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#### The History of Right to Work Claims

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THE HISTORY OF RIGHT TO WORK CLAIMS\*

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## CONTENTS

Introduction .....	3
The Historical Roots of Right to Work Claims .....	5
Fourier .....	7
1789 .....	9
1848 .....	12
Socialist Views After 1848 .....	14
Twentieth Century Communism .....	17
The New Deal .....	21
Sweden .....	24
Recognition of the Right to Work in International Human Rights Law .....	28
The United Nations Charter .....	29
The Universal Declaration of Human Rights .....	31
The International Covenant On Economic, Social and Cultural Rights .....	33
The Nature of Right to Work Claims .....	35
The Political Legitimacy of International Human Rights Standards .....	38
Conclusion .....	42
References .....	43

## THE HISTORY OF RIGHT TO WORK CLAIMS

### Introduction

In his 1944 State of the Union message to Congress,<sup>1</sup> President Franklin Roosevelt invoked a comparison between the broad natural rights proclaimed in the nation's Declaration of Independence and the more limited set of positive rights protected by the United States Constitution. He suggested that the latter were inadequate to secure the former. America had achieved its present strength, he said, "under the protection of certain inalienable political rights." These were "our rights to life and liberty," he argued, but they did not assure the American people "equality in the pursuit of happiness." The realities of modern economic life have taught us, he urged, that a "second Bill of Rights" is needed so that "security and prosperity can be established for all--regardless of station, race or creed."<sup>2</sup>

The list of entitlements comprising President Roosevelt's proposed "second Bill of Rights" began with "[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the nation."<sup>3</sup> The attraction of this idea to a population that had just emerged from the

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<sup>1</sup> Franklin D. Roosevelt, "Message to the Congress on the State of the Union" (Jan. 11 1944), reprinted Rosenman (1950, vol. 13, pp. 32-42).

<sup>2</sup> Ibid., pp. 40-41.

<sup>3</sup> Ibid., p. 41.

Great Depression (and currently was experiencing full employment) is obvious.<sup>4</sup> Even the Republican candidate for President in 1944 took the position that government had an obligation to create job opportunities when needed to ensure the availability of work for all.<sup>5</sup> But the claim that society has an obligation to ensure the availability of adequately paid employment for everyone who wants to work has much older roots than President Roosevelt's State of the Union Message, and the popularity of the idea has endured in periods with much more conservative political tendencies than the New Deal Era.<sup>6</sup>

In this paper I review the history of right to work claims, concluding with a discussion of the recognition afforded the right under international human rights agreements promulgated since World War II. My purpose in reviewing this history is to encourage further study of efforts to secure the right to work, arguably the most elusive to achieve of all the individual entitlements afforded wide recognition in modern conceptions of economic and social human rights. Governments may not do an adequate job of securing individual rights to such things as food, clothing, shelter, medical care, and education; but few would deny that real progress has been made towards achieving those goals in the past 50 years. Progress in combating involuntary joblessness has been much less apparent. Although unemployment rates have been less volatile in the United States during the second half of the twentieth century compared to the first, and we have avoided deep depressions like those we experienced in the 1890s and 1930s, median

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<sup>4</sup> The unemployment rate for the United States averaged 18.8 percent from 1931 through 1940. In 1943-1944, it averaged 1.6 percent. See U.S. Department of Commerce Bureau of the Census (1975, p. 135, Series D-86).

<sup>5</sup> See Bailey (1950, p. 42).

<sup>6</sup> See Harvey (1989, pp. 4-5).

unemployment rates have been higher since 1945 than they were during the preceding half century.<sup>7</sup> If the right to work is to be secured, better means of reducing involuntary joblessness will have to be found in the future. Studying the history of right to work claims is one way to remind ourselves of the importance of this task.

### The Historical Roots of Right to Work Claims

The claim that all persons have a right to employment which governments have a duty to secure has deep historical roots, but it has flowered only occasionally. While focused research would probably uncover many more traces of it in the historical record than I have been able to identify, its presence does not loom very large. The idea has never figured prominently in the work of mainstream political philosophers, and it has only rarely played a conspicuous role in major historical events. Nevertheless, as noted above, the claim appears to enjoy broad popular support. This is curious. How has a claim with such a low historical profile achieved such wide support? To further complicate the picture, practical initiatives designed to secure the right have generally provoked bitter controversy. How has a claim capable of provoking such controversy achieved such broad acceptance?

Part of the secret of the claim's popularity surely lies in its close relationship to a moral judgement that is almost universally affirmed, namely, that people should work, be productive, contribute to the common store from which humanity draws its subsistence. This is an idea that finds acceptance across the ideological spectrum. It is expressed alike in God's judgement of

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<sup>7</sup> See Harvey (1989, pp. 14-15).

Adam -- "In the sweat of thy face shalt thou eat bread"<sup>8</sup> -- and in the Communist Manifesto's recognition of the "[e]qual obligation of all to work."<sup>9</sup> It is an idea that almost no-one contests except as a form of protest against social institutions deemed unworthy of support. What is more natural than to recognize a person's right to do what is so widely viewed as an obligation? It is a right that most people will affirm whether or not they have been so advised by philosophers or politicians. In short, acknowledgment of the right is supported by widely held feelings of social obligation and fair play.

This obviously helps explain the broad visceral appeal of the right to work idea. Ironically, it also helps explain why more specific claims for recognition of the right to work are likely to be controversial. Since it is so widely acknowledged that everyone is owed an opportunity to be self-supporting, an assertion that people are being denied that opportunity tends to be seen as a very damning indictment of society. Defenders of the existing order (whether motivated by self-interest or ideological conviction) are loath to admit the validity of such an allegation precisely because the imperative to alter existing institutions would be so great if the failing were acknowledged. An aggressive defense of the status quo is therefore offered. On the other hand, those who believe that people are systematically denied the chance to earn a reasonable livelihood are prone to advocate radical correctives. A high stakes battle over social policy, and possibly the very structure of society, is the usual outcome, as the following summary of the history of right to work claims amply demonstrates.

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<sup>8</sup> Genesis 3:19.

<sup>9</sup> Marx and Engels (1955, p. 32).

## *Fourier*

Charles Fourier (1772-1837) is commonly credited with having first used the term "the right to work."<sup>10</sup> A utopian reformer, his view of the right was an expansive one. He viewed it as more than a right of access to adequately remunerative employment. Presaging the findings of modern research concerning the role of work in promoting the psychological and social well-being of individuals, Fourier believed the right to work included a right to enjoyable work in a succession of occupations carried on in the company of friends.<sup>11</sup>

The justification he offered for recognizing such an entitlement paralleled the natural rights claims of classical liberalism, but with a decidedly different focus. Fourier was not concerned with the rights that individuals supposedly reserve when they enter society, but with the substantive obligations that society should be seen as assuming towards its individual members. Specifically, he argued that in a state of nature everyone had seven natural rights. Four of these -- the right to hunt, to fish, to gather food, and to pasture animals -- were rights to derive a subsistence from nature's bounty through work carried on in free association with others. It was society's obligation, he maintained, to provide its members equivalent opportunities.

