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#### The collapse of labor power in the United States is inseparable from a widespread embrace of economism. *Homo economicus* leaves no room for normative, pro-social political commitments. Interrogating and building-anew the intellectual foundations of the law of collective bargaining, including its understanding of both rights and the human, is a prerequisite for successful labor law reform, and a moral imperative for labor law research and scholarship. Marxism provides useful analytic insights but bankrupt policy prescriptions.

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Michael J. Piore, “Whither Industrial Relations: Does It Have a Future in Post-Industrial Society,” Prepared for Presentation at: British Journal of Industrial Relations Annual Lecture, 2011

Industrial relations is in trouble. It is in trouble both as a set of institutions and practices linked to trade unions and collective bargaining (however broadly defined) and as a scholarly endeavor. The problem is that these institutions are under attack. The attack has been especially virulent in the U.S., and particularly successful. There, trade union membership and collective bargaining coverage has fallen from a third of the private sector labor force in the early postwar decades to less than 8% today. For this reason, I want to focus on the U.S. here. But the attack is not confined to the United States: Union power has declined to a greater or less extent in most of the industrial world.

The attack is, to be sure, both in the U.S. and elsewhere, part of an effort of particular economic and social interests to gain private advantage; and it has succeeded through the exercise of raw political and economic power. But the attack is also intellectual, and takes advantage of a weakness of industrial relations as a scholarly discipline. In the past, the discipline has provided an intellectual defence of trade unions and a framework in terms of which society, and indeed the unions themselves, could understand and justify their existence and deal with the problems that they posed for social organization. In the current period, the discipline no longer seems to provide a viable intellectual framework of this kind. It has not been able to justify trade unions to the larger society. Nor does it seem to be able to help the unions themselves understand their decline. This paper is addressed to the question of how the intellectual framework of industrial relations has failed and how that failure might be remedied.

As the title of this paper indicates, I had initially thought to do this in terms of the transition from “industrial” to “post-industrial” society—recognizing of course that the terms themselves are a shorthand for a series of changes that need to be much more carefully specified if we are to speak in a meaningful way to the dilemma with which we are concerned here. And that is indeed one of themes I want to pursue in this paper. But to understand our present dilemma and think through the question of how to respond, I think we need to work through two other themes as well. One of those is the demise of the Soviet Empire and with it the threat of communism and, more important, the collapse of Marxism as an ongoing intellectual enterprise. The second is the current economic crisis and the way it is shaping the policy debate. I know – or rather hope and presume – that the crisis itself will eventually pass, but I am also quite certain that it will leave a lasting intellectual legacy, one which we need to begin to address now if it is not to cripple us for some time to come.

Post-Industrial Society

But first, post-industrial society: The basic outline of what I have to say here I have already said in collaboration with Sean Safford in an article we published a few years ago in Industrial Relations (Piore and Safford, 2006). Our argument there is that, at least in the United States, the industrial relations system reflected a very particular model of the world of work and its relation to economic and social life. The model was one in which there was a sharp distinction between the economy and the rest of social life. In this, it was very much consistent with Max Weber’s idea of how modern capitalism emerged from traditional society (Weber, 1958). But it was a much more elaborate model than Weber’s. Not only were the social and the economic realms conceived as separate and distinct, each of these two realms was also governed by a single, dominant institutional form: the large corporate enterprise in the economic realm; the family in the social. The two institutions were taken to be stable, enduring in time, and well defined, 3 with clear boundaries around them. The family was represented in the economy by the male head and breadwinner and his income was the bridge between the economy and the social life. Hence any conflict between these two realms could be reconciled by adjustments in the breadwinners’ terms and conditions of employment. When these workers were then organized into trade unions, such conflicts were resolved in collective bargaining through negotiations between the unions and corporate employers. The discipline of industrial relations, which focused on and studied union organization and collective bargaining, became the prism through which these conflicts and the process of resolving them were understood.

What “post-industrial” society means in this context is first and foremost the breakdown of the neat separation between the social and economic realms and of the institutions of reconciliation. The enormous increase in female labor force participation has undermined the male breadwinner model. And we have moved into a world in which neither the family nor the corporate enterprise are stable, enduring or well defined. Both of these institutions now regularly break apart and reemerge in surprising and seemingly unpredictable ways.

In the economy, firms which once seemed to occupy a well-defined and permanent place in the industrial landscape – like IBM, specializing in office equipment, AT&T the U.S. telephone monopoly, Motorola a radio company, or Kodak focusing on photography – now find themselves competing with each other, and with new players such as Microsoft and Google, in an industry that seems to produce commodities that perform all of these functions at once. Indeed, the very term commodity seems anachronistic; we do not know exactly what to call the objects which this new hybrid industry produces. And, in a further break with the traditional industry structure, these same companies have also begun to sell services, ranging from accounting and entertainment to email and web browsers, which actually compete with the physical objects they sell and which set them up for mergers with companies even further removed from their “core competencies” (another term whose popularity in the business literature, in seeming to contradict these very trends, underscores how much trouble we are having understanding what is taking place around us). In the social realm, wives who were once dependent on their husbands for support are now free to leave them and able to support 4 themselves; children move back and forth between their separated parents in households that each parent has formed with new partners. And male breadwinners leave the women whom they may or may not have married to form relationships with each other, and with children they may have adopted from half-way-around the world. Social identities signaled by sex, race, ethnicity, age, physical disability and sexual orientation often trump identities anchored in the workplace as axes of political mobilization, and organizations representing groups defined in these ways make demands in the workplace which can only be understood in the larger social context of which work has become a part. Work, in other words, is no longer in a separate and distinct realm, the emergence of which Weber imagined heralded economic development.

A discipline which seeks to help us understand the interrelationship between the economy and society thus can no longer focus only upon the intersection created by collective bargaining. It needs to go much deeper and more fundamentally into the details of the economy on the one hand and the society on the other. Many of us have tried to do this (see, for example, Kochan, 2005), but the tools which helped us to understand collective bargaining are not really adequate to this task. Indeed, one has to wonder whether they have any relevance at all to the inner workings of the two realms whose intersection was once their domain of study.

Some questions to consider in the realm of public policy: Is the enterprise or the establishment an institution to which one can attach employment rights or are they merely ephemeral sites of production? If one cannot attach employment rights to them or make them responsible for working conditions, is there some economic unit which can be made responsible for the terms and conditions of employment? What is a living wage in a family where at least two members are more or less permanently attached to the labor force? Indeed, is the family the right unit to think about in terms of income adequacy? Can you force the family or the firm to be responsible socially or economically for the people associated with it? These policy questions lead to parallel questions in terms of scholarship: Should we be studying the firm or the family at all? Is there some other institution or constellation of institutions which we ought to take as our unit of analysis?

The Marxist Alternative

The second factor which seems relevant in understanding the decline of industrial relations is Marxism: the role which Marxism played in the emergence of the discipline in the first place and now the way in which it too has declined as an intellectual enterprise. Indeed, I find it hard not to see the fate of the two intellectual endeavors as intertwined. From the late nineteenth until the late twentieth centuries, industrial society was faced with a problem that was euphemistically called industrial peace. Industrial peace, or rather the lack thereof, became a persistent feature which could not be made to go away and posed a continuing threat of anarchy, if not revolution. The dominant social science theories, particularly standard economics, were unable to recognize the problem let alone address it—the forces which generated it had no place within their conceptual framework. The instinctive response was to suppress the proximate cause, trade unions, as one would repeal a tariff that impeded free trade, or break up a monopoly that dampened competition, a prescription which in the case of unions only aggravated the problem. Marxism offered a conceptual tool kit for thinking about these issues, but at the price of an ideology of revolution.

Industrial relations offered an alternative. It recognized the problem of industrial peace as being central in the formulation of economic policy and provided a vocabulary for talking about it and a conceptual framework for thinking about it that seemed to avoid the Marxist outcome. The collapse of the Soviet Empire, and the threat it posed, has obviously undermined the appeal of Marxism and with it the perceived need for and attraction of the alternative which industrial relations offered. In the United States, the decline of strike activity has obviously diminished the need as well—although the protests in France and Greece in 2010-2011 suggest that this is not universally true. But, in understanding the decline of industrial relations as a scholarly endeavor, the more important development is that the emergence of post-industrial society has undermined the intellectual credibility of Marxism in much the same way it has undermined the credibility of industrial relations.

Just how much so was driven home to me in a very personal way by my cousin when he called several years ago to ask me if I would like to look through my grandfather’s papers, which he had inherited, before he donated them to the New York Public Library. My grandfather was manager of the Jewish Daily Forward, a Yiddish 6 language newspaper which up until the 1950’s had a daily circulation of over 150,000 and was published simultaneously in New York, Chicago and on the West Coast. And I did indeed think it would be interesting to look through them. It actually was not quite as interesting as I had anticipated. My grandfather, who was born in Russia and came to the States as an adolescent, was a Menshevik, a term evoked almost daily with multiple meanings in my parents’ household, but which my own children would not recognize at all. The Forward was a socialist newspaper, a key organ of the Jewish socialist movement, but by the 1950’s Yiddish was a dying language and the socialist movement had been progressively absorbed into the Democratic Party to the point where it really no longer had an independent existence. There is a sense in which Marxism had died in the U.S. long before the demise of the Soviet Empire or the coming of post-industrial society.

Most of my grandfather’s papers consisted of “orations” he had prepared for the funerals of old comrades—in fact they were really all variations of the same speech. I can remember hearing it when I went with him to one of these funerals. But among the papers was something I had never heard him talk about before, a pamphlet called the Conditions of Jews in Poland (Kahn, c. 1935). It was a report of a mission he led for the Joint Distribution Committee that had been sent to Poland in the early thirties to review the programs that the organization ran there. The JDC was originally founded to help Jewish refugees in Europe in World War I, but it then expanded its mission to help Jews more generally (really I suppose poor Jews, but in those days most Jews were poor).

The pamphlet started from the proposition that the social identity that really mattered was class. It took pains to point out that the brutal anti-Semitism to which the Jews were subject in Poland in that period was the product of bourgeois efforts to divide the working class, and the Polish workers themselves opposed the violence committed in their name. My grandfather had very little sympathy for Zionism. Emigration to Palestine (or the U.S. for that matter) wouldn’t hurt he argued; it would relieve some of the population pressure, but there were so many Jews in Poland and their condition was so bad that emigration could never be enough to solve the problem. The real solution had to be found in Poland itself. Such a solution required that Jews move out of agriculture and commerce, which belonged to the historical past, and into manufacturing which represented the future. In this, he clearly had a Marxian vision of the historical trajectory 7 of the system. The JDC-financed programs in Poland were primarily aimed at helping the Jews to do this through education and training. Another startling feature of the pamphlet was the range of programs, which actually went considerably beyond training and education for manufacturing and included virtually everything that has been invented to address poverty and employment and training beginning, or at least I thought beginning, with President Johnson’s Great Society in the 1960s, and including a program which sounded remarkably like the Grameen Bank.

In some ways, the lessons about contemporary society which I drew from the reading of my grandfather’s pamphlet are not very different from the lessons about industrial relations; neither conceptual framework seems very relevant today. Even my grandfather gave up his class-based orientation in the postwar period, at least by enough to make Jewish identity as expressed through the State of Israel a major political commitment. In a way it had already replaced manufacturing, which as a solution to the problems of the Jews now seems completely irrelevant. I am not sure what lessons to draw from the fact that in 2010 we still seem committed to the same range of programs for fighting poverty as the JDC used in the 1930’s; perhaps it suggests that our understanding of poverty is as irrelevant to the real problem of poverty in contemporary society as our understanding of industrial relations.

But while Marxism seems no more able to capture the reality of post-industrial society than industrial relations, the way in which it fails in this regard is very different. Marx actually predicted the fusion of the social and economic realms which seems to undermine the construction around which industrial relations was built (he predicted the decline of the family as well). But the impact of these changes has not worked out as he foresaw; rather than economic identities coming to dominate social identities, it is more like the other way around. As the employments of women have become more and more like those of men, it has increased women’s identity as women and led them to pursue a feminist agenda; it has not led women to make common cause in the workplace with men. Post-industrial employment opportunities have become if anything more differentiated by the technological trajectory, not as Marx predicted less so. The differences suggest that industrial relations is a good deal more than a tamed version of Marxism. And Marx would seem to provide a more promising starting point for figuring 8 out where we went wrong. Marx did not focus, as industrial relations did, upon the intersection of the social and the economic, but actually tried to get inside and understand the dynamics within each realm. That, it would seem, is where we need to go as well; we could begin by trying to understand the errors to which the Marxist framework led and to identify the analytical weakness which led it to make them. This presumably would be a very different critique from that which industrial relations theorists made in the 1930’s and the immediate post-World War II decades when the field was at its apogee.

