

PHILOSOPHICAL FOUNDATIONS OF LABOR LAW*

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I. INTRODUCTION

Labor law is an offspring of the social and political action of the working class movement. While this movement started its first revolts in seventeenth-century Europe, it was only capable of organizing itself in the nineteenth century when the old laws against combinations were repealed.¹ During this period, socialist ideologues provided the intellectual substratum for the movement to flourish.² Thus, in England, Robert Owen inspired the foundation of the Grand National Consolidated Trades Union in 1834, Ferdinand Lassalle founded the General German Workers' Union in 1863, and the following year Karl Marx was a chief actor in the creation of the International Working Men's Association, usually called the First International.³ Governments conceded both democratic and labor law reforms under the pressure of uprisings, and toward the end of the century, when working class parties and trade unions consolidated their power, labor and industrial legislation was an essential feature of European law.⁴

The emergence of American labor law was influenced by socialist ideas as well. It is worth quoting one of the leading experts in labor policies in the interwar period, Walton Hamilton, who served as the first U.S. representative to the International Labor Organization (ILO) in 1935:

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1. WOLFGANG ABENDROTH, *A SHORT HISTORY OF THE EUROPEAN WORKING CLASS* 15 (Nicholas Jacobs & Brian Trench trans., New Left Books 1972) (1965).

2. *See id.* at 15-26.

3. *Id.* at 16, 32-33, 40.

4. *See id.* at 41-50.

The wise organization of wage-earners, by keeping its personnel fairly intact, by imposing restrictions upon entrance to a trade, by using “collective bargaining” in the making of wage contracts, and by seizing the favorable moment for the presentation of its claims, can secure for its members higher wages than they could otherwise obtain.⁵

Hamilton advocated for a social reform agenda that included, among other things, the social control of business.⁶ Even if Hamilton was not an explicit supporter of Marxism, his socialist leanings are undisputable. In effect, Hamilton defended the socialization of corporate property:

If scientific knowledge, discovery, and invention become “public property” after a term of years, there seems no reason why investments in the apparatus of production should not become the property of the community when those whose savings make them possible are fairly paid.⁷

Basically, labor law is a complex bundle of restraints on freedom of contract in the labor markets. According to Henry Farnam’s classification, such legislative measures fall into three different types: protective labor legislation, distributive legislation, and permissive legislation.⁸ Protective legislation includes compulsory regulation of the labor contract such as child labor laws, maximum hours laws, and health and safety laws.⁹ Today, this type of legislation also encompasses the prohibition of sexual and moral harassment at work and nondiscrimination in recruitment and hiring. Distributive legislation seeks to affect the terms of exchange; for example, compulsory payment in legal tender, minimum wage laws, control of wages, and retirement security. Compensation for arbitrary discharge is often regarded as a distributive measure, but it can also be taken as a piece of protective legislation if it seeks to guarantee fair and humane treatment in the workplace. Finally, permissive legislation facilitates the creation of institutions for concerted worker action, collective bargaining, and labor arbitration.¹⁰ The National Labor Relations Acts (NLRA) of 1935, also known as the Wagner Act, is the typical example.¹¹ To allow union action, these permissive measures are usually coupled with exemptions in other areas of law, like the permission of labor cartelization in antitrust law or the exemption of

5. WALTON HAMILTON & STACY MAY, *THE CONTROL OF WAGES* 119 (1923).

6. *Id. passim.*

7. *Id.* at 68.

8. Charles W. McCurdy, *The “Liberty of Contract” Regime in American Law*, in *THE STATE AND FREEDOM OF CONTRACT* 161, 190-91 (Harry N. Scheiber ed., 1998).

9. *Id.* at 190.

10. *Id.* at 191.

11. National Labor Relations Act, 29 U.S.C. §§ 151-167 (2000).

union boycotts and picketing from tort law.¹² For instance, the Norris-La Guardia Act of 1932 limited the jurisdiction of federal courts to issue injunctions in labor disputes and nonviolent strikes.¹³

The literature on the philosophical foundations of labor law is scant; the most interesting contributions appear in works that do not specifically address labor law, rather they address more general topics in moral and political philosophy. In view of labor law's roots in socialism, the paucity of contemporary philosophical works on labor law is surprising.¹⁴ In this Article I focus on philosophical arguments relevant to the justification of labor law institutions. Because some of these arguments are made in the course of more abstract philosophical discussions, they are often missing in the labor law literature. Thus, this Article has the additional goal of bridging the philosophical and the labor law literature. At times I also have to deal with economic works. In fact, while some philosophical arguments are insensitive to economics issues, other arguments depend to a greater extent on economic assumptions; in the latter cases, a discussion of such assumptions is unavoidable.

This Article is organized around the discussion of five philosophical arguments: (1) the argument from positive freedom and real freedom, (2) the argument from equity and distributive justice, (3) the argument from noncommodification, (4) the argument from paternalism, and (5) the argument from equal autonomy. I try to show that the first three arguments are defective in various ways. In contrast, the argument from paternalism and the argument from equal autonomy offer a sound theoretical approach to labor law. Both arguments can justify regulations that fall under the head of protective legislation. While the argument from paternalism can ground noncoercive regulation of the employment contract in order to prevent workers from committing systematic decisionmaking mistakes (for example, underestimating health risks), the argument from equal autonomy can justify nonprice compulsory terms that seek to protect workers as autonomous agents.

The approach to labor law developed in this Article is to some extent revisionist. Thus the approach shows that some labor law institutions are not necessarily warranted. For instance, compulsory collective bargaining is not justifiable in competitive labor markets. Ac-

12. Norris-La Guardia Act, 29 U.S.C. § 101 (2000).

13. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 158-66 (1991); Eileen Silverstein, *Collective Action, Property Rights and Law Reform: The Story of the Labor Injunction*, 11 HOFSTRA LAB. L.J. 97, 108 (1993).

14. Though there are a few theoretically minded works on labor law, they generally discuss less philosophical arguments than economic and legal considerations. See generally FOUNDATIONS OF LABOR AND EMPLOYMENT LAW (Samuel Estreicher & Stewart J. Schwab eds., 2000); A.C.L. DAVIES, *PERSPECTIVES ON LABOUR LAW* (2004); *LABOUR RIGHTS AS HUMAN RIGHTS* (Philip Alston ed., 2005).

cordingly, this view could be contested by claiming that it fails to justify the institutions that it recommends to revise. My reply is to point out that any piece of normative philosophy is to some extent revisionist. Therefore, the would-be critic should engage in a sustained argument to show that the discussion made in this Article is flawed. In the absence of such argument, the approach developed here should obviously guide labor law reform.¹⁵

II. THE ARGUMENT FROM FREEDOM

A. *Positive Freedom*

Labor law's birth was easier in Europe than in America. In effect, during Reconstruction the ideology of free labor blocked legislative intrusion on the employment contract. Thus, laws establishing a legal day's labor of eight hours allowed contracting out, and courts scrutinized liability labor legislation more seriously than other regulations of commerce. As McCurdy says, "The specialness of labor contract in American law was the product of a 'free labor' ideology that virtually all northerners—Republicans and Democrats, workers and employers—regarded as an expression of the North's distinctive social order from the 1840s through the 1870s."¹⁶

According to McCurdy, the same ideology was influential in the *Lochner*-era, when the Supreme Court struck down compulsory maximum hours laws¹⁷ and legislation prohibiting yellow-dog contracts.¹⁸ At the same time, supporters of social legislation, like Richard Ely, defended those laws on the basis of positive liberty and social justice.¹⁹

During the nineteenth century, British utilitarians favored the Hobbesian conception of liberty as absence of external interference. Thus, Jeremy Bentham endorsed a clearly negative conception of freedom: "All coercive laws, therefore . . . and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty."²⁰ Positive liberty emerged as an alternative conception of freedom during the social reform debates in Britain. In fact, in the last decades of the century neo-Hegelians started to espouse ideals of moral freedom, that is, moralized conceptions of positive freedom as self-realization and self-fulfillment.²¹ T. H. Green was the main representative of this line of

15. This is a philosophical Article. Therefore, I do not discuss the political economy of labor law reform.

16. McCurdy, *supra* note 8, at 167.

17. *Id.* at 179-80; see *Lochner v. New York*, 198 U.S. 45 (1905).

