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DANBURY HATTERS IN SWEDEN:
AN AMERICAN VIEW OF EMPLOYER REMEDIES FOR ILLEGAL COLLECTIVE
ACTIONS¹

César F. Rosado Marzán²

Margot Nikitas³

ABSTRACT

The European Court of Justice Laval quartet held that worker collective actions that impacted freedom of services and establishment in the E.U. violated E.U. law. After Laval, The Swedish Labor Court imposed exemplary or punitive damages on labor unions for violating E.U. law. These cases have generated critical discussions regarding not only the proper balance between markets and workers' freedom of association, but also what should be the proper remedies for employers who suffer illegal actions by labor unions under E.U. law. While any reforms to rebalance fundamental freedoms as a result of the Laval quartet will have to be very sensitive to member state and E.U. institutions and practices, an American perspective may prove useful to figure out the way forward. The United States has a rich experience of court-imposed injunctions and punitive damages which ultimately were deemed excessive by the public. It required very assertive legislative and executive action to curb such excessive judicial incursions into the workplace. To the extent the American experience is relevant to the EU, it will be very likely that the E.U. will require political leadership and EU-wide labor law and policy to rebalance markets and workers' rights in the EU.

¹ A prior version of this paper was presented on May 27, 2011 in Florence, Italy, at “Remedies and Sanctions for Unlawful Industrial Action in a Comparative Perspective,” a conference sponsored by Regulating Markets and Labour Programme, Istituto Italiano di Scienze Umane and the University of Florence, Florence, Italy. The authors thank Marty Malin, Paul Secunda, Laura Wienreb and Steven Willborn for comments made to a prior draft of this paper. Any errors and omissions remain the sole responsibility of the authors.

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I. INTRODUCTION: AMERICANS, SWEDES AND PENDULAR SHIFTS IN LABOUR LAW

Theoretically, *laissez-faire* or freedom of contract implied the freedom of workers to withhold their labor either individually or jointly, if they so decided.... But in practice such freedom conflicted with the institution of a self-regulating market, and in such a conflict the self-regulating market was invariably accorded precedence. In other words, if the needs of a self-regulating market proved incompatible with the demands of *laissez-faire*, the economic liberal turned against *laissez-faire* and preferred—as any anti-liberal would have done—the so-called collectivist methods of regulation and restriction.⁴

*Laval*⁵, *Viking*,⁶ *Ruffert*⁷ and *Luxembourg*⁸ (hereinafter referred to as the “*Laval* quartet”),

the freedom of services and establishment cases that have shaken the foundations of European discussions regarding “social Europe” strongly resonate with the central of thesis of the economic historian Karl Polanyi regarding the relationship between regulation and markets. The imposition of exemplary damages (which approximate what American lawyers would call punitive damages⁹) by the Swedish Labor Court against labor unions that resulted from *Laval* continues to spread grave concern among labor advocates. These advocates argue that the EU law is friendly to markets at the expense of workers.¹⁰ The EU cases all depict state-like actions¹¹

⁴ KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 148 (2001 Beacon Press).

⁵ *Laval un Partneri*, Case C-341/05 (Dec.17, 2007).

⁶ *Int’l Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line ABP and OÜ Viking Line Eesti*, Case C-438/05 (Dec. 11, 2007).

⁷ *Dirk Rüffert v Land Niedersachsen*, Case C-346/06 (Apr. 8, 2008).

⁸ *Commission v. Luxembourg*, Case C-319/06 (June 8, 2008).

⁹ Exemplary damages may resemble punitive damages in that neither corresponds to an actual and proved economic loss. However, they may diverge in both the level of fault by the party required to assign such damages and the amount of damages issued by the court, as described in *infra* at note 39.

¹⁰ See for example the European Trade Union Congress’ call for a E.U. “social protocol,” particularly after the *Laval* quartet. European Trade Union Congress, Social Progress Protocol / ECJ rulings, available at <http://www.etuc.org/r/846> (last visited in May 2, 2012).

¹¹ We say “state-like” because the authors, like Phillippe Schmitter, agree that the E.U. is neither a state nor a simple international organization, but a *sui generis* hybrid polity, a “non indentified political object” (“*objet politique nonidentifié*”). PHILLIPE SCHMITTER, HOW TO DEMOCRATIZE

clamping down on working class collective action to protect the free movement of services and freedom of establishment, cornerstones of an integrated EU market for goods and services.

The *Laval* quartet decisions resonate with Polanyi's claim that elites create the self-regulating market through state action. Second it resonates with Polanyi's claim that interactions between atomized individuals maximizing self-interest are not the locus of real markets. Therefore, and related to the first point, Polanyi argued that when workers acted collectively to protect themselves against markets, the pro-free market ruling elites shifted gears and imposed restrictions on the actions workers; they dropped their *laissez-faire* agenda and used elite collective power and the state over workers. However, when markets are valued above "society," markets threaten society's very fabric and require regulation. This is Karl Polanyi's famous "double movement" of deregulation followed by regulation.¹²

The *Laval* quartet in many ways follows this Polanyian trajectory: EU law, through its "four freedoms"—free movement of goods,¹³ services,¹⁴ labor,¹⁵ and capital¹⁶—has created an integrated market society in twenty-seven member states. In some cases, including those in the *Laval* quartet, workers used their collective resources to challenge some of the excesses of the market. The European Court of Justice, through its holdings, was mobilized by employers to

THE EUROPEAN UNION AND WHY BOTHER? 2 (Rowman and Littlefield Publishers 2000). Moreover, as Perry Anderson has also argued, "The Union is no equivalent to either the United States or Japan, since it is not a sovereign state. But what kind of formation is it? The Union remains a more or less unfathomable mystery to all but a handful of those who, to their bemusement, have recently become its citizens. Well-nigh entirely arcane to ordinary voters, a film of mist obscures it even in the mirror of scholars." PERRY ANDERSON, *NEW OLD WORLD* 3 (Verso 2009).

¹² POLANYI, *supra* n. 4.

¹³ Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 (hereinafter "E.U. Treaty") arts. 26 and 28.

¹⁴ *Id.* at arts. 26 and 76.

¹⁵ *Id.* at arts 26, 45, and 49.

¹⁶ *Id.* at arts. 26 and 63.

curb such working class actions. Now, especially after the Swedish labor court issued exemplary damages against the unions in *Laval*, Europe discusses how to better regulate labor relations and deal with the potential excesses of market integration in the EU. We are seeing the double movement unfold.

If history is to serve as a guide for future action, it is certainly true that the EU member states have a rich history of their own in which to look for guidance for a new regulatory shift. From Marx to Polanyi and the scores of others who have documented working class history and its challenges, there are more than sufficient lessons to learn from accounts of European working class history, market construction and regulation.

