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LABOR LAW, ECONOMIC NARRATIVE AND LAW & ECONOMICS: 
THE METHOD IS THE PROBLEM

Sergio Gamonal C.*

“They made a science out of people?” she said. “What a crazy science that must be.”

- Kurt Vonnegut

I. INTRODUCTION: NEOLIBERAL ECONOMIC NARRATIVE AND HEGEMONY

If you were asked to take a plane and knew it was not designed by engineers but rather by lawyers, would you take it? What if historians or sociologists designed it? What if it were actually designed by economists? In all the previous cases, you would probably have serious doubts before boarding a device that might not fly or that, if it succeeds in flying, may end up crashing to the ground.

It is clear that since the beginning of the modern era, people put a lot of trust in engineers and scientists in general. Natural sciences, known as exact sciences or hard sciences, have spurred spectacular developments in technology, to the point that flying is now even safer than driving.²

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

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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. 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. This is what Professor Stewart Schwab has called "the [e]conomic [i]nvasion of [l]abor [l]aw." 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. Economic critiques of labor law have created a narrative adverse to workers and unions that has unfortunately influenced many policymakers.

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."

6. See id. at 236-242.
7. See id. at 236-39.
8. See id. at 237-38.
Morton J. Horwitz denounced the ideological and political character of the L&E more than 30 years ago. Despite the denunciation revolving around the neoliberal narrative and L&E, it has been successfully enforced within the public and global discourse. 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.

As the cold war ended, markets and market thinking enjoyed unrivaled prestige, understandably so. No other mechanism for organizing the production and distribution of goods had proved as successful at generating affluence and prosperity. And yet, even as growing numbers of countries around the world embraced market mechanism in the operation of their economies something else was happening. Market values were coming to play a greater and greater role in social life. Economics was becoming an imperial domain. Today, the logic of buying and selling no longer applies to material goods alone but increasingly governs the whole of life. It is time to ask whether we want to live this way.

Id. at 5-6.

10. Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 905-912 (1979-1980). The criticism of this author was based on the subjectivity of the notion of efficiency used by the economists and the problem of the distribution of welfare. In that regard, they state that,

Thus, both liberals and conservatives came initially to agree that the “correct” solution for a court facing a transaction cost situation was to “mimic” the market-to find the solution that the parties themselves would have agreed to if there had been no transaction costs. But for liberals like Calabresi, there was only a formal correspondence between finding the “cheapest cost avoider” and mimicking the market. For conservatives, there appeared to be some imaginative act through which the judge could actually empathize with bargaining individuals. But, in practice, efficiency could be either the centralized technocratic manipulation of the liberal policymaker or the results thought to be required in the fantasies of the free market conservative. It was at this point that the ambiguities in applying this analysis to law became increasingly apparent.

See id. at 909.

From another similar perspective, Duncan Kennedy warns against the technocratic imperialism, emphasizing that the judges easily manipulate the criterion of efficiency, both from a conservative and liberal ideology. In his words,

An important implication of the analysis above is the tenuousness or even the incoherence of the distinction between a free market solution and a regulatory solution. There is no way to set the private law rules through the abstract definitions of private property and freedom of contract. Setting the rules in their details by applying Kaldor-Hicks is neither practically nor theoretically feasible. As a matter of fact, courts and legislatures专利ly take a whole range of non-efficiency goals into account in deciding issues like the scope of the law of nuisance and whether or not to impose compulsory terms in consumer and labour contracts.


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

13. Id. at 245-46.
14. It should be noted that the “objectivity of natural sciences” and the paradigm of modernity about scientific knowledge is also under discussion in the present day. See id.
of their own, more linked to understanding than explanation.\textsuperscript{15}  

What about economics? This discipline is full of mathematical calculus, graphics and statistics,\textsuperscript{16} and it seems to be the most exact of all social sciences.\textsuperscript{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.\textsuperscript{18} This is what David Colander calls “inappropriate use of mathematics.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{15} Id.

\textsuperscript{16} Robert Cooter & Thomas Ulen, LAW AND ECONOMICS, 1, 3, 7, 44, 436 (Sally Yagan et al. Eds., 6th ed. 2016) (“Economic theory has developed a precise calculus for making decisions under uncertainty. . . .”).

