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Introduction: Does Labour Law Need Philosophical Foundations?

Hugh Collins,* Gillian Lester** and Virginia Mantouvalou***

Philosophical foundations of labour law is emerging as a new field of scholarship. As far as we know, a book on this subject has not yet been published, though in recent years several exploratory articles and book chapters have directly addressed the theme.¹ In addition, some monographs that engage with philosophy have examined aspects of labour law such as dismissal, the statutory minimum wage, freedom of association, recognition of trade unions for the purpose of collective bargaining, and the right to work.² Building on those initiatives, this collection of essays tries to develop a philosophical perspective on the subject of labour law as a whole. At its heart this enquiry concerns the moral and political ideas, values, and principles that underpin conceptions of the foundations, purposes, and scope of the field of law known as labour law. The contributors to this volume illuminate and critically examine the meaning, application, and interconnection of these foundational ideas, values, and principles that shape labour law. Going beyond many fruitful enquiries into the purposes and rationale of labour law,³ the essays try to uncover the moral ideals and principles that provide the foundations or assumptions that support the differing views that have been expressed about the aims and purposes of labour law. This collection of essays offers the opportunity to shape for the first time a wide ranging and pluralist philosophical enquiry into the foundations of labour law, which in turn is likely to influence the development of the subject and the law in the future.

For centuries, of course, there has been lively and thoughtful philosophical discussion of closely related topics such as the nature and meaning of work, the quality of the social relation between master and servant (or slave), the nature of exploitation, the need for democracy in economic institutions such as firms, and the demands of justice in the distribution of the benefits of work.⁴ But the topic of why and how the law regulates and ought to regulate work

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¹ E.g. Horacio Spector 'Philosophical Foundations of Labour Law' (2006) 33 Florida State University Law Review 1119; Brian Langille, 'Labour Law's Theory of Justice' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 101; Hugh Collins, 'Theories of Rights as Justifications for Labour Law' in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Riccardo Del Punta, 'Labour Law and the Capability Approach' (2016) 32 International Journal of Comparative Labour Law and Industrial Relations 383; David Cabrelli and Rebecca Zahn, 'Special Issue: Theories of Domination and Labour Law: A New Conception for Legal Intervention?' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 331; Alan Bogg, 'Labour, Love and Futility: Philosophical Perspectives on Labour Law' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 7.

² E.g. Hugh Collins, *Justice in Dismissal* (OUP 1992); Sheldon Leader, *Freedom of Association: A Study in Labor Law and Political Theory* (Yale UP 1992); Alan Bogg, *The Democratic Aspects of Trade Union Recognition* (Hart 2009); Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart 2015).

³ E.g. Hugh Collins, 'Labour Law as a Vocation' (1989) 105 Law Quarterly Review 468; Hugh Collins, 'The Productive Disintegration of Labour law' (1997) 26 Industrial Law Journal 295; Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011); Guy Davidov, *A Purposive Approach to Labour Law* (OUP 2016).

⁴ See e.g. Hannah Arendt, *The Human Condition* (University of Chicago Press 1958); Karl Marx, *Economic and Philosophic Manuscripts of 1844* (Dirk Struik (ed), International Publishers 1964); John Locke, *Second Treatise*

and relations in the workplace is rarely mentioned in philosophical analysis. Rather than engaging in much philosophical enquiry, the subject of labour law has in the past mostly comprised technical legal analysis for the purpose of assisting legal practice, or evaluative discussion about the policies embodied in legislation, or calls for activist interventions through the legal process and collective industrial action by workers. This book provides an opportunity to stand back from those other valuable activities and contemplate more fully the central moral and political principles that go to the core of the existence of labour law as a field of legal practice and scholarship. Should we embrace this opportunity?

1. The Case for Examining Philosophical Foundations

The claim that it is a good time for philosophical contemplation is not to deny that ultimately the point of labour law is to do something. One of labour law's key tasks is to provide a countervailing force against the power of owners of business organisations in support of workers, who, because they have nothing to sell but their labour, suffer from an inherent weakness of bargaining power that can lead to exploitation.⁵ The countervailing force can be achieved in many ways including mandatory protective laws and support for collective bargaining and industrial action through which workers can negotiate better terms of employment. As discussed in this book and elsewhere, labour law performs many other important tasks, ranging from protection of the dignity and liberty of workers to the basic task of the facilitation of the cooperation needed for an advanced division of labour in a market economy. The identification and pursuit of these practical goals clearly does not depend upon a philosophical understanding of the values and principles that may underlie labour law. Instead of philosophical contemplation, it may appear more important to carry out other kinds of research such as empirical assessment of the effects of legislation in order to discover how best to achieve the goals of labour law through legal regulation.⁶

Moreover, labour law is often infertile terrain for reflection upon coherent underlying principles. In devising the laws and legal institutions, much of the detailed rules and standard labour laws are the product of political conflict in the legislature and sometimes in the streets. Laws that are produced through politics are always provisional settlements of these conflicts of interest and ideologies that will be open to contestation. The balance of political forces and

of Government, in John Locke, *Two Treatises of Government: A Critical Edition* (Peter Laslett ed, 2nd edn, CUP 1967); Karl Marx, *Capital: A Critique of Political Economy*, vol 2 (International Publishers 1967); Carole Pateman, *Participation and Democratic Theory* (CUP 1970); Adina Schwartz, 'Meaningful Work' (1982) 92 *Ethics* 634; Robert Dahl, *A Preface to Economic Democracy* (University of California Press 1985); Andrew Reeve (ed), *Modern Theories of Exploitation* (Sage Publications 1987); Gerry A. Cohen, *History, Labour, and Freedom: Themes from Marx* (OUP 1989); James Bernard Murphy, *The Moral Economy of Labour* (Yale University Press 1993); Michael Sandel, *Democracy's Discontent* (Harvard University Press 1996); Alan Wertheimer, *Exploitation* (Princeton University Press 1999); Kory P Schaff (ed), *Philosophy and the Problems of Work: A Reader* (Rowman & Littlefield Publishers 2001); Ruth Sample, *Exploitation: What It Is and Why It's Wrong* (Rowman and Littlefield 2003); Iris M Young, 'Responsibility and Global Labor Justice' (2004) 12 *Journal of Political Philosophy* 365; Andrea Veltman, *Meaningful Work* (OUP 2016).

⁵ P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd edn, Stevens, 1983) 18.

⁶ For examples of insightful empirical research, see e.g. Lizzie Barmes, *Bullying and Behavioural Conflict at Work* (OUP 2016) and Lydia Hayes, *Stories of Care: A Labour of Law* (Palgrave 2017). On prospects and challenges for empirical labour law research, see Amy Ludlow and Alysia Blackham (eds), *New Frontiers in Empirical Labour Law Research* (Hart 2015).

the popularity of political parties explain the detailed content and nature of those legal outcomes at any particular time. In view of the shifting and often pragmatic goals and measures of labour law, the question must arise whether it is even possible to have a philosophy of a subject that concerns an area of law that often appears to dispense with coherent legal principles in favour of a patchwork of regulations that have been devised to satisfy short-term political agendas. Does it make any sense to look for coherent philosophical foundations of moral and political principles for a subject like labour law that is so clearly the product of historical and pragmatic political compromises?

Although no doubt there is much to be said in favour of the argument that labour law demands action rather than contemplation, there are some important reasons for believing that the aims of labour law cannot be secured unless we articulate its philosophical foundations.⁷ We suggest that it is essential and inevitable to stand back from the political compromises and ad hoc measures to consider and spell out explicitly what are the key attributes of the subject and its foundational goals and principles. We also suggest that in order to identify what it is that labour law needs to do and whether it is successful in doing it, we must think about its philosophical foundations. We need a normative account of labour law in order to assess its shortcomings and propose reforms. To assess the success of legal and civil society institutions, we need to consider against what this success is assessed: do we assess it against the ideas of workers' equality or liberty, against everyone's social inclusion, or against the promotion of workers' dignity? And what is the meaning of each of these concepts? It is easy to lose sight of the broader picture when one is engaged in the resistance to some apparently technical measure that may have adverse practical ramifications for workers in employment. The same can be said about empirical research findings: we suggest that they may be of limited significance unless they are assessed against a normative framework that explains what is just and what is unjust in the workplace. Political action and empirical study, on the one hand, and normative theory, on the other, have to go hand in hand.

Yet, probably the most important reasons for pursuing a philosophical agenda at this time concern very large questions. These involve the continuing existence of the subject of labour law and the paradigm around which it is built. As well as the significance of those questions for the destiny of the subject of labour law as a whole, philosophical enquiry has the potential to throw valuable light on a whole range of difficult issues and concepts that arise within labour law. We need to explain briefly these key tasks for an enquiry into the philosophical foundations of labour law.

(a) The Existence of Labour Law.

The need for labour law has often been questioned, and perhaps no more so than today when the very idea of labour law is under attack.⁸ A major challenge to the existence of labour law comes from the direction of libertarian political philosophies.⁹ Apart from the protection of rights to private property, on a strong libertarian view, pretty much all that is required from

⁷ See Arthurs in this volume.

⁸ Alan Hyde, 'The Idea of the Idea of Labour Law: A Parable' in Davidov and Langille (n 3).

⁹ Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974); Friedrich A. Hayek, *Law, Legislation and Liberty* (Routledge & Kegan Paul 1982).

government is the legal enforcement of contracts freely concluded between those wishing to acquire and use labour power and those seeking to sell it in return for wages. On this view that treats the provision of work personally much like the sale of any other commodity, an employer and employee can and should use the ordinary law of contract to regulate their relations to their mutual benefit, without the need for any special rules for contracts of employment. As well as being unnecessary, the libertarian view holds that labour law is extremely undesirable. One reason given for rejecting labour law is that libertarians assert that legal regulation of employment tends to create inefficiency and inelasticity in the labour market by interfering with freedom of contract. As a consequence, labour law may end up ‘back-firing’:¹⁰ by increasing the costs of employment to employers from the need for compliance with the law, it may depress demand for labour, with the possible consequences of reduction of wage levels and unemployment.

Moreover, on the libertarian view, any mandatory laws about employment relations are wrong in principle, because they do not fully respect the rights of the parties to self-determination or autonomy, but instead impose improper paternalist controls over the labour market and employment relations. The political manifestation of such libertarian views includes such policies as getting rid of ‘red tape’, a category that tends to include all mandatory labour laws, and laws against discrimination.¹¹ This view also supports the reduction of the power of trade unions and organised labour by placing restrictions on the right to organise or the right to strike on the ground that the activities of trade unions interfere with the operation of a free market. The libertarian view can also be used to justify measures designed to make access to specialised agencies and the courts to enforce specialised employment rights more difficult or more expensive, because easy access to justice may encourage frivolous and wasteful claims. Libertarians are likely to concede that sometimes the unregulated market produces the consequence that individuals may lose nearly all their rights and freedoms – in which case, it is appropriate to pass laws against such comprehensive denials of rights, such as the crimes of modern slavery and human trafficking. But these measures are not perceived as invidiously paternalistic like other labour laws, but merely laws to prevent the free market from undermining a libertarian social order in which everyone’s basic liberties are fully respected.¹²

Versions of these libertarian views have achieved prominence in politics in recent years, especially in North America and the United Kingdom. Labour lawyers correctly perceive that such arguments in favour of a simple regime of freedom of contract and the freedom of a business to conduct its affairs without detailed regulation of employment relations foreshadow the demise of labour law. To be a libertarian labour lawyer would be to commit professional suicide. To resist such arguments for the abolition of a special set of rules to govern employment relations, it is necessary to address critically the fundamental assumptions of the libertarian position. One major presupposition insists on the efficiency of an unregulated labour market; and the other is the claim that to properly respect the rights of the individual, it is necessary to avoid any kind of paternalist mandatory laws. Whilst the former claim can be effectively challenged by more sophisticated economic models of the operation of the labour

¹⁰ Cass Sunstein, ‘Paradoxes of the Regulatory State’ (1990) 57 *University of Chicago Law Review* 407 (though Sunstein does not endorse the libertarian position).