This article, however, will try to show the need to curb state coercion and particularly punitive damages in the EU against labor union collective actions as part of the larger need to rebalance the scales of power between capital and labor. With no intent to provide a complete account—although with the sincere effort to provide an account that provides justice to the facts—we recount a short, but well-known sliver of United States’ history with injunctions and punitive damages in labor relations: the extension of antitrust law and damages into industrial relations exemplified by the landmark U.S. Supreme Court case *Loewe v. Lawlor*,¹⁷ commonly referred to as the “Danbury Hatters” case, in which 250 union hatters faced punitive damage penalties and confronted losing their homes and possible bankruptcy.¹⁸ An important sector of the American capitalist class—proprietary capitalists—and its lawyers used the courts to attempt

¹⁷ 208 U.S. 274 (1908).

¹⁸ The employers sought to attach the real estate and bank accounts of 250 Danbury Connecticut union hatters, some of which were not actively involved in the union at all. Daniel R. Ernst, *The Danbury Hatters*, in CHRISTOPHER L. TOMLINS AND ANDREW J. KING, *LABOR LAW IN AMERICA* 180, 181 (Johns Hopkins 1992).

to all but destroy a hatters union, if not the entire American labor movement¹⁹ through the use of antitrust law, injunctions and damages.²⁰ While proprietary capitalists and their allies did not ultimately triumph in destroying labor, they inflicted very real injuries to workers and their organizations through the courts. The extreme, anti-labor ruling in the “Danbury Hatters” case stirred national debates leading, in great part, to the birth of modern American labor law.

This chapter argues that from an American perspective, the exemplary (or what Americans would call “punitive”) damages ordered by the Swedish Labor Court in *Laval un Partneri Ltd.*,²¹ seem excessive. Under American federal labor law, which in this article refers to the National Labor Relations Act²² (“Act” or “NLRA”), punitive damages are not available. Unions that commit illegal collective actions will be penalized under the NLRA, but the remedies available to employers are normally limited to injunctions and compensatory damages. *Antitrust law* may impose treble damage (a severe type of punitive damages) liability, but only in extremely limited circumstances.

The U.S. courts did not always have this limited injunctive/compensatory remedy system. For lack of a better term, and accepting the possibility of distorting the contours of American labor law, which some say is rule-based and legalistic,²³ we will refer to this limited injunctive and compensatory remedy system as a “liberal” one. From the late 19th to mid-20th century, U.S. courts frequently issued injunctions against strikes and even imposed punitive damages on

¹⁹ The employer and plaintiff in *Loewe v. Lawlor*, Dietrich Edward Loewe, formed with another proprietary capitalist and hat maker, Charles H. Merritt, the American Anti-Boycott Association to “resist boycotts by lawsuits and other legal measures—in effect, a pro-employer legal defense fund.” *Id.* at 190 (internal citations omitted).

²⁰ Daniel R. Ernst, *supra* note 18 at 182-184 (Johns Hopkins 1992)

²¹ *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, Case No. A 268/04 (Dec. 12, 2009).

²² 29 U.S.C. §§ 151-169.

²³ Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 NORTH CAROLINA LAW REVIEW (2012).

workers and unions. Even when the U.S. Congress passed laws protecting workers' concerted activities and restricted injunctions and court-imposed damages on such actions, courts continued to impose injunctions and punitive damages on workers by interpreting such statutory protections very narrowly. It took not only assertive legislation but also executive action from the President to curb the punitive, interventionist role of courts in labor markets and promote a more liberal industrial labor relations system in the U.S.

Finally, to the extent U.S. history in any ways foreshadows EU policy regarding the relationship between markets and labor—to the extent it may echo Polanyi's pendulum's shifts between deregulation and regulation—the EU requires assertive political leadership to stop the real possibility that coercive, anti-labor, court-imposed sanctions may grow from the seeds of the *Laval* quartet. The *Laval* quartet discussions come at the heels of larger discussions of democratizing the EU,²⁴ determining its “social model”²⁵ and expanding EU to all society, not just the thin social layer that currently identifies with the project.²⁶ Reining in the effects of *Laval* is thus part of a larger debate in favor of a more democratic and “social” EU construction.

II. FREE MARKETS THROUGH STATE COERCION: *LAVAL*

It is clear from the case-law of the Court that ... freedom to provide services is one of the fundamental principles of the Community In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.... However, collective action such as that at issue in the main proceedings cannot be justified in the light of the public interest objective....²⁷

²⁴ PHILIPPE C. SCHMITTER, *HOW TO DEMOCRATIZE THE EUROPEAN UNION AND WHY BOTHER?* (Rowman and Littlefield 2000)

²⁵ JONAS PONTUSSON, *INEQUALITY AND PROSPERITY: SOCIAL EUROPE VS. LIBERAL AMERICA* (Cornell 2005).

²⁶ NEIL FLIGSTEIN, *EURO-CLASH: THE EU, EUROPEAN IDENTITY AND FUTURE OF EUROPE* (Oxford 2008).

²⁷ *Laval un Partneri*, Case C-341/05, ¶¶ 103, 110 (Dec.17, 2007).

The Labor Court finds that the stance of the European Court of Justice in these issues entails in this case that there is a violation of [EU] law that is sufficiently clear. The requisites for damage liability exist therewith.²⁸

In the *Laval* case, the Swedish Labor Court ordered several Swedish labor unions to pay punitive damages and attorneys' fees to Laval, a Latvian construction company that had posted workers in Sweden, after the unions struck to induce Laval to join an existing collective bargaining agreement that bound all Swedish construction workers.²⁹ Laval did not employ any of the Swedish union members.³⁰ Laval and its employees were already bound by a collective bargaining agreement governed by Latvian law,³¹ but the Swedish unions wanted Laval to enter into a collective bargaining agreement with them and pay Swedish-level wages.³² The collective actions by the unions included a blockade of the employer's worksite that precluded delivery of goods, placing pickets and prohibiting Latvian workers from entering the worksite.³³ Electricians and then other labor unions held sympathy strikes, boycotts and blockades.³⁴ These actions made work at the construction site impossible and eventually bankrupted Laval.³⁵

Laval then filed suit against the Swedish Building Workers' Union (Byggnads), its Local Branch No. 1, and the Swedish Electrician's Union. Laval petitioned the Swedish Labor Court to request a preliminary ruling from the European Court of Justice ("EU Court") before deciding the case. The Swedish Labor Court then requested a preliminary ruling from the EU Court on the legality of the industrial actions taken by the Swedish unions against Laval. The EU Court

²⁸ *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, Case No. A 268/04 * 23 (Dec. 12, 2009) (An unofficial translation by Jur. Dr Laura Carlson, on file with author).

²⁹ *Id.* (Dec. 12, 2009).

