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Industrial Democracy: A Liberal Law of Labour Relations

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INDUSTRIAL DEMOCRACY: A LIBERAL LAW OF LABOUR RELATIONS

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"I am free . . . when my existence depends on myself."
F. Hegel
Philosophy of History (17)

"Some security is essential if freedom is to be preserved . . . ."
F. Hayek
The Road to Serfdom (133)

I. INTRODUCTION

I have been struck by the revival which liberalism seems to be experiencing in the academic press of North America. Obviously it (or, more properly, one of its competing versions) has never moved very far off center stage; yet at least since the publication of John Rawl's *A Theory of Justice*, it seems that the liberal, or liberal-democratic, theory of law has enjoyed new respectability and critical attention among our academic communities. I have found this renewed interest, particularly that dealing with the normative, legislative-justice side of this general legal theory, to be especially stimulating in so far as it induces one to trace the effect of the logic of its constitutive principles upon those social institutions which make up the basic structure of our society.

It is in that spirit that this essay is written. My object is to trace out the skeletal features of a legal theory of employment relations, which would regulate and coordinate the interests of individuals in their work relationships in a way which is derived from and consistent with the basic premises which are taken to be characteristic of all liberal democratic[1] theories of law. The idea is to apply to the predominant social relationship within which each of us exercises our labour, the same legal principles and theories of law-making (viz, legislating), as govern the other major social institutions in which we coordinate and regulate other aspects of our lives. With the core prin-

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1. Although it may not always have been so, certainly for most contemporary adherents of this theory, the basic ethical postulate of the liberal tradition seems logically to entail a democratic law-making process. See C. MACPHERSON, THE REALWORLD OF DEMOCRACY 9 (1966). *See also* A. GUTTMANN, LIBERAL EQUALITY (1980).

ciples of legislative justice and legitimacy, which unify all of the various versions of what we espouse to be our governing legal theory, we should be able to sense the broad framework, the most basic substantive and procedural principles, which should characterize and presumably make distinct such a 'liberal' law of our labour relationships. Deducing the basic structure of such a liberal law of employment relations from "first (viz. foundational) principles" ought to permit us to assess the extent to which our own contemporary schemes which regulate the work relationship are compatible and consistent with this general theory of law.

The development of the essay is in three parts. In the first, I will identify what I take to be the basic ethical premise, the liberal theory of right, which characterizes all contemporary versions of this general legal tradition, and will show how it connects with the processes by which law is made in the liberal society. My objective here is purely descriptive. I begin by introducing what is, for liberals, the essential normative idea that in our common capacities to experience pleasure and pain, to pursue our own interests, to be the author of our own plans for our lives, etc., every individual must be taken to be the equal of every other member of the society and is entitled, in these aspects of one's existence, to an equal respect. That idea of our moral equality is the most fundamental ethical postulate in liberal theory. I shall refer to this basic premise as the equal right of individual autonomy or liberty. It is an entitlement to an equal opportunity of personal freedom, to personal self-government.

Next I describe how this basic assumption has influenced and permeated the processes and institutions by which law is made in a liberal society. Here I am concerned with emphasizing how liberal theory has relied (*inter alia*) on a set of basic civil and political rights to give effect to its assumption about the equality between individuals, by shaping the structure and constraining the output of society's law-making (viz, legislative) processes. By enshrining personal liberties or freedoms in the liberal tradition of law, civil, legal and political rights are intended to ensure that the autonomy of every individual receives some basic equality of respect. Limits and checks are imposed upon the legislative institutions in which society settles the rules in accordance with which individuals must coordinate their competing and often conflicting ambitions and aspirations. At least since taking on a democratic dimension, the crucial idea in the liberal conception of legislative justice is that its basic ethical assumption of the equal right of each individual to control the most basic choices in his life can most effectively be established by ensuring that the procedural principles which govern the major legislative (viz, law-making) institu-

tions in society, are themselves consistent with and give effect to our equality as moral agents.

From this understanding of the general method of legislative justice in the liberal tradition of law, in the second part of the essay, I endeavor to derive the broad features of a liberal law of labour relations. After establishing why this theory of rights and conception of law-making is relevant to the rules governing our work relationships, the idea is to endeavor to deduce the first principles, the basic structure or framework, of a law of labour relations which is concerned, in the first instance, in ensuring that every person in the society is equally free from (what for liberals is the potentially arbitrary and coercive) interference by others in the development of this central, productive aspect of their lives. Here, my object is to identify the rights, liberties, conditions of labour which are essential to securing the autonomy of every individual. Two broad sets of entitlements of industrial citizenship seem to suggest themselves as natural and integral features of such a liberal law of labour relations. Paralleling the general theory's characteristic reliance on civil and political liberties, I argue that one set of rights would, by imposing limits on the subordinate law-making processes which actually settled the law (terms and conditions) of employment, endeavor to secure that degree of material well-being which is essential to the autonomy of the individual. The second set, by recognizing a right to participate fairly (viz. as an equal) in the subordinate law-making processes, would ensure that, beyond a basic equality of independence, in settling the actual terms and conditions of work each person's aspirations are given an equal consideration. The first set of rights, which guarantee some basic entitlement to tenure and economic well-being, would bear directly on how such a law of labour relations would resolve such contemporary work-related issues as redundancies, termination for cause, compulsory retirement, and guaranteed incomes. The second set of 'political' rights, including rights of due process, would settle the basis on which, within those prior constraints, each person would participate in the processes which settled the actual terms and conditions under which they would be obliged to pursue their ambitions as producers. Together, such rights (to procedural justice as it were) would be the means by which a liberal law of labour relations would particularize and concretize the set of economic entitlements which are regarded as necessary to ensuring a basic equality of autonomy for every member of the society.

In the third part of this essay, I endeavor to draw some practical conclusions about our own laws of employment. By assessing the basic structure and first principles of our own systems of individual and collective bargaining, I propose to test the intensity of our com-

mitment to the basic moral assumption which drives our governing theory of law. My conclusion is that set against the theory and techniques of procedural fairness within the liberal theory of law, the current institutions and principles we have enacted to govern our labour relationships seem seriously deficient both in their failure to provide substantial constraints against the tyranny that is the potential of any law-making process,[2] and in their reliance on a technique of law-making in which individual participation is both unequal and incomplete. In each of these failings, alternate principles, policies and structures are suggested which our own policy makers ought to consider in their effort to liberalize this basic social institution within which most of us must pursue and realize our ambitions as producers.

Before I set off in search of the basic principles of a liberal law of labour or work relations, a preliminary matter warrants attention. It is important to acknowledge that the liberal theory of legislative legitimacy, and more particularly that aspect of it which requires law-making institutions to show an equal respect for the liberty of each of its citizens, is certainly not the only criterion against which systems of labour regulations might be erected or assessed. Plainly, there are a host of other criteria against which schemes of labour relations could be assayed. Thus, even within the liberal tradition itself, principles of utility or distributive justice ultimately must be reconciled with the fundamental ideal of moral equality that liberalism adopts as its basic standard of legislative legitimacy. Wealth maximization, which is the exclusive basis on which classical economic labour market analysis rates competing schemes of labour relations, offers itself as another available standard of comparison.[3]

It is not my intention in this essay to balance these or indeed any other criteria of social justice. I do not try to work through a full statement of the liberal law of employment complete with a set of priority rules to reconcile the pluralist principles of legislative

2. J. FISHKIN, TYRANNY AND LEGITIMACY (1979).

3. While for many the different ethical starting points around which one might organize a law of labour relations compete and ultimately conflict with each other, there are others for whom such a trade-off is not implied. For example, some have made the argument that a right to some measure of economic security and material well being, in particular, and workplace democracy more generally, could be derived from and supportive of either a liberal or wealth maximization postulate. *See, e.g.*, L. THUROW, THE ZERO-SUM SOCIETY (1980). *See also* P. BLUMBERG, INDUSTRIAL DEMOCRACY, THE SOCIOLOGY OF PARTICIPATION (1969); J. VANEK, THE GENERAL THEORY OF LABOUR MANAGED MARKETS ECONOMICS (1970); F. STEPHEN, THE PERFORMANCE OF THE LABOUR MANAGED FIRM (1982); J. MOORE, GROWTH WITH SELF MANAGEMENT (1980).

justice that seem implicit in a comprehensive version of this theory of law. Rather, I simply want to test, on its own terms—and indeed on its most cautious and conservative interpretations—what laws or institutions of employment a liberal theory of law entails and how favorably our own model of labour relations compares. I want to derive only the most basic, the "first" principles, the essential framework, the minimum conditions as it were, of a liberal law of labour relations and understand how well they are expressed in our mixed system of public standards and individual and collective bargaining.

