Human Rights and Responsibilities at the Workplace

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Joining the Northwestern University Law School faculty in the late 1930’s, incredibly a half century ago, was a lucky experience. Part of its good fortune was the privilege and pleasure of becoming a colleague and, subsequently, a lifelong friend of the man whose spirit presides over this afternoon’s occasion. Our offices were a few feet apart, up on the third floor. My first law review article appeared by the courtesy of his co-authorship. Whatever I have learned about intellectual integrity and human warmth has come in large measure from him. And when Leah joined Nat a little later, fifty years ago this coming June, the Nathansons became, for the Wirtzes, a central part of life’s meaning and its joy.

One other Nathanson note, less personal, will move us directly into this afternoon’s subject. Serendipity led me to his first legal publication, a student comment in 40 Yale Law Journal, appearing in 1930. The comment subject was the Supreme Court’s decision earlier that year in Texas & New Orleans Railroad v. Brotherhood of Railway & Steamship Clerks, involving the Railway Labor Act of 1926. The student commentator noted that “the right of the employer to discharge has been hitherto considered absolute,” and that the Court was now setting this feudal concept aside. Emphasizing...
the embodiment in this decision of a new concept of employee rights, the note concluded presciently: "The law made here may well affect the law in other fields." Which indeed it has — so that the extension of this concept of individual rights at the workplace over the next six decades becomes the subject of this Seventh Annual Lecture memorializing that student law review editor's subsequent achievements.

The lecture title prompts a little clarification. The worst enemy of human rights at the workplace would be to let them get mixed up with softness, with featherbedding, with the textile worker's dream in the old labor ballad of a shop where "the walls are built out of marble, the machinery is made out of gold; and nobody ever gets tired and nobody ever grows old." With apologies to Don Weckstein, and to those of you in my class, I once more identify human rights at the workplace with the recognition of those interests of employees which enhance work as a human value, giving full recognition at the same time to the critical importance of effective labor as an element of production in an increasingly competitive economy. I have changed the original title to include both human rights and responsibilities — because of the recognition, as I thought this subject, through, that in the employment relationship, as in all others, much more flows from reciprocal recognition of responsibility than from the enforcement of rights.

So many of you here know so much of the story of the development of the employment rights and responsibilities concept over the past sixty-five years, that only the briefest summary of what has been accomplished is an appropriate preface to a consideration of what has not been. Five years before that 1930 note in the Yale Law Journal appeared, employees had virtually no rights. Five years after that publication date (although this may seem to give the student comment more influence than it probably had), all American employment related to interstate commerce was brought within the rule, previously applicable only to the railway industry, giving employees the right to organize unions and obligating employers to bargain with them. Over the next twenty-five years, about forty percent of American workers were covered by collectively bargained provisions—seniority clauses giving them job rights, compensation clauses that included broad "fringe benefits," guarantees against unjust discharge, grievance and arbitration clauses—that gave meaning to the concept of human rights and responsibilities in the workplace.

Another branch of this law also started developing in the 1930s. Almost all employees were guaranteed by federal and state statutes minimum wages, time and a half for overtime, limited recovery if

3. *Id.* at 98.
they were injured on the job, restricted unemployment compensation, and a degree of financial security in their retirement.

Starting again in the 1960s, these statutory protections have been significantly widened. In addition to a variety of other provisions (covering medical and safety protection and limited guarantees regarding health care and retirement plans), these most recent enactments have been concentrated primarily on prohibiting employer discrimination among employees. The Equal Pay Act of 1963 requires that women and men be paid the same rate for equal (though not necessarily for comparable) work. The Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin. Those of us who are older than we ought to be are protected (perhaps beyond what we ought to be) by the Age Discrimination in Employment Act of 1967.

The Americans with Disabilities Act, adopted by Congress in 1990, embodies the quintessence of the concept of human rights and responsibilities in the workplace. Employers may not discriminate against individuals with disabilities if "reasonable accommodation" to their limitations would permit them to perform open jobs. Work is to be fitted to meet people's needs instead of the other way around.

This same vital principle underlies the recently adopted San Francisco ordinance governing work at video display terminals. Employers are required to provide special lighting, equipment, furniture, break periods, and other conveniences for employees spending four hours per day or more at computer terminals. The ordinance has been considered not just as a health measure but primarily in terms of ergonomics — meaning "adapted to the worker."

