

THE DIFFICULT PATH FROM OBSERVATION TO PRESCRIPTION

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While the law of the American workplace presumes that the market for employment operates as formal economic theory would predict, it would be difficult to find an area of law where the governing conceptual model is at such disjuncture from the law as applied. Professor Samuel Issacharoff argues that behavioral law and economics is the latest model that attempts to explain this disjuncture. However, he provides two cautions to the application of this model. First, he notes that the empirical observations that this model offers are amenable to conflicting interpretations and thus possess a limited ability to offer reliable generalizations. Additionally, he explains that even if the empirical foundations were solidified, empiricism itself does not generate normative conclusions.

INTRODUCTION

Employment markets have the great benefit of being easily observed. One need not stray far from the everyday practices of how we earn a living to see in operation a remarkably robust and dynamic market. But it would be rare for such a thick market, as economists would have us use the term, to perform so out of keeping with the basic tenets of microeconomic policy. Paradoxes abound. We know that wages move up, but rarely down. We know that in long-term relationships, the relation between actual productivity and compensation is imperfect at best. We know that individuals and firms form attachments that defy conventional economic wisdom.

At the same time, we also must know that the American law of the workplace presumes that the market for employment operates exactly as formal economic theory would have it, unless we can invoke one of the myriad patchworks of exceptions.¹ The conventional legal model of at-will employment presumes the supremacy of contract and the absence of a societal interest in how the terms of this exchange are crafted.² Nonetheless, it would be difficult to find an area of law

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¹ See Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law 22-24* (1990) (describing emergence of “vast array of legal rules” in recent decades designed to counter inadequacies of unfettered labor markets); Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 *Tex. L. Rev.* 1655, 1658 (1996).

² Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment At-Will*, 92 *Mich. L. Rev.* 8, 23-24 (1993).

where the governing conceptual model is so decisively out of keeping with the actual force of the law as applied.³ The welter of exceptions to the contractual at-will rule makes the presumption of contractual voluntarism at best a crude approximation of the reality of the law of the workplace, or simply a misunderstanding of the state of American law. But if the formal contractual regime is incomplete or wrong, what should step into the breach?

This is the central question confronting the still nascent field of employment law. Over the years, a number of models attempting to answer this question have emerged. The first, and most formidable, was a deracinated model of labor law. This model sought to import the concepts of job security, enforcement of the priorities of tenure in the firm, and the orderliness of both promotion and discipline—but all somehow stripped from their mooring in collective bargaining.⁴ This effort foundered on the difficulty of transporting the presumption of counterposed poles of authority present in the union context to the more directly hierarchical structure of the nonunion sector. Absent unions, even the ability to file a grievance or arbitrate a claim appeared hollow, despite the sudden infatuation of courts with all manner of alternative dispute resolution.⁵

The second effort was to expand the other major departure from employment at will: The antidiscrimination model of Title VII.⁶ Unlike the union model, this approach did not try to refashion the poles of authority within the workplace or even to create some presumed terms to the employment contract. Instead, the antidiscrimination model sought to structure legal supervision over the motivation of employers in adverse dealings with employees. With sufficient pulls and stretches, antidiscrimination law could be made to reach questions of age, disabilities, and pregnancy, and thereby penetrate more and more deeply into the personnel practices of firms. Each extension of the antidiscrimination model introduced some significant contortions as a result of the lack of fit between the categories to be protected and the classic understanding of discrimination,⁷ but creative causes of action

³ *Id.*

⁴ See Weiler, *supra* note 1, at 308-11 (describing decline of collective bargaining in private sector and emergence of alternative models of worker representation).

⁵ The most recent manifestation was *Circuit City*. *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001) (holding “proarbitration provisions” of Federal Arbitration Act, 9 U.S.C. §§ 1-16 (1994), applicable to arbitration agreements in all nontransportation employment contracts).

⁶ See Estlund, *supra* note 1, at 1659-62.

