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The Right to Work: Law and Ideology

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PART I: RIGHTS AND WORK

THE RIGHT TO WORK: LAW AND IDEOLOGY

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Many people in the United States feel strongly about human rights. They champion human rights, criticize the violation of human rights abroad, and both support the U.S. Government's complaints about human rights violations in other countries and encourage a stronger policy on human rights than the Reagan administration has adopted. Yet listed in the Universal Declaration of Human Rights is the right to work—a right neither recognized nor respected in the United States, where unemployment is both accepted and expected. How are we to explain this apparent contradiction in attitudes, and what importance does it have for law?

I. THE HUMAN RIGHT TO WORK

The Universal Declaration of Human Rights, Article 23, states:

> 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
> 2. Everyone, without any discrimination, has the right to equal pay for equal work.
> 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
> 4. Everyone has the right to form and to join trade unions for the protection of his interests.[1]

The right, as stated, requires both interpretation and defense. As every human right it applies to all human beings simply by virtue of their being human. The right is appropriately implemented differently both in different societies and for people of different ages and circumstances. Infants as well as all other human beings have the right

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1. I. BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS 25 (2d ed. 1981).

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to work; but being physically and mentally incapable of working, they do not actively exercise the right. Adults in primitive societies exercise the right differently from those in advanced industrial societies.

We can roughly divide the population of the United States into four groups. One group is composed of children too young to work, or at least considered too young to work full time in our society. Either they are incapable of working because they are infants or very young children, or they are required to go to school and so are legally precluded from working full time. After a certain age they may be allowed to work part time. A second group consists of retired workers. They have worked for a certain period of time and have now left the work force. A third group consists of those unable to work—whether because of sickness, injury or other infirmity. The fourth and largest group consists of adults able to work. We shall be primarily concerned with this fourth group in an initial approach to the right to work.[2]

The group of able bodied adults can be further subdivided. The largest subgroup consists of those actually in the work force, either self-employed, employed by government, by someone else or by some firm. The second largest subgroup consists of those who work at home but who are not employed. Here are included housewives and mothers with no outside employment, who do not seek employment. There is clearly a difference between work and employment. A woman who raises a family, and "keeps house" works but is not employed. A person who sculpts, writes, or makes his or her living in some similar way works but is not employed. Children who work at home or for the family may also not be employed, yet still work. The husband and wife of a small farm family work in the fields, care for the animals, and work in the house; the children do chores in the morning and evening, and go to school between times. All the members of the family work. None is employed, but none is unemployed either.

The third largest group are the unemployed. This group can be further subdivided. It includes young adults who want to work but are unable to find their first full-time job, as well as those who work at home but want outside employment. It includes seasonal workers, young or old, who work in certain seasons and are unable to find work

2. This is not to deny that there are serious problems of interpretation of the right to work that concern the other three groups, *e.g.*: at what age do children become adults and deserve full protection of the right to work; does forced retirement violate the right to work; and do the physically and mentally impaired who desire to work have the same right to appropriate work as others?

in other seasons. It includes the hard core unemployed, who do not have work and who have given up looking for a job. It includes the structurally unemployed, *i.e.*, those who had work in a certain industry but who are unable to find that sort of employment, are unable to relocate, and have no other skills to sell. It includes as well the cyclically unemployed, *i.e.*, those who are unemployed because of a cut-back in the number of workers employed by firms due to recessions or depressions; and the frictionally unemployed, *i.e.*, those who are temporarily out of work for a short period while changing jobs.

Employment usually implies both an employer and a wage. Work implies neither of these. Defining work is notoriously difficult.[3] We can, however, determine what the right to work involves without deciding precisely what is and is not work and how we distinguish work from play or from other kinds of human activity.

The right to work as a universal, human right, is a derived right. It can be derived from the right to life, the right to development, and/or the right to respect. In each case the derivation hinges on certain assumptions and background conditions. Thus the right to work can be derived from the right to life to the extent that access to work is necessary to obtain the wherewithal to preserve life. The right to life carries with it the right to engage in those activities, compatible with the exercise of the rights of others, necessary to sustain life. Work is the typical means by which adults maintain themselves and produce the goods they need and want to sustain themselves and those dependent on them; to that extent the right to work is a derivative of the right to life. The right so derived is a negative, not a positive right; and the assumption is that if one is deprived of work, one is deprived of the means of sustaining one's life and the lives of one's dependents. If to prevent people from working is to threaten their lives, then in that society the right to work is easily derived from the right to life.

While the assumption that people in general produce the means of their subsistence is correct, it is not necessarily the case that each adult person able to engage in productive labor must be allowed to do so to prevent him from dying. For society can so arrange what it produces to sustain not only those who work and those dependent on them, but others as well. In the United States, for instance, a variety of welfare programs are justified on the basis of a recognized

3. *See* Burke, *'Work' and 'Play'*, 82 ETHICS 33-47 (1971); and Sparshott, *Work—The Concept: Past, Present, and Future*, 7 J. AESTHETIC EDUC. 22-38 (1973).