18. McCurdy, *supra* note 8, at 167; see *Adair v. United States*, 208 U.S. 161 (1908).

19. McCurdy, *supra* note 8, at 180-81.

20. Jeremy Bentham, *Anarchical Fallacies*, in 2 THE WORKS OF JEREMY BENTHAM 489, 503 (John Bowring ed., 1995).

21. For a helpful survey of these conceptions, see David Nicholls, *Positive Liberty, 1880-1914*, 56 AM. POL. SCI. REV. 114 (1962).

thought. In his *Lecture on Liberal Legislation and Freedom of Contract*, Green defines positive liberty as an individual moral capacity:

We shall probably all agree that freedom, rightly understood, is the greatest of blessings; that its attainment is the true end of all our effort as citizens. But when we thus speak of freedom, we should consider carefully what we mean by it. We do not mean merely freedom from restraint or compulsion. We do not mean merely freedom to do as we like irrespectively of what it is that we like. We do not mean a freedom that can be enjoyed by one man or one set of men at the cost of a loss of freedom to others. When we speak of freedom as something to be so highly prized, we mean *a positive power or capacity of doing or enjoying something worth doing or enjoying*, and that, too, something that we do or enjoy in common with others. We mean by it a power which each man exercises through the help or security given him by his fellow-men, and which he in turn helps to secure for them.²²

Green takes positive liberty to be by necessity equally distributed and refuses “to ascribe the glory of freedom to a state in which the apparent elevation of the few is founded on the degradation of the many”; in this respect Green deems modern societies superior to the ancient republics.²³ For Green, freedom of contract is instrumentally valuable to the “equal development of the faculties of all”:

If I have given a true account of that freedom which forms the goal of social effort, we shall see that freedom of contract, freedom in all the forms of doing what one will with one’s own, is valuable only as a means to an end. That end is what I call freedom in the positive sense: in other words, the liberation of the powers of all men equally for contributions to a common good.²⁴

Green accepts the economic proposition that labor is an exchangeable commodity, but he claims that because it is a commodity so closely attached to “the person of man,” legal restrictions are needed to secure that labor contracts will not hinder workers to become “free contributors to social good.”²⁵ There are various ways in which the employment contract can stand in the way of equal positive freedom:

This is most plainly the case when a man bargains to work under conditions fatal to health, e.g., in an unventilated factory. Every injury to the health of the individual is, so far as it goes, a public injury. It is an impediment to the general freedom; so much deduction from our power, as members of society, to make the best of ourselves. Society is, therefore, plainly within its right when it lim-

22. T.H. Green, *Lecture on Liberal Legislation and Freedom of Contract*, in 3 WORKS OF THOMAS HILL GREEN 370-71 (R.L. Nettleship ed., 1891).

23. *Id.* at 372.

24. *Id.*

25. *Id.* at 373.

its freedom of contract for the sale of labor, so far as is done by our laws for the sanitary regulations of factories, workshops, and mines. It is equally within its right in prohibiting the labor of women and young persons beyond certain hours. If they work beyond those hours, the result is demonstrably physical deterioration; which, as demonstrably, carries with it a lowering of the moral forces of society. For the sake of that general freedom of its members to make the best of themselves, which it is the object of civil society to secure, a prohibition should be put by law, which is the deliberate voice of society, on all such contracts of service as in a general way yield such a result.²⁶

Moralized conceptions of positive freedom, like Green's, have a potential for totalitarianism, as shown by Isaiah Berlin in his famous *Two Concepts of Liberty*.²⁷ Though Berlin was committed to welfare liberalism, he opposed the ideal of positive freedom, particularly in its moralized, neo-Hegelian variant.²⁸ Berlin tries to explain how a misguided defense of liberty can lead to the abolition of liberty, obviously having in mind the authoritarian experiences of Germany and Russia.²⁹ Berlin notes that positive liberty is often a dangerous weapon in the hands of authoritarian regimes, because it suggests the idea of a self divided into two sides: a "higher or true self" and a "lower self," with the former governing the latter.³⁰ This makes it possible to claim that totalitarian coercion is not only congenial to liberty but also a necessary condition of it, so long as the coercion is addressed to the lower self as a means to achieve the full manifestation of the true self.³¹ Berlin is best understood as demarcating the proper place of liberty, as opposed to equality and other political values. In fact, he defends a pluralistic value theory, which warrants labor and social legislation.³² Berlin's criticism, leaving aside its metaphysical overtones, boils down to a warning about the serious menace involved in granting, in the name of positive freedom, discretionary powers to government.

In contemporary political theory, a number of Marxists and liberals defend generally nonmoralized conceptions of positive freedom which could also be used to ground labor legislation.³³ For these authors, freedom is either the possession of opportunities, options and powers,

26. *Id.*

27. ISAAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

28. *See id. passim.*

29. *Id.* at 119.

30. *Id.* at 132.

31. *Id.*

32. *Id.* at 171.

33. *See, e.g.*, LAWRENCE CROCKER, *POSITIVE LIBERTY: AN ESSAY IN NORMATIVE POLITICAL PHILOSOPHY* (1980); ALAN GEWIRTH, *HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS* (1982); C.B. MACPHERSON, *Berlin's Division of Liberty*, in *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 95 (1973).

or the actual exercise of those powers. Similarly, Amartya Sen argues that well-being should be understood as a set of substantive freedoms or “capabilities.”³⁴ He avails himself of the concept of “functionings,” the various things a person may have a reason to be or do.³⁵ Freedom as capability connotes the idea of a range of options, or “alternative combinations of functionings,” that a person can achieve.³⁶ Focusing on labor rights, Simon Deakin has recently argued that Sen’s capability approach may “provide us with a normative framework of point of reference from which to compare different proposals.”³⁷ Deakin contends that social rights, as much as civil and political rights, are institutions created to enhance citizens’ capabilities.³⁸

Unlike Green’s moralized conception of freedom, the capabilities approach is basically a public policy position, and its claim to ground labor legislation relies on empirical propositions. However, the capabilities justification of labor law is a nonstarter as a philosophical theory, because it attaches decisive importance to economic consequences. Now it is a contingent matter whether labor legislation enhances positive freedom or rather reduces it. For instance, a minimum wage law might reduce workers’ capabilities by augmenting unemployment. The notion of capabilities is too broad to identify our fundamental concerns in labor law, because it encompasses most economic consequences. What we need is a philosophical approach to labor law capable of showing that, even if a piece of labor legislation is detrimental to welfare or capabilities, it still deserves our allegiance.

B. Real Freedom

Though there are various philosophical doctrines about the moral basis of contractual obligation, it is widely accepted that contracts are binding (only) if they are voluntarily (freely) consented to.³⁹ Accordingly, law establishes coercive threats and economic duress as reasons that exclude voluntariness.⁴⁰ Because an employment contract typically begins with an employer’s offer, there seems to be no coercion involved in this contract. Although both threats and offers can have mo-

34. Amartya Sen, *Capability and Well Being*, in *THE QUALITY OF LIFE* 30, 30 (Martha Nussbaum & Amartya Sen eds., 1993).

35. *Id.* at 31.

36. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75-76 (1999); AMARTYA SEN, *THE STANDARD OF LIVING* (Geoffrey Hawthorne ed., 1987); Sen, *supra* note 34, at 31; Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 *J. PHIL.* 169 *passim* (1985).

37. Simon Deakin, *Social Rights in a Globalized Economy*, in *LABOUR RIGHTS AS HUMAN RIGHTS*, *supra* note 14, at 59.

38. *Id.*

39. JEFFREY FERRIELL & MICHAEL NAVIN, *UNDERSTANDING CONTRACTS* § 12.04, at 519-20 (2004).

40. *Id.* at 529-30, 533-36.

tivational influence on the agent, there is a fundamental difference between threats and offers. While a threat diminishes the victim's range of options, an offer enhances this range.⁴¹ Employment offers seem to be exempt from any charge of coerciveness because they enhance workers' menus of options. But things are not so simple. There are offers that narrow the offeree's range of options; some of them are coercive, others are not. Charles Fried gives a clear pair of cases:

[Case A:] A student pianist who has given free annual recitals in his village church for several years announces that henceforth he will require a fee.