⁷ This is an argument that I have developed in an earlier series of articles. See, e.g., Samuel Issacharoff & Erica Worth Harris, *Is Age Discrimination Really Age Discrimination?: The ADEA’s Unnatural Solution*, 72 N.Y.U. L. Rev. 780 (1997) (questioning

could be fashioned for what were primarily individual enforcement actions.

The third approach was to develop a legal framework distinct to employment law premised on the notion that employment markets actually behaved very little like the proverbial exchange of widgets. Under this approach, the increasingly far-reaching common law inroads of primarily state courts could be explained and rationalized as corresponding to the lifetime employment model that held sway in post-World War II America.⁸ But here too, the model faltered. Career-wage relations began to unravel under pressure from globalization, corporate reorganization, and the rise of service and high-tech employment sectors that shared little of the lifetime attachment to a stable firm that typified the career-wage model. At the same time, the career-wage model failed to account for a significant portion of the bottom end of the workforce whose relations to any particular employer were episodic, at best.

Underlying this Symposium is the question of whether a fourth model might emerge. This time, the inadequacy of the at-will approach to employment is challenged not by an alternative institutional model (as with importation of union analogues into the increasingly nonunionized workforce), nor by a generalized imputation of ill motive to employers as a class, nor by an alternative institutional arrangement reflected in legitimate expectations of employment permanence. Rather, the newest contender looks to the behavioral underpinnings of the employment bargain to locate the inadequacy of the at-will model of employment law.

In this brief Essay, I want to offer two cautions about the development of this approach. The first echoes the caution put forward by Alan Hyde,⁹ and mirrors what I have expressed previously concerning

whether antidiscrimination model, designed to address “aberrant behavior that departs from rational market commands,” is appropriate tool to address age discrimination resulting from ordinary functioning of economic incentives in employment market); Samuel Issacharoff & Justin Nelson, *Discrimination with a Difference: Can Employment Discrimination Law Accommodate the Americans with Disabilities Act?*, 79 N.C. L. Rev. 307 (2001) (arguing that, while antidiscrimination law is purely preventative and easily enforced, “reasonable accommodation” standard in Americans with Disabilities Act, 42 U.S.C. § 12122(b)(5)(A) (1994), creates affirmative obligations for employers resulting in judicial confusion over scope of employer liability); Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 Colum. L. Rev. 2154 (1994) (suggesting that antidiscrimination model of Pregnancy Discrimination Act, 42 U.S.C. § 2000e (1994) focused on combating “invidious discrimination,” is ill-suited to negotiate questions of affirmative employer obligation and resource allocation raised by possibilities of pregnancy during employment term).

⁸ See Schwab, *supra* note 2, at 10-11.

⁹ Alan Hyde, *Endogenous Employee Subrationality: Neglected Institutional Dimensions of the New Behavioral Law and Economics* (unpublished manuscript, on file with the

the emerging field of behavioral economics and the law.¹⁰ The concern is simply that the empirical observations are either insufficiently robust or amenable to conflicting interpretation, thereby limiting their ability to offer reliable generalizations. The danger exists that an emerging catalogue of behavioral heuristics will serve as this generation's equivalent of the canons of statutory construction of old: For each canon there was always a counter-canon, and perhaps for each departure from what would be predicted by rational choice might emerge a modifying or even counterposed behavioral insight.¹¹ In part, this is the product of a relatively young field emerging from the social science tradition. As Jeffrey Rachlinski has observed, the academic conventions in psychology strongly rewarded the observation of empirically verifiable decisional behaviors; there was relatively little effort directed towards or reward given to attempts to generalize or systematize the ensuing mass of observed behaviors.¹²

The second concern goes beyond the robustness and generalizability of the empirical foundations of behavioral approaches to employment law. Even if the empirical foundations were to be shored up, empiricism does not readily generate normative conclusions.¹³ Take, for example, the fascinating work done on savings behavior by Madrian and Shea for this Symposium¹⁴ and by Thaler and Benartzi previously.¹⁵ Both establish that altering default rules and rules of presentation can produce dramatic increases in participation in deferred compensation plans. Both could be generalized further to show the unreliability of revealed savings behavior as a gauge of actual pref-

New York University Law Review) (cautioning that undifferentiated behavioral data suffers from "promiscuous prediction" and lacks clear normative force for policymaking).