To equal nature's bounty you must give us at least what it gives to the savages and the wild animals, a job which pleases them and to which they have become accustomed during the course of their lives, a job with creatures whose society suits them.<sup>12</sup>

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<sup>10</sup> See, e.g., Mayer (1985, p. 226).

<sup>11</sup> For a summary description of Fourier's life and writings, see Beecher and Bienvenu (1971, pp. 1-75).

<sup>12</sup> Fourier (1968, vol. 12, p. 625).



Fourier was well aware of the differences between his discussion of natural rights and that of earlier writers. His recognition of the right to work was associated with express denunciations of what he perceived to be the inadequacies of classical liberalism. He refused to debate the "renewed reveries of the Greeks, these Rights of Man that have become so ridiculous."<sup>13</sup> He believed that such debates merely diverted attention from the real source of civilization's failure.

Our social compacts are utterly unable to provide the poor man with a decent level of subsistence consistent with his education. They cannot guarantee him the first of the natural rights, the RIGHT TO WORK!<sup>14</sup>

Politics extol the rights of man and do no guarantee the prime and only useful right, the right to work.<sup>15</sup>

The first task of politics, he maintained, was "to find a new social order that insures the poorest members of the working class sufficient well-being to make them constantly and passionately prefer their work to idleness and brigandage to which they now aspire."<sup>16</sup>

A true Utopian, the means proposed by Fourier to achieve this end involved a total reorganization of society. Nothing less would do. A categorical repudiation of existing social institutions was needed. Society's faults could be corrected only by rebuilding it from the ground up. The right to work could be secured, in his view, only with the establishment of a radically different social order.

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<sup>13</sup> Quoted in Mayer (1985, p. 226).

<sup>14</sup> Ibid, p. 624.

<sup>15</sup> Quoted in Mayer (1985, p. 226).

<sup>16</sup> Ibid.

1789

Although Fourier may have coined the phrase "right to work," he was by no means the first to suggest that work is a fundamental entitlement which society has a duty to secure for its members. The claim behind the slogan was advanced during the French revolution by a number of people representing various tendencies on the left. Jerome Petion de Villeneuve -- a leader of the Girondins who served as Mayor of Paris and President of the Convention before falling victim to the Terror -- was an early exponent of the idea. During the 1789 National Assembly debates that led to the Declaration of the Rights of Man, he proposed that a right to subsistence be recognized which could be secured through the provision of either land or work to the able-bodied and direct grants to those unable to work.<sup>17</sup> Francois Noel "Gracchus" Babeuf, later executed for his role as a leader of the so-called conspiracy of equals, picked up the idea from Petion and actively promoted its adoption in the early years of the revolution before he embraced communism. In a pamphlet published in the spring of 1790 he wrote that "Each citizen ought to have an assured existence, be it from the revenue from his properties, be it from his labor and his industry. And if infirmities or misfortunes reduce him to misery, society ought to provide for his subsistence."<sup>18</sup> Finally, Robespierre adopted a similar position, proposing in 1793 that the Declaration of the Rights of Man be revised to include an affirmation that "[s]ociety is obliged to provide for the subsistence of all its members, whether by providing them with work, or by assuring the means of existence to those who are not able to work."<sup>19</sup> His proposal was accepted,

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<sup>17</sup> Rose (1978, p. 69).

<sup>18</sup> Ibid.

<sup>19</sup> Ibid, p. 141.

and the French Constitution of 1793, enacted in a national referendum, provided that "Public aid is a sacred debt. Society owes subsistence to the unfortunate, either by procuring them work, or by assuring the means of existence to those who are unable to work."<sup>20</sup>

The idea that all persons have a right to work was thus well established on the French left by the end of the 18th century. The origin of the idea, however, probably lies in similar but much older claims that all persons have a natural (or god-given) right to a share of the earth in order that they may secure their own existence, the right to existence being the most fundamental of all natural entitlements. In agrarian societies this claim has been the common currency of radical reformers for centuries, perhaps millennia. It was the rallying cry of Winstanley and the diggers in seventeenth century England;<sup>21</sup> of supporters of the so-called "agrarian law" (a redistribution of the property of the rich among the poor) in eighteenth century France;<sup>22</sup> and of "land reform" advocates in the Third World today.<sup>23</sup>

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<sup>20</sup> Constitution of 1793, Declaration of the Rights of Man and of the Citizen, art. 21, in Hardman (1973, p. 141).

<sup>21</sup> See Hill, Reformation to Industrial Revolution, pp. 129-30, 148, 153, 176, 261. [Get a better source XX].

<sup>22</sup> See Rose (1978, pp. 85, 137). [Get a better source XX]

<sup>23</sup> The continuing salience of the claim is illustrated by the following lead-in to a recent New York Times article on Central America:

The futility of efforts to attack the basic causes of Central America's endemic poverty preoccupied President Vinicio Cerezo one day three years ago as he sat in a hotel room with friends. Some topics, he complained, were so explosive they could not even be mentioned. Asked for an example, he paused. Then he replied, "agrarian reform." In that instant, the chandelier fell from the ceiling with a crash.

That anecdote was told last week by a friend of the Guatemalan President to illustrate the roadblocks that confront the latest effort to end the poverty that has

In urban societies, the idea that everyone is entitled to enough land to be self-supporting is more or less naturally transmuted into the claim that everyone is entitled to enough work to be self-supporting. This is almost certainly what happened in urban France during the Revolution. Radicals among the French revolutionaries generally supported a redistribution of feudal property among the poor, but they also began to advance claims that a corollary right to work should be recognized. If peasants received land in satisfaction of their natural rights, their urban compatriots, the *sans culottes*, should receive a functionally equivalent guarantee of work. The kinship of the two claims, proposed as alternative means of guaranteeing the right of the poor to secure their own existence, is explicit in the advocacy of Petion and Babeuf. By 1793, in the revised Declaration of the Rights of Man included in the Constitution of that year, the right to work stands on its own.

1848

If the right to work was first proclaimed in the French Revolution of 1789, by the time of the Revolution of 1848 its protection had become the central programmatic goal of the French left. So important was its role in the first four months of the latter upheaval that the anarchist theoretician Pierre Proudhon commented contemporaneously, "What are you called, Revolution of 1848? My name is the Right to Work."<sup>24</sup>

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brought Central America a decade of civil war.

Lindsey Gruson, "Can Central America Win a War on Poverty?" N.Y. Times, June 24, 1990, p. E3, col. 1.

<sup>24</sup> Quoted in Duveau (1967, p. 66).

The Revolution was precipitated by mass demonstrations in Paris in late February 1848. Under intense pressure from working class demonstrators demanding recognition of the right to work, one of the first acts of the provisional government established at the time was the adoption of the following decree:<sup>25</sup>

The Government of the French Republic commits itself to guarantee the existence of the worker by labor.

It commits itself to guarantee labor to all citizens.

It recognizes that workers should associate with one another in order to enjoy the legitimate benefits of their labor.