¹¹ Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* (Harvard University Press 1992).

¹² Exceptionally, Nozick (n 9) 331 holds to the view that contracts for slavery should be permitted.

market in the context of a state that provides a social security system,¹³ the latter claim about the incompatibility of labour law with a state that fully respects the rights of individuals can be assessed by philosophical reflection. In particular, a libertarian will object to the state telling employers what value they should place on the labour of others, how they should run their businesses, and dictating the terms of their contracts through mandatory regulations.

Does labour law violate the basic liberties and rights of persons? The starting point for libertarians is the proposition that interference with freedom of contract is incompatible with the value of freedom or liberty of the individual, a value that they cherish. It is plainly true, for instance, that a minimum wage law takes away the freedom of both employer and employee to choose the terms on which they will enter a transaction, for agreed wages below the minimum wage will be invalidated by the law and replaced with the statutory minimum. Is this mandatory law therefore an impermissible interference with the freedom of employers and workers? The decision of the Supreme Court in *Lochner v New York*¹⁴ haunts us to this day: is a law that sets maximum hours for workers in order to protect their health necessarily a wrongful and unconstitutional interference with their liberty as the US Supreme Court decided? To answer that question, we need to develop a deeper, philosophical understanding of concepts like human rights, dignity, freedom, and respect for the equality of persons. It is too simple to say that liberty has been damaged simply because the law prevents people from selecting an option that might lead to exploitation and damage to their health.

A better understanding of the value of liberty might claim, for instance, that freedom is only valuable if it provides individuals with worthwhile opportunities and the capability of seizing some of those opportunities. On this view, precarious, exploitative, and dangerous jobs are not worthwhile opportunities to have, so that deprivation of those opportunities is not an interference with an exercise of freedom that anyone should value. Moreover, one should question the assumption made by libertarians that unregulated markets involve dealings between free and equal persons achieved through ordinary contractual arrangements.¹⁵ A typical employment relation involves the worker's submission to a one-sided contract drawn up unilaterally by the employer. This asymmetry in the labour market arises in general because only one party, the employer, owns substantial property, the means of production, which places structural constraints on the freedom of the other party, the employee to refuse offers of employment.¹⁶ In the context of employment, there has to be a better interpretation of freedom that takes account of workers' material conditions.¹⁷

This better understanding of the concept of freedom in the context of employment needs also to incorporate two further special features of typical contracts of employment. First, under the

¹³ Frank Wilkinson and Simon Deakin, *Labour Standards – Essential to Economic and Social Progress* (Institute of Employment Rights 1996); Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000); Hugh Collins, 'Justifications and Techniques of Legal Regulation of the Employment Relation' in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000).

¹⁴ 198 US 45 (1905).

¹⁵ For discussion of freedom in relation to the employment contract, see Gardner in this volume.

¹⁶ Gerry A. Cohen, 'Capitalism, Freedom and the Proletariat', in Alan Ryan (ed), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (OUP 1979) 11-14.

¹⁷ On freedom and material conditions, see e.g. *ibid*; see also Jeremy Waldron, 'Homelessness and the Issue of Freedom', in *Liberal Rights – Collected Papers* (CUP 1993); Gerry A. Cohen, 'Freedom and Money' (2001) 2 *Revista Argentina de Teoria Juridica* 1.

terms of employment contracts, the employer acquires the right to direct and manage employees, and employees are obliged to obey those instructions. This structure of power and subordination appears to confer a discretionary power on the employer that often seems to be the very opposite of a free and equal relationship. Workers are frequently in a relation of something that is more aptly described as master and servant relation than business partnership. Second, the employer's power extends in practice not only to complete control over the workplace in every aspect, but also to the ability to tear up the contract almost at will and set new terms for the arrangement. This additional power stems from the employer's power to terminate the contract of employment by summary dismissal. Although national legislation differs in the constraints placed on employers with respect to dismissal, with few countries having the equivalent of the American doctrine of termination at will, the employer's power to threaten to terminate the contract unless employees agree to contractual modifications or extra-contractual performance is invariably strong. This power reduces the contract of employment to a bargain that, unlike most binding legal contracts, has surprisingly little effective coercive force. Employees may object to a wage cut or an imposed variation in duties, but the employer can impose these changes usually at very little cost. If the workers do not go along with the new arrangements, they can be dismissed and find themselves unemployed, and replaced by others who will accede to the employer's demands. When these two features of the one-sided deal that can be unilaterally adjusted to the interests of one part are combined in the contract of employment, they create a unique kind of transaction. This context reveals that the freedom and equality that are presupposed by libertarians to exist in all contractual relations assume a special deviant form in contracts of employment, in which the essence of the contract in some respects is for the worker to sacrifice freedom and equality.

Threats to the existence of labour law depend on intellectual perspectives and frameworks that essentially liken employment to other kinds of transactions, such as sales of goods. But labour is not a commodity. Nor is the contract of employment really a textbook type of freely negotiated contract: its terms are normally dictated unilaterally; they confer discretionary power on the employer to vary the employee's performance obligations; and through threats of termination can always be altered unilaterally in the interests of the employer. Employment is more of an autocratic governance mechanism than a contractual bargain.¹⁸ How may philosophical reflection contribute to countering the agenda voiced by libertarians?

To be sure, ideas such as inequality and subordination are already widespread in discussions of labour law, as in the frequent references to the inequality of bargaining power between employer and employee. Values such as equality and dignity have also been discussed, especially in connection with laws against discrimination in employment,¹⁹ but also in the

¹⁸ Elizabeth Anderson, *Private Government* (Princeton University Press 2017). For explorations of this idea in this volume see: David Cabrelli and Rebecca Zahn; and Hugh Collins.

¹⁹ This book mostly excludes the law of discrimination because its philosophical foundations have been explored extensively elsewhere, including a volume in this series: Deborah Hellman and Sophie Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP 2013). C.f. Larry Alexander, 'What makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) 141 *University of Penn State Law Review* 149; John Gardner, 'On the Ground of Her Sex(uality)' (1998) 18 *Oxford Journal of Legal Studies* 167; Deborah Hellman, *When is Discrimination Wrong?* (Harvard University Press 2008); Kasper Lippert-Rasmussen, *Born Free and Equal: A Philosophical Inquiry into the Nature of Discrimination* (OUP 2013); Benjamin Eidelson, *Discrimination and Disrespect* (OUP 2015); Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015); Hugh Collins and Tarunabh Khaitan (eds), *Foundations of Indirect Discrimination Law* (Hart/Bloomsbury 2018).

context of the contract of employment.²⁰ Wrongs such as exploitation have been analysed in connection with laws against forced labour, trafficking, and modern slavery. However, there is limited theoretical exploration of these ideas as the underlying justification of labour laws and their broader implications for legal intervention. To resist the challenge to the existence of labour law posed by libertarians, we need to be much clearer about the ways in which the contract of employment subverts liberal values such as rights, dignity, liberty and equality, and about the broader structures that make workers vulnerable to exploitation. A more precise understanding of the tension between libertarianism and liberal values helps us to understand exactly why labour law is needed, how it should be interpreted, and what it should do. It can give a strong intellectual support to labour law, which will be important for workers and their organisations, scholars, judges, and legislators.

(b) The Paradigms of Labour Law

Labour law has never been entirely sure about its special province or scope.²¹ Indeed, the subject has never settled on its own name. Should it be called, as it has been at various times in the last century, industrial law, labour law, employment law, work law? Different names reveal varied historical contexts and economic systems; to some extent they reflect the evolution in America and Europe from the heavy industry of mass production to modern service networks, global supply chains, and the emerging gig economy. As well as historical circumstance, the changes in name often signify different priorities and scope for the subject.

When we choose a label for a field of study, we are not simply launching a descriptive account of various laws. The label derives implicitly from a conception of the subject that describes a normative vision of what labour law ought to do or what its ideal scope should be. The selection of a label involves the choice of a paradigm for the subject. This paradigm has in mind a central case of the subject, which in this instance will be certain social and economic institutions and how they ought to be regulated. This paradigm indicates boundaries for the subject, though of course related topics can always be considered as well. The selection of a paradigm is not a purely descriptive exercise. It is a normative judgement about what labour law ought to be doing and how that task should be performed. The central case of labour law will be the best example of that paradigm available. There will be marginal cases on the boundaries of labour law, of course, but understandings of the subject will rely heavily on their orientation towards the paradigm.

The selection of a paradigm may be motivated by a variety of moral and practical considerations. At bottom, however, the selection of paradigm involves, we suggest, a

²⁰ Mark Freedland and Nicola Kountouris, *The Legal Construction of Personal Work Relations* (OUP 2011).

²¹ Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing 2006); Guy Mundlak, 'The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers' in Davidov and Langille (n 3); ACL Davies, 'Identifying "Exploitative Compromises": The Role of Labour Law in Resolving Disputes Between Workers' (2012) 65 *Current Legal Problems* 269; Guy Davidov 'Setting Labour Law's Coverage: Between Universalism and Selectivity' (2014) *Oxford Journal of Legal Studies* 543; Alan Bogg and others (eds), *The Autonomy of Labour Law* (Hart 2015).

philosophical choice. The choice relies upon analysis of social and legal practices, but develops a conception of labour law that presents the subject in its best light as a coherent and purposeful undertaking.

The paradigm that is usually strongly associated with the label of ‘labour law’ concerns collective labour relations. The normative vision within this paradigm holds that the best way in which to combat an employer’s inequality of bargaining power and to provide a countervailing force to capital is to promote and support collective bargaining on the part of workers.²² Within this paradigm, labour law needs to establish the rights of workers to organise, to strike, and to compel employers to come to the table and negotiate about terms and conditions of employment. Provided that organised labour develops sufficient bargaining power, collective agreements should on this view establish fair terms and conditions of employment and mechanisms to ensure fair management of the enterprises through forms of joint regulation with worker representatives, such as trade union officials. Supporters of this agenda for labour law also assert that through collective organisations workers can achieve voice at work and exercise a kind of industrial democracy.²³ In the middle of the twentieth century, collective bargaining was typically the preponderant method by which the terms of employment relations were fixed in advanced industrial economies. Collective agreements were enforced either by a legal mechanism such as arbitration or a court or by the threat of lawful industrial action. Based on this industrial context and the widespread development of unions and collective bargaining, the paradigm of labour law focused on the rules of collective labour relations between management and unions, and paid rather less attention to individual contracts of employment or other forms of regulation.