While such a limited objective necessarily narrows the lessons to be drawn from this essay, nevertheless, it does not, I trust, reduce it to trivial proportions. For those who operate within the liberal tradition, consideration of the principles and legislative programs which can legitimately be derived from the premise of our equality as autonomous producers, will identify necessary, if incomplete, features of a liberal law of labour relations. It will allow us to identify a set of basic entitlements which, as guarantors of the conditions which are essential to the independence and autonomy of virtually all persons in an industrial society, will be conceptually prior to any competing claims, for example of property owners, which would be expected to be involved in a more comprehensive description of the liberal law of employment. Once the liberal makes the assumption that equality of liberty is the organizing principle of her theory of justice, property rights, just like all of our fundamental freedoms, are understood to be derivative of and instrumental to the realization of that more fundamental value. Like the "Lockean proviso," rights in and principles of employment which are essential to the autonomy and liberty of the individual would constrain and logically precede whatever powers and privileges property could be defined to entail.[4] At least for those operating within the liberal tradition, the exercise of deriving the first principles a liberal law of employment should permit the identification of those economic entitlements which parallel our civil and political liberties and which are immune to what others have characterized as "the big trade-off."

II. The Liberal Idea Of Law

The ultimate purpose of this essay is to assess the degree to which our own system of employment regulation coincides with our governing theory of law. Our first task then is to specify exactly what are the ethical premises which distinguish this legal theory from its

4. L. BECKER, PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS Chap. 4 (1977).

rivals, and how they will, at least in broad outline, determine the framework within which the labour relationship will be organized.

There are a variety of competing legal theories which might be said to fall within the liberal tradition.[5] But this diversity notwithstanding, there is also a good deal of common ground at the base of the tradition which all liberals have come to share. Rooted in the normative, and more particularly the legislative part of this theory of law, is a set of common assumptions as to the basic starting point, the methodological perspective if you will, that one ought to adopt when confronting the most basic questions of social organization such as: the circumstances under which a society can legitimately make law to regulate (coordinate, interfere with, - as you please) the affairs and ambitions of its members; who can make such law; by what processes; and what kind of law it may ultimately be.

In addressing these fundamental issues of how individuals interact with each other in their societies, all liberal theories begin by adopting an ethical posture which distinguishes them from a whole range of competing legal theories about the purposes, legitimacy, and justice of social regulation. Reduced to its simplest terms, the liberal theory of social organization begins with the almost tautological assertion that regardless of our individual talents and merits, no matter the distinctiveness of our persons and personalities, as individuals we share, because of our humanity, a will, power, or a personality, which makes us desirous and capable of organizing and directing our own lives. In arranging the basic structures of social organization, liberal democrats cannot be distracted from the idea that each of us, as rational, sentient beings, has a capacity for, and an interest in, endeavoring to accomplish a set of life plans which we choose for ourselves. Individuals are taken to have an equal interest in viewing themselves as independent moral agents and not being identified with any predetermined set of ends. This intrinsic equality of every human being is what all liberals raise as the essential moral assumption for their theories of law.[6] In the societal coordination of the competing interests of individuals in a liberal community, the basic starting point is the individual and her equal freedom to pursue whatever goal she chooses. No matter whether her plan puts primary emphasis on acquisition and consumption or exertion and development, as long as

5. Helpful descriptions of the major strands of liberal democratic theory can be found in C. MACPHERSON, THE LIFE AND TIME OF LIBERAL DEMOCRACY (1977); GUTTMAN, *supra* note 1.

6. A. GUTTMAN, *supra* note 1.

the individual recognizes an equal, reciprocal right in every other member of her society, the liberal tradition of law assumes, in erecting the institutions within which individuals settle the rules on which they must select and pursue their plans, that each person ought to be equally free in making those basic choices for themselves. Because everyone is assumed to have an interest in deciding what to do with their lives and doing it without (the coercive) interference of others, liberal policy makers, and the law they propose, endeavor to ensure that everyone is equally free to ignore those who claim to have some privileged access to the truth and the light, to the "right" way to live out one's life. If the cornerstone of the liberal edifice is individual choice, the task of the liberal law maker is to secure and cement the independence which is recognized as being a precondition to these acts of choosing.

In liberal theory it is this basic idea which is raised to constrain the imperialistic inclinations of some to meddle in the lives of others by any means. Liberal democrats refuse, except by force of rational appeal (by neutral dialogue as Bruce Ackerman nicely calls it[7]), to impose their choices on the rest of society. The basic liberty of each individual which guarantees personal autonomy serves as protection against the potential tyranny and aggression of others, whether their interference is attempted by physical or legislative means. With respect to the latter, viz, the processes and institutions through which society enacts its laws, this basic constraint has been played out in the tradition's first principles of legislative justice. In fact, two different techniques are utilized to ensure that the inviolability of an individual's autonomy is secure from legislative intervention. By one set of principles, limits are imposed on the reach of legitimate law-making; while by the other, principles of participation are adopted which ensure the integrity of the output which will eventually be enacted. Manifested as part of its theory of legislative justice, the basic ethical postulate of the liberal tradition requires that the legislative output, as well as the law-making processes through which those laws are enacted, respect the intrinsic equality of every individual to control the most basic choices about how she will go about living her life. In the liberal tradition of law, rights are legal devices which are intended to ensure that the law-making processes and the legislation they produce will respect a basic equality of liberty between all members of the society.

As liberal theories evolved, it was the latter, the limits on the

7. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

reach of legitimate law-making, which was the initial focus of attention for many liberals concerned with principles of legislative justice. As the theory developed, a set of basic liberties which were regarded as essential to the condition of being autonomous and independent, of choosing how to experience life, came to be recognized by liberal theorists as the inviolable right of every member of the liberal society. These are our traditional legal and civil rights. Thus, freedom of our physical persons and of our thoughts were among the first subjects of justice which distinguished this tradition of law. These rights, which have since become the hallmark of the liberal democratic societies were, and remain, legal constructs by which the physical and intellectual independence which was regarded as essential for a person's autonomy were guaranteed. The traditional rights of our physical persons against arbitrary detention, inhuman treatment, servitude, etc., together with the fundamental freedoms over one's thoughts and beliefs were devised and are intended to ensure that on these matters, which are so essential to our autonomy, there could be no case for social interference. Civil and legal rights, in the liberal democratic theory of law, act as controls, as trumps over the output of the legislative process, and by doing so they ensure each individual in the society will be independent of authoritative and ultimately coercive choices that others in society might otherwise make for them. In the liberal tradition of law, civil and legal rights are legal devices which require that all of society's law-making institutions, sovereign or subordinate, parliamentary or regulatory, respect an equal opportunity in every individual to the autonomous control of their thoughts and persons.

But to show an equal respect for the independence of each individual's own personal existence, it is not sufficient, as many of the earliest liberal democrats came to realize, to rely exclusively on controls or checks against the potentially coercive influence of the law-making process. Whether as a matter of empirical observation of the legal and social condition of those who, except for their civil liberties, were excluded from participating in the legislative process,[8] or as a matter of the internal logic of their own ethical assumptions,[9] liberal theorists soon came to require that the basic ethical postulate of equality of individual liberty be recognized in and protected by

8. The rules of employment that were imposed on Sissy Jupe and her sisters and brothers, by a legislative process in which they had no standing, is perhaps the most dramatic piece of evidence of how an undemocratic, or more generally procedurally unfair, law-making process can undermine and ultimately destroy our civil rights. *See* C. DICKENS, HARD TIMES (1854).

9. C. B. MACPHERSON, *supra*, note 1.

a correlative equality to participate in the law-making process. Unless the theory recognized some equality in our political rights, our equality as autonomous agents could be reduced to a pure formality. Equality of liberty could only be guaranteed by ensuring that every individual had an equal opportunity to participate in the institutions and processes which determined the rules according to which their competing ambitions and aspirations must be formulated and pursued. If individuals were equal in their capacity to experience pleasure and pain, in their ability to rationally determine their own life plans, etc., then for most liberals logic required, the recognition of rights and principles of procedure which guarantee an equal opportunity to participate in the formulation of the rules to which each of their pursuits would have to conform.