³⁰ *Laval un Partneri*, supra note 26 at ¶ 28.

³¹ *Id.*

³² *Id.* at ¶ 30.

³³ *Id.* at ¶ 34.

³⁴ *Id.* at ¶ 37-38.

³⁵ *Id.* at ¶ 38.

determined that the Swedish labor unions' strike against Laval was illegal as an unlawful restriction on the freedom to provide services.³⁶

After the EU Court issued its preliminary ruling that the strike was unlawful in *Laval*, the Swedish Labor Court ordered the labor unions to pay exemplary damages and Laval's attorneys' fees.³⁷ Although the Swedish Labor Court had determined that Article 49 of the Treaty of the European Union ("EU Treaty"), which protects the free movement of services, had horizontal direct effect between the parties (it bound private parties between each other), the question remained as to whether the Swedish unions' violation of Article 49 of the EU Treaty was susceptible to a damage remedy. Laval asserted two grounds for its damage claims: (1) the labor unions' violation of the EU Treaty regulations as to freedom of movement; and (2) the industrial actions were taken to displace a collective agreement under which the company was already bound. The Swedish Labor Court found that the unions could be held liable for damages under both theories.³⁸

The Swedish Labor Court then addressed whether the labor unions were liable to pay damages to Laval. Although the Swedish Labor Court found that Laval had clearly suffered economic harm, it had failed to prove any damages. Therefore, the Swedish Labor Court denied Laval's claim for economic damages.³⁹

However, the Swedish Labor Court ordered the Swedish unions to pay exemplary damages, or what we may define in the U.S. as punitive damages. The Swedish Labor Court first held that, contrary to the unions' view, liability for punitive damages in cases of violations of EU

³⁶ Id at ¶1-2; *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet and Others*, Case No. A 268/04 * 3.

³⁷ *Id.* at *44.

³⁸ *Id.* at *23, 31-32.

³⁹ *Id.* at *35.

law is not dependent on a finding of intent or negligence.⁴⁰ The Swedish Labor Court noted that exemplary damages were not unknown in Swedish labor law, and indeed were “somewhat typical. . .and can be awarded in situations where industrial actions in the form, for example, of a blockade, have been taken in conflict with the regulations of [Swedish law].”⁴¹ In addition, the court stated that it had to consider the “principle of effectiveness,” which requires that EU law be given functional effect in all the member states.⁴² This meant that “the requisites that are in place for the right to damages may not be less favorable than those concerning similar national claims for damages, nor be formulated so that it in practice becomes impossibly or unreasonably difficult to receive damages.”⁴³

With regard to the requirements of Swedish labor law, the Swedish Labor Court held that reductions of exemplary damages—as the union requested here—were not applicable to “conscious and/or flagrant cases.”⁴⁴ Although the industrial actions were not illegal under Swedish law, they clearly violated EU law. Even though the industrial actions had taken place prior to any judicial decisions stating the illegality of their actions, the Swedish Labor Court emphasized that the EU Court’s ruling had retroactive effect. It also declared that “[e]ven if the

⁴⁰ *Id.* at *36. Certainly, a determination that punitive damages do not require a showing of intent or negligence strikes an American lawyer as odd. For example, the American *Black’s Law Dictionary* states that punitive damages require the liable party to have acted with “recklessness, malice or deceit.” Therefore, the lower threshold for liability should give us a moment to pause regarding the symmetry between punitive damages in the United States and exemplary damages in Sweden. Perhaps they are not exact functional equivalents. However, the same dictionary states that punitive damages are also termed “exemplary damages; vindictive damages; smart money.” BRIAN GARNER, *BLACK’S LAW DICTIONARY* 164 (New Pocket Edition 1996). Understanding the exact functional role and equivalence of punitive or exemplary damages in Sweden in the U.S. is therefore warranted, but is beyond the bounds of this article. It should be explored in a future work.

⁴¹ *Id.* at *28.

⁴² *Id.* at *38.

⁴³ *Id.*

⁴⁴ *Id.*

state of the law was not established, there was reason according to the view of the Labor Court for the Labor Unions to consider whether the industrial actions notwithstanding were consistent with E.U. law.”⁴⁵ The unions should have made those determinations before engaging in industrial action especially because the Swedish Labor Court had consistently held that “high demands must be placed on the labor market organizations when it comes [to] investigating, with exactitude and care, whether a planned industrial action is not prevented by an eventual arising duty to maintain the industrial peace.”⁴⁶ In this case, the Swedish Labor Court found that this view equally applied to potential impediments to industrial action arising from EU law.⁴⁷ Thus, the Swedish Labor Court ordered Byggnads and the Local Branch to each pay SEK 200,000 in punitive damages,⁴⁸ or approximately US \$29,750,⁴⁹ and the electrician union to pay SEK 150,000 in punitive damages,⁵⁰ or approximately US \$22,310.⁵¹ The Swedish Labor Court also awarded Laval SEK 2,000,000 in attorneys’ fees,⁵² or approximately US \$280,000 plus interest.⁵³

Certainly, the amounts issued as exemplary damages were not tremendous, particularly for a strong national union such as Byggnads, which claims a membership of 100,000.⁵⁴ However, what worries us is the manner in which the Swedish Labor Court established a precedent for exerting its coercive authority over workers to protect and prioritize the free

⁴⁵ *Id.* at * 39.

⁴⁶ *Id.* at * 39.

⁴⁷ *Id.*

⁴⁸ *Id.* at *44.

⁴⁹ Conversion done in March 27, 2012 using <http://www.oanda.com/currency/converter>.

⁵⁰ *Id.* at * 44.

⁵¹ *Id.*

⁵² *Id.*

⁵³ Conversion done in March 27, 2012 using <http://www.oanda.com/currency/converter>.

⁵⁴ Svenska Byggnadsarbetareförbundet, available at <http://www.byggnads.se/Om-Byggnads/Om-oss> (last visited on May 4, 2012).

movement of services in the EU *when the unions were uncertain of the illegality of the act under EU law*; their actions were certainly legal and traditionally undertaken under Swedish law.

Polanyi's pendulum swung toward the use of regulatory powers against workers and in favor of the so-called market. Perhaps the exemplary damages were modest this time, but what could happen next, if not in union-strong Sweden, elsewhere in the EU?

III. THE AMERICAN "LIBERAL" MODEL

The NLRA defines what elsewhere may be termed "collective action" as "concerted activity," or activity performed by more than one statutorily defined employee.⁵⁵ An employee acting alone can also engage in "concerted activity" when he or she performs such activity with the intent of getting more employees involved,⁵⁶ when others encourage the activity, or the activity refers to rights contained in a collective bargaining agreement.⁵⁷ Employees need not be represented by a labor organization to perform protected, concerted actions.⁵⁸

The NLRA generally protects employees' concerted actions, which means that the employer cannot discipline or terminate the employees, or otherwise take adverse action against the employees, to the extent that such concerted actions are for "mutual aid and protection."⁵⁹ However, the National Labor Relations Board ("NLRB"), the federal agency charged with administering the NLRA, considers some concerted actions performed in ways that are disproportionately injurious to the employer as unprotected, either because the goals are

⁵⁵ *Phillips Petroleum*, 339 NLRB 916 (2003).