In contrast, the paradigm association with the label ‘employment law’ places the contract of employment at the centre of the subject. The core legal materials of employment law consist not only of the legal rules governing the formation and enforcement of contracts of employment, but also the variety of modern legislation and regulations that to some extent have replaced collective bargaining as the principal mechanism for ensuring fairness at work. Important regulations of this kind might include laws against discrimination, guarantees for minimum wages, health and safety regulations, laws that place upper limits on hours of work, and more generally regulations that protect employees against unfair treatment by employers and against exposure to unnecessary risks. The label ‘work law’ extends the paradigm to people who are not classified by the law as employees, but who nevertheless are economically dependent on the sale of their services to others. The label ‘work law’ can also extend to unpaid workers such as volunteers and prisoners.²⁴ The normative vision behind these conceptions of ‘employment law’ and ‘work law’ views mandatory regulation that provides workers with

²² See e.g. Karl Klare, ‘Countervailing workers’ power as a regulatory strategy’ in Hugh Collins, Paul Davies and Roger Rideout (eds), *Legal Regulation of the Employment Relation* (Kluwer Law International 2000); Keith Ewing and John Hendy, ‘New Perspectives on Collective Labour Law: Trade Union Recognition and Collective Bargaining’ (2017) 46 *Industrial Law Journal* 23. More broadly on the different roles of trade unions, see e.g. Keith Ewing, ‘The Function of Trade Unions’ (2005) 34 *Industrial Law Journal* 1; Gillian Lester, ‘Beyond Collective Bargaining: Modern Unions as Agents of Social Solidarity’ in Davidov and Langille (n 3).

²³ Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (OUP 2014).

²⁴ Noah D Zatz, ‘The Impossibility of Work Law’ Guy Davidov & Brian Langille (eds), *The Idea of Labour law* (OUP 2011); Noah D Zatz, ‘Does Work Law Have a Future If the Labor Market Does Not?’ (2016) 91 *Chicago-Kent Law Review* 1081.

legally enforceable individual rights as usually the best way to secure the goals of labour law.²⁵ That view will be strengthened during periods when trade unions are weakened and collective bargaining is ineffective to secure fair terms and conditions of work. That view can also be undermined if the coverage of employment law rights becomes so diminished that a social division emerges between those who benefit from a good package of legal rights and those routinely or systematically excluded from legal protection.²⁶

Many other paradigms for labour law seem possible. Harry Arthurs has argued that labour law should be discussed as part of a broader field of the law of economic subordination and resistance.²⁷ Feminists have frequently questioned whether the paradigm should be based exclusively on paid work or whether it should include unpaid work in the home.²⁸ This integration of paid and unpaid productive activities may also be described as ‘work law’. In the German and French traditions, ‘social law’ (‘droit social’) takes broad issues of social justice and insurance against economic security as a central normative theme and organising paradigm.²⁹ The law is envisaged as creating an ‘economic constitution’ that ensures the fair operation of markets and the division of labour.³⁰ On that approach, boundaries between public and private law, and between employment regulation and social security systems dissolve, for they are attributed with common objectives that include the promotion of an efficient labour market and the protection of workers from the vicissitudes of market forces such as poor wages and unemployment. This broad perspective of social law arguably informs the current employment policy of ‘flexicurity’ of the European Union.³¹ It also informs many of the ideas in the influential Supiot report that viewed employment regulation in the context of the whole life-cycle of workers, from education and training to retirement and dependence on a pension.³² That social and labour market perspective was also at the heart of the pre-industrial statutory regulation of labour markets in England, which restricted the free movement of labour, fixed wages, and regulated access to skills and good jobs.³³

Boundaries between public and private law are also challenged when the subject is regarded as being founded on human rights, an approach that is sometimes also called the

²⁵ Hugh Collins ‘Against Abstentionism in Labour Law’ in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence: Third Series* (OUP 1987).

²⁶ See in this volume the chapters by Einat Albin, Mark Freedland, and Sabine Tsuruda.

²⁷ See, for instance, Harry Arthurs, ‘Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment’, (2013) 34 *Comparative Labor Law and Policy Journal* 585.

²⁸ Joanne Conaghan in this volume, and see Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work and Family: Critical and Comparative Perspectives* (OUP 2005).

²⁹ Léon Duguit, *Le droit social, le droit individuel et la transformation de l'état* (Social Law, Individual Law and State Transformation) (Presses Universitaires de France 1911). The German tradition was similar: Otto von Gierke, *The Social Role of Private Law* (2016) (originally *Die soziale Aufgabe des Privatrechts* (Berlin 1889)) translated and introduced by Ewan McGaughey, ‘The Social Role of Private Law (Otto von Gierke, 1889)’ (Social Science Research Network 2016) SSRN Scholarly Paper ID 2861875 <<https://papers.ssrn.com/abstract=2861875>> accessed 19 February 2018.)

³⁰ Ruth Dukes, *The Labour Constitution* (OUP 2014).

³¹ Commission, ‘Towards Common Principles of Flexicurity: More and better jobs through flexibility and security’ COM (2007) 359 final; Commission, ‘An Agenda for new skills and jobs: A European contribution towards full employment’ COM (2010) 682 final. See Catherine Barnard, ‘EU Employment Law and the European Social Model: The Past, the Present and the Future’ (2014) 67 *Current Legal Problems* 199.

³² Alain Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001).

³³ Statute of Labourers 1351, Statute of Artificers 1563.

constitutionalisation of labour law.³⁴ Philosophical justifications for human rights or for treating rights as constitutional imperatives can be appropriated as arguments for the need for labour law in the form of protection of human rights.³⁵ This stance leads to debates about which labour rights should be classified as human rights in constitutions. It also poses the question of the extent to which traditional liberal rights, such as freedom of expression, should be applied to the employment relation. Viewing the subject as a study of human rights at work is connected to the idea that the employment relation resembles the power relation of an authoritarian state over its citizens. If workers' rights can be viewed as fundamental or human rights, these are stringent entitlements with an increased moral and legal force. They can therefore be a countervailing legal force against an employer's power based on ownership of private property. They may also ensure that workers' essential interests are not sacrificed in the political compromises of legislation. In this context, the judiciary plays a vital role in defending workers' rights, a task that some courts may be reluctant to perform.³⁶ The human rights at work paradigm can also embrace the idea of transnational labour law.

In recent decades, the challenges posed by the economic forces of globalisation have been understood to undermine the effectiveness of national labour laws.³⁷ National laws may need to be supplemented or even replaced by transnational or international labour laws, for only such transnational laws may be capable of providing a bulwark against social dumping in the context of rapid movements of capital investment and economic migration of workers.³⁸ Studies of transnational labour law, such as EU employment law, typically pay special attention to regulation of equal opportunities in labour markets, restrictions on the free movement of workers placed by immigration laws, and protections for workers against capital restructuring that intensifies in response to global pressures on domestic markets. As well as focussing on the governance of labour markets, transnational labour law may also be grounded in respect for human rights. The European Convention on Human Rights is providing a fertile source of legally binding principles that require both respect for individual liberties in the workplace and rights for collective organisation and bargaining.³⁹ The Charter of Fundamental Rights of the European Union appears to have an unrealised potential to reorient European Union labour law towards respect for fundamental rights under the banners of equality and solidarity rights.

³⁴ Keith Ewing, 'Democratic Socialism and Labour Law' (1995) 24 *Industrial Law Journal* 103; Virginia Leary, 'The Paradox of Workers' Rights as Human Rights', in Lance Compa and Stephen Diamond (eds) *Human Rights, Labor Rights, and International Trade*, (University of Pennsylvania Press 1996); Harry Arthurs, 'Labour and the "Real" Constitution' (2007) 48 *Les Cahiers De Droit* 43; Guy Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Enquiries in Law* 719; Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 3 *European Labour Law Journal* 151; Pablo Gilabert, 'Labor Human Rights and Human Dignity' (2016) 42 *Philosophy and Social Criticism* 171; Joe Atkinson in this volume.

³⁵ Atkinson in this volume; see also Collins (n 1).

³⁶ See the sceptical reflections in Keith Ewing, 'The Human Rights Act and Labour Law' (1998) 27 *Industrial Law Journal* 275; Keith Ewing and John Hendy, 'The Trade Union Act 2016 and the Failure of Human Rights', (2016) 45 *Industrial Law Journal* 391. C.f. Keith Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 2.

³⁷ See e.g. Joanne Conaghan, Richard M Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization*, (OUP 2002).

³⁸ Ton Wilthagen (ed), *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (North Holland 1998); Yossi Dahan, Hanna Lerner and Faina Milman-Sivan (eds), *Global Justice and International Labour Rights* (CUP 2016).

³⁹ Virginia Mantouvalou, 'Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation' (2013) 13 *Human Rights Law Review* 529.

Using these transnational sources of binding rights, together with international norms and national constitutions, it makes sense to explore a new paradigm for labour law under the rubric of ‘human rights at work’.⁴⁰

Although there is considerable continuity between the values and principles that motivate these paradigms of labour law, employment law, work law, social law, human rights law, and transnational labour law (which we will collectively refer to as labour law for convenience), some differences emerge. These differences can be explored by philosophical enquiry. It may be suggested, for instance, that the high value attached to individual rights, especially human rights, comes to the fore in normative discussions of employment law rather than labour law, because the focus in employment law is always on the individual employment relations. In contrast, in the paradigm of labour law understood narrowly as collective labour relations, a particularly important value is solidarity between workers doing the same jobs and ideally solidarity between much wider groups of workers. Yet these differences should not be exaggerated, for it is certainly possible to derive a strong argument for collective labour law institutions from individual liberties,⁴¹ and equally individual employment rights such as the right to a minimum wage can be justified on the basis of collective considerations of distributive justice.⁴²

One of the tasks of investigations into the philosophical foundations of labour law (in its broadest sense) is to tease out these contrasting normative foundations buried within competing conceptions of the subject. The exploration of the underlying values of the subject brings out insights that unify it and challenge traditional assumptions.⁴³ These elucidations should help us to understand better what we believe should be the proper scope and purpose of the subject.⁴⁴

(c) Concepts in Labour Law

A third general task that philosophical enquiry will assist is the clarification of some of the difficult concepts used in labour law. Labour law deploys a wide range of indeterminate and contested concepts. This becomes evident, for instance, when examining labour rights that are classified as human rights, and is also true of human rights law more generally. There are a number of controversial examples. Consider, for instance, the right to work. The United Nations Universal Declaration of Human Rights (UDHR), states at Article 24 that ‘[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment’. Does this mean that everyone should have the work of their choice? Or that everyone should have non-exploitative work? Some scholarship has attempted to explore the meaning of the right to work, sometimes using philosophical ideas for

⁴⁰ See e.g. Tonia Novitz and Colin Fenwick, *Human Rights at Work: Perspectives on Law and Regulation* (Hart 2010); Bob Hepple (ed), *Social and Labour Rights in a Global Context* (CUP 2002).

⁴¹ See Bogg and Estlund in this volume.

⁴² See Davidov in this volume.

⁴³ See Zatz in this volume.

