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Panel Discussion of The Excuse Factory

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I heard a number of interesting points in the lunch discussion, and appreciated the opportunity to hear Walter Olson expand on the themes of his book. The issue of the hidden costs of employment laws is exceedingly important. Most of his evidence is anecdotal. Nevertheless, I am persuaded that the costs of employment regulation may be high. Of course, costs are only half of the balance; the employment laws give benefits as well.

The major existing study that I am aware of comes from the Rand Corporation.[1] They estimate that the cost of state wrongful discharge laws is equivalent to a 10 percent tax on wages. These estimates do not include the costs of federal regulation, such as Title VII[2] and the Americans with Disabilities Act,[3] which are probably higher. I do not know whether that 10 percent number strikes you as big or little. It strikes me as a fantastically large number. The Social Security program with its 7 percent tax on employers and 7 percent tax on employees is somewhat larger, but of the same general magnitude. So we are talking about regulation with huge impacts if those figures are correct. The issues are important enough that I think further scholarly inquiry should continue. I would like to see more analysis of broad data bases to supplement or question or refine the conclusions of Mr. Olson. Indeed, I hope to engage in such a research project myself.

But I would like to shift to make my major point for this panel, which is that the comparisons made with Europe are often misleading. Mr. Olson points out that employment litigation in America is much more extensive than in Europe, and undoubtedly that is true. The cost of lawsuits and trials and the number of trials is far higher in America. But if you ask business leaders in Europe versus business leaders in America how hard is it to fire workers, I think it is quite clear that it is harder to fire in Europe. This is particularly true when a business leader is trying to reorganize or downsize a company. Many European employers complain that reductions in force are virtually impossible because of legal restrictions. European employers also have greater difficulty in terminating individual workers. Whatever inroads this country has made in employment at will, we are not at universal just cause, which of course the rest of the world requires. I think in part Mr. Olson conflates two points: the differences in litigation systems between Europe and America; and the merits of the law or actual standards. Whatever we think of the complexities and difficulties with American employment regulation as recounted by Mr. Olson, I think it is far more difficult in Europe, and they are very worried about Euro-sclerosis as it is known. Unemployment rates in Europe, and particularly youth unemployment rates, are far higher in Europe than in the United States, and that worries policymakers there.

In short, a fuller comparison between American and European employment regula-

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tion would indicate, I think, that American regulation imposes fewer costs on employers.

Mr. Olson's comments reveal a flexible and subtle mind, compared to the image one gets merely from reading the book. It is surprising. That is actually meant as a compliment. In particular, I am hearing here that he envisions a positive role for unions in some contexts in solving workplace disputes. Given his positive assessment of labor unions, as I now hear it, let me react to Mr. Olson's point that no one ever contracts for just cause. This is one of his major points. Of course, that is only true in the non-unionized workplace. In the unionized workplace, everyone contracts for just cause.

Why unionized workplaces always contract for just cause and non-unionized workplaces rarely do is one of the interesting empirical puzzles about the at will/just cause debate. I think one explanation for it is that in the non-unionized market, employers receive signals largely from young people entering firms who are not that interested in job protection twenty or thirty years down the road. In a unionized workforce by contrast, unions cater to the median, older worker who is much more interested in job security. So we may have a problem here of what the economists label infra-marginal workers versus marginal workers. My basic question then is to ask Mr. Olson, who is not trashing unions, at least not wholeheartedly, although I am offering him another opportunity to explain the puzzle as to why unions always go for just cause.

This is an important issue and Henry Butler flagged it to us as one of central concern to the audience. I believe it is a tough issue. I have not written anything specifically on this and so my views are unformed. My instinct would be to enforce agreements to arbitrate; in other words, to allow this to be a contract. Forbidding arbitration terms creates a mandatory term. As I hope to discuss later this afternoon, mandatory terms should be viewed with suspicion. Ian Ayers makes the good point that when you point to a market failure, this at least gives a rationale for stepping in with legislation to correct the market. Externalities are the classic form of market failure. Mr. Ayers points to the creation of precedent, which is an externality because it benefits (or harms) many actors other than the litigants. Extending this externality argument, however, would suggest that parties should not be allowed to settle cases either, even once they are in litigation. Arbitration is at heart only a variation on the private settlement of cases. Why? Because there will be no precedent, which is the key point. And I think it is way too late today to argue against the abolition of settlement of litigated cases, even though my personal opinion is that the push toward settlement has been overdone by most judges. That is a totally different topic, a major topic, and clearly I am not about to advocate the abolition of settlements. The arbitration clauses at issue here, many people emphasize, are predispute agreements rather than agreements after litigation has begun. But I do not see that as being major difference in kind. So again, I want to emphasize that my comments are tentative, but I would be inclined to enforce these agreements. One possible area of regulation is to use an opt-in system rather than opt-out system, so that the agreements have to be carefully drafted and publicized before they are enforced against workers.