The Economic Crisis

Finally, the economic crisis: The crisis is to be sure a moving target, especially after the resounding defeat of President Obama’s party in the 2010 mid-term congressional elections, but however elusive a target it is proving to be, it is one which promises to have a decisive impact on industrial relations, both as a practical endeavor and as a scholarly enterprise. We do know, moreover, what the run up to the crisis was like. In the thirty years leading up 2008, social and economic policy had been conceived within a neoliberal conceptual framework. The framework has two key elements: one is a theory of human motivation which places exclusive emphasis on individual monetary incentives; the other is the competitive market as a template for social and economic organization. This was precisely the framework which precluded an understanding of trade union organization and collective bargaining, and which earlier in the century, when these were pervasive, had created the space for industrial relations.

Conventional economics could not explain the persistence of trade union organizations and strikes because of the classic free rider problem: Why should individuals be willing to engage in the risky activities of union membership and strike when they could have the benefits without paying the costs? And yet people did engage in these activities at great personal risk. Hence, there was a space for a theory of human behavior which admitted a collective motivation. That space was further enhanced by the memory of the Great Depression, the embrace of Keynesian economics as a way of understanding that most salient economic event, and with it the acceptance of the contradictions between the Keynesian assumption of rigid prices and wages and the neoliberal market model in which prices and wages were the instrument of economic adjustment. As my colleague Duncan Foley once said, the contradictions were forced into the labor market, and it thus became convenient to suppose that the labor market worked in a radically different way from other markets in the economy, a way which one could believe was consistent with industrial relations even if the latter never really tried to explain what that was. As the Great Depression receded from active memory, Keynesian economics gave way to much more orthodox economic models, and with the decline of union organization the intellectual space for alternatives to the neoliberal framework narrowed, indeed one could say virtually disappeared. The crisis promised to reopen that space.

The promise of an opening was reinforced by the election of President Obama, who rode to office on a coalition of forces opposed to many of the trends which seemed to flow from the neoliberal orientation of public policy. And the crisis itself put into the hands of the new Administration the instruments for an altogether different approach to economic management. The Federal government actually took ownership of much of the financial services sector and the automobile industry. This combined with the economic stimulus package, and the government’s inherent role in education and health care (and the expansion of the Federal role in these areas through new legislation the Administration proposed) and traditional government goods and services, to give the Obama Administration direct control over half of the economy. But while policy did indeed change in several dimensions, most notably in social and environmental spending, the new Administration continued to conceive of what it was doing within the neoliberal framework. Its programs in health, education and energy/environmental policy were designed around the template of the competitive market and relied on personal incentives based on individualized monetary rewards, even in industries like health and education where the practitioners had a strong collective identity and professional ethos which might also have served to direct behavior. My point is not that the market-like incentives were wrong, but rather that they were so limited, particularly at a time when budgetary constraints (rightly or wrongly) were being stressed. To take one particularly telling example: when the teachers’ union, at considerable political cost to the leadership and after an extensive internal campaign to carry along the rank-and-file, proposed mixed (rather than purely monetary) incentives, it was dismissed as self-interested and treated 10 with ridicule. We need to recognize and build into our theories the way in which people’s identities are embedded in their professions and that they can be motivated to work to given standards not simply because they are paid to do so but because if they do not then they feel themselves a failure in their own eyes and that of their colleagues (Piore, 2010).

But the limits of the Administration’s vision are perhaps most evident in its failure to develop an incomes policy, particularly in those sectors over which it had direct control: most noticeably in terms of the political reaction, in its refusal to control bonus payments in the financial services industry. The Administration insisted on managing the assets which it had acquired so as to maximize the financial return, as if the government were no more than a private investor. Numerous proposals to limit bonuses payments in the industry were offered by its congressional allies but when they were not vetoed openly and outright by the President and his Secretary of the Treasury, they were sabotaged in one way or another in the legislative process. The President himself actually opposed the bonuses and attacked industry for offering them in several of his public appearances and press conferences, but insider accounts suggest that he viewed his own rhetoric in this regard as demagogic and winked at his aides standing in the wings even as he spoke from center stage (Alter, 2010). Thus, he seemed to endorse the trends in the U.S. income distribution of the recent decades (1976-2007) in which 58% of the growth in income went to the top one percent of the distribution (Atkinson, Piketty, and Saez, 2011). This seems particularly relevant because it contrasts so strongly with the 1960’s and 1970’s, a period when incomes throughout the distribution rose at roughly the same rate, a rate determined by gains in labor productivity (Dew-Becker and Gordon, 2005; Gordon and Dew-Becker, 2008). In that period, presidents from Kennedy and Johnson to Nixon and Carter all pursued incomes policy of one form or another which sought to limit compensation in particular industries, using economy-wide productivity gains as the standard. Those policies were fashioned by a range of economists, from Samuelson and Solow at one end of the spectrum of orthodoxy to John Dunlop and George Shultz, at the other. But the intellectual space in which such a policy was conceived – Keynesian economics for Samuelson and Solow, industrial relations for Dunlop and Shultz – has essentially disappeared. The one place where the Obama 11 Administration has departed from economic orthodoxy is in its insistence on the need for an enormous government stimulus to sustain the economy in a period of recession which followed upon a financial crisis of the magnitude of that which the country experienced in the fall of 2008. The justification for the stimulus is, however, basically empirical:

The recovery falters in virtually every similar crisis about which we have records for the last two centuries—actually the standard reference here refers to eight centuries in its title (Reinhart and Rogoff, 2009). How one could understand the need for this conceptually in the framework of liberal economics, i.e., without a theoretical apparatus comparable to that offered by Marx or by Keynes, without, in other words, a broader conception of human motivation and without something more than the market mechanism to produce social cohesion, is another question. It is not surprising that the Administration has had such trouble articulating a justification for its policies within the political arena.

Thus, to conclude, the crisis perhaps more than anything else underscores that the most pressing task, morally and scientifically, is to fashion a broader conceptual apparatus for understanding human activity, one in which, to repeat, human beings are more than economic men and society is more than a market. I think it is basically the failure to build such an alternative understanding that is the weakness of industrial relations as a scholarly discipline. But I want also to emphasize that, as I have argued, the role that industrial relations played in industrial society never required an understanding of this kind. Indeed, as I tried to suggest, the construction of industrial society in which it was embedded essentially skirted this issue. Marxism is in terms of its construction better placed to explore these questions; but the answers it once provided are, if not universally wrong, clearly wrong for our times. Whether, given its ideological position, Marxism is able to take advantage of the fact that it was immersed in these issues to explore why it was wrong and fashion an alternative is another question. And I certainly do not see in Keynes the roots of serious answers to these issues. So, I am not sure whether this is a direction in which industrial relations is really equipped to move, and I have even less of idea as to whether it is likely to go there, but it is definitely the direction in which I wish it would move, because somebody has to go there.

#### Neoliberal economics is indefensible both theoretically and empirically. It survives only by theological faith in its priors, which is underpinned by the dominance of its economic narrative. That in *turn* both was and is designed to disguise and serve particular political and ideological ends.

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Sergio Gamonal, “ARTICLE: Labor Law, Economic Narrative and Law & Economics: The Method is the Problem,” 35 Hofstra Lab. & Emp. L.J. 317 (Spring, 2018)

The scientific method has allowed us to dominate nature, and although there is still much to learn regarding those matters, much of the physical world has become susceptible to accurate prediction. 3

However, the same phenomenon does not occur when it comes to [\*318] social sciences. Law, sociology, and economics contain an element of permanent uncertainty - the human being. The theories behind these disciplines are constantly debated and it is difficult to contrast them with an objective reality. That is why you would be afraid to fly in a plane designed by lawyers, considering that lawyers rarely agree. Or by sociologists, who debate intensely about many theories on society. Or by economists, who even though they support their theories with mathematical calculations, graphs, and statistics, are almost never able to predict rates of growth or when a great crisis may arrive.

Regardless, many economists are known for trying to demonstrate that their discipline is as scientific as the natural sciences. The tone of many economists is that of a mathematician who lectures on what should or should not be done, especially in other areas such as politics and law. 4 This could be merely anecdotal and many of us would agree that the lack of humility and true critical spirit of many economists reflects a serious defect of that discipline.

However, the situation is much more serious. With the development of the economic analysis of law (hereafter L&E), since the 1960s many economists have freely commented on how, when, and where to regulate. 5 This is what Professor Stewart Schwab has called "the economic invasion of labor law." 6

And in the case of labor law, according to economists, regulation is almost always unwise and ill-timed, except when it comes to limiting union activity. 7 Economic critiques of labor law have created a narrative adverse to workers and unions that has unfortunately influenced many policymakers. 8

This paper argues that the economic narrative is overvalued, considering that it pretends to be an exact science when it is, in fact, a social science. This narrative has spread to law and almost every aspect of human life, as Michael J. Sandel points out: "Over the past three decades, markets-and market values-have come to govern our lives as never before. We did not arrive at this condition through any deliberate choice. It is almost as if it came upon us." 9

[\*319] Morton J. Horwitz denounced the ideological and political character of the L&E more than 30 years ago. 10 Despite the denunciation revolving around the neoliberal narrative and L&E, it been successfully enforced within the public and global discourse. 11 In this paper, I return to Horwitz's critique by quoting the marginalized economists of the dominant discourse who have emphasized the limits of economic analysis. I conclude by placing the economy's narrative and the L&E in its rightful place regarding labor law.

[\*320] I must make two clarifications. First, the fact that a particular discipline is not an exact science does not affect its importance at all. Moreover, precisely because it is an area of study centered on the uncertainties of the human being, it is probably equal to or more difficult than an area of study that can always contrast its theories with what happens in the natural world.

Second, this work does not seek to attack the economy or economists in general. The economy is a very relevant area of study and many economists, past and present, must be taken seriously.

On the contrary, this work focuses on neoliberal hegemonic economic thinking and its crusade against labor law through the L&E. My criticism relates merely to the pseudoscientific character of its thought.

The following section, Section II, analyzes the criticisms made by economists and social scientists to the claim of the hegemonic economic narrative of being a scientific discipline like the natural sciences. Section III critiques the L&E approach on Labor Law. And finally, Section IV concludes by putting the economic narrative in its rightful place regarding labor law.

II. Economics or Political Economy as a Social Science

Science is a discipline that seeks laws that might explain reality. Constant relations between phenomena are found and formulated through science, and it is precisely those laws that allow us to explain and predict particular events. Science is a critical knowledge that stimulates and develops doubts as much as possible, being aware of its provisional nature and the possibility of being revised or overcome. 12

Science justifies its statements in two dimensions, a logical one and an empirical one. Science seeks objectivity, that is, the subject must have the capacity to be elevated above all historical and subjective conditioning, and to have enough distance regarding the observed object, so it is possible to adopt the point of view of a neutral observer. 13 This paradigm explains the ideals of natural sciences, and justifies some reductionist views that estimate that social sciences are lacking due to the fact that they will never reach the objectivity of the natural sciences. 14 Other visions emphasize the irreducible specificity of humanities, claiming for them their own particular method and a type of knowledge [\*321] of their own, more linked to understanding than explanation. 15

What about economics? This discipline is full of mathematical calculus, graphics and statistics, 16 and it seems to be the most exact of all social sciences. 17 However, that is not true.