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right to life, which can be sustained without recognizing a right to work.

The derivation of the right to work from the right to development, despite a certain plausibility and appropriateness in some societies, is tenuous for a number of reasons. If work or productive activity is a means by which human beings develop themselves physically and mentally, then to the extent that one has a right to such development, and to the extent that work is necessary to such development, one has the right to work. At both critical junctures the link is weak. For even granting the right to development, such a right could be implemented by education, leisure activity, and other non-work related means. Furthermore, it is not clear that work of many kinds does in fact develop one either physically or mentally. A charge frequently heard to the contrary is that much work is stultifying and prevents rather than fosters development.

The derivation that hinges on the right of all human beings to respect provides the most solid basis for the right to work. To be a human being is a matter not only of being of a certain biological type but also of belonging to human society. A full, able-bodied, competent member of society has a role and plays a role in it. Each has a right to do so. No adult is "excess" or "expendable" and the recognition of this fact is part and parcel of what it means for people to have the right to respect. Work is the typical way by which human adults assert their independence and are able to assume their full share of responsibility in a community. Work involves the assumption of one's place in the community, whether it is work in the home, the fields, the factory, or the office. One's self respect as well as the respect of others is closely linked with what one does, how a person expresses himself through his actions, and the extent to which one assumes the full burden of and responsibility for one's life and one's part in the social whole. A person who is not allowed to work, is not allowed to take a rightful place in society as a contributing, mature, responsible adult. The fight to work is in this way closely related to the right to respect and derived from it for every society. It is for this reason that in many societies to deprive a person of a productive role in society is a form of ostracism, tantamount to punishment, and justifiable only for a serious social offense or crime.

The right to work can be interpreted as both a negative and as a positive right. As a negative right, no one, including the government, may legitimately prohibit someone who wishes to work from doing so, within the normal restrictions for negative rights, such as not infringing the similar, equal, or more important rights of others.

As a positive right it requires at least that one's society provide one with the opportunity for full membership including the opportunity for participation in the productive activity of that society.

The relation of respect and the right to work is implied in Article 23 of the Declaration of Human Rights, which insists on the "free choice of employment" to preclude forced labour, slavery, or gross exploitation, and on "just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity."

As with most rights, the right to work rises to consciousness only at a certain historical time. In the idyllic society of an imaginary tropical island where needs are few, food is plentiful, and the population is small in comparison with the land and resources available, the right to work would not arise. It is not explicitly raised although it is implicitly implemented in a traditional society, for in such a society everyone has a place in the social order—whether that society is one of hunting, herding, or agriculture and whether it is organized on tribal, feudal, or other similar lines. Each adult is accepted into the community and participates in the activity of the adults of that community. Nor would one tend to invoke the right in a country where land is plentiful and where there are many alternative ways to keep oneself and one's family flourishing with dignity. The right to work was not an issue when there was always an alternative to the jobs available. Finally, the right to work would tend not to arise in a society that had a chronic shortage of labor. If the demand for labor always exceeded the supply, the notion of the right to work would have little, if any, importance, except in its negative sense.

The issue of the right to work typically arises when the supply of labour exceeds the demand, when large numbers of people have no choice but to work for others, and when the social fabric characteristic of tribes and extended families who share whatever is available breaks down. Historically, the right to work becomes an issue with industrialization, because only a few own the means of production and the typical person earns his living by working for a wage.

In an industrialized society the line between the negative and the positive interpretation of the right to work often blurs. Preventing someone from working in a traditional society involves depriving that person of access to work or to a place in the society. In an industrial society those who depend on employment for wages can be kept from working by being deprived of employment. This can be done actively by intervention or some action such as blackballing, or passively when an employer needs workers. Unemployment might in this latter sense result from the economic structure of society. It

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is not the active result of employers discriminating or out of malice refusing to employ people. No individual employer has the obligation to employ others, and employers, acting individually in their own interests, cannot be blamed if collectively they cannot provide work for all who want it. It is the way the economic system operates that is to blame, not individual employers within it.

In such a situation the right to work is equivalent to the right to employment for those able, willing, and desiring work and unable to engage in productive work if not employed. Properly speaking, the right to employment is not itself a human right but becomes a specification appropriate in industrialized society of the human right to work. The right to employment is properly exercised by the unemployed against the society with such a system, since it is the system that is responsible for preventing them from working. Americans have come to accept the system because of the goods and wealth it produces, and have provided welfare as an alternative to employment. But welfare has masked the right to work and has kept its violation from general consciousness. For although welfare does indeed preserve life, it does not allow the able-to-work who receive it to take an active, productive part in their society with the concomitant respect and self-respect that goes with having such a position in work or employment.