Audience member question:

A lot of the problems you are talking about steam from the notion that like the law, we are stuck with the opinions of jurors. Those of us who are trial judges are stuck with jurors' beliefs, and I find that I can charge jurors about employment at will until I am blue in the face, but most jurors think they are entitled to their jobs as long as they are doing a good job, and they are imposing that rule on employers in the cases they hear. I do not know if you all have done your studies in actual trials that have gone on, but it is my experience that jurors will not enforce the law of employment at will.

Professor Schwab:

I have not done studies on actual trials of wrongful discharge cases. I will report later in the afternoon, however, about a survey of workers on their knowledge of employment law. Henry Butler had you judges also participate in the survey. The point for this afternoon is to examine whether workers know what the judges think the law is, which is some indication of what the law might actually be. This goes back, in part, to Walter Olson's big point. A valid role for judges is to issue judgments notwithstanding the verdict if you think the jurors really are not applying the facts in accordance with your instructions.

Question:

Do you know what my odds of getting JNOV affirmed are?

Professor Schwab:

Well, next time cite Justice Frankfurter and say that "[a] timid judge, like a biased judge, is intrinsically a lawless judge."[4] It was not a majority opinion.

Notes

1. James N. Dertouzos and Lynn A. Karoly, Labor-Market Responses to Employer Liability. Santa Monica, CA: RAND Corp., Institute for Civil Justice, (1992).
2. 42 U.S.C. § 2000e et seq. (1994).
3. 42 U.S.C. § 12101 et seq. (1994).
4. Wilkerson v. McCarthy, 336 U.S. 53, 65 (1949) (Frankfurter, J., concurring).

Panel Discussion of *The Excuse Factory*

Sidney A. Shapiro

We are fortunate to have Henry Butler at the University of Kansas. Those of you who have participated in the programs sponsored by the Law and Economics Center know this better than others. When Henry was interviewing for a position at Kansas, I asked him for his definition of law and economics, and he had a very generous definition. He said, "Law and economics involves the recognition that governmental decisions create costs, and, as a result, analysis of public policy ought to take this fact into account and make judgments in light of it." Certainly, Mr. Olson's book brings that to our attention.

In thinking about my remarks on this panel, however, I harken back to my undergraduate training in economics classes, where I remember one of my professors always using the phrase: "compared to what?" My remarks start from that premise. A few years ago, Neil Komesar observed that the alternative solutions to most policy problems are highly imperfect alternatives.[1] In reading Walter Olson's book, I was therefore interested in the following question: Assuming that we wish to respond to problems in the workplace, what are the alternatives, potential responses, and what are the advantages and disadvantages of each?

Mr. Olson identifies four potential responses. At some points, he cites with approval the manner in which European countries address workplace difficulties, at least to the extent that they seem to operate without the kind of high transaction costs that are associated with work-related litigation in the United States.[2] At another point, he notes that for some problems we rely on government agencies to protect workers, rather than private enforcement through employee lawsuits.[3] The Occupational Safety and Health Administration (OSHA) is a good example of this approach. At still other points, Olson mentions workers compensation[4] and unemployment compensation[5] as examples of systems which he seems to admire, at least to some extent. Finally, he mentioned arbitration as yet another approach.[6]

As I move quickly through these ideas, I would like to suggest to you the type of comparative analysis that is necessary before we decide that the litigation system should be abandoned. Starting with the European systems, I agree with Professor Schwab about the difficulty of adopting a European system in the United States. I am reminded that some years ago I went to a talk by Bruce Valdeck, who was speaking about health care reform, about which he is an expert. Someone in the audience asked him whether it would be advisable for the United States to adopt the type of health care system that is used in Canada. Vladeck replied that the important fact to know about Canada was that it was full of Canadians. What he meant was that what people in other countries find acceptable in terms of government action is a function of their political culture and experience.[7] As a result, it is difficult to adopt a for-

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eign system in the United States because Americans are not prepared to accept the same types of arrangements that prevail in other countries. Thus, although the European systems might appear to Mr. Olson to be better in some ways, they simply cannot be adopted here very readily.

In my prepared remarks, I will talk about the role of OSHA and workers' compensation in addressing occupational accidents and disease. For now, I would point out that an administrative agency, like OSHA, may not offer a sufficient level of protection for workers, when it is not accompanied by a private right of action to enforce workplace safety and health regulations. OSHA has about 1,000 inspectors, and is supposed to inspect seven million workplaces.[8] So, needless to say, an employer could live a long life and never see an OSHA inspector. The fact of the matter is that agencies, like OSHA, will inevitably be underfunded in today's political climate.[9] This means that unless there is a private right of action, there is likely to be underenforcement of regulations. Thus, if Mr. Olson expects that administrative agencies alone can do the necessary job, he is likely wrong.