The logic of deriving our most basic political rights, and in particular the democratic franchise, from the ethical postulate of equality of liberty, was driven, in part, by the explicit assumption that liberal democratic societies exist in a world in which resources are scarce and in which individual plans are highly pluralistic and indefinitely in conflict, at least insofar as they make claims on the society's resources. Liberals assume we will never have enough to satisfy our wants and we will always have quite different conceptions of the "good" life. For most theorists, those empirical assumptions eventually have meant that some process or institution of law-making was indispensable for the organization of society and that the only certain way that everyone's interest, including their primary interest in the autonomous control of their lives, would be given respect and consideration, was to ensure their equal status and opportunity to participate in the process which settled the rules on which their competing ambitions would be resolved. Acceptance of the idea that in certain fundamental respects we are equals as moral and rational beings has for most liberals meant an equal representation in the procedure that settles the terms of social cooperation.[10] From the principle of equality of liberty, liberalism metamorphosed naturally into a democratic state.

To summarize, the first principles of social justice in a liberal democratic theory of law endeavor to serve the ethical, pluralist, assumption which drives the system in two ways. First, with respect to the conditions which are essential to choosing a life-style for oneself, (independence of thought, freedom of person, etc.) one set of liberties, in the form of individual rights, establishes almost impenetrable

10. For example, *see* Rawls, *Kantian Constructivism in Moral Theory*, 77 JOURNAL OF PHILOSOPHY 515 (1980).

barriers against virtually all interference by a society's legislative processes. Second, in those processes and institutions in which the rules of social cooperation to which the life plans of everyone must conform are settled, these rights manifest themselves as principles of procedural equality. Taken together, these political, civil and legal rights are the primary legal devices employed by liberal theory to achieve its ethical objective of respecting an equal space within which each individual is entitled to maintain control over her personal life. They represent the minimal legal framework which is necessary to ensure that the natural predispositions of some respect the basic autonomy of others.

III. A LIBERAL LAW OF LABOUR RELATIONS

To construct a legal institution to govern our labour relationships around these first principles of legislative justice would seem to be a reasonably straightforward exercise. Essentially, the task will be to articulate a set of principles which will act as limits upon and guarantees of participation within the law-making processes which are utilized to settle the actual terms and conditions (the law) under which people work. Each of these techniques of legislative justice would be infused in the law-making processes which regulate the labour relationship so as to allow us to derive constitutional rights of labour which would be compatible with, and derived from the liberal theory of what is right or legitimate in law.

Before we undertake such an assessment, it may be thought necessary to establish the legitimacy of this application of moral reasoning. That is to say we must be satisfied that the labour relationship is an appropriate subject of justice. Before we seek to detail the substance and structure of liberal rights of labour and use them as the criteria by which to measure contemporary systems of labour relations, we must first have in hand an affirmative answer to the question of whether there are *any* rights of that kind which are so basic to the autonomy of the individual that they must be enshrined in a constitutional Charter of Rights. Thus, as a preliminary matter, we must address the question of whether there are any rights of labour as basic to the liberty of our physical and spiritual selves as our traditional civil and legal liberties such as freedom of speech and security of the person.

In contemporary industrial societies it would seem that some kind of right to labour and material well-being, a right to economic security, is as basic to individuals' maintenance of "the final authority to con-

trol their own lives"[11] as any of our more long-standing civil, political and legal rights. Certainly, the labour relationship is central in the life plans of virtually every member of any contemporary industrial society. It is not a peripheral relationship or social institution. To the contrary, in Rawlsian terms the labour relationship seems firmly cemented in the foundation of the basic structure of all industrial societies.[12] In the institutions in which we exercise our labour, we take care of and give expression to the most basic aspects of our humanity. By our labour we effectively settle our identities as producers and identify many of those with whom we develop our most personal attachments.[13] With respect to the former, for most of us it is almost entirely a result of our labours that we are able to acquire the satisfactions and utilities which are central to all but the most monastic lifestyles. From subsistence needs to frivolous extravagances, to the socially scarce "positional goods"[14] which are so influential in the kind of life most enjoy, whether we will be able to satisfy our consumptive choices is determined largely by means of how (or whether) we exercise our labour. And, of course, in addition to serving such consumptive purposes, it is in our labour relationships that we act out our most basic instincts to exert and develop our natural capacities. By our labour, as in our speech, we give direct expression to our identities as we conceive of them. We demonstrate who we are and what we think is a worthwhile application of our talents. For almost everyone who lives in an industrial society, it is a fact of their human condition that to an unparalleled degree they are sustained by and identified with what they produce, and what they do productively with their lives is settled largely by the legal institutions and the legislative processes which regulate their labour relationships. Employment has become for the industrial society what commons land was to its feudal predecessor. It is the social institution through which we pursue virtually every ambition we have to be productive.

With such a strategic position in the basic structure of an industrial society, the connections between the employment relationship and the autonomy of the individual would be expected to be deep and diverse. Thus, just as a matter of logical entailment, some sort

11. This is the characterization of the basic ethical postulate of the liberal theory used in Richards, *Rights and Autonomy*, 92 ETHICS 3 (1981).

12. J. RAWLS, THEORY OF JUSTICE 7 (1971).

13. In Durkheim's terms, in an industrial society, work and employment are two of the primary legal artifacts through which "organic solidarity" is furthered. *See* DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY (1965); M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981).

14. *See* F. HIRSCH, SOCIAL LIMITS TO GROWTH (1978).

of a right to labour, guaranteeing some level of material well being, seems to be essential to the liberal ideal of equality of liberty, of each person having the legal authority to maintain control over her life. If, as some argue, a right to life can be implied in or derived from the liberal premise of a person's right to pursue her interests,[15] then simply as a matter of logical deduction, some right to economic security would have to be a condition precedent to and an entailment of both. In the absence of such an entitlement, neither our physical existence nor our psychological identities would be secure. Because it is within this employment relationship, almost to the exclusion of all others, that we choose how we shall be productive, it seems incontrovertibly vital to the liberal ideal that access to these means by which our labour is made productive actually be guaranteed.

The logical dependency that holds between a person's economic security and the capacity to control her own life is (tragically) confirmed in the historical evolution of industrial societies. In the earliest stages of their development we have strong evidence that in the absence of some right to labour which would guarantee some minimal level of economic security, the autonomy of many individuals could be substantially, if not completely, compromised by and within the employment relationship.[16] As Dickens' fictional, but nonetheless realistic portrayal of Sissy Jupe made all too plain, in the absence of any entitlement to some level of material well being, the weak and the powerless could be and were required to labour and live out their lives under conditions of virtual enslavement. The *Factory Acts*[17] which were first enacted in response to their plight at the turn of the last century offer confirmatory and more objective evidence of the causal connection that holds between a person's economic security and the independence which is required to allow her to control the choices which are most central to her life. Those early enactments evinced a clear understanding on the part of the earliest industrial societies which regarded themselves as being governed by a liberal theory of law that the employment relationship was a legal construct, a social artifact which, if not constrained to respect some limits, could effectively undermine the liberty of vast numbers of their members.

Beyond its effect on a person's physical existence and right to life, the absence of any guarantee of access to the means by which

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15. Melden, *Are There Any Welfare Rights?*, INCOME SUPPORT (Brown, Johnson & Vernier, eds. 1981).

16. E. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS (1968).

17. B. HUTCHINS & A. HARRISON, A HISTORY OF FACTORY LEGISLATION (1966).

we make ourselves productive and secure our material well-being could also jeopardize many, if not all, of the other rights traditionally assumed to be integral to the liberal theory of law. Quite simply, as others have already observed, some basic level of economic security, no less than the integrity of one's physical being, seems essential to the enjoyment of all of the other rights which are thought integral to preserving an individual's autonomy. All of our traditional political and civil liberties are, to a significant extent, premised upon and derivative of a more basic right to some minimal physical and economic security. No other rights can be enjoyed if a right to physical and material security is not guaranteed.[18]

Indeed, even if some right to economic security is recognized, unless it guarantees a substantial level of material well-being, we realize that our traditional freedoms and liberties, our political, civil and legal rights, may remain seriously exposed. We concede this in the distinction we draw between liberty and the worth of liberty.[19] The stratification, according to economic class, of involvenment in our political processes; the unequal freedoms of speech which flow from the economic barriers which block access to the modern media of communication; and our disparate capacities to enlist the support of the most expert agents in the enforcement of our legal rights are but a few of the more commonplace, contemporary illustrations of the close connection that exists between a person's economic circumstances and those entitlements which liberals have traditionally accepted as being integral to a person's autonomy. Even the right to contract, the legal authority to engage in acts of private law-making, may be compromised in the absence of secure economic status. Thus, as we have just observed in the example of Sissy Jupe, the failure to recognize any right to economic independence can so affect the process of contract, that even it can become a threat to virtually every aspect of a person's liberty. In the absence of any right to the means by which one nourishes, clothes and houses oneself, a person has so little control over her effective choices that she may be compelled to accept, "agree to," terms and conditions of employment which virtually enslave her.

