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Efficiency and Its Discontents

*Richard Michael Fischl**

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When I first read *The Labour Constitution*¹ – as I madly prepped for the live version of the author-meets-readers colloquy published here – it brought to mind the clever tactic my weary and badly outnumbered parents deployed each night to herd their six young children off to bed. My wife and I, badly outnumbered by two, eagerly adopted the tactic as our own and thus avoided the inevitable negotiation and resistance that would surely have ensued if we’d simply announced it was “bed time” and instructed our daughters to unplug the changing cast of electronic devices, wash up, and go to bed. Instead, we let them know that the kitchen timer would sound in five minutes, and the off-stage device did the rest.

When the timer went off, we treated it as just another fact of life: “There goes the timer!” We might offer the soon

* Professor of Law, University of Connecticut. Many thanks to Diamond Ashiagbor for inviting me to participate in this timely conversation; to Harry Arthurs, Karl Klare, and Peter Siegelman for insightful reactions to an earlier draft; and to Ruth Dukes for the wisdom and courage it took to write the book under review.

¹ Ruth Dukes, *The Labour Constitution: The Enduring Idea of Labour Law* (Oxford 2014).

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to be departed a sympathetic smile, but what could otherwise have been a full-on struggle of wills was almost invariably replaced by a collective and ritual submission to the buzzer, bell, or beep. Somewhat to our surprise, the girls never thought to ask who *set* the bloody timer; Blair was focused on other things and Molly easily distracted by the challenge of seeing just how quickly she could get ready for bed. Had one of them pressed the point, perhaps I would have had the presence of mind to respond, “Why, dear, it’s set by an invisible hand.”

Thus do power’s apologists obscure its exercise with a claim of irresistible outside forces at work, which is very much the story Ruth Dukes tells in *The Labour Constitution*, a carefully drawn intellectual history of labour law and labour law scholarship in Germany, the UK, and the EU. (How oddly that line-up reads now, in no small part the consequence of developments closely related to Ruth’s story that have recently upended the political order here in the US as well.) The book’s central focus is the rise and decline of the idea that economics can and should be harnessed in the service of democracy rather than let loose to crowd the latter out of nearly every nook and cranny of sublunary life. The idea may well endure – as Ruth’s hopeful subtitle suggests – but it’s been embattled for some time now, widely viewed as well past its shelf life and utterly out of sync with the unyielding pressures of competitive markets and globalization. Resistance, we are told, is futile; why, it’s like trying to argue with the buzzer on the kitchen clock.

That we should find ourselves in this predicament is a bit of a surprise, since not so long ago we were also told (and told and told and told) that “everything is socially constructed.” How rich it is, then, that “everything” turned out to mean “everything except economics,” which has, naturally enough, cornered the market on incontestable facts. In serious discussions among political and policy

grown-ups, the social is permitted but a brief cameo: “mess with the market and you only hurt those you would assist,” as if the plight of those in need would otherwise operate as the Prime Directive.

And so it was that progressive labour scholars, eager for a place at the policy table, found themselves energetically embracing the cause of (*wait for it*) flexible labour markets, producing a body of scholarship that is, as Ruth argues, “remarkable for the way in which non-market considerations – such as the question of whether more, or more centralized, collective bargaining might improve working lives, securing more dignity for workers, or more democracy at work – seem to lose their force.”² Indeed, such considerations are brought into play principally for the purpose of addressing market *imperfections* – instances of market access and information barriers, collective action problems, toxic externalities, transaction costs and the like – in order to fend off a nigh hegemonic deregulatory agenda with a pitch for chastened “win-win” interventions and “regulation lite.” (Look, Ma, no conflict!) And thanks to this work, we have met the biggest market imperfection of them all – Pogo’s pithy if ungrammatical *us* – for it turns out that human beings aren’t nearly as rational, steadfast, and reflexively self-interested as successful market participants are supposed to be. The result is a form of interdisciplinarity that turns the enduring idea of labour law on its head, harnessing the social in service of the market and elevating economics to the role of . . . well, disciplinarian.

I have had previous occasion to express misgivings about this project.³ For one thing, I have doubts about its

² Id. at 110-11.

³ See Richard Michael Fischl, Labor Law, the Left, and the Lure of the Market, 94 Marquette L. Rev. 947 (2011).

capacity to persuade the intended audience, many of whom seem to think that contemporary labour markets are working just fine, thank you, and that all those bugs are really features, since nothing concentrates the mind of working people like precarious employment, poverty-level wages, insecure hours, and the threat of starvation in old age. More fundamentally, I share Ruth's concern that the monomaniacal focus on "making markets better" characterizing the imperfectionist turn may reinforce an understanding of the world we should instead be contesting – an understanding, in Ruth's elegant phrasing, "that some kinds of market intervention are desirable (for all) because they help markets function better, and some kinds are bad (for all) because they interfere with or prohibit optimal market functioning" and, by implication, "that good economic policy – and good labour law (good labour market regulation) – is non-political by definition."⁴ Lost in the shuffle, then, is a critical question: Making markets *better for whom?*