¹⁰ Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 *Vand. L. Rev.* 1729, 1744 (1998) (stating that behavioral law and economics "has not yet achieved the results that would allow for a triumphal declaration that it is the emergent approach to sophisticated understandings of legal regulation").

¹¹ See Robert A. Hillman, *The Limits of Behavioral Decision Theory in Legal Analysis: The Case of Liquidated Damages*, 85 *Cornell L. Rev.* 717, 738 (2000) ("[P]articular cognitive phenomena point to different explanations . . . and policy approaches to . . . [a] problem.").

¹² Jeffrey Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 *Cornell L. Rev.* 739, 750-52 (2000).

¹³ See F.M. Kamm, *Moral Intuitions, Cognitive Psychology, and the Harming-Versus-Not-Aiding Distinction*, 108 *Ethics* 463 (1998).

¹⁴ Brigitte C. Madrian & Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior 2* (Dec. 1, 2000), <http://papers.ssrn.com/sol3/delivery.cmf/00cfm/00042403.pdf?abstractid=223635> (illustrating strong tendency towards "default behavior" in 401(k) enrollment and policy preferences).

¹⁵ Shlomo Benartzi & Richard H. Thaler, *Myopic Loss Aversion and the Equity Premium Puzzle*, 110 *Q.J. Econ.* 73, 73-76 (1995) (concluding that investors are typically "loss averse," in that they place greater value on avoiding loss than on achieving equal amount of gain).

erences or likely future behavior. But neither can contribute to a normative conclusion that increased savings is desirable or should be pursued as a matter of public policy. That conclusion must be derived externally from broader economic and policy considerations.

To flesh out this point, I want to look at particular applications of behavioral insights in the employment context.

I BEHAVIORAL HEURISTICS

Among the best known and most robust of the decisional heuristics is the endowment effect, the well-known tendency of individuals to value what they have over what could be their aspiration for a similar good in the open market. In some experiments with George Loewenstein a few years back, we tried to tease out whether the endowment effect might be capable of calibration depending on the source of the endowment. Instead of only determining whether there was an endowment, the question we posed was whether there were certain forms of endowment that bound up more of the sense of self and could, accordingly, be predicted to create a stronger attachment than would be predicted by mere ownership of the good. The direct supposition for these experiments was that a good that comes to define a significant part of one's self is going to be valued much more greatly than even what the endowment theory alone would have anticipated. The inspiration for these experiments came from the employment setting. The results, which have been published,¹⁶ supported the working hypothesis and found that the expected result could be prompted with direct relation to individuals' sense of professional esteem.

I confess to being fond of these results and to believing that they capture something significant about the sense of loss that accompanies a discharge. I also believe that the results, assuming their robustness and generalizability across a variety of employment settings, provide support for the claim that parties may not be able to contract fully at the hiring stage for all anticipated adverse effects in a maturing employment relation.

Assuming this to be a robust effect, what can the law do about it? One approach that I looked to a few years back, and one that gains greater force in the submissions of Sunstein¹⁷ and Estlund¹⁸ in this

¹⁶ See Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 *Tex. L. Rev.* 1783, 1802 (1996); George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 *J. Behav. Decision Making* 157 (1994).

¹⁷ Cass R. Sunstein, *Switching the Default Rule*, 77 *N.Y.U. L. Rev.* 106 (2002).

Symposium, is to alter the default rules to adjust for the potential unanticipated loss that would result from the termination of a long-term employment relationship. There may be reasons to alter the default rules in employment contracts, but it is not clear that they follow from the endowment observation. To begin with, the likely stickiness of default rules—another behavioral insight¹⁹—gives greater significance to the presumed baseline and imposes a greater burden of justification for the selection of a particular default rule. While there is no clear normative force to the at-will rule simply because it is the status quo ante, there may be unanticipated powerful effects in setting the baselines such as to require some justification for choosing a presumption of non-at-will employment.