So it would seem, both from the logic if its own assumptions and from the record of its historical and contemporary experience[20] that the question is not whether a liberal theory will accommodate

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18. *See, e.g.*, H. SHUE, BASIC RIGHTS, Chap. 1 (1980).

19. *See* Daniels, *Equal Liberty and the Unequal Worth of Liberty*. READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE Blackwell ed. 1975); A. GERWIRTH, HUMAN RIGHTS.

20. Discounting life choices to which they cannot realistically aspire, accepting

some right to economic independence, but rather what form such an entitlement should take. The issue is not whether some measure of economic security is integral to the individual's autonomy, but whether such an entitlement can be cast in a shape which conforms to the structure which rights have assumed in this particular tradition of law.

It would seem, in the first instance, that rights of the kind we are considering could not take the form of universal cash grants. Unless we imagined a society in which the condition of scarcity had been conquered, it would simply not be feasible to recognize a right in every individual to a specified level of income.[21] In rights jargon, such an entitlement could not be universalized. A claim to a guaranteed level of income would, if asserted by everyone, jeopardize the very existence of the society. In the absence of environments of abundance, such absolute rights to income, standing by themselves, could only be provided by interfering with and dominating the life plans of the others in society who would be obliged to create the material wealth implied by such claims. In addition, a constitutional guarantee of income would be seriously incomplete. It would not secure the conditions which are essential to the development of our natural, productive capacities. It would not provide access either to the technological resources and scientific achievements which form the material base with which we mix our labour or to the social and communal environment which is integral to the realization of most plans of production. Finally, such rights to a guaranteed income would legitimate and make paramount the choices of the free rider, and in so doing would render unequal and subordinate the liberty of the others in society who would have to sustain her. Such rights would offend the liberal idea of "neutrality" in which no one is entitled to claim that intrinsically or by her conception of life, she is superior to and able to dominate the life choices of others.

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invasions of their physical autonomy and involving themselves less than any other economic group in the regulation of society's affairs all provide strong evidence of the serious prejudice that may be effected to a person's autonomy by being economically insecure. Descriptions of the implications of being poor in contemporary societies which I have found helpful include, W. RUNCIMAN, RELATIVE DEPRIVATION AND SOCIAL JUSTICE: A. STUDY OF ATTITUDES TO SOCIAL INEQUALITY IN TWENTIETH CENTURY ENGLAND (1966); M. HARRINGTON, THE OTHER AMERICA: POVERTY IN THE UNITED STATES (1963); Briar, *Welfare from Below: Recipients View of the Public Welfare System*, 5 CAL. L. REV. 54 (1966); D. ROSS, THE WORKING POOR (1981).

21. A comprehensive statement of economic entitlements entailed by liberal theory would obviously include guarantees of income security for those who, by reason of incapacity or infirmity, could not work. Because of their extra employment dimension, I have not considered accident compensation and pension policies in the body of this essay.

Conceptually, then, a guarantee of a specified level of income would be incongruous in a liberal Charter of Rights because it would fundamentally misconceive the meaning and purpose of the liberties which rights are intended to safeguard. Rather than understanding liberty as defining the conditions which are essential to the status that each of us is entitled to claim as equal moral agents and which thereby constrain the natural freedom of everyone else in society to respect that independence, the kind of entitlement we are now considering would recognize a freedom in some to make choices and pursue their interests in a way which would substantially interfere with the like autonomy of others. In Ronald Dworkin's phrase, a right to income would be premised on an erroneous conception of liberty as a "license" to do as one chooses oblivious of the impact it may have on the liberty and inviolate space of others.[22] By permitting some to require others to make positive provision for their well-being, the liberal ideal of equal liberty, or an equal independence from the ambitions and choices of others, would be sacrificed.

The intrinsic inability of an entitlement like a guaranteed income to satisfy this condition of universality or reciprocity[23] suggests that any right to economic security in a liberal regime of law would need to be attached to and form part of a larger right to labour. To avoid the 'externality' effect of a pure incomes policy, it seems that the liberal right to the economic security, which is integral to the autonomy of the individual, would have to make some provisions for occupational tenure as well as for material well-being. Some formulation of what we might, for convenience, characterize as a right to work at a decent income[24] seems necessary to ensure that the economic security we require to control our most basic choices in life can be provided and

22. Dworkin, *Liberty and Liberalism*, TAKING RIGHTS SERIOUSLY (1978).

23. Apart from their failure to respect the equal liberty of others, rights to a guaranteed income or to a fair share of a community's wealth, suffer a variety of other defects which would be fatal for most adherents to the liberal theory of law. In the first place such entitlements would seem to render its claimants morally dependent upon and vulnerable to the rest of society in a way which would not be true if they could found their claim to economic security on their having met a moral obligation to work. Becker, *The Obligation to Work*, 91 ETHICS 35 (1980). Only in the latter case, where income and labour are joined would an individual enjoy the moral independence, so central to the whole thrust of the liberal tradition, of having provided for herself.

Beyond these fatal weaknesses, for liberals who are also efficiency buffs, rights to guaranteed incomes or fair shares stimulate adverse incentives that seriously prejudice their attractiveness compared to the rights of economic well-being which attach to the employment relationship.

24. In addition to conditions of income and tenure such a right would of necessity also include other factors such as a safe and healthy work environment which

made available equally to everyone in the society. Integrating the requisite economic security in a right to work seems to respect the basic independence each of us is entitled to assert as equal moral agents. By guaranteeing access to the means by which our labour is made productive, each individual could enjoy the conditions essential to her autonomy in a way which respects the equal autonomy of others.

But even if a right to labour at a decent income could satisfy the condition of universality or neutrality in a way which a right to a guaranteed income could not, it still might be argued by those who subscribe to the more classical formulations of liberal theory (or one of their contemporary offspring), that such an entitlement would require society to act in a way which exceeded the "negative" obligations to which liberal rights, on their interpretations, are thought to give rise.[25]

Now in liberal theory, no less than in other legal systems, rights are a distinct legal concept with quite discrete characteristics of their own. Having a right in the liberal tradition of law is to have a legal entitlement of a specific and definite kind. Much has been written about the various characteristics which distinguish rights from other legal forms but the feature which has traditionally been regarded as the most germane to and troublesome for a discussion of economic rights lies in the "positive" obligations to which such entitlements are said to give rise. In liberal theory, rights correlate to duties and to duties of a particular kind. Broadly, the recognition of a right is said to carry with it a correlative obligation on the part of everyone else in the society to respect that right. There is a duty on the part of each of us not to interfere with the freedom or liberty which is entailed by that entitlement. And that is the extent of our duty.

In liberal theory, or at least in its most traditional versions, the idea is that in securing the conditions which are essential to safeguard the autonomy of the individual, rights may only give rise to duties which require the rest of the society to refrain from behavior which would otherwise interfere with those liberties. Liberal rights correlate to duties to refrain from acting in the prescribed ways; they are said not to give rise to an affirmative duty to act and/or to provide. Thus, my duties which would correspond with your freedom of speech or thought are said to involve an obligation on my part (and the rest of society) not to encroach upon or interfere with you in your exercise of those entitlements. My duty precludes me, for example, from

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are equally integral to the physical well-being of the individual. For convenience in this essay I shall simply assume that security of tenure refers to a job which is not dangerous to one's health or safety.

25. A. GUTTMAN, *supra* note 1.

physically obstructing the peaceful expression of your views or from requiring you to espouse or refrain from espousing a particular set of beliefs. By contrast, your liberal rights to the independence of your speech and thought can never require me to provide you with the means by which those freedoms might be enhanced and made even more worthwhile. It is because liberal rights, and the duties to which they correlate, are purely negative that it is said I am not obliged to allocate to you a prime-time television channel or a particularly stimulating ocean-side study—nonwithstanding that you could easily establish that they would enhance, respectively, the worth of the liberty of your speech and your thought.