Drafted by the socialist Louis Blanc, one of two representatives of the "left" in the eleven member provisional government, the last paragraph of the decree hinted at the establishment of producers' cooperatives, a form of enterprise that Blanc had long favored. This was not to be. Despite its bow to the Parisian working class, the provisional government was dominated by opponents of socialism, and Blanc was denied any role in the implementation of the decree. Instead of cooperative enterprises, "national workshops" were established that provided low quality work relief for meager wages in a quasi-military setting. Nevertheless, despite the shortcomings of the workshops, they were welcomed by the poor. Unemployed workers flooded the program's registration offices, and within two months 94,000 workers were enrolled. Tens of thousands more were turned away.<sup>26</sup>

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<sup>25</sup> Quoted in Sewell (1980, p. 245). For accounts of the adoption of the pledge, see Blanc (1971, pp. 81-83); Duveau (1967, pp. 65-66); Sewell (1980, p. 245).

<sup>26</sup> For Blanc's vision of socialism, see his Organization of Labor (Blanc 1840). For descriptions of the establishment and operation of the National Workshops, see Agulhon (1983, pp. 25-26, 36-37); Blanc (1971, pp. 82-83, 89-96, 193-208); Duveau (1967, pp. 65-69); McKay (1933; Marx (1964, pp. 51-52); Price (1972, pp. 105-06); and Sewell (1980, p. 246).

The primary concern of those who ran the workshops appeared to be the maintenance of control over a potentially threatening population through the distribution of relief. Little useful work was done, and enrollees were required to work only about one day in four for their daily stipend. Nevertheless, the national workshops were viewed by contemporaries (both supporters and opponents) as an important political symbol, emblematic of the "social republic" that the Parisian working class hoped to establish and which the middle and upper classes feared. Of course, those employed in the workshops also shared a more immediate reason for their support of this perceived experiment in socialism. It provided them with desperately needed income at a time when joblessness commonly meant starvation.<sup>27</sup>

The workshops therefore functioned as a lightning rod for the hopes of the urban working class, the resentment of the middle class and peasantry (who became a conservative force in French politics after coming into full possession of their land holdings), and the enmity of the rich. When a popularly elected but decidedly more conservative government assumed power in May 1848, it decided to close the national workshops. When the announcement was made, the Parisian working class revolted. An estimated 50,000 persons participated in the insurrection, a spontaneous uprising with little leadership or organization and no chance of success. It was crushed in four days with singular brutality. Four to five hundred persons were killed on the barricades, but as many as 3000 were massacred by government troops after the fighting ended. Almost 12,000 persons were arrested. A large proportion of those arrested were married men,

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<sup>27</sup> See references cited in preceding footnote and Dickore (1911, p. 7); Price (1972, pp. 56-82); and Sewel (1980, p. 246).

and since the common penalty imposed was deportation to Algeria, thousands of families were effectively forced into exile.<sup>28</sup>

### *Socialist Views After 1848*

The association of right to work claims with both utopian and revolutionary socialism was therefore firmly established between 1789 and 1848. After 1848, however, avowals of the right to work do not appear to have formed an important part of socialist doctrine. The reasons for this neglect of what appear to have been among the first spontaneous demands of working class movements are not clear. Further research on the topic is needed. I will merely hypothesize that two tendencies may account for the historical trend.

The first is the tendency, already noted in Fourier's work, for socialists to regard the realization of the right to work as something that is achievable only with a total reorganization of society. It is not a concession that most socialists believe capitalism can grant. According to this view, advocacy of the right to work would be futile in reformist struggles for immediate working class gains, and in revolutionary struggles for ultimate power, it is seen as a goal contingent upon, and therefore subsidiary to, the task of seizing state power. In other words, realization of the right to work is a goal that most socialists believe must be put off until after capitalism is replaced. It is a promised benefit of socialism, not a goal of working class struggle within capitalist society.

This attitude was amply illustrated by retrospective socialist commentary on the French Revolution of 1848. Marx ridiculed the national workshop experiment as involving nothing more

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<sup>28</sup> See Agulhon (1983, pp. 45-46, 49-63); Blanc (1971, pp. 417-56); Duveau (1967, pp. 98-148); Price (1972, pp. 157-89); and Sewell (1980, p. 272).

than the establishment of "English workhouses in the open."<sup>29</sup> Louis Blanc condemned them in even stronger terms. "The national workshops emptied the exchequer with a dead loss; they humiliated the working man, who was reduced to accept the bread which he desired to earn; they discredited State interference in industrial matters. In the place of associations of workmen, they set up battalions of paid idlers . . ."<sup>30</sup> In more general terms, Marx characterized the right to work claims advanced by the Parisian working class in 1848 as merely the "first clumsy formula wherein the revolutionary aspirations of the proletariat are summarized."<sup>31</sup> According to this view, the French workers were guilty of immaturity. They had not yet sorted out their priorities and made the mistake of demanding as their first goal a benefit that only a thoroughly reformed socialist society could deliver.

It should be noted that "bourgeois" theorists agreed with their socialist counterparts on this point, although their reasoning was different. Among pro-market economists, John Stuart Mill was the most sympathetic to right to work claims, but he believed they were unrealistic. A strong admirer of Fourier,<sup>32</sup> he nonetheless believed that Malthusian population growth would accompany and therefore doom any effort to guarantee "permanent employment at ample wages."<sup>33</sup> Thus, neither socialist or bourgeois theorists offered much encouragement to workers who sought immediate recognition of the right to work.

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<sup>29</sup> Marx (1964, p. 51).

<sup>30</sup> Blanc (1971, pp. 193-208).

<sup>31</sup> Marx (1964), p. 68.

<sup>32</sup> Mill (1965, pp. 211-14).

<sup>33</sup> *Ibid.*, pp. 356-59. See also, Blanc (1973, pp. 83-86).



The second tendency that may help explain the relative neglect of right to work claims by socialists is their dissatisfaction with the rights-based claims of classical liberal political philosophy. This dissatisfaction has been expressed on at least two levels. First, on a practical level, socialists frequently express dissatisfaction with liberal rights-based claims because they are perceived as diverting attention from efforts to achieve more urgently needed social reforms. As Fourier's dismissive comments on the "rights of man" illustrate, radical social reformers have been quick to conclude that struggles which focus on liberal political rights are not only incomplete; they have their priorities backward. Social justice should come first. Freedom of conscience is meaningless on an empty stomach. Second, on a more purely ideological level, socialists have tended to view liberal rights-based claims with a jaundiced eye because the claims are associated with values, historical perspectives, and visions of government that most socialists reject. Liberal rights are perceived as promoting possessive individualism rather than cooperation, as encouraging myth making rather than realistic historiography, and as favoring governmental structures that shield the wealthy rather than those that are conducive to the pursuit of egalitarian goals.

Given the suspicion with which socialists have tended to view liberal rights-based claims, it is not surprising that modes of analysis and argument associated with those claims have been largely shunned in socialist theory. Calls for the recognition of transcendent rights were replaced by calls to recognize and pursue class interests. Indeed, socialists continue to manifest considerable ambivalence about the assertion of any political claims in human rights terms.<sup>34</sup> But

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<sup>34</sup> For an extended discussion of the relationship between modern socialist theory and human rights claims, see Campbell (1983).

this has meant abandoning the effort, begun by early proponents of socialism, to co-opt natural rights theory in order to support demands that social entitlements like the right to subsistence and the right to work be secured.