The notion of full employment is often treated as equitable for practical purposes with the right to work. Thus, the Declaration Concerning the Aims and Purposes of the International Labour Organization, 1944, emphasizes not the right to work but:

> the obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: (a) full employment and the raising of standards of living; (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being. . . .[4]

The European Social Charter, 1961, which was "to be complementary to the European Convention on Human Rights"[5] and was signed by the members of the Council of Europe, also closely links the right to work with full employment. Accordingly, under Article 1 of The Right to Work, we find:

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4. BROWNLIE, *supra* note 1, at 174.
5. BROWNLIE, *supra* note 1, at 301.

> With a view to ensuring the effective exercise of the right to work, the Contracting Parties undertake: (1) to accept as one of their primary aims a level of employment as possible, with a view to the attainment of full employment; (2) to protect effectively the right of the worker to earn his living in an occupation freely entered upon; (3) to establish or maintain free employment services for all workers; (4) to provide or promote appropriate vocational guidance, training and rehabilitation.[6]

The right to employment, however, is not identical with full employment. Full employment is an aim or goal that if reached would go a long way towards implementing the right to employment for all those seeking it. However "full employment" is usually defined in such a way in the United States as to be compatible with a certain level of unemployment. Some have even suggested that ten percent unemployment in the U.S. might constitute full employment.[7] Since the percentage is based on unemployment figures, it ignores the "discouraged" or "hard-core" unemployed, who have given up looking for work. Full employment, moreover, is a societal goal, not a right. It is a goal properly adopted by a society in which unemployment is a result of the socio-economic system. There is an important difference between full employment as a goal and the right to work, or its instantiation as the right to employment. As a societal goal, full employment is appropriately balanced against other societal goals, such as control of inflation. The right of individuals, however, is different from societal goals and should not be weighed simply as one good against another. The point of a right is that it is an entitlement that should be respected even at the cost of some other good. There is no right to single-digit inflation, even though that is desirable. One can attempt both to implement rights and control inflation; but the difference between considering full employment simply as one goal among many and seeing the right to work as a valid individual claim against society is fundamental.

II. IDEOLOGY AND LABOUR LEGISLATION

How are we to understand the failure of the United States to recognize the right to work? It becomes intelligible when we understand the ideology behind U.S. labour legislation. The ideology has two main aspects. The first is linked historically with the conception

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6. *Id.* at 303.

7. *See* Neikirk, *Unfortunately, We May Now Be Close To "Full Employment,"* CHICAGO TRIBUNE, May 1, 1983, §5, at 3.

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of free enterprise that has grown up in the United States and can be understood in terms of both social conditions and ideas. The second is related to how labour legislation develops in the United States and is linked to the adversarial relation of labour and management and the power conflict that results from this. Ideology helps prevent recognition of the right to work; but the portion of the ideology in question is a carry-over from an earlier age, no longer reflects reality, and should properly be replaced.

The aspects of the free enterprise ideology that prevents recognition of the right to work in the United States has its roots in the nation's history. At the time the Constitution was adopted the country was young and growing. The Bill of Rights did not include the right to work, for that right had not emerged as a matter of concern, either in its negative or in its positive sense, except in the case of slavery. Slavery was a different and separate issue. The right to life, liberty, and the pursuit of happiness were paramount, although behind the scenes the right to property was strongly upheld. The main fear was of government intrusion, and the rights to be secured were primarily against the government. The right to life was not interpreted as the right to work. A number of factors make this intelligible and make it acceptable.

The availability of the frontier was both a safety valve and an opportunity for people who wished to strike out on their own. The population was relatively small, and the opportunities many. It was not true, as would later be the case, that the only way for most people to live was to sell their labour to entrepreneurs for wages. Together with the land and opportunities available went three other ideological components, the roots of which can be traced to the conditions of the times.

The first of these was the doctrine of self-reliance. It was a trait that was cherished, and had to be cherished if one were to survive in a new land, especially on its frontiers. Self-reliance, of course, did not preclude helping one's neighbour. Yet each person was expected to stand on his own feet, work, and fend for himself.

Joined to this was the doctrine of competitive individualism. The ideology of incipient capitalism, which developed in the eighteenth and nineteenth centuries, incorporated the notion of competition. In the competitive battle each person was ego-centered. The best succeeded. The experience of the immigrants to a new land, joined with the experience of the frontier, complemented the capitalistic emphasis on the individual and the concomitant notion of competition. Individualism was ideologically joined with competition to become

"rugged individualism," according to which one competed and managed on one's own, whatever the outcome.

The third component comes from the "Protestant work ethic." This complemented the other two components and fostered the developing capitalist ideology. Industriousness was a virtue. Each person was expected to do his fair share. The belief was that those who worked hard prospered. Prosperity was an indication of the virtue of industry. The lazy reaped their own reward in the way of poverty and difficulty. Each person, it was believed, had the opportunity to succeed, and success depended on individual initiative.