More significantly, why should the law intercede? One can imagine all sorts of situations in which attachments to the status quo produce deep senses of loss when disrupted. Does it follow that the law should presume to protect against all such losses? No doubt, John D. Rockefeller felt deep attachments to the pre break up form of Standard Oil. But the disruption of the preexisting corporate form more than doubled the value of the enterprise, creating a tremendous windfall for all shareholders—Rockefeller himself being the primary beneficiary.²⁰ Similarly, the elimination of trade barriers, as with NAFTA, undoubtedly causes widespread losses as jobs in protected, but inefficient, areas of production are lost.²¹ Recognizing the accompanying sense of loss and community may be a significant consideration, but clearly it cannot be the sole concern in determining the overall benefits of trade enhancements.

The problem is one of knowing how to value the endowment effect independently. To a large extent, the behavioral challenges to standard economic models derive their normative force from the presumed attachment to welfare maximization in traditional economic thought. Much of the persuasive power of the behavioral insights has been to refute the cruder assumptions of rational choice models. But,

¹⁸ Cynthia L. Estlund, *How Wrong Are Employees About Their Rights and Why Does It Matter?*, 77 N.Y.U. L. Rev. 6 (2002).

¹⁹ See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 608, 675 (1998) (“Because individuals tend to prefer the status quo . . . they are likely to prefer the default term, whatever it may be . . .”); William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. Risk & Uncertainty 7, 8-14 (1988) (finding experiment subjects tend to favor choice that maintains status quo).

²⁰ Ron Chernow, *Titan: The Life of John D. Rockefeller Sr.* 553-56 (1998).

²¹ See, e.g., Thomas Bailey et al., *The Effect of High-Performance Work Practices on Employee Earnings in the Steel, Apparel, and Medical Electronics and Imaging Industries*, 54 Indus. & Lab. Rel. Rev. 525, 530-31 (2001) (describing job losses in apparel industry since NAFTA).

unfortunately, if behavioral economics is to generate an independent basis for making policy determinations, there must be some independent metric for assessing the significance of any particular observations. If, for example, the endowment effect attached to all long-term employment, the normative conclusion would have to be derived from some independent utility function. An unlikely, but possible result, is that job disruption is an inevitable by-product of market societies and that all are benefited by the highest form of labor mobility. A more credible result might be that some subset of workers, presumably younger ones with more current skills, are likely to be benefited in the long run by severing job attachments to atrophying sectors of the economy. Or, perhaps even more likely, the benefits of labor mobility are unlikely to be realized by the current generation of job holders and the impact on them must be cushioned by society.

All of these policy conclusions are possible and each is consistent with a recognition of an endowment-based attachment to employment. The fact that workers may "overvalue" their current employment does not in itself drive any particular policy prescription.

II INFORMATION BARRIERS

There are two forms of asymmetries in employer-employee bargaining that have been raised by critics of the at-will rule of employment. The first has to do with asymmetry of bargaining power between repeat-player employers and single-play or employees. This is hardly a new observation; indeed, this asymmetry is prominently featured in the preamble to the National Labor Relations Act as one of the central reasons for promoting collective bargaining.²²

Of greater significance in this Symposium, however, is the sort of information asymmetry described by Pauline T. Kim.²³ Here, the issue is not one of institutional reform to alter the terms of the bargain, but the reform of legal rules to account for the fact that workers appear to misapprehend the true, limited state of legal protection of their jobs. It is not clear that the workers are as wrong as first appears, for reasons suggested by Cynthia Estlund,²⁴ nor is it clear that this form of lack of knowledge should be considered a behavioral issue at all, unless it can be shown to fall within an observable pattern of

²² National Labor Relations Act, 29 U.S.C. § 151 (1994).

²³ Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *Cornell L. Rev.* 105 (1997).