\textsuperscript{17} See Marion Fourcade, Etienne Ollion & Yann Algan, The Superiority of Economists, 29 J. OF ECON. PERSP. 89-91 (2015) (“[E]conomic graduates in elite programs agree that . . . economics is the most scientific of the social sciences.”). Economics is the only social science with its own Nobel Prize (courtesy of the Bank of Sweden). Economists usually have the greatest salaries within universities, and are more likely to undertake expensive consultancies (up to 40% of their income) or belong to business directories. See id. at 90.


\textsuperscript{19} David Colander, et al., Mathematics, Methods, and Modern Economics, 50 REAL-WORLD ECON. REV. 118, 118 (2009) (“The key to appropriate use of mathematics in economics is to find the right mathematics to use for the right problem, and not to claim more for a mathematical model than it delivers.”).

\textsuperscript{20} Ann Jennings, Social Constructions of Measurement: Three Vignettes from Recent Events and Labor Economics, 35 J. OF ECON., 366 (Jun. 2001) (“All measures are social constructions, requiring a more or less elaborate social and technological apparatus to defines what should be counted, for tabulation, and identify and correct mistakes and errors . . . [and] [t]he apparatus is also necessary.”). The same arguments in relation to the “social constructions” of measurements can be logically extended to the abuse of statistics. Both the sample chosen, and the type of average (mean, median, or mode), the small data that are omitted, the correct way to present the graphs, the confusion of correlation with causality, etc., allow to handle and lie with a semblance of objectivity.

\textsuperscript{21} Andrew W. Lo, Reading About the Financial Crisis: A Twenty-One-Book Review, J. OF ECON. LITERATURE 151, 154 (2012).
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

22. See id. at 154-55.
23. Id. at 176-77.
24. See infra notes 26-37 and accompanying text.
25. See infra notes 26-37 and accompanying text.
31. Christopher Schenk, UNIONS AND DEMOCRACY 1, 13 (Canadian Centre for Policy Alternatives, 2014) ("[T]he plunge in unionization in the U.S. accounts for approximately a fifth of the increase in hourly wage inequality among women and a third among men.").
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

39.  See id. at 148.
43.  See id.
44.  See id.
45.  See id. at 19-21, 28.
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.\textsuperscript{46} However, economists often forget this and suffer from “art-phobia.”\textsuperscript{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.\textsuperscript{48} It links real world solutions to real world problems.\textsuperscript{49} By neglecting the art of economics, we often work with models that are unrealistic.\textsuperscript{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.\textsuperscript{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.\textsuperscript{52} In addition, the dominant economists often make extravagant assertions in favor of “behavioral and economic hypotheses” (with the name of laws or \textit{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.\textsuperscript{53} Bunge categorically concludes that economics is a semi-science or proto-science, with some pockets of mature science and others of pseudoscience,\textsuperscript{54} calling on economists to

\begin{itemize}
\item principles of \textit{laissez-faire}. See \textit{id.} at 20-21. The report of the Gulbenkian Commission is conclusive in this sense:
\item Political science as a separate discipline responded to an ulterior objective: legitimizing the economy as a separate discipline. Political economy had been rejected as an argument on the grounds that the state and the market operated and had to operate according to different logics. And this logically required, as a long-term guarantee, the establishment of a separate scientific study of political space.
\end{itemize}


\begin{itemize}
\item 46. Colander, \textit{supra} note 42, at 22-23.
\item 47. Colander, \textit{supra} note 42, at 10-11, 23.
\item 48. Colander, \textit{supra} note 42, at 29.
\item 49. Colander, \textit{supra} note 42, at 29.
\item 50. Colander, \textit{supra} note 42, at 32.
\item 51. Bunge, \textit{supra} note 38, at 150.
\item 52. \textit{Id.} at 150.
\item 53. \textit{Id.}
\item 54. \textit{Id.} at 152.
\end{itemize}
refrain from using the economy as an excuse to do math.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{60} But considering the temporal and linguistic nature of social reality, these assumptions appear to be very partial.\textsuperscript{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.).\textsuperscript{62}