Many economists have emphasized how debatable economics can be, its lack of precision, and how its "mathematization" is nothing more than mere marketing. 18 This is what David Colander calls "inappropriate use of mathematics." 19 There is no doubt that economics, as well as the law, try to anticipate human behavior, which has been rich and unpredictable from the very beginning. 20

Proof of this is the investigation done by MIT Professor of Finance Andrew Lo, who reviewed twenty-one books dedicated to explaining the 2008's financial crisis; eleven of them were written by academics, ten by journalists and a former treasury secretary. 21 The conclusion is clear and convincing: a unique interpretation regarding the crisis and its causes does not exist among the experts, but rather a true Tower of Babel of different [\*322] and contradictory visions. 22 Andrew Lo emphasizes the need for economics to build more accurate narratives of the facts to be able to infer more precise conclusions. 23

Numerous contemporary economists and social scientists have criticized the dominant neoliberal narrative, stressing that many of the proposed labor deregulations, such as the lowering of the minimum wage, have been negative. 24

In the same way, and in other matters regarding the labor field, such as the need to have stronger unions, several economists and social scientists have denounced the harmful and political nature of many neoliberal recommendations that have ended up weakening the unions, increasing precarious work, and finally, undermining the middle class. 25 Examples of this criticism appear in Algan and Cahuc, 26 Atleson, 27 Baylos, 28 Brown and Oxenbridge, 29 Western and Rosenfeld, 30 Schenk, 31 Forbath, 32 Hacker and Pierson, 33 Stern, 34 Raday, 35 Stiglitz, 36 and [\*323] Lichtenstein. 37

Economics tries to be the most accurate social science, the most truly scientific, although its predictive results are poor. Mario Bunge has emphasized that the so-called economic science plays with ideas that have little or nothing to do with the real world. 38

Economists are indifferent to the truth, which is supposedly what scientists seek. 39 Members of the Austrian School, such as von Mises argued that economic theories were true *a priori*. 40 Another variant is that of Milton Friedman, a champion, according to Bunge, of the fictitious or antirealist variety in economics, where assumptions can be wildly unrealistic, and only the consequences matter. 41

David Colander accuses Milton Friedman of what he calls "The lost art of the economists." 42 In fact, the father of the famous economist J.M. Keynes, John Neville Keynes, wrote in 1891 a famous book on economics and its method The Scope and Method of Political Economy. 43 In this text, according to Colander, the elder Keynes distinguished among three categories: positive economics (theoretical economic science, not applied), normative economics (the study of what should be, not applied economics) and the "art of economics" (refers to applied economics). 44 These categories were recognized at the beginning of Milton Friedman's work, Methodology of Positive Economy, but the categories are reduced to just the first two in the rest of his text. 45 Colander speaks of the "art of [\*324] economics," which studies a social science that seeks to understand a complex social framework where exact sciences are often unsuccessful, that is, when complex systems that are not reconcilable with a model or equation must be understood, because the interactions are too many and the dynamics are non-linear. 46 However, economists often forget this and suffer from "art-phobia." 47 The "art of economics" connects positive and normative economics, linking what has been learned in positive economics with the purposes developed by its normative counterpart to analyze how realistic these ends are. 48 It links real world solutions to real world problems. 49 By neglecting the art of economics, we often work with models that are unrealistic. 50

Bunge enumerates certain characteristics of economics that keep it from being a hard or exact science, such as investing a disproportionate mathematical wit in formalizing, embellishing, and analyzing unverifiable or false assumptions. 51 Or as akin to theology, since it argues arduously over concepts such as "scarcity, utility, shadow pricing and expectations," but it invests very little effort in linking these theoretical variables with observable variables through economic indicators. 52 In addition, the dominant economists often make extravagant assertions in favor of "behavioral and economic hypotheses" (with the name of laws or a priori principles), and very seldom or never are they tested, or worse, when they are proved as false, the economists continue to attribute to these claims a great heuristic or normative capacity. 53 Bunge categorically concludes that economics is a semi-science or proto-science, with some pockets of mature science and others of pseudoscience, 54 calling on economists to [\*325] refrain from using the economy as an excuse to do math. 55

In this way, hegemonic economics pretends to be a natural or exact science when it is nothing more than an intellectual impostor that uses mathematics and natural science models to disguise an ideology and, contrary to its manifested purpose, to hold dogmas that cannot be criticized or falsified. 56 It is paradoxical, then, that many economists, on the one hand, defend the nature of exact science of their discipline, but betray one of the fundamental assumptions of the exact sciences: to be a critical knowledge being constantly revised or surpassed. 57

In addition, economics partakes in the problems of all social sciences (law obviously included) to make accurate measurements. All measurement requires assumptions that are their starting point, but in social sciences there is usually no agreement on these assumptions. 58 Furthermore, any measurement should be based on assumptions about its instruments, but in the social sciences it is much more difficult to be certain about its measuring instruments according to an objective pattern. 59 Finally, any measurement involves the reduction of reality into determinable or quantifiable dimensions. That is, reality is what can be calculated, measured and manipulated, according to principles of logical and mathematical equivalence. 60 But considering the temporal and linguistic nature of social reality, these assumptions appear to be very partial. 61

This last problem is aggravated by the insularity of economists. In fact, in the United States, economics is the social discipline that cites or quotes fewer studies or research papers of other colleagues in peer social sciences (sociology, political science, psychology, etc.). 62

#### Their assumption that stronger protections corrode society is neoliberal dogma that justifies slavery-based logics.

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As the Gulbenkian Commission's report concludes, in taking the natural sciences as a model, economics has created three kinds of expectations born from political science and sociology that have proved [\*326] impossible to fulfill as they were initially announced: an expectation of prediction, and an expectation of management, both based on an expectation of quantifiable accuracy. 63

III.Labor law Under Economic Attack

Considering the deficiencies and shortcomings of the dominant hegemonic discourse, and pondering the claim of economists to be an exact science as an intellectual imposture, we can briefly review the criticisms that L&E makes of labor law.

Richard Epstein, for example, is a great advocate of employment at will. 64 His reasoning is as follows: the contractual freedom of the parties must be respected because it allows the realization of individual autonomy and increases labor market efficiency. 65 Discharge at will, he adds, reflects the dominant practice in the market 66 and introducing a rule regarding dismissal with just cause might alter that balance. 67 State regulation of personal life, religious life, or political activities is undesirable, as it is in labor relations. 68

For Epstein, it is precisely the efficiency of discharge at will that makes it so common and popular in the United States. 69 In other words, he states that the survival of the employment at will and the frequency of its use can be considered a sign of its suitability. 70 With such a free system, it is not possible or probable that the employer will abuse the worker, since the worker can always quit for good reason, without reason or even for a bad reason. 71 Employment at will is very cheap to administer and, according to Epstein, it is easier for workers than for employers to overcome the errors of a dismissal, because the worker can quickly get a new job and free dismissal simplifies this task since it does not imply a non-fulfillment or fault that stigmatizes the worker, since all employment contracts are at will. 72

[\*327] As we can see, these arguments are of a theological kind. If you have faith in what Epstein says, you will agree with his opinions. If you believe that the worker is free, that he can always give up and find a better job, that is, that the employer lives almost intimidated because the worker can resign at any minute, you will find this argument very reasonable. If you have faith that a social practice is only good because it lasts in time (like what happened with slavery until the middle of the nineteenth century), you will find Epstein's argument valid. Epstein does not provide any evidence of why individual autonomy increases market efficiency. 73 But for L&E fans, to talk about "efficiency" is like mentioning a sacred word.

In the United States, an exceptional case is the state of Montana, which has norms regarding contract termination that require a showing of just cause for termination. 74 Andrew P. Morriss, former Professor of Law at Texas A & M, noted in 2007 that empirical studies regarding this law concluded that its application had reduced employment in Montana by 0.46% per year. 75 The accuracy of the calculation is striking and it is more amazing that other studies conclude otherwise. As Ann McGinley points out, almost ten years from the effective date of the dismissal law in Montana, unemployment had fallen from 7.4% in 1987 to 5.5% in 1995. 76 After twenty years of enforcing Montana's dismissal law, employment increased. 77 It is obvious that we are not implying that the law generates this effect. But the whole economic and neoliberal theory is debunked with these statistics. More protections do not necessarily mean more unemployment.

A very enthusiastic author of the L&E is the Professor of Labor Law at Cornell University, Stewart J. Schwab. In a paper published last year, Schwab explains the impact of L&E on labor law. 78 He groups the relations between L&E and labor law in three "eras." 79 First, the era based on the assumption that the market operated in perfect form. 80 Then, a [\*328] second era that takes into account market failures. Finally, a current era that debates between empirical studies to mediate and decide whether the market works or not. 81

After explaining the history of L&E briefly, Schwab tries to illustrate how L&E and labor law are related. 82 He explains, for example, that the optimal vacation time is two weeks, 83 and that workers as rational agents prefer contracts with less vacation but better pay. 84 Later he gives us some "methodological data": L&E applied to labor law is based on the idea that all agents are rational. 85 He points out that for the economy, the maximization of social efficiency is very relevant. 86 He also indicates that economics instead of focusing on a normative analysis, is rather devoted to a positive analysis. 87 He adds that economics studies the unintended consequences of regulations 88 and that defenders of the fact that labor law should be protective of workers suffer from a lack of realism because Schwab wonders who makes the laws, the weak or the powerful? 89 And of course, the answer is obvious since money greatly influences lawmakers. 90 Schwab then explains that L&E's followers measure social welfare in a different way, considering not only workers but also consumers, children, retirees, investors and non-workers. 91 He emphasizes that the protection of workers is not the sole purpose of society. 92 Schwab adds that L&E takes into account that everything has a price and that there must be awareness about this fact. 93 He focuses on the skepticism about regulation 94 and devotes an entire section to market failures. 95 Finally, Schwab points out that in L&E the negotiating power [\*329] gap plays a limited role when studying the employment contract. 96

In short, Schwab has ideological assumptions that distract him from the scientific method necessary for an exact science that economists boast of possessing. Trying to explain reality and the world of work relations from the suspected rationality of its parties, in isolation from the complexities of the human being, is closer to the vision that the prisoners of Plato's Allegory of the Cave could have, instead of the vision of scientists in search of the truth. The unidirectionality or bias of the analysis generates incomplete answers and diagnoses. In the world of human relationships, isolating a factor and raising it to be a supreme guideline implies a loss of perspective. The economic perspective based on the rationality of profits forgets the perspective of power. Using Schwab's example, there may be employers who even prefer to earn less or pay fines just to emphasize their power by not giving holidays even though the workers are less productive and thus emphasizing who is in charge. 97

Schwab also resorts to a sophism already supported by Hayek. 98 It reminds us that in society there are not only workers, but also children, non-workers, consumers, retirees, etc. That is, the pie is not large enough for everyone and we must choose, either the orphans or the unions. What about the employers? They are never considered in these comparisons, and therefore the argument, although false, is ingeniously operative: pitting the weak and helpless against one other in a dramatic choice. However, at this point we are already facing pure ideology. The scientist has long since lost his way with these sophisms. Hayek developed this argument early on, better known as insider/outsider. 99

In other words, trade unions hurt the rest of society because they privilege their members with stable jobs, setting up barriers for unemployed and informal workers to find a job. 100

If this were true, why do most developed countries maintain [\*330] collective bargaining systems that cover more than fifty percent of their workers? L&E propagandists have no answer to this reality, rather than continue to repeat their dogmas to the end.

In any case, Schwab's outburst of sincerity is appreciated, because by saying the law is made by the powerful, we must understand that in L&E there is no place for the weak. It is the legal version of social Darwinism. 101

Another enthusiastic L&E author is Professor Richard Posner, who points out that he does not take sides about whether the price of labor should be decided by a competitive market or a cartel system such as the unions. 102 His analysis is positive and not normative, 103 which means that, in accordance with the hegemonic narrative, we shall not read a social scientist but rather someone devoted to economics as an exact science.

It then manifests itself in favor of some regulations that were considered protective in the United States in the 1930s (especially the Wagner Act on Collective Bargaining), since clearly common law was not efficient. 104 However, Posner criticizes supporters of syndicalism who argue that unions favor increased productivity because they ignore one of the basic assumptions of the economy: that people in general and employers in particular are rational maximizers of their profits. 105 If this were so, that is, if unions improved productivity, employers would not spend money and resources in discouraging the formation of unions, since it would be an irrational behavior. 106

But that is not the case, Posner states. 107 Because common sense indicates that unions raise the value of work beyond productivity and therefore employers do not want them. 108 This explains why unions are in favor of the minimum wage, to raise the price of non-unionized workers that could replace union members, and also explains why trade unions [\*331] demand safety in their workplaces from the government, to reduce the competition of non-unionized workers. 109 A non-unionized worker might accept a lower wage or less secure conditions than union workers and thus compete just to get a job. But unions are able to neutralize this competition with the minimum wage and the safety and hygiene standards at work.

Posner continues, reasoning that unions are simply monopoly cartels that restrict competition. 110 For example, he explains that they generally agree with the employer to derogate the rule of employment at will for their members. 111 That is, dismissal must be with just cause. Posner again suggests that this is a limitation to competition, as it provides preferential treatment for older workers, who could be replaced by a younger worker, but since dismissal must be with just cause the employer cannot get rid of senior workers. 112

Posner complements these arguments on labor law in his famous book regarding the economic analysis of law. 113 He states that the tutelage of the legislator is not necessary because if an employer is arbitrary or capricious, then nobody will want to contract with him, which means that the market will punish him and he will have to amend his behavior or pay more. 114 The market is the antidote because the parties voluntarily negotiate their contracts. 115

Richard Posner's arguments can be criticized from several points of view. First of all, even though he believes that he is objective and that his analysis is positive instead of normative, his starting point is that competition is the best option and that the labor market works perfectly on its own. That is, Posner begins his analysis by uncritically assuming the neoliberal economic assumptions as dogma.

Secondly, some of his suggestions limit with ingenuity. To suggest that the market will punish an arbitrary employer because nobody will want to contract with him is derisory. Perhaps someone who has never talked to a worker, or perhaps someone who has none of these uncertainties can think something so alien to reality. Common sense and minimal experience do not support this.