²⁴ Estlund, *supra* note 18. (noting that, despite their misperception of at-will employment relationship, employees do not necessarily believe they will be fired only for just cause, and do not necessarily believe that law will provide fully effective remedy).

decisional heuristics. But even assuming systematic worker misperception of legal protections, and even assuming that this is a widespread phenomenon, what is the normative force of this insight?

In his paper, Cass Sunstein suggests that the law should intervene to correct employee ignorance by placing the presumed entitlement to job security in the hands of employees.²⁵ While I am generally sympathetic to modifications of the legal presumptions in long-term employment contracts, the emphasis on mistakes by employees strikes me as an insufficient normative basis for this proposed legal reform. First off, much simpler mechanisms of correcting misinformation are available. Employers could be required to post the at-will equivalent of workers' compensation coverage notices at all worksites. Or there could be public service announcements at the beginning of each rented videocassette informing viewers not only of the requirements of the copyright laws, but of their presumed status as at-will employees.

More seriously, the reason for legal intervention cannot be the mistake of one of the parties. For example, the research of Lauren B. Edelman and her collaborators indicates that there may also be a significant amount of employer overestimation of the amount of legal protection available to employees.²⁶ Stimulated by self-interested labor consultants, it may be that employers significantly overestimate the potential legal liabilities they face in case of layoffs or terminations and respond by overinvesting in defensive personnel practices.²⁷ Absent some greater normative attachment to the protection of employee rights, the case of the misinformed employer looks not that different from that of the misguided employee. Under this depiction, the employers are a contracting party that consistently is acting to its detriment because of a mistaken take on the prevailing requirements of law.²⁸ Yet, it is unlikely that there will be reform proposals for more binding at-will rules in order to protect employers from the consequences of their own misunderstandings.

III

THE NATURE OF AN EMPIRICAL INQUIRY

Before concluding, I want to shift focus slightly to the difficulties in defining a legal reform agenda from behavioral insights. These difficulties are of two different sorts. The first, as discussed to some ex-

²⁵ Sunstein, *supra* note 17.

²⁶ Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 *Law & Soc'y Rev.* 47, 73-74, 80 (1992).

²⁷ *Id.* at 74.

²⁸ *Id.* at 80.

tent above, has to do with the preconditions for deriving policy objectives from as yet unsystematized empirical insights.²⁹ The second difficulty derives from something more central to the methods of both law and behavioral economics: empirical observation in each of these disciplines. As Oliver Wendell Holmes Jr. once observed, "The life of the law has not been logic: it has been experience."³⁰

Law, particularly as carried out through the common law method, responds to the incrementalism of the resolution of specific problems. Grand theories, whether from natural law or even law and economics, map uncertainly onto the difficult terrain of the law. Legal analysis tends to operate at the middle tier between the observations coming from the resolution of specific problems and the broader thrusts of theory. In this limited sense, behavioral economics shares the methodological middle tier with law; it emerges from the world of empirical observation but, thus far, stops well short of the generalizations of pure theory. Both law and behavioral economics are built up from the empirical domain of case observations, rather than from the top down beginning with theory.³¹ This may account for the rapid rise in interest that behavioral economics has generated among legal scholars.

The lack of a top-down approach is both the strength of behavioral economics and a source of difficulty in consolidating its application to law. Conventional law and economics has the great advantage of having its normative and prescriptive dimensions follow simply from its theoretical commitment to the maximization of social welfare.³² To a large extent, the application of behavioral economics in

²⁹ I previously identified four conditions that would have to be met for assessing the generalizability of behavioral insights: (1) the effects must be generalizable; (2) the effects must be robust; (3) the effects must be of sufficient magnitude as to systematically undermine alternative predictive models; and (4) the insights must be capable of being operationalized. Issacharoff, *supra* note 10, at 1734.

³⁰ Oliver Wendell Holmes Jr., *The Common Law* 1 (1923).