What about workers' compensation? Does this system work better than litigation in the federal and state courts? Does it avoid the type of absurd results that occur in tort and contract litigation according to Walter Olson? The fact is that there is a heck of a lot of litigation going on in the workers' compensation system. It is true that employers have fewer issues that they can use to contest paying compensation, but that does not stop them from enthusiastically contesting many claims by employees.

In any case, if you are going to compare workers' compensation and tort litigation, you must recognize that they deliver different levels of deterrence. In my prepared remarks, I will discuss how workers' compensation weakens the incentive for employers to take safety and health precautions. This occurs because the amount of compensation that employers pay under workers compensation is limited or capped. As I will discuss, this is contrary to economic theory. If we expect to reach an economically appropriate result concerning compensation for occupational injuries and disease, then we would expect employers to pay for the full costs of such injuries and diseases, either in the form of wages for undertaking risky work or compensation for accidents and illnesses. Because workers' compensation limits the damages that workers can recover, it is an economically inappropriate system.

The type of arbitration that Mr. Olson has in mind is apparently different. He mentions with approval the "old days" when the shop foreman of a labor union was responsible for handling various employee grievances.[10] He likes this approach because when labor unions have this function they must take their broader institutional concerns into account in resolving individual employee grievances. With the greatly reduced role of labor unions in today's workplaces, the unions no longer function in this manner. One can argue about why labor unions are no longer an important force in the American workplace, but certainly one viable theory is they were done in by the National Labor Relations Board. Republican control of the Board during the Reagan and Bush administrations led to a series of rulings that have made it more difficult for unions to organize workers. I mention this theory because it is

related to another problem when you depend on agencies as the method to enforce rules and regulations. Agencies can get captured by those with superior resources. You have to look at who plays the game and what resources they bring to it. Recently, employers have gotten a lot better results from the NLRB than have employees and unions.

I see a connection here. I would suggest that the growth in employment litigation, which Mr. Olson bemoans, is related to the drastic reduction in unions. Capitalism has rough edges. Workers sometimes come up on the short end, and there are far more employees in this country than employers. Inevitably, people will seek relief for what they view as the unfairness of capitalism. If they don't find relief in labor unions, they'll go somewhere else, and it seems to be pretty clear where people have gone is to all these other solutions, particularly litigation. Thus, if Mr. Olson wishes to reduce employment related litigation, he should favor the reinvigoration of labor unions. It will be interesting to see if he will join me in supporting stronger unions.

Notes

1. *See* Neil Komesar, *Injuries and Institutions: Tort Reform, Tort Theory, and Beyond*, 65 N.Y.U. L. REV. 23, 24 (1990).
2. *See* WALTER OLSON, THE EXCUSE FACTORY 234-35 (1997).
3. *See id.* at 50-51.
4. *See id.* at 7.
5. *See id.* at 34.
6. *See id.* at 298.
7. *See generally* STEVEN KELMAN, REGULATING AMERICA, REGULATING SWEDEN: A COMPARATIVE STUDY OF OCCUPATIONAL SAFETY AND HEALTH POLICY 221-28 (1981) (discussing the connection between political culture and governmental structure).
8. *See* THOMAS O. MCGARITY & SIDNEY A. SHAPIRO, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION 47 (1993).
9. *See* Richard J. Pierce, *Judicial Review of Agency Actions In a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 87 (1997).
10. *See* OLSON, *supra* note 2, at 237.

Panel Discussion of *The Excuse Factory*

Keith W. Chauvin

While reading through the book, I thought of the following quote describing economists: "Economists' function in society is to point out unintended consequences. Our habitual refrain is that simple policy fixes may have more fizz than fix and may do unanticipated collateral damage. Our cheerful side - the invisible hand demonstration that greed has unintended benefits - goes unappreciated and our dismal side dominates public perception."

Many of the stories in this book show us the unanticipated collateral damage from a particular form of market intervention. However, one of the costs we don't see when we interfere in the market is the foregone benefit of the solution that the market's invisible hand may have provided had the market been allowed to function. We may be taking away or stealing from the market an opportunity for the market to deal with a diversity of problems through a diversity of creative and efficient solutions. I have a couple of stories that I believe illustrate the labor market's potential for allowing employers and employees to make the best of difficult situtations.