[Case B:] An enterprising journalist discovers that a professor of moral philosophy was convicted of embezzlement years ago. He proposes to publish this fact in a review of the professor's new book, unless the professor promises to pay him several thousand dollars.⁴²

Fried argues that the only way to characterize coercive proposals is by appealing to a moral criterion.⁴³ Thus, he says that a proposal is not coercive if it offers what the proponent has a right to offer or not as he chooses.⁴⁴ It is coercive if it proposes a wrong; otherwise it is noncoercive.⁴⁵ Thus, the pianist's proposal is noncoercive, while the journalist's proposal is coercive.

From a legal standpoint, labor offers do not violate workers' rights, and therefore, they should be considered noncoercive. But consider a case of economic duress, also proposed by Fried:

[Case C:] A small contractor specializing in exterior repairs offers jobs at low wages to young men in a time of high unemployment. He explains that the work is dangerous and that he has limited safety equipment and limited insurance coverage. Each employee signs an undertaking to accept the full risk of the work and under no circumstances to sue for injuries.⁴⁶

This is not only a fictional case. In fact, disclaim of compensation for injuries was common in railroad labor contracts when the first employers' liability laws abrogated the fellow servant rule. Some legal scholars would consider the contractor's job offer as coercive. The political philosopher Gerald Cohen maintains the same position. He holds that when the employee has no reasonable or acceptable alternative to taking a hazardous job, he is forced to do so.⁴⁷ Cohen, in

41. HORACIO SPECTOR, *AUTONOMY AND RIGHTS* 18 (1992).

42. CHARLES FRIED, *CONTRACT AS PROMISE* 96 (1981).

43. *Id.* at 96-98.

44. *Id.*

45. *Id.*

46. *Id.* at 104.

47. G.A. COHEN, *Are Disadvantaged Workers Who Take Hazardous Jobs Forced to Take Hazardous Jobs?*, in *HISTORY, LABOUR, AND FREEDOM: THEMES FROM MARX* 239, 241-42 (1988).

fact, maintains a more general thesis, namely, that all job offers under capitalism are coercive because proletarians, considered collectively, are not free to leave the working class and become private owners of capital.⁴⁸ Following Marx, Cohen argues that, just as slaves and feudal serfs, proletarians are forced to sell their labor force to capitalists through labor contracts.⁴⁹ Against this background, labor law could have the remedial and transitional function—while capitalism persists—to ameliorate the worst effects of what Cohen calls “proletarian unfreedom.”⁵⁰

Robert Nozick denies that workers who take the least attractive jobs do so under coercion.⁵¹ He gives a fancy example.⁵² Suppose there are twenty-six women and twenty-six men, each wanting to be married. Call the women A to Z and the men A' to Z'. In each sex group, these people share their preferences. All women prefer A' to B', B' to C', and so on, and all men prefer A to B, B to C, and so on. Suppose all proceed to choose partners until we remain with Z and Z', who by the other twenty-five's choices have only one choice: marrying the other or remain unmarried. If they finally marry, is the marriage unfree? Despite the harsh conditions Z and Z' face, Nozick claims that the marriage is voluntary, because the other twenty-five have acted within their rights. Similarly, says Nozick, if worker Z is confronted with the choice of working or starving and chooses to work, he works voluntarily. Although he lacks a more attractive alternative, the narrowing of options has resulted from other people legitimately exercising their rights.

Both Fried and Nozick defend a moralized account of coercion. This account implies that labor contracts are voluntary even if workers have no other palatable alternative. Cohen rejects this view by arguing that it implies that a criminal in prison, if imprisonment is justifiable, is not forced to be in prison.⁵³ This is counterintuitive. But even if the use of physical force is, by definition, a form of coercion, we would not say that an attorney makes a coercive offer if he offers a criminal to release him on bail on condition that he enters a plea of guilty.⁵⁴ So I do not think Cohen's example rebuts the Nozick-Fried analysis of coer-

48. G.A. Cohen, *The Structure of Proletarian Unfreedom*, 12 PHIL. & PUB. AFF. 3 *passim* (1983).

49. See G.A. COHEN, *Labour Theory of Value and the Concept of Exploitation*, in HISTORY, LABOUR, AND FREEDOM, *supra* note 47, at 209, 233-35.

50. G.A. COHEN, *The Structure of Proletarian Unfreedom*, in HISTORY, LABOUR, AND FREEDOM, *supra* note 47, at 255, 255-85.

51. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 262 (1974).

52. See *id.* at 263-64.

53. Cohen, *supra* note 48, at 4. For a criticism of Cohen's argument, see JOHN GRAY, *Against Cohen on Proletarian Unfreedom*, in POSTLIBERALISM: STUDIES IN POLITICAL THOUGHT 123 (1993).

54. For an excellent discussion of coercion, see ALAN WERTHEIMER, COERCION (1987).

cion. In fact, Marxists need not adopt a neutral, nonmoralized definition of coercion to maintain that labor offers are coercive. Under Marxism private property of the means of production is morally indefensible.⁵⁵ If employers do not possess a right to control the means of production or a right to control the profits arising out of the exclusive control of such means, the labor offers they make to propertyless workers are coercive. The coerciveness of labor offers then turns on the underlying theory of moral entitlements one adopts.

When the Marxian argument that labor contracts are coercive reflects a general indictment of capitalist law, it proves too much for our purposes. It does not really justify labor law, but rather the total abolition of private property and private contracts. So there are good reasons for rejecting a comprehensive account from duress. Of course, there is no denying the fact that some labor offers, made under special conditions like Fried's small contractor example, are coercive. According to the moralized criterion of coercion, to assert this we might say, for instance, that a worker has an inalienable right to obtain compensation for negligent injuries. But once we have accepted this analysis, the role of coercion gets blurred. First, if the contract is coercive, why should we not declare it null and void? This would be the natural response for an involuntary contract. Second, if the moral objection against the contract is that it violates the worker's inalienable right to compensation for negligent injuries, it seems that other contracts, made in the presence of more alternatives of choice, would also be objectionable. This shows that, though particular contracts can be attacked as coercive, under a moralized account of coercion the real work is done by the moral principles bolstering the account. Therefore, the harsh conditions surrounding the small contractor's transaction can explain why the worker is prepared to accept such a grievous contract, but they do not constitute the reason why the contract is unconscionable. The reason should be looked for elsewhere.

III. THE ARGUMENT FROM EQUITY AND SOCIAL JUSTICE

It seems natural to view labor law as a weapon of the working class in its struggle to obtain the full value of its contribution to the social product. This socialist portrayal of labor law is optimistic because it regards labor law as an attempt to alleviate the exploitative character of capitalism. But there is also a cynical socialist conception of labor law. These socialists would rather take labor law as a strategic device adopted by the ruling classes and their political allies to calm down social discontent and appease the working class's revolutionary impetus. As is obvious, it is only the optimistic view that

55. See COHEN, *supra* note 49, at 235.

can possibly offer a justification of labor law; the cynical view is contemptuous of any form of justification.

Is there a plausible exploitation theory of labor law? In its traditional form, the Marxian argument about capitalist exploitation relies on the labor theory of value.⁵⁶ For Marx, value was an objective property of every commodity.⁵⁷ Exchange value of commodities in the market is explained by their cost of production, what Marx called the “socially necessary labor time” to produce them.⁵⁸ Labor itself has an exchange value (that is, the wage rate) explained by the amount of labor needed to “produce” the labor force.⁵⁹ But laborers create greater value that is embodied in the commodities they produce and that explain their respective exchange value (that is, the price); this greater value is the surplus value.⁶⁰ So, under capitalism, the amount of labor a worker expends in the productive process to earn his wage is greater than the amount of labor embodied in the goods he can purchase with his wage.⁶¹ For Cohen, this transfer of value from workers to capitalists constitutes exploitation, because greater value is exchanged for lesser value. Cohen has stated this argument in this way:

- (1) Labor and labor alone creates value.
- (2) The laborer receives the value of his labor power.
- (3) The value of the product is greater than the value of his labor power.
- (4) The laborer receives less value than he creates.
- (5) The capitalist receives the remaining value.
- (6) The laborer is exploited by the capitalist.⁶²

This argument is exposed to many objections. First, it is important to notice that the charge of exploitation has normative force only if we assume an ideal of equity condemning unequal exchange. Though some interpreters think that Marx eschewed a normative theory of justice, the use of exploitation to criticize capitalism and justify socialism or interventions in the market must assume that exploitation is wrong or unjust. Even if Marxists do not endorse a theory of justice, they must hold some ideal of equity if the concept of exploitation is to serve a normative purpose. But the argument leaves unex-

56. *Id.*

57. *Id.* at 209.