⁵⁶ *Martin Marietta Corp.*, 293 NLRB 719 (1989).

⁵⁷ *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

⁵⁸ NLRA § 7. *Accord NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

⁵⁹ *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

“reprehensible” or the means are “indefensible.”⁶⁰ When concerted action is not protected employers may terminate or otherwise discipline the employees.⁶¹

Strikes in the U.S. are not protected constitutionally, as they are in many other countries. Moreover, as the U.S. has not ratified International Labor Organization (“ILO”) Conventions 87⁶² and 98,⁶³ U.S. strikes are not shielded by those international instruments. However, strikes are generally protected by Section 7 and particularly by Section 13 of the NLRA. The 1947 Taft-Hartley amendments⁶⁴ to the NLRA define a strike as “any strike or other concerted stoppage of work by employees (including stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted interruption of operations by employees.”⁶⁵ Employees who strike retain their status as “employee.”⁶⁶ However, employers in the United States have the unique right to “permanently replace” striking workers during an economic strike.⁶⁷ In the United States we have two basic kinds of strikes: “unfair labor practice strikes”, or strikes undertaken by employees in protest of employer actions that the NLRB determined were in violation of the NLRA.⁶⁸ Economic strikes are all other strikes, such as those, “in support of bargaining demands

⁶⁰ ROBERT A. GORMAN AND MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 406 (2d ed. 2004).

⁶¹ *Id.* at 408.

⁶² ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organize (1948).

⁶³ ILO Convention No. 98 on the Right to Organize and Collective Bargaining (1949).

⁶⁴ The 1947 Taft-Hartley Act, which amended the NLRA, is codified as the Labor Management Relations Act (“LMRA”) 29 U.S.C. §§ 141 et seq.

⁶⁵ LMRA § 501(2), 29 U.S.C § 142(2).

⁶⁶ NLRA § 2(3) and § 13. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969).

⁶⁷ *NLRB v. Mackay Radio & Telegraph*, 304 U.S. 333 (1938).

⁶⁸ GORMAN AND FINKIN, *supra* note 60 at 456.

regarding wages and working conditions or requests that the employer recognize the union.”⁶⁹

The employer may temporarily but not permanently replace employees engaged in an unfair labor practice strike.⁷⁰

The practice of permanently replacing striking employees can be destructive of unions,⁷¹ hence why it has been denounced by prominent international human rights organizations, including Human Rights Watch, as a violation of internationally recognized rights of freedom of association.⁷² The ILO’s Committee on Freedom of Association, in its report regarding the U.S. law and practice of permanently replacing economic strikers, stated that permanently replacing strikers might be a violation of internationally recognized fundamental rights of freedom of association.⁷³ Nevertheless, permanent strike replacements continue to be the law of the land in the U.S.

Moreover, primary strikes—or strikes against an employer with whom the union has a dispute regarding its members’ terms and conditions of employment—are protected by the NLRA. However, secondary activity is illegal. Secondary activity, “may be defined as the application of economic pressure upon a person upon with whom the union has no dispute regarding its own terms of employment in order to induce that person to cease doing business

⁶⁹ *Id.*. Establishing whether a strike is an unfair labour practice is no easy task, it requires “drawing nice factual inferences from an ambiguous record.” *Id.* For a fuller description of the unfair labour practice and economic strikes see *Id.* at § 17.4.

⁷⁰ *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956).

⁷¹ KENNETH DAU SCHMIDT ET. AL., *LABOR LAW IN THE CONTEMPORARY WORKPLACE: CASES AND MATERIALS* 614 (West 2009).

⁷² LANCE COMPA, *UNFAIR ADVANTAGE: WORKERS FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* (Human Rights Watch and ILR/Cornell University Press 2000).

⁷³ International Labour Organization, Committee on Freedom of Association, *Complaint Against the Government of the United States presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, ¶ 92, Report No. 278, Case No. 1543 (1991).

with another employer with whom the union does have such a dispute.”⁷⁴ Specifically, section 8(b)(4) of the NLRA proscribes secondary activity and strikes pertaining to jurisdictional or work assignment issues (relating to representation conflicts between unions). In addition, section 8(b)(7) regulates and restricts strikes aimed at compelling the employer to recognize a union, where the employer has lawfully recognized another union and a question concerning representation cannot be raised, a valid election has taken place within the preceding year, or the union has begun picketing for more than thirty days without filing an election petition.⁷⁵

Other important regulations regarding economic strikes include that the union must provide the employer with sixty-day notice before striking.⁷⁶ In the healthcare industry, the “cooling-off period” requiring notice is extended to ninety days.⁷⁷ However, unfair labor practice strikes do not require a notice period.⁷⁸ Finally, strikes deemed to involve a “national emergency,” by imperiling national health and safety,⁷⁹ may be enjoined for eighty days.⁸⁰ During that period the appropriate government players will fact-find and mediate the conflict in an attempt to avert the strike.⁸¹

Remedies available to employers who are subject to 8(b)(4) and 8(b)(7) actions include injunctions and damages. The NLRA requires the NLRB regional director handling the case to

⁷⁴ GORMAN AND FINKIN, *supra* note 60 at 313.

⁷⁵ NLRA § 8(b)(7).

⁷⁶ NLRA § 8(d).

⁷⁷ NLRA § 8(g).

⁷⁸ THE DEVELOPING LABOR LAW VOL. II 1588 (John E. Higgins, Jr., ed., 5th ed. 2006) (hereinafter “Developing Labor Law”) citing *Park Inn Home for Adults*, 293 NLRB 1082 (1989). It is important to note that under federal labour laws covering federal employees, strikes are restricted or entirely prohibited. For example, federal government employees are forbidden to strike and violation of this prohibition amounts to a penal action. *See* 5 U.S.C § 7311; 5 U.S.C § 3333; DEVELOPING LABOR LAW, *supra* n. 23, at 1589. Strikes also cannot be used to commit the crime of extortion. *See* 18 U.S.C § 1951; DEVELOPING LABOR LAW at 1589.

⁷⁹ NLRA § 208 *et seq.*

⁸⁰ GORMAN AND FINKIN, *supra* note 60 at 496.