### *Twentieth Century Communism*

Whatever its source, socialist neglect of right to work claims meant that they received little attention during the late nineteenth and early twentieth centuries. This changed with the Russian Revolution and the coming to power of other communist parties after World War II. In keeping with prevailing socialist views on the subject, the right to work was recognized in Soviet law as an automatic benefit of the nation's centrally planned economy. For example, the 1936 Soviet constitution proclaimed that

[c]itizens of the U.S.S.R. have the right to work, that is, the right to guaranteed employment and payment for their work in accordance with its quantity and quality. The right to work is ensured by the socialist organization of the national economy, the steady growth of productive forces of soviet society, the elimination of the possibility of economic crises, and the abolition of unemployment."<sup>35</sup>

The Soviet Union's poor overall human rights record has made it easy to discount the value of this commitment to the right to work, and the same is true of similar commitments made by other countries ruled by communist parties. Nevertheless, it would be a mistake to dismiss the importance of either the promise of these governments to secure the right to work or the fact that they have generally were able to deliver on the promise.<sup>36</sup> In press reportage of public opinion in

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<sup>35</sup> Constitution of the U.S.S.R. (1936) art. 18, quoted in Campbell (1983, p. 171).

<sup>36</sup> See, e.g., Hewett (1988, pp. 39-42).

Eastern Europe, the one misgiving that is invariably mentioned concerning the desirability of the changes occurring in the region is the prospect of increased unemployment.

Less clear is whether the past commitment of communist governments to secure the right to work will have much continuing influence in eastern Europe. As I have previously noted, the orthodox socialist view is that the right to work can be secured only under socialism. It was in the interest of Communist governments to promote that position, but little dissent has been heard on the issue from the west either. It is not surprising, therefore, that eastern Europeans should so readily accept the idea that their embrace of capitalism necessarily implies a forfeiture of the right to work. They don't like the prospect of having to face unemployment, but they see it as the price they must pay for the benefits they hope to secure from the market.

As in so much that has happened in the region, Poland led the way. In an effort to spur growth, the democratically elected government of Poland has adopted policies that it readily acknowledges will cause unemployment. The abandonment of the right to work and the individual suffering that will necessarily result from these policies are accepted as unfortunate but necessary side effects of an economic reorganization undertaken for the good of the nation. A "safety net" of unemployment insurance has been provided to relieve the suffering, but only partially. It would defeat the purpose of the government's economic program if unemployment was not made to hurt.

Other countries in the region generally have followed Poland's example. We are told by economists inside and outside these countries that the economic medicine being prescribed -- a cold bath in the market -- is necessary to lay a foundation for sustained economic growth. People are being asked to make sacrifices -- to endure the cold -- for the common good. But the pain is

not equally shared by all or even randomly distributed. Each person's fate is determined by the market. A few get rich. Indeed, an unstated goal of the strategy is to permit a minority of the population to grow rich, even during the period of immediate general sacrifice. If all goes well, the bulk of the population will experience only moderate losses, balanced by the expectation of renewed income growth in the near future. Only a minority of the population experiences the full brunt of the prescribed sacrifices.

What the future promises for this minority we know only too well from our own experience with unemployment and poverty. Those whom the market dispossesses have little to look forward to in either the short or the long run. Some will be thrown to the wolves quickly, with the loss of a job that is not replaced. Others will succumb more gradually as market forces grind away at their independence and dignity.

Viewed objectively, eastern European governments are sacrificing a minority of their population so that a majority can enjoy more rapid income growth (if all goes well) while another minority is permitted to get rich. The minority to be sacrificed is being selected partly on the basis of individual good or ill luck, partly on the basis of age and family circumstance (with children, single parents, and the elderly likely to suffer the most), and partly in accord with market principles that work to the disadvantage of individuals with physical, mental, or social handicaps. The experience of other market economies indicates that ethnicity is also likely to play a major role in the selection process, whether or not ethnic prejudice is officially condoned.

If a group selected in this way were to be imprisoned, or denied its right of free speech, or stripped of its vote, there would be howls of protest inside and outside eastern Europe. If a group selected on the basis of race, religion, or national origin were selected to bear this economic

sacrifice, the same would be true. But when a nameless minority is sentenced to poverty, it is viewed as a regrettable necessity. Comforting talk of a safety net is intoned, but no one really believes it will do more than lessen the severity of the punishment being inflicted. It would be considered barbarous to sentence a family to a life of material and cultural deprivation for a crime committed by the family's breadwinner, but such a sentence is accepted as a matter of fate when it is pronounced by the market.

The readiness with which eastern European governments are accepting unemployment as an acceptable, if regrettable consequence of economic modernization is startling. The failure of socialists in both the east and the west to embrace and cultivate the idea that access to work is a human right that all governments have a duty to secure, rather than just a subsidiary benefit of socialism, must be deemed partly responsible for this. If employment were indeed recognized as a human right in eastern Europe, the adoption of policies designed to create unemployment might not be so readily accepted. Democratically elected governments are owed deference, but they have no license to violate the human rights of a minority of their citizenry, whether or not it would serve the interests of a majority to do so.

### *The New Deal*

Despite widespread acceptance of the assumption that capitalism and unemployment are inextricably bound, tangible support for efforts to secure the right to work have not been totally absent in market economies during the twentieth century. To be sure, the dominant trend among the evolving welfare states of the advanced capitalist world has been to tolerate relatively high levels of unemployment while attacking the negative effects of joblessness through the provision

of transfer benefits. Nevertheless, there has been some experimentation with the use of welfare state institutions to secure the right to work without abandoning a market economy. One such effort was partially implemented by the New Deal administration of Franklin Roosevelt. I have described the New Deal strategy for the provision of "employment assurance" elsewhere,<sup>37</sup> so I will limit my discussion here to the minimum necessary to relate their ideas to other efforts to secure the right to work.

First, although New Deal social welfare planners suggested that employment assurance be provided to all workers, the proposal was not originally conceived as a human rights measure. The originators of the idea were social workers charged with the responsibility of constructing a national relief system, not academic or political theorists, and their support for the idea of guaranteeing work for all job-seekers was based on conventional public policy considerations. They simply believed the best way to distribute public assistance to able-bodied persons was through the offer of a job rather than a dole.<sup>38</sup>

Nevertheless, during the war years, their policy proposals gradually came to be conceived in human rights terms. The stimulus for this development was the need felt for a principled

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<sup>37</sup> Harvey (1989, pp. 3-4, 18-20, 88-93, 99-110).

