

COLLEGE OF LABOR AND EMPLOYMENT LAWYERS, INC.
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It is a privilege to be the first lecturer in what I hope will be a long series for the College. But I have to admit, my previous experience with being the inaugural performer makes me a little nervous. While I was still on the bench, West Publishing Company informed me, with great fanfare, that my opinion in Home v. Babbitt had been selected to be the first opinion in Fed. Third, I felt a little bit guilty about having been on the bench while most of the trees were cut down to print Fed. Second, but nevertheless, it was a great honor to be the author of the case to be cited as 1 Fed.3d 1. Unfortunately, the judge who made up my majority changed his mind and the opinion was overturned in 17 Fed.3d 1463. While the Supreme Court ultimately agreed with me, 1 Fed.3d I has an asterisk after it. I hope that won't happen to this speech.

During my first term as an Illinois legislator, I became the darling of the Illinois labor movement by taking on the employer groups who were trying to pass a right-to-work statute. The older members in the audience will remember that in the 1950's, efforts were being made to take advantage of the provision in the Taft-Hartley Act which allowed states to prohibit union security clauses in collective bargaining agreements. It was one of our dubious experiments in permissive federalism. I took advantage of the catchy title, and introduced my own right-to-work proposal. Mine had nothing to do with dues checkoffs to the union; my proposal required the state to provide a job for every person seeking one who could not find one. My proposal went nowhere, but it did head off the employers' proposal for the year. Legislatures hate to separate out that kind of confusion about titles.

My proposal has not caught on at the national level either, where it has been known as the employer of last resort bill. That's unfortunate, because the last time it was tried in this country, it was a huge success. I am referring, of course, to the Works Progress Administration and the Community Conservation Corps—the WPA and the CCC of the New Deal and the Depression Era. I can make my point about the success of those programs either statistically, or anecdotally. Anecdotes are more interesting.

There is hardly a place in this country that doesn't have some of the fruits of those programs: courthouses, libraries, national parks. In many cases, the work is over 60 years old, but it still serves us well. More important, there are few families that weren't the beneficiaries, directly or indirectly, of the labor itself. A WPA job saved my father's self respect, and perhaps our family. He had been fired from his job as an insurance agent in 1931 during

the height of the Depression. I was five years old. Fired—that is such a traumatic word. When I first heard my parents talking about it, when I heard my mother crying, I thought it meant that the Metropolitan Life Insurance Company actually had lit a match to my father and burned him. It really did burn our family for several years, until WPA gave him a job so that he could get off the relief roles. I probably would have voted for the welfare reform bills that passed the Congress a few years ago, because I am for workfare instead of welfare. Most people who have been on welfare would like nothing better than a job instead of the grubby treatment they get on welfare. Who really wants to be on food stamps, so that every shopper standing in line can voyeuristically review your shopping habits and food tastes to decide whether you are abusing the program intended for the poor? Who really wants to go through the degrading and humiliating process of getting on and staying on the welfare rolls? There really is such a thing as a work ethic in this country. By the time one reaches puberty, there is a societal expectation that one is to work—to provide for the necessities of life and of the soul. We even look down on those who don't have to work for a living. (Kennedy story.)

At least once a week, even at this time of full employment plus, there is a newspaper story about some hotel seeking to hire its workforce—mostly low-paying service jobs. The story recounts with wonder how thousands respond to an ad, even though only a small fraction of the applicants will be hired. What's wondrous about this is the wonder. It is a benighted view of the American psyche that holds that people would rather not have a job than have one, when the consequences of not having a job are so grim. Try living on a welfare diet some time, or even try feeding a family on unemployment compensation—especially after it runs out. Try maintaining your self-respect, your ego, the respect of your family, when you are able-bodied but not working. I spend some time in Florida each year, and I am impressed with the number of working senior citizens, many of them not needing the income, but needing the feeling that they are still a part of the work ethic.

I suspect there is a proper reverence for the work ethic in this room, so I will stop trying to sell the already sold. Is it impractical to have a public policy that holds out the promise of a job for every one who is capable of holding one? Is it too complicated to get there? Do we just have to hope that the economy will keep on improving to squeeze down that small percentage of unemployment to a virtual zero? And then do we have to hope that my friends at the Chicago school of economics continue to be wrong about the hyper-inflation that overly-full employment causes? I think that all of the consequences and costs of unemployment are far greater than the consequences and costs of establishing and maintaining a right to work. Let me state my case.