This ideology had its basis in reality. There was, of course, unemployment. But the general belief was that opportunities were available for the industrious, those willing to take a chance, seek their own fortune, and if necessary tame the wilderness. The right to work did not emerge as an issue. It became an issue only when the labour supply exceeded demand; and only with the development of large industry, which carried with it the growth of a working force dependent on others for jobs. But the frontier had disappeared; there are no longer abundant opportunities for the self-reliant; and although industriousness is still deserving of reward, the equation of poverty with laziness is clearly not justified.

Traditionally, the individualistic ideology of self-reliance has been fiercely opposed to government's competing with private enterprise. The belief is that government is not in the business of business. Government ownership of the means of production is anathema, and government should not compete with the private sector. There are a few exceptions in the service sector, *e.g.,* where state supported hospitals and universities compete with private institutions. But these are usually non-profit areas and areas in which the rights of the population are not adequately served by the private sector.

The general opposition to government's ownership of industry, of government's competition with industry, manifests itself in three ways with respect to the right to work. The first and most significant is the opposition to the notion of a human right to work because that right is viewed as socialistic and is identified with countries run by communist governments. Historically defenders of socialism have indeed the right to work and the constitutions of a number of socialist states recognize this in various ways.[8] In the Soviet Union the right goes together with a concurrent obligation on the part of all able

8. *See* I. DUCHACEK, RIGHTS AND LIBERTIES IN THE WORLD TODAY: CONSTITUTIONAL PROMISE & REALITY 15 (1973); and Becker, *The Obligation to Work*, 91 ETHICS 36 (1980).

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bodied Soviet citizens to work. Hence not working is not an allowable alternative, and those who do not work are guilty of parasitism—a criminal offense. Since the Soviet government, moreover, is the only employer insofar as all enterprises are government owned, the government is in a position to allocate jobs, to train people for jobs into which they are put, to transfer people from one job to another, and in other ways to secure full employment—at least nominally.

The joining of the right to work with the obligation to work is one of the major reasons for rejecting the right as a bona fide right. Such a purported right to work is most easily implemented in a society in which the government owns the means of production, in which private ownership is not permitted, and in which everyone is in fact an employee of the state. In such a society, the state clearly should not discriminate by giving work to some and not to others. Since it controls all the means of survival, it has the obligation of making sure that everyone has work who must work in order to live. It thus has the obligation of providing work for all those capable of doing so. This obligation is further fulfilled in a way that is counter to the free enterprise system. Since the government controls all the jobs, it can allocate them. It can plan how many engineers, machine workers, teachers, or doctors to train, and it can correlate jobs to skills, and anticipate openings for those who will be coming on the job market. It can move people or force transfers if need be, as well as provide retraining and whatever else is necessary to match the labour available to the work to be done. This almost total control makes the implementation of the right to work relatively easy. In the process a great deal that is cherished in the free enterprise system is lost.

Since the models in contemporary times for implementing the right to work have come from communist societies, and since the implications of implementing the right in that way are unpalatable to most Americans, their rejection of that version of the right to work is understandable. Their mistake, however, is to identify the right to work with the form it takes in socialist or communist countries. For the right to work is compatible with free enterprise and private ownership of industry. It is compatible with what many in American society recognize as the right not to work if one chooses and is able to do so without calling upon state funds for support[9] as well as with the emphasis Americans also want to place on the section of the statement from the Declaration of Human Rights following the first clause, namely the right to free choice of employment.

9. *Contra., see* Becker, *supra* note 6 (in which he claims a duty to work, but not one that should be enforced by law).

Second, the free enterprise system allows people to take risks and to fail as well as to succeed. It also allows the market to make adjustments in prices, wages, the allocation of resources, and the allocation of labour. This is a cornerstone of the ideology and of the system. To have government intervene in this process at any point supposedly undermines the system. Guaranteed full employment, the ideology maintains, interferes with these processes in such a way as to preclude their efficient operation. The adoption of a policy that guarantees full employment, it is feared, is an invitation to government to set wages, to prevent the natural dislocations and redistribution of labour, and to interfere with the free enterprise process. If these were the inevitable results, then implementation of the right to work would indeed be incompatible with the ideals of the free enterprise system. However, the belief that these are the inevitable results is neither well founded nor empirically demonstrable. Government already plays an enormous role in the U.S. economy. Just as government regulation does not necessarily lead to socialism, neither does recognition and implementation of the right to work. The right is in fact recognized in many non-socialist countries.

The third factor militating against recognition of the right to work is the fear of the government's becoming an employer of last resort. Unless people were put to work on meaningless jobs, government would supposedly compete directly with the private sector. Moreover, there is great skepticism about the success of any job plan adopted by the government. For, it is argued, given the existing bureaucratic machinery of government, it costs much more for the government to implement any such job program than it is worth.[10]

Neither the fear nor skepticism need militate against recognizing the right to work. Government as employer of last resort can be interpreted in many ways. Government need not compete with private industry; it can cooperate in supplying and supplementing employment and training opportunities in the private sector itself. Nor need every government-funded program be cost-inefficient. The free enterprise system has built-in corrective mechanisms for high unemployment. But the mechanisms operate at great cost to individuals who are at the mercy of the system, and whose right to work is violated. The government's acting as employer of last resort does not necessarily lead to socialism; but even without acting as employer of last resort, the government can recognize and implement the right to work, and such recognition should not be precluded by ill-founded ideological beliefs.