To be fair, if those in the thrall of efficient markets tend toward reticence about the losers, they do have a bold and ready answer to the question of who wins: the sovereign consumer. To the extent it's acknowledged, the degradation of work is thus justified by the promise of affordable access to nifty goods and services once you get home – nevermind the collective action problem lurking in that tradeoff, captured brilliantly a few years back in a Ted Rall cartoon captioned "America: What Went Wrong" and featuring a landscape of factories and offices each with the same speech bubble floating overhead: "Let others hire people. *We'll* sell them stuff!" And nevermind the nagging question of just how and when it was we *agreed* to the tradeoff, for there's a

⁴ Dukes, *supra* note 1, at 194.

ready if revealing answer to that query as well – “By spending our purchasing dollars!” – further evidence that Ruth is right about the pressing need to evaluate the “better” in *better for whom* “not only in terms of market access and market functioning, but also with reference to non-market values such as democracy, freedom, and human dignity.”⁵

But here’s the thing. I’m a consumer – a voracious and concededly privileged consumer at that – and I’m here to tell you that I’m not feeling very *sovereign*. And for that matter, “efficiency” is not the first thing that comes to mind in describing the practices I encounter in my frequent trips to the market, virtual and otherwise.

The day I began drafting this essay, I had just finished a summer teaching gig in Seoul and was scheduled to fly home the following morning. Like clockwork – do we still say that? – my smart phone, a nigh necessity in navigating the logistics of contemporary travel, suddenly stopped accessing cellular data. Using my laptop and the hotel WiFi, I spent nearly an hour on a “chat line” with AT&T tech support, which is not to say we spent our time actually “chatting,” for each exchange involved a protracted delay on the part of the techie as he simultaneously serviced multiple customers in his queue. His intermittent directives suggested a number of tricks I had already tried (like turning the phone off and back on again) as well as some additional maneuvers – one of which resulted in a restoration of the phone’s default settings, and don’t get me started on *that* – but alas produced no fix for the problem. So on the eve of my return, I was facing the prospect of making the 22-hour planes-trains-and-automobiles trek back home without the net.

⁵ Id. at 207.

It gets worse. My scheduled flight was with Delta, which that very week was experiencing a massive computer network outage causing flight cancellations and delays throughout the globe. For those with imminent travel plans, a seemingly helpful message appeared on the delta.com landing page: “Customers traveling today and tomorrow should check the status of their flight at delta.com or the Fly Delta App.” And so I did repeatedly, each time receiving the reassuring news that my flight was still scheduled for an on-time departure. But Delta’s difficulties were much in the news, and an on-line article in the *Washington Post* alerted me to the fact that Delta’s malfunctioning flight status system was incorrectly assigning on-time status to long-delayed and even cancelled flights.⁶ A quick check with an on-line flight tracker revealed that the Detroit-to-Seoul and Seoul-to-Detroit flights scheduled for the previous day had been cancelled – not a reassuring development – and multiple attempts to reach Delta customer service to determine whether my own flight’s on-time status was real or imaginary were utterly unavailing. In the end, the flight flew as scheduled, though it was an unsettling experience to pack up my summer belongings, check out of the hotel, and make the long cab ride to Incheon Airport with no idea whether I would actually fly and no way to access the internet en route.

This was but a single day in the life of a sovereign consumer, and – like most people I know – I’ve got a million more stories where those came from. Consider, to mention just a few, the night the automated payment machine at the downtown parking garage rejected the credit cards of

⁶ Andrea Peterson, “Delta’s Massive Computer Outage a Part of a Bigger Problem,” *Washington Post*, Aug. 8, 2016, available at <https://www.washingtonpost.com/news/the-switch/wp/2016/08/08/what-you-need-to-know-about-the-massive-delta-computer-outage/>.

everyone in the growing queue, and the “help” button produced a voice recording directing us to “call back during regular business hours”; and the time my ATM card was mysteriously declined when I tried to purchase travelers checks at an airport currency exchange while the transaction was recorded as a debit on my bank account, resulting in months of phone, snailmail, and email inquiries without the slightest assistance from my bank, though the culprit turned out to be the contractor the bank had hired to process its ATM transactions; and the time a car rental company billed an unauthorized charge to my credit card and for six months ignored my repeated requests either to explain or remove it, ultimately referring the charge to a collection agency; and finally our family’s recent encounter with the brave new world of emergency room medicine, which produced separate bills from no fewer than four service providers (the medical practice group, the radiology lab, the hospital etc.) – five, if you count the double-billing by one of them – and countless email and phone exchanges with billing departments and our health insurer before the payments were sorted out.