58. *Id.*

59. *Id.* at 210.

60. R.B. EKELUND, JR. & R.F. HÉBERT, *A HISTORY OF ECONOMIC THEORY AND METHOD* 270-72 (3d ed. 1990).

61. G.A. Cohen, *The Labor Theory of Value and the Concept of Exploitation*, 8 *PHIL. & PUB. AFF.* 338, 342 (1979).

62. *Id.* For a formal exposition of Marxian exploitation, see JOHN E. ROEMER, *A GENERAL THEORY OF EXPLOITATION AND CLASS* (1982).

plained why, even if the capitalist expropriates the surplus, the labor contract involves unequal exchange. The capitalist pays a wage for the labor power, and this wage is, by hypothesis, equated with the value of the labor power. Because the laborer does not sell the product but just his labor power, the fact that the product gives a surplus does not imply that the capitalist exploits the laborer. The existence of surplus is not inconsistent with equality of exchange holding between labor power and wage.

Another objection is that the argument assumes an absolute theory of value that is inconsistent with mainstream neoclassical theory. As Robert Nozick persuasively puts it, "Marxian exploitation is the exploitation of people's lack of understanding of economics."⁶³ He provides a simple example: Suppose a person works on something absolutely useless that no one wants. For example, he spends hours efficiently making a big knot; no one else can do it more quickly. Will this object be valued by the hours invested?⁶⁴

In neoclassical competitive equilibrium, workers are paid a wage that is equivalent to the value of the marginal product they produce. Since marginal productivity determines the price of labor, exploitation can only occur when workers are not paid the full value of their marginal product.

In view of the demise of the labor theory of value, Marxists usually adopt one of two strategies: (a) they remove the idea of exploitation from its preeminent place in Marxism, or (b) they try to show that exploitation can be understood without the labor theory of value. John Roemer adopts the first strategy.⁶⁵ He claims that distributive injustice in the ownership of productive assets, rather than exploitation, is the central concept for a contemporary construal of Marxism.⁶⁶ Cohen takes the second route. He argues that the exploitation argument can be premised on two obvious propositions:

- (1') The laborer creates the product, that which has value, and
- (2') The capitalist receives some of the value of the product.⁶⁷

Unlike premise (1), (1') does not presuppose the labor theory of value. This is true, but it is doubtful that the charge of unequal exchange can be made against the background of the neoclassical theory of value. The laborer "creates," or rather produces, a commodity and is paid the value of his marginal contribution measured at the commodity's price. Why is this "unequal" exchange? On the other

63. NOZICK, *supra* note 51, at 262.

64. *Id.* at 259.

65. John E. Roemer, *Should Marxists Be Interested in Exploitation?*, 14 PHIL. & PUB. AFF. 30 (1985).

66. *Id.* at 32.

67. COHEN, *supra* note 49, at 213-14.

hand, though the capitalist receives some of the value of the product, as premise (2') says, this does not necessarily offend equity. As Israel Kirzner and N. Scott Arnold have argued, capitalist profits derive from investment decisions taken in environments of risk and uncertainty.⁶⁸ The capitalist's contribution can take different forms: managerial functions, discovery of inefficiencies, entrepreneurial skills, and so on. While the capitalist as capitalist just brings in capital in the productive process but not labor, the capitalist is also an entrepreneur whose productive resources must be rewarded in equity.

The exploitation argument can be best served by leaving Marxian economics and turning to neoclassical accounts of exploitation. Exploitation has no place in competitive markets, because, in an ideal situation of perfect competition, the product demand curve and the labor supply curve are perfectly elastic; therefore, economic agents have no power to fix prices or wage rates. Every producer can sell any quantity of a commodity at the competitive price, and every employer can hire labor at the competitive wage rate. However, the ability to set prices and wages, that is, bargaining power, does exist in imperfectly competitive markets. Joan Robinson has discussed two main classes of labor exploitation in her seminal book *The Economics of Imperfect Competition*.⁶⁹ Robinson distinguishes these classes as arising out of (1) monopoly conditions in the market for the product and (2) imperfections in the labor market.⁷⁰ Robinson calls the former "monopolistic exploitation," and the latter "monopsonistic exploitation."⁷¹ Monopolistic exploitation occurs because, under monopoly conditions, the marginal revenue is (not equal to but) less than the price, because the firm cannot discriminate prices and, consequently, must lower the price across all its production to sell more units.⁷² This means that a worker produces an additional unit whose (new) price is greater than the marginal revenue this unit generates. Since the wage is determined by the marginal revenue (not by the price), workers are paid a wage that is less than the value of their marginal product.⁷³

Monopsonistic exploitation typically occurs when there is a single employer for a given labor input. In this case, the employer

68. ISRAEL M. KIRZNER, COMPETITION AND ENTREPRENEURSHIP 86 (1973); N. Scott Arnold, *Why Profits Are Deserved*, 97 ETHICS 387 (1987).

69. JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 281 (1946). For a brief exposition, see EKELUND & HÉBERT, *supra* note 60, at 502-07.

70. ROBINSON, *supra* note 69, at 283.

71. *Id.* at 281, 292.

72. *Id.*

73. *Id.* at 293-94.

confronts an upward-sloping labor supply curve, and therefore, he must pay higher wages to hire more workers.⁷⁴ This means that the marginal cost of labor exceeds the wage rate. The employer will hire labor up to the point where the marginal revenue product is equivalent to the marginal cost.⁷⁵ Because the wage paid is less than the marginal revenue product, there is exploitation. In such a case, a minimum wage law can drive wage rates up and, at the same time, increase employment.⁷⁶

John Kenneth Galbraith rejected technical notions of imperfect competition to understand unionization but nonetheless defended trade unions in industrial capitalism along Robinsonian lines. For Galbraith, workers' associations can operate as "countervailing powers."⁷⁷ This means that trade unions can be a proxy for economic competition under conditions of market power in order to restrain corporate power. Focusing on the American steel industry, Galbraith argued, "The economic power that the worker faced in the sale of his labor—the competition of many sellers dealing with few buyers—made it necessary that he organize for his own protection."⁷⁸

Galbraith's case for trade unions—for example, the United Steel Workers—could be reinterpreted as the view that, under monopsonistic conditions, collective bargaining is needed on grounds of fairness in order to reduce the surplus extracted from wage laborers. Because collective bargaining corrects the inequality of bargaining power between employers and workers, it is natural to think that union legislation facilitates a more fair distribution of the labor surplus. But even if unionization can promote bargaining equity, it may be counterproductive in terms of overall distributive justice. As is well known, union legislation allows the creation of cartels that monopolize labor and raise its price. In fact, as Mancur Olson argues, unions will typically keep wages above competitive levels by preventing mutually advantageous transactions between the involuntary unemployed and employers.⁷⁹ Because trade unions bring about wage inflexibility, they cause unemployment when drops in demand occur. This will probably damage the allocation of resources and social justice. Other negative effects are worth considering. Wage stickiness can

74. *Id.* at 294-95.

75. *Id.* at 295.

76. *Id.* at 285.

77. JOHN KENNETH GALBRAITH, *AMERICAN CAPITALISM: THE CONCEPT OF COUNTERVAILING POWERS* 114-15 (1952).

78. *Id.*

79. M. OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 201 (1982).

aggravate or accelerate economic crises, a usually tragic outcome from a social justice stance. Daniel Kahneman and Amos Tversky have noted a psychological asymmetry: losses are more aversive than objectively equivalent foregone gains.⁸⁰ Under certain conditions, this asymmetry can exacerbate wage stickiness induced by unions. Biased by the aversion to workers' losses, unions can effectively block nominal wage cuts even when this is indispensable to avert an economic cataclysm that will cause far more serious decreases of real wages, both for unionized and nonunionized workers. The Argentine megacrisis in 2001 illustrates this point.