10. *See, e.g.*, Bartlett, *Public Works Programs Don't Create Jobs*, THE WALL STREET JOURNAL, November 30, 1982, at 28.

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If ideology stands in the way of recognizing the right to work, the history of the development of labour legislation, resulting from this ideology, hinders its implementation. As other papers in this volume note, labour legislation in the United States has developed largely out of the relations between management and labor, especially in the collective bargaining process. As a consequence, unless an issue is in the interest of either labour (as represented by the unions) or management such that it arises in collective bargaining, it usually fails for lack of an advocate. If, moreover, an issue is opposed by either labour or management outside the collective bargaining situation and without the full support of the other side, it has formidable opposition to overcome and slight chance of either getting a full hearing or of finding its way into legislation. The issue of the right to work is such an issue. It is opposed to the interest of management, does not arise in collective bargaining, and is given less importance by unions than issues that more directly affect their members.

The right to work, even if understood as full employment, is clearly not in the interest of management. Unemployment guarantees the availability of people for at least some—usually lower level—jobs. It helps keep wages down and helps enforce labour discipline, since fear of loss of one's job is a real threat. Given a choice, it is in management's interest to have a pool of unemployed from which to choose. Management would, therefore, not be anxious to have legislation that would guarantee full employment or recognize a right to work. If, however, full employment included people in training programs and people who were employed by the government only as an employer of last resort, there would in fact be a pool of people from which to draw when the need presented itself in times of expansion; and the presence of training programs might also guarantee a larger pool of qualified people than would otherwise be the case.

Any attempt to get a full hearing for the right to work must overcome a semantic hurdle. To the extent that the right to work has received any attention in labour law in the United States it has been in the sense of a negative right. Thus, for instance, it has been argued that union shops (in which union membership is required for employment either on or after the thirtieth day of beginning employment)[11] prevent those who do not want to join the union from working, or at least from working where they choose. Legislation on the union shop has varied from state to state in the United States, ever since Section 14(b) of the Taft-Hartley law allowed states to

11. Labor Management Relations Act (Taft-Hartley) of 1947, § 8(a)(3), 29 U.S.C. § 158(a)(3) (1982).

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outlaw such shops.[12] But although the legislation and debates surrounding union shops have been couched in terms of "right to work" laws, they touch only a small portion of what the human right to work covers. Whether such laws are truly for the benefit of the worker is a hotly debated issue. Yet, ironically, at least with respect to the right as so understood, unions oppose right to work laws. Unions oppose such laws both because they undercut the leverage of the union in negotiations and because they invite free riders who do not pay union dues, yet reap the advantages secured by union bargaining. Management typically supports such right to work laws, ostensibly because they protect the freedom of both the worker and the manager to enter into the bargaining process without the union. Management's interest, however, is protected by being able to bargain individually with workers, and it is precisely to gain the strength of numbers that unions were formed. The existing "right to work" laws, therefore, do not implement the human right to work we have been considering. Having preempted the terminology, they make discussion of right to work laws—in the sense of positively implementing the right—confusing and difficult.

In general, organized labour supports full employment legislation. But for some of the reasons we have seen, United States unions have not been as vocal as one would expect in support of the right to work specifically as a human right. In practice individual unions have often been more concerned with benefits for their members than with the rights of unemployed workers. Some have even fought for benefits resulting in the laying off of some of their own members.[13] Moreover, although full employment with no unemployed would put unions in a better bargaining position than otherwise, guaranteed full employment would also undercut to some extent the need for the protection of jobs by unions.

A good deal of labour legislation has to do with the relation of labour and management, the rights of organized labour, and the workers represented by the unions. Many of the unemployed are non-union, unorganized, and unrepresented. Clearly the hard-core unemployed are of less concern to the unions than are union members, and in collective bargaining neither the unions nor management are concerned with the rights of the unemployed. While the history of labour legislation has been generated by collective bargaining and by

12. For a discussion of this, see P. SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 55-62 (1958).

13. The U.A.W., for instance, in 1982 insisted on higher wages for auto workers—twice the average for manufacturing workers—even as layoffs by auto manufacturers mounted.

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the interests of the union on the one hand and management on the other, less than 30 percent of the American labour force belongs to a union, and the number of unionized workers has been diminishing for several years.