One other piece of this developing picture involves the erosion of the previously well established common law rule in this country that all employment should be considered "at will" — subject to termination for any reason or lack of reason — except as restricted by contract or statute. Since about 1980, the courts in over half the states have found the seeds of contrary doctrine, and a variety of rules now provide various combinations of tort and contract damages for "unjust discharges."

This is the background against which I try to glimpse into what

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8. Id.
lies ahead as far as this concept of human rights and responsibilities at the workplace is concerned. If the story so far is one of change, perhaps unparalleled in the annals of essentially conservative law, this concept remains viable, protean, and incomplete.

Some intriguing policy issues tempt exploration: whether subjecting employees to invasive tests for drugs violates the Fourth Amendment's search and seizure clause or California's constitutional guarantee of a right of privacy; whether a worker's right of employment includes the entitlement to return to the job after a strike; whether possibly fertile women may be denied jobs involving a chance of lead poisoning of fetuses. The status at common law of the "employment at will" concept still divides state judges almost equally. Furthermore, the division between employers and employee rights activists frustrates the efforts of a uniform law committee to resolve the issue.

Although, such issues are intriguing, I would like to take a broader approach. To the extent that the life of the law, as Mr. Justice Holmes suggested, is not logic but experience, what is it in the sixty years of experience with the law of the employment relationship that offers the future instruction?

Thinking and talking about experience does not permit the neat packaging and orderly presentation that playing with logic does. However, I have come to four quite different elements of this experience which appear to have current significance and perhaps warrant more explicit consideration than they have received. I suggest that the following areas warrant attention:

Agenda item number one involves the experience in this field with alternative methods of dispute resolution;

A second item relates to the role of labor unions;

A third gets into the international effects of labor standards;

The final inquiry will be into the implications of the extraordinary changes that are taking place today in the American workforce and in the nature of work.

**ALTERNATIVE METHODS OF DISPUTE RESOLUTION**

Recognizing that the importance of alternative dispute resolution to architects of the law is paralleled by its dullness as a subject of public discussion prompts hurried and therefore risky generalization.

The emerging instruction of experience in this country and in most others is that employment and labor disputes will be resolved most equitably and effectively if: (i) they are entrusted as broadly as possible to adjudicators—administrative agencies, arbitrators, or labor courts—intimately familiar with the employment relationship; (ii) courts of general jurisdiction do no first-line adjudication here and limit their appellate function strictly; and (iii) the participation of
juries is reduced to whatever is the constitutional minimum. It might be possible to defend this general position on the ground that the employment relationship is so special, so complex, such a compound of social and economic elements, that controversies which develop in its course warrant the adjudication—sometimes the mediation—of experts. Supporters of this position would point to the comparative law that has developed regarding the issue of equal pay to men and women for work of "comparable value." In the United States, the courts have made it clear that they will leave the valuation of jobs to the market place. So comparable value—"pay equity"—claims are denied. In the European Community nations, however, and in Canada, the comparable value concept is accepted and its implementation is apparently presenting few difficulties. The critical difference is that in these other countries the comparable worth decisions are made by administrative bodies with the competence to undertake the necessary job analyses.

A controversial element involved in this choice of dispute resolution is whether, or to what extent, employment rights claims entitle the plaintiff to trial by jury. I do not think that they do, at least if adequate provision is made for carefully devised administrative review procedures including provision for equitable relief. Part of my argument would be that evenhandedness cannot always be expected in employment disputes from juries composed of numerous employees and few employers. I would press the related view that the principal impediment today to reaching agreement regarding both a new civil rights bill and a uniform unjust discharge law is the unwillingness of plaintiffs' lawyers to give up the prospect of indecent contingent fees from swollen jury awards. The problem was highlighted earlier this month by the U.S. Supreme Court's decision to leave undisturbed an Alabama jury's punitive damage award of over $700,000 in a case (not an employment case) involving less than $4,000 of actual damages.9

The broader case for restricted judicial participation in this area is based essentially on what is generally accepted as the satisfactory experience with administrative agencies and arbitration in this country and abroad; Furthermore, the ominous prospect of the courts being swamped by proliferating employment rights litigation is further reason for restricting judicial participation.