It might be thought that inequality of bargaining power can also prevent workers from obtaining fair contract terms, such as health and safety conditions or protection against wrongful discharge. The point would be that such terms could not be agreed on voluntarily by employers and employees because employers have greater bargaining power than employees. Unequal bargaining power could also warrant regulation of the employment contract. But, as Duncan Kennedy argues, "even a monopolist has an interest in providing contract terms if buyers will pay him their cost, plus as much in profit as he can make for alternate uses of his capital."⁸¹ Monopolists do not affect contract terms but adjust quantity and price. Accordingly, asymmetrical bargaining power does not prevent the free negotiation of any term or condition that the employee is prepared to pay for. Ian Ayres and Stewart Schwab extend this thesis to the labor monopsonist: "[I]n a well functioning employment market, employers will provide all benefits and protections that employees are willing to pay for."⁸² Therefore, the argument of unequal bargaining power cannot justify nonprice compulsory terms in employment contracts. While monopsony-related considerations can justify wage regulations, they are irrelevant for justifying regulation of employment contract terms.

The extent to which Robinson's or Galbraith's models describe real markets is an empirical question. Economists generally claim that, in the absence of legal restrictions, that is, when there are no barriers to entry, monopolies are unable to survive market forces in the long run. The monopsony model's ability to replicate

80. Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *ECONOMETRICA* 263 (1979); see also Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. POL. ECON.* 1325 (1990).

81. Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 608 (1982).

82. Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 *KAN. J.L. & PUB. POL'Y* 71, 71 (1998-1999).

real markets is more difficult to assess. Labor economists disagree in their understanding of labor markets in contemporary developed economies. While most of them usually resort to the competitive model or noncompetitive “matching” models, Alan Manning has recently maintained that the labor supply curve to firms is generally inelastic. Manning claims that firms typically set wages and that the monopsonistic model should be substituted for more sophisticated “matching” models to explain several features of labor markets.⁸³

Employers and employees often face high rehiring and relocation costs, respectively. When this occurs, the situation can be analyzed as a bilateral monopoly, which gives rise to a negotiation surplus to be divided between both parties. Richard Epstein has analyzed this particular problem.⁸⁴ Given the bilateral monopoly, it might be thought that, under the contract at will, the employer will appropriate most of the surplus in the negotiations. This might provide a theoretical case for labor regulation. However, Epstein claims that this distributional concern has a very limited scope, because the employee cannot be driven below the competitive wage; the only question is, How much of a supracompetitive wage the worker will appropriate? Epstein argues that the social costs of any measure adopted to correct the distribution of the transactional surplus will be greater than the size of the surplus.⁸⁵

The above points show that while trade union legislation can contribute to bargaining equity in noncompetitive labor markets, it can also affect social justice under some plausible conceptions of social justice. Take Rawls’s theory of justice as an example. Rawls states that economic inequalities can only be justified if they work to the advantage of the worst off.⁸⁶ Under Rawls’s theory, individual shares are expressed in terms of primary goods, defined as goods that are needed for implementing any conception of the good life.⁸⁷ Now, in terms of two of Rawls’s primary goods, income and self-esteem, the unemployed are the worst off. Given the economic effects of cartelization in the labor market, union legislation may be unjustifiable in accordance with Rawls’s theory of justice.

83. ALAN MANNING, *MONOPSONY IN MOTION: IMPERFECT COMPETITION IN LABOR MARKETS* *passim* (2003).

84. Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

85. *Id.* at 976; *see also* RICHARD A. EPSTEIN, *LIBERATING LABOUR: THE CASE FOR FREEDOM OF CONTRACT IN LABOUR RELATIONS* (1991).

86. JOHN RAWLS, *A THEORY OF JUSTICE* 13 (2d ed. 1999).

87. *See id.* at 78-80.

A similar argument applies to wage regulations. Anthony Kronman argues that any system of contract law requiring voluntariness for the enforceability of contracts underwrites a form of distributive justice because it discriminates between rightful and wrongful forms of advantage-taking.⁸⁸ As against Rawls, who excludes the regulation of individual transactions from the scope of distributive justice, Kronman claims that contract law rules, including those governing employment contracts, should be designed to accomplish redistribution of wealth as required by our principles of justice.⁸⁹ Thus he says, "Minimum wage laws . . . attempt to insure a fair distribution of wealth between workers and employers by specifying, in part, the terms on which workers may contract to sell their labor."⁹⁰ As said above, when the labor supply curve is less than perfectly elastic, a minimum wage law can promote bargaining equity. But this does not imply that minimum wage laws are generally effective to achieve social justice, for instance, by benefiting the worst off.

The exact consequences of minimum wage laws for social justice remain uncertain. For instance, Michael Trebilcock has argued that minimum wage laws are not able to affect the overall balance of advantage between workers and employers.⁹¹ For him, both in competitive and monopolistic contexts, those laws are likely to harm workers.⁹² In fact, if the minimum wage exceeds the competitive wage, it will cause unemployment. This is anything but a novel proposition in economics. As John Stuart Mill states in *Principles of Political Economy*, "It is nothing to fix a minimum of wages, unless there be a provision that work, or wages at least, be found for all who apply for it."⁹³ Mill adds, "These consequences have been so often and so clearly pointed out by authors of reputation, in writings known and accessible, that ignorance of them on the part of educated persons is no longer pardonable."⁹⁴

Undoubtedly, labor law can be viewed as an attempt to redistribute wealth in accordance with some ideal of social justice. While under special monopsonistic conditions, union legislation and minimum wage laws can ameliorate the effects of unequal

88. Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 474 (1980).

89. *Id.* at 474-75.

90. *Id.* at 499.

91. MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 250-53 (1993).

92. *Id.*

93. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* bk. 2, ch. 12, § 1 (W.J. Ashley ed., Longmans, Green & Co. 1929) (1848).

94. *Id.* bk. 2, ch. 12, § 2.

bargaining power and so promote bargaining equity, these measures are generally detrimental to overall social justice. There is little doubt that, given a conflict between bargaining equity and social justice, the latter should prevail. We can conclude that bargaining equity is either unable to justify some labor law institutions (Farnam's "protective legislation") or comes into conflict with social justice when the justification of other institutions is at stake ("distributive legislation" and "permissive legislation").

IV. THE ARGUMENT FROM NONCOMMODIFICATION

The basic idea that certain goods are not tradable goes back to Kant: "In the kingdom of ends everything has either a *price* or a *dignity*. Whatever has a price can be replaced by something else as *equivalent*. Whatever by contrast is exalted above all price and so admits of no equivalent has a dignity."⁹⁵

If certain goods do not have an exchange equivalent, that is, a price, they are not a commodity. Is labor a commodity? The Clayton Act of 1914 declared that "the labor of a human being is not a commodity or article of commerce."⁹⁶ After the First World War, the principle that labor is not a commodity also became part of the Labor Charter of the Treaty of Versailles.⁹⁷ According to David Beatty, labor is not a commodity because, apart from its productive functions, it gives persons a sense of identity and meaning, allowing them to secure their self-respect and self-esteem.⁹⁸ Thus, Beatty opposes the common law rule that an employment contract can unilaterally be terminated by the employer with reasonable notice.⁹⁹ This rule fails to capture the personal dimension of labor. To prevent the contractual commodification of labor, labor law should forbid dismissal without just cause.

Even though the main elements of the noncommodification conception of labor law were already present in Beatty's essay, it was Margaret Jane Radin who placed this conception within a general theory of noncommodification in law.¹⁰⁰ Radin claims that some goods should not be separated from persons through market trading.¹⁰¹ The reason is that those goods should not be treated as commodities.¹⁰²

95. IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 235 (Thomas E. Hill, Jr. & Arnulf Zweig eds., Arnulf Zweig trans., 2002).

96. Clayton Antitrust Act, 15 U.S.C. § 17 (2000).

97. David M. Beatty, *Labour Is Not a Commodity*, in *STUDIES IN CONTRACT LAW* 313, 324 (Barry J. Reiter & John Swan eds., 1980).

98. *Id.* at 324 n.21.

99. *Id.* at 328.

100. Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987).

101. *Id.* at 1905-06.

102. *Id.* at 1907.