The history of labour legislation in the United States shows that negotiations between unions and management have not led to any serious consideration of the human right to work. Discussion of this right has not surfaced because in the context of collective bargaining this right is in the interest of neither organized labour nor management. While this fact makes the failure to notice this right understandable, it does not justify the absence of any legislation implementing the right of all to work and of those who desire it and are qualified. Consequently, the ideology underlying labour legislation should be brought out in the open and reevaluated. Similarly, the presuppositions of much of labour law jurisprudence that picture legislation as a means of arbitrating between contending factions—organized labour and management—should also be reexamined. This view is reinforced by the respective ideologies of both labour and management, who see themselves as opponents in an adversarial system. This opposition is fostered by collective bargaining. But since the right to work can sometimes be best implemented by collaboration rather than antagonism between management and labour, the ideology helps suppress implementation of the right to work.

The reexamination shows that the traditional ideology is partially defective. It is presupposed that organized labour and management are the only two contending parties. Since those who are outside of the organized labour force have no organized representative, their rights are systematically ignored and violated. The right to work is compatible with the best in the United States' tradition of free enterprise and of peaceful and productive labour relations. Implementation of that right leads necessarily neither to socialism nor to disruption of the worker-management relation of free enterprise. As David Beatty in another article in this volume argues, the right to employment at a decent wage is or should be part of the liberal ideology that has developed in the United States. The remnants of the older ideology have in part delayed recognition of the human right to work.

III. IMPLEMENTING THE RIGHT TO WORK

In 1946, the Employment Act set a national goal of providing "useful employment opportunities" for all persons "able, willing, and seeking to work."[14] In 1948, the American Declaration of the Rights

14. Employment Act of 1946, Pub.L. No. 79-304, 60 Stat. 23.

and Duties of Man in Article XIV stated: "Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit."[15] But the 1946 Act established no machinery for providing such opportunities, the Declaration was not intended to be binding, and the final clause left much room for interpretation.

On January 3, 1976, the International Covenant on Economic, Social and Cultural Rights of 1966 went into force.[16] This Covenant supersedes the Universal Declaration of Human Rights and has the legal force of a treaty for its signatories. The right to work is stated in Article 7: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work. . . ."[17] The United States signed the Covenant on October 5, 1977, but never ratified it.[18]

In the United States the failure to recognize and address the right to work has to some extent been mitigated by a variety of public programs from unemployment insurance to welfare programs. But while these have kept the unemployed from starving, the failure to recognize and respect the right to work remains an anomaly in a country that places so much emphasis on human rights.

Unemployment insurance, as the name implies, is a type of insurance program. It is available only to those who have such insurance, and the minimal requirement is that one have been previously employed. It is thus not available to those leaving school who have not been previously employed on a full time basis. Nor is it available to women, for example, who have been working in the home raising a family and wish at a certain time to join the work force. And it is not available to those who have been out of work for a longer period than that covered by unemployment insurance. As a stopgap measure for those temporarily unemployed or for those between jobs, it is on the whole adequate and serves an obvious need. For the others, however, it does nothing.

Welfare programs come to the rescue for some of those not eligible for unemployment insurance and in need of help. Such programs serve another obvious need. But there is a difference between providing support for those who cannot work outside the home because of disability, or the need to care for children, and providing support

15. BROWNLIE, *supra* note 1, at 384.

16. BROWNLIE, *supra* note 1, at 118.

17. *Id.* at 120.

18. United Nations. MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRATARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS 99-105 (1978).

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for those who both can work and wish to do so. For the latter, the absence of work can be and very often is demoralizing and leads to loss of both self-respect and the respect of others. They are not responsible for their unemployment, but in some sense the society or the economic system is. That failure is only partially corrected by charity or by welfare payments. And what is not corrected marks the difference between welfare and recognition of the right to work.

The original Humphrey-Hawkins full employment bill was, "A bill to establish a national policy and nationwide machinery for guaranteeing to all adult Americans able and willing to work the availability of equal opportunities for useful and rewarding employment."[19] Section 2(a) of the bill provided that "Congress hereby declares that all adult Americans able and willing to work have the right to equal opportunities for useful paid employment at fair rates of compensation." This is the closest that proposed legislation has come to recognizing and implementing the right to work. Section 8(b) of the bill would have given the President five years to provide for full implementation of the Act.

The Act, however, encountered fierce opposition. The first revisions set five year targets of four percent unemployment overall, three percent for those aged 20 years and older, as well as specifying the government as employer of last resort. The president, however, was given the right to revise the numerical goals. When finally passed in 1978[20] the provision for the government's being the employer of last resort had been stricken. The goal of reducing unemployment to four percent by 1983 was maintained. Implementing provisions had been largely dropped. As passed, the Act was called the Full Employment and Balanced Growth Act of 1978. Once again, failure to recognize the right to work resulted in legislation that made full employment a national goal to be balanced with other economic goals.

The effectiveness of the Act can be gauged by the fact that in 1983 in the United States unemployment had not been reduced to four percent but it had increased to 10.8 percent.[21] Nonetheless the Act states that, "The Congress further declares and establishes as a national goal the fulfillment of the right to full opportunities for useful paid employment at fair rates of compensation for all individuals

19. A bill, the Balanced Growth and Economic Planning Act of 1975, is the genesis of a number of key provisions of H.R. 50 and S. 50, which were passed in 1978. *See infra* note 20.

