

Rights, Minimal Terms, and Solidarity: A Comment

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Labor-law theory is enjoying a kind of intellectual rebirth. Academic lawyers are exploring the underlying premises of contemporary labor legislation, its actual effects, and the possibility of using alternative premises to develop new ways to order labor-management relations.¹

Professor Fried's paper² is a valuable contribution to this continuing enterprise. It points out an important weakness in recent efforts to justify returning to a common law system of labor law,³ and it contains a useful analysis of the goals of labor law and the functions of the Wagner Act. Moreover, Fried's basic proposal—a market system supplemented with minimal terms—raises interesting issues.

In this comment, I use Fried's analysis as the basis for a general discussion of labor-law theory. Two aspects of Fried's approach are of special interest. The first is his identification of the various goals of labor law.⁴ The second is his proposal to replace the current system with a market arrangement supplemented by government imposition of minimal terms.⁵ I conclude that both

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¹ See, e.g., Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983); Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984). Some theoretical issues are also explored in BERNARD D. MELTZER, *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* (2d ed. 1977). I emphasize that I am referring here to labor-law theory, as distinguished from the more applied, but still very valuable, work of traditional labor-law scholars.

² Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984).

³ Compare *id.* at 1015-17 with Epstein, *supra* note 1, at 1357-63.

⁴ See Fried, *supra* note 2, at 1020-23.

⁵ See *id.* at 1036-37.

discussions are, for substantially the same reason, incomplete: they fail to develop or rely on a coherent and general theory of how labor-management relations should be structured. Because of Fried's failure to generate such a theory, his analysis and prescription are vulnerable to two familiar critiques. The first critique is based upon a presumption in favor of private ordering and is thus suspicious of government regulation of agreements voluntarily entered into by contracting parties.⁶ The second critique, in contrast to the first, stresses the dangers of market ordering in connection with labor-management relations.⁷

Fried is correct, however, in pointing to the need for a general theory with which to evaluate labor-management relations. Hence the incompleteness of his own approach and, even more, of the usual discussions of labor law found in law reviews in the last few decades. And while the general theories we now have are vulnerable at important points, it is possible to outline the inquiries that ought to be made by those interested in labor-law theory. In the final part of this comment, I will venture some remarks about the relevant inquiries.

I do not propose in this brief essay to reach anything like a final judgment on the various forms of government intervention in the labor-relations area. Indeed, one of my main points is that such a judgment requires resolution of exceptionally intricate questions, often ignored in legal literature, of both theory and fact. In these circumstances, the first task is to outline the structure of the relevant arguments and to suggest some routes for future study. In performing that task, I hope to expose weaknesses not only in Fried's proposal, but also in recent efforts to justify returning to a market-centered understanding of labor law.

I. THE NEED FOR A GENERAL CONCEPTION OF LABOR LAW

Fried begins his discussion by identifying the goals that labor law should seek to promote and the rights that it should attempt to protect. Fried refers to a number of such goals and rights: freedom of association, provision of a social minimum, redistribution of resources, industrial democracy and dignity, industrial peace, and efficiency.⁸

The problem with Fried's catalogue, as with all such cata-

⁶ See *infra* notes 20-25 and accompanying text.

⁷ See *infra* notes 31-38 and accompanying text.

⁸ See Fried, *supra* note 2, at 1020-21.

logues, is that it is of limited usefulness unless one has an underlying conception that establishes (1) why the particular goals identified should be treated as "goods" and—more important for present purposes—(2) how to choose among them when they cannot all be simultaneously obtained. Many would agree that all or most of Fried's various goals are goods,⁹ at least if they can be obtained without making it harder to get competing goods. But it is difficult to evaluate particular goals without a theory that explains why certain ends are desirable and distinguishes between those goals that should be pursued and those that should not.

Moreover, the interesting and difficult issues have to do with questions of choice. For example, there is no doubt that employees would be willing to give up something in the way of control of the workplace for a lot in the way of salary. Should their choices be respected? A market system, we have been told,¹⁰ will lead to higher salaries, but also to less protection from arbitrary discharges than many reformers would tolerate. Should the market outcome be permitted? To resolve such questions, it is necessary to develop a general theory.

Several such theories are available. For example, classically liberal, entitlement-based approaches¹¹ would treat Fried's goals as goods only if, and to the extent that, private bargaining would produce them. Individual choices—always, to the classical liberals, defined by reference to the current set of preferences and the current distribution of entitlements and incomes—should be respected. This prescription is based on a principle of autonomy: freedom of contract is one of a set of private entitlements and thus is to be valued as an end in itself. Economics provides an alternative theory, one based on the criterion of private willingness to pay. The basic position—when the approach takes normative form—is that the legal framework ought to be structured to mimic market outcomes, thus maximizing "wealth." Many who accept this approach would be substantially in accord with the classical liberals about means, though for very different ends and, perhaps, with occasionally different prescriptions for action.¹² Those influenced by Marx-

* Some, however, would deny that these goods are in fact goods in the abstract and would contend that they should be assumed to be desirable only if they are generated by the market.