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

\begin{itemize}
  \item \textsuperscript{55} Id. at 153.
  \item \textsuperscript{56} See id.
  \item \textsuperscript{57} See id. at 147.
  \item \textsuperscript{58} See id. at 16.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 16-17 ("Therefore, the claim that we have an immediate or intuitive knowledge of other people (Schütz 1967) and the demand that the models in social science should be generally understandable (Schütz 1953) are guaranteed to produce truisms and falsities in industrial quantities. By the same token such dogmatic pronouncements rule out the technical concepts and hypotheses representing deep features of social reality, and block the construction of mathematical models.")
  \item \textsuperscript{61} Id. at 16.
\end{itemize}
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.\footnote{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 imposition, 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.\footnote{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.\footnote{65} Discharge at will, he adds, reflects the dominant practice in the market\footnote{66} and introducing a rule regarding dismissal with just cause might alter that balance.\footnote{67} State regulation of personal life, religious life, or political activities is undesirable, as it is in labor relations.\footnote{68}

For Epstein, it is precisely the efficiency of discharge at will that makes it so common and popular in the United States.\footnote{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.\footnote{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.\footnote{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.\footnote{72}

\footnote{63}{See source cited supra note 45 and accompanying text. And even in natural sciences it is recognized that the person who measures tends to modify whatever is measured in their study, although this affirmation is still discussed in social sciences where it is more obvious. \textit{Id.}}


\footnote{65}{\textit{Id.} at 951.}

\footnote{66}{\textit{Id}.}

\footnote{67}{\textit{Id}. at 952.}

\footnote{68}{\textit{Id}. at 954.}

\footnote{69}{\textit{Id}. at 965.}

\footnote{70}{\textit{Id}. at 948.}

\footnote{71}{\textit{Id}. at 965.}

\footnote{72}{\textit{Id}. at 970.}
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. 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. 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. 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. After twenty years of enforcing Montana’s dismissal law, employment increased. 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. He groups the relations between L&E and labor law in three “eras.” First, the era based on the assumption that the market operated in perfect form. Then, a

73. Id. at 951.
75. Id. at 250.
79. See id.
80. See id. at 118.
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 regulations88 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 regulation94 and devotes an entire section to market failures.95 Finally, Schwab points out that in L&E the negotiating power

81. See id.
82. See id. at 121-29.
83. See id. at 123-25. This is because the productivity of the worker rises with each week of vacation. Id. However, if vacation time moves up to three weeks, the increase of productivity becomes uneconomical for the employer. Id. Consequently, vacations for L&E are only appropriate when the employer makes a profit, that is, an increase in worker productivity greater than the cost of paying the holiday. Id.
84. Id. at 125.
85. Id. at 129.
86. Id. at 130.
87. Id. at 131.
88. Id.
89. Id.
90. Id. at 131-32.
91. Id. at 132.
92. Id.
93. Id. at 133.
94. Id. at 134-35.
95. Id. at 135.
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/outside. 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

96. Id. at 139.
97. See id. at 123-24, 139-41 (discussing the implications behind an employer’s unequal bargaining power).
98. See id. at 133.
100. See Schwab, supra note 78 at 119.
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

101. Social Darwinism is a variant of the inevitable progress doctrine. See Wallerstein, supra note 45. If progress is the result of the social struggle in which competition triumphs, to interfere in that social struggle is to interfere with social progress. Id. Social Darwinism describes as irrational and unreal any conception associated with the losers in the evolutionary process of the “survival of the fittest.” Id. Technocratic rationality, as the most advanced version of modern rationalism, has in many ways been the incarnation of social Darwinism. Id. Legitimacy is denied to any concept that does not fit into a rationality model of ends and means, as well as any institution that has no immediate functional utility. Id.


103. Id.

104. Id. at 991.

105. Id. at 1000.

106. Id. at 1001.

107. Id.

108. Id.
demand safety in their workplaces from the government, to reduce the
competition of non-unionized workers. 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. For example, he explains that they generally
agree with the employer to derogate the rule of employment at will for
their members. 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.