⁴⁴ In this volume, other examples of this sort of philosophical enquiry include: Langille’s explanation of the expanding scope of labour law by reference to Sen’s capabilities approach; Collins’s emphasis on the significance of the protection of employee’s civil liberties and equal respect within a paradigm of employment law informed by strong liberal values.

this purpose, such as the idea of self-realisation that is achieved through work.⁴⁵ The right to rest and leisure, including a right to paid holidays, in Article 24 of the UDHR has also been debated in theoretical scholarship, with some saying that it does not belong to a list of human rights,⁴⁶ and others suggesting that denial of this right would violate human dignity.⁴⁷

Or consider the right to ‘just and favourable remuneration’. Article 23.3 of the UDHR proclaims that ‘Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.’ How should we understand this idea of just and favourable remuneration? Does it mean no more than that workers should be paid the going market rate for their labour? Or does the reference to a life worthy of human dignity mean that workers should receive a living wage, even if it exceeds the market rate for the job? Or does the principle merely require the state to supplement earned income when it falls below the poverty line for a family?

Friedrich Engels thought that the whole idea of advancing claims for a fair wage was nonsense, because it seemed to amount to no more than a claim for the poverty wages of the going market rate.⁴⁸ Yet it is possible to attribute a more determinate and principled meaning to the idea of a just wage. There are several conceivable routes towards developing a coherent concept of the idea of a fair wage. One possibility is to consider what the difference might be between a fair wage and exploitation.⁴⁹ Yet that strategy inevitably raises the further contested question of what counts as exploitation.⁵⁰

We cannot understand and assess these difficult and contested concepts without considering their moral meaning. This endeavour cannot only be a technical enterprise of putting together the different interpretations that courts have adopted or that the drafters of the legislation and international conventions may have preferred. A dictionary definition of the concepts will also not suffice, because the dictionary cannot do our moral thinking for us.⁵¹ To understand these concepts, we need to uncover the principles of political morality underlying them.⁵² Answers to complex questions such as the ones that labour lawyers address can only be discovered by considering a range of principles that justify labour law. In some instances of the exploration of concepts, as in the case of exploitation, we are trying to understand better the variety of meanings that have been signified by the word in order to dispel confusion and assist in normative arguments about how to address the problem of exploitation.⁵³

In other instances, the exploration of words is not as significant perhaps as the normative enquiry into what the word ought to mean in its particular legal context. For example, when

⁴⁵ Mantouvalou (n 2).

⁴⁶ Maurice Cranston, ‘Human Rights, Real and Supposed’, in DD Raphael (ed), *Political Theory and the Rights of Man* (Macmillan 1967).

⁴⁷ Jack Donnelly, *Universal Human Rights* (2nd edn, Cornell University Press 2003) 28.

⁴⁸ Friedrich Engels, ‘A Fair Day’s Wages for a Fair Day’s Work’ *The Labour Standard* No. 1 (London, May 7 1881) 1. As an alternative to the pricing of labour according to supply and demand, Engels urged workers to seize ownership of the means of production and set their own wages, which would be presumably fair.

⁴⁹ Horacio Spector in this volume.

⁵⁰ See Spector, Wolff and Mantouvalou in this volume.

⁵¹ Jeremy Waldron, ‘Social Citizenship and the Defence of Welfare Provision’ in *Liberal Rights – Collected Papers* (CUP 1993) 299.

⁵² Ronald Dworkin, ‘In Praise of Theory’ (1997) 29 *Arizona State Law Journal* 353.

⁵³ As above (n 50).

the European Court of Human Rights is asked to rule on the meaning of the right to freedom of association, it views its task as not merely providing a choice between the variety of possible meanings, but rather its considered view about how the European Convention on Human Rights *ought* to protect the activities of trade unions with respect to collective bargaining and industrial action. Similarly, in these philosophical explorations, the answer to reflections on the meaning of hard concepts depends in part upon the normative goals that one might wish to attribute to the law.

2. The Relevance of Theories of Justice

In relation to some other fields of the law, the search for the normative foundations of the subject has been conceived rather narrowly. For example, in relation to contract law, the principal idea has been that the moral duty to keep one's promises provides the essential moral justification for the law enforcing contracts.⁵⁴ Although this idea has many opponents and encounters difficulties in accounting for the law of contract, it provides a focus for discussion of the moral foundations of the law of contract that confines the field to a branch of moral philosophy. Similarly, an influential (though by no means as dominant) theoretical approach to tort law has been to insist that its role is merely to protect existing legal rights, not to attempt to secure policy goals such as the reduction of accidents or the device of insurance spread accidental losses throughout the community as far as possible. These focused approaches to investigations of the normative foundations of branches of private law are not imitated in labour law. Though perhaps attractive to libertarians examining the employment relation, a narrow moral enquiry has rarely appealed to most labour law specialists, who prefer to link labour law to a more capacious set of values.

Why should labour law look more broadly into moral and political philosophy for its normative foundations than many other legal subjects like contract law and tort law? The answer seems to be that labour law presupposes and builds on the institutions of private law such as contract, tort, and property law with a view to adjusting the governing rules in particular instances. Labour law assumes that the parties enter into a contract when they form an employment relation. Labour law assumes that private ownership provides the explanation of why an employer has control over the capital assets of the business. Private law provides some kind of framework for governing work relations, but this legal framework is certainly not the same as the distinctive legal fields of labour law and employment law that developed in the twentieth century. The normative justification for labour law must therefore reach beyond the justifications for private law rules and discover more compelling arguments and justifications for partly overriding those private law rules with different, often mandatory, regulations. In other words, the justice achieved by the application of the ordinary rules of private law is regarded by labour lawyers as an inadequate scheme of justice for the employment relation and associated institutions. In the search for normative foundations, labour lawyers therefore reach for other schemes of justice. Those that come most readily to hand are to be found in general

⁵⁴ Gregory Klass, George Letsas and Prince Saprai (eds), *Philosophical Foundations of Contract Law* (OUP 2014).

political theory, in which there are many candidates for explanation of the key elements of a just society and system of government.

These broader values may be loosely described as theories of social justice. These theories of social justice seek to describe, justify, and promote moral principles that will achieve justice in a given society (or more broadly the world) with regard to the distribution of wealth, power, opportunities, freedoms, and other capabilities and material that we have reason to value as part of enjoying well-being and a valuable life.⁵⁵ Political theories of the state, justice, the constitution, fundamental rights and the idea of the rule of law consider how best (morally) to construct a framework for such a just society deserving of our obedience to its laws. But do those insights about the nature of a just society and its appropriate form of government have anything to tell us about how labour law should address the more concrete, limited issues, with which it is typically concerned, such as the legal framework for collective bargaining, protection of workers against unjust dismissal or unfair discrimination, and minimum wages? Can we derive valuable and credible insights for labour law from the abstract discussions of justice provided by liberal political philosophy? Labour lawyers believe that the need for labour law as a specialist branch of the law is intimately linked to conceptions of social justice.

Scholars have also examined political theories of democracy at state level, and their implications for the governance of the workplace. In democratic theory, the central idea is that ‘in a certain kind of human association, the process of government should as far as possible meet democratic criteria, because people involved in this kind of association possess a *right*, an inalienable right to govern themselves by the democratic process’.⁵⁶ Workplace participation has also been grounded on democratic theory with the key idea being that the workplace is a political system itself, and individuals in this political system should be able to exercise control in the way that they are governed in this context, in a manner analogous to the control that they exercise at state level.⁵⁷ Labour law scholarship has provided a justification for workplace participation on the basis of democratic theory.⁵⁸

Other kinds of theoretical approaches to an examination of labour law are of course possible. A critical historical approach seeks to uncover the structures of ideas and perhaps their internal contradictions and development.⁵⁹ A social theory approach might seek to understand how labour law contributes to social cohesion or social disorder. Such an approach grounded in sociology might also cast doubt on the coherence or validity of concepts that seem to be taken for granted in the deliberations of moral and political philosophy.⁶⁰ Feminism has also provided a powerful critique of the paradigm of labour law and how it conceives the key issues.⁶¹ Although there are elements of these different methodologies in the contributions to this volume, most of the contributors have reached for political philosophy as their inspiration for reflection on the foundations and normative scope of labour law.

⁵⁵ Davidov in this volume.

⁵⁶ Robert Dahl, *A Preface to Economic Democracy* (University of California Press 1985) 56-57.

⁵⁷ Carole Pateman, *Participation and Democratic Theory* (CUP 1970) 43.

⁵⁸ Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans 1897). See also Karl E Klare, ‘Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform’ (1989) 38 *Catholic University Law Review* 1; Alan Bogg, *The Democratic Aspects of Trade Union Recognition*, Hart Publishing, 2009; Keith Ewing, ‘The Importance of Trade Union Political Voice’, in Bogg and Novitz (n 23); Martin O’Neill and Stuart White in this volume.

⁵⁹ Conaghan in this volume.

⁶⁰ Zatz in this volume adopts this approach to the concept of the labour market.

⁶¹ Joanne Conaghan, ‘Labour Law and Feminist Method’ (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 93; see also Joanne Conaghan and Kerry Rittich (eds), *Labour Law, Work, and Family* (OUP 2005).

3. The Perils of Appropriating Political Theory

Having made the case for the necessity of political theory when reflecting on the philosophical foundations of labour law, we should acknowledge that we may encounter difficulties in applying some of these ideas and theories of justice to an enquiry into the foundations of labour law. There may be a risk of some kind of unsatisfactory transplant in the sense that ideas, concepts and principles designed to address one set of questions in political philosophy will not function well or in a similar way when they are applied to resolve issues about the normative foundations of labour law. Some political theorists have specifically discussed the labour relationship. Philosophical literature has examined directly workers' exploitation, for instance.⁶² However, most political theories focus on the role of the state in relation to its citizens. Is it problematic to apply this kind of analysis directly to the employment relation? It may be helpful to distinguish the different ways in which we might borrow insights from political theory to help to establish the normative foundations of labour law. There seem to be three possible strategies in making what might be called the transplant from political theory to labour law: (a) methodological imitation; (b) re-application of key concepts of political theory; and (c) exegesis of implicit positions.

(a) Methodological imitation

The first approach is to copy the methodology from a particular political theory, such as the work of John Rawls on justice,⁶³ and then apply the method to construct a just system of labour law.⁶⁴ Imagine an 'original position' of the kind envisaged by Rawls, where the task is for everyone to agree the rules about the institution of employment and its legal regulation. Behind a 'veil of ignorance', no-one knows if they will be an employer or an employee, a senior manager, an agency worker, or regular employee or a casual worker etc. They understand how the economy works in general and that the division of labour is required for reasons of efficiency, and that some savings on transactions costs can be achieved by granting one party to a contract the power to direct the performance of the other. What kinds of rules and institutions would reasonable people agree in this artificial situation that is designed to rule out considerations of self-interest?

This approach using (broadly speaking) Rawls's methodology was applied by Jackson with respect to the law of corporate insolvency.⁶⁵ The question is what a hypothetical meeting of creditors of a company would agree to be the fair rules for the distribution of assets in the event of insolvency between the various groups of creditors. That approach can work reasonably well in the context of insolvency, because in the end the issues are all about money and the allocation of risks of loss. In labour law, things are not so simple, because the parties in the original

⁶² See literature on exploitation cited above (n 4).

⁶³ John Rawls, *A Theory of Justice* (OUP 1972); and John Rawls, *Political Liberalism* (Columbia University Press 1993).

