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LABOR LAW, THE LEFT, AND THE LURE OF THE MARKET

RICHARD MICHAEL FISCHL*

I'm not an economist, but sometimes I play one in the classroom. Case in point, for many years I began my Labor Law course with a section on labor economics and invariably introduced the material to the class with a Q&A along the following lines:

How many of you have ever looked for a job?

With the rarest of exceptions, every hand in the room would go up, and so I would proceed to ask about their job-seeking strategies, to what extent they succeeded, how long they took etc. In response, students described a variety of techniques, from resume spamming to knocking on doors to networking to calling in family ties. But no matter how desperate and difficult the reported search, over the years no one ever admitted to using the technique suggested by the question I always kept in waiting:

Did anyone ever try to land a job by offering to work for less than the employer's current employees?

Indeed, the query would typically prompt either stony silence or a ripple of nervous laughter, making my scripted follow-up irresistible:

Why not? Isn't that how markets work?

You can imagine the discussion that would ensue once they realized I was serious, as they would struggle to “explain the obvious” in the face of my increasingly skeptical replies: “I don't think it would send the right message to the employer about my skills and talents!” *Good point, you wouldn't want a potential employer to think that hiring you might help save labor costs.* “I thought my work was worth at least as much as

* Professor of Law, University of Connecticut; Visiting Professor, Yale Law School. Many thanks to Paul Secunda for organizing the symposium and inviting me to take part; to Ken Dau-Schmidt whose intriguing essay has provided the rest of us with a marvelous point of departure for discussion and argument; to my fellow participants for their own thoughtful and thought-provoking contributions; to Jim Atleson, David Howell, Karl Klare, Jeremy Paul, Kerry Rittich, Brishen Rogers, and Peter Siegelman for helpful and encouraging comments; and to the editors of *Marquette Law Review* for hosting the conference and herding the cats through to the published version.

the employer was paying his incumbent workforce.” *If that were true, then why were they working while you were out looking?* “That strategy might get me in the door, but I’d worry that once I started I’d be bitter about the pay and that might negatively affect my performance.” *How does the lack of work altogether make you feel?* “If I had a job, I wouldn’t want someone else to use that strategy to displace me.” *But would you really rather remain jobless just to honor the Golden Rule?* And so on.

The point of the extended Q&A, of course, was to frame the discussion of the labor economics materials we were about to explore: Labor markets just don’t seem to work the way other markets do, and we—meaning the very human participants in those errant markets—are the reason that’s the case. When I was on top of my game, I would keep careful track of the student responses and tease out what each might reveal about why it is that labor markets don’t follow the supposed rules of supply and demand. Widgets don’t worry about the “signaling” effects of their price, though people do; widgets don’t experience dignitary or material harms when their price goes down, but people might; widgets don’t care when fellow widgets draw a higher price, but people care a *lot*; if the price of widgets rises fewer will be sold, but an increase in the price of people may have the opposite effect; widgets don’t turn in a better performance if they are sold at higher prices, but—oddly enough—people may; and so on.

You could write a book about the many ways in which widget markets and labor markets differ, and Robert Solow did just that two decades ago, when his Royer lectures at Berkeley were published in *The Labor Market as a Social Institution*.¹ Solow’s principal theme is the imperial quality of price theory—the tenacious grip of what he refers to as “textbook economics” on the ways those in his field think and how it forces them to struggle mightily with longstanding but seemingly anomalous facts about labor markets, most notably the persistence of unemployment and the “sticky” quality of wage rates. Widgets would know *exactly* what to do if their current price left them lingering in the stockroom, but people—and sometimes very large numbers of people—can sit on the shelves a long time before any downward pressure on wages makes itself felt.

Perhaps people aren’t as smart as widgets, or—as Solow argues—perhaps they have more complex desiderata than those imagined in the textbooks. (As he wryly observes, “Persistent unemployment has been

1. ROBERT M. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* (1990).

a persistent problem for economic theory. It is obviously a problem for the persistently unemployed.”²) Solow’s basic argument is that social norms—foremost among them notions of fairness and reciprocity—do a better job of explaining such inconvenient facts than do the profession’s inveterate efforts “to find a believable story that can account for the facts with minimal damage to the structure of economic theory.”³

Though I’ve always suspected that Solow’s insights might have some purchase beyond the labor market setting—that there might be other markets that involve, well, people and can likewise be better understood if the social dimension is included in the calculus—price theory is a powerful analytical tool that accounts for a wide variety of phenomena. Economists in its thrall may thus feel they have good reason to be skeptical of claims, whatever the evidence and in whatever the setting, that “the rules are different here.”