<sup>38</sup> See Hopkins (1936, pp. 108-117); Committee on Economic Security (1935, 3-4, 7-9); Charnow (1943, pp. 114-123). Harry Hopkins headed the New Deal's public relief effort and was the person primarily responsible for the promotion of public employment programs as an alternative to other forms of relief. He believed that for able-bodied persons, a job in a government work program like those operated by the Works Progress Administration (WPA) was superior to both work relief (what we call "workfare") or gratuitous cash assistance; but he was also a strong advocate of providing cash relief as opposed to in-kind assistance to those not expected to work (Hopkins 1936, pp. 104-05, 114-15). Hopkins' guiding principle was that public assistance should be distributed in the form most conducive to the recipient's continued participation in both family and community life, without stigma and without the self-debasement normally associated with the receipt of relief. See McJimsey (1987, pp. 55-56).

statement of the goals being pursued by the United States in the war. The fact that social welfare objectives were included among these goals provided dramatic evidence of the influence that New Deal values had come to assume. It also meant that the administration's social welfare objectives were now expressed in universalistic, rights-based language.

The trend was established in President Roosevelt's widely cited 1941 speech in which he included "freedom from want" among the "four essential human freedoms" for which Americans should work "everywhere in the world."<sup>39</sup> the President's 1944 State of the Union Message, cited at the beginning of this paper, provided an even more explicit endorsement of the claim that social entitlements should be viewed as fundamental rights.

The second feature of New Deal employment policy that should be noted is its apparent uniqueness. The idea that the state should respond to mass unemployment with programs of direct job creation seems to have had currency only on this side of the Atlantic during the 1930's. To be sure, the New Dealers never came close to delivering on their employment assurance proposal, generally providing jobs for fewer than half of the unemployed between 1933 and 1940, but direct job creation was the centerpiece of their social welfare efforts. More money was spent on New Deal employment programs between 1933 and 1940 than on all other forms of federal, state, and local public assistance and social insurance combined.

Why weren't similar measures adopted in European countries? That is an intriguing question that invites further research. One possible explanation -- and I stress the tentativeness of this hypothesis -- is that European responses to the economic crisis were canalized by the socialist conceptions previously noted regarding the limits of capitalist reform. If socialists believed the

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<sup>39</sup> Message to Congress of Jan. 6, 1941, 87 Cong. Rec. 44, 46-47 (1941).

right to work could be realized only with the replacement of capitalism, they were not likely to gravitate to the idea that it could be secured through social welfare measures designed to function within a capitalist economy. After all, the immediate goal of reducing unemployment could be pursued simply by increasing government spending. The idea that the state could provide useful work at decent wages for all unemployed workers, while leaving the capitalist base of the economy intact, might have seemed a flight of utopian fantasy to committed socialists.

The effect of these attitudes on policy debates, of course, would depend on the extent of socialist involvement in those debate. In Europe, where the socialist movement was much stronger during the interwar years than in the United States, models for "progressive" responses to the economic crisis were probably based to a large extent on the short-term programs advocated by socialist parties. If those parties did not advocate social welfare schemes designed to secure the right to work, such proposals were unlikely to receive serious consideration. Ironically, the very weakness of the socialist movement in the United States may have made it easier for reformers to consider and obtain a hearing for guaranteed employment schemes designed to be compatible with the market. At the same time, of course, the weakness of the American left made it more difficult for social reformers to defend the New Deal welfare state from conservative counterattacks once the economic crisis that inspired it had passed.

### *Sweden*

In at least one European country the policy of general demand stimulation that was popular among socialists during the 1930's evolved into something more -- a policy of active intervention in the labor market reminiscent of the New Deal idea of "employment assurance."



That country is Sweden. Unlike the American experiment of the 1930s, however, Swedish efforts to secure the right to work continued unabated until the early 1990s, resulting in what is arguably the best performance in achieving that goal of any market economy.<sup>40</sup>

In the late 1940's Sweden relied on expansionary fiscal and monetary policies to maintain a high level of aggregate demand. The result -- low levels of unemployment accompanied by strong inflationary tendencies -- has been a common experience in market economies. What distinguishes Sweden from other market economies is the strategy developed by the country's social democratic government for combating inflation without sacrificing full employment.<sup>41</sup> The economic model underlying the strategy was developed by two labor union economists, Gosta Rehn and Rudolf Meidner, in the late 1940's. Meidner and Rehn argued that full employment could be achieved in two ways -- either by stimulating aggregate demand to the point that labor surpluses are absorbed or by using highly focused job-creating measures in the weakest sectors of the economy. The problem with the first strategy, according to Rehn, is that the policy is inflationary. As a practical matter, before aggregate demand reaches a level capable of soaking up excess labor in the weakest sectors of the economy, it will be well above the level necessary to achieve full employment in stronger sectors. The result will be inflation in the overheated sectors that will tend to spread throughout the economy. Meidner and Rehn believed the second strategy would avoid this problem, because it could be combined with a restrictive fiscal policy at the

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<sup>40</sup> For a comparison of Swedish unemployment rates over the past three decades to those of other market economies, see Harvey (1989, p. 13, table 1.1). [Expand note to discuss collapse of full employment policy in early 1990s. See Ledyard article.]

<sup>41</sup> For discussions of the evolution of Swedish economic policy, see Lindbeck (1974); Ginsburg (1983, pp. 111-15); Milner (1989, pp. 22-45).

aggregate level to control inflationary pressures. They proposed the adoption of an employment policy guided by the following principles:

Any measure aiming at preserving the level of employment wherever it may be threatened, should be applied as locally as possible as opposed to any general increase of effective demand, which only could restore the inflationary pressure again. On this basis they should, on the one hand, consist of public works, subsidies to individual firms and the placing of State orders with firms and in localities, where, otherwise, unemployment would arise. On the other hand they should consist in encouraging the voluntary transfer of labour to firms, trades, and localities where the prospects of expansion are favorable. Much greater importance than hitherto should be attached to incentives to labour to transfer to places where it is most needed.<sup>42</sup>

The emphasis that Meidner and Rehn placed on labor mobility is an essential feature of their model. A policy of channeling support to weak sectors of the economy would be self-defeating in the long run if the result was to subsidize poor economic performance. Also, the low rates of unemployment they hoped to maintain might set off a wage-price spiral, even in the absence of a strong fiscal stimulus, as expanding firms and expanding industries competed for scarce labor while other workers fought to retain their relative position with compensating wage increases. Measures designed to encourage technological modernization, facilitate the movement of labor from less productive to more productive jobs, and discourage inter-firm and inter-industry wage competition therefore formed an essential part of the Meidner-Rehn plan.