For these liberals, the idea that rights only give rise to duties to refrain from behavior which would impinge on the independence of others seems to follow directly from the basic ethical starting point of their theory. In their view, if everyone in the liberal society adhered to their obligations and organized their behavior so as to respect the rights of others, everyone would enjoy, equally, the space which was essential to their personal autonomy. Discharging one's negative duties seems to be a sufficient condition to ensure the environment in which the moral premise of liberalism would be secure and could thrive. If, as liberals believe, rights are recognized so as to guarantee that every individual will have an equal space within which she may autonomously control and pursue her interests in life, then simply by respecting those boundaries, by restraining our inclinations to invade the territory of others, we can guarantee the liberal ideal of our equality as moral agents. By everyone equally, but minimally, constraining their own choices and pursuits in life, the ethical end point of the theory, the equal autonomy of each of us can be secured.

Now it would be hard to deny that a right to economic security, which was attached to work, would require some affirmative commitment on the part of the rest of society for its realization. Even rooted in a labour relationship, a right to economic liberty could still be expected to require society to provide opportunities and create institutions in which such an entitlement could be realized. Even if it could be characterized as being universal, it might still be argued such a right to work at a decent income was inherently positive in character.

While it possesses an initial plausibility, the weakness in such an argument lies in its assumption that *any* 'positive' characteristic that can be identified in a putative entitlement would disqualify it from the liberal tradition. Its challenge is predicated on a dichotomy between positive and negative rights which is not nearly as sharp as the argument suggests. In fact, this 'positive' aspect, which is

implicit even in our traditional political and civil rights, does not alter the essentially negative form in which such a right to work would be cast. The allocation of resources necessary to implement or enforce such an entitlement would not interfere with the equality of our liberty any more than it would when directed to the realization of our traditional political and civil rights.

This matter can be approached in either of two ways. On the one hand, we can establish the compatibility of a right to work with even the most cautious versions of the liberal tradition by identifying 'positive' attributes which are part and parcel of all rights which have been recognized by this theory of law. Thus we can observe that because no right or freedom is self-enforcing, not even our traditional rights and liberties to be free from physical or mental coercion, it is entirely misleading to assume or to assert that liberal entitlements only give rise to negative duties to refrain from certain kinds of behavior. In truth even these traditional rights require the members of a liberal society, acting collectively, to allocate significant social resources to ensure that whatever condition or liberty is protected by the right is actually enjoyed by its members. At a minimum[26] even our most fundamental rights and freedoms possess a 'positive' character to the extent they oblige the liberal society to put in place a set of policing and judicial institutions which can ensure such rights are respected and ultimately vindicated in the event they are transgressed. From this perspective, the legislative responsibility which would derive from the entrenchment of a right to work at a decent income would entail the establishment of institutions and programmes of enforcement which would parallel the police, penal and judicial institutions which we create to enforce our traditional political and civil rights. Just as the construction of penal institutions is an obvious way of deterring those who would otherwise be inclined to invade our liberty, so, to require that equal work and employment opportunities be established seems the most efficacious method of responding to those who would, by the rules of social cooperation that they would sanction in the legislative process, deny others the space and resources which are required for their independence.

However, the distinction that may be thought to exist between

26. Indeed, beyond the resources which are expended to ensure compliance with and enforcement of our most traditional freedom, as liberal societies have evolved they have come to understand the necessity of comitting substantial social resources to an elaborate set of policies which provide for legal aid, election expenses, and some equality of access to the modern media of communications in order to enhance and make secure the equality of our freedoms of speech and political participation.

our traditional freedoms and economic rights is not only blurred by the realization that all rights and liberties require some positive expenditure of social resources on the part of society in order to enforce them. In addition, on closer scrutiny, one perceives that the duties which correlate to economic entitlements, or at least a right to work at a decent income, are themselves essentially negative in character. No less than our traditional political and civil rights, a right to work at a decent income seems most accurately described as requiring for its realization, primarily, that everyone refrain from behavior which would otherwise interfere with the liberty of others. Specifically, the most fundamental obligation which seems to correlate with such an entitlement is the 'negative' commitment from everyone to refrain from using society's legislative processes to impose social institutions, such as property or employment laws, that would regulate the labour relationship in a way which interfered with the equal liberty of others. Given the necessity of society choosing some system by which to organize its productive resources,[27] the most basic duty to which a right of the kind we are now considering could be said to give rise, would be the obligation to avoid erecting a legal structure which is at odds with the basic ethical premise which motivates this theory of law. Thus, to revert to an example we have considered above, the obligation which would correlate to a right to work at a decent income would require members of a liberal society to renounce a purely private, contractual process by which to settle its law of employment. Left to its own we have already observed how that legal institution, no less forcefully than physical abuse, can be hostile to, and ultimately destructive of, the liberty and autonomy of others.[28]

So described, the economic entitlement we are now considering could be seen, at its core, to be a right to procedural fairness in the institutions in which these (occupational, economic) conditions of liberty and individual autonomy were defined. Rather than a right against any particular person, a liberal right to work at a decent income would be a claim against the society as a whole and to social institutions and processes of law-making which would enforce these conditions of liberty as fairly and as equally as the society's economic resources would allow. Cast again in terms of the duty that would correlate

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27. As Karl Renner, the Austrian legal scholar, said:

> "No society has yet existed without a regulation of labour peculiar to it, the regulation of labour being as essential for every society as the digestive tract [is] for the animal organism."

K. RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTION 115 (1949).

28. Beatty, *Labour is not a Commodity*, STUDIES IN CONTRACT LAW (Swan & Reiter, eds. 1978).

to such a right, it would be the obligation of every member of a liberal society (and particularly when joining organizations primarily concerned with matters of labour relations, e.g. trade unions) to advocate and work towards establishing institutions which would settle the substantive law of labour relations according to procedural principles so pure that they would ensure (so far as it is possible) that their legislative output, and particularly the rules pertaining to a person's security of tenure and income, would be legislatively just.

Characterizing the right to work at a decent income as being, ultimately, a right to procedural fairness in the processes by which such conditions of liberty are settled, brings us back full circle to our discussion of the techniques of legislative justice that have traditionally been relied upon in liberal regimes of law. At a minimum, it suggests that the legal processes by which the law of labour relations, including the central matters of security of tenure and income, is enacted must conform to the procedural principles we require of all democratic institutions. Translated into the terms we considered in the last section, it would mean that a liberal law of labour relations would emphasize the individual's independence from and participation within the processes which defined, in substantive terms, those conditions which are essential to that person's most basic aspirations as a producer. Like the public law-making processes with which we are most familiar, a liberal law of labour relations would be highlighted by a set of entitlements which ensured equal participation within, as well as equal respect from, the institutions through which society settled upon these basic conditions of liberty.

Paralleling our traditional civil and political liberties, to respect our moral equality as autonomous persons, limits and rules which govern the liberty of the individual to be productive would themselves be premised upon this common aspect of our humanity rather than on how much property (real, personal or genetic) we possess or on how valuable the marginal product of our labour is. By ensuring that the principles which govern the local, private processes of making the law of employment (e.g., collective bargaining) are themselves sensitive to and respectful of this equality of personhood (are, in Rawlsian terms procedurally pure) we could be confident that the resulting terms and conditions of employment, which define the details of economic security, would be equally protective of the autonomy of everyone.

Of course, the substantive content of the principles of procedural justice which define a liberal law of labour relations and its central principle of a right to work at a decent income, would not be precisely the same as those which characterize our existing democratic

law-making institutions. Necessarily, the limits which would constrain the subordinate law-making processes by which the terms and conditions of economic security are actually settled would, in substance, relate to economic matters of occupational tenure and material well-being rather than to the security of our physical persons or private thoughts. But in structure and in its principles of participation, the analogy seems valid. Thus, like our most general constitutional procedures and theories of legislative legitimacy, one would expect a right to work at a decent income, in particular, and a liberal law of labour relationships, in general, to be hierarchical in structure. The principles pertaining to security of income and employment, such as minimum wage legislation, which would act as constraints on the local subordinate law-making institutions (such as contract or collective bargaining), would themselves be the product of independent and more senior legislative institutions. Like our civil and legal rights, these conditions of minimal economic security would serve to protect against the tyranny which is the potential of all legislative processes, however local or private they may be.[29] Standards of employment pertaining to discharge, lay-off, retirement, minimum wages, pensions, etc., which would establish and guarantee the pre-conditions necessary for an individual to remain in control of her life, would serve as the framework, the constitutional limits as it were, to which the local law-making institutions would have to conform.