There is now broad consensus that a fair and effective balancing

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of workers’ interests and those of enterprise have been achieved in the functioning of the private arbitration process. This system proceeds quietly and effectively to the resolution each year of tens of thousands of grievance disputes arising under the more than 100,000 collective bargaining agreements in effect in this country. One of the frontiers of the employment relationship is the extension of this arbitration process beyond the interpretation of collective bargaining agreements to include the resolution of disputes about new agreements, reducing the waste of strikes and lockouts.

There is more doubt, I guess, about the efficiency of the National Labor Relations Board (NLRB) procedures, but no suggestion of enlarged judicial authority — unless perhaps in a special labor court. The most sobering lesson of experience with the NLRB procedures is that in labor relations slow justice—with final decisions often being delayed for three years or more—is worse than worthless. The business community’s defeat in Congress of the proposed Labor Reform Act of 1977, which would have reduced these delays substantially, was unfortunate to a point approaching irresponsibility.

A lesser but still significant responsibility has been placed on federal and state administrative agencies in implementing the statutory prohibitions of discrimination in employment because of race, gender, and age. The courts are only occasionally required to get into controversies involving workers’ compensation, unemployment insurance, or social benefits. On the other hand, thousands of cases involving the Fair Labor Standards Act go needlessly to the courts every year, in substantial part because of the lack of adequate provision for administrative determination.

One of the complicating factors in the current turbulence regarding suits for unjust discharge is that almost all of these cases go directly into courts of general jurisdiction. The practice in European countries is to the contrary—with results approved by virtually all comparative law commentators. Accordingly, a proposal currently under consideration by a committee working for the Commissioners on Uniform State Laws recommends a combination of administrative review and arbitration subject to narrowly restricted court review.

Risking hell’s most widely known fury, I suggest that some dubious law may be emerging in connection with the handling of the proliferating claims for damages resulting from sexual harassment. This male perversion has been held to be a violation of federal and state prohibitions of discrimination in employment based on sex, which is right—and an important advance in the law relating to human responsibilities at the workplace. I also greet respectfully the
holdings in January, both by the Ninth Circuit Court of Appeals and a Federal District Court in Florida, that these harassment claims are not to be adjudged by the traditional "reasonable man" standard. It is to be asked, instead, how a reasonable woman would feel; and none of this nonsense, Judge Robert Beezer wrote in the circuit court's opinion, about a sex-blind or gender-neutral "reasonable person" test, which would inevitably, he said, be male-biased.

My concern, quite different, is about such developments as the California Supreme court's decision last December, in Rojo v. Kliger, that sexual harassment claims may be filed directly in court without going through the administrative procedure prescribed in the California Fair Employment and Housing Act. U.S. Senator Robert Dole, picking up the torch that Elizabeth Dole had lighted before she resigned as Secretary of Labor, has introduced a bill in the Senate, the Women's Equal Employment Act. This bill would put Title VII sexual harassment cases on what he calls a fast track, by passing the Equal Employment Opportunity Commission. I do not see how sexual harassment cases can be distinguished, so far as going directly to court is concerned, from other cases of alleged gender or race discrimination covered by the same statutes. In an area in which I have lost all self-confidence, I venture timidly the view that it is reasonable—even if politically inept—to be concerned both about inexcusable affronts to women and about the further burdening of court calendars already clogged by employment cases.

Some broader reliance on alternative methods of dispute resolution in employment cases may develop in connection with the handling of the approximately 100,000 employee claims for damages resulting from exposure to asbestos which are currently in the courts. Plaintiffs' lawyers turned down one company's offer to settle 60,000 of these cases for $750 million, which may have been low, and a federal appeals court rejected an effort at the district court level to establish a special tribunal to handle this litigation. Last September, Chief Justice William Rehnquist set up an ad hoc Committee on

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12. Ellison, 924 F.2d at 879.
asbestos litigation,\(^\text{17}\) which was to report to the Judicial Conference. The subject is also under consideration as part of the complex-litigation project of the American Law Institute.\(^\text{18}\) Recommendations for special handling will probably be made to the Congress. Consensus is complete in the profession, except for the plaintiffs’ lawyers bar (whose reasons are no longer accepted at face value), that as employment rights litigation proliferates, more of it must be removed some way from overburdened court calendars.