Thirdly, if what Posner claims is true, and the protection of labor and [\*332] unions limit competition resulting in harmful consequences for the economy, growth, employment and prosperity, countries that do not follow Posner's prescription should be bankrupt have thousands of unemployed people, have greater poverty rates than the United States, and be on the verge of collapse. But any average reader who cares about general culture knows this is not true. It could be said Norway, Finland, Canada, Sweden, Denmark and Iceland are the most advanced countries on the planet, with greater degrees of freedom and equality, with a lower poverty rate, in short, enviable societies with protective labor legislation, unions a lot more powerful than those in the United States, sectorial negotiations or branches. 116 What could Posner, the objective, the positive analyst, the scientific economist tell us about the success of these countries?

In summary, although one may argue that the law should refrain from protecting the worker and the unions, it is not legitimate to present this opinion as a truth born from an exact science, with a technical and allegedly non-ideological format, because economic knowledge that supports this responds to a social science instead of the knowledge of an exact science as if it were physics, chemistry or biology. And even less so when these laws regarding labor law's supposed inefficiency do not apply to countries that maintain a strengthened protection of worker and their unions.

However, we must recognize the success of the neoliberal economic narrative that has monopolized public discourse and has penetrated the debate of labor law academics.

IV.Conclusion: The False Scientific Prestige of Economics

The economic analysis of law, I believe, could maintain its prestige only so long as it wrapped itself in the cloak of science. Once its practitioners become overt apologists for a grossly unequal Distribution of Wealth, it is only a matter of time before they are pluralistically assigned to the class of one of the many "ideologies" from which one may pick and choose. After twenty years of attempting to claim that they stood above ideology in [\*333] their devotion to science, the practitioners of law-and-economics have finally been forced to come out of the closet and debate ideology with the rest of us. 117

Neo-liberal economists have shaped our lives as if they were some sort of gurus, spreading a series of ideas as if they were objective and unquestionable truths. They have provided theoretical justifications for the financial deregulation and the unbridled pursuit of short-term profits. 118 They have encouraged and justified policies that have produced slower growth, greater inequality, less secure jobs, and more frequent financial crises than three decades ago. 119 Economists have helped to destabilize the lives of citizens, and have presented as inevitable the increases in inequality, the astronomical salaries of executives, and the extreme poverty in poor countries. 120 As Sandel states, " the more markets extend their reach into noneconomic spheres of life, the more entangled they become with moral questions." 121

This means that a subjective and fallible ideology, disguised as an absolute mathematical truth, predominates in political discourse as the revealed truth and dominates the most important decisions for our planet in the so-called information age.

Consequently, should we dispense with economics? Obviously not. What we denounce as imposture is the type of neoliberal economic narrative of the last three decades, which leads the world off an economic, social, environmental and political cliff.

But there are other economists who take the importance of the economy very seriously and we are not only talking about the founding fathers of the eighteenth and nineteenth centuries. 122 All their works [\*334] recognize that capitalism is developed through investments and technological innovations in the long term. 123

Bruce E. Kaufman has studied the evolution of economic thought regarding labor markets, noting that most economists have recognized that it is an imperfect market and that it therefore requires legal interventions and promotion of collective bargaining. 124 In his analysis he mentions Adam Smith, 125 Alfred Marshall, 126 and the institutionalist economists of the University of Wisconsin who have been influenced by the ideas of the British economist couple Sydney and Beatrice Webb (Commons, Perlman, Witte, and Lescohier), 127 Douglass, Millis, and Slicher, 128 the post-World War II economists called neo-institutionalists or neo-classical revisionists (Dunlop, Kerr, Lester, and Reynolds), 129 and more contemporaneously, the Cambridge Group (MIT and Harvard professors such as Samuelson, Solow, Thurow, Freeman, Doeringer, Piore, Summers, Akerlof, and Osterman). 130 All of these economists agree that the labor market is imperfect. 131 They obviously differ in their views about the degree of regulation or the degree of collective bargaining required to solve these imperfections, but they agree that the work market is far from operating perfectly.

The great exception is the Chicago School (Friedman, Stigler, Lewis and Becker). 132 These economists believe that the labor market works perfectly and therefore there is no need for regulations or collective bargaining. 133 The Chicago School has been the basis of neoliberal hegemony in the world, and we must not confuse it with the economists or the economy as an important and respectful social science. Kaufman attempts to explain why this trend in Chicago has been so popular and successful, mentioning, for example, that one of the factors that has [\*335] allowed this success has been the economists' divorce between theory and reality. 134 However, the process of spreading ideas involves complex interactions ranging from universities to government research policies, including foundations, publishers, the press, political parties, and lobbying organizations. 135

And a key aspect in the diffusion of ideas is money, as Colander points out, "money acts as a magnet, directing research and ideas." 136 And there is no doubt that businessmen have financed numerous think tanks and foundations since the 1980s. 137 Unfortunately lost in the pursuit of funding is neutrality. 138 [FN 138] David Harvey, A Brief History of Neoliberalism 22 (Oxford Univ. Press, 2005) (pointing out, neoliberal ideas were explicitly diffused within the academy by the University of Chicago,vvvvvvv\\\\\\ and through several generously funded think tanks such as the Institute of Economics Affairs or the Heritage Foundation.). [End FN 138]

We cannot help but admit how successful the dissemination of neoliberal ideas has been and how it has reached the law through L&E. As I have explained in this paper, economics is a necessary and important social science; but as a social science it cannot claim the objectivity, accuracy, predictability, and rigor of the physical sciences. The neoliberal narrative that has been hegemonic so far must give way to real social scientists. From the perspective of the social sciences, L&E cannot even be considered as a methodological contribution superior to law, sociology, or political science.

How about the law? The law is a civilizing development that should not be influenced by theories that are protected by their hypothetical accuracy when they are nothing more than disguised ideologies. And labor law? Labor law has allowed the success of the capitalist system. Its regulations played a key role in the inclusion of workers into the system and also relaxed its ferocity. The unions allowed a significant participation of the workers, enabled the redistribution of income and were the voice of the voiceless. However, labor law has been a victim of its own success. 139 Societies that developed after the fall of the Soviet [\*336] Union turned to neoliberalism with the illusion that a counterweight to business power was not necessary and that globalization and the so-called free market would benefit us all. 140 [FN 139-140] As Bauman points out, the phantom of the revolution was key for the capitalist state of the early twentieth century to establish boundaries on corporate profits and limit the appetite of those who went after the gains and the inhumanity of working conditions, thereby impeding the proletarian pauperization, and noting that the workers established themselves, either with pleasure or lack of interest, within the capitalist society. See Zygmunt Bauman, Collateral Damage: Social Inequalities in a Global Age 18, 48-49 (Polity Press 2011), https://books.google.com/books/about/Collateral\_Damage.html?id=-dbHg1ZaYkoC&printsec=frontcover&source=kp\_read\_button#v=onepage&q=revolution&f=false. And this is why Lenin affirms that the proletariat freed to its own resources and wisdom would not succeed in overcoming the trade-union mentality. Id. at 18. This unexpected course taken by the workers entering the bosom of capitalism thanks to the protective union legislation openly contradicted the expectations of the Marxian analysis. Id. This is why some authors have emphasized how important labor law has been for the development of a moderate capitalist system instead of the savage capitalism of the nineteenth century. See Karl E. Klare, Labor Law as Ideology: Towards a New Historiography of Collective Bargaining Law, 4 Indus. Rel. L. J. 450, 452 (1981) [hereinafter Klare, Labor Law]; Robert W. Gordon, Corporate Law Practice as a Public Calling,49 Md. L. Rev. 255, 270-72 (1990); Karl Klare, The Horizons of Transformative Labour and Employment Law, Labour Law in an Era of Globalization 3, 12 (Joanne Conaghan, Richard Michael Fischl & Karl Klare eds., Oxford Univ. Press, 2004) [hereinafter Klare, The Horizons]. From this perspective, labor law helped consolidate the corporate power while limiting the most serious abuses in the system. See Klare, Labor Law, Id.; Gordon, Id., and Klare, The Horizons, Id. [End FN 139-140] And we have ended up in a world nationally and globally dominated by private monopolies. The time will come for us to return to our good senses, to find the golden mean, prudence represented in a democracy free from the influence of the rich, and a labor law that fulfills its mission of defending the weak.

Labor law is not the villain of the movie. But at this point neoliberal hegemony is at the forefront of the narrative, a narrative that argues that workers are to blame for recession, the lack of growth and the high rates of unemployment. In this narrative, it is not economics that has failed but labor and labor law. Neoliberal economists have been tacitly suggesting this for decades based on misperceptions regarding their knowledge of both their own and other disciplines.

Labor lawyers must stop feeling guilty for economic failure and must stop being intimidated by the supposedly greater rigor of economics. We must recover our original vocation and voice in support of a more human labor law and practice, which will also increase the true wealth of society.

#### Ours is a political economy of labor law that understands it as the product of struggle. It requires blood, sweat, and tears by labor organizers, and a reinvigorated public that understands itself as agential. Rejecting progressive control of law, bargaining, and rights as a political horizon is bad. But so is conceiving of those rights as something will somehow spring forth from nowhere to save us. Building countervailing checks on the power of Capital is the only way to render regulation of capitalism effective. That can curb the Gilded Age 2.0, same as the first one. Failure to do so will cause extinction.

Rosenblum 22 – Activist in Residence at the Center for Work and Democracy at Arizona State University, 30+ year labor organizer, and author of Beyond $15

Jonathan Rosenblum, “Lessons for Organizing: From the Depression to Amazon and Beyond,” March 15, 2022, *Beacon Broadside*, https://www.beaconbroadside.com/broadside/2022/03/lessons-for-organizing-from-the-depression-to-amazon-and-beyond.html

Let me just say a little bit for your readers and listeners about the right to strike in the United States. It is generally not protected, as a practical matter. It’s true that many so-called private sector workers have the legal right to strike, but it’s also true that all American businesses have the right to permanently replace and fire workers who go on strike. We’ve seen that the threat itself actually serves to neutralize strikes and actually prevent strikes by intimidating workers.

Importantly, many so-called private sector workers don’t enjoy any federal protections on the right to strike. Agricultural workers, gig economy workers, Uber and Lyft drivers, Instacart workers, truck drivers, all are excluded from federal labor law protections. By the way, if you did a racial analysis you’d find that disproportionately these are workers of color who are denied the right to strike. So, there is a racist component to the legal strike regime in this country. Federal government workers can’t strike by law. That’s also true for the vast majority of local and state government workers. In fact, in many cases public sector workers can’t even demand the right to bargain from their employer. Healthcare workers have to give 10 days’ advance notice before they strike, and there are restrictions on that even.

Notably, all airport workers and railroad workers basically have to get court approval before they can go on strike. Just to give you a concrete example, during the SeaTac Fight for $15, there was a group of fuelers at the airport who were so frustrated with the problems with safety and the abuse from supervisors that they sent a notice to their boss saying they’re going to go on strike if these problems aren’t fixed. These are people soaked in fuel by the end of their shift, who are working for poverty wages, running around trying to get planes fueled on time, tripping over operating equipment that was outright broken and dangerous. Rather than fixing the problems, the company went to federal court and got an injunction against the workers. The federal court said the workers may not strike, they may not have a sickout, they may not have pickets, they may not engage in any concerted activity to protect their rights.

It took us three years to get an appeals court to undo that adverse decision. What do you think happened to the workers and those problems in the meantime? Nothing happened to correct the issues raised and many of the workers got fired or pushed out the door. That’s the practical reality of the so-called right to strike in the United States. So we absolutely need to support workers who bravely do go on strike in the States, in Canada, and elsewhere. In particular, I want to note the John Deere workers, Columbia University graduate student workers, the grocery workers now on strike in Denver and elsewhere. We have to recognize that these strikes are not just over better contracts; they are examples of a direct challenge to the power of Capital.

We also need to take note that most of the leading strikes in this country in recent years were outright illegal or not protected by labor law. If you think about the 2018 West Virginia educators strike, in 55 counties, teachers, aides, bus drivers, cafeteria workers, all went on strike, not just for better contracts, wages, and benefits, but for smaller class sizes and increased staffing. Those 20,000 people who were striking were all violating state law that said you may not strike. That instigated and inspired similar education workers in Oklahoma, Kentucky, Arizona, and Colorado to also go on strike and demand a better public education system. Those were all illegal strikes as well, without legal protections for workers.

There’s a reason why the state tries to neuter and limit strikes in every capitalist country, because the bosses know that strikes have tremendous power. Effective strikes threaten profits, threaten the viability of business, and even threaten, in many cases, the political order. At its extreme, strikes call into question the very basic premise of labor exploitation; they get people asking basic questions about how power and wealth are distributed in society. That’s why strikes are so dangerous to political and economic elites, and why we have a legal regime that actively pushes workers away from that. As well as a court structure that actually actively tamps down strike threats. So, when workers do strike, we absolutely need to be there on the picket lines with them.