20. Full Employment and Balanced Growth Act of 1978, Pub.L. No. 95-523, 92 Stat. 1886.

21. ECONOMIC REPORT OF THE PRESIDENT 199 (1983).

able, willing, and seeking to work."[22] This kind of recognition by Congress makes it possible to enlarge the discussion and eventually to implement the right to work. The *Congressional Quarterly Almanac* reports that "the bill retained a strong emotional impact with black and labor groups, who lobbied intensely for it as a symbol of concern for the jobless."[23]

The 1983 *Economic Report of the President* fulfilled the President's reporting requirement as specified in the 1978 Full Employment and Balanced Growth Act. Its tone was almost one of pleasure as it reported negatively on a number of government policies. It noted that "[b]ehavioral effects of social insurance programs such as unemployment insurance include the encouragement of firms to lay off workers and the inducement of persons to prolong their spells of unemployment."[24] It claimed that "[a]vailable evidence suggests, however, that public works programs adopted in past recessions have been counter-productive."[25] Further, "[a] recent study by the Office of Management and Budget found that 90 percent of the outlays for local public works projects designed to stimulate recovery from the 1974-75 recession occurred more than two and one-half years after the trough of the recession."[26] Moreover, ". . . many public works projects do not yield a net increase in employment. . ."[27]; and "most jobs in countercyclical public works projects are of extremely short duration. . ." and ". . .very few jobs are actually filled by unemployed workers."[28] Finally, "it would be imprudent to use macroeconomic policies to reduce the unemployment rate below its inflation threshold level of six to seven percent."[29]

Despite this negative appraisal of public programs and the fact that the *Report* contained no mention of the right to employment, the President did cite the Job Training Partnership Act (JTPA) of 1982 as the "major Federal initiative to reduce structural unemployment among youth and adults"[30]. The partnership between private industry and the public sector is a step in the right direction. The Targeted Jobs Tax Credit program, which provides tax credits to certain

22. *See supra* note 20, at § 2(b).
23. CONGRESSIONAL QUARTERLY ALMANAC 275 (1978).
24. *Economic Report of the President* 38 (1983).
25. *Id.* at 39.
26. *Id.* at 40.
27. *Id.*
28. *Id.* at 41.
29. *Id.*
30. *Id.* at 44.

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employers who hire youths, and Title II of the JTPA, which provides State training, job search, relocation assistance, and employment counseling are other steps in the right direction. Nonetheless, the United States is still far behind other free enterprise countries such as Canada and some of the countries of Western Europe in its approaches to implementing the goal of full employment.[31]

Bruce Bartlett, deputy director of the Joint Economic Committee of Congress, in a *Wall Street Journal* article claims that:

> According to OMB, the typical public works project expends only 22 percent of its cost on direct employment. The other 78 percent of expenditures have only indirect employment effects no different from a general increase in government expenditures. In addition, OMB found that very few workers employed in the public works projects were unemployed prior to being hired—as few as 12 percent in one program studied and no more than 27 percent in another. And because 50 percent to 75 percent of jobs on public works projects are skilled, the chances of such a project helping unskilled, hard-core unemployed are almost nil.[32]

The arguments of Bartlett and the fear of government, however, do not get at the heart of the matter. Bartlett's arguments are targeted against Congress's enacting ad hoc legislation to handle cyclical unemployment, at the very time when that unemployment seems to be coming to an end. His arguments do not address the possibility of the government's acting not in an ad hoc way but setting a policy that is constantly in operation and hence is not always introduced too late to be effective. Bartlett also attacks a specific program that involves public works and that does not include training or retraining. That the United States government has not done a good job with respect to controlling unemployment and that it has reacted ineffectively when faced with high unemployment indicate not that the government cannot implement the human right to work, but that it has not even tried. Instead it has reacted to crises, as Bartlett indicates, only after the crises have developed to such an extent that they are on their way to a resolution.

The reaction of the American Government to the high rate of

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31. *See* Batt, *Canada's Good Example With Displaced Workers*, 83 HARV. BUS. REV. 6-22 (1983).

32. *See* Bartlett, *Public Works Programs*, *supra* note 10.

http://scholar.valpo.edu/vulr/vol19/iss1/2

unemployment in 1981-83 was to attempt to stimulate business by controlling interest rates and reducing inflation. This approach assumed that the employment of workers was a function and factor of business, and not a direct responsibility of government. The reaction of the Government would have and should have been different, however, if it recognized a positive right to work as a human right.