One encouraging development is the Supreme Court's recent decision, with Mr. Justice Kennedy writing the opinion, allowing class actions to be brought in alleged age discrimination cases.\(^\text{19}\)

**ROLE OF LABOR UNIONS AND COLLECTIVE BARGAINING**

A second agenda item, related in some ways to the first, involves the role of labor unions and collective bargaining in implementing human rights and responsibilities at the workplace. This union role was dominant from the late 1930's to the early 1960's, with government's principal function being to facilitate unionization and bargaining. During the past thirty years, however, the enlargement of employee rights has been principally by statute. There has been an accompanying over-all decline in the size and effectiveness of unions in this country.

In my personal view, this shift from an essentially private to a primarily public jurisprudence of employment relations represents a distinct loss. To look at a carefully drawn collective bargaining agreement — such as the one recently entered into between Harvard University and the American Federation of State, County and Municipal Employees, representing Harvard’s 3,500 clerical and technical employees— is to realize what a real charter of human rights and responsibilities at the workplace looks like, going far beyond any conceivable pattern of federal and state laws.

It is also too little realized that rights such as those accorded in the anti-discrimination statutes and the new common law prohibiting unjust discharge are not worth much without representation to enforce them. Few plaintiffs in unjust discharge litigation are employees who need this protection most; the great majority are high salaried executives or managers.

It is wrong to identify unionism solely with an adversarial relationship. The number of strikes involving over a thousand employees has

\(^{17}\) See generally, Texas Lawyer, October 8, 1990, at 1.


\(^{19}\) Hoffman La-Roche, Inc. v. Sperling, 110 S.Ct. 482, 486 (1989).
dropped from an earlier level of over 400 per year to less than fifty. New potentials of employee fulfillment and of enterprise effectiveness are opened up by the constructive bargaining relationship between General Motors and the United Automobile Workers at the new Saturn plant in Tennessee. It involves an unprecedented sharing of decision making at virtually all levels of operation and management.\textsuperscript{20}

The idea of employee stock ownership plans—ESOPs—captures the public imagination and has become the subject of fairly extensive Congressional legislation,\textsuperscript{21} involving tax subsidies for these plans of between three and four billion dollars a year. Although the complexity of this subject defies further attention to it here, the evidence increasingly shows that such plans can be dangerous delusions unless the employee dollars that go into them have the protection of employee representatives.

I do not fully understand the reasons for the decline of union status and effectiveness in this country during the past twenty years. It is partly a consequence of the shift from a primarily production economy (where large numbers of organizable employees worked together in a single location) to a predominantly service economy (characterized by smaller establishments). Changes in the patterns of NLRB rulings and employer attitudes and practices have had an effect. The broadening of statutory employment protections and benefits has seemed to reduce the unions' role. Few employees face the degree of economic fear so many did forty years ago.

It is also a fair charge that the unions did a poor job at first of giving minority groups and women the recognition and representation they deserve. And the unions defended too long too much labor redundancy and featherbedding, especially in the entertainment, transportation and newspaper industries. The five-month strike recently concluded at the N.Y. Daily News was a shame.

\textsuperscript{20} The Saturn Agreement provides for UAW and GM employee involvement in nearly every aspect of decisionmaking at Saturn. Note, \textit{The GM-UAW Saturn Agreement: A New Approach to Premature Recognition}, 74 Va. L. Rev. 89, 91 (1988). Worker agreement is necessary before any action is taken or decision is made. \textit{Id.} at 91 n. 18. The agreement also provides for preferential hiring of UAW represented GM employees, UAW as the employees' sole bargaining agent, job classification and work units allowing overlapping worker responsibility and self-management, and permanent job security. \textit{Id.} at 89-91.

Yet the unions have been, remain today, and will be in the future the most effective advocates and representatives of human interests at the workplace. The best available analyses and defenses of these interests are in the Catholic Bishops' 1986 Pastoral Letter (*Economic Justice For All*)\(^{22}\) and in the two reports of the AFL-CIO Committee on the Evolution of Work: *The Changing Situation of Workers And Their Unions,* and *The Future of Work.*\(^{23}\) The agenda which has been set for the AFL-CIO Conference on Civil Rights next month is provocative and promising.

The legal profession has become identified with union busting, in large part because of the counseling of employers to pursue dubious or even clearly illegal practices solely to delay dealing with a union until it collapses and because the penalties are negligible or nothing at all. This demeans the profession and is a disservice to the public. Human rights at the workplace will be enhanced, in my judgment, by strengthening the present laws regarding collective bargaining; so as to speed up the National Labor Relations Board processes, and to protect the right of employees legally on strike to return to their jobs when a strike ends. It was disappointing to hear the new Secretary of Labor announce last week that despite the indications of strong congressional support for the pending striker reinstatement bill,\(^{24}\) she is opposed to it and the President will veto it.