Indeed, the resilience of orthodoxy continues to this day as those attempting to force the square peg of labor into the round hole of price theory struggle mightily to explain away empirical studies suggesting that an increase in the minimum wage may actually be associated with an increase in employment levels rather than the decline so confidently predicted by textbook economics.⁴ Most recently, they have taken up the cudgels for the New Personnel Economics (NPE), which endeavors to explain the workings of those pesky internal labor markets from an optimization and efficiency perspective—i.e., firms are on a relentless search for the most efficient personnel practices and those failing to identify and adopt them pay the price in the competitive market.⁵ Playing the role of Robert Solow are Paul Osterman and others who (here we go again) marshal a great deal of ethnographic and comparative evidence that is difficult to square with NPE (for example, the agonizingly slow diffusion of high-performance work systems and the considerable variety of personnel practices among similar and similarly successful firms) and argue once again that labor markets can be better understood as *social* institutions, where power relationships, hierarchies, politics, cultural and national diversity, intra- and inter-group dynamics and the

2. *Id.* at 28.

3. *Id.*

4. See, e.g., TITO BOERI & JAN VAN OURS, *THE ECONOMICS OF IMPERFECT LABOR MARKETS* 33, 38–44 (2008). In particular, see the discussion of the now-famous work on minimum-wage effects by David Card and Alan Krueger. *Id.* at 40–43.

5. See, e.g., Edward P. Lazear & Kathryn L. Shaw, *Personnel Economics: The Economist’s View of Human Resources*, 21 *J. ECON. PERSP.* 91 (2007).

like fairly overwhelm simplistic economic modeling.⁶ But this New Institutional Labor Economics—itsself an effort to revive an older tradition on which Solow drew heavily for his lectures—still finds itself struggling for purchase among those under the spell of price theory and resistant to considerable evidence that it just doesn't account very well for a large and central arena of human endeavor.

There is, naturally enough, a “third way”—the work associated with behavioral economics that likewise critiques the orthodox view in favor of ferreting out all manner of market “imperfections” that arise as a result of the fact that it's human beings rather than robots whose endeavors and interactions are at stake. Thus, a plethora of empirical studies confirms that people are not nearly as rational, as steadfast, or as monomaniacally self-interested as the imagined participants in idealized markets: their “[a]ctual judgments show systematic departures from models of unbiased forecasts”; their “actual decisions often violate the axioms of expected utility theory”; they “often take actions that they know to be in conflict with their own long-term interests”; and they “care, or act as if they care, about others” and are, as a result, “both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical theory.”⁷

One might be forgiven for thinking that such work simply “proves the obvious” about the human condition, but—judging from some of the reactions it has sparked—it is the adherents of neoclassical economics and not the behavioralist critics who are working with straw men. Indeed, I greatly admire the thoughtful scholarship associated with the behavioral approach, and it has provided the basis for important insights as well as promising policy analyses across a variety of settings. But when it comes to the world of work, I have the nagging sense that it reads the way I would have expected astronomy literature to read just before someone finally figured out that the earth was revolving around the sun rather than vice versa: There's so much explaining to do, so many things that don't quite make sense, so many places where the predictions and the data seem to be at odds, that you can't help but wonder whether there's a point at which those involved might finally begin to consider the possibility that there's a problem with the underlying model itself. (Enter Solow and Osterman, again and again and again.)

6. See, e.g., Paul Osterman, *The Contours of Institutional Labour Economics: Notes Toward a Revived Discipline*, 7 SOCIO-ECON. REV. 695 (2009).

7. Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477-79 (1998).

But if it's easy to see why folks trained in hammer deployment might have a tendency to see nails wherever they look, what I found myself thinking as I read my way through the essay that brings us together for this symposium is why labor law professors and especially those of a progressive bent might succumb to the same temptation. Since when has “address[ing] labor market failures”—in Professor Dau-Schmidt's phrasing, responding to the familiar market “imperfections” of “imperfect information, transaction costs, and public goods”⁸—become our calling's most important and promising argumentative strategy?