For instance, Richard Titmuss argued that human blood should not be allocated through the market.¹⁰³ According to Radin, noncommodification is the moral foundation of market inalienability.¹⁰⁴ She distinguishes between complete and incomplete noncommodification.¹⁰⁵ Some things, like consumer products, are completely commodified. Others, like babies, are completely noncommodified. And many things are incompletely commodified, because they are to some extent within the market and to some extent outside the market.

Radin interprets labor law in terms of the idea of incomplete commodification: “Although work has not been fully decommodified, it is incompletely commodified through collective bargaining, minimum wage requirements, maximum hour limitations, health and safety requirements, unemployment insurance, retirement benefits, prohibition of child labor, and antidiscrimination requirements.”¹⁰⁶

Radin thinks that labor law’s point is to avoid the harm to human personhood caused by the complete commodification of labor that would result from legalizing the contract at will. To sustain her conception of labor, she inspires herself in Marx and Hegel. Thus, she quotes Marx saying:

The worker becomes an ever cheaper commodity the more commodities he creates. With the *increasing value* of the world of things proceeds in direct proportion the *devaluation* of the world of men. Labour produces not only commodities; it produces itself and the worker as a *commodity*—and does so in the proportion in which it produces commodities generally.¹⁰⁷

This Marxian statement echoes Kant’s distinction between price and dignity. Radin also quotes Hegel trying to justify wage labor as opposed to slavery:

Single products of my particular physical and mental skill and of my power to act I can alienate to someone else and I can give him the use of my abilities for a restricted period, because, *on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being*. By alienating the whole of my time, as crystallized in my work, and everything I produced, I would be making into another’s property the substance of my being, my universal activity and actuality, my personality.¹⁰⁸

103. *Id.* at 1913 (citing R. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 237-46 (1971)).

104. *Id.* at 1908-09.

105. *Id.* at 1917-21.

106. *Id.* at 1919.

107. *Id.* at 1871-72 (quoting Karl Marx, *Economic and Philosophic Manuscripts of 1844*, in *THE MARX-ENGELS READER* 71 (Robert C. Tucker ed., 2d ed. 1984)).

108. *Id.* at 1894 (quoting HEGEL’S *PHILOSOPHY OF RIGHT* § 42 (T.M. Knox trans., 1952)).

Radin charges Hegel with confusing the internal/external distinction with the total/partial divide.¹⁰⁹ Even when the worker does not sell all his capabilities, his capabilities are internal to him.¹¹⁰ According to Radin, Hegel recognizes the normative category of noncommensuration but subordinates it to a market agenda that leads him to accept the externality of human labor.¹¹¹

Is the argument from noncommensuration plausible? I will try to show that it must be rejected by noting how Elizabeth Anderson applies it to the particular case of commercial surrogate motherhood.¹¹² Deploying the principle that women's labor is not a commodity, Anderson claims that there is an "unconscionable commodification" of women's reproductive capacities in commercial surrogacy.¹¹³ One of Anderson's statements is very illustrative of her general position: "Treating women's labor as just another kind of commercial production process violates the precious emotional ties which the mother may rightly and properly establish with her 'product,' the child, and thereby violates her claims to consideration."¹¹⁴

What are the legal implications of Anderson's commodification view of surrogate motherhood? She begins, "At the very least, surrogate contracts should not be enforceable."¹¹⁵ The parallel conclusions with respect to employment contracts would be: "Employment contracts should not be enforceable." But Anderson does not content herself with unenforceability. She goes on, "I think these arguments support the stronger conclusion that commercial surrogate contracts should be illegal, and that surrogate agencies who arrange such contracts should be subject to criminal penalties."¹¹⁶ By the same token, employment contracts should be illegal and corporations trying to hire employees should be criminally prosecuted. Instead of a justification of labor law, the argument supports criminalization of wage labor.

It could be replied that, unlike surrogate motherhood, labor is only partially commodified. However, Radin makes it clear that inalienability is a strategy for eliminating markets.¹¹⁷ Incomplete commodification is not justified by itself, but rather because of its possible dom-

109. *Id.* at 1894-97.

110. *Id.*

111. *Id.*

112. Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, 19 PHIL. & PUB. AFF. 71 (1990).

113. *Id.* at 71.

114. *Id.* at 82.

115. *Id.* at 87.

116. *Id.*

117. See Radin, *supra* note 100, at 1850.

ino effect.¹¹⁸ Therefore, the argument from noncommodification cannot give a principled justification of labor law.

However, suppose, for the sake of argument, that labor deserves to be partially commodified. Is this better? Now the problem is that there is no systematic correlation between degrees of commodification and degrees of restraint on freedom of contract. At the extremes the correlation is clear. Just as complete commodification is correlated with contractual freedom, criminal prohibition is the counterpart of complete noncommodification. But we lack a criterion to match "partial commodification" with any specific form of labor regulation. For instance, how should we match partial commodification with minimum wages? If price is not an adequate response for labor, do we get it better by fixing the price by law?

V. THE ARGUMENT FROM PATERNALISM

John Stuart Mill contended in *On Liberty* that people should be left legally free to lead their lives as they see fit as long as they do not harm others.¹¹⁹ This tenet is at the core of liberalism. Thus, paternalism is often regarded as inimical to individual autonomy and free choice. However, Mill was aware that some forms of paternalism can be reconciled with the principle of free choice. For instance, Mill said that preventing a person from crossing an unsafe bridge does not constitute paternalistic interference, because the person, if consulted, would surely consent to being impeded from risking his life.¹²⁰ More generally, Mill held that some kinds of government interference with individuals' choices are taken for the individuals' good without detriment to individual liberty.¹²¹ Maximum hours legislation is one example. Mill says that such measures are "required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."¹²² In contemporary economic jargon, such interventions are addressed to avoid collective action problems. Such problems typically arise in prisoner's dilemma situations.¹²³ Mill mentions for illustration laws diminishing the hours of

118. For a systematic criticism of Radin's view, see Eric Mack, *Dominos and the Fear of Commodification*, in *MARKETS AND JUSTICE* 198 (John W. Chapman & J. Roland Pennock eds., 1989).

119. JOHN STUART MILL, *UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM* 135 (Mary Warnock ed., 1962).

120. *Id.* at 229.

121. See Mill, *supra* note 93, bk.5, ch. 11, § 11.

122. *Id.* bk. 5, ch. 11, § 12.

123. The literature on the prisoner's dilemma is copious. See, e.g., DAVID GAUTHIER, *MORALS BY AGREEMENT* 79-80 (1986); GREGORY S. KAVKA, *HOBBSIAN MORAL AND POLITICAL THEORY* 109-10 (1986); DAVID SCHMIDTZ, *THE LIMITS OF GOVERNMENT: AN*

labor.¹²⁴ Obviously, the legal diminution of labor hours has public good properties in relation to the group of actual wage workers.

Government interventions addressed to correct disharmonies between individual and collective rationality in prisoner's dilemma situations do not convey an insulting or humiliating message. When government compels an individual to follow an efficiency-enhancing rule, it does not say, "My judgment is superior to yours," but rather something like, "According to widely accepted social science, in the absence of government intervention, individual rational agents will follow strategies that impair their individual preferences as they see them." It is not on the assumption of irrationality or lack of competence that government takes these measures, but rather on the assumption that individuals are *fully rational*. Simply because individuals act in accordance with the postulates of individual rationality, they will sometimes fail to achieve those outcomes that are rational from a collective perspective.

Mill's view of justifiable paternalism relies on a mismatch between individual and group rationality, but a generalized argument based on the limitations of human rationality might ground other benign forms of paternalism. Gerald Dworkin famously suggested that "paternalistic" interventions can be defended on the basis of systematic limitations of our cognitive and emotional capacities.¹²⁵ He gives the example of Odysseus's choice to be tied to the mast, which was based on his prediction that he would otherwise yield to the Sirens' singing.¹²⁶ We can contrast Dworkin's view with Mill's by using economic notions. While Mill was concerned about prisoner's dilemma, failure of individual rationality, Dworkin seeks to ground some paternalist interventions on what Herbert Simon termed "bounded rationality."¹²⁷ Like Mill's view, Dworkin's account of paternalism is not inconsistent with the principles of liberalism because it appeals to consent: "Under certain conditions, it is rational for individuals to agree that others should force them to act in ways that, at the time of action, the individuals may not see as desirable."¹²⁸ Dworkin suggests a "hypothetical consent" test to evaluate "paternalist" interferences:

I suggest that since we are all aware of our irrational propensities—deficiencies in cognitive and emotional capacities and avoid-

ESSAY ON THE PUBLIC GOODS ARGUMENT 55-79 (1991); see also Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

124. Mill, *supra* note 93, bk. 5, ch. 11, § 12.

125. Gerald Dworkin, *Paternalism*, in *PATERNALISM* 19 (Rolf Sartorius ed., 1983).

126. *Id.* at 29.