¹⁰ See Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 974-76 (1984).

¹¹ See, e.g., Epstein, *supra* note 1.

¹² The classical-liberal position is based on a conception of private entitlement, not on a desire to promote aggregate economic welfare. Under this approach, if a system based on

ist and associated critiques of the market also have a theory by which to decide the difficult cases. In their view, the existing distribution of income and entitlements, and the existing set of preferences, are hardly sacrosanct. The task of employment law is to generate a system in which workers engage in self-determination instead of a struggle for increased wages where the critical entitlements are vested in owners of capital.¹³ This objective, sometimes captured in the notion of "industrial democracy," points toward a system in which workers participate in and vote on the most important issues associated with the conditions of their employment and the responsibilities of their jobs.

Fried rejects the classical liberal theory.¹⁴ He describes, but does not really criticize, the theories of those influenced by Marxist critiques,¹⁵ and he ignores the law-and-economics approach. I am not sure that he has an organizing theory of his own.¹⁶ For that reason, his identification of various goals and rights is an incomplete standpoint from which to evaluate current labor law or to make affirmative proposals. One might go further and suggest that any such identification will be inadequate unless it is backed by a general method to establish what things count as "goods" in labor law and how legislators and administrators ought to choose among competing goods when they cannot be achieved simultaneously. I will return to these questions shortly.

II. MINIMAL TERMS AND VALUES IN LABOR LAW

The affirmative part of Fried's paper is an attempt to explain how the various goals of labor law might best be achieved. Fried urges a free-market solution accompanied by the ad hoc imposition of specific minimal terms where the market fails to achieve the rel-

entitlements promotes "efficiency," that is a fortunate coincidence, but it is not the motivating force behind the system.

It is true, however, that there will be a substantial overlap between outcomes based on principles of private right and outcomes based on the willingness-to-pay criterion. For a discussion of this point, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1233-35 (1982).

¹³ See, e.g., Klare, *supra* note 1, at 338-39 (lawmaking should be linked to the "struggle to make the workplace a realm of free self-activity and expression"); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 627-33 (1983) (discussing the inadequacy of ad hoc corrections to problems of unequal bargaining power and economic duress and suggesting the need for "broader institutional restructuring of the economy").

¹⁴ See Fried, *supra* note 2, at 1015-17.

¹⁵ *Id.* at 1013-15.

¹⁶ Fried does refer to an underlying conception of liberty as a basis for his approach. See *id.* at 1019-20. But he does not explain or defend that conception in any detail.

evant ends.¹⁷ This is an intriguing proposal. Especially interesting is Fried's suggestion that employment law is not in any relevant respect different from the law of products liability, housing, and so forth—areas that are now controlled by a system of government interventions not designed to displace the market completely but instead to supplement it where it fails.¹⁸

The proposal is vulnerable, however, on several fronts. Here too its vulnerabilities result from the absence of a theory from which to order and evaluate the various ends that an employment-law system is supposed to achieve. The consequence is that the proposal is susceptible to critiques from both the right and the left. The critiques raise large issues at both the theoretical and empirical levels. This fact should hardly be surprising. Labor law is the area in which the supporters and critics of market ordering have done their fiercest battling during the past century. One of the oddities of legal scholarship since the passage of the Wagner Act is that this battle has largely been ignored in the legal literature,¹⁹ but it is not difficult to show that the controversy has generated questions and arguments with obvious application to labor law generally and to Fried's proposal in particular.

A. The Critique from Regulatory Failure

There is a large and constantly growing literature, most of it coming from those interested in the intersection of law and economics, purporting to show (and sometimes showing) that imposition of what Fried calls "minimal terms" may hurt nearly everyone, including those it is designed to help.²⁰ The question is, in both theory and practice, a complicated one,²¹ and ritual recitals of the inevitable "failure" of government intervention oversimplify a complicated problem. Nevertheless, an argument for minimal terms must be prepared to meet the critique.

¹⁷ See *id.* at 1040.

¹⁸ See *id.* at 1019.

¹⁹ But see sources cited *supra* note 1.

²⁰ See, e.g., Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & Econ. 211 (1976); Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 J. POL. ECON. 1049 (1973).

²¹ See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Distribution Policy*, 80 YALE L.J. 1093 (1971); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976).

Some of the supposed examples of regulatory "failure" come from labor law itself. Minimum-wage legislation, it is sometimes said, has the effect of eliminating jobs for the poorest among us and of redistributing wealth to persons who have a comparatively weak claim to government assistance.²² Minimum-wage legislation does not, in this view, help laborers "as a class"; it redistributes wealth from one set of laborers to another, to the detriment of the least well-off and of the economy as a whole. Similarly, government protection against arbitrary discharges may result in less arbitrariness, but also lower salaries, than an unregulated market would produce and might in that sense be thought to hurt employees on balance.²³ The market will presumably achieve an allocation of opportunities that—always in light of the current distribution of wealth and the current set of preferences—will provide employees with what they want *ex ante*.²⁴ Protection from arbitrary discharges has its costs, and one needs a reason to disturb the market solution.²⁵ Fried offers no such reason. It is important, moreover, to recognize that in at least one respect a proposal for minimal terms goes much further than the Wagner Act. About twenty percent of the American work force is unionized—to many, a strikingly low figure.²⁶ But minimal terms would apply to all of the work force, thus reducing what is perhaps a healthy competition between the unionized and nonunionized sectors.