⁸¹ LMRA §§ 201-210. *See also* DEVELOPING LABOR LAW, *supra*, at 1590, n. 92.

file a complaint in federal court requesting a so-called 10(l) injunction when the regional director has “reasonable cause” to believe that the union has committed violations pertaining to 8(b)(4) and 8(b)(7) of the Act.⁸² Violations of the labor law that fall outside the bounds of sections 8(b)(4) and 8(b)(7) may also be enjoined through section 10(j) of the Act.⁸³ One difference between 10(l) and 10(j) injunctions is that for 10(j) injunctions the regional director must, prior to requesting the injunction, determine that an unfair labor occurred. Mere “reasonable cause” that an unfair labor practice occurred will not suffice to request a court to order a 10(j) injunction. Second, whereas the NLRB regional director *must* request 10(l) injunctions in appropriate circumstances, the regional director has discretion whether to request 10(j) injunctions. Finally, even though courts may grant 10(l) and 10(j) injunctions as they deem “just and proper,” courts are generally more hesitant to provide 10(j) injunctive relief than 10(l) relief.⁸⁴

Under Section 303 of the Labor Management Relations Act, compensatory damages may also be available to employers harmed as a result of secondary activity.⁸⁵ Moreover, the Sherman Antitrust Act, the federal antitrust and anti-monopoly statute, provides for treble (punitive) damages against unions under very narrowly defined situations when unions and employers or third-party businesses purposefully and illegally “combine” to restrain trade.⁸⁶ But again, punitive damages are unavailable under federal *labor* law. They are deemed as inimical to the very functioning of a labor union. As the Supreme Court of the United States held in 1979:

Just as unlimited access to the grievance process could undermine collective bargaining, so too the threat of punitive damages could disrupt the responsible decision making essential to peaceful labor relations. In order to protect against a future punitive award of

⁸² GORMAN AND FINKIN, *supra* note 60 at 384-385.

⁸³ GORMAN AND FINKIN, *supra* note 60 at 386.

⁸⁴ *Id.* at 386.

⁸⁵ LMRA § 303; DEVELOPING LABOR LAW, *supra*, at 2796.

⁸⁶ 15 U.S.C. §§ 1-10.

unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements. Indeed, even those unions confident that most juries would hold in their favor could be deterred by the possibility of punitive damages from taking actions clearly in the interest of union members. Absent clear congressional guidance, we decline to inject such an element of uncertainty into union decisions regarding their representative functions.⁸⁷

For the U.S. Supreme Court, punitive damages may deter a labor union from performing its fiduciary duties to represent workers. The labor laws proscribe them.

IV. THE DIFFICULT PATH TO “LIBERAL” LABOR LAW IN THE U.S.

The combination charged falls within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes.... [The workers] proceeded to carry out their combination to restrain and destroy interstate trade and commerce between plaintiffs and their customers in other states by employing the identical means contrived for that purpose; and that, by reason of those acts, plaintiffs [the employers] were damaged in their business and property in some \$80,000.⁸⁸

The Supreme Court particularly points out that although Congress was frequently importuned to exempt farmers' organizations and labor unions from its provisions, these efforts all failed and the [Sherman] Act still remains, after nearly a quarter of a century of trial, unmarred by amendment, in the language originally adopted. In short, the court held that if the plaintiffs proved the conspiracy or combination as alleged in the complaint, they were within the Anti-Trust Act and entitled to the damages sustained by them.⁸⁹

It is important to emphasize that the American liberal model of industrial relations emerged only after a slow and painful history. The response of U.S. courts to workers' collective actions that disrupted employers' business operations (and thus the flow of goods in commerce) was initially based on common law theories of criminal and civil conspiracy.⁹⁰ Actions such as strikes, boycotts, and picketing were treated as unlawful conspiracies that restrained trade and

⁸⁷ *International Brotherhood Of Electrical Workers v. Leroy Foust*, 442 U.S. 42, 51-52 (1979).

⁸⁸ *Loewe v. Lawlor*, 208 US 274, 294-295, 308 (1908)

⁸⁹ *Lawlor v. Loewe*, 209 F. 721 (Second Circuit 1913), *affirmed by Lawlor v. Loewe* 235 U.S. 522 (1915).

⁹⁰ GORMAN AND FINKIN, *supra* note 60 at ch. 1, 2-3 .

inflicted irreparable harm on the employer.⁹¹ Antitrust law was also used against unions, serving as a basis to request injunctive relief and damages, as will be detailed below.

A. Clamping Down on Collective Action Through Anti-Monopoly Law

Karl Marx once said that history tends to repeat itself first as tragedy, then as farce, but the essential elements of the plot tend to persist. In Europe, current attempts to curb workers' concerted action are diffusing through judicial interpretations of EU law that give primacy to the freedom of movement of services and establishment in the EU. Common law theories of civil and criminal and civil conspiracy were readily argued by employers and in many cases accepted by courts to sanction union actions in the United States. However, in late 19th to early 20th century U.S., state-sanctioned attempts to curb workers' concerted action came through judicial extension of federal antitrust statutes against unions, in favor of saving the market from "illegal combinations," whether of corporations or workers.

In 1890, the U.S. Congress passed the Sherman Antitrust Act.⁹² The Sherman Act makes illegal "[e]very contract, combination...or conspiracy...in restraint of trade."⁹³ Penalties for violation of the Sherman Act include injunction, criminal prosecution, and treble damage awards. Although Congress had in mind the regulation of business corporations that combined to control market supply and prices when it passed the Sherman Act, the Act was more often applied to labor unions.⁹⁴

B. The "Danbury Hatters"

⁹¹ *Id.* at Chapter 2.

⁹² 15 U.S.C. §§ 1-10.

⁹³ 15 U.S.C. §1

⁹⁴ GORMAN AND FINKIN, *supra* n. 60, at 4.

Arguably the most famous case applying the Sherman Act to unions was *Loewe v. Lawlor*, also called the “Danbury Hatters” case.⁹⁵ The employer-plaintiff owned a hat factory in the state of Connecticut that derived the bulk of its profits through the sale of hats in interstate commerce (or trade between the American states). The defendant union and its members were the United Hatters of North America, which was part of the American Federation of Labor, and promulgated a union hat label. After an extended organizing campaign by the United Hatters, the employer’s factory was one of a few remaining non-union plants. The United Hatters then engaged in a strike and secondary boycott to pressure the employers to recognize the union. The complaint alleged that the union members intentionally and maliciously conspired to restrain the employers’ trade in hats by intimidation and threats made to employers, their wholesalers, and retail customers. The complaint further alleged that the union instituted a boycott against wholesalers and retailers who sold the employers’ hats, and even against retailers who purchased hats not made by those employers. The boycott was achieved through direct pressure, distributing leaflets, and publicity in local newspapers and the union’s periodical. The employer-plaintiff alleged US \$80,000 in damages⁹⁶, or over US \$2 million in 2012 currency.⁹⁷

On these facts, the U.S. Supreme Court held that the union actions violated the Sherman Act and remanded the case for a determination on damages. The Court held that the union violated the Act by unlawfully combining to restrain trade by “compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the [union]

⁹⁵ 208 U.S. 274 (1908).