127. Herbert A. Simon, *Bounded Rationality*, in 1 *THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS* 266 (John Eatwell et al. eds., 1987).

128. Dworkin, *supra* note 125, at 29.

able and unavoidable ignorance—it is rational and prudent for us to take out “social insurance policies.” We may argue for and against proposed paternalistic measures in terms of what fully rational individuals would accept as forms of protection.¹²⁹

Dworkin’s test relies on “individualized hypothetical consent.”¹³⁰ What the test requires is a counterfactual inquiry, to what the interfered-with agent would have consented. One difficult issue is to select the group of choices on which paternalistic restrictions can be justified by appealing to hypothetical rational consent: “I suggest we think of the imposition of paternalistic interferences in situations of this kind as being a kind of insurance policy that we take out against making decisions that are far-reaching, potentially dangerous, and irreversible.”¹³¹ Thus, labor contracts that compromise laborers’ health and safety can be subject to paternalistic regulation. On this view, paternalistic labor legislation does not oppose autonomous choices. On the contrary, hypothetical rational consent would only sanction autonomy-enhancing restrictions: “I suggest that we would be most likely to consent to paternalism in those instances in which it preserves and enhances for individuals their ability to rationally consider and carry out their own decisions.”¹³²

Unlike Dworkin, other authors support very intrusive paternalist policies in contract law.¹³³ For instance, Duncan Kennedy argues that compulsory terms can cure “false consciousness,” which covers such differing things as underestimation of risk, augmentation of the discount rate, unsupported confidence in others’ future behavior, and erroneous appreciation of long-term consequences of submissive relationships.¹³⁴ Kennedy claims, “Courts using the doctrine of unconscionability like to put their decisions on grounds of unequal bargaining power But it’s often obvious that they are concerned not with power but with naïveté, or with lack of ability to make intelligent calculations about what one can afford on one’s budget.”¹³⁵ In these cases, “the decision maker has to take the beneficiary under his wing and tell him what he can and cannot do.”¹³⁶ Kennedy portrays individuals in a way that is disrespectful of their autonomous agency. Analyzing mistakes made by small investors, he writes:

129. *Id.*

130. I borrow the label from DONALD VANDEVEER, *PATERNALISTIC INTERVENTION: THE MORAL BOUNDS ON BENEVOLENCE* 75 (1986).

131. Dworkin, *supra* note 125, at 31.

132. *Id.* at 33.

133. *See, e.g.*, Kennedy, *supra* note 81.

134. *Id.* at 626-29.

135. *Id.* at 634.

136. *Id.*

[E]veryone knew that what was really at work was greed, gullibility, incurable optimism, the gambler's itch, the allure of something for nothing, all followed by addiction to the ticker, the secret diversion of the family's savings, the mortgaging of a small business, and then, when things turned down, increasing margin requirements, a desperate scramble to stay in the game just a little longer . . . ruin and a swan dive from a high window. What was going on in this fantasy drama of capitalism was not extortion. At worst, widows and orphans trust blindly in apparently upright advisors who turn out to be secret addicts themselves. It is a story of folly, not of duress. People are idiots.¹³⁷

Because people are idiots—the argument runs—politicians must take paternalistic interventions to prevent them from damaging themselves. However, Kennedy's view of citizens is at odds with a liberal view of personhood. As Seana Shiffrin says of paternalism in general, "[I]t directly expresses insufficient respect for the underlying valuable capacities, powers, and entitlements of the autonomous agent. Those who value equality and autonomy have special reason to resist paternalism toward competent adults."¹³⁸ This lack of respect has a potential for political elitism. If people are idiots, why are they invested with the power to elect government officials? This is a disconcerting question for anyone committed to democracy. Intrusive paternalism threatens both individual and political autonomy.

Moreover, Kennedy's recipe relies on a naïve model of paternalistic policymaking. It assumes that politicians are less likely to commit mistakes than citizens. In fact, since politicians externalize a good deal of the costs of their mistakes, they are more likely to occur. Kennedy also assumes that government positions tend to be occupied by altruists. Public choice theory suggests that this assumption is implausible.¹³⁹ Politicians are as self-interested as other people, because human rationality does not vary on social role.¹⁴⁰

Paternalism has received new impetus from research in behavioral decision theory.¹⁴¹ In fact, psychologists and experimental economists have studied some of the mistakes that Kennedy treats under the label of "false consciousness." Behavioral decision theory assumes that these mistakes derive from cognitive mechanisms, rather than from capitalist alienation. Loss aversion, framing, hindsight, and other cognitive biases explain a number of mistakes that

137. *Id.* at 632-33.

138. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 220 (2000).

139. See generally DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991).

140. *Id.* at 22.

141. See generally *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982).

people systematically commit in making judgments and decisions.¹⁴² Because some of these irrational factors affect many contracting or consumer decisions, “behavioral law and economics” advocates paternalist interventions in contract law, such as the striking down of onerous liquidated damages clauses and warranty disclaimers and the regulation of financial markets.

Behavioral paternalists opt for nonintrusive, noncoercive varieties of intervention. These varieties of paternalistic regulation are more congenial to the liberal motivation behind Dworkin’s own view. For instance, Cass Sunstein proposes “libertarian” paternalism, according to which private and public organizations should establish arrangements that influence people’s choices in ways that will further their interests but that nonetheless leave them free to opt out if they prefer to follow different strategies.¹⁴³ “Libertarian paternalism” does not attempt to influence people’s behavior by blocking free choice. For instance, Sunstein recommends default rules.¹⁴⁴ Similarly, Colin Camerer, among others, defend “asymmetric paternalism,” which promotes regulations that create benefits for those who do not act in their best interests because of errors that lead them astray, while letting those who act in their best interests to do so without interference.¹⁴⁵ These authors say that “a policy is *asymmetrically paternalistic* if it creates large benefits for those who are boundedly rational . . . while imposing little or no harm on those who are fully rational.”¹⁴⁶ Asymmetric paternalism has various applications in contract law. The defenders of this position mention as examples default rules, provision or re-framing of information (protection of credit consumers, of investors, etc.), cooling-off periods, and limiting consumer choices (for example, deadlines to avoid procrastination).

There is little doubt that paternalism is one important motivation in labor law. Weak or nonintrusive paternalism can ground labor legislation designed to protect workers from irrational choices that threaten them, particularly in times of harsh economic conditions. By the same token, unions can perform helpful functions in advising workers about their best strategies and choices in their negotiations with employers. Unlike Green’s moral freedom theory, the behavioral

142. See, e.g., Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997); see also Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000).

143. Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1161 (2003).

144. *Id.* at 1162.

145. See Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211, 1219-23 (2003).

146. *Id.* at 1219.

economic approach does not offend free agency, because it relies on basic traits of all human beings. Thus, this approach does not express a moral elitist conception that underrates the capacities of laborers. In addition, the behavioral approach favors noncoercive measures that leave ample leeway for making employment contracts that further workers' reflective interests. In the last Part, I try to show that there also are moral grounds for nonprice compulsory terms in employment contracts (Farnam's "protective legislation").

VI. THE ARGUMENT FROM EQUAL AUTONOMY

In 1854, Abraham Lincoln replied to Southerners who claimed that "their slaves are better off than hired labourers amongst us."¹⁴⁷ For Lincoln the great difference between slave labor and free labor is that, under the latter, "[t]he hired labourer of yesterday labours on his own account to-day, and will hire others to labour for him tomorrow."¹⁴⁸ For Lincoln, "Advancement—improvement in condition—is the order of things in a society of equals."¹⁴⁹ Ever since Lincoln understood a society of equals as a society of equal freedom and prosperity, the contest over the meaning of equality has dominated American politics and law.