These considerations suggest that, in order to justify Fried's basic proposal, it is necessary to justify interference with market outcomes. At this point, it will be sufficient to outline some familiar possibilities.

The first route would be to look for market failures, economically defined. In the context of employee discharges, for example, it may be that an information failure justifies governmental intervention. Employees may be insufficiently aware of the magnitude

²² See, e.g., FINIS WELCH, *MINIMUM WAGES: ISSUES AND EVIDENCE* 1-2, 21-32 (1978).

²³ See Epstein, *supra* note 10, at 974-76.

²⁴ This is not to say that it is always desirable to approach problems of social choice from the *ex ante* perspective. Sometimes an *ex post* approach may reveal that individual choices work to make people worse off in the end. See Kelman, *Choice and Utility*, 1979 Wis. L. Rev. 769, 771-72. Perhaps the major tasks of labor-law theory are (1) to understand the meaning of "worse off" in this context and (2) to ascertain whether there are categories of people whose bargains systematically serve to make them "worse off" in the relevant sense. See *infra* notes 40-58 and accompanying text.

²⁵ This is not to suggest that there should be a presumption in favor of market ordering but only that a basis for evaluating market outcomes is needed.

²⁶ See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1771 (1983).

of the risk of discharge to make good bargains. They may be insufficiently aware of the incremental advantages of the contractual provision of procedural safeguards. They may not know of the existence of an "at will" rule. There are obstacles to such arguments from inadequate information, but at least they form a possible basis for intervention even if market outcomes are generally accepted.

A second route would invoke distributional goals. Regulatory intervention may in some circumstances redistribute wealth from one group to another. If one believes that redistribution from employers as a class to employees as a class is desirable—an instinct that often underlies labor law proposals²⁷—one may be inclined to favor such interventions as the minimum wage and protection against arbitrary discharges. The problem, of course, is that the desired redistribution may not occur. Employers and employees may adjust contractual terms in order to prevent redistribution, just as landlords may raise rents to compensate for an implied warranty of habitability. Mandatory minimal terms may end up redistributing wealth not from employer to employee but from one set of employees to another. The nature of these effects depends on the structure of the relevant market.²⁸

A final route would be paternalistic. It may be that in choosing (say) an increased salary over protection from arbitrary discharges, workers make decisions that they will (or should) come to regret. Of course, such arguments threaten the foundations of classical liberal principles of contractual freedom.²⁹ It is perhaps for that reason that the nature and value of paternalistic interventions into the marketplace remain one of the great unexplored areas of the law.³⁰ Nevertheless, there is little doubt that the drafters of the Wagner Act were skeptical, if only implicitly, about classical liberal principles in the context of employer-employee relations.

In short, a proposal for supplementing the market with minimal terms requires a theory to justify the government's intervention. Without such a theory, the proposal is vulnerable to the critique from regulatory failure. I have suggested some of the ways in which the critique might be met, but each requires a fairly elabo-

²⁷ See, e.g., Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1828-34 (1980).

²⁸ See sources cited *supra* note 20; *infra* text accompanying notes 40-50.

²⁹ See Kelman, *supra* note 24, at 782-87; Kennedy, *supra* note 21, at 624-49.

³⁰ There have been recent efforts to fill this gap. See Kennedy, *supra* note 21; Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

rate argument.

B. The Critique of the Market Solution

Fried spends little time justifying acceptance of market ordering in the field of labor relations. Indeed, he attempts not at all to meet the radical-left critique of labor-management relations in a system of freedom of contract. This critique should be a familiar one. A crude outline may suffice.

Market outcomes derive from a number of factors: the existing distribution of wealth (including, of course, the existing structure of entitlements), the existing allocation of "bargaining power"³¹ as between capital and labor, and the existing set of preferences for the various goods that an employer may offer an employee. Economists generally take all of these factors, which together form the basis for "willingness to pay" on the part of both labor and capital, as exogenous variables.³² But that approach, at least if used normatively, is highly controversial. Existing preferences, for example, are shaped by both public and private power.³³ In the view of many, such shaping of preferences inclines employees in a market economy to attempt to increase their wages instead of seeking (or having a chance) to obtain control of the workplace.³⁴ Under some conceptions, of course, such control captures the notion of freedom more fully than the notion of unhindered private bargaining.³⁵ Moreover, the existing distribution of wealth and entitlements need not always be taken as an exogenous variable. One might well be skeptical of outcomes that are based on existing distributions; Fried himself argues that the property rights that form the basis of classical liberal theory are not "natural," but only "conventional," and are therefore an unsuitable basis for a systematic theory of labor law.³⁶

³¹ I do not pause to deal with the ambiguity of this concept here.