Within that framework more local and personal law-making institutions (contract, collective bargaining, etc.), would settle the actual details of economic well-being to be enjoyed by each individual. Within these subordinate "private" legal processes, one would expect the rules of participation to conform in all material respects with those which characterize all of our democratic institutions which have the potential and the power to encroach unequally on the liberty of those whose lives they regulate. In our own societies, the rules under which individuals would participate to settle the terms and conditions by which each exercises the liberty to the productive, would be expected to conform to the principle of one person-one vote. Regardless of how superior she believed herself to be, or how much more significant she thought her plan was, no one would be able to assert that she should count for more than others in the process by which the terms of her occupational ambitions and economic security were fixed. It would not be consistent with the liberal postulate for this subordinate legal institution to exclude some individuals from participating in the resolution of the material well-being which most of us derive from our labour relationships. Such an institution could not tolerate a principle by

29. *Supra*, note 2.

which some, but not all, could participate in settling the rules on which individuals could be laid-off or discharged or retired. To the contrary, on the liberal premise that each of us is an equal moral agent, the relevant characteristic for participation in the law-making institutions which defines our productive liberty would be personhood, and the distributive principle which conforms with that feature is equality. In this respect, as in its overall, multi-tiered structure, the liberal law of labour relations and the right to economic security to which it would give rise, would mirror closely the principles and techniques of procedural fairness which govern our most general legislative procedures.

IV. THE ROUTE TO A LIBERAL LAW OF EMPLOYMENT: COLLECTIVE BARGAINING OR INDUSTRIAL DEMOCRACY?

If, as I have argued, it can be established that a right to work at a decent income would be a central constitutional principle in a society which professed to be governed by a liberal theory of law, and that such a right would, consistent with the traditional structure and methodology of that theory, be essentially procedural or institutional in form, then we are now in a position to move on to the ultimate objective of this essay and assess the strength of our own commitment to the liberal ideal. We have in hand the tools which will allow us to explore, at each stage of the employment relationship, the principles and processes embodied in the various pieces of labour legislation we have enacted and to determine to what extent we have satisfied our collective responsibility to organize our social system in a way which respects the right of every member of our society to the conditions on which their liberty depends. Such an analysis will also enable us to anticipate the alternate policy choices available to ensure that the legal institutions which we erect to house our work relationships conform as closely as they can to the liberal mould.

Certainly both in the structure and subject matter of our law of employment it is not difficult to spot the influence of the liberal theory. Even a casual perusal of those laws reveals the broad division which we earlier identified as being characteristic of the liberal method of social justice; between on the one hand, standards legislation, touching a variety of incidents of economic and occupational security and, on the other, procedural rules intended to ensure that individuals can participate more equally in the private, local law-making processes where the detailed terms and conditions under which they must labour are settled. Thus, in the laws which prohibit discrimination in the hiring and employment of persons, stipulate

minimum wages and maximum hours of work, establish minimum periods of maternity leave, require the health and safety of employees to be protected, promote the sharing of available work, and guarantee that no one may be dismissed without just cause, all of which are now recognized to varying degrees in Canadian if not American labour legislation, we can identify a set of equal entitlements available to virtually[30] all workers. These do provide some measure of security of occupation and income which, as we have observed, would be integral to any right to work at a decent income as recognized by a liberal theory of law. Moreover, as laws of general application, they envelop and constrain the outcomes of the private, local law-making processes in a hierarchical structure which parallels the relationship we identified earlier in liberal theory between rights and public expressions of the legislative will. In the same way that rights limit the authority of the legislature to interfere with our autonomy and liberty, these pieces of standards legislation impose constraints on the outcomes which are permissible in the local, private law-making processes of collective bargaining and contract. Concurrently, collective bargaining statutes can be viewed—and indeed are justified by supporters—as an attempt to enfranchise those workers who, like Sissy Jupe, are unable to participate meaningfully in the ordering and regulation of their (working) lives through a process of private contract. Collective bargaining, like universal suffrage, is intended to be a legal instrument through which individuals may participate more nearly as equals in the governance of their (working) lives.

But while the influence of the liberal theory and method of legislative justice can, not surprisingly, be seen to have permeated the system of employment laws we have erected to govern our working relationships, on closer scrutiny it is startling to see, in substantive terms, how seriously imperfect and incomplete our commitment to the liberal ideal really is. At each stage of the employment relationship, the laws we have brought forth to regulate our interaction as consumers and producers fall short of the institutions and principles which would be required to enforce, and thereby respect the conditions an individual requires to remain independent and autonomous. In some fundamental respects, the basic legal regime we have enacted to govern an individual's entry to, involvement within and termination from an employment relationship seems to undermine

30. It is not uncommon for standards legislation to deny certain occupational groups the benefits of their terms. Two groups which seem most consistently prejudiced by such discrimination are domestic and agricultural workers. Employment Standards Act, 137 Ont. Rev. Stat. (1980); and in particular Ont. Rev. Regs. §§ 283, 284 (1980).

the promise of equality of liberty which drives the liberals' definition of legislative justice. At each phase of the employment relationship, an agenda of reform to secure that equality confronts the legislator who takes seriously her responsibility to fashion rules of social cooperation in accordance with the liberal theory of law.

Curiously, given how relatively late in the day the issue seems to have come to our attention, it is at the hiring state where, as a society, we seem to have come closest to putting in place laws which reflect and give effect to the idea which underlies the equal right of every person in the community to work at a decent income. Recognition of our equality as self-interested, self-governing choosers of the ways we shall act out our lives seems, at a minimum, to entail a commitment to equalizing access to the means by which those choices can be realized. It is not surprising then, that in all jurisdictions it is now unlawful for any person—property owner or otherwise— to deny another an opportunity to work because of any of a long list of (prohibited) reasons which, with some notable exception[31] is quite exhaustive. Human rights and employment standards legislation guaranteeing individuals an equal opportunity to be considered for a vacancy only on factors or criteria relevant to the nature of the position seem to be the most obvious, simplest and most straightforward derivation of legislative policy from the principle that we have a social obligation to respect a right in all members of the society to work at a decent income. It is perhaps to be expected then that (ultimately) our commitment to liberal theory seems the strongest at this entry phase of the employment relationship. Ironically, it is perhaps to our embarrassment that recognition of the principle of non-discrimination, of equal opportunity employment, came so late in the day which explains why, in a rush of confused enthusiasm to right past wrongs, we have sanctioned a set of policies, known colloquially and constitutionally as affirmative action programmes, some aspects of which seem positively hostile to the liberal ideal. Laws which sanction strong affirmative action, in the sense that it is permissible for one individual to be selected for employment over another, all other things being equal, simply in virtue of sex, race, ethnic origin, residence, etc., do not seem to fit comfortably with the liberal idea of neutrality. Except in those cases where past privations may have precluded a fair competition for available opportunities by particular

31. Sexual orientation is perhaps the most publicized ground on which it is not unlawful to discriminate between individuals in the distribution of work opportunities. In some jurisdictions equality is achieved by an omnibus provision which prohibits discrimination in hiring or employment on any ground not relevant to the job. British Columbia Human Rights Code, 186 Brit. Col. Rev. Stat. § 8 (1979).

members of a discriminated group,[32] strong affirmative action programmes which are contemplated and sanctioned in human rights legislation, seem to offend the liberal ideal of treating neutrally, viz. equally, the freedom of every individual to choose and pursue the opportunities most central to their lives. In liberal theory, discrimination in hiring, in the sense of distributing work opportunities on criteria and factors not relevant to the job, seems to offend the commitment to equality of liberty regardless of whether the direction in which it is practiced is forward or reverse. Unless jobs are stipulated to serve social purposes independent of providing access to the means by which an individual's labour is made productive and autonomy is secured, such programmes seem to undermine the idea of equality implicit in the right to work at a decent income.