MD: Considering the generally anti-worker labor law regime that does hold back worker power both in the US and Canada, what would you say to those whose response to these challenges are needing to prioritize struggling around issues of labor law reform? Should labor law reform be a priority for those seeking to organize their workplaces or for those who wish to support that organizing?

JR: You’ll note that the West Virginia educators didn’t go to the state capitol demanding labor law reform, they demanded more money and smaller class sizes. That’s not to say that we shouldn’t argue and fight for labor law reform because it does reveal the contradictions of capital, like where there’s ostensibly the right to strike, as you’ve said, but in practical reality it doesn’t exist.

I want to walk people back to some recent history in the United States. If you’ll remember in 2008, as Wall Street was actively crashing the economy, we had an election here that Barack Obama won. One of the things that he said to unions was, if you vote for me, I will make sure that we pass labor law reform. It was called the Employee Free Choice Act (EFCA). And Obama won in November of 2008. The Senate was a majority of Democrats, 60 Democrats and 40 Republicans. The house was also overwhelmingly Democrat. There were a number of union leaders who had very high hopes going into 2009 when Obama was inaugurated. EFCA didn’t get passed. EFCA didn’t come anywhere close to getting passed, even though the Democrats had super majorities at the time. Instead, Obama and Congress spent more time propping up Wall Street and giving handouts to the billionaires who had crashed the economy. Meanwhile, tens of millions of Americans suffered, lost their jobs, lost their homes, many of them lost their lives. We still didn’t get labor law reform. For people who say we have to fight for labor law reform, I would say, look at what happened back then.

What we can achieve, whether it is at the bargaining table or in the political arena, is always a function of the balance of power between working people and the bosses. What we saw in 2009 was not just a sell out by the Democrats, who were happy to spout rhetoric but not deliver for working class people because they got our votes. We have to have a clear-eyed assessment that says, workers did not have the balance of power to prevail in that struggle.

It’s not a matter of electing Democrats or figuring out a different kind of policy to put forward. It’s a matter of building power at the grassroots, so that workers actually can prevail and create a different kind of society. Some of that may be done through legislative battles, but we’re not going to win those battles until there’s more organizing and a more powerful base. I also would say not just more organizing, but more demonstrated capacity to engage in militant strikes in the community and in the workplace, that force these concessions. Anything we win in the political arena is not because of the beneficence or the enlightenment of elected officials. It’s a concession to our power. We have to recognize that’s what it comes down to in the end.

Tori Fleming (TF): We want to pivot back a little bit and talk about strategy. What do you think it will take to actually unionize Amazon? We’ve frequently seen that unions can be very competitive over the chance to organize specific sectors. So, considering Amazon seems to be a pretty hot place to organize right now, do you think that unions need to cooperate to make a breakthrough within organizing at Amazon? How realistic is it to expect such a major breakthrough?

JR: I am hopeful when I hear some of the things that union leaders are saying about the need to organize Amazon, particularly the Teamsters Union. But I’m not sure that rhetoric matches up with the resource commitment that it’s going to take for the international labor movement as a whole to see organizing Amazon as an urgent priority. That’s sort of the view from the top down.

From the bottom, I would say I’m also very excited about a lot of the innovative organizing that’s happening at the grassroots, sometimes through institutional unions, and sometimes not. Workers at the grassroots have the creativity, imagination, and perseverance to figure out new models of organizing. A big part of the job of union institutions is to go talk to the workers, and more importantly, to listen to them and learn about tactics and strategies. They have to be accompanying workers, not dictating to workers, but accompanying them in the struggle to take on this behemoth, and figure out something that the working class hasn’t figured out in the history of the world yet.

There was a time when workers hadn’t yet figured out how to organize basic industry. We overcame that in the ’30s in the US, and right after that, in Canada. We didn’t overcome it by having teams of paid organizers parachute into cities and tell workers what to do. It came through a bottom-up process that combined knowledge and struggle. Workers had years and years of struggling through many losing battles. Famously the steel strikes of 1919-1921. They were losing strikes; people lost their jobs and lives. But workers in the ‘20s and ‘30s began to understand power, starting with auto. Those workers had an assessment of how you choke off production with sit-down strikes and other militant tactics to hurt the employer. Some of those kinds of tactics and strategy will work in organizing Amazon, and some of them won’t.

What capital learned from the struggles of the ’30s, is that you can’t allow your production process to become hostage to a militant group of organizers who can choke off your production and distribution networks. So now they build redundancy into those networks. Amazon is a classic example of it, where you could shut down an entire warehouse, but it won’t make a bit of difference to the company; they’ll simply shift distribution to another place. You could shut down a number of warehouses and it would barely register a blip. When workers in Germany go on strike at Amazon warehouses, Amazon simply shifts distribution to Poland. So, it’s not just a national problem.

For capital, borders have always been porous and will continue to be. You can’t distribute goods that are being ordered in the United States very easily from a warehouse in Thailand. But if workers at Seattle warehouses all go on strike, Amazon can get warehouses in British Columbia to cover for them. So, we have to have a recognition that while all organizing starts out locally, it has to be regional, national, and ultimately international in order to succeed. Moreover, there’s tremendous power – structural power – that some workers in Amazon have. If I’m a warehouse worker, I have very little structural power, but I might have some power if I can unite with everyone in my warehouse. Better yet if I unite with everyone in warehouses throughout the region. Tech workers have more structural power as individuals or small groups because of the specialized nature of the work that they do.

Just like how our predecessors in basic industry had an understanding of how to influence production and who has structural power and who doesn’t, we also have to have the same analysis, whether it’s organizing at Amazon, or Starbucks or any other big company. You have to start off with an analysis of power building, then organize from there.

TF: To build on that, Canadian labor history has come up a lot recently within socialist conversations as well as in other areas of organizing activity around Toronto. What specific lessons do you think Amazon organizers can draw from the unionization efforts of the ’20s and ’30s that you reference?

JR: The most important lesson is when workers unite and fight, we can win. We can do extraordinary things; we can transform workplaces and communities and even societies.

The second thing I would say is that it’s extraordinarily hard work and there are no shortcuts to organizing. You have to build structure, you have to form committees, you have to identify organic leaders, you have to recruit people, you have to struggle with people who may have a different understanding or political inclination. You have to engage with people, starting from where they’re at, listening, and then challenging them. Those are the basics, the day-to-day work of organizing, which is not about putting out a press release or simply positioning yourself morally. It’s about the grassroots organizing that needs to happen.

MD: Unfortunately, we’re nearing the close of our time here. As one final question, what would you say to organizers at places like Amazon in these trying times and who might be feeling positive about their chances of succeeding against these massive corporations?

JR: I would say that these are really, really scary times when you think about it. Not just the nature of work, but the climate crisis too. You see what happened in my state of Washington and just north of here in BC with the floods and fires last summer. The already obscene wealth disparity in this New Gilded Age is only getting worse, it’s even accelerated under COVID. The devastating human toll over the last two years has for many people ripped to shreds any illusion that US political and economic leaders – and Canadian ones for that matter – are really committed to meeting the basic health and safety needs of the population. We see ultra-right, anti-democratic, outright racist, and xenophobic groups striding boldly onto the political stage and into office. One can become very despondent at this moment.

Precisely because the crises are so grave, and severe and urgent, that’s why we need to organize. The only thing that’s going to save us, humanity, is the working class organizing and fighting for a different vision of society. And it starts in the workplace. It starts when you say, it’s not right that I’m making poverty wages, forced to walk or run eight miles a day through this cavernous warehouse, and subject myself to risk, danger, injury, and repetitive motion stress that is going to give me arthritis in a few years. There is a better way. But the only way we’re going to have that better way is if we join hands with other workers who are similarly facing the same situation. It starts in the warehouses; then it goes out from there.

The problems that I started off by noting are not going to get solved immediately. They’re not going to get solved with shortcuts, and they’re not going to get solved because some miraculous leader emerges from the mist to steer this country or this world in a different direction. It’s going to happen when we come together and build the mass movement and demand a different kind of society. That starts with the work we do day to day on the shop floor, convincing coworkers that we deserve better, and we should form a union. Only then can we build an understanding that we are all in the same class, and we better stick together, no matter our gender, race, religion, or where we come from. We have to unite everybody in a common enterprise that says we actually deserve more.

#### Marxist theory provides one of many useful analytic inputs, but it cannot do provide a viable political or economic blueprint, especially in the present day. The structural contradictions inherent in economic centralization guarantee that it would merely replace the alienation of *laissez-faire* capitalism with a new bureaucratic alienation. In every historical example that culminated in forced labor, gulags, mass famine, unchecked totalitarianism, and productivity collapse. The best alternative to both is a progressive liberalism that protects both individual AND collective, and rejects both central planning AND libertarianism of any stripe. That requires progressive collective bargaining rights.

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Karl Marx’s labor theory is a seminal critique of capitalistic economic systems, highlighting legal and social establishments in perpetuating labor alienation. The crux of this theory is based on the laborer’s alienation from labor, commodities, other laborers and human potential. In this respect, legal systems, in capitalistic economies, perpetuate alienation by commodifying labor, hence reinforcing ownership rights and perpetuating obligations based on agreements, which benefit the ruling class in a large part. Marx argues law must not be examined in a standalone capacity, for it is a tool for class oppression. This allows for an introspection of legal systems in a socialist system, which, in theory, sought to end labor alienation by substituting individual ownership for collective ownership. The legal systems in the Soviet Union, China and Cuba, however, failed in these objectives, being bogged down by bureaucratic overreach, political meddling and economic struggles (Jonna; Foster, 2016).

This study carefully considers the ways in which socialist states made attempts to integrate Marxist labor theory in legal systems and considers, in parallel, the success of these efforts in reducing labor alienation. While Marx’s thought laid down a conceptual groundwork for a redefinition of labor relations, its actual realization too often benefited states over labor freedom. Through an historical examination of labor legislation in its varied forms in socialism, this study contributes to current debates on precarious labor, digital one and legislative change. Comparative study of labor regulations, in socialism and in capitalism, contributes toward an assessment of legal mechanisms in reducing labor alienation in modern economies.

1 LABOR VIEW AND LEGAL THEORY IN MARXISM

1.1 Marx’s view of labor

Karl Marx’s conception of labor is central to his critique of capitalism, as he viewed labor not merely as an economic activity, but as a defining human characteristic. He argued that, through labor, individuals express their creativity and establish their connection with the world. However, under capitalist production, this natural relationship is disrupted, and workers become alienated from their labor, leading to a loss of autonomy and fulfillment.

Marx identifies four forms of labor alienation. First, alienation from the product of labor occurs when workers do not own or control the goods they produce. Instead, these goods belong to the capitalist, severing the connection between the worker and their creation. Second, alienation from the labor process happens when the production process is dictated by the employer, leaving workers with no control over their work conditions or creative input. Third, alienation from other workers emerges as workers are pitted against one another in a competitive labor market, diminishing solidarity. Finally, alienation from oneself takes place when work, which should be a source of self-expression, instead becomes monotonous and devoid of personal meaning, causing workers to lose their sense of identity and purpose.

In Capital, Volume I (1867), Marx introduces the distinction between concrete labor and abstract one, which is essential for understanding the commodification of labor under capitalism. Concrete labor refers to specific and purposeful work that creates use-values, meaning goods or services that have practical utility. For instance, a carpenter making a chair or a tailor sewing clothes performs concrete labor. Abstract labor, on the other hand, is the work reduced to a measure of economic exchange value. In capitalist society, labor is treated as a homogeneous commodity, valued only by the amount of time it takes rather than its intrinsic qualities (Trubetskoi, 1902, p. 124).

For instance, a good craftsman, who is proud of his work, does manual labor. However, once the same craftsman is working in a factory doing a repetitive and non-creative work, his labor becomes abstract - a mere component of economic activity, but not a manifestation of human creativity. The commodification of labor is facilitated by legal institutions, including employment contracts, property law and labor legislation, that reproduce capitalist relations of production. According to Marx, such legal stipulations are not neutral; rather, they work in the dominant class’s interests in reproducing the divide between labor and capital (Pashukanis, 2017).

1.2 Legal development in Marxist theory

Marxist legal theorists, particularly Evgeny Pashukanis, expanded on Marx’s ideas by asserting that law itself is a product of capitalist exchange relations. According to Pashukanis (2017), legal systems, in capitalist societies, emerged to regulate the buying and selling of labor power, thereby reinforcing alienation. In this view, legal formalism develops alongside capitalism, promoting the illusion of equal contractual relationships between employers and workers, even though structural power imbalances persist.