³² See, e.g., Oi, *On the Economics of Industrial Safety*, 38 *LAW & CONTEMP. PROBS.* 669, 671-80 (1974); Viscusi, *Wealth Effects and Earnings Premiums for Job Hazards*, 60 *REV. ECON. & STATISTICS* 408, 409-10 (1978).

³³ See, e.g., CHARLES LINDBLOM, *POLITICS AND MARKETS* 45-51 (1977) (disagreeing with the position that an employee accepts a job "only if the proffered benefits are attractive" and discussing various ways in which the individual is "coerced" to accept, retain, or leave employment).

³⁴ See, e.g., Klare, *supra* note 1, at 318-25 (arguing that the Supreme Court's "narrow conception of the social relations of the workplace" in its interpretations of the Wagner Act made the Act a tool for union wage-bargaining but not for "radical restructuring of the workplace").

³⁵ See C. LINDBLOM, *supra* note 33, at 45-51.

³⁶ See Fried, *supra* note 2, at 1016.

Finally, the consequences of treating labor like other commodities may be quite dramatic. The basic point is nicely captured in Karl Polanyi's well-known (if controversial) description of the shift to "freedom of contract" in the workplace:

To separate labor from other activities of life and to subject it to the laws of the market was to annihilate all organic forms of existence and to replace them by a different type of organization, an atomistic and individualistic one.

Such a scheme of destruction was best served by the application of the principle of freedom of contract. In practice this meant that all noncontractual forms of organization such as kinship, neighborhood, profession, and creed were to be liquidated, since they claimed the allegiance of the individual and thus restrained his freedom. To represent this principle as one of noninterference, as economic liberals were wont to do, was merely the expression of an ingrained prejudice in favor of a definite kind of interference, namely, such as would destroy noncontractual relations between individuals and prevent their spontaneous re-formation.³⁷

In this respect, application of principles of contractual freedom to labor created two new sorts of relationship. The first is between workers and owners. In that relationship, workers may have a kind of subordinate status that affects all of their working and nonworking lives. The second is between workers and the products of their labor. One need not accept the Marxist critique of market ordering in order to recognize the existence of alienation and its consequences for the lives of workers.³⁸

Under these assumptions—even under considerably milder assumptions—Fried's suggestion that the area of labor-management relations is without "special characteristics"³⁹ appears quite odd. There *are* special characteristics to the labor market. An employee's working life—usually a substantial portion of his or her adult life—is spent in the workplace. The structure of the workplace creates a set of relationships and attitudes that serves as a dominant part of the life of every worker. Those relationships—between employee and employer and between employee

³⁷ KARL POLANYI, *THE GREAT TRANSFORMATION* 163 (1st paperbound ed. 1957).

³⁸ For Marx's own analysis, see KARL MARX, *CAPITAL* 81-96 (S. Moore & E. Aveling trans. 1906); cf. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 *YALE L.J.* 779, 799-800 (1918) (labor and capital are conflicting parties in the "free struggle for life").

³⁹ Fried, *supra* note 2, at 1034-37.

and the products of labor—must be a primary consideration in efforts to develop a sound theory of labor law.

These are grounds on which Fried chooses not to do battle, and I think this weakens his basic proposal. He gives no systematic argument for the conclusion that market outcomes (1) should be preferred as an intrinsic or presumptive matter or (2) will generate outcomes that are consistent with his (let alone any other) conception of the proper ends of labor law. It is as if the critique of market outcomes in the labor area had never been made. To be sure, Fried is in favor of what may turn out to be substantial government intrusions into the market system. But his basic presumption is in favor of market ordering in the labor area; he indulges that presumption without responding to the familiar critique.

To say this is not to say that it is impossible to answer that critique. But it is to say that one who adopts a presumption in favor of market ordering must be prepared to try. For example, the goal of employee control of the workplace cannot be approached sensibly unless one has taken a position on market ordering and on the proper relationship of workers to capital. That goal will receive sharply divergent evaluations if informed by one or another of the general positions I have outlined.

III. LABOR THEORY: MINIMAL TERMS AND SOLIDARITY

Fried follows the lead of many others who have recently attempted to rethink labor law from the ground up—to abandon the current framework in favor of an attempt to develop an ideal system of labor law in light of current conditions. I want to explore here, in outline form, some of the underpinnings of particular forms of governmental intervention into labor-management relations. Such interference might take two basic forms. The first would attempt to protect “rights” through minimal terms, either waivable or nonwaivable. The second would not protect rights in the usual sense but would instead structure a process by which to increase employee control of the workplace. I discuss the two forms of intervention in sequence.