In general terms, the policies adopted to accomplish these disparate goals combined "wage solidarity" with a host of focused measures designed to induce modernization, encourage labor mobility, and ensure the availability of work for all job-seekers. Job-creating assistance provided

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<sup>42</sup> Swedish Confederation of Trade Unions, Trade Unions and Full Employment (Stockholm: 1951), pp. 92-93, quoted in Milner (1989, pp. 104-05. For general discussions of the Meidner/Rehn analysis, see Lindbeck (1974, pp. 32-33, 39); Ginsburg (1983, p. 114); and Milner (1989, pp. 102-06).

to weak sectors of the economy was carefully structured to encourage technological modernization. Also, to put fire to the feet of low-wage, low-productivity producers (and to discourage inter-industry wage competition) the dominant trade union confederation (which has extremely close ties to the governing social democratic party) pursued a consistent policy of requiring all employers to pay the same wages for the same kind of labor while gradually increasing the relative wages of low-skilled labor. The emergence of wage differentials based on the relative profitability of individual industries or firms was actively discouraged. In this way, less productive industries and firms were forced to either modernize or die, and inflationary wage competition was reduced. Labor mobility was encouraged through heavy investment in job training, the maintenance of an extremely efficient system of labor exchanges, and the subsidization of mobility related costs incurred by both employers and workers. Finally, beginning in the early 1970s, a concerted effort was made to develop programs that enhance the job prospects of hard-to-employ workers.<sup>43</sup>

The labor market policies developed by Sweden to secure the right to work have not been widely imitated, but they do demonstrate that it is possible to secure the right in a market economy without sacrificing economic prosperity. [Add comment on what happened in the early 1990s.] If and when governments feel a stronger compulsion to protect this right, Sweden's example will provide useful data on how the effort can be organized. Our review of the history of right to work claims, however, suggests that such commitments will be slow in coming. The advocacy of right to work claims has been pursued with vigor only intermittently, and practical

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<sup>43</sup> See Lindbeck (1974, pp. 39-41); Ginsburg (1983, pp. 127-211); Milner (1989, pp. 106-09, 115-25).

measures designed to secure the right have always encountered strong resistance. Indeed, the trend since the Second World War has been towards greater acceptance of high unemployment rates. With the re-introduction of capitalism in eastern Europe, this acceptance seems likely to spread. Supporters of the right to work therefore face a formidable challenge in the years ahead, despite the formal recognition accorded the right under international law.

### Recognition of the Right to Work in International Human Rights Law

The claim that employment is a human right is provided substantial in international human rights agreements concluded since 1945. A review of these agreements is useful both to convey a sense of how the right is conceived and to underscore the point that right to work claims have enjoyed broad popular acceptance, at least in principal, even if political support for measures designed to secure the right has been limited.

#### *The United Nations Charter*

The United Nations Charter, drafted in 1945, is an international treaty which imposes duties on member states that are considered binding under international law.<sup>44</sup> Articles 55 and 56 of the Charter contain the following pledge:

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<sup>44</sup> International law is conventionally recognized as having three sources: "(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; [and] (c) the general principles of law recognized by civilized nations". Statute of the International Court of Justice art. 38. The United Nations Charter falls under the first of these three headings. For an introductory discussion of the sources of international law, see Sieghart (1985, pp. 47-58).

Article 55: With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

All members of the United Nations, including the United States, have therefore acknowledged their obligation to promote both "full employment" and "human rights." The extent of the "joint and separate action" which member states are obliged to undertake in this regard has been the subject of considerable controversy among legal scholars,<sup>45</sup> but the nature of the full employment and human rights goals which they are obligated to pursue are fairly clear.

The "full employment" goal is a mandate to ensure the availability of remunerative employment for all job-seekers. This point needs to be emphasized since the term "full employment" is now commonly used in a different sense. In recent years, professional economists have tended increasingly to use the term to denote a level of unemployment thought necessary to keep inflation in check. In the 1940's, however, when the United Nations Charter was drafted, the term was unquestionably understood to imply the elimination of all but the most temporary

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<sup>45</sup> See Henkin (1990, pp. 55-56).

frictional and seasonal unemployment. This understanding of the term is illustrated by a 1945 book on the subject by William Beveridge, the principal architect of the British welfare state. He defined full employment in the following terms:

It means having always more vacant jobs than unemployed men, not slightly fewer jobs. It means that the jobs are at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means, by consequence, that the normal lag between losing one job and finding another will be very short.<sup>46</sup>

A few years later, a task force of internationally prominent economists working under United Nations auspices and led by an American, John Maurice Clark,<sup>47</sup> defined full employment for purposes of Articles 55 and 56 as "a situation in which unemployment does not exceed the minimum allowances that must be made for the effects of frictional and seasonal factors."<sup>48</sup> That the American Senate which ratified the United Nations charter shared this understanding of the term is amply demonstrated by the political battle fought in the United States Congress during 1945 and 1946 over a proposed "full employment" bill that would have required the federal government to take steps ensuring the availability of work for all job-seekers.<sup>49</sup>

### *The Universal Declaration of Human Rights*

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<sup>46</sup> Beveridge (1945, p. 18).

<sup>47</sup> At the time, Clark was one of the most eminent of all American economists, a fact evidenced by his receipt in 1952 of the American Economics Association's Walker Medal, awarded at intervals of at least five years to the most distinguished living American economist.

<sup>48</sup> Clark et al. (1949, p. 13). See also Nixon (1973).

<sup>49</sup> See Harvey (1989, pp. 106-10); Bailey (1950).

The concept of human rights which members of the United Nations are pledged to promote pursuant to Articles 55 and 56 of the organization's Charter are not defined in the Charter. More important, the substantive content of the term was by no means as clearly settled at the time as the meaning of "full employment." This definitional gap was largely filled, however, by the promulgation of the Universal Declaration of Human Rights by a 48 to 0 vote of the General Assembly in 1948.<sup>50</sup> The Preamble of the Universal Declaration proclaims it to be:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance . . .<sup>51</sup>

Unlike the United Nations Charter, the Universal Declaration is not a treaty, and it was not generally viewed as imposing legally enforceable obligations on individual governments at the time of its promulgation.<sup>52</sup> This is one reason it was embraced so warmly. Nevertheless, it has gradually assumed legal weight over the years. First, it helped to clarify the nature of the human rights goals that members of the United Nations are obligated to promote under the terms of the Charter.<sup>53</sup> Second, by virtue of its widespread acceptance, it has gradually assumed an

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<sup>50</sup> Universal Declaration of Human Rights, U.N. Doc. A/811 (1948). Eight countries abstained from voting on the Universal Declaration: Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukraine, and Yugoslavia.

<sup>51</sup> *Ibid.*, preamble.

<sup>52</sup> This view was not accepted, however, by all authorities. Opinion was divided on the question. See Robinson (1958, pp. 33-53).

<sup>53</sup> See Szabo (1982, pp. 23-24); Sieghart (1985, p. 65).

independent status as a statement of customary international law.<sup>54</sup> Finally, to the extent that it does enumerate recognized human rights, it can be viewed as a statement of the obligations that governments bear irrespective of customary practice and irrespective of the absence of express agreements acknowledging their obligation.

The right to work is expressly recognized in Article 23 of the Universal Declaration which proclaims that:

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

...

3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

### *The International Covenant on Economic, Social and Cultural Rights*

As I have noted, the Universal Declaration was not originally perceived as imposing binding obligations on governments, so two international treaties were subsequently drafted to afford individual countries the opportunity to assume such obligations with respect to the protection of specifically enumerated human rights. The drafting process was conflict ridden and took almost two decades, but the two treaties--the International Covenant on Civil and Political Rights<sup>55</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>56</sup>--were finally

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<sup>54</sup> See Humphrey (1984, pp. 64-65, 73-76); Pechota (1981, pp. 34-38); Sieghart (1985, pp. 64-64); Robertson (1972, p. 26-28).