⁹⁶ 208 U.S. 274, 283-285.

⁹⁷ Conversion performed using formula from the U.S. Federal Reserve Bank of Minneapolis, formula available at http://www.minneapolisfed.org/community_education/teacher/calc/hist1800.cfm (last visited on May 3, 2012).

impose[d].”⁹⁸ Although the union’s true purpose in the boycott was not to obstruct interstate commerce but to compel the employers to recognize the union, the “combination was nonetheless deemed illegal under the Act because it had the effect of restraining trade. The Court also noted that its prior case law and failed attempts to exempt “farmers and laborers” from the Act’s prohibitions confirmed that the Act applied to labor organizations.”⁹⁹

When the remanded case¹⁰⁰ again reached the U.S. Supreme Court, the Court affirmed a treble-damage award of US \$240,000 against the union, or about US \$5.5 million in 2012 currency.¹⁰¹ Because 250 defendant union members could have lost their homes and bank accounts, which were the plaintiff-employer attached in order to collect the damage award,¹⁰² the American Federation of Labor prevailed on workers across the U.S. to donate one hour’s pay on January 27, 1916.¹⁰³ The donations, along with contributions from the United Hatters, paid the damages.¹⁰⁴

What was perhaps most paradoxical of the employer’s lawsuit in this case was that the employer based his lawsuit on what legal historian Daniel Ernst calls “proprietary capitalism” and “Victorian” culture, which extolled values of “independence, diligence, thrift and calculation needed to thrive in a competitive market.”¹⁰⁵ Yet, Loewe, the owner of the firm, permitted practically un-blameworthy workers (who were nominal union members but who did not participate in any way in the public life of the hatters union) to have their bank accounts and

⁹⁸ *Id.* at 294.

⁹⁹ 208 U.S. 274, 301.

¹⁰⁰ *Lawlor v. Loewe*, 235 U.S. 522, 537 (1915).

¹⁰¹ Conversion made using the consumer price calculator of the U.S. Federal Reserve Bank of Minneapolis, available at <http://www.minneapolisfed.org> (last visited on May 3, 2012).

¹⁰² Daniel R. Ernst *supra* note 18 at 181.

¹⁰³ ARCHIBALD COX, DEREK CURTIS BOK, ROBERT A. GORMAN, & MATTHEW W. FINKIN, *LABOR LAW CASES AND MATERIALS* 34 (14th ed. 2006).

¹⁰⁴ *Id.*

¹⁰⁵ Daniel R. Ernst, *supra* note 18 at 183.

property attached by his lawyer.¹⁰⁶ The law of agency, which imposed legal liability regardless of an individual's actual role in a conspiracy, became the convenient statist tool to impose liability and coercive pressure on workers.¹⁰⁷

One of these workers whose property was attached, an Irish immigrant by the name of William Humphries, while formally a union member,

[D]idn't know the national officers ... either by sight or name." He rarely read the *United Hatters' Journal*. "I couldn't see very good," Humphries explained, "and hadn't time to do it." As an honorary member of his local union since his fiftieth birthday, Humphries was excused from appearing at its meeting and almost never attended them."¹⁰⁸

Humphries further testified that, "I never was party to a conspiracy to interfere with Mr. Loewe or anybody else."¹⁰⁹ In fact, Humphries personally knew Loewe and both men sat in the board of directors of the local Danbury Hospital.¹¹⁰ During the trial, Humphries asked Loewe, personally, why he had attached his home. Loewe replied, dismayed, that, "If I had the doing of it, I wouldn't have attached your property."¹¹¹ The boss was sorry. But, in fact, he had no choice. If he wanted to oppose the powerful union he needed strong tools from the state and legal fictions to create blameworthy collectives. In a Polanyian manner, the *laissez-faire* capitalist had to resort to collective strategies.¹¹² As Ernst suggests, Loewe's response to Humphries, then, reveals his genuine confusion at finding himself locked in mortal struggle with a man who had been no less faithful to the tenets of economic morality than Loewe had himself."¹¹³

C. Towards a More Liberal Labor Law

¹⁰⁶ *Id.* at 181.

¹⁰⁷ *Id.* at 180-183.

¹⁰⁸ *Id.* at 181. Internal citations omitted.

¹⁰⁹ *Id.* at 181.

¹¹⁰ *Id.* at 182.

¹¹¹ *Id.* at 182.

¹¹² Ernst also argues that unionism would have likely threatened his personal control over his firm, as unionism and corporate manufacturers had sided against propriety capitalists such as Loewe. *Id.* at 183.

¹¹³ *Id.* at 183.

The “Danbury Hatters” led to national discussions regarding the need for legislative changes that could protect workers from treble antitrust damages and other excessive punishments, culminating in the passage of the Clayton Act of 1914. The Clayton Act explicitly states that antitrust laws are not applicable to labor organizations,¹¹⁴ and no injunctive relief shall issue against persons involved in a labor dispute.¹¹⁵ The labor movement hailed the Clayton Act as its “Magna Carta.”¹¹⁶ But victory was declared too early. In 1921, in *Duplex Printing Press Co. v. Deering*,¹¹⁷ an obstinate U.S. Supreme Court determined, that the Clayton Act did not shelter unions from liability for secondary boycotts, rendering the Act a nullity in light of the “Danbury Hatters” case and the debates it generated.¹¹⁸

The courts were resilient to change, continuing a pattern of “government by injunction” decried by Felix Frankfurter (who later became a justice of the U.S. Supreme Court) and Nathan Greene in their seminal work, the *Labor Injunction*.¹¹⁹ It was only after Congressional passage of the Norris-La Guardia Act in 1932 and strong executive action during the New Deal that courts began to diminish their use of coercion against workers engaged in concerted actions. In 1935, the U.S. Congress passed the NLRA, which formulated comprehensive national labor policy for the first time in U.S. history. President Franklin D. Roosevelt challenged the U.S. Supreme Court with court packing in 1937 if the Court declared the Act unconstitutional.¹²⁰ In *NLRB v. Jones &*

¹¹⁴ 15 U.S.C. § 17.

¹¹⁵ 29 U.S.C. § 52.

¹¹⁶ KENNETH DAU SCHMIDT et al. *supra* note 71 at 37.

¹¹⁷ 254 U.S. 443 (1921).

¹¹⁸ KENNETH DAU SCHMIDT et al. *supra* note 71 at 38.

¹¹⁹ FELIX FRANKFURTER AND NATHAN GREENE, *THE LABOR INJUNCTION* (Peter Smith [1930] 1963).