Posner complements these arguments on labor law in his famous
book regarding the economic analysis of law. 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. The market is the antidote because the parties voluntarily
negotiate their contracts.

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

109. Id.
110. Id. at 1001-03.
111. Id. at 1001.
112. Id. at 1006-07.
113. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (2d. ed. 1977).
114. Id.
115. Id.
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

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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{120} As Sandel states, "[t]he more markets extend their reach into noneconomic spheres of life, the more entangled they become with moral questions."\textsuperscript{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.\textsuperscript{122} All their works

\begin{thebibliography}{18}
\bibitem{117} Horwitz, supra note 10, at 912.
\bibitem{118} See, e.g., Posner, supra note 102, at 1000-01.
\bibitem{120} See HA-JOON CHANG, 23 THINGS THEY DON'T TELL YOU ABOUT CAPITALISM, 28-30 (Bloomsbury Press 2010); see also MICHAEL J. SANDEL, JUSTICE: WHAT'S THE RIGHT THING TO DO?, 18 (Farrar, Straus and Giroux 2009 (pointing out that in 2007 the remuneration of general managers of the largest companies in the United States was 344 times that of an average worker. In 1980 it was 42 times. Compared to other countries, according to data from 2004-2006, U.S. general managers earned, on average, 13.3 million dollars per year– with their peers in Europe earning 6.6 million and 1.5 million in Japan. Is it that U.S. general managers have twice as much merit as their European peers and nine times that of the Japanese? Or is it that the market or personal merit has nothing to do with this issue?).
\bibitem{121} SANDEL, supra note 9, at 88.
\end{thebibliography}
recognize that capitalism is developed through investments and technological innovations in the long term.\textsuperscript{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.\textsuperscript{124} In his analysis he mentions Adam Smith,\textsuperscript{125} Alfred Marshall,\textsuperscript{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),\textsuperscript{127} Douglass, Millis, and Slicher,\textsuperscript{128} the post-World War II economists called neo-institutionalists or neo-classical revisionists (Dunlop, Kerr, Lester, and Reynolds),\textsuperscript{129} and more contemporaneously, the Cambridge Group (MIT and Harvard professors such as Samuelson, Solow, Thurow, Freeman, Doeringer, Piore, Summers, Akerlof, and Osterman).\textsuperscript{130} All of these economists agree that the labor market is imperfect.\textsuperscript{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).\textsuperscript{132} These economists believe that the labor market works perfectly and therefore there is no need for regulations or collective bargaining.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{123} Chang mentions List, Schumpeter, Kaldor, Hirschman, Simon, Pigou, Sen, Baumol, and Stiglitz. \textit{Chang}, \textit{supra} note 120, at 250.
  \item \textsuperscript{125} \textit{Id.} at 147-50. In any case, he states that Smith seems to contradict himself in some passages of his classic work \textit{An Inquiry into the Nature and Causes of the Wealth of Nations}. \textit{Id.} at 150.
  \item \textsuperscript{126} \textit{Id.} at 150-53.
  \item \textsuperscript{127} \textit{Id.} at 153-57.
  \item \textsuperscript{128} \textit{Id.} at 157-62.
  \item \textsuperscript{129} \textit{Id.} at 162-68.
  \item \textsuperscript{130} \textit{Id.} at 177-82.
  \item \textsuperscript{131} \textit{Id.} at 177.
  \item \textsuperscript{132} \textit{Id.} at 168-77.
  \item \textsuperscript{133} \textit{Id.} at 168-69, 171.
\end{itemize}
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, "[m]oney 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.\(^{138}\)

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

\(^{134}\) Id. at 184.
\(^{137}\) 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, and through several generously funded think tanks such as the Institute of Economics Affaires or the Heritage Foundations.).
\(^{138}\) Id. at 233.
\(^{139}\) 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
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 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.

140. See BAUMAN, supra note 139, at 48-49.

INEQUALITIES IN A GLOBAL AGE 18, 48-49 (Polity Press 2011), https://books.google.com/books/about/Collateral_Damage.html?id=dbHglZaYkoC&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.