<sup>55</sup> A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16)52, U.N. Doc. A/6316 (1966).

<sup>56</sup> G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).



approved by a unanimous vote of the General Assembly in 1966 and opened for ratification by individual governments. Both Covenants came into force in 1976, when they received the required minimum of 35 ratifications to become effective, and they have now been ratified by over 90 countries.

President Carter signed both Covenants in 1977 and forwarded them to the Senate for ratification.<sup>57</sup> The Senate ratified the International Covenant on Civil and Political Rights in 1992,<sup>58</sup> but it has not ratified the International Covenant on Economic, Social and Cultural Rights. This failure has important political implications,<sup>59</sup> but its legal effect should not be overestimated. It means the United States is not subject to the monitoring and enforcement measures established under the two International Covenants, but it does not relieve the United States of its obligation to protect most of the rights proclaimed in the Covenants, including the right to work. As I have already noted, such an obligation exists independently under the United Nations Charter and the Universal Declaration of Human Rights. Nevertheless, it is worth noting that the right to work recognized under the International Covenant is essentially the same as that proclaimed in the Universal Declaration. Articles 6 and 7 of the Covenant contain the pertinent language.

#### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work

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<sup>57</sup> See U.S. Const. art. II, § 2.

<sup>58</sup> The Senate ratified the agreement on April 2, 1992. 138 CONG. REC. S4781-4784 (1992). The United States deposited its instrument of ratification at the U.N. on June 8, 1992. 31 I.L.M. 645, 645.

<sup>59</sup> See Henkin (1990, pp. 74-78).

which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

...

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

The general obligation which governments incur under the Covenant with respect to the realization of these rights is stated in Article 2.

#### Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Thus, as with the United Nations Charter and the Universal Declaration of Human Rights, no obligation is incurred to secure the right to work immediately, but a state party to the Covenant does agree to take steps to secure the right progressively over time.<sup>60</sup>

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<sup>60</sup> See Harvey (1987).

## *The Nature of the Right to Work*

These documents do not exhaust the sources of recognition for the right to work in international human rights law,<sup>61</sup> but they are sufficient to illustrate how the right is defined.

First, it involves more than freedom from forced labor and an opportunity to compete for available jobs. It is a right actually to be employed. An offer of income support in lieu of a job will not secure the right. It is access to remunerative work that must be provided, not just a promise of subsistence.<sup>62</sup> This does not mean that an unemployment rate of zero must be achieved to secure the right. Some frictional unemployment will exist even if there are more job vacancies than job seekers. The ready availability of suitable opportunities for self-employment can also be counted as contributing to the realization of the right. For example, access to land might secure the right to work for an agricultural worker. But the theoretical availability of opportunities for self-employment is no substitute for full employment among wage workers. This view of the right was expressed very clearly by Eleanor Roosevelt, the United States representative on (as well as the elected chairperson of) the committee that drafted the Universal Declaration.

In the opinion of the United States delegation, the right to work, in this Declaration, meant the right of the individual to benefit from conditions under which those who were able and willing to work would have the possibility of doing

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<sup>61</sup> For a collection of texts drawn from other international human rights documents recognizing the right to work, see Westerveen (1986, pp. 92-99). For citations to national constitutions that expressly recognize the right to work, see Mayer (1985).

<sup>62</sup> Governments are perceived as having a separate obligation, however, to provide support to persons who lose their jobs. See Universal Declaration of Human Rights, arts. 22, & 25 para. 1; International Covenant on Economic, Social and Cultural Rights, arts. 9, and 11 para. 1.

useful work, including independent work, as well as the right to full employment . . .

<sup>63</sup>

Second, the right to work does not include a right to retain a particular job. Realization of the right is therefore compatible with legal regimes that make it easy to fire individual workers as well as with those that make it difficult to fire them.<sup>64</sup> Its touchstone is not tenure in a particular job but the availability of enough jobs to eliminate involuntary unemployment.

Third, the entitlement is viewed as including a right to be paid wages sufficient to support a dignified standard of living. The right has not been secured if employment is only made available on terms that leave full-time workers in a condition of poverty. What constitutes an adequate standard of living will depend on local conditions and expectations, of course, but for the right to work to be fully realized, a minimum wage must be paid that reflects those conditions and expectations.

Fourth, the right is claimable against governments, but the duty of governments to secure the right is perceived to be limited. They are not viewed as having an obligation to guarantee the right immediately, but only to adopt policies that will secure the right progressively over time. It is obvious that this qualification limits the practical import of the right, but it would be a mistake to conclude that it cancels it entirely. The standard of performance that governments are

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<sup>63</sup> Summary of statement by Eleanor Roosevelt quoted in Robinson (1958, p. 135 note 2). Early drafts of the Universal Declaration contained even stronger language, expressly noting that "[t]he state has a duty to take such measures as may be within its power to ensure that all its citizens have an opportunity for useful work." Ibid. See also, Kanger (1984, pp. 133-34).

<sup>64</sup> Compare Epstein (1984) and Minda and Raab (1989).

expected to meet in securing a particular human right has enormous practical importance, but that obligation speaks to the enforceability rather than the existence of the right.

Although extreme positivists take the position that a claim must be legally enforceable to be termed a right at all,<sup>65</sup> a definition of human rights this extreme would force one to conclude that Nazi Germany did not violate the human rights of Jews and that South Africa is not violating the human rights of Blacks. In fact, it is not at all unusual for a right to be recognized without providing total or immediate protection for it. The Supreme Court of the United States illustrated this in its landmark school desegregation case, Brown v. Board of Education.<sup>66</sup> Even though the maintenance of segregated educational facilities was held to violate the constitutional rights of the plaintiff children in the case, the defendant school districts were not ordered to desegregate their schools at once. Instead, they were merely ordered to work towards that goal "with all deliberate speed."<sup>67</sup>

Rather than concluding that the plaintiffs in Brown had no right to the relief they sought, it would be more reasonable to conclude that the right they asserted was indeed vindicated, but the Court was not prepared to order government agencies to secure it immediately. A compromise order of this sort is actually quite likely whenever a court recognizes that major institutional changes are needed to secure a newly recognized right. It is no more incongruous to declare that

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<sup>65</sup> This view is exemplified by Bentham's frequently cited attack on natural rights claims: "Right is a child of law; from real laws come real rights, but from imaginary law, from 'laws of nature,' come imaginary rights. . . . Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense, -- nonsense upon stilts." See *infra*, note ?.

<sup>66</sup> The case was decided in two parts, Brown v. Board of Education (Brown I), 347 U.S. 483 (1954) and Brown v. Board of Education (Brown II), 349 U.S. 294 (1955).

<sup>67</sup> Brown v. Board of Education (Brown II), 349 U.S. 294, 301 (1955).

the human rights of unemployed workers are being violated by the failure of governments to secure their right to work, even though those governments are not deemed to have a duty to end the violation at once, but only progressively over time.