While the apparent divergence between our laws of hiring and the liberal ideal of equality of liberty might be explained as an overly enthusiastic, if ultimately a wrongheaded, attempt to right earlier lapses in our commitment to the liberal principles of justice, no similar account can be made for the employment laws which our legislatures have enacted to govern the interaction of individuals once they are employed. Both standards legislation, which defines the minimum terms on which individuals can work, and the collective bargaining statutes which specify the (legislative) processes by which the particular rules and regulations of each work place are settled, seem to reflect deliberate choices on our part to stop well short of the requirements of liberal theory. Both of these legal instruments do far too little, rather than too much, in translating the ideal of equality of liberty into the rules which actually govern our work communities. The standards we have generally adopted to ensure that all workers have an adequate and fair level of material well-being provide the most obvious example of the gap between our laws which regulate the activity of work and the liberal ideal. For example, minimum wage laws, which are not universal in scope and which guarantee levels of income close to or even below the generally accepted definitions of poverty do not provide an environment in which significant choices of personal lifestyle and ambition, let alone options to participate in the governance of the community, can meaningfully be contemplated. Similarly, public standards which guarantee equal pay for equal work are notorious for their tolerance and protection of occupational ghettos in which inequalities in the well-being and renumeration of individuals are predicated on factors as irrelevant and (in this context) as invidious as sex.

32. Sher, *Justifying Reverse Discrimination in Employment*, 4 PHILOSOPHY AND PUBLIC AFFAIRS 160 (1980).

Standards legislation, such as the above, may provide the most dramatic illustrations of our failure to respect the principle of an equal right of every member in our society to work at a decent income. However, it is the contemporary collective bargaining models upon which we rely to flesh out the detailed terms and conditions of employment in the work place, which seem most inconsistent with and prejudicial to the equality that liberals insist holds among individuals. In essence, as I have described in an earlier essay[33] collective bargaining rejects as the relevant criterion for defining the rules of participation in the processes which settle the law of employment, the fact that each individual, as a moral agent, has an equal concern in her autonomy and therefore an equal interest in involving herself in formulating the rules within which she must pursue her choices. To the contrary, in collective bargaining, what counts as the currency of participation is what kind of person you are, or, more accurately, were born to be. What counts, and counts profoundly, are the social circumstances in which one is born, the inheritance of a particular economic status[34] and the locational[35] or occupational setting in which one exerts one's labour. It is those factors, and in particular the endowments which one inherits, rather than the equality of our personhood, which, in the processes of individual and collective bargaining, are made the relevant bases on which participation in the legislative institutions of employment are determined. By organizing and channelling an individual's participation into groups, into "bargaining units" which recognize and indeed are defined against distinctions in our occupational identities and in the endowments we have inherited,[36] the process of law-making by collective bargaining ensures that involvement on a whole range of issues essential to our economic security and ultimately to our autonomy as moral agents will be stratified and highly unequal. Issues of hiring and firing, work assignments, election of supervisors, technological change and the layoffs they cause, wages, supplemental health and welfare benefits, and pensions are all settled in a legislative process in which those who are already the most privileged in their genetic and hereditary inheritances and in their occupational and industrial location have the most say.

Segregated into discrete, highly decentralized institutions of lawmaking (bargaining units) which are drawn against what are in vital respects highly arbitrary features of their birthright, doctors, univer-

33. Beatty, *Ideology, Politics and Unionism*, STUDIES IN LABOUR LAW, (Swan and Swinton eds. 1983).

34. J. A. BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS (1977).

35. *Supra*, note 33.

36. *Supra*, note 33.

sity faculty (and some times librarians) and engineers can and do participate in the processes of settling the terms of those economic preconditions to their liberty and autonomy in a way which is quite literally beyond the competence of their fellow workers who toil as orderlies, cleaners, and support technicians. In a manner which is characteristic of all market, nondemocratic institutions, whether individualized or collectivized, our own model of labour relations, in its rules of participation, invoke a principle of weighted voting in which individuals are enfranchised according to the value of their economic inheritance, rather than by virtue of their equality as moral agents. As I have earlier summarized the essential ingredients of this theory,

> Native abilities, parental instruction, tangible and intangible inheritances, the natural inequalities which are assumed away in moral theory, become crucial in determining whether an individual will be successful in securing rights which are distributed by the market. In this sense, like the feudal model which preceded it, a market system of allocation of labour represents, ultimately, a system of rights founded on birthright. Just as feudal law and custom determined that a person's status and identity were wholly fixed by the class into which he was born, now the theory of the labour market, expressed in our common law of employment, ensures that our natural endowments, bequeathed at birth and developed in the early, formative years will indelibly affect the fundamental rights that each of us will acquire to realize our own life plans. In such a system it is to the best and the brightest, the strong and the powerful that the market will distribute such rights of participation and development. Contrariwise, for those whose skills are in common supply and for whom employment is the only institutional setting in which they can make use of their property, the market proves miserly in its distribution of these rights.[37]

Moreover, it is not just the case that collective bargaining models fail to treat individuals as equals in their ability to participate in the decision making processes which generate the rules and regulations which govern their (working) lives. On the contrary, there is a whole range of issues on which, for all but the most elite workers, collective bargaining is unable to ensure any participation at all. Grounding rights of participation on the economic determinants of a group's bargaining power has meant that there exists a whole set of planning

37. *Supra*, note 28.

issues, pertaining to prices, products and investments, which is commonly accepted as being an inviolable part of management's prerogatives and on which virtually no employee is able to assert her interest. In terms of public law, it is as if we have gone back to colonial times for our principles of decision making in our employment relationships and invoked a theory of responsible government in which the legislatures and their electorate are obliged to defer to some elite or ruling compact on a range of issues as basic as the very definition of membership in the workplace. As a system of law-making which sanctions the creation of a managerial class such as exists, with some notable exceptions[38] in our work communities, which is neither chosen by, nor accountable to the persons (employees) they supervise, the principles of collective bargaining must be seen to be inadequate to the task of ensuring or enforcing for all workers an equal opportunity to participate in the institutions and processes which determine the rules according to which the most basic aspects of their competing ambitions must be formulated and reconciled.

The institutional afflictions which cause our standards and collective bargaining legislation to fail to respect the equal right of every member in a liberal society to work at a decent income suggest an agenda of remedial legislation to repair the breach between the actual and ideal. To make credible our claim of commitment to a liberal theory of law as the organizing device of the basic structures of our society, standards would have to be promulgated which would ensure every individual a level of economic security adequate to permit meaningful aspirations beyond the most basic patterns of survival. To respect our commitment to the equality of an individual's liberty, including political and civil liberties, standards closer to our average industrial wage rather than poverty-line incomes would seem to be required.[39] Similarly, if equal pay for work of equal value is a principle integral to a person's equal right to work at a decent income[40] then such standards and even more broadly defined principles of job evaluation[41] and income distribution (as well as processes such

38. For example, in our universities and professional societies.

39. There would certainly be considerable room for debate about where precisely the floor should be set. One method, which recognizes the relativity of the concept of poverty, would be to establish a fixed ratio between it and an income ceiling in the society. Contemporary adherents of the approach, which can be traced back to the writings of the ancient greeks, include L. THUROW, THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITY FOR ECONOMIC CHANGE (1980) and also Fried, *Is Liberty Possible?*, 2 TANNER LECTURES ON HUMAN VALUES 272 (1981).

40. In the most fundamental sense of that term it would be "indecent," all other things being equal, to pay work of equal value (however value is defined) at different rates of pay.

41. For a discussion of the difficulties experienced in Great Britain in im-

as compulsory arbitration by which such principles may be applied)[42] would figure prominently in a legislative agenda committed to the liberal ideal of equality.

Paralleling such alterations in the standards, which, as described, would act as limits upon the private, local law making processes, fundamental reform of the principles and structures of collective bargaining would also be required to respect the equality which in liberal theory holds between individuals.[43] Bargaining structures and definitions of bargaining units would have to be radically altered and expanded to allow for much broader, more egalitarian means of participation. Requiring Labour Boards to ignore skill, education, experience and location in defining bargaining units, to certify bargaining units beyond single enterprises, and to amalgamate or merge separate units into larger bargaining structures[44] would enhance the liberal ideal by ensuring that the individuals would be able to participate more as equals in the formulation of the rules and regulations on which their right to work will be exercised. Additionally, to ensure that all workers could participate in the resolution of the full range of issues which materially affect their autonomy as producers, decision making structures and procedures would seem more appropriately cast in a collegial rather than adversarial mold. Replicating the rule-making institutions that currently govern our academic institutions, replacing the managerial exclusion with principles of accountability and responsibility to the persons they govern would guarantee all employees some (indirect) influence on a range of personnel and planning issues such as hiring, promotions, production processes, termination and technological change. As we have observed to date, collective bargaining has proven itself incapable of providing most employees with anything more than the most attenuated influence on any of these issues.