A. Ex Ante, Ex Post, and Minimal Terms

Analysis of labor law might begin with an understanding of the traditional principles of freedom of contract—principles that formed the basis for the common law of labor relations for large parts of the nation’s history. Those principles are grounded on the assumption that, in a free market, each party who enters into an

agreement believes that he or she will thereby be made better off. This suggests that contractual arrangements should be evaluated *ex ante*, not *ex post*. The *ex ante* perspective ensures that products (including labor) are sold under rules set by the "impersonal" principles of supply and demand. Such a result is preferable to a system in which contracts are arranged by the choice of government officials, who are unlikely to be aware of the preferences of the contracting parties and whose knowledge of such preferences is certainly less than that of the parties themselves. Moreover, the *ex ante* perspective serves as a guarantee that people will not be able to escape contractual obligations simply because the contract turned out to disadvantage them *ex post*. In this sense as well, the *ex ante* approach appears to be "impersonal."

Under this framework, there is a strong presumption against government intervention. Such intervention would (by hypothesis) make people worse rather than better off. If they had wanted the terms produced by the intervention, they would have contracted for them (assuming, as always, that transaction-cost barriers do not prevent bargaining). A natural corollary to this insight is that people will always try to find, and generally succeed in finding, ways to counteract the effects of the government's intervention—for example, by raising rents to combat an implied warranty of habitability or by decreasing services to offset rent control.

It will be useful to examine the modern dispute over the contract at will as a means of exploring the use of minimal terms in labor law. The contract at will permits employers to fire employees whenever they wish, subject to neither procedural nor substantive constraints. Under a pure "at will" regime, employers may, for example, discharge employees for failure to submit to sexual advances, for having given testimony before a jury, or for their political views. In recent years, some jurisdictions have limited the ordinary presumption that employment contracts are at will, holding that there is an implied prohibition of arbitrary discharges.⁴⁰ Such holdings have been the subject of considerable comment.⁴¹

The defense of at-will arrangements⁴² is a specific application

⁴⁰ See, e.g., *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974).

⁴¹ See, e.g., Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976); Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974).

⁴² For purposes of the present discussion, I do not distinguish between defenses based on principles of private entitlement and those based on maximization of utility or "wealth."

of the attack on regulatory intervention in the marketplace. The defense starts with the notion that market arrangements will generate outcomes that are to the mutual advantage of the participants. In these circumstances, regulatory intervention would make both parties worse off. If the parties wanted the arrangement produced by regulation, why did they fail to bargain for it? An obvious answer (the one relied upon by the defenders of the "at will" regime) is that they did not in fact want it, in the sense that the implied term was not part of the bargain each party thought most advantageous. Imposition of such a term would merely provoke the parties to contract around it by altering some other provision.

In these circumstances, the consequence of the compulsory "for cause" provision for discharge will be (1) to reduce the employer's profit by an uncertain degree, (2) to cause a decrease in the employee's wage or other forms of compensation so as to offset any gains from the compulsory term, and (3) to produce efficiency losses by virtue of the frustration of the bargain voluntarily arrived at by the parties. Arguments of this sort have been made against other compulsory terms, including the minimum wage⁴³ and, most frequently, the implied warranty of habitability.⁴⁴

Such arguments are not, it must be emphasized, an attack on implied terms in general. Such terms may be justified under this approach if they attempt to mimic the market by generating the bargain that the parties would have entered into if they had made provision on the subject. Thus, for example, an implied prohibition of arbitrary discharges may be justifiable if in the particular context it captures the understanding that the parties would have reached. And it may be the case that many workers (if not their employers) believe that they may be discharged only for good reason.⁴⁵ A waivable implied term is subject to correction through the marketplace; the parties can contract around it, through an express "at will" provision, if they see fit. Waivable implied terms ought therefore to be a relatively uncontroversial part of labor law, as

Frequently the two seem to coalesce in practice. See *supra* note 12. In Professor Epstein's contribution to this symposium—an elaborate defense of at-will arrangements—the two defenses are offered together. See Epstein, *supra* note 10, at 951.

⁴³ See *supra* note 22.

⁴⁴ See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 356-59 (2d ed. 1977); Komesar, *Return to Slumville: A Critique of the Ackerman Analysis of Housing Code Enforcement and the Poor*, 82 *YALE L.J.* 1175 (1973).

⁴⁵ Workers may generally understand that they are subject to layoffs, which might well be unobjectionable even under a "for cause" regime—either because there is "cause" or because the "cause" requirement need not be met in such circumstances. This understanding might not exist when a worker is discharged for reasons more personal to him or her.

they are elsewhere in the law of contract. The argument I have outlined is instead an attack on implied terms that cannot be waived by the parties, that is, terms that do not permit the parties to readjust their deal if the governmentally approved bargain is not the bargain they would have struck were there full contractual freedom.