* * * * *

To be sure, I am in ready agreement with Dau-Schmidt that the US would be much the better for a genuine labor voice in both corporate and workplace governance, and in principle I would happily sign on to all of his specific law-reform proposals, including some version of co-determination (i.e., worker representation on corporate boards)⁹ and his detailed agenda for labor law reform:

1. institute a system of moderate but mandatory severance pay for discharges without good cause and a requirement of reasonable notice for unilateral changes in contract terms (let's call these the “employment security” proposals);¹⁰
2. require or encourage an Americanized version of European works councils while relaxing § 8(a)(2) of the National Labor Relations Act (NLRA)—the provision originally designed to outlaw company unions—in order to permit employer-sponsored employee representation plans, subject to enforceable guarantees of independence and representativeness (the “non-union employee representation” proposals);¹¹
3. enact the Employee Free Choice Act, including card check (enabling unions to avoid the cumbersome and employer-friendly election procedures of the NLRA); mandatory first-contract arbitration (since labor's bargaining power is severely curtailed under current law by the employer's right to permanently replace striking workers and by the limitations of secondary boycott law); and

8. Kenneth G. Dau-Schmidt, *Promoting Employee Voice in the American Economy: A Call for Comprehensive Reform*, 94 MARQ. L. REV. 765, 804 (2011); see also *id.* at 781-82.

9. *Id.* at 824-26.

10. *Id.* at 827.

11. *Id.* at 827-28

enhanced injunctive and monetary remedies for employer unfair labor practices (such as firing union organizers) that match the remedies available to employers against unions (the “EFCA” proposals);¹²

4. authorize union solicitation by “outside” organizers under the same rules that govern solicitation by fellow employees (in essence, reasonable access in non-working areas during lunch and work breaks); provide incumbent employees with access to low-cost employer owned communications systems (e.g., email) for organizing activities; and guarantee a right of equal access for unions and their supporters when an employer campaigns against union representation and/or opens its property to other forms of solicitation (the “access” proposals);¹³
5. relax the doctrine of exclusive representation to require employers to bargain with unions representing less than a majority of employees, whether or not there is a majority union already in place (the “minority union” proposal).¹⁴

Though I’d be eager to see the details, in principle you can sign me up for each and every one of these. But I worry that there is a disconnect between this ambitious legislative agenda and Dau-Schmidt’s larger goal of providing enhanced employee voice in American worklife and that this disconnect may undermine any asserted “appeal to employers” making the agenda “politically feasible” in the current climate.¹⁵

For one thing, only two of the proposals—i.e., codetermination (on the corporate governance side) and the works council-style and employer-sponsored representation plans (on the workplace governance side)—directly address the question of employee voice in the contemporary workplace. To be sure, employees with legally protected job security are a lot more likely to speak up than those who are employed at will, and unions strengthened by EFCA, enhanced access, and the right to represent less than a majority of a firm’s employees would certainly provide more employee voice than is available under current law. But the latter proposals raise a multitude of non-voice issues that—to employers and their many friends in Congress anyway—are likely to provide reasons for strenuous opposition to enactment without regard to

12. *Id.* at 828–29.

13. *Id.* at 829–30.

14. *Id.* at 830–31.

15. *Id.* at 769.

the merits of the voice issue. To put it another way, they might not want to buy the dog no matter how they feel about the tail.

Perhaps more striking, there is a notable absence of proposals designed to provide employee voice in the context of *today's* workplace, where outsourcing to labor contractors and supply chains is increasingly common and presents some of the most daunting challenges for contemporary workplace regulation, whatever its aim.¹⁶ You can provide the employees of a cleaning services firm or an auto parts supplier with all the voice in the world vis-à-vis their proximate employers, but if the policies and practices of a user firm are a principal source of their discontent—or, for that matter, if the user firm would prefer not to deal with contractors or suppliers that promote employee voice, with or without union representation—then it's not clear how much good those rights would do them. Developing plausible and creative ways to enforce the promise of labor law in the context of this brave new world of outsourced work is going to have to be an essential dimension of any effort to enlarge employee voice going forward.

I worry too that the lack of fit between the stated goal of “promoting employee voice” and the specific proposals on the table risks making the effort here look like a *post hoc* rationalization for organized labor's legislative wish-list from the past two decades rather than the fresh view from a new perspective that Dau-Schmidt intends. Indeed, with the exception of the card check provision of EFCA—and more about that in a moment—these proposals have been around in various forms for a long time and the chances for enactment may not have improved with age.