As a result of the proliferation of such challenges, my monthly date with our family bills has become a perfect microcosm of the larger experience of contemporary consumption. Most of the bills require but a quick once-over to confirm accuracy and are set up for easy on-line or even automatic payment. Gone are the days of writing checks, filling out the detachable portion of the billing form, addressing and self-addressing envelopes, and licking stamps. The resulting reduction in transaction costs is undeniable, though gone too are the jobs of many of those involved in directing those stamped envelopes to their proper destinations. But it *looks* for all the world like a vast and oh-so-modern improvement for the consumer.

In fact, though, I dread bills-day with heart and soul because those time savings are far more than offset by the challenges of dealing with cock-ups of the sort I've already described and a host of new ones that seem to arise with each billing period: an erroneous refusal to pay by this insurer; delivery of the wrong product from that on-line merchant; an errant charge on one or another credit card; the inevitable but utterly unexplained increase in the monthly charge by this or that service provider; and so on *ad infinitum*. Trouble-shooting these difficulties is an experience that makes you want to gnaw your arm off, for the selections available on the telephonic menu of options ("Press 'one' if you are calling about an existing order . . .") seldom correspond to the problem at hand; the wait times are horrible and made worse by the drone of endless advertisements or bad music played loudly coupled with the need to listen attentively for a human voice lest you lose your place in the queue; and, once you finally connect, your service rep is multitasking like my techie from AT&T, providing agonizingly slow service interrupted by frequent breaks ("May I put you on hold for three or four minutes?") so the beleaguered rep can provide poor service to multiple callers at once. There is typically an opportunity to get even, when the automated voice intervenes at the call's end requesting that you "take a short survey of customer satisfaction," but this takes more time still and leaves the caller with a terrible choice between punishing the harried rep and pretending that everything was just swell. Worst of all, it turns out that all of this is the result of a deliberate corporate strategy undertaken to reduce the considerable labor costs of providing real-time assistance to customers in need; we are thus left largely to our own devices, even when

we purchased those devices from our reluctant correspondents.⁷

Nor does one fare much better in the contemporary world of bricks-and-mortar retail. Gone, for example, are the local hardware and pharmacy, where knowledgeable assistance was frequently a central feature of the transaction and of particular importance in rural areas and among consumers with limited means. In their place are “big box” stores chock full of competitively priced goods available to anyone willing to brave the ever-longer check-out lines and ever-scarcer staff with the slightest understanding of the products on offer, though you might well find the elderly hardware clerk – who lost his job when the “big box” bought out his employer – at the front entrance sporting a blue vest and dispensing shopping karts and greetings to arriving customers.⁸

In other words, the experience of contemporary customer service is excellent until you actually need customer service – that is, until you need real-time communication with a sentient being who has the

⁷ See, e.g., Sally Herships, “Why Is Automated Phone Help So Bad?” *Marketplace* (Aug, 8, 2016) available at <http://www.marketplace.org/2016/07/19/world/iaw-phone-tree>; Kate Murphy, “Why Tech Support is (Purposely) Unbearable,” *The New York Times*, July 3, 2016, available at <http://www.nytimes.com/2016/07/04/technology/why-tech-support-is-purposely-unbearable.html?hpw&rref=technology&action=click&pgtype=Homepage&module=well-region®ion=bottom-well&WT.nav=bottom-well>

⁸ See, e.g., Panos Mourdoukoutas, “Walmart’s Outdated Management Style Is Failing Customers,” *Forbes* (Jan. 16, 2016), available at <http://www.forbes.com/sites/panosmourdoukoutas/2016/01/30/walmarts-outdated-management-style-is-failing-customers/#4e3d801467db>.

experience, training, authority, willingness, and, most of all, time to solve an unexpected problem. Indeed, what the experiences I've recounted here have in common is that they are almost invariably the result of mechanization, outsourcing, or some intersection of the two gone awry, and it is no coincidence that these are the usual suspects in the contemporary degradation of work as well. To be sure, virtually all of the cock-ups I've described had happy endings – I made it home from Seoul just fine and in a timely fashion; my phone is accessing more cellular data than ever; the erroneous charge for travelers checks was eventually removed from my bank account; and the car rental firm's collection agency backed off when its minions learned they were dealing with a law professor who knew a little something about contracts. But the point is that merchants and service providers are saving labor costs not only by mechanizing and outsourcing work to outside firms – they are saving labor costs by outsourcing work *to their customers*, and as a consequence the task of cleaning up their more than occasional messes has become an increasingly time-consuming burden, falling on all of us but distributed unequally – as such burdens invariably are – by gender, race, and economic privilege.⁹

The success of portraying the interests of labor and the interests of consumers as necessarily opposed – of sacrificing the former in the name of the supposed sovereignty of the latter – depends on keeping this costly subsidy hidden from the view of either. If we pull the curtain back, we may realize that we occupy both sides of the divide – that practices degrading work life are also degrading home life and that the opposition of interests lies elsewhere.

⁹ See generally Elizabeth F. Emens, Admin, 103 The Georgetown Law Journal 1409 (2010).