Historically, legal structures have evolved to protect property relations that benefit capitalists. In feudal societies, laws were based on lord-vassal obligations, while in capitalist societies, law promotes contractual autonomy and individual property rights (Tomlins, 2017). However, in both cases, law functions as a tool to legitimize existing economic hierarchies rather than as a neutral arbitrator of justice.

In socialist legal systems, Marx expected the law to gradually wither away as societies moved toward communism. In the initial phase of socialism, however, legal systems were still needed to restructure property relations, regulate labor and dismantle capitalist institutions (Stone, 1985, p. 39). The Soviet Union and China attempted to apply Marxist legal theory by nationalizing industries, collectivizing agriculture and restructuring labor relations through state-planned economies. These efforts sought to eliminate the commodification of labor, but bureaucratic inefficiencies and political centralization often undermined the workers’ autonomy (Vincent, 1993, p. 371).

A key contradiction in socialist legal theory is that, while Marxist ideology rejects the idea of law as a neutral framework, socialist states still relied on legal structures to manage labor relations and enforce productivity. This paradox created tensions between the state control and the workers’ empowerment, as seen in cases where labor laws were used to maintain political stability rather than the workers’ self-management.

2 LEGAL PRACTICES IN SOCIALIST COUNTRIES: CASE STUDIES

2.1 The Soviet Union

The Soviet Union was one of the first states to implement Marxist labor theory into its legal system following the Bolshevik Revolution of 1917. The newly established socialist state sought to abolish private property and create a legal environment that promoted collective ownership of the means of production. The Decree on Land (1917) and the Decree on Workers’ Control (1917) nationalized private industries and transferred workplace decision-making to the workers’ councils, or soviets. The Soviet Constitution of 1918 further reinforced the principle that labor was every citizen’s duty rather than a commodity to be bought and sold.

To institutionalize Marxist labor principles, the Soviet government enacted the Labor Code of 1922, which eliminated unemployment by guaranteeing the right to work for all citizens. This legal framework sought to end labor alienation by ensuring that employment was not a commodity, but a social obligation. The state controlled wages, working hours and employment assignments, enforcing strict labor discipline through policies, such as compulsory work quotas and prohibition of the workers’ strikes.

However, as the Soviet Union transitioned into a centralized command economy, worker autonomy diminished. The initial system of the workers’ self-management through soviets was gradually replaced by a hierarchical state bureaucracy that controlled production targets, wages and employment distribution. The Stalin era industrialization policies further intensified state control, with the introduction of forced labor in gulags and harsh penalties for workplace absenteeism (Vincent, 1993, p. 371). Despite legal guarantees of employment and social benefits, Soviet labor policies often reinforced the workers’ subordination to state planning rather than the workers’ true empowerment.

By the Brezhnev era, Soviet labor law had solidified into a rigid system that maintained full employment, but suppressed workplace democracy. Trade unions, though formally recognized, primarily functioned as the state’s extensions, lacking genuine independence to advocate for worker rights. While the Soviet labor system succeeded in eliminating open unemployment and providing social protections, such as housing and healthcare, it ultimately replaced capitalist alienation with bureaucratic alienation, wherein workers remained unable to control the conditions of their labor.

2.2 The People’s Republic of China

Following the establishment of the People’s Republic of China (PRC) in 1949, the Chinese Communist Party (CCP) sought to restructure labor relations in accordance with Marxist principles. Early legal reforms, such as the Land Reform Law of 1950, redistributed land to peasants and abolished feudal landlordism. In the industrial sector, private enterprises were nationalized, and the 1956 Socialist Transformation of Industry and Commerce consolidated the state ownership of production. These reforms aimed to eliminate capitalist exploitation and align labor with the state’s collective interests.

During the Great Leap Forward (1958-1962), the government introduced people’s communes, a system where rural workers labored collectively on state-managed agricultural projects. These communes were intended to eliminate private property and fully integrate workers into the socialist economy. However, rigid state planning and unrealistic production targets led to economic inefficiencies and widespread famine, demonstrating the practical limitations of centralized labor policies (Quigley, 1989).

The Cultural Revolution (1966-1976) further disrupted China’s labor structure by dismantling legal institutions and promoting ideological purity over legal stability. Courts and labor regulations were rendered ineffective, and mass political campaigns encouraged workers to challenge traditional hierarchies. While this period saw the workers’ temporary empowerment through “revolutionary committees”, it ultimately led to economic and legal instability, making labor relations highly unpredictable.

After Mao’s death, economic reforms by Deng Xiaoping, beginning in 1978, saw the move away from state control and towards a combined socialist-market type. The institution of Special Economic Zones (SEZs), during the 1980s, permitted private as well as foreign enterprise within China, thereby once again introducing capitalist labor relations in some sectors. Although collective ownership was the only sanctioned principle officially, the liberalization of the labor market facilitated increasing wage differences, insecure job practices, as well as dwindling the workers’ rights (Hart-Landsberg; Burkett, 2006).

The contemporary Chinese labor system is a hybrid of state socialism and market capitalism, and the workers’ legal protection coexists with increasing labor flexibilization. The expansion of gig economy work and digital platforms, in China, is indicative of the contradictions of Chinese labor law, with workers in informal sectors often lacking social protections, echoing Marx’s theories regarding labor alienation in capitalist economies.

2.3 Cuba

The Cuban legal labor system was greatly affected by the 1959 Revolution, which led to the nationalization of key industries and the redistribution of agricultural land. Under Fidel Castro’s leadership, the Cuban government established labor laws that sought to eliminate capitalist exploitation and ensure universal employment opportunities. The passage of the Fundamental Law of Labor, in 1962, brought about workplace democracy through the inclusion of the workers’ participation in decision-making and the prohibition of private ownership of key industries.

Cuban labor law emphasized the moral value of work over monetary incentives, aligning with Che Guevara’s concept of “New Man” socialism, where labor was seen as a duty to society rather than a means of personal gain (Backer, 2004, p. 337). Unlike in the Soviet Union and China, Cuban labor unions maintained a degree of influence, with the Cuban Workers’ Central (CTC) playing an active role in shaping labor policies.

However, Cuba’s labor system was not free from contradictions. While workers had job security and access to social benefits, wage structures remained uniform and unresponsive to productivity, leading to declining motivation and economic stagnation. Additionally, the lack of independent trade unions meant that workers had limited avenues to contest workplace decisions imposed by the state (Sáenz, 2007, p. 1).

The Special Period (1990s), following the Soviet Union’s collapse, forced Cuba to introduce economic liberalization measures, including the legalization of self-employment and private enterprises in limited sectors. These reforms created a dual labor economy, where state-employed workers earned fixed wages while private-sector workers had greater income potential, but fewer legal protections. Recent labor reforms have further expanded market-oriented policies, raising concerns about the long-term sustainability of socialist labor protections in Cuba.

2.4 Comparative analysis of socialist labor systems

The legal systems, implemented in the Soviet Union, China and Cuba, shared common ultimate goals: the elimination of private enterprise, the establishment of state control over labor relations and the promotion of collective ownership. Yet the enforcement of these labor policies often substituted state control for capitalist exploitation and thus limited the workers’ independence. Labor legislation, in the Soviet Union, was intended to instill discipline in workers, but eliminated democratic processes within the workplace. China witnessed oscillations between collectivization by the government and market-oriented reforms, resulting in a diluted dual legal system. Cuba, prioritizing social protection, encountered economic inefficiency in addition to state control over labor unions.

Despite their ideologically grounded origins in Marxist labor theory, these socialist governments faced built-in structural contradictions in trying to implement anti-alienation labor policies. The need for central economic planning often conflicted with the Marxist value of the workers’ self-management, creating bureaucratic alienation rather than the workers’ true empowerment.

3 COMPARATIVE ANALYSIS OF SOCIALIST LEGAL SYSTEMS

The labor policies and laws, instituted in the Soviet Union, China and Cuba, were essentially rooted in Marxist ideals with the aim of eliminating the labor alienation of capital through collective control of the economy, centralized planning, as well as state regulation of the terms of work. These socialist regimes shared the same objectives: the elimination of private property, the elimination of joblessness through guaranteed work, as well as the introduction of work as a part of the broader socialist political as well as economic aims. Yet despite their ideational affirmations, actual implementation of these policies revealed considerable discrepancies with the theoretical approach of state socialism.

3.1 Structural similarities in socialist legal systems

One of the defining features of socialist labor law, across all three countries, was the abolition of private ownership of the means of production. The Soviet Union’s early labor reforms, including the Decree on Workers’ Control (1917), nationalized all major industries, granting formal control to the workers’ councils (soviets). Similarly, China’s 1956 Socialist Transformation of Industry and Commerce transferred ownership of private enterprises to the state. Cuba’s 1962 Fundamental Law of Labor ensured that key industries remained under government control. These policies aligned with Marx’s belief that the commodification of labor could only be eliminated through the collectivization of production.

Another key similarity was the state’s role in guaranteeing employment. In the Soviet Union, the Labor Code of 1922 enshrined the right to work, ensuring universal employment while prohibiting private wage labor. China’s Maoist-era work-unit system (danwei) tied the workers’ social benefits-housing, healthcare and education-to their place of employment, integrating labor into the socialist state structure. Similarly, Cuba’s revolutionary labor policies guaranteed jobs and social welfare benefits for all workers. These legal guarantees sought to prevent the precarity of capitalist employment and fulfill Marx’s vision of a classless society, where work was a social duty rather than an economic necessity.

Additionally, socialist labor models theoretically promoted the processes of collective decision-making. In the Soviet Union’s early days, the workers’ councils instituted workplace democracy. Later, as the economy grew more bureaucratized, state planners progressively centralized the process of labor decision-making. China’s communes sought the rural workers’ active participation in communal agricultural work. However, local self-governing power among workers was repeatedly curbed through state-mandated quotas. In Cuba, enterprise management featured the workers’ input mediated through unions. These unions, however, existed under state control, which limited their autonomy.

3.2 Divergent approaches and national contexts

Despite these congruencies, the adoption of Marxist labor legislation varied considerably across the three countries, reflecting their political systems, economies and histories. In the Soviet Union, labor policy was characterized by tight central control and extensive state regulation. Though work was guaranteed, labor policy took on more authoritarian characteristics with the implementation of draconian punishments for transgression at the workplace, notably for absenteeism and striking. Utilization of forced labor camps (gulags), under Stalin’s regime, deviated considerably from the ideals of voluntary and meaningful work, enunciated by Marx. By Brezhnev’s era, the labor system, in the Soviet Union, evolved as a hard and highly bureaucratic system, wherein the mechanisms of the law served the state’s domination more than the workers’ empowerment (Vincent, 1993, p. 371).

China, on the other hand, experienced more radical shifts in labor policy. During the Great Leap Forward (1958-1962), labor was collectivized into massive communes, but unrealistic production targets and state-enforced quotas led to economic failures. The Cultural Revolution (1966-1976) saw a temporary dismantling of bureaucratic structures, as Mao encouraged workers to challenge traditional hierarchies. However, after Deng Xiaoping’s reforms (1978 onward), China embraced a market-socialist hybrid, allowing private enterprises and foreign investment, which reintroduced capitalist labor dynamics alongside socialist legal protections (Hart-Landsberg; Burkett, 2006).

Cuba’s approach was more flexible compared to the Soviet Union and China. While Cuba maintained state control over labor and promoted ideological commitment to socialist work ethics, its legal framework also adapted to economic realities. Unlike the Soviet Union, where labor was strictly regulated, Cuban labor laws allowed for some degree of the workers’ participation through trade unions. However, as the Special Period (1990s) forced economic liberalization, Cuba introduced legal reforms allowing private businesses and self-employment, creating a dual labor market, where socialist guarantees coexisted with capitalist employment practices (Backer, 2004, p. 337).

3.3 The contradictions of Marxist labor theory in practice

While these socialist labor systems sought to eliminate alienation, they often replaced capitalist alienation with state-driven one. In theory, Marx argued that, in a socialist society, labor would be liberated from market exploitation and workers would collectively control production. However, in practice, socialist states often centralized economic planning under a bureaucratic elite, limiting the workers’ true autonomy.

One of the key contradictions, in socialist labor law, was the tension between centralization and the workers’ empowerment. In the Soviet Union, China and Cuba, state control over labor laws meant that workers had guaranteed employment, but little power to influence workplace conditions. Trade unions, though legally recognized, functioned as the state’s extensions rather than independent advocates for labor rights. In contrast to Marx’s vision of the workers’ self-management, labor laws, in these socialist states, often served to discipline the workforce rather than empower it.

Furthermore, productivity and worker motivation became significant challenges in socialist labor systems. Since wages were standardized and job security was guaranteed, there were fewer incentives for innovation or efficiency. In the Soviet Union, strict labor codes enforced discipline through legal penalties rather than economic incentives, leading to low morale and declining productivity. In China, the transition to a market-socialist model demonstrated that some degree of competition and wage differentiation was necessary to sustain economic growth. Cuba’s economic crises forced a partial retreat from strict socialist labor policies, further highlighting the challenges of maintaining the workers’ motivation in a centrally planned economy (Guthrie, 2002, p. 139).