First, as to those who are unemployed. We spend a lot of money on people without jobs. Not all of it ends up in their pockets, but the total cost of welfare programs and unemployment compensation programs and homelessness programs and crime prevention programs are staggering. And we get very little for any of those programs—either in satisfaction to the recipients or to the taxpayers who foot those bills. Meanwhile, the infrastructure of this country and its cities is going to pot—and potholes. Everything from rail beds to some of the bridges that WPA workers built are falling apart. The cost of cleaning up some of our waste sites, toxic and otherwise, project their timetable well into the next century. We still squabble about the cost of reducing the number of students in our classes by one or two, when teacher's aides could provide for dramatic reductions, and provide jobs for a lot of otherwise unemployable people in our poorest neighborhoods. For the same money we now spend to keep people idle, we could undertake the kind of public improvements program that this country needs.

I mentioned otherwise unemployable people. I worry that the welfare reform bubble is scheduled to burst soon. What are we going to do with those people whose eligibility for welfare runs out in the next year or two or three? The federal program has no safety net for those people. Some states have elongated the eligibility period, and have provided some kinds of public works programs. But most states have not. Will we really let people starve to death? Will we really allow the number of homeless, with all their messy ways, to increase dramatically?

Is this a good time to be talking about such a program? Unemployment is at a record low. Why is this a time to advocate new government programs. Perhaps this is the best time to do so. First the people who are presently unemployed are easier to absorb in public works programs than in the private sector. My father was given a job typing, even though I doubt that he had ever seen a typewriter before. You have heard countless stories about some WPA workers digging holes for other WPA workers to fill in. No matter, or not much matter. The benefits still outweighed the costs. And the cost benefit ratio was not the same as it would be in the private sector. A lot, if not most, of the currently unemployable will not find jobs in the private sector. Lack of skills, lack of capacity to learn skills, lack of capacity to exercise the discipline necessary to keep a job—all of these are easier to cope with in public sector works programs than in the private sector. Moreover, there would be a virtual dollar for dollar setoff for the cost of such programs, against the cost of welfare programs and the other programs that now provide for the unemployed.

But what of the night? What happens if this near record full employment cycle comes to an end? We clearly cannot stop the programs when we need them the most, but can we afford to pay for them when we are

talking about a nine or ten per cent unemployment rate? And here is where I ask you to stretch your mores a little bit to contemplate, just contemplate a radical notion.

I think that people should not have to worry about losing their jobs through no fault of their own. That immediately excludes all of the discharges for cause. I am suggesting that people should not have to worry about layoffs or discharges attributable to the employer's failure, or to the economy's. It only sounds radical because we really haven't been as committed to the work ethic as we say we are and we don't realize how far down the road I suggest has already been traveled.

My friends at the University of Chicago would insist that any kind of job guarantee program would violate the basic tenets of a free market system. Of course, most of them argue with all kinds of programs that we have passed over the last 70 years which also put burdens on a totally free market. Minimum wage laws, social security laws, pension guarantee laws, workmen's compensation laws, safety laws, anti-discrimination laws, all of the laws that keep most of you with a full practice in employment laws, plant closing laws—all of them are burdens on a totally free market. Indeed, the permissible grounds for laying off or discharging an employee get fewer and fewer. (Arnie Morton and the New York bunnies.) I had occasion to recently read some of the diatribes against Abraham Lincoln when he issued the Emancipation Proclamation. That too was denounced as an interference with the free market and private property rights. And indeed it was. But those proposals were perceived as radical only to those who elevated capital rights over personal rights. If the right to work is as essential to an individual as I think it is, and as our society says it is except when it comes to protecting it, then I think that the property rights and the free market principles must not be allowed to trump the personal rights.

How would it work? In legal circles, there is already some discussion about whether traditional notions of "at will" employment ought to be reexamined. The Model Employment Termination Act adopted by the Uniform Law Commissioners in 1991 seriously addressed the problem of job security and provided a legislative road for the states to follow as far as protecting employees against wrongful discharge. Professor Ted St. Antoine has been a pioneer in the effort to break down the walls of the traditional concept of employment at will. But even the Model Act allows employers to lay off or discharge for any economic cause. "Good cause" includes the entire gamut of economic reasons, ranging from plant-closing, to discontinuing certain operations, to down-sizing in general.