Something very much like the employment security proposal was offered by Paul Weiler two decades ago in *Governing the Workplace*, when the anti-“at will” movement seemed to have legs and a modified Montana approach—i.e., a mandatory “just cause” rule for private employment enforced by a modest administrative compensation scheme for wrongful discharges—seemed a plausible goal.¹⁷ But for a host of reasons, the anti-“at will” movement lost its legs and indeed is arguably on the verge of being unceremoniously interred by the curiously retro provisions of the ALI's Restatement of Employment.¹⁸

16. See, e.g., Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (2010) (analyzing strategies for enforcing minimum wage laws against user firms of outsourced labor).

17. PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 94–104 (1990).

18. See Matthew W. Finkin et al., *Working Group on Chapter 2 of the Proposed Restatement of Employment Law: Employment Contracts: Termination*, 13 EMP. RTS. & EMP.

The non-union representation proposals were under active consideration at the dawn of the Clinton Administration, which produced the Dunlop Report but got nowhere against an onslaught of argument that works councils and other forms of non-union employee representation were (a) Euro-socialistic and (b) merely a foothold for union organization. Sad to say, there is little reason to think the current polity would be more receptive—especially if the package includes provisions (such as the access proposals) that are clearly and unapologetically designed to do exactly what the earlier opponents feared, i.e., gain a more secure foothold for union organizing.

As for card check—the one relative newcomer to the list—its prospects looked surprisingly promising as recently as two years ago, with the newly elected President and majorities in both houses of Congress voicing support. But the moment passed, the bill didn't, and the prospects for enactment in anything like the current political climate are vanishingly small.

On the good news side, it would not surprise me to see some or all of the access and minority union proposals emerge as law from the Obama NLRB, a reminder—in even our darkest moments, when we worry that Ralph Nader might be right after all—that the choice between the two major parties does matter, and matter a lot, to some fairly important things in the world of law.¹⁹ Such changes would likely be protected for the next while by presidential veto—and by the fact that even a Tea Party Congress is not likely to de-fund the NLRB once they figure out that §§ 8(b)(4) and 8(b)(7) are part of the NLRA, though it is great fun to imagine a world in which they took their minimalist government rhetoric seriously and decided to let both secondary boycotts and recognitional picketing out of the box. At all events, accomplishments via NLRB decisions, to whatever extent they materialize, are highly likely in even the medium term to become part of the ping-pong law that successive Republican and Democratic Boards reverse and reverse again as majorities shift with election returns, not a particularly promising platform from which to herald a new era of employee voice.

POL'Y J. 93 (2009) (critiquing job security provisions of the proposed restatement of private-sector employment law for embracing a far more robust version of the employment-at-will rule than is justified by the case law).

19. Indeed, between the time I originally prepared these remarks and their submission for publication, the newly constituted NLRB issued a decision suggesting likely support for reviving the long-time agency position—recently called into question by a Bush Board decision and several courts of appeals—that a firm can't ban union solicitation efforts by non-employee organizers if it opens its property to other forms of solicitation. *See Roundy's Inc.*, 356 N.L.R.B., slip op. No. 27, at 6 (Nov. 12, 2010).

* * * * *

If the prospects for enactment have not improved with time, might they improve with an effort to promote them as a package reconfigured in the name of employee voice? Dau-Schmidt makes a promising move on this front by tying together issues of corporate and workplace governance, and there's a lot to like in the notion of promoting a worker-shareholder alliance to monitor managerial overreaching and a worker-management alliance to resist the predations of capital markets obsessed with short-term gains. Indeed, the consequences of the latter are the stuff of media attention and popular culture, and a broad-scale governance reform effort featuring a common theme of "look, Ma, no employee voice" offers intriguing possibilities for strategic linkage. But—as the opening section of my essay suggests—I'm less convinced by the idea of pitching worker voice as a remedy for "market failures and imperfections," a central argument in the paper presented here.

The basic idea, I gather, is that the employers to whom Dau-Schmidt wishes to appeal—together with their supporters in public officialdom and policy circles—believe in the virtues of competitive markets and oppose most regulatory interventions on the basis of those beliefs. Thus, if we are able to convince this audience that imperfections and failures are undermining the operation of the labor market, then we have strengthened the case for an intervention designed to set things right.

On reflection, I guess I'm not surprised that those of us trained as lawyers might find this a compelling rhetorical strategy since it's the one we use all the time with judges: *Your Honor, you may think you oppose X result but in fact you are compelled by your acceptance of principle or rule or case Y to accept it.* Judges speak in the language of logical entailment and so they always *say* they are reaching X result—no matter how distasteful they may find it "personally" or how certain they would be to vote against it "if I were a Member of Congress"—because principle or rule or case Y compels it and is already the law. Entire forests have been sacrificed in the debate over whether and to what extent what judges *say* they are doing and what they are *actually* doing are one and the same, but there is little reason to assume that employers or their supporters work the way judges say they do and a lot of reasons to assume they don't.