### *The Political Legitimacy of International Human Rights Standards*

Taken together, the Universal Declaration of Human Rights and the two International Covenants based upon it are commonly referred to as the International Bill of Rights. The immediate impetus for the adoption of such standards was provided by popular revulsion at the gross violations of human rights committed by fascist states, particularly Germany, before and during World War II.<sup>68</sup> This revulsion led to intense lobbying by non-governmental organizations (aided by the delegations of a handful of smaller countries) at the founding conference of the United Nations in San Francisco in the Spring of 1945. As a result of this lobbying effort, relatively strong human rights language was added to the United Nation's Charter at the conference and a general understanding was reached that the drafting of a universal "bill of rights" would be among the organization's first tasks.<sup>69</sup>

The United Nations Commission on Human Rights was subsequently established, and responsibility for drafting an international bill of rights was entrusted to it. Chaired until 1953 by Eleanor Roosevelt, the Commission's work fully reflected the disparate political tendencies that

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<sup>68</sup> See Humphrey (1979, p. 21); Szabo (1982, p. 21). For discussions of the prior history of international human rights law and of the development of the international human rights movement, see Lauterpacht (1968, pp. 3-72); Robertson (1972, pp. 15-22); Szabo (1982, pp. 11-22); Henkin (1990, pp. 13-15).

<sup>69</sup> Humphrey (1984, pp. 12-13); Sohn (1968, pp. 51-2).

emerged in the post war era.<sup>70</sup> No one group of nations dominated the drafting process. At first, the dominant split was the one that divided capitalist and communist states, but over time the "north-south" division between the advanced capitalist states and the developing countries of Africa, Asia, and Latin America assumed more and more importance. It is important to remember that the Universal Declaration and International Covenants were drafted during the height of both the cold war and the de-colonization struggles of the post war era. There were also important religious, regional, and ideological differences that existed within the major blocs and frequently cut across them. These were not easy times in which to search for a consensus concerning a list of universal entitlements.<sup>71</sup>

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<sup>70</sup> For discussions of the history of the International Declaration and the International Covenants, see Sohn (1968); Meyer (1981); and Humphrey (1967, 1979, 1984); Szabo (1982).

<sup>71</sup> The flavor of the disagreements that existed within the committee that drafted the Universal Declaration can be discerned from the following interchange described by John Humphrey, the Canadian who served as the Director of the United Nations Division of Human Rights from 1946 to 1966, and the person who prepared the first draft of the Universal Declaration for the drafting committee (Humphrey 1984, pp. 44-45).

The inclusion in my text of a series of articles on economic and social rights, which Cassin [the French representative who prepared the second draft of the Declaration] had reproduced, was quickly challenged. R.H. Harry, speaking for Australia in the absence of Colonel Hodgson, said that it would be "difficult to spell out in detail the different rights involved." In his opinion, "two or three articles in the final draft should be sufficient to cover the broad principles." Geoffrey Wilson [England] agreed: "two or three general principles should be stated. These principles would be worked out at a later stage by the United Nations and its specialized agencies." Santa Cruz [Chile] disagreed: "if the drafting committee did not introduce economic and social rights into the Declaration, it would not appear to the world to be acting realistically." Mrs Roosevelt [U.S.] and Malik [Lebanon] took a middle ground. "Some of the rights," said Malik, "would be true in a socialistic form of society; others would not. Since the Declaration had to be universal, only fundamental principles should be stated, such as the right to education, the right to participate in cultural life, the right to property, the fact that human labor is not a merchandise and so on." He then said

It would be a mistake, however, to view the drafting process as nothing more than a political competition. Governments certainly looked to their immediate interests, but the nature of the exercise required them to address much broader concerns. Each government spoke from its own history, its own particular tradition of struggle against injustice. Together, they effectively catalogued the wrongs against which human rights claims have been asserted, and while each government sought legitimation for the claims with which it identified, the process required a mutual recognition of the legitimacy of other struggles as well.

As one would expect, the developed capitalist democracies provided strong support for the recognition of individual civil and political liberties. The communist states emphasized the importance of economic and social rights. The emerging Third World block provided additional support for the recognition of economic and social rights while also pressing for the recognition of a new generation of collective entitlements -- the rights of peoples to self-determination and to the disposal of their own natural resources.<sup>72</sup> Other interests pressed other agendas. Each claim had a history. The documents that emerged from this process were based on protracted deliberations,<sup>73</sup> and they embodied a host of political compromises. But they also embodied

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something which showed how rigid his logic could be. Thinking probably that my article outlawing slavery and the slave trade was not sufficient, Cassin had added the principle that a person cannot "either alienate his person nor place himself in a state of servitude to another." This, said Malik, might be interpreted as "a restriction on a man's personal freedom. If he wanted to be a slave it was his right." Cassin's addition was not retained.

<sup>72</sup> For a discussion of the differing perspectives on human rights of these three groups of countries, see Espiell (1979). For an extended discussion of the rights of peoples, as opposed to individuals, see Crawford (1988).

<sup>73</sup> For article by article discussions of the deliberations, see Kanger (1984, pp. 78-163); Verdoodt (1963); Robinson (1958, pp. 100-143).



something approaching an international consensus regarding a set of human rights claims that commanded universal respect. However uneven and inadequate the actual protection provided these rights may be -- and the nature of the drafting process would lead one to predict such unevenness -- the political legitimacy of the Universal Declaration and the International Covenants cannot be dismissed easily.

The rights proclaimed in these documents are not based on a unified theory of human rights. Given the highly political nature of the process that led to their adoption it could hardly be otherwise. As Louis Henkin has noted, "international human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them."<sup>74</sup> This does not mean that theoretical justifications of these rights are in short supply, but the importance of these intellectual warrants as a source of the claims that have succeeded in gaining international recognition has been less important than the strongly felt grievances that have animated popular struggles against perceived injustices over the past several centuries of world history.

## Conclusion

Right to work claims have deep historical roots but a checkered history. Ironically, they played a more central role in social reform movements in the first half of the nineteenth century than they have since. The reasons for the relative abandonment of right to work claims by anti-capitalist reformers after 1848 is a subject requiring further research. In the twentieth century, right to work claims have been advanced both by communist parties (who reflected the then

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<sup>74</sup> Henkin (1990, p. 6).

orthodox socialist view that the right could not be secured except through socialist revolutions) and by political movements that could be termed social democratic, in a broad sense of the term. The efforts made by these latter movements to devise policies capable of securing the right to employment within market economies have provided a wealth of practical experience in achieving that goal, but these efforts have not been sustained.

The inherent attractiveness of the right to work goal has led, however, to its formal recognition as a human right in authoritative international human rights agreements. Effective enforcement mechanisms for securing the right do not exist under these agreements, but they provide a strong support for the legitimacy of the claim that governments have obligations in this area that they are not meeting. This should help keep right to work claims alive during a period when political conditions are not favorable to efforts actually to secure the right. Also, like civil and political rights claims that lay dormant in the United States Constitution during the nineteenth and early twentieth century, the recognition afforded the right to work in international human rights agreements may one day flower into a genuinely effective means of enforcing the right.

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