3.4 Lessons for contemporary labor systems

The discrepancies in socialist legal models provide valuable insights to contemporary labor struggles, especially in light of precarious employment, platform labor and job displacement through automation. The rise of digital labor platforms is an eye-catching representation of capitalist exploitation, where labor is typified by alienation in employment, defined by precariousness and absence of societal protection. The inability of socialist labor models to effectively power labor demonstrates that state-oriented power and market liberalization cannot eradicate labor alienation completely. On the other hand, robust legal models, combining labor protection and economic flexibility, might demonstrate greater sustainability.

Research findings, concerning socialist labor structures, recognize the importance of independent trade unions, worker-controlled cooperatives and flexible labor regulations, prioritizing job protection while encouraging incentives for greater labor productivity. Future labor regulations have to address labor alienation in both socialist and capitalist settings, ensuring labor law promotes worker self-management, equitable remuneration and decent working conditions.

4 CHALLENGES AND CRITICISMS OF MARXIST LEGAL DEVELOPMENT

The application of Marxist legal theory, in socialist states, revealed several inconsistencies in theoretical and pragmatic contexts. The goals of abolishing private property, guaranteeing employment for everyone and encouraging collective property were supposed to overcome labor alienation. Nonetheless, their implementation in practice tended to strengthen the state’s authority over labor instead of enabling labor organization for the expropriation of means of production. Such contradictory actions provoke serious questions concerning whether, and to what extent, it is possible to realize Marxist legal theory in legal systems and if such theory is, by default, incompatible with state institutions.

4.1 The contradiction of state-enforced socialism

Marx envisioned a future when the state would “wither away”, leading to a classless and stateless society, in which workers collectively manage production. However, socialist states had to rely on legal frameworks to transition from capitalism to communism, creating a contradiction, in which law, a supposed tool of capitalist oppression, was used to regulate socialist labor relations (Pashukanis, 2017).

In the Soviet Union, China and Cuba, labor laws were designed to abolish labor as a commodity, but their implementation often resulted in bureaucratic control rather than the workers’ self-management. For instance, while Soviet labor laws guaranteed full employment, they also imposed harsh legal penalties for workplace absenteeism and strict production quotas that left workers with little autonomy. In China, Maoist policies, such as communal labor organizations, theoretically promoted collective ownership, but in practice, state planners dictated work assignments and production targets, limiting the workers’ true agency. Similarly, in Cuba, while labor laws emphasized worker participation through trade unions, these unions remained subordinate to state directives, preventing the independent the workers’ advocacy (Backer, 2004, p. 337).

This contradiction between Marxist theory and socialist legal practice suggests that state-led efforts to enforce Marxist labor ideals often led to new forms of alienation, where workers were controlled by state bureaucracies instead of private capitalists.

4.2 The lack of independent trade unions and the workers’ control

A major criticism of socialist labor law is that, while it abolished property rights, it did not construct the workers’ genuine self-organization. As per the Marxist labor theory, workers should have ownership over the means of production. However, in the socialist states, the trade unions were tightly linked to the state apparatus and became means of political and economic governance rather than the workers’ organizations.

For the Soviet Union, the All-Union Central Council of Trade Unions (AUCCTU) was a state organ that implemented the state policies in the labor relations rather than striving for the workers’ rights (Vincent, 1993, p. 371). Likewise in China, state-owned enterprises dominated employment and restrained freedom of labor associations and labor movements. In Cuba, the Cuban Workers’ Central (CTC) was involved in policy-making concerning employees, but it was not independent and subordinate to the government, which restricted its actions and influence for the workers’ complaints.

Without independent trade unions, workers in socialist countries had limited means to challenge workplace conditions or engage in meaningful decision-making. This undermined the workers’ empowerment that Marxist theory aimed to achieve, as labor relations were still dictated from above rather than shaped by the grassroots workers’ control.

4.3 Economic efficiency vs. the workers’ motivation

Another major challenge in socialist labor systems was balancing economic efficiency with the workers’ motivation. While capitalist labor markets rely on competition, wage differentiation and profit incentives, socialist economies sought to eliminate these mechanisms by standardizing wages and guaranteeing employment. However, these policies often led to low productivity and the workers’ disengagement, as there were few incentives for innovation or efficiency.

In the Soviet Union, the rigid structure of command economy made it difficult to adapt to changing labor demands, resulting in overstaffing, low worker morale and stagnant productivity. In China, Maoist labor collectivization initially sought to increase agricultural and industrial output, but state-imposed production targets often led to inefficiencies. The Great Leap Forward (1958-1962) exposed the limits of centralized labor planning, as unrealistic quotas and forced collectivization led to mass economic failure (Guthrie, 2002, p. 139).

Cuba faced similar issues, particularly after the Soviet Union’s collapse, which forced it to rethink labor policies. The introduction of limited market reforms, in the 1990s, created a dual labor market, where state-employed workers earned low fixed wages while those, in the private sector, had higher income potential. This shift demonstrated that some degree of wage differentiation and market flexibility was necessary for economic sustainability, challenging the socialist model of uniform labor rewards (Backer, 2004, p. 337).

4.4 Non-Marxist critiques of socialist labor law

Beyond internal contradictions, non-Marxist scholars have criticized socialist labor systems for undermining individual labor rights. While capitalist labor laws often protect freedom of contract, unionization and the workers’ mobility, socialist legal systems prioritized state control over labor relations, which sometimes resulted in coercive labor policies.

For instance, in the Soviet Union, legal mechanisms, such as internal passports (propiskas), restricted the workers’ mobility, forcing individuals to remain in assigned workplaces. In China, workers in state-owned enterprises often had limited ability to change jobs, as employment was tied to social benefits provided by the danwei system. In Cuba, the uniform wage system discouraged entrepreneurial activity and limited the workers’ ability to seek alternative employment opportunities (Vincent, 1993, p. 371).

Critics argue that these policies restricted economic freedom, creating dependency on state employment rather than genuine labor empowerment. From a legal perspective, the absence of independent judicial mechanisms to resolve labor disputes meant that workers had little recourse if they faced unfair treatment by state employers.

4.5 The relevance of Marxist labor critique in modern labor law

Nevertheless, the problems of socialist labor systems do not make the Marxist labor theory irrelevant in the modern legal discourse, especially with regard to precarious work, automation and the gig economy. New forms of work organization that include digital platforms, such as Uber and Deliveroo, have eroded standard employment relations and offer short-term and insecure employment relations (Fuchs, 2015). This corresponds with Marx’s critique of abstract labor, where workers are just reduced to mere commodities in terms of utility.

However, automation and artificial intelligence have raised issues of the worker’s alienation because more and more jobs are being automated and made to be done by machines. These modern labor issues indicate that, although the socialist labor law did not eliminate the workers’ alienation, the issues that Marx pointed out about labor under capitalism are still relevant. This paper concludes that the future of labor law is in a middle ground - the workers’ increased protection, collective bargaining and legal regulation of precarious work- which combines socialist labor values with realistic legal solutions that will guarantee the workers’ independence and economic feasibility of the adoption of these values.

5 THE FUTURE OF MARXIST LABOR THEORY IN LEGAL SCHOLARSHIP

Marxist labor theory continues to be of great relevance in modern legal theory, especially as labor markets are rapidly changing under the pressures of technological change, globalization and the emergence of precarious forms of labor. Although earlier experiments with Marxist labor ideals, in socialist legal orders, demonstrated practical shortcomings and governance problems, the critique inherent in labor alienation and exploitation continues to be an indispensable framework for analysis of current labor law. As economies are transformed into platform-mediated gig work, AI-powered automation and global supply chains, Marxist legal theory provides important insights for the future trajectory of labor law to combat emergent forms of the workers’ exploitation.

5.1 The gig economy and digital labor: a new form of alienation?

Arguably, one of the most contentious labor questions of the present is the phenomenon of the ‘gig economy’, which involves workers undertaking short-term and project-based work, facilitated by digital platforms, like Uber, Deliveroo and TaskRabbit. These platform-based jobs are not covered under conventional labor standards, such as minimum wages, medical cover, or unionization. Marx’s critique of labor commodification is also apt here because gig workers are considered merely usable inputs rather than valued employees with employment rights (Fuchs, 2015).

In legal scholarship, Marxist analysis has been used to critique the classification of gig workers as “independent contractors”, which denies them access to labor protections, such as unemployment benefits and sick leave (Cherry; Aloisi, 2016, p. 635). Recent legal reforms in the European Union, California’s Proposition 22 and China’s evolving labor regulations have attempted to extend some protections to gig workers, but the structural imbalance between platform corporations and individual workers persists. A Marxist-informed legal framework would advocate for collective bargaining rights, worker-owned cooperatives and stronger protections against labor misclassification to reduce the workers’ alienation in the digital economy.

5.2 Automation and the displacement of human labor

Marx predicted that technological advancements, in capitalist economies, would lead to the workers’ increased displacement, concentrating wealth in the capitalists’ hands while rendering human labor increasingly redundant. Today, the rise of artificial intelligence and automation is reshaping industries ranging from manufacturing to professional services. Algorithms and robotic systems are replacing human labor in warehouse operations, customer service, and even legal and medical professions, creating mass layoffs and economic insecurity (Virgillito, 2017, p. 240).

From a Marxist legal perspective, automation raises urgent questions about the right to work, economic redistribution and the regulation of corporate profit accumulation. Some scholars have proposed universal basic income (UBI) as a potential legal remedy to counter the effects of mass automation, aligning with Marx’s vision of reducing the necessity of labor for survival (Standing, 2017). Others advocate for the workers’ co-ownership models in automated industries, where employees retain control over production processes rather than being replaced by machines owned by corporate entities. Future labor laws must integrate the workers’ protections against automation, such as mandatory retraining programs, the workers’ participation in technological adoption decisions and profit-sharing models that distribute the benefits of automation more equitably.

5.3 The globalization of labor and the persistence of exploitation

In an era of globalized production, multinational corporations have relocated manufacturing to regions with weaker labor protections, taking advantage of low wages, minimal union representation and exploitative working conditions. This has created a “race to the bottom”, where countries compete for investment by deregulating labor markets, further alienating workers from fair wages, stable employment and safe working conditions (Boyer, 2018, p. 284).

Contemporary labor protests include the Amazon workers’ strikes, protests against sweatshop labor in South Asia and demands for a living wage in global supply chains. Marxist principles for labor rights on the international level would call for the promotion of international labor rights conventions, corporate accountability legislation and the workers’ international unity. Some advances have been made on some fronts, such as the ILO conventions and codes on corporate social responsibility. However, enforcement measures are still very weak. The future reforms in labor laws should also plug the legal gaps that allow the TNCs to avoid labor standards, and it should guard against capital that takes advantage of geographical and legal differences with a view to undermining the workers’ rights.

5.4 Hybrid legal frameworks: a path forward?

The historical socialist labor systems faced major problems in terms of over- centralization and bureaucratic rigidity. On the other hand, capitalistic labor markets still cause insecure employment, increasing income inequalities and labor dehumanization. A combination of Marxist labor principles with the present day legal framework may be a better solution to the workers’ rights and economic justice.

Some new trends show how to organize the labor process in a way that would allow workers to exercise self-organization and guarantee the economic viability of the undertaking. Promoting worker-owned cooperatives or organizations, the legal structures supporting labor management and socialized wage/salary or profit sharing can potentially minimize alienation while addressing efficiency (Schneider, 2018). Furthermore, some scholars have called for shorter working hours and four-day work week without a cut in pay, which is similar to Marx’s view of cutting unnecessary working hours and improving the workers’ quality of life (Weeks, 2020).

In contrast with supporting the reimposition of state control of the workforce through the state, contemporary scholarly literature enunciates a systemic approach, combining strong labor protections with the workers’ self-management. It is intended to ensure the flexibility of the laws of work with changing economic conditions, without the state-bureaucratic inefficacies associated with earlier forms of socialism.

5.5 The future of Marxist legal thought in labor law

Marxist labor theory remains relevant today in understanding the structural imbalances in the labor market, especially as capitalist economies grapple with labor insecurity, technological displacement of jobs and international exploitation. Although past experiences of attempting to establish Marxist labor policies on the legal level, in socialist countries, revealed such contradictions and issues, these experiences are useful for building further labor policies.

Moving forward, it is essential for legal theorists and policymakers to examine hybrid models of labor that combine protections for workers, democratic decision-making mechanisms and sustainable economic policies. The applicability of Marx’s critique of labor alienation remains an essential framework for creating fair and equitable labor relations in the 21st century, whether through the workers’ cooperatives, international labor protections, or platform-based employment reforms.