The first story is about Nucor Steel, a very successful mini-mill steel operation that has given the large integrated steel manufacturers some strong competition. PBS did a program several years ago on Nucor Steel and some of their unique management practices.[1] Workers at Nucor work with hot molten steel and clearly there are dangers in the plants. Nucor is known for having very stringent rules on pay for performance, absenteeism and other employment practices. For example, a very large portion of pay for workers at Nucor Steel comes from bonuses. Each person's bonus is based on what his or her team produces. And, they have rules such as: If you are late for one day, you lose your bonus for the week. If you miss one day for any reason, you lose your bonus for the month. Lynn Williams, president of the United Steel Workers, expressed strong opinions about Nucor during the documentary. He said: "These are childish rules and Nucor is a dangerous place. This is the best indication of a sweat shop. Nucor is a horror story. We, the union, are committed to the proposition that people shouldn't have to be killed because they are trying to earn a living. They [Nucor]- are re-creating the old sweatshop conditions where the idea is to push people as hard as they possibly can."[2]

I'll grant you that Nucor doesn't sound like a very nice place. It doesn't sound like a university, certainly not the kind of place where I would like to be.

I have a second firm I would also like to describe, then I'll come back to Nucor. The second firm is Lincoln Electric, a manufacturing firm of arc welding equipment located in Cleveland, Ohio. This is a very successful Fortune 500 firm and they too have very unusual rules regarding pay and pay practices. There was a *60 Minutes* program on Lincoln Electric

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about six or seven years ago, and Lesley Stahl interviewed managers and workers at Lincoln.[3] I'd like to share a few quotes from Leslie Stahl, Don Hastings, who is Lincoln's CEO, and some of the workers:

> Leslie Stahl: "Piece rates make people think of sweatshops. There's that word again. Garment workers, migrant workers, exploited by greedy owners."[4]
>
> Don Hastings: "Workers at Lincoln Electric are on a high wire without a safety net and they only get paid if they make good products. They get paid just for what they do. It is a system that people think is on the barbaric side. There is no seniority system, no union . . . . Books being written about job satisfaction and happy workers doing exercises or singing company songs as they do in Japan are baloney."[5]
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> Leslie Stahl: "Lincoln is an unforgiving place. Lots of new hires can't take it. Twenty percent go right back out within three months. If older workers slow down, tough luck, their pay drops. Employees pay for all of their health insurance, and have no paid holidays or sick days."[6]
>
> Lesley Stahl addressing a Lincoln worker: "What happens if you get sick?"[7]
>
> Worker: "You come to work. If you don't, you don't get paid."[8]
>
> Dan Lacey, Editor of *Workplace Trends*: "Lincoln is a place where you would not want to work. The Lincoln system is based on go-go-go. Work as fast as you can. Lincoln Electric produces by whipping their horses harder than their competitors."[9]

Nucor and Lincoln may sound like employers that should be regulated more closely. They sound like places where a union shop would thrive and maybe places where someone needs to step in and offer some protection to the workers. Before we conclude that we should rush in and provide help, let me conclude the stories of these two firms. At Lincoln Electric there is an unusual sign at the front gate. The sign reads, "No admittance prior to one-half hour before starting time." Because of Lincoln's piece rate system, Lincoln workers had earnings in 1990 that exceeded the average starting salary for professors in business schools. Workers at Lincoln Electric were admonished for coming to work too early. Given the overall package of strict rules and high pay, people love to work at Lincoln and they line up outside the gate so they can start 30 minutes before their shifts officially begin.

In the Nucor case, the following appeared in a *Fortune* magazine: "When Nucor Steel in Darlington, South Carolina, advertised to fill eight openings last fall, over 1300 applicants showed up, creating such a traffic jam that State police had to be called out. Unfortunately, the force was a bit thin. Three officers were already at Nucor applying for jobs."[10]

Things aren't always as bad as they seem to

be, and the market has an incredible ability to deal with a diversity of problems taking into consideration the diversity of tastes among workers. The market is not perfect and sometimes more regulation is needed. However, when we interfere in the market, we should recognize that we might be standing in the way of creative solutions that would otherwise develop through market interactions between employers and employees. In the cases of Nucor Steel and Lincoln Electric, I feel the market has created a package of working conditions and compensation that the people who work in these places prefer over the alternatives available to them. The opportunity cost of interfering in the market is that we may prevent the market from discovering the combinations of working conditions and pay that workers prefer. This opportunity cost is very difficult to measure, but is very real.

Notes

1. *See* The Nightly Business Report (PBS television broadcast, April, 9, 1992).
2. *Id.*
3. *See* 60 Minutes: Guaranteed Employment at Lincoln Electric: Ahead or Behind the Times? (CBS television broadcast, Nov. 8, 1992).
4. *See id.*
5. *See id.*
6. *See id.*
7. *See id.*
8. *See id.*
9. *See id.*
10. Nancy J. Perry, *Here Comes Richer, Richer Pay Plans,* FORTUNE December 19, 1988, at 58.