⁶⁴ E.g. Collins (n 1).

⁶⁵ Thomas H Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press 1986).

position would have to reach agreement on such issues as power, fairness, and self-affirmation through work, as well as the distribution of resources.

Where might the Rawlsian methodology take us with respect to the normative foundations of labour law? Rawls's general objective was to avoid both a libertarian position in which there is minimal government and redistribution, but also to avoid a general reliance on utility as a comprehensive guide to justice. His methodology in effect seeks to protect fundamental rights and minimum standards of welfare, but to avoid detailed imposition of programmatic welfare policies. If the economic argument that the structure of the contract of employment provides an efficient use of labour power is correct and accepted by the parties to the original position with respect to labour law, the general features of the institution of employment, including the subordination of the employee to the employer's demands for performance, would be broadly preserved by the parties in the original position. However, it seems likely that they would also want some guarantees against the abuse of power by employers and at least protections against oppressive economic arrangements of the kind found in sweatshops. Perhaps, if sufficiently risk averse, people in the original position would also agree to a law requiring 'fair wages' or at least a 'living wage'. Rawls's emphasis on the point that the protection of rights or civil liberties would be a key outcome of agreement in the original position might also lend support to the argument that the participants in the original position would agree to the protection of the human rights of workers at work, which might not only include rights such as freedom to manifest a religion and the right to freedom of expression, but also extend to the right to work and the right to freedom of association including the right to join a trade union.

There are, of course, many other kinds of methodologies apart from Rawls's original position that can be employed in political theory. Some start from some basic moral ideas, such as respect for human rights, and seek to elaborate the consequences of deriving the structures for a just society by reference to that idea. This methodology could be applied to labour law by exploring the implications of founding labour law on the protection and elaboration of human rights in the context of the workplace, an agenda explored by several authors in this volume.⁶⁶ Instead of human rights, the powerful motivating idea behind labour law might be ascribed to freedom,⁶⁷ or equality,⁶⁸ or dignity,⁶⁹ or some other widely acknowledged fundamental political principle, such as Sen's capabilities approach.⁷⁰ There has also been a strong utilitarian or welfare theme in labour law in which maximising general wealth has been a guiding methodology, as in the example of regulating the employment relation for the purpose of maximising the competitiveness of businesses.

Are there problems or dangers in using the methodology of political theories? The main danger derives from the difference in purpose of political theory and investigations of the philosophical foundations of labour law. Political theories usually start with very minimal conditions or assumptions that avoid making many presuppositions about human nature and the world and how social systems work. They try to justify their theories of justice or liberty on the basis of a few core principles and basic assumptions about human nature and the social organisations

⁶⁶ Atkinson; Gilabert; Bogg and Estlund.

⁶⁷ Cabrelli and Zahn in this volume

⁶⁸ Davidov in this volume.

⁶⁹ Gilabert in this volume.

⁷⁰ Bruce Archibald, 'The Significance of the Systemic Relative Autonomy of Labour Law' (2017) 40 Dalhousie Law Journal 1; Langille in this volume.

of human beings. Although the presuppositions may be more numerous than appears at first sight, the strength of a political theory is often regarded as lying in its ability to generate interesting and plausible conceptions of justice out of relatively minimal assumptions.

In contrast, when we are looking for the normative foundations of labour law (or indeed some other branch of law), though we may be interested in the implications of first principles and of views about human nature, we also need to keep a focus on what measures we find in the existing labour laws and employment law. We are looking for the normative foundations of something that already exists, albeit perhaps in a flawed form. We cannot start from a basic principle and ignore the question of whether its implications actually have much fit with the current law. Unless we are content to let the methodology of political theory take us far away from the kinds of labour laws that we actually have, we need to recognize that the search for normative foundations of labour law is to some extent a different kind of enterprise. It is an interpretive exercise in the sense articulated by Ronald Dworkin:⁷¹ we are examining an existing human institution and trying to explain it by presenting it in its most coherent and morally compelling form. Moral principles and concepts can be drawn from political theory, but it is a mistake simply to impose them on the existing practices known as labour law whether or not they fit and explain them. We are looking for an interpretation of labour law that presents it in its best light, not proposing a new theory of justice that has some application to work relations.

(b) Re-application of Key Concepts.

A second kind of use of political philosophy is to copy some of the key concepts in a particular political theory and apply those concepts to employment law and associated institutions such as collective bargaining. Conceptions of democracy might be applied to collective bargaining. The value of protecting particular human rights such as privacy or freedom of expression could be applied to the terms of contracts of employment. These transplants of concepts of moral and political theory into interpretations of the foundations of labour law may produce genuine insights, but there are evident dangers in trying to use the same concept in two different contexts – abstract theories of justice or other moral ideas, on the one hand, and interpretations of labour law, on the other, without placing adequate weight in the particularities of the employment context.

For example, in what have been called ‘republican’ theories of freedom and justice,⁷² the central claim is that the main purpose of a constitutional framework for a society is to minimise the exercise of uncontrolled power by one person or group over all the others. The prerogative power of a king provides an example of such arbitrary power. To prevent such domination by a monarch or later on a dictator, a political theorist in this stream of republican thought might support various proposals including strict observance of the rule of law by all including the most powerful, democracy as a mechanism of control and accountability, constitutional

⁷¹ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986).

⁷² Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1977); Cecile Laborde and John Maynor (eds), *Republicanism and Political Theory* (Blackwell 2008); Frank Lovett, *A General Theory of Domination and Justice* (OUP 2010); Alex Gourevitch, ‘Labor and Republican Liberty’ (2011) 18 *Constellations* 431.

government, and perhaps more generally measures designed to prevent people acquiring domination or at least too much dominating power over others. Observing the many successes of such a republican theory of government, we might attempt to reapply these notions of domination and constitutional government to employment relations and an interpretation of the foundations of labour law.⁷³ Such an endeavour is encouraged by republican theorists themselves, who sometimes liken the powers of an employer to those of an arbitrary dictator.⁷⁴

We could say plausibly enough that employment relations are a situation where there is considerable potential for the exercise of domination by one party (the employer) over the other (the worker). Employment law could be seen as an appropriate ‘republican response’ to domination. In pursuit of the application of republican ideas to labour law, it might be proposed, for instance, that the law should include, amongst other things, tight regulation to prevent the abuse of power by employers and managers, some kind of democratic representation or voice at work, and, in an endeavour to reduce the amount of domination that is produced in the employment relation, it might also lead to measures to fix fair basic standards such as a minimum wage and maximum hours.

Another example of re-application of key concepts might be attempts to justify the moral foundations of labour law on the idea of human rights. Some human rights documents were perhaps originally conceived as establishing primarily civil and political rights that would be exercised by individuals against their governments. Even so, many of these human rights documents, such as the Universal Declaration of Human Rights, had some references to social and economic rights, including labour rights, so they might help to provide some foundations for labour law. Furthermore, some general civil rights and freedoms such as rights to dignity, liberty and equality, can be used to justify a variety of legal structures including rules regarding the employment relation.

Are there problems or dangers in transplanting the key concepts of moral and political theory to provide an explanation of the normative foundations of labour law? The problem that may be encountered is that a concept such as ‘domination’ or ‘human rights’ or ‘capability’ may be taken out of its original context and given a new meaning with a whole set of fresh implications. Although it may appear that the original political theory has provided the key concepts in a proposed account of the normative foundations of labour law, it may be the case on closer inspection that the meaning of the concepts has changed in significant ways when they are re-applied to labour law. With respect to domination for instance, the question is whether some important dimensions of the concept alter as we move the context from the unbridled power of an arbitrary dictator to apply it to the more powerful party to the contract of employment.⁷⁵

In relation to human rights, some theories examine duties imposed primarily on state institutions, while others examine duties imposed on everyone.⁷⁶ When considering these theories, do the key concepts of human rights alter when we shift the context from claims that sovereign states should not be permitted to violate the human rights of anyone in their territory

⁷³ Cabrelli and Zahn (n 1).

⁷⁴ Pettit (n 72) 22.

⁷⁵ Guy Davidov, ‘Subordination vs Domination: Exploring the Differences’ (2017) 33 *International Journal of Comparative Labour Law and Industrial Relations* 365; Collins in this volume.

⁷⁶ For a theory that focuses on state duties, see Charles Beitz, *The Idea of Human Rights* (OUP 2009) 109; for a theory on [of?] duties on everyone, see Henry Shue, *Basic Rights – Subsistence, Affluence, and US Foreign Policy* (2nd edn, Princeton University Press 1996) 157; James Griffin, *On Human Rights* (OUP 2008).

to a claim about the proper limits of the employer's power? For instance, does the meaning of the right to privacy change when it is used by employees against an employer's intrusive surveillance or testing as opposed to its similar uses by public authorities?⁷⁷ Furthermore, is it even appropriate to think that private employers should have the same duties to respect and promote human rights as those undertaken by institutions of the state? On this issue, it can be said that employers have duties of justice on the basis of their role in the institution of employment. In any case, in this volume, since we discuss labour law, our primary focus is on the role of the state in delivering principles of social justice through the regulation of the institution of employment.

This change of meaning in the transfer from theories of justice to their application to labour law may have sometimes happened with the concept of capability used by Amartya Sen. His attack on material and pecuniary notions of welfare and wellbeing that were used by international financial institutions was justified by reference to his idea of the greater importance of positive freedom to achieve meaning for one's life, an idea that he called 'capability'.⁷⁸ In the same way, we might transpose the idea of 'capability' to provide normative foundations for labour law by saying that in the pursuit of fairness or justice at work, labour law should be concerned with not only material conditions of work produced by inequality of bargaining power, but also with a worker's opportunity for self-realisation through work.⁷⁹ Whilst this line of enquiry looks promising, it is unclear where it leads. Is it possible, for instance, to move from that philosophical position about the importance of the value of positive freedom in any judgement about welfare, to an assertion that labour law needs to have certain kinds of protective rights or should protect some basic labour rights of workers? In the context of a theory of justice, the idea of capability seems to be an aspirational goal and a measure of whether a situation has improved or not. It does not appear to provide conceptual apparatus for a programmatic theory of justice that might provide concepts and guides to an elaboration of a principled discussion of labour law. Improving the capabilities of individuals may indeed be a worthwhile goal, but it is unclear how it might be applied to help to fix minimum standards and entitlements of employees.

The difficulties of the transplantation and adaptation of ideas and concepts drawn from political theory and applied to labour law provide a fertile source of debate, distraction, and perhaps misunderstanding. The investigation of the ensuing problems can provide a valuable source of insight in itself. We should not be concerned that ideas drawn from political theory may not prove fruitful or inspirational. The concern voiced here is rather that those ideas will often be subjected to unacknowledged or unconscious transformations, so that the link to the original idea may sometimes be tenuous at best.

(c) Exegesis of the principles of political theories

⁷⁷ For shifts in the meaning of the right to privacy in the employment context, for instance, see Virginia Mantouvalou, 'Human Rights and Unfair Dismissal: Private Acts in Public Spaces' (2008) 71 *Modern Law Review* 912.

⁷⁸ Amartya Sen, *Development as Freedom* (OUP 1999).

⁷⁹ Brian Langille pursues this line of thought in this volume.