Against whom is this right and how might it be implemented? The right to work in its negative sense is a right to be exercised against anyone who would prevent one from engaging in legitimate labour, and like other human rights, would be enforced by the government. It is also a right against the government not to be prevented by it from working. Against whom the positive right to work is to be exercised is less clear. Although private businesses may be prevented from discriminating in their employment practices, and although they may also be precluded from dismissing employees arbitrarily and without cause, they are presently required neither to hire any particular person or persons nor to keep their work force at a certain number if their needs change, their financial situation deteriorates, or their desire to cut costs or increase profits mandates closing a plant, laying off workers, or trimming the number of employees.

The right to work is presently exercised against a particular employer by an employee only after the employee has secured employment, and only to the extent that the worker is productive and abides by the employment agreement, and that the fortunes of the employer make it possible to provide employment. The right here amounts to protection from arbitrary dismissal and from discriminatory treatment. It does not provide a guaranteed job unless that is part of the contract. Whether we are moving to guaranteed job protection is another issue; but it is not one that I shall argue for on the basis of the right to work.

If the right to work does not mean that a potential worker has any claim on any particular job, nor that he or she has any permanent claim on a position once secured, what does the right mean? And if it is not a right against particular employers, is it a right against employers in general? The answer to the latter question is yes. In practice, the unemployed raise their claims against the government. Yet just as business benefits from the system adopted by society, it is appropriate for business to share in meeting the obligations of society to all its members as a result of the system. For this reason business appropriately shares in society's obligation to implement each person's right to work.

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If the number of jobs exceeded the number of workers, and if workers were completely mobile, then, barring discrimination everyone should be able to get a job. Even this ideal situation, however, does not guarantee that everyone will get the kind of work that he or she would like or is qualified for, and the right to work should guarantee at least work commensurate to some minimal extent with one's capabilities and training. Implementation should aim at the fulfillment of the right in this way.

The burden of implementing the positive human right to work might be placed on individual employers as well as on the government, but would in either case have to be enforced by the government. There are two aspects to the question of unemployment. One deals with those who do not have employment and who seek it. The other concerns those who have employment and who through no fault of their own lose their jobs. Concentrating on the private employer, government can take several approaches with respect to employment, short of entering into the business decisions of hiring and firing. One way is through tax incentives to motivate firms to retain employees they might otherwise fire. A second is to require firms to relocate employees when plants are shut down, or to retrain them for work that is available. In Canada, unions and management cooperate in helping relocate workers before a plant is closed. Another approach consists of tax benefits for firms that provide training programs for the unemployed, whether or not they are actually later employed by that firm. A fourth approach would require a general temporary cut in pay for all members of a firm together with a temporary reduction in hours worked rather than the temporary furloughing of some employees. This would mean that instead of laying off ten percent of its workers, a firm would be required to reduce the pay and work of everyone in the firm by ten percent. Lowering the number of hours in the work week would also share work more widely making more jobs available, as would precluding overtime for employees.

Placing these and other similar requirements on business may seem like interference with their freedom. And of course it is. But the freedom of business is and has always been legitimately circumscribed by the rights of the individuals in society. Such interferences seem perhaps severe only because we have not considered seriously the human right to work.

The obligations of the government, however, do not end simply with enforcing various measures against private enterprises. In times of recession or depression, there will undoubtedly be many unemployed people who cannot be employed by the private sector. The government can meet its obligation to such people in a variety of ways. The

most obvious but perhaps in the long run one of the least desirable is for the government to become an employer of last resort, in any of the senses discussed earlier. Such an approach is preferable to the alternative of welfare. But it is by no means the only one. Structural unemployment can be handled by a combination of relocation and retraining, either provided directly by the government or subsidized by the government. Some of those opposed to the right to work argue that there are always jobs available, as a perusal of most newspapers will attest. A close look at those ads shows that the jobs typically require specialized training or experience, and are available at specific locations. Training and relocation allowances are necessary to match the unemployed with the employment available. Frictional unemployment can be eased by providing better information on the availability of jobs. Securing of employment is one part of the right to work in which the government can play a significant role. The securing of work commensurate with one's capacities and training or education is, of course, more difficult. But even employment that falls below one's training is preferable to welfare, providing the work is not degrading or simply make-work, and providing the real possibility for transfer to more appropriate work is constantly considered according to some fair system.

The third aspect of the right, securing fair remuneration requisite to support oneself and one's family in dignity, can be implemented in a variety of ways. The often proposed negative income tax is one that is compatible with the right to work and the notion of the dignity of work. A negative income tax is not charity but the readjustment made by society to make up in part for the deficiency of the system to otherwise implement the right to work. Those who argue that the United States cannot afford to implement the right to work fail to consider that the real cost of unemployment includes not only welfare and other payments but also loss of productivity, that full employment means increased total wealth and productivity, and that many nations—non-socialist as well as socialist—with economies less developed than ours already recognize the right to work.

That the right to work is not recognized in the United States is not only an anomaly; it is a moral failure that can and should be rectified. If the right to work were considered seriously, American society and the American government would take a different approach to problems of unemployment and welfare. The legislated mechanisms by which the right to work could be implemented would then be approached more imaginatively and more seriously than at present.

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