¹²⁰ Court-packing refers to the threat that the President of the United States made to the Supreme Court that if the Court struck down as unconstitutional further New Deal legislation, including the NLRA, he would “pack” the courts with younger and hence more politically progressive judges who would legitimate his New Deal.

Laughlin Steel Corp.,¹²¹ the Court held that the NLRA was constitutional and did not violate rights of freedom to contract.

The ideological shift in the U.S. Supreme Court triggered “the change in time that saved the nine” and started a new era for labor relations in the U.S.¹²² Labor jurisprudence took a completely different turn. In 1940, the Court held in *Apex Hosiery Co. v. Leader*¹²³ that treble damages were not applicable against unions engaging in strikes that affected the shipping of goods across state lines.¹²⁴ In 1941, the Court went even further when it decided in *U.S. v. Hutcheson*¹²⁵ that the Clayton Act and the Norris-LaGuardia Act sheltered peaceful union activity from injunctions, criminal prosecutions and treble, punitive damages under the antitrust laws. The Court even acknowledged that the Clayton Act was a “disavowal by Congress of its *Duplex Printing* decision”¹²⁶ and, therefore, overruled *Duplex Printing*. Unions and employees may still be liable under antitrust law when unions, “act as a conduit of price fixing conspiracy among employers,” and when “employees and non-employees combine together to engage in certain secondary activities.”¹²⁷ However, for the most part, a new era of freer industrial labor relations ensued on the American landscape. National labor policy protecting workers and reducing coercive, state action against workers came to the fore.

¹²¹ 301 U.S. 1 (1937).

¹²² The first case testing the likely constitutionality of the New Deal was *West Coast v. Parrish*, 300 U.S. 379 (1937), which upheld a Washington State minimum wage law. KENNETH DAU SCHMIDT et al. *supra* note 71 at 63. The same five justices who upheld the constitutionality of the Washington law also held in favor of the Wagner Act that same year. *Id.*

¹²³ 310 U.S. 469 (1940).

¹²⁴ KENNETH DAU SCHMIDT et al. *supra* note 71 at 64.

¹²⁵ 312 U.S. 219 (1941).

¹²⁶ KENNETH DAU SCHMIDT et al. *supra* note 71 at 64.

¹²⁷ *Id.* at 64.

However, it should be noted that the 1947 Taft-Hartley Act, which amended the NLRA, was unfavorable to labor in that it significantly relaxed the Norris-LaGuardia Act's¹²⁸ limitations on the availability of injunctions in labor disputes. Furthermore, it amended the NLRA to, *inter alia*, prohibit secondary boycotts; exclude supervisory employees from the law's coverage; grant employers free speech rights; and deny bargaining rights to unions with officers who were Communist Party members.¹²⁹ Although some scholars have argued that several of the Taft-Hartley amendments, such as that which made union coercion of employees an unfair labor practice, were necessary to "equalize" the law, as a whole Taft-Hartley signaled a shift to the right in U.S. labor policy.¹³⁰ Yet, even these restrictive amendments to the NLRA did not reverse the ideological move away from imposing treble antitrust damages on union activity.

V. DISCUSSION AND CONCLUSION: SHIFTING THE PENDULUM BACK

The [EU] desperately needs to reconnect with its history. [Perry] Anderson [in his book, *The New Old World*] shows it to us from the West, as an eastern suburb of America and institutional laboratory of ultra-liberalism.¹³¹

The above citation from the French labor law scholar and public intellectual, Alain Supiot, commenting on Perry Anderson's book on the polemics of Europe¹³²—although perhaps extreme in its manifestation of the EU as an American "suburb" experimenting with "ultra-liberalism"—is an important EU voice in the discussions regarding the EU's difficulties to cement a social model that contrasts starkly with the now exhausted Washington Consensus. Certainly, the most important and immediately relevant lessons for the EU should come from the

¹²⁸ 29 U.S.C. §§ 101 et seq.

¹²⁹ Labor Management Relations Act, 29 U.S.C. §§ 141 et seq. The provision of the Taft-Hartley Act denying bargaining rights to unions with Communist officers has since been repealed.

¹³⁰ HARRY A. MILLIS & EMILY CLARK BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 664-665 (1950).

¹³¹ Alain Supiot, *Under Eastern Eyes*, 73 NEW LEFT REVIEW 29, 36 (2012).

¹³² PERRY ANDERSON, NEW OLD EUROPE (Verso 2009).

EU itself, since those experiences are, simply, much more meaningful—in the sense of being understandable—for Europeans.

However, there are lessons that can be drawn from the American experience, especially after both the American and EU experiences can be made meaningful through a Polanyian lens of regulation in market economies. Our argument here is not so much that the *Laval* quartet decisions and the Swedish Labor Court imposition of punitive damages are experiments in American “ultra-liberalism,” or even that the EU cases share the same anti-worker intensity of the “Danbury Hatters.” Rather, we argue that in the EU the pendulum shifted towards markets, as it did in the U.S. in the “Danbury Hatters” case, and momentum for a more extreme market shift may well be in motion in the EU today. How do we shift it back towards workers?

As we have argued here, the *Laval*-quartet, the Swedish Labor Court’s imposition of punitive damages in *Laval* and the American “Danbury Hatters” case reveal a parallel tension between collective labor rights and markets. In the “Danbury Hatters” and subsequent American cases, the tension was between workers’ right to engage in industrial actions to better their working conditions and alleged monopolistic practices, i.e., unlawfully combining in restraint of trade. Because unions realized that employers could easily defeat unionization by closing and reopening their plants union free, unions sought to increase pressure on employers by threatening their goods at various points in the supply chain and by instituting boycotts and sympathy strikes of other businesses that had some connection to the primary employer. However, by so doing, unions were subject to injunctions and treble punitive damage liability under the Sherman Act for unlawfully combining in restraint of trade.

It took a Congressional declaration of a national labor policy in both the Norris-LaGuardia Act and the NLRA and the President’s threat to pack the courts to reverse this trend.

Under current U.S. law, employers may permanently replace striking employees engaged in an economic strike and may terminate them if the strike is illegal and no other employer violations are found. Employers may sue unions to obtain damages for violations of collective bargaining agreements.¹³³ Secondary boycotts remain unlawful. They are susceptible to compensatory damage claims under section 303 of the LMRA and to injunctions under Section 10(l) of the NLRA. However, employers can no longer request punitive damages from the courts. Only in very narrow situations where unions and employers or third parties unlawfully conspire or combine to restrain trade are treble punitive damages available to employers or, for that matter, to anyone affected by an illegal combination in restraint of trade.