So far we have reviewed the inconsistencies that exist between the laws we have chosen to govern the basis on which individuals may enter and be involved in a work relationship and the liberal idea of equality of liberty. We have also sketched in broad, structural terms

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plementing a broad, public scheme of job evaluation, see K. SWAN, *Apples and Oranges: Comparability as a Criterion of Interest Arbitration*, INTEREST ARBITRATION (J. Weiler, ed. 1981).

42. Which would make the Australian model a rich and relevant source of information for our policy makers.

43. For a more comprehensive description of the respects in which our model of collective bargaining structures *see supra*, note 27.

44. In British Columbia, the Labour Board has been given some authority to amalgamate bargaining structures. See Labor Code of British Columbia, 212 Brit. Col. Rev. Stat. § 57 (1979).

the sorts of changes which would have to be made to reconcile the acutal with the ideal. It should not be surprising then, when we turn to the final stage and examine the principles which govern the circumstances in which such relationships can be terminated, to find current legal principles are amenable to a similar analysis. Indeed, the most significant difference appears to be that whereas in the law governing the earlier stages of the employment relationship, misguided enthusiasm and moral insensitivity may have caused the legislature to make imperfect policy choices, the inadequacy and failure of our law of termination to conform to the liberal ideal of justice stems mainly from an apparent unwillingness to act; from a kind of collective moral indifference to the liberal ideal. While an employment relationship is no longer strictly at will, there is, nevertheless, essentially no statutory restriction on the termination of employment beyond the principle of non-discrimination and the payment of limited compensation.

The moral void which characterizes this aspect of the law governing our employment relationship is virtually absolute. There has been almost no legislation enacted to constrain and require the private law-making processes to respect even the most rudimentary expressions of the occupational security which we have seen to be so central to individual autonomy in an industrial society. Thus, the vast majority of legislatures[45] have not even provided the occupational security (which is enjoyed by those having tenure) of immunity from dismissal in circumstances in which there is no just cause, viz., legitimate reason, to terminate the relationship. Indeed, even those jurisdictions which do respect, to this limited extent, the principle of an equal right to work have failed to extend it to ensure that newly hired employees have a fair opportunity to demonstrate their suitability for employment in a period of probation. More meaningful concepts of occupational security, (which are recognized by other industrial societies), such as lifetime employment or the assurance of being transferred to or trained for suitable, alternate employment,[46] are not even part of the legislative agenda. Indeed, even legislative initiatives of the (Humphrey-Hawkins) *Full Employment and Balanced Growth Act* (1976) sort, in which, at least as it was originally proposed, society at large, rather than specific (property-owning) individuals, collectively

45. The most notable exception is Canada Labour Code, Can. Rev. Stat. § 561.5 (L-1) (1970) (as amended) in which employees with seniority in excess of one year are given this entitlement.

46. A concept which, as our experience with one of the entitlement sections of the Unemployment Insurance Act makes plain, is easily operationalized. See C. CHOATE, UNEMPLOYMENT INSURANCE ¶ 186 (1982).

discharges the responsibility which correlates with a commitment to respect each person's equal right to work, have not stimulated any legislative conscience to act. No legislature has yet made the obvious and direct derivation that society itself must accept the responsibility of being the employer of last resort if it is to discharge its obligation to construct a social and economic system in which everyone's equal right to work is respected. Indeed, on the rare occasions when a legislature has addressed the issue of occupational tenure, as in the case of work-sharing arrangements (which seem most in keeping with the liberal commitment to an equal right to work), its enactments have been largely experimental, purely voluntary[47] and on occasion positively discouraging.[48]

A community which took its commitment to liberal theory seriously would cause its legislators to enact legislation securing all of these principles—just cause for termination, work sharing (including mandatory retirement), responsibility for retraining and replacement, and in the last resort, guaranteed employment.[49] There would be no reason, in theory, not to. All of these legislative initiatives would make secure the economic conditions which are prerequisites to our autonomy and all of them are well within the liberal's principles of legislative legitimacy. The legislative agenda called for by such proposals is substantial (particularly when they are added to the prescriptions which would be required to legitimate our laws governing hiring and involvement within the employment relationship). Many of the amendments would fundamentally alter the structure of decision making in our enterprises (in effect by democraticizing decision making in the workplace). However, it is important, in the context of our earlier discussion about the nature of rights, to observe that with the exception of the principle of guaranteed employment none of the required legislative activity by which liberals would collectively satisfy their obligation to respect the equal (productive) liberty of everyone in the society would involve expenditures beyond the traditional policing and adjudicating costs (e.g., human rights commissions, labour and arbitration boards) associated with all of our political, civil,

47. See, e.g., Unemployment Insurance Act, Can. Rev. Stat. § 537 (U-2) (1970) (as amended).

48. Constitutional guarantees and Human Rights legislation have rendered of dubious validity some mandatory retirement schemes which, from the liberal theory of employment relations, seem to be crude but essentially legitimate applications of the principle of equality.

49. Principles such as just cause and mandatory retirement make it clear that a right to work is not an absolute, permanent entitlement. It is a right to an equal share of available work and not a right to work all the time to the exclusion of others or in a way which imposes external costs on one's fellow employees.

and (proposed) property rights. As I earlier argued, even legislation of the Humphrey-Hawkins sort ought properly to be seen simply as authorizing the construction of an (appropriate) institution of enforcement to deal with those who refuse, in their control of the legislative process, to respect the liberty of others. In the same way that we build institutions of incarceration to protect ourselves against those who would trespass on our physical integrity, guaranteeing employment seems the appropriate means to safeguard ourselves against those who might otherwise take away or intrude upon the means and conditions of our existence. In the same way in which courts can and do require municipal legislatures to enact educational policies (e.g., integration plans) to conform to a constitutional commitment to equal protection of the laws, so it would be natural and legitimate for them to exercise a similar supervisory mandate to insist on the integrity of the legislation we enact to regulate our labour relationships.

Nor can it be argued that such an entitlement in employment is not a legitimate candidate within a liberal Charter of Rights because of its encroachment on the property rights of others. While it is apparent that the entire remedial programme we have surveyed would entail a substantial constraint on the existing rights of property holders, as we earlier observed, those latter entitlements must themselves respect and give way to what, in liberal theory, is the more fundamental and deeper concern for the equality that holds between individuals in their liberty, their freedom, to organize their lives as they best see fit. Rather than undermining the legitimate claims of property owners, all of the policy prescriptions entailed in a liberal regime governing entry to, participation within, and termination from, the economic communities where we exercise our labour would stipulate the conditions on which such rights could themselves be legitimately recognized. In effect, by ensuring that property rights would only be entrenched on terms which respected and secured the conditions on which everyone's autonomy, their liberty, is predicated, the legislative agenda which is entailed by a right to work would serve as our recognition and satisfaction of the "Lockean proviso." That is, it would ensure that "enough and as good" (industrial) property as is essential to the independence of a person, would in fact be left over for her. Fully developed, a liberal law of employment and the constitutional commitment it entails would ensure that any constitutional recognition of rights would, like rights we enjoy over our own person, respect the conditions which are essential to the liberty, the autonomy, of everyone else.

V. CONCLUSION

In this essay I have endeavored to derive the broad, structural features of what I have characterized as a liberal law of employment. The premises common to the liberal tradition of law, and empirical observation of the central importance of work and employment to the independence of our existence argue, in my view, for the entrenchment in our constitutional documents of what I have characterized as a right to work at a decent income. Enshrined in a Charter of Rights, such an entitlement would give rise (as do all rights in a liberal theory) to an obligation on the part of society, and particularly those to whom it delegates authority to enact rules of social interaction, to create legal institutions, processes, and principles through which such a right would be enforced.

The impact of such a programme of legislative reform could be profound. The revisions to our current employment relation legislation that are entailed by the entrenchment of a right to work would fundamentally narrow the domain in our lives in which property rights are permitted to constrain the reach of the liberal precepts of equality and justice. The potential exists for a system of employment relations in which each of our competing ambitions as producers is resolved in a process in which fairness and reason, rather than privilege and combat, prevail. Indeed for some liberals, the expectation would be that the security and independence that would be achieved in the democratization of the workplace would stimulate participation in the social regulation of the community as a whole.[50] By ensuring that everyone is secure in the basic conditions essential to controlling their productive development, industrial democracy could make the active participation of every person in the general affairs of society, the equality of our liberty, a distinguishing characteristic of our communities.

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50. C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).