CONCLUSION

The Marxist theory of labor has provided a major analytical framework for the study of capitalism, particularly through its emphasis on the commodification of labor and the workers’ resulting alienation. This study explored the methods adopted by the Soviet Union, China and Cuba to institutionalize Marxist labor ideologies through legal frameworks, notably through the elimination of private property, nationalization of industry and guarantee of employment. While these efforts were intended to eliminate capitalist exploitation, they often resulted in a type of state-imposed alienation, where bureaucratic administration of labor relations limited the workers’ control instead of fostering true collective ownership.

The comparative assessment of the socialist regimes revealed considerable discrepancies in the implementation of the Marxist labor precepts. Lacking independent trade unions, as well as the state’s rigid planning mechanisms coupled with the coercion of work discipline, created new kinds of alienation. Workers found oppression at the behest of state bureaucracies, as opposed to private capitalists. Although there existed, at least, some level of the workers’ self-management in Cuba, the Soviet Union, as well as China, passed labor legislation, reinforcing state control of the workers, as opposed to enabling them. These earlier examples illustrate the difficulties inherent in achieving self-management in the labor force under highly centralized economies.

Despite these challenges, the Marxist critique of labor remains highly relevant in modern labor law, particularly in regards to precarious work, automation and the global exploitation of labor. The gig economy and work through digital platforms illustrate Marx’s fear of the commodification of labor, as digital workers face precarious wages, inadequate labor protections and are excluded from collective bargaining rights. Likewise, the rise of automation threatens to replace millions of workers, thus increasing economic disparity while concentrating wealth and power in the hands of corporations. These phenomena call for the creation of modern legal frameworks that not only include protections for workers, but also respond to the changing economic environment.

An integrated approach fusing the philosophies of Marxist labor analysis with functional legal models can be a plausible solution. Increased worker cooperatives, international labor standards, as well as labor protection for gig workers and platform workers under the law, can be substitutes for capital-driven exploitation as well as state-controlled labor. Additionally, policies like the four-day workweek, the provision of a universal basic wage, as well as profit-sharing models, can be in harmony with the Marx’s vision to reduce necessary labor with the aim of achieving economic stability.

In conclusion, the observations from socialistic experiments through history, as well as from present movements, state that the labor laws have to keep changing according to changing work patterns. Though state socialism as well as laissez-faire capitalism have failed in eradicating labor alienation, research work in the area can use the views from the Marxist paradigm in the formulation of more just labor policies. By combining the flexibility of economy with the protection of the workers’ rights, new labor policies can work toward the aims of reducing labor alienation as well as fostering just and sustainable work.

#### THUS, we reject the neoliberal cabining of labor law and political horizons, and therefore stand Resolved: that the United States federal government should substantially strengthen collective bargaining rights for workers in at least the United States.

#### The evolution in debate toward comparative evaluation of disembedded policy instruments is co-productive with the broader conceptual shifts in scholarship of law, economics, and political science. Researching and debating policy-as-“widgets” serves to discipline our political imagination and diminish our understanding of the conditions of possibility for solving complex problems.

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As illustrated in more detail in Part II, the instrument choice debate in environmental law came of age in the 1980s and reflected an effort to reduce the task of solving environmental problems to a choice among different tools. Often framed as a battle between prescriptive "command-and-control" regulations, such as technology standards and mandates, and market-based approaches, such as taxes, fees, and tradable permits, the debate established a normative framework for evaluating different instruments against various criteria such as efficiency, fairness, and ease of administration. In doing so, it drew on deeper conceptual shifts in law, economics, and political science that had been underway since the middle of the twentieth century.

During the 1970s, a handful of environmental law scholars took up the question of instrument choice, reflecting the early import of economic ideas into the field. 22 But environmental law was still taking shape at the time, and the scholarly literature during the 1970s, along with some of EPA's early regulatory [\*411] actions and important appellate decisions, was marked by a diversity of approaches and concerns. 23 By the mid-1980s, however, the instrument choice debate had moved to center stage as prominent legal scholars mounted a full-throated attack on so-called first generation command-and-control approaches to pollution control and argued strongly in favor of emissions trading and other market-based approaches. 24 Much of this reflected the growing influence of law and economics on the field, all of which brought an increasing level of abstraction and formalism to environmental law scholarship. 25 While the field of environmental law has expanded and diversified in various ways since the 1980s, even a cursory review of the literature since that time reveals sustained and ongoing attention to the instrument choice debate. 26

[\*412] Together with quantitative risk assessment and cost-benefit analysis [CBA], the comparative evaluation of policy instruments sought to discipline and formalize environmental decision making. In retrospect, these various approaches operated together as a package of neoliberal reforms aimed at replacing earlier commitments to rights, precaution, and expert judgment with a more abstract and reductive approach that would force the work of environmental protection to run along more well-defined grooves. 27 In the process, questions of politics and public engagement were cabined and pushed to the side.

Indeed, despite much lip service regarding the need to attend to institutional and political context, the instrument choice debate has tended to operate at a very high level of abstraction. 28 Policy instruments, in this view, are often treated as discreet tools or widgets - an approach that may be necessary for making systematic comparisons, but one that also has significant costs when it comes to understanding how policies get translated into actual programs. By disembedding the processes of policy design, implementation, and diffusion from their institutional [\*413] contexts, the widget view of policy instruments has left us with a diminished understanding of the conditions of possibility for responding to complex problems.

#### Instead, we need to “follow the policy.” That’s logically prior.

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This Article has a different focus. Rather than engage in yet another round in the instrument choice debate, it investigates [\*421] how emissions trading, and carbon pricing more generally, emerged as policy orthodoxy in the fight against climate change over the last thirty years and what this reveals about our conception of government problem solving. Answering that question requires a more empirical investigation of how we came to think about the climate problem as amenable to these tools, why these particular instruments were able to gain normative momentum and travel around the world, and how their popularity has impacted the ability of governments to respond to climate change.

The key methodological lesson here is that we need to "follow the policy" - both geographically and historically. But in doing so, we need to be careful not to replicate the problem of reifying these policy instruments as stable objects that remain relatively intact as they travel. 68 We need histories of instruments that place them in context, investigating how they gain traction and develop over time and across different jurisdictions. That means looking at the role of experts, networks, and ideologies in the constitution of policy orthodoxies and always questioning why a particular approach is being advanced as the right fit for a particular problem.

It also means moving away from the policy instrument theory of state capacity to recognize instead that major government interventions are always works in progress - complicated political undertakings crafted under a particular set of circumstances and legal constraints, informed by particular understandings of problems, and based on a particular coalition of supporters. Successful policies, when measured in terms of their ability to deliver over time, cannot be reduced to a set of simple design choices. Policies are more than the sum of their parts. They have complicated, vernacular histories. Understanding those histories will help us make better policy - today and in the future. 69

#### “Following the policy” via a historical, contextual, and reflexive genealogy of both the policy instrument idea AND a given policy context is key to reveal and break down hegemonic ideologies, call forth new publics, and enable the effective harnessing of government power to solve complex problems.

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While there are elements of truth in all of these criticisms, they also miss the deeper political rationalities that are embedded within the instrument choice frame itself. Indeed, as this Article argues, a principal but previously unexamined reason emissions trading and other forms of carbon pricing have not lived up to expectations is because they rest upon an overly abstract theory of instrument choice that has led to a deeply unrealistic view of public engagement, policy development, and government problem solving. In advancing this argument, the Article explains how a particular conception of policy instruments underwrote efforts within economics and law to reconceive the task of environmental protection as a choice among different tools.12 This then paved the way for the comparative evaluation of such instruments, with market-based instruments almost always coming out on top when compared to older, more prescriptive forms of regulation.13 The resulting theoretical debate over instrument choice that has preoccupied environmental law since the mid-1980s has stunted our collective ability to imagine, much less to implement, a realistic way forward on climate change.

There are lessons here not only for climate policy, but also for environmental law and broader studies of regulation. Within environmental law, in particular, a critical analysis of the instrument choice debate is long overdue. As Jonathan Wiener observed more than twenty years ago, “[c]ontests to crown the best regulatory instrument have been the ceaseless sport of environmental law.”14 For all of its insights, however, that literature has never looked in any sustained way at how we came to view policies as instruments in the first place and what effects this framing has had on our understanding of various problems and the possibilities for response. As for broader studies of regulation and governance, there is much to learn from a more critical genealogy of the policy instrument idea and its impact on prevailing views of government problem solving and state capacity.

The Article proceeds as follows. Part I elaborates on the overall framework. It argues that the mainstream technocratic framing of instrument choice in environmental law and policy needs to be situated and understood historically as a distinctive political rationality—that is, as a particular approach to governing. Doing that allows us to move outside of the comparative assessment of different instruments (the traditional frame of the instrument choice debate) to investigate and explain how instruments acquire normative momentum in the first place—where they come from, how they get stabilized as legitimate objects of inquiry and investment, how they acquire the capacity to travel, and how they shape the ways in which we see problems and imagine different ways of responding. Such an undertaking is necessarily more historical, contextual, and reflexive than mainstream understandings of environmental regulation.15 It looks at policy instruments not as abstract, neutral tools available for governments to use depending on the problem at hand but as historically situated technologies that are actively produced and reproduced by specific actors and institutions and that carry with them a specific politics of knowledge and social control. By “following the policy”—both intellectually and institutionally—we can begin to unpack the ideologies, networks, and infrastructures that allow specific policies to spread and the implications this has for efforts to harness the power of government to solve complex problems.16

Part II applies this framework to the case of emissions trading. It starts with a critical intellectual history of emissions trading that locates it within deeper conceptual shifts in law, economics, and political science regarding policy instruments and their comparative evaluation. In tracing this story, Part II shows how a particular, and largely inaccurate, history of emissions trading became accepted wisdom and, as such, how it contributed to the larger mobilization of market-based instruments in environmental law starting in the 1980s. Part II also provides an assessment of emissions trading in practice, showing how the actual spread of emissions trading has often been highly contingent, driven more by pragmatic experiments or the political inability to adopt other approaches than by its supposed theoretical virtues or actual success. In fact, as Part II demonstrates, the continued popularity of emissions trading and other forms of carbon pricing as leading tools to reduce greenhouse gases around the world has been less a product of their inherent merits than the result of a robust transnational network of professionals, consultants, and policy entrepreneurs who have provided a critical and often self-serving infrastructure to support their spread.17 In virtually all instances where emissions trading has been adopted in practice, moreover, substantial challenges have emerged in building and maintaining these markets, highlighting the critical but all-too- often neglected role of implementation in delivering on the promises of particular interventions.18

Part III steps back and offers some thoughts on what a more realistic and critical theory of instrument choice might look like, with particular attention to climate policy. It argues that policy instruments are not simply tools, but carry with them their own politics of knowledge and social control that shape and format the ways in which problems are understood and the possibilities for response. Borrowing from John Dewey, Part III seeks to recover and revise the idea of public problems as a basis for government action.19 Rather than seeing problems through the narrow frame of instrument choice, this notion of public problems sees the spillovers, harms, and long-term consequences of a complex industrial society as problems that emerge from and call forth new publics.20 By framing problems such as climate change not as a market failure best addressed by getting the prices right but as a problem of collective concern—that is, a problem for which we have shared but differentiated responsibilities—we can begin to see how new publics arise to take ownership of and demand responses to these problems. The gathering strength of the climate movement and its connections to broader concerns with structural inequality and systemic racism is an important example of this, demonstrating how new publics can coalesce into a potent political force. The Green New Deal, President Biden’s Executive Order on the climate crisis, with its embrace of a whole-of-government approach and strong commitment to environmental justice, the proposed $2 trillion infrastructure package, and the President’s recent commitment to reduce U.S. greenhouse gas emissions by 50% below 2005 levels by 203021 all recognize this, marking a possible inflection point in U.S. climate policy that embraces a broad public framing of the problem and a corresponding view of government intervention and problem solving that moves beyond the narrow, policy instrument theory of state capacity that has limited our ways of thinking and acting for far too long.

#### AND: that both requires and enables us to reconceive of the state as the “public articulated.”

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[\*422] The normative conclusion that emerges from this is that the narrow, technocratic focus on instrument choice that has shaped so much of the mainstream discussion in environmental law and related fields since the 1980s has made it increasingly difficult to frame problems as sources of collective concern that can give rise to new publics. By focusing on tools and instruments, we have lost sight of the state as the "public articulated," to use John Dewey's phrase. 70 Put simply, the abstract, reductionist view of policy instruments that has preoccupied lawyers and policy professionals for almost half a century has disempowered and marginalized the public in ways that make it harder to solve big complicated problems. By design, they have pushed a more fulsome view of the public and its problems to the side.