The problem with the defense of the contract at will as against a nonwaivable "for cause" provision is that the consequences of such a provision are much more complex than some defenders of at-will arrangements are willing to acknowledge. There can be no doubt that employees would be willing to pay something for a "for cause" provision. The failure of the market to generate such provisions reflects the fact that employees, given the constraints of information and existing preferences, would not be willing to pay enough to make such a provision worthwhile in light of the alternatives. "For cause" provisions, in short, are valued less than other available methods of compensation, including, most prominently, an increased salary. From this it can be concluded that a compulsory "for cause" provision will harm the interests of employees (in the relevant, controversial sense of the terms "harm" and "interests"⁴⁶) if employers are willing and able to respond by decreasing compensation by an amount that is greater than the incremental benefits of the "for cause" provision—if, in short, there is sufficient flexibility in the market to permit the employer to pass on to the employee all or most of the costs imposed by the provision. In addition, a "for cause" provision may have adverse effects on newly hired employees—entrants to the labor force as well as those changing jobs.

The nature of these effects will depend on the structure of the relevant market. It may be, for example, that employers are unable to pass on to employees all of the additional costs associated with the nonwaivable "for cause" provision. The principal situation here involves workers who are earning a salary at or near the minimum wage. In such cases, the employer will be able to reduce salaries very little or not at all. It would therefore be impossible for the employer to adjust salaries to compensate for the "for cause" pro-

⁴⁶ I say "controversial" because the assumption is that both harm and interest should be measured from the standpoint of the workers' current preferences and perceptions, as reflected in the willingness-to-pay criterion. For a general discussion, see Balbus, *The Concept of Interest in Pluralist and Marxian Analysis*, 1971 *POL. & Soc'y* 151 (discussing the concept of "interest" in competing schools of political theory).

vision.⁴⁷ In situations involving workers earning well over the minimum wage, such an adjustment would probably occur, though its occurrence and extent will depend on the supply of and demand for labor.⁴⁸ Moreover, in cases of limited intrusions on at-will regimes—for example, a prohibition on discharges for failure to submit to sexual advances—it may be doubted whether a prohibition would result in diminished compensation for the employee at all.⁴⁹

With a general “for cause” provision, then, some employers can pass on part of the costs, some can pass on all, and some can pass on very little. Moreover, employees as a class may not be willing to pay as much as the provision costs to employers, but they may be willing to pay the amount that is charged to them under the restructured market. And even if the requisite flexibility is there—even if all or most of the additional cost can be transferred to employees—it is likely that some categories of employees will be benefited by the change. Such categories may in turn include a disproportionate number of those likely to be unfairly treated under at-will arrangements: women and members of minority groups. Whether this is so is a complicated matter, but it is more than plausible that, with respect to current employees, at-will arrangements will come down particularly hard on groups suffering from pervasive prejudice or hostility. In such cases, discharges may be likely to occur for reasons unrelated to performance. On the other hand, a “for cause” provision could have an adverse effect on newly hired employees in those same cases.

What all this suggests is that the distributional consequences of a nonwaivable “for cause” provision may be significant. It is simply wrong to assume that there will be no such consequences or that any such consequences are a matter of indifference. If, for example, one could show that, in general, a “for cause” provision would benefit certain traditionally disadvantaged groups, or that such a provision would work some sort of transfer from employers to employees, one might be able to make considerable movement toward the conclusion that such nonwaivable terms are a good idea. At the very least, the nature and existence of distributional consequences are critical questions for those interested in labor law

⁴⁷ Where feasible, however, the employer might be able to compensate by reducing the number of his employees through layoffs and attrition.

⁴⁸ Cf. Markovits, *supra* note 21, at 1819-26 (showing that beneficial effect on poor tenants of minimum standards of habitability in housing depends in part on supply of and demand for housing).

⁴⁹ See Kennedy, *supra* note 21, at 610.

to ask.⁵⁰

Thus far I have put to one side any efficiency justification for a compulsory "for cause" provision. But it may well be the case that some workers assume that they may not be discharged without cause. This type of "information failure" forms a conventional economic justification for government regulation.⁵¹ Even an express at-will provision may not carry the requisite information to some categories of employees. Moreover, it is a common phenomenon that consumers underestimate the risk that an event that is harmful to them will occur.⁵² This form of information failure is also a traditional justification for governmental intervention to regulate dangerous products in the marketplace.⁵³ To be sure, there may be a difference between discharge without cause and the sort of highly improbable event, such as a tornado, the probability of whose occurrence is often underestimated; perhaps workers do calculate the likelihood of discharge and take it into account in the bargaining process. But it is at least plausible that workers tend to underestimate the risk of discharge or the benefits to be gained from a "for cause" provision.⁵⁴ If so, such a provision might be justified on efficiency grounds.⁵⁵

⁵⁰ It is sometimes suggested that redistribution ought to be the province of the tax laws and that efforts to redistribute through regulation are likely to be counterproductive. See, e.g., Olsen, *An Econometric Analysis of Rent Control*, 80 J. POL. ECON. 1081, 1096-99 (1972). But sometimes regulation will be more effective than tax laws as a means of providing redistribution, at least if the relevant groups are not defined solely in terms of their resources. See Markovits, *supra* note 21, at 1827-38. Moreover, even if redistribution through taxes would be preferable, the regulatory solution may be the only practical alternative. For general discussion, see Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 498-510 (1980); Shavell, *A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation*, 71 AM. ECON. REV. PROC. 414, 414-18 (1981).