As I said earlier, labor law cannot be justified as a method of implementing a Rawlsian conception of social equality. Is there any other conception of equality that can be realized through labor law? Post-Rawlsian egalitarian theories of justice have gravitated toward what Elizabeth Anderson has called "luck egalitarianism," the doctrine that resource distribution should be choice-sensitive and luck-insensitive.¹⁵⁰ According to this doctrine, a fair scheme of resource allocation should be insensitive to what Ronald Dworkin has called "brute luck," that is, the contingencies of endowments, familiar background, and social position.¹⁵¹ However, luck egalitarianism incorporates an ideal of individual responsibility according to which people must internalize, as a matter of justice, the costs of their choices.¹⁵² Accordingly, inequalities arising out of people's choices for labor and leisure, for instance, are morally legitimate.¹⁵³ A number of political philosophers who are critical of luck egalitarianism, like Elizabeth Anderson, Timothy Hinton, Samuel Scheffler, and Jonathon Wolff,

147. Abraham Lincoln, A Fragment, *in* SPEECHES AND LETTERS OF ABRAHAM LINCOLN, 1832-1865, at 26 (Merwin Roe ed., 1919) (1894).

148. *Id.*

149. *Id.*

150. Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 289 (1999).

151. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 73 (2000).

152. Anderson, *supra* note 150, at 289-93.

153. *Id.*

have recently worked out a different ideal of equality that Hinton calls “equality of status” and Anderson dubs “democratic equality.”¹⁵⁴ I prefer the name “equal autonomy,” as a way of indicating the doctrine’s origin in Kant. Anderson has sketched an articulation of this ideal: “In seeking the construction of a community of equals, democratic equality integrates principles of distribution with the expressive demands of equal respect.”¹⁵⁵ For Anderson:

The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others.¹⁵⁶

What are the labor-related implications of a community of equals? Equal autonomy endorses Kant’s ideal of an unconditional duty to respect one’s own and others’ autonomy and dignity. Kantian respect is unconditional in that it cannot be overridden by anyone’s desire or preferences. Thus Anderson mentions Kant as opposing contracts into slavery or servitude.¹⁵⁷ Interestingly, she fails to quote what Kant himself had to say about the labor relationship. In *The Doctrine of Right*, Kant claimed that the master must treat his servants as autonomous beings:

[H]e can never behave as if he owned them (*dominus servi*); for it is only by a contract that he has brought them under his control, and a contract by which one party would completely renounce its freedom for the other’s advantage would be self-contradictory, that is, null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force.¹⁵⁸

It is not easy to derive concrete legal rules from Kant’s ideal of equal autonomy. However, Kant himself gives an example. He holds that the employment contract must be determined as to its quality and quantity to avoid being offensive to the worker’s autonomy:

Now it might seem that someone could put himself under obligation to another person, by a contract to let and hire (*locatio conductio*), to perform services (in return for wages, board, or protec-

154. Anderson, *supra* note 150; Timothy Hinton, *Must Egalitarians Choose Between Fairness and Respect?*, 30 PHIL. & PUB. AFF. 72 (2001); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5 (2003); Johnathan Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97 (1998).

155. See Anderson, *supra* note 150, at 289.

156. *Id.* at 288-89.

157. *Id.* at 319.

158. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 66 (Mary Gregor ed. & trans., 1996).

tion) that are permissible in terms of their quality but *indeterminate* in terms of their quantity, and that he thereby becomes just a subject (*subiectus*), not a bondsman (*servus*). But this is only a deceptive appearance. For if the master is authorized to use the powers of his subject as he pleases, he can also exhaust them until his subject dies or is driven to despair (as with the Negroes on the sugar islands); his subject will in fact have given himself away, as property, to his master, which is impossible.—Someone can therefore hire himself out only for work that is determined as to its kind and its amount, either as a day laborer or as a subject living on his master's property.¹⁵⁹

While Kant embraced in general freedom of contract, he rejected contracts whereby people disclaim their equal worth and autonomy.¹⁶⁰ These contracts he proposed to declare null and void.¹⁶¹ Accordingly, equal autonomy can justify nonprice regulations of the employment contract (that is, some forms of Farnam's "protective legislation"). In fact, those contract terms that offend equal autonomy cannot depend on market forces, because duties to respect equal autonomy are not subordinated to subjective preferences. Some non-disclaimable labor rights are then a natural corollary of equal autonomy. Thus, there are areas of labor law, such as workers' privacy rights, employment discrimination, health and safety conditions, and compensation for arbitrary discharge that seem central to the respect for individuals a society of equals should foster. The same holds of the prohibition of sexual and moral harassment at work, because the ban of a nonoppressive climate in workplace is essential to the respect owed to autonomous individuals. Therefore, all these labor law institutions can be validated as institutional forms needed to secure the relevant nondisclaimable rights.¹⁶²

Democratic egalitarians often rely on unsupported economic propositions to uphold price regulations and a variety of measures that tend to confiscate business property. For instance, Anderson defends minimum wage laws and a qualified entitlement to work on the part of willing, able-bodied adults in order to eliminate all forms of status hierarchy, servitude, oppression, and exploitation.¹⁶³ In trying to reply to obvious economic arguments against these measures, she speculates, "A minimum wage need not raise unemployment if low-wage workers are given sufficient training to make them more productive or if the higher wage induces employers to supply their work-

159. *Id.* at 104.

160. *Id.*

161. *Id.*

162. I do not think the same argument necessarily applies to industrial democracy, though workers' opinions should be properly considered in labor processes if their autonomy is not to be impaired.

163. Anderson, *supra* note 150, at 325.

ers with productivity-enhancing tools.”¹⁶⁴ However, compelling employers to train low-productive workers could reduce the hiring of these workers. It is worth noting that Anderson did not feel obliged to give theoretical or empirical support for the hypothesis that minimum wage/training laws do not increase unemployment.

In supporting labor rights, equal autonomy does not allow us to avoid serious economic analysis to assess the consequences of different policies. On the contrary, because law operates through complex causal mechanisms, we need economic analysis to ascertain whether a certain measure respects or violates equal autonomy. For instance, by resorting to serious economic analysis, we can know that, unless monopsonistic conditions are present, compulsory collective bargaining does not treat individuals as equals. On the one hand, this method of wage fixation does not allow workers to individually negotiate higher wage rates. On the other hand, collective bargaining harms the unemployed to obtain higher wages for actual workers. Equal autonomy takes unemployment to be more offensive to human dignity than low wages. Because unionism often helps to raise wages to the detriment of the unemployed, it can be indefensible from the perspective of equal autonomy. By the same token, except in monopsonistic labor markets, minimum wage laws cannot be justified on the basis of equal autonomy. But this is not a general truth. Wages below the minimum could be more offensive to human dignity than unemployment if, for instance, unemployment were alleviated by a social security regime. In such cases, maximum wage laws could be morally justified. In general, we need both moral judgment and economic analysis to assess the impact of a given measure on equal autonomy.

VII. CONCLUSION

I have discussed five arguments for labor law, namely, the argument from positive freedom and real freedom, the argument from equity and social justice, the argument from noncommodification, the paternalistic argument, and the argument from equal autonomy. The argument from positive freedom has two variants: the argument from moral freedom and the argument from capabilities. The former has a potential for authoritarianism, and the latter is not associated to a discernible moral ideal. The arguments from real freedom and noncommodification are excessively broad, because they lead to the overall rejection of capitalism when carried to their final conclusions. The argument from equity and social justice exposes a tension between bargaining equity and social justice; this tension should be resolved in favor of social justice. The arguments from paternalism and from

164. *Id.*

equal autonomy offer the best possible defense of some labor law institutions. Libertarian or nonintrusive paternalism can justify non-compulsory regulation of labor contracts that remedies so far as possible people's propensities to commit mistakes in their contractual decisions. Finally, the argument from equal autonomy can justify nonprice compulsory terms in employment contracts that materialize the Kantian ideal of equal autonomy in labor settings. In fact, equal autonomy underlies most recent labor law developments in America and elsewhere, such as the prohibition of sexual and moral harassment. It was also at the center of the liberal ideals that constituted this nation.