, they miss the key concerns of employment law—that is, the constitutive place of work in people’s life-plans and the systemic vulnerability of workers to their employers. Dagan and Heller reunite these fields and demonstrate the emancipatory potential of contract for the law of work. Rightly understood, contract is an autonomy-enhancing device that is founded on the fundamental liberal commitment of reciprocal respect for self-determination. From this “choice theory” perspective, the presumed opposition between employment and contract law melts away. Dagan and Heller show that many employment law doctrines are not external to contract, but rather entailed in contract itself. Grounding worker protections in contract theory has two salutary effects. First, it offers workers more secure protection than that afforded by their reliance on momentary public-law compromises. Second, it reveals the emancipatory potential of contract for all of us—not just as workers, but also as widget buyers. Contract can empower, and employment can show the way.

Avihay Dorfman’s article addresses labor law through the lens of torts and demonstrates the importance of the relationship between the two bodies of law. It focuses on the case of union organizers’ and workers’ nonconsensual access to the employer’s workplace. In doing so, the article first criticizes two well established conceptions of tort—tort as the law of wrongs, and tort as the law of recourse. The author instead shows, in the renowned case of *Vosburg* and the tort of battery, that tort as either wrongs or recourse cannot account for what tort actually does, and what it ought to be. The article proposes that tort actually hinges on conflict, and that it ought to facilitate valuable conflicts. It then applies the view of tort as conflict to the issue of trespass in the employment relationship, finding that tort establishes the worker’s right to nonconsensual access to the workplace, as it facilitates an inherently valuable conflict within the workplace relationship.

Richard Epstein’s contribution presents a normative and empirical case against legislative attempts to increase the power of unions in the context of employment relations. On a normative level, the article criticizes this progressive agenda as antithetical to the core principles of the classical liberal view, which is profoundly opposed to government intervention in a competitive labor market, and which the author champions as the model best suited to dealing with both the economic and dignitary aspects of employment relations. Epstein argues that the misappropriation of classical liberal terms, such as “autonomy” and “good faith,” by pro-union scholars

is the result of a mistaken underlying assumption that there is an inherent inequality of bargaining power between an employer and an employee, which precludes the latter from having any meaningful freedom of contract. On an empirical level, the article points to the global decline of unionization as evidence of the model's failure in advancing either workers' interests or overall social welfare. Given the untenable normative position and adverse economic implications of the pro-unionization movement, Epstein applauds a recent U.S. Supreme Court decision, which he believes will hinder its advancement in the near future.

Cynthia Estlund contrasts in her article two views of the relationship between the fields of work law and private law. The first, "internal" view brings work law into the private law sphere by re-centering the latter on liberal values of reciprocal respect for autonomy. The second, "external" view places the law of work in the domain of "social law." As such, it operates as a set of externally imposed conditions on employment. At points where workers' rights and interests become conflated with owner-employers', the two views contest on the constitutional terrain of takings. Estlund contends that the internal view could offer a stronger safeguard against takings challenges to laws that restrain property owners' entitlements in the interest of workers. In contract, the external view relies more on takings law than property law to accommodate others' interests when they conflict with traditional property rights. Recently, the U.S. Supreme Court's ruling in *Cedar Point Nurseries v. Hassid* compromises both views, as it is grounded in a neo-Blackstonian interpretation of property rights. *Cedar Point* thus tells the story of the challenges that modern U.S. takings law poses to the advancement of workers' rights, whether understood as internal or external to property law.

Sophia Lee's article is historically oriented. New Private Law (NPL) theorists seek to distinguish private from public law. Lee challenges NPL theorists' assumptions by juxtaposing them with her historical account of the push for job security and against "at-will employment" in the second half of the 20th century in the U.S. She examines two paths to job security: the statutory one, and the common-law path. Their intertwining connections, Lee argues, reveal the many inconsistencies which characterize NPL theory's categorization of public and private law. Moreover, contrary to NPL theorists' normative aspirations, the history of "at-will" employment in the U.S. goes to show that the common law, even when envisaged through NPL theory, is unlikely to strengthen employees' protections.

Examining private law from a different perspective, Julia Tomassetti points to the disputed relevance of the platforms' intellectual property rights in the context of platform workers' rights and employment classification. Leaning on intellectual property law, platform companies have avoided the control test of work law and invoke managerial prerogative, while conceding employer-like authority. They rely on property and entrepreneurial rights to contest traditional employer-employee relationships and evade statutory duties. Drawing on case studies concerning the employment status in companies such as Uber, Foodora, FedEx, Lyft, etc., the author unravels how these companies rely on managerial prerogative to dictate how individuals perform services for their platforms. According to the author, reality

could be different: Tomassetti suggests that any appeal to managerial prerogative should be rejected. She argues that any conflict between a property-based rationale for employee-employer relationships and employment and statutory work law is essentially based on assumptions, rather than fundamental differences. Turning to the legal basis, economic background assumptions, and normative implications of these arguments, she shows how public labor law and private law can be intermingled.

Focusing on the demand of “good faith” in the contractual system of norms, Sabine Tsuruda aims to shed new light on the benefits of contract doctrines for the employer-employee relationship. Using the principle of good faith as well as work contracts’ basic characteristics and goals as a point of departure, the author draws out a neglected perspective of work law. Building on the understanding of good faith as a norm that obligates the parties equally, investing them with joint authority for determining the meaning, purpose, and requirements of their contract, Tsuruda claims that it can both empower workers and enhance their means to dispel unfair treatment and pursue legitimate interests, providing workers with an opportunity to reject work in good faith and protect them from employment termination. To meet the standards of good faith, a communicative space and sufficient resources are needed to develop an understanding of the employee-employer contract. Against this backdrop, she shows the benefits of a good faith mandatory duty and its ability to promote the needed protection of employees, highlighting its possible role in promoting workers’ speech rights.

The collection of articles in this issue is the product of the conference on “Private Law Theory Meets the Law of Work,” held online in September 2021. The conference was organized by the Edmond J. Safra Center for Ethics and the Cegla Center for Interdisciplinary Research of the Law, both at Tel Aviv University, and cosponsored by NYU Law. *Theoretical Inquiries in Law* thanks Hanoch Dagan, Cynthia Estlund, and Katrina M. Wyman, the organizers of the conference, for bringing together an outstanding group of contributors and for serving as guest editors of this issue; Ruvik Danieli for style-editing the articles; Michal Semo Kovetz for graphics; and all the conference participants and commentators for a most fruitful discussion. We also thank our Managing Editor, Sharon Vered Shaked, for her wonderful work. We thank the Editor in Chief, Ronen Avraham, and his predecessor, Yishai Blank, for their trust and guidance. Finally, we thank the editorial board for their committed and dedicated work through the volume. The articles published in this issue are available online at the *Theoretical Inquiries in Law* website (<http://en-law.tau.ac.il/til>).

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