³¹ Jeffrey Rachlinski, the first legal academic formally trained in behavioral decision theory (BDT), directly addresses the still incomplete nature of the behavioral research agenda:

The field was founded on the suspicion that rational-choice models are inadequate. As a result, BDT has progressed in the way that many scientific revolutions proceed: by first amassing flaws in the theories that have preceded it, and then developing new theories to replace the old. Because the field is still new, BDT sometimes appears to be a loose collection of aberrations, but researchers in the field are working toward developing general theories of human judgment and choice. That BDT's theories are often more complicated than those of rational-choice theory is a sign of progress, as human behavior is more sophisticated and complicated than the rational-choice model can easily accommodate.

Rachlinski, *supra* note 12, at 752 (footnotes omitted).

³² See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471, 1474-75 (1998) (arguing that in conventional economic analysis "normative

law largely has assumed the normative framework from conventional law and economics, and then challenged some of the empirical failures of the latter.³³

This is perhaps the reason that one of the immediate questions raised in the application of behavioral economics is whether it best explains what already exists in the law, rather than provides a normative blueprint for what the law ought to be. It may be that the empirical backbone of behavioral economics lends itself more fully to understanding where the law has arrived, as opposed to the distinct terrain of where the law *ought* to be that is the claimed mantle of theoretically-based approaches. Thus, it may be that one of the greatest contributions in the field of employment law will be to provide a more robust understanding of why the law intercedes to protect the job expectations of working people despite the formal doctrinal attachment to employment at will.

There is a further limitation on the use of behavioral decision theory to derive normative legal positions. Here I address the more basic limitation that emerges from the relative youth of behavioral economics as a field. To serve as a generalized and trustworthy guide to the incentive structures of law, behavioral economics must do more than simply describe a defined series of empirical observations. There must be a power beyond description rising to the level of explanation of how human behavior will interact with the complex institutional pathways of the law. This is a distinction that Nobel Laureate Steven Weinberg recently addressed as the line between description at an immature level of scientific understanding and the ability to explain that emerges from a robust level of scientific achievement. Addressing himself specifically to physics, Weinberg holds out that scientists “explain a physical principle when we show that it can be deduced from a more fundamental physical principle.”³⁴ For an empirically based ap-

analysis is no different from prescriptive analysis” in that both seek to “maximize ‘social welfare’”).

³³ Thus, leading pieces in the field have an unfortunate tendency to catalogue particular observations and graft them onto a conventional law and economics model. This is a point that others have also raised. A particularly harsh assessment of proponents of behavioral economics finds that leading proponents are “unself-critical about the degree to which behavioral economics can better be seen as a series of particular counterstories, formed largely in parasitic reaction to the unduly self-confident predictions of rational choice theorists, than as an alternative general theory of human behavior.” Mark Kelman, *Behavioral Economics as Part of a Rhetorical Duet: A Response to Jolls, Sunstein, and Thaler*, 50 *Stan. L. Rev.* 1577, 1586 (1998).

³⁴ Steven Weinberg, *Can Science Explain Everything? Anything?*, *N.Y. Rev. of Books*, May 31, 2001, at 47. Weinberg in turn relies on the leading work in the philosophy of science for this basic definition of the aim of the scientific inquiry. Carl G. Hempel & Paul Oppenheim, *Studies in the Logic of Explanation*, 15 *Phil. of Sci.* 135, 136 (1948) (“[T]he

proach to human conduct, the step from observation to this form of prescriptive explanation is a difficult one.

CONCLUSION

The central issue I want to raise is the absence of a clear normative framework emerging from the sorts of behavioral and informational insights that have thus far been incorporated into the employment law debates. Over time, this might prove to be for the good. It may be that greater insight into the characteristically human condition of imperfect information and imperfect decisionmaking will help researchers understand when markets and law should be expected to perform according to design and when they are likely to break down. But the fact that they break down in certain ways, and perhaps even that they do so along predictable lines, does not define a reform agenda. That has to be generated externally and is unlikely to depend on the state of the science. Nor is there any reason to suppose, particularly at this early stage of behavioral inquiry, that the results of further scientific inquiry will necessarily buttress arguments for reform and regulation.

If the science is promising, its results should surprise us all.

explanation of a general regularity consists in subsuming it under another, more comprehensive regularity, under a more general law.”).