Across the Atlantic, in the EU, the *Laval*-quartet and the Swedish Labor Court's imposition of punitive damages showed a tension between the freedom to provide services and the rights of workers in the host member state to maintain—and impose on the foreign service provider—the wage levels and working conditions embodied in their collective bargaining agreements. Since the *Laval* decision, one scholar has argued that “[u]nions must face the dilemma of adjusting action taken to protect their members to the economic freedoms of the EU, whenever there is a situation of potential social dumping.”¹³⁴ In this context, social dumping occurs where posted workers have inferior wages and working conditions than workers in the host country.¹³⁵ In the *Laval*-quartet and the Swedish Labor Court's imposition of punitive

¹³³ In practice, most collective bargaining agreements in the United States contain arbitration provisions where the parties agree to provide a neutral third party authority to decide questions and resolve disputes arising from the collective bargaining agreement. GORMAN AND FINKIN, *supra* note 60 at 733.

¹³⁴ Silvana Sciarra, *Viking and Laval: Collective Labour Rights and Market Freedoms in the Enlarged EU*, in THE CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 2007-2008, Vol. 10 563 (C. Barnard, ed., Hart Publishing 2008).

¹³⁵ *Id.*

damages, courts privileged the freedom to provide services over the fundamental right to strike embodied in Articles 49 and 6(2) of the EU Treaty.

One can reasonably argue that the Swedish Labor Court went too far in awarding punitive damages. After all, the E.U. Court had already determined that the Swedish unions' strike was unlawful. Employers could have sued for provable, compensatory damages. However, the Swedish Labor Court awarded exemplary *qua* punitive damages, making a clear point that the state would protect the EU market against workers. There are some resemblances here between the *Laval* decisions and Loewe's attachment of property of *de facto* non-labile workers to save themselves against the workers' collective actions.

We agree that the EU Court and Swedish Labor Court decisions are nowhere near declaring the unions' activity a combination illegal in itself, as did some U.S. courts under the Sherman Act. Neither were the damage awards issued by the Swedish Labor Court comparable to those affirmed by the U.S. Supreme Court in the "Danbury Hatters" saga. However, the regressive nature of the Swedish Labor Court in holding the unions liable for punitive damages for engaging in collective action reflects a similar desire to protect market liberties and to punish workers' collective actions. A more anti-worker court at some other time and place may lead to a scenario closer to that in the "Danbury Hatters." *This* is the point of concern from an American view.

This article continues the discussion on how to shift the pendulum back to workers. There is no necessary reason why EU history needs to follow U.S. history or for EU reformers to mimic past American strategies. It could well be the case that no national court in an EU member state will ever issue injunctions *a la Americana* or punitive damages akin to those awarded in the "Danbury Hatters" case when other unions violate EU law. Or it may just be the

case that a well-crafted litigation strategy may change the way that the EU Court balances workers' rights with market freedoms. But American history suggests that assertive political leadership may be necessary to rebalance the scales of power between capital and labor when the courts protect "markets" over workers. The risk of reliving something like the "Danbury Hatters" in Sweden or elsewhere in the EU is not unreasonable to fathom. After *four* EU Court decisions and the traditionally worker protective Swedish Labor Court erring on the side of "markets," a coordinated political strategy for workers seems more than justified. Just as in the U.S. injunctions and damages compelled the formulation of national labor policy and labor law, perhaps it is time for a *European* labor policy and labor law. The entire drama befits a Polanyian diagnosis and cure.

VI. EPILOGUE

As this article goes press, the European Commission has proposed a Directive of the European Parliament and of the Council on the Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of The Provision of Services¹³⁶ (hereinafter referred to as the "Proposed Directive."). It has also proposed a Council Regulation on the Exercise of the Right to take Collective Action within the Context of The Freedom of Establishment and the Freedom to Provide Services¹³⁷ (hereinafter referred to as the "Proposed Regulation"). The Proposed Directive and the Proposed Regulation (hereinafter referred to collectively as the

¹³⁶ Proposed Directive of the European Parliament and of the Council on The Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of The Provision of Services, available at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=201461 (last visited May 19, 2012 (last visited on May 20, 2012)).

¹³⁷ Proposal for a Council Regulation on the Exercise of the Right to take Collective Action within the Context of The Freedom of Establishment and the Freedom to Provide Services, available at http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=201461 (last visited May 19, 2012 (last visited on May 20, 2012)).

“Proposals”) have been met by mixed reactions by EU politicians and the social partners; no clear consensus has yet emerged regarding it.¹³⁸

The Proposals in essence codify the basic policy tenets of the *Laval* quartet by giving significant importance to freedom of movement of workers, services and establishment without providing new or clear guidelines on how courts should balance such freedoms with freedom of association rights. The Proposals acknowledge the fundamental but limited nature of freedom of association¹³⁹ in a way that parallels that of the *Laval* quartet. In one of the Explanatory Memoranda of the Proposals state,

[T]rade unions play an important role in this respect and should, as confirmed by the Court of Justice, continue to be able to take action to protect workers’ rights, including the possibility of calling their members out on strike and ordering boycotts or blockades to protect the interests and rights of workers and ensure the protection of jobs or terms and conditions of employment, provided this is done in compliance with European Union and national law and practice.¹⁴⁰

Parroting the *Laval* quartet’s policy reasoning’s and without clear guidelines on how to balance the workers’ rights with the Treaty’s freedoms, the proposed regulation does not qualify as the type of assertive political leadership that we have advocated for in this chapter.

¹³⁸ Sophie Petitjean, Europolitics, Posting of workers: Proposals do not measure up to expectations, Wednesday 21 March 2012, available at <http://www.europolitics.info/social/proposals-do-not-measure-up-to-expectations-art329623-25.html> (last visited in May 20, 2012).

¹³⁹ Proposed Directive, Preamble (1) and (33), Article 1(2). Proposed Regulation Preamble (3), (6), (7) and (13).

¹⁴⁰ Proposed Regulation, Explanatory Memorandum 15-16.

Moreover, the regulation also legitimizes the imposition of nationally established “fines and penalties”,¹⁴¹ which may reasonably include punitive damages, as in *Laval du partnieri*. The Proposals open the door for the punitive damages that the *Laval* quartet enabled. In our view, the Proposals do little to address our concerns established here.¹⁴²

¹⁴¹ Proposed Directive of the European Parliament and of the Council on The Enforcement of Directive 96/71/EC Concerning the Posting of Workers in the Framework of The Provision of Services at Art. 13 (1) and (2).

¹⁴² The proposed regulation deals more specifically with some technical details on how to better deter the more crass violations of the posting of workers directive by including, for example, joint and several liability for principal and agents (subcontractors, or firms providing services) in relationship to the posted employees. *Id.* at Art. 12. It also provides language to preserve alternative dispute resolution methods that may be legitimate in certain Member States. *Id.* at Preamble ¶ 14.