It is rare that political philosophy engages with normative questions about labour law. There may be some broad principles that may be obviously relevant, such as a stress on equality of opportunity that can certainly support some employment rights, not least laws against discrimination, or the prohibition of exploitation that can support other employment rights, such as a fair wage. In order to address this problem that political theory offers little by way of explicit guidance about labour law, the third strategy linking political theory and labour law holds that some rules or broad principles about labour law are already implicit in the leading works of political theory, even though they may not have been drawn out explicitly by the original authors of the theories of justice. The task becomes one of proposing a close reading of these works on political theory in order to discover clues about their implicit recipe for labour law's rules and principles. It is also possible within this framework to argue that although there is no direct textual support for a particular aspect of employment law, a particular rule or principle is inherent in the explicit statements of the authors, or is an inevitable consequence of the adoption of a particular explicit statement in the political theory.

For example, it might be claimed that Rawls's theory of a 'basic structure' that provides a guarantee of fairness in civil society contains within it the rudiments of a scheme for employment law. Rawls's theory holds that in the original position the parties would agree to certain guarantees about civil liberties, democracy, equal opportunities, and minimum standards of welfare. Rawls recognizes that free markets are valuable as generators of material goods, but that they may also lead to gross disparities of wealth. It is clear that he envisages that the system of taxation and public welfare policies would address those gross disparities. What Rawls does not say, however, is whether he would regulate markets and market transactions to prevent those gross disparities of wealth and perhaps other problems of injustice from arising. On one view, there is no need to regulate the market or interfere with freedom of contract if there is an effective progressive system of taxation and generous welfare payments; on the opposite view, which is often associated with Gerry Cohen,⁸⁰ regulating the market and controlling contracts was surely envisaged (implicitly) by Rawls as another tool for preventing gross disparities from arising. On the former view, therefore, there is no reason to have, for instance, a minimum wage law, for the government and its system of welfare will (under the rules of the basic structure) rectify labour market outcomes by some kind of tax credit or in-work benefit system; on the latter view, it would be irrational for Rawls and those seeking to follow his general theory of justice not to support a minimum wage, for that legislation prevents very efficiently the worst disparities in wealth and income from arising at source.⁸¹ There are many possible positions within this spectrum between complete freedom of contract and detailed regulation of contracts including employment relations. Much turns on the extent to which it is accepted that private employers should have any duties at all with respect to securing distributive justice. All of these positions may find some textual support in the work of Rawls, so we should be cautious when trying to extrapolate from these abstract philosophical ideas to

⁸⁰ For a variety of views of this kind: Gerry A. Cohen, 'Where the Action Is: On the Site of Distributive Justice' (1997) 26 *Philosophy & Public Affairs* 3; Liam B Murphy, 'Institutions and the Demands of Justice' (1999) 27 *Philosophy & Public Affairs* 251; Arthur Ripstein, 'The Division of Responsibility and the Law of Tort' (2004) 72 *Forham Law Review* 1811; Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 *Virginia Law Review* 1391; Sean Valentine Shiffrin 'Incentives, Motives, and Talents' (2010) 38 *Philosophy & Public Affairs* 111; Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 *Oxford Journal of Legal Studies* 213.

⁸¹ Anthony Kronman, 'Contract Law and Distributive Justice' (1980) 89 *Yale Law Journal* 472.

propose normative standards for labour law. It is certainly worth reflecting upon what insights might be gained about the normative foundations for labour law by extrapolating from political theories, but we are unlikely to obtain determinate answers.

Another problem may arise from a close reading of the texts of a political theory for clues about the normative foundations of labour law. We may discover that the author of the political theory has endorsed two important principles, both of which have obvious applications to the kinds of issues that arise in labour law. The problem is rather that these principles clash in the particular instance of labour law, and the political theory offers no obvious way in which to reconcile these competing principles. For instance, the political theory may endorse free markets and freedom of contract as a general principle that is conducive to autonomy or positive freedom, but also endorse protections against exploitation or demeaning work. If we cannot discover any clear indications within the theory about how to reconcile these principles, perhaps by giving one priority over the other, we will only extract indeterminate guidance from the political theory. In a sense, the political theory may only state at a higher level of abstraction the problem with which labour law may be wrestling without offering any further guidance about a process or method for resolving the issue in line with a general theory of justice.

It is suggested that problems of linking political theory to labour law will be a common issue when we investigate the philosophical foundations of labour law. The detailed kinds of questions that interest those seeking to find the normative foundations of labour law will simply not be answered except in broad terms. In the case of Rawls, we cannot be sure what he might have wished to say about labour law. It may be fun and enlightening to have intelligent disagreements about what he ought to have said, given his general position on the principles of justice, but these arguments are unlikely to deliver firm conclusions.

4. Towards a General Theory?

Assuming that we can navigate safely around those methodological reefs of drawing on political and moral philosophy to help to elucidate the foundations of labour law, there remains the question of what outcomes might be expected from these investigations. Is deeper reflection on the philosophical foundations of labour law going to produce a general theory of the principled foundations of the subject and an associated clear paradigm for the subject that together might be regarded in some sense as a conclusion to this line of thought? Some contributors to this volume might be read as having that ambition.⁸² More commonly the contributors may be read as articulating views about what should be regarded as the principal aim of labour law, without denying that other aims and principles could be sensibly incorporated into labour law as well.

In the foreword to the volume, however, Harry Arthurs, speaking from long experience, pours cold water on the ambition to develop a general theory, let alone a new general theory. He describes the scholarly efforts to develop philosophical principles for labour law as a kind of alchemy, a task that fascinates brilliant minds, but which has failed to secure much of value for the working class, and perhaps like alchemy it is bound to fail. Indeed, Arthurs points out a risk

⁸² E.g. Langille.

that the elegant theories will somehow end up legitimising a system of subordination and exploitation of ordinary people rather than providing a vision for the reconstitution of a market society with radically different foundations. Looking at the contemporary world, he fears that the success of radical libertarian and populist ideologies have led governments not only to seek to dismantle labour law as an instrument of social justice but also to abandon social justice as an aim of politics altogether. His advice is to parry these ideas with equally bold, broad, and deep principles such as human rights, liberty, democracy and justice, but not to tie ourselves to one particular value as a lodestone.

Willingly following that advice, the editors commissioned papers for a conference and ultimately this volume that sought to explore a wide range of principles, theories, themes and values. The book is divided into four parts, each representing what seems to us to be a key set of values that need to underpin any labour law system. Part I engages with values that are particularly associated with liberal political theories, such as freedom, dignity of the individual, and the protection of human rights, and examines how they underpin labour laws. Part II considers how labour law addresses the task of securing distributive justice in society and of seeking to eliminate exploitation. Part III investigates how the workplace can and should become a site for democratic values and participatory government. Part IV asks how labour law can contribute to social inclusion for all groups in society, including women, without becoming an exclusionary force itself. This inaugural volume cannot, however, aspire to be comprehensive. What it claims rather is that it has identified and begun to explore four of the key fields of moral and political values in which labour law can make a significant contribution.

5. Part I: Freedom, Dignity, and Human Rights

The chapters in Part I of the book explore whether justifications for labour law might be found in liberal values. Values such as autonomy, dignity, human rights, and freedom from domination and alienation have been close subjects of study in political theory, where the focal relationship is that of citizens to the state and the objective is to identify and justify the *desiderata* of a just society. Earlier we discussed some of the hazards of transplantation, such as whether the theories of a just state vis à vis its citizens can be generalised to the more private or localised relationships of employers to employees. The opening chapters take on these and other questions in their rich and provoking contributions to this collection.

The first of these chapters confronts the challenge of reconciling the apparent contradiction between the rejection of authoritarianism in the relation of citizen to state and the apparent toleration of parallel risks in the relation of employee to employer. John Gardner argues that as employment relations have shifted from status norms to a more contractarian ethos, the risks of worker alienation have increased. By contractualising roles and relationships, Gardner argues, the values intrinsic to vocations, such as the meaningfulness of one's work, the satisfaction of putting one's talent to good use, developing one's potentialities, and the like, have been subordinated to the impulse toward getting one's money's worth. Work has become less about pride, he argues, and more about sacrifice; this, in turn, begets resentment on the part of the worker and loss of motivation. The worker's loss of motivation further leads the employer to redouble its assertion of authority, and so on, in a self-reinforcing cycle toward the ultimate process of alienation of the worker.

Hugh Collins similarly presses the question of why, if a political regime that suppresses core liberal values such as freedom, dignity, privacy and equality would be seen as authoritarian and abusive, we should be untroubled by the autocratic features of the contract of employment. His answer: we *should* be troubled. Collins considers the tension between the institution of contract and several core liberal values: negative liberty (freedom from interference by the state), positive liberty (autonomy), non-domination, and equal respect. He shows how the contract of employment undermines these values to greater and lesser degrees, but ultimately identifies as most directly fatal to liberal values in the workplace the inherently hierarchical structure of the contract of employment. Collins advances this claim through the clarifying analytic device of distinguishing between submission to the contract of employment and the subordination that is intrinsic to the relationship. Submission to contractual terms in a variety of contexts may do no harm from a liberal perspective; the trouble is that subordination – the requirement of obedience to the employer’s will and the attendant assertion of hierarchy – is a pervasive feature of the contract of employment and of necessity deprives the employee of the value of equal respect.

Other chapters look to political theory to explore the *purpose* of labour law. There is a growing body of scholarship suggesting that law can advance human development, capacities, or capabilities. Capabilities might include health, education, reason, conscience, and the ability to work and act in the spirit of solidarity – all resources that enable people to lead a life to which they attach value. These capabilities have intrinsic value, but they also can be instrumental in advancing human freedom. Can the goal of increasing capabilities provide a justification for labour law? Pablo Gilibert explores the requirements of human dignity, a concept commonly appearing in human rights instruments but which is often underspecified. He argues that protecting dignity involves ‘solidaristic empowerment,’ whereby a good society does not block, and ideally facilitates, the development and exercise of critical human capacities. Labour rights, by Gilibert’s reckoning, are norms that advance the ideal of solidaristic empowerment in the workplace by supporting a range of basic interests linked to capacities, such as access to consumption goods, associational power, self-development, a feeling of contribution, self-esteem, and so on.

Brian Langille, who also takes a capabilities approach, stresses that it is not only what set of capabilities one has that matters, but also how one comes to have them. Collective bargaining, for example, facilitates a “process” aspect of the freedoms and opportunities important to human development. But Langille’s focus is labour standards. His analysis of several recent leading court decisions from Canadian labour jurisprudence lauds approaches to statutory interpretation that seek to vindicate the remedial purpose of the statutes. This approach asks who is best situated to advance a statute’s purpose, rather than whether a duty was required by contract – the latter framework being rife with problems of avoidance and exclusion. It is this more pragmatic and purposive jurisprudence, he argues, that can best remove obstacles to freedom and advance human development.