To those who accept freedom of contract on autonomy grounds, of course, arguments from redistribution are unlikely to be persuasive.

⁵¹ See generally Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

⁵² See, e.g., Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 BELL J. ECON. 27, 34-35 (1981) (drivers surveyed underestimated their risk of car accident); Kunreuther, *Limited Knowledge and Insurance Protection*, 24 PUB. POL. 227, 234-36 (1976) (discussing people's estimations of probabilities of severe floods or earthquakes).

⁵³ See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* 26-28 (1982) (discussing government regulation intended to prevent consumers from being misled and to help them evaluate such information as is supplied); Arnould & Grabowski, *supra* note 52, at 28-30, 36-44 (discussing market failure as a cause of "suboptimal" seatbelt use and analyzing federal safety standards aimed at reducing auto fatalities).

⁵⁴ For a general discussion of information and intervention in consumer markets, see Schwartz & Wilde, *supra* note 51, at 666-82.

⁵⁵ Cf. Kronman, *supra* note 30, at 766-70 (making efficiency argument for minimal

Justifications of this sort are not paternalistic. They are not based on a conclusion that the employee, even if armed with perfect information, will make decisions contrary to his or her interests. The underlying notion is, instead, that a lack of information produces injurious decisions. But this kind of efficiency rationale does tend to slide into paternalistic arguments for governmental intervention, and paternalistic interventions are now common in contract and tort law.⁵⁶ They are not always bad. It is plausible, for example, that workers frequently underestimate the likelihood or effects of wrongful discharge and are therefore willing to accept too low a premium for foregoing a "for cause" provision. Governmental intervention may in these circumstances protect workers, or significant categories thereof, from bad bargains.⁵⁷

Paternalistic arguments of this sort are vulnerable to the familiar objection, derived from conventional freedom-of-contract principles, that one ought to look at the bargain *ex ante*, not *ex post*, and that the individual employee's judgment about what will promote his or her welfare should not be overcome by the contrary judgment of a government official. In this view, agreements freely entered into by contracting parties make both sides better off. But that proposition is false. Contracts are not always for the mutual benefit of the parties. We know that people make bad bargains; this is one reason why a system of freedom of contract produces losers as well as winners. And such bargains may be bad not merely in the sense that they turned out to be disadvantageous *ex post*; it may be that the contracting parties have seriously miscalculated the costs and benefits when they entered into the agreement. Sometimes those bad bargains may have disastrous consequences for a long time, and sometimes they can be identified in advance by third parties. Is it so clear that the proper response is always to allow the bargain to go forward and to be enforced in accordance with its terms? Of course, there are usually good reasons not to disturb terms freely agreed to by contracting parties, but the notion that contracts always and inevitably benefit both sides is not such a reason. Indeed, the assumption that bargains should always be evaluated *ex ante* itself depends on questionable

terms in contracts that relies on costs of individualized inquiry into understanding of parties).

⁵⁶ See *id.* at 763-64.

⁵⁷ Such intervention may take the form of either compulsory terms or an effort to provide the additional information to employees. But if the argument is paternalistic, the former remedy will seem preferable.

premises.⁵⁸

To say this is hardly to suggest that paternalistic interventions are always justified. There is much to be said in favor of private ordering even in the context of labor-management relations. The fact that we observe systematic losers, however, does suggest that paternalistic bases for intervention ought not to be dismissed out of hand.

I have examined the particular controversy over the contract at will very briefly in order to illustrate the sorts of issues that must be explored by those interested in minimal terms as a solution to the problems raised by market ordering in the labor field. I have hardly concluded that the argument for a nonwaivable "for cause" provision is airtight. But the case for at-will arrangements depends on a variety of assumptions that need and lack detailed theoretical and empirical support. The task is to explore the possible grounds for governmental intervention in order to see whether those grounds are persuasive for the particular implied term.

We may generalize from this discussion of the contract at will. Minimal terms may serve a redistributive function, helping employees as a class against employers as a class. They may help particular groups of employees at the expense of employers and other groups of employees. Moreover, economic and paternalistic arguments are sometimes a persuasive basis for minimal terms. A significant task of labor-law theory, then, is to take account of the modern understanding of the various grounds for intervention to help decide what sorts of minimal terms are likely to produce more good than harm.