Suppose, just suppose, the employer had to reckon with the cost to the employees of closing a plant or downsizing the work force. To some degree, there already is some reckoning. The rate attributable to

unemployment compensation taxes is measured in part by the employer's unemployment experience. But the variations are small, and don't really apply to an employer who moves the plant to another state, or goes out of business. Some years ago, the Steelworkers Union negotiated a supplemental unemployment benefits fund with the steel companies, that provided greater benefits than the law provided in the event of layoffs. While it didn't prevent layoffs altogether, it forced the employer to add in that cost when looking at the pluses and minuses of layoff decisions.

I started practicing labor law when automatic elevators first became common. The union representing Chicago elevator operators hit upon a formula which calculated the savings that the building owner would derive from conversion to automatic elevators, and negotiated a substantial portion of that savings for the elevator operators by way of severance benefits. A lot of Chicago elevator operators retired or semi-retired to Florida with those severance checks, and the sharing of the economic benefits did not seem to result in a collapse of the real estate community in Chicago. Vice President Gore has properly claimed credit for "reinventing government" by reducing the federal work force substantially. He has pushed the bureaucracy to find out which positions are redundant and to eliminate them. But they are always eliminated by voluntary early retirement programs, by attrition; none are achieved by discharge.

Variations on that theme abound. Work sharing programs, with reduced work weeks already exist, and could substitute for layoffs. For plant closings, recognition of the rights of the work force to continued employment could be achieved either in fact or in damages. Some employers already accept this principle by offering jobs at other locations, or providing severance pay programs. In my fair city of Chicago, Marshall Field, using maximum corporate incompetence, decided to outsource its manufacture of Frango Mints, firing with virtually no notice over 100 not-so-young Chicagoans. Even the usually persuasive Mayor Daley could not persuade them to do otherwise. Thus far, it has been a corporate disaster, with all kinds of informal boycotts of Field's department store and Frango mints, and wide-spread and ongoing adverse publicity. I can't believe that it would not have been feasible, and maybe even good for the bottom line, for Field's to have offered the employees an opportunity to move to the new manufacturing place (which most would not have been able to accept) or placement elsewhere in the Chicago stores, or some kind of early retirement program.

Why should that not have been required? Free market principles that I learned would say that the costs of such programs would be spooned into the cost of doing business, just like all of the other programs that are required

or desired. The cost of golden parachutes is spooned into the cost of a merger or acquisition. Why should there not be a six-pack parachute for the working stiffs? The principle and the purpose are the same. If corporate executives can have the peace of mind that goes with the job security (at the company's expense) why is extension of that principle to the corporation's other employees a radical idea? Especially when the alternative is so expensive to society and is the parachute frequently is so much more necessary to the necessitous employee?

If the United States adopts "right to work" laws, as I have used that term, it would be doing nothing more than joining the rest of the modern world. Most of the new eastern European constitutions include such a right. The Czech constitution, for example, ensures both the right to work and the right to "adequate security" in case of "involuntary unemployment." Similar protections exist in Poland and Hungary. Now I am not strong on including economic rights in constitutions, and the inclusion of such provisions does not prove that such a scheme is workable. But we don't have to look to eastern Europe for that. Virtually every western European country protects workers' job security. In France, anyone who gets fired for any reason, other than employee wrongdoing, must receive severance pay borne solely by the company. In Italy, an employer must pay a penalty for every worker discharged for economic reasons, based on the worker's anticipated earnings over compete with underpaid, underprotected foreign workers. We could at least deny lucrative tax breaks or other federal benefits to companies moving jobs abroad.

Maybe job security protection might actually improve American competitiveness. Doing the planning necessary to avoid the cost of keeping unnecessary employees might sharpen the competitive edge. Maybe it would mean expanding more at home and less abroad, to make use of the existing work force. Is it that unreasonable to put a burden on a corporation that made its stake in this country with an American work force? For most people in this country, the right to a job is the most important right they will ever have. Without it, the other rights cannot be enjoyed. It is the most important economic asset they will ever own. Should we not stretch our legal concepts, our workplace protection package to take this into account? Is that not a task worthy of a mighty and enlightened nation?

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