The tradition of civic republicanism might similarly help provide a moral foundation for labour law. A common thread in civic republican accounts – and one that gives them particular appeal for labour lawyers – is the assertion that citizens are entitled to be free from domination. Some theorists see this as flowing from the value of liberty while others link it to conceptions of social justice. Despite its origins in efforts to establish criteria for the limits of state power in relation to citizens, Cabrelli and Zahn argue in their chapter, the appeal of non-domination

theory is its ready generalisability to relations in the private sphere, including the workplace. The types of labour regulation that might be justified by non-domination theories could depend, however, on whether one's theory is grounded in liberty values or social justice. Liberty-based theories might justify procedural protections to enable collective action and worker participation in managerial decision-making, while other forms of labour law – e.g. minimum wage, equal pay, and working time regulation – can be understood as concerned with the minimisation of domination as a matter of social justice. A non-domination framework, they argue, might free us from the limitations inherent in the construct of the 'employment' relation as a basis for regulation and justify extension of protections to independent contractors and other workers who fall outside the employment paradigm.

Finally, Atkinson illuminates both the allure and the limitations of looking to human rights to provide a normative justification for labour law. The challenge, in part, lies in the contestation among theorists of the very foundations and imperatives of human rights, with political approaches seeking to classify human rights as rights the violation of which justifies state intervention with a sovereign state, and more naturalistic accounts seeing human rights as protecting 'personhood,' or the ability to choose one's own conception of the good life. Moreover, even if one could resolve such conflicts, the fit between human rights and labour rights may prove quite imperfect. Human rights are seen as timeless, universally applicable norms of the highest moral order, while many labour rights are quite particularised and workaday in character. Atkinson ventures that while an unlikely candidate to serve as a general theory of labour law, human rights might at least offer an arrow within a more pluralistic quiver of normative foundations.

6. Part II: Distributive Justice and Exploitation

As was said earlier, academic scholarship often refers to the inequality of bargaining power between the employer and the worker as the central issue that labour law seeks to address. Less frequently perhaps, scholars refer to employment as an institution that distributes wealth and power in modern societies.⁸³ By intervening in the employment relation, then, we do not only seek to make workers and employers more equal: we also aim to promote a vision of social justice and fair distribution of resources both in the workplace and in society more broadly. Against this background, the second part of the book examines, first, the implications of theories of distributive justice for labour law. Distributive justice involves questions of how political, economic, and social institutions and laws should distribute burdens and benefits in society. Scholarly debates on distributive justice explore questions such as what is to be distributed (for instance opportunities or material resources), on the basis of what principles there should be redistribution (for instance different conceptions of equality or desert), and who should benefit from this redistribution (for instance individuals or groups).

⁸³ Hugh Collins, *Employment Law* (2nd edn, OUP 2010) 14.

A society's laws have significant effects on the distribution of resources. Perhaps the area of law that most obviously deals with redistribution of resources is tax law.⁸⁴ A state's tax system addresses how resources should be redistributed in order to promote principles of distributive justice. Contract law rules can also serve to redistribute resources.⁸⁵ In this volume, Guy Davidov considers the application of theories of distributive justice to labour law, and examines what interventions through labour legislation each of these theories support. He first outlines theories of distributive justice that are based on desert, namely on the responsibility of individuals as a basis for what treatment they should receive. On this view, each person's contribution or effort should form the basis for the resources that they should receive. Luck egalitarianism, in turn, insists that people should not suffer consequences because of their bad luck, and argues that distributive justice should address such issues. The chapter also presents theories of redistribution as addressing inequality, according to which redistribution should eliminate existing disadvantage. It considers what is to be redistributed according to the relevant theories, and explores redistribution as instrumental to equality of status. Having reviewed these different approaches, the chapter considers what labour laws each theory justifies and requires, including legislation on anti-discrimination, trade union and collective bargaining protection, unfair dismissal and minimum wage. Moreover, the chapter examines the implications of employing these theories in order to address unjust distribution between different groups of workers.

Like many contributors to this volume, Davidov takes a broad account of the scope of labour law, and considers individual and collective labour law, as well as anti-discrimination law as parts of it. Noah Zatz, on the other hand, presents and challenges the traditional accounts on the foundations of anti-discrimination law and labour law, and examines the insights that we gain from this exercise. He explains how the traditional narrative of labour law focuses on inequality of bargaining power in the labour market, and the principle that 'labour is not a commodity' as a way to address this. Employment discrimination law, on the other hand, focuses on employers who, because of bias, do not treat workers as market actors, and aims to purify market dynamics. Zatz considers the bilateral employer/employee relationship as the central focus of attention in both fields of law, and puts forward a more structural analysis. He suggests that the wrong that anti-discrimination law addresses is the arbitrary distribution of opportunities for work and income. This move brings employment discrimination law closer to labour law. At the same time, it brings insights to labour law by questioning its exclusive focus on market structures and highlighting relationships that are typically viewed as falling outside the labour market.

When is workers' treatment exploitative? It is to this question that the three chapters that follow turn. When considering exploitation, a natural starting point is the theory of Karl Marx. For Marx all workers are exploited in a capitalist system, because they do not have access to the means of production. On this account, they are exploited when they work more hours than it takes to make goods that they can buy with their earnings. This theory of exploitation does not examine distributive justice at a general, macro-level, but is concerned instead with unfair distribution of resources within the employment relationship. Yet some of the crucial insights

⁸⁴ See, for instance, David G Duff, 'Tax Policy and the Virtuous Sovereign', in Monica Bandhari (ed), *Philosophical Foundations of Tax Law* (OUP 2017). See also Gillian Lester, 'Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design' (2011) 64 *Tax Law Review* 313.

⁸⁵ Kronman (n 81).

from Marx involve the role of structures in creating conditions of exploitation. Political philosophy has examined the concept of exploitation both by developing Marx's account and by departing from it. Some philosophers examine interpersonal exploitation, disconnected from background structures, while others focus attention on structural conditions that make workers' exploitation possible.⁸⁶

The contributions to this volume give primary attention to structures of exploitation. Jonathan Wolff examines the concept's structure and normative implications. He addresses the puzzle that often the only thing that is worse than being exploited is not being exploited: for many people, the alternative to having low wages and bad working conditions is having no wages at all. How then shall we determine if people are exploited if they are better off than they would be had they not been exploited? To determine this, we need to consider background norms. Wolff broadens the Marxist inquiry from the specifics of the structural problems of the employment relation, to the background structures that give rise to the particular exploitative relations. These broader structures, he argues, will have a key role to play in our attempt to understand if the particular relation is exploitative. Having explained that exploitation has two aspects – first the treatment of the worker, and second the background structures that create vulnerability – he suggests that it can be addressed in two ways. We can tackle exploitation either by regulating working conditions through offering a minimum wage and other such protections, or, more ambitiously, by changing the background structures that create vulnerability through, for example, educating groups of people who are in a position of vulnerability. On this latter issue of structural injustice, he emphasises that even when background structures are legitimate, this does not mean that there can be no limits to the powers that flow from them.

In the chapter that follows, Virginia Mantouvalou continues this attention to the role of structures, but focuses on the role of the law in particular as an institution that creates special vulnerability to exploitation. She questions the current accounts of exploitation that we find in law and policy, which emphasise extreme violations of labour rights, pay special attention to interpersonal relations, and focus on criminalisation as a legal response. Building on Marxian insights, she examines structural accounts of vulnerability to exploitation, and considers particularly the role of the law in creating special vulnerability, which is exploited by violating workers' rights or other human rights. Mantouvalou suggests that against this background, it is not only individual employers who have to be held accountable for exploitation, but also the state itself for its role in creating these unjust structures. She suggests that human rights law, with its focus on state conduct, can expose some forms of exploitation, and labour law can address the problem by incorporating rules that remove workers' structural vulnerability, and protect them from oppressive subordination.

In the final chapter in this part, Horacio Spector sets out to define the meaning of the concept of fair compensation, which is implied in provisions such as Article 7 of the International Covenant on Economic, Social and Cultural Rights, by reference to the idea of exploitation. Article 7 of the Covenant provides, *inter alia*, that everyone has a right to fair and just working conditions, including fair wages that secure a decent living standard. To examine what is fair in this context, he discusses different accounts of exploitation, before putting forward a risk theory of exploitation grounded in contemporary economic theory. He suggests that labour

⁸⁶ See literature on exploitation above (n 4).

exploitation is a structural feature of modern capitalism because of the allocation of risks in a market economy. In this context he places attention on workers who, against a backdrop of unemployment, are risk averse for the reason that they risk significant losses in case of non-transaction. Capitalists, on the other hand, have many ways in which they can spread the risk by investing in stocks or bonds, for instance. The workers' inequality of power, understood in this way, leads them to accept wages that they would not accept if the risks were distributed equally. Capitalism gives the opportunity to exploit systematically workers' aversion to risk. Spector suggests that the right to a fair wage should be understood as a right to address the risk imbalance that is inherent in capitalism. The same can be said about the role of labour law as a whole: it can be seen as a mechanism that addresses the imbalance of risks.

7. Part III: Workplace Democracy and Self-Determination

The third theme of the book concerns the support given by labour law for democratic values. That support might be directed towards the workplace or towards national and international political activities. In the workplace, the values of democracy might explain and justify the need for representation of the workforce at key decision-making bodies of the organisation. The workers should have a voice in influencing all the different decisions that might affect them from the obvious claims to be interested in wages and other terms of employment to the more remote strategic goals and ethical conduct of the business. Outside the immediate workplace, workers may contribute to the functioning of democratic government by their formation of political parties and other associations that represent the interests of workers or particular groups of workers. It is also possible to observe at the transnational and international level how federated trade unions, as associations of workers' organisations, can join councils, committees, and other consultative mechanisms to help to set the agendas and guide the outcomes of their deliberations about international labour standards.

In most countries, the principal mechanism through which workers represent their interests in the workplace is collective bargaining between their employer and a recognised trade union. There may also be works councils that provide a forum for discussion of a broad range of issues. Is collective bargaining or a works council a form of democratic representation? It is clear that these institutions differ from the political process in government that relies on candidates belonging to political parties standing for election for office and power. By seeking recognition for the purpose of collective bargaining, a trade union is not seeking to replace management but merely to compel it to reach decisions that respect and protect the interests of the workforce. Inside trade unions themselves, there is likely to be competition for office between different personalities and factions, though these rival groups are unlikely to share the organisational and membership qualities of political parties. When we speak of workplace democracy, therefore, we are not making an analogy with the political process but rather drawing on the underlying ideas of democratic government that include respect, equality, and self-determination. The emphasis must be on the idea that individual workers should have a say in how their business is run and the objectives it pursues without taking over the governance of the organisation.

Although this idea of workers having a voice and the possibility of participation in decision-making seems a rather loose demand that might be easily satisfied by some kind of consultation mechanism in the workplace, many employers resist even this amount of worker participation. Claims for worker voice are seen as antithetical to the claims of management to govern the workplace. Management insists that its power to govern is conferred by the employer's ownership of the means of production. Thus claims for voice at work must address the tension between the employer's reliance on the entitlements of private ownership and the workers' claim, based upon values of respect, equality, and self-determination, to have a voice in the management of the business.

Given the reluctance of most employers to concede voluntarily the need for employees to be able to express their views about the conduct of management, effective employee voice is likely to depend upon the power of workers to compel the employer to listen to their concerns. Labour law may be able to induce employers to sit and listen to representatives of the workforce in collective bargaining and works councils, but it is much harder for the law to compel a recalcitrant employer to listen and act upon the concerns of the workforce. In order to have an effective voice within the employing organisation, workers generally have to use their economic power as well as their legal rights. Their ultimate economic power is to take industrial action and refuse to work until the employer listens and accedes to some of their demands.