Simply put, I think employers—and their organizational and elected representatives—are far more likely to base their reaction to a particular law reform agenda on whether they think that agenda will serve their material interests than on whether its constituent proposals are somehow entailed by the grander principles they are perfectly willing to cast aside when need be. Thus, I seriously doubt we're ever going to convince most American employers that enhancing employee voice—let alone enhancing it through the mechanism of union representation—will be good for *them*. Indeed, they'll be right about their self-interest in an important way, because whatever the virtues of union representation in connection with the holy trinity of “imperfect information, transaction costs, and the provision of public goods,” the fact remains that the union wage effect derives in no small measure from a reduction in firm profitability (there goes that worker-shareholder alliance) and that the union's role in workplace governance necessarily means a reduction in the power and discretion of those running the day-to-day operations of the firm (and there goes that worker-management alliance).

So why do we persist in pursuing such argumentative strategies? I don't doubt for a moment that Dau-Schmidt and others in our field do so because they hope and believe those strategies may work, and—particularly with the imprimatur of a highly and rightly respected labor law scholar—perhaps they will indeed find some purchase in American policy discourse. I have much the same reaction to Kathy Stone's ingenious effort to hold employers to their part of the “new psychological contract,” accepting “the boundaryless workplace” (i.e., the decline of long-term employment) as a given but arguing that employers should make good on promises of training and mobility deployed to persuade their workers that there is life after job security.²⁰ And maybe we *can* convince employers that their professed commitment to market ordering requires them to accept a greater measure of employee voice or that their professed commitment to boundarylessness requires them to provide their workers with greater skills-development and networking opportunities—or, in the latter case, at the very least to stop enforcing all those decidedly demobilizing non-compete agreements. But once again I am dubious about the efficacy of such strategies and worry that those we would persuade will gladly accept our apparent embrace of their ideas (like the primacy of market ordering or the inevitability of boundarylessness) while rejecting the reform proposals offered in their name

20. KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 127-56 (2004).

without the slightest trace of irony—a devil’s bargain, to be sure, only without any hint of a quid pro quo.

I worry all the more that in making these arguments we are reinforcing ideas we should be challenging and that we are seducing ourselves rather more than we are our intended audience. Market talk has to a remarkable degree become a *lingua franca* of the contemporary legal academy, and it’s increasingly easy to believe that law reform proposals just won’t be taken seriously by serious people unless they can be defended in the rhetoric of economic analysis, as if we must genuflect at the altar of competitive markets before we may petition for the redress of grievances born of all too human failures and imperfections.

Indeed, I see a powerful intuitive appeal to such arguments born of our training and habits of mind as legal professionals. In a nutshell, their economic cast gives them an apparent rigor we can no longer derive from either doctrinal analysis (after the indeterminacy critique) or normative engagement (after the decline of grand narratives), and rigorous entailment (rather than contestable choice) is the holy grail of legal argument. Moreover, there is a deep and abiding resonance between contemporary legal consciousness (i.e., an understanding of the legal universe framed by an atomistic common law of contract, tort, and property where statutory interventions are exceptionalized) and economic thinking (a world of perfect markets where interventions are justified by particular market failures)—a resonance that may explain the appeal of the latter to those of us who have drunk the water of the former, a link I am exploring at greater length in a work-in-progress.²¹ And finally there is the transgressive thrill of using “the master’s tools” against him—of “flipping” the usual entailments of economic orthodoxy and proving again and again that a commitment to market ordering entails this or that progressive intervention.

Now I may well be succumbing here to some habits of thinking of my own, in this case those born of a pre-Vatican II Catholic upbringing: Anything anywhere near as fun as economic analysis—particularly in the service of counter-intuitive ends like promoting worker voice—simply *must* be a sin. Yet as the Q&A with which the essay began suggests, textbook economics may obscure more than it reveals about the operation of labor markets. Understanding the workplace and the labor market as *social* institutions—and forthrightly pursuing governance reform in the name of social values such as democratic and humane or-

21. Richard Michael Fischl, *A Common Law for Labor Relations (Redux)* (forthcoming 2011).

dering—seems to me a more promising starting point than casting our lot with the supposed laws of supply and demand.