B. Solidarity, Welfare, and the Wagner Act

To Professor Fried, the apparent fault of the Wagner Act lies in its effort to protect workers not through minimal terms but through a more general attempt to create collective rights in labor unions.⁵⁹ Hence, I think, his proposal for minimal terms. But a proposal for such terms tends to ignore what many have seen as an important goal of labor law: fostering a sense of solidarity among workers and promoting participation in decisionmaking processes

⁵⁸ Cf. JON ELSTER, *SOUR GRAPES* (1983) (discussing and criticizing traditional premises of rational-choice theory); Kelman, *supra* note 24, at 778-95 (discussing reasons why parties may not always choose contract terms that will make them better off); Kronman, *supra* note 30, at 780-86 (using notions of "self-respect" and "regret" as bases for disallowing freedom of contract).

⁵⁹ See Fried, *supra* note 2, at 1028-29.

at the workplace.⁶⁰ Economists tend to see here the creation of a cartel and rent-seeking behavior by cartel members.⁶¹ But the notion of rent-seeking (if used normatively) depends on an antecedent assumption that the market status quo, and the willingness-to-pay criterion on which it depends, have some natural, prepolitical status. That assumption is valuable for some purposes, but it need not be accepted by those who are seeking to design an effective system of labor law.

What is accomplished by the Wagner Act that is not accomplished by a scheme of minimal terms? The answer lies in the Act's effort to create a process in which workers can use "voice" as well as "exit" as a means of expressing their views on how the workplace should be run.⁶² Minimal terms, as an attempt to promote efficiency, redistribute wealth, or protect workers from themselves, do not promote "voice" at all. They create a series of entitlements, whether waivable or not, designed to protect employees against the effects of market ordering.

In one respect, at least, the Wagner Act goes further. It also creates a right to a process of decision—"collective bargaining"—designed to ensure a continuing opportunity for workers to help determine employment conditions. An underlying premise of the Wagner Act is that regulation of employer-employee relations has not only economic goals—transferring or increasing wealth—but also the political goal of promoting a role for the employee in the operation of the workplace.⁶³ In short, it is possible to understand the system of collective bargaining as an effort to supplement the market remedy of exit with the political remedy of voice.

In this regard, it is important to understand that while critics often see the concern of labor law as the creation and protection of

⁶⁰ See *id.* at 1022.

⁶¹ See, e.g., Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999-1011 (1984).

⁶² See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970) (discussing "exit"—quitting or ceasing to buy products—and "voice"—complaining to management—as methods of expressing dissatisfaction with an economic organization). It might be possible to redefine the class of private rights so as to include this sort of participatory notion ("voice"), but that would stretch the notion of private rights very far. Cf. Stewart & Sunstein, *supra* note 12, at 1272 (traditional rights-based notions generally fail to justify rights of participation).

⁶³ Cf. Hyde, *Economic Labor Law vs. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981) (discussing the distinction, under the Wagner Act, between workers' political and bargaining activities); Hyde, *supra* note 1, at 796 n.14 (noting the tendency of courts to discount political values in collective bargaining by recasting "essentially political struggles" as "disputes over economic interest").

“rights,” others see a rights-based understanding of the subject as entirely misguided. The object is not to create and safeguard individual entitlements but instead to generate employee participation in the process of workplace governance. This object is a natural outgrowth of the critique of market ordering that I examined earlier. Under that critique, the willingness-to-pay criterion, insofar as it is implemented by the existing set of entitlements and the existing distribution of wealth, is an improper basis for structuring labor-management relations. The Wagner Act, of course, promotes the goal of self-governance highly imperfectly at best. The point is not that the existing law is satisfactory but that a complete account of labor law must be prepared to evaluate attacks on rights-based approaches that place no value upon “voice.”

A common attack on such measures insists that if employees in fact value self-government, the marketplace will produce it. But this attack is vulnerable to a critique that should by now be familiar. It takes for granted the current distribution of wealth and entitlements and the current set of preferences. It fails to take account of the possibility that an unconstrained market in labor may—as a result of voluntary bargaining within the various constraints of the willingness-to-pay criterion—produce relationships, attitudes, and allocations of power that are on balance highly undesirable for society in general. No specific proposals follow inevitably from such a rejection of rights-based approaches to labor law. But if one accepts the critique, one will believe that the Wagner Act reflects an insight that is missing from Fried’s proposal.

CONCLUSION

There are three principal directions in which contemporary labor law might move. The first would involve increased reliance on the market. The second would call for the supplementation of market mechanisms with minimal terms, either waivable or nonwaivable; such an approach may or may not include collective bargaining. The third would involve creation of rights of participation in the governance of the workplace—rights that are more straightforwardly political in character.

Choosing among the three options requires resolution of large and difficult questions. The principal task of labor-law theory is to attempt to answer them. Above all, that task requires considerable theoretical and empirical work aimed at identifying the areas in which disruptions of market solutions will operate systematically to benefit employees, specific groups thereof, or the society as a whole. Such an effort will, in the process, have to make some judg-

ment on the controversial question of what constitutes a "benefit" in this context. Without some such judgment—whether or not rooted in existing theories—analysis of labor law is likely to continue to suffer from the eclecticism and disorder from which we have recently been attempting to escape.