Many employers take the further view that such strike action is itself morally wrong. Industrial action can be presented as interfering with the entitlements attached to private ownership of businesses or at least attempting to induce management to change direction. Trade unions are criticised by employers by interfering with their business and their contractual relations by inducing workers to go on strike. The common law accepted this point of view and decided that a union leader who led strike action was committing a tort. Legislation was needed to grant trade unions immunity from this tort. But is strike action morally wrong? Is there not a right to strike that competes with an employer's entitlements based on property rights?

Alan Bogg and Cynthia Estlund contribute to the collection by considering the moral basis and strength of the right to strike. Drawing on the perspective that labour law can be based on respect for human rights, they argue that the right to strike is a fundamental right resting upon three basic liberties: freedom from forced labour, freedom of association, and freedom of expression. In turn they explain that the importance of these civil liberties can be explained and justified by the republican ideas of freedom and contestatory citizenship.⁸⁷ They then use those philosophical foundations to explore how the basic regulatory questions of a 'right to strike' have been addressed in Canada, the UK, and the US.

Turning to the relation between workers' organisations and politics in the government of the state, Martin O'Neill and Stuart White make the case for using associations like trade unions to help to insulate political structures against the influence of the wealthy. Associations of workers can act as conduits for information and lay the basis for political participation. They can also help to mobilise mass preferences in favour of social legislation that addresses such concerns as the precariousness of work and the need for benefits such as health care.⁸⁸ Labour

⁸⁷ Pettit (n 72).

⁸⁸ Lester (n 22).

law can help to stabilise and protect such associations, but there is clearly a role for the state to try to cement these alternative routes for political participation into the democratic processes.

8. Part IV: Social Inclusion

Our fourth theme examines the idea of social inclusion as a philosophical foundation for labour law and particular aspects of regulation of employment. This theme of social inclusion is part of the concern to identify how and in what ways distributive justice is an aim of labour law. It explores the ways in which labour law may be regarded as one of numerous institutions and legal measures in the modern state that aim to distribute power and wealth fairly. That task has already been addressed to some extent within the theme of exploitation, though not all conceptions of exploitation are concerned with distributive questions and some address rather different issues such as those concerned with human rights in exploitative relationships. The theme of social inclusion is primarily concerned with distributive issues, though it concerns not so much the distribution of wealth as the distribution of other valuable interests including the distribution of good jobs.

It was earlier said that within political theory, distributive aims are often described by reference to various conceptions of equality. For instance, the distributive aim in a theory of justice might be described as equal treatment for everyone, or equal opportunities for all, or equality of initial resources, or equality of welfare or well-being, or some other standard of equality. A more complex approach to distributive justice, though one still influenced by ideas of equality, is to permit some inequalities in wealth and power to exist in society, but only to the extent that these disparities function ultimately to the benefit of everyone. Rawls provides an example of that kind of flexible egalitarian principle in his proposed second principle of justice, which as well as requiring equality of opportunity, states that: social and economic inequalities should be arranged so that they are to the greatest benefit of the least advantaged.⁸⁹ Such a principle of justice might prove interesting if it were used to assess the justice of arrangements within productive organisations. According to that ‘maximin’ principle, we might ask whether the disparities of power and income within an organisation accrue to the greatest advantage of the lowest paid workers at the bottom of the hierarchy of the organisation. Assuming that this principle could fairly be applied beyond the ‘basic structure’, it seems unlikely that many large organisations could meet that demanding principle of justice.

In contrast to ideas of distributive justice based on different conceptions of equality, a recent strand in political theory puts forward the idea of social inclusion as a possible distributive aim for theories of justice. This idea is open to a number of interpretations, but it is reasonably clear that it does not use the scales of justice provided by some measure or conception of equality, because its objective is defined in terms of minimum standards rather than equal standards. Furthermore, the ambition of the idea of social inclusion seems to be broader, because it is not solely aimed at a fair distribution of power and wealth, but is also concerned with securing social order and acceptance of the legitimacy of government and the law.

⁸⁹ John Rawls, *A Theory of Justice* (OUP 1972).

Great disparities of wealth and power tend to undermine social cohesion. If a society contains a substantial group of people who lack material necessities, who cannot obtain economic security or improve their lot in life, and who lack any effective political representation, it risks social disorder and even revolution. The aim of social inclusion is to help people feel more integrated into society and to feel that it is worth their while to uphold the institutions of their society including its government and laws. Measures to address social exclusion may include material support by the state, but in accordance with a goal of social inclusion governments are more likely to prioritise the creation of decent jobs open to all, the opportunity to participate in political institutions and government, and effective policies to enable everyone to be able to benefit from the educational and cultural dimensions of society. The aim of social inclusion prioritises those goals concerning work, education, participation in social institutions, over narrower attempts to relieve poverty and to make people more materially equal. One way to present the aim of social inclusion is to present a list of minimum opportunities and outcomes that must be accessible to every person such as education to their full potential, decent work according to their capabilities, and real opportunities to have a voice in matters that affect them.

Usually the first task for governments who are aiming to increase social inclusion is to try to make sure that everyone has a paid job. Having a job not only meets many material needs such as food and shelter, but it also integrates the worker into an organisation or a network through which the worker can establish social relationships, self-esteem, and a sense of belonging to the group and society as a whole. The most obvious relevance to labour law of this goal of social inclusion is that it suggests that priority should be given to the distributive goal of getting everyone a paid job no matter what disadvantages they may suffer from. Not only do laws against discrimination match into that distributive goal, but also other legal measures such as family-friendly provisions that permit parents and carers to arrange their working time around their other pressing responsibilities. The priority to be attached to this goal of maximising access to paid work by reason of maximising social inclusion is challenged, however, at least in part, by contributions to this volume.

In her contribution to this volume, Joanne Conaghan questions the central importance attached to paid work in the thinking of labour lawyers. Adopting a critical historical perspective, she points out how the division between home and workplace arose during the industrial revolution. This division was used, she argues, to justify a patriarchal society with the subordination of women in the home where they performed unpaid work, whereas men were treated as free and equal participants in a labour market that offered paid work. Although paid work was thus a gendered construct, she welcomes to some extent the opening up of opportunities for women in recent decades, whilst recognising that caring responsibilities are for the most part still not shared equally between men and women, so there remains a powerful exclusionary effect for women. More fundamentally, however, she challenges the idea that paid work for everyone should be the measure of success in the policy of social inclusion on the ground that it is a historically constructed male norm. It is possible that economic developments such as teleworking may break down the separation between work and home, which in turn may facilitate a reintegration of work and social reproduction.

As that discussion of paid work as a boundary of labour law's protections illustrates, whilst a goal of labour law or at least some parts of labour law may include social inclusion, it is also true that labour law inevitably draws lines around the scope of application of employment rights. Laws that set minimum wages, maximum hours, and health and safety rules do not apply

to every kind of work that is performed. In the gig economy, for instance, where people agree to perform particular tasks on a casual basis, the normal conditions for the application of employment rights may not be satisfied for various reasons, such as the absence of a contract with the putative employer. Alternatively, if there is a contract, it may be the wrong kind of contract such as a contract for services, or the short duration of the engagement may exclude the application of relevant legislation, or some other condition for the entitlement may not be satisfied. Unfortunately, in most cases, the workers who are excluded from many of the protections that workers in good jobs enjoy are precisely those workers who tend to be excluded in a more general sense from the opportunities provided by society. Einat Albin illustrates this point by reference to domestic workers. She is also critical of the narrowness of the goal of social inclusion. Using the example of sex workers, Albin argues that current definitions of the policy of social inclusion would emphasise the importance of making such work legitimate and paid and regulated according to the standards applicable to other kinds of jobs. She argues that such a conception of the goal of social inclusion overlooks the significance of the way in which sex workers are degraded by their work. She advocates therefore a broader conception of social inclusion that also prioritises humanitarian concerns.

Another group who are typically excluded from labour law because they do not perform paid work are volunteer workers. In most legal systems, the absence of payment will have the legal consequence that they are excluded from employment protective rules such as the minimum wage and also legal rights to become a member of a trade union and to organise and bargain collectively. As Sabine Tsuruda points out in her contribution to this volume, volunteers may nevertheless perform exactly the same range of tasks as regular paid employees and suffer from many of the problems that employees suffer in the workplace such as discrimination, harassment, abusive treatment by managers, and risks to health and safety. Tsuruda accepts that it is appropriate to exclude some volunteer work from employment protections, but only when that volunteering satisfies a condition that she describes as ‘merit inclusivity’, which means that it provides opportunities not available in the labour market for people to use their skills and abilities. For instance, interns working in many organisations as volunteers are functioning as free substitutes for paid labour, rather than being granted the opportunity to develop their skills and capabilities, in which case they should be entitled to the minimum wage because their work does not satisfy the criterion of ‘merit inclusivity’.

In the final contribution to this book, Mark Freedland tackles the question of how ideas of social inclusion can address the complex issues faced by migrant workers, who may be excluded by either employment law rules or immigration law rules or a complex interaction of both sets of rules.⁹⁰ Freedland argues that the policy of social inclusion applied as a goal for labour law can be expressed as including within its scope all personal work relations that merit worker-protective regulation and assigning classifications of different kinds of work relations that uphold worker-protective regulation in a proportionate way. He recognises the many different kinds of challenges presented to this aim by current kinds of precarious work relationships, not least zero-hours contracts and sham self-employment. Immigration law also tends to function to exclude workers, though in a way that can be justified by reference to a particular interpretation of the aim of social inclusion that treats its citizens as those who must be included, not others. This ‘us’ and ‘them’ mentality of populist immigration law,⁹¹ however,

⁹⁰ See further, Cathryn Costello and Mark Freedland (eds), *Migrants at Work* (OUP 2014).

⁹¹ Bridget Anderson, *Us and Them? – The Dangerous Politics of Immigration Control* (OUP 2013).

seems ultimately to run counter to the aim of other possible understandings of the goal of social inclusion, which might be linked more closely to the appeals to social solidarity that lay at the foundation of the Declaration of Philadelphia in 1944.⁹²

9. Conclusion

This brief introduction has mainly focussed on some of the challenges that the contributors to this volume have faced in exploring the relatively uncharted terrain of the philosophical foundations of labour law. We have explained how we hope that careful reflection about underlying moral and political principles and values can serve to provide firmer foundations and a clearer sense of direction for labour law. At a time when many appear to doubt the value of labour laws and workers' rights at all, we believe it is necessary to reassert that the values and principles that provide the foundations for a system of labour law are not those of a narrow special interest group, but rather embrace interpretations of key values such as freedom, autonomy, dignity, equal respect, democracy, and social justice. Exploitative labour conditions are simply incompatible with key values that most of us share. But more fundamentally, many of the contributions explain how even the basic building blocks of the division of labour such as contracts of employment must be engineered and regulated so that they do not interfere with those key values in a disproportionate way. We hope that readers of this volume will agree that labour law does need philosophical foundations and that elements of those foundations have been uncovered by the contributors.

⁹² Alain Supiot, *The Spirit of Philadelphia – Social Justice vs. the Total Market* (Verso 2012).