**Rights and Responsibilities in the U.S. and Labor Standards Abroad**

Agenda item number three, involves recognition of the increasingly close relationship between rights and responsibilities at the U.S. workplace and labor standards in other nations.

Alongside reports in the press earlier this month of a 6.5% unemployment rate in the United States, 7.4% in California, were two other stories. One was about the U.S. footwear industry, in which wage levels and labor standards have always been notoriously low. This industry has now lost 74% of its market to imports from countries with even lower levels and standards; the consequent loss of jobs is in the tens of thousands. The other newspaper report was that there are now between 350,000 and 400,000 Mexican workers employed in the Maquiladora plants that line the border from Tijuana to the Gulf of Mexico.

Many of these Maquiladora plants — most but not all of them

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U.S. owned — do assembly and similar work on parts sent down by U.S. manufacturers and later returned here, with only a minimal import tax being added. The rate paid for this work when it used to be done in U.S. plants was from $5 to $12 an hour. The rate being paid the Mexican workers is (in dollar equivalents) from $1.50 to $2. When the Maquila program was set up in the 1960s, it was expected to result in the employment of only about 50,000 workers.

Having been brought up and then having started growing older on the principles of free trade, I admit to some back-sliding, as advancing technology and sharper foreign competition make Gresham's law increasingly applicable to world labor standards. The prospect in this county is that there will be fewer and fewer jobs for more and more unskilled workers — which I want to come back to in another connection. The Maquila program, and now the prospect of a U.S.-Mexico trade agreement that contemplates a much more extensive dropping of tariff barriers, only bring the broader questions of international trade and varying labor standards into a particular focus. A 1988 report by the United States International Trade Commission25 confirms convincingly the question of whether, or at least how much, the Maquila program affects U.S. employment. Although I confess skepticism about the analysis, I have no basis for disproving the report that the U.S. manufacturers involved would lose, without the Maquila savings, business upon which a still large number of jobs depend.

It bothers me that proponents of the proposed U.S.-Mexico open trade agreement refer frequently to the analogy of the European Community, but leave out the fact that one of the basic ground rules of the European Community is that all member countries must adhere to the same labor standards. In an early case, European Commission v. United Kingdom,26 The European Court of Justice ordered the United Kingdom to amend its law requiring equal pay to women and men for equal work so that the British statute will meet the Community standard of equal pay for work of comparable value. Recognizing that uniformity of rules for European partners cannot be applied on this continent, it does seem reasonable to give serious consideration to preventing inhuman labor standards in other countries from destroying U.S. jobs.

There will be fuller agreement about the desirability of doing a

good deal more than we have in the past about trying to raise labor standards in other countries. The universally respected International Labor Organization (ILO) has enacted over the years, by a majority vote of its hundred-plus member nations, about 140 conventions establishing various kinds of proposed international labor standards. The United States has ratified only ten or twelve of these, far fewer than any other country. It was ironic when, several years ago, a Convention about protecting employees from unjust discharge came before the ILO. Only six nations voted against it: Brazil, Chile, Lebanon, Saudi Arabia, Iraq, and the United States.

I do not want to seem to oversimplify these international labor standards questions. They are more involved than they appear. The impression is widespread in this country that workers in Japan have job security for life, and a survey several months ago showed hourly wage rates in the Japanese automobile industry at levels slightly above, in comparable dollar terms, those in the United States. Yet the detailed and apparently credible report in Sunday's Los Angeles Times ²⁷ is of Japanese workers being required to work incredible overtime hours without reporting them; of 10-minute work breaks during which "a tired worker lies down in an enclosed capsule, surrounded by darkness and soothing music. When time is up, his face is blasted with cold air and he is sent back to work;" and of numerous cases each year of Karoshi, "death from overwork."

Some of the advantages that many foreign producers have obtained may be related to lower labor standards.

It is hard to evaluate and untangle the implications (in terms of what to do about labor standards and protective tariffs) of our sudden drop to the position of the largest debtor nation in the world. This area is simply too complex for further discussion here, especially because I only half understand it. The truth clearly emerges. Comparative international labor standards have become important parameters in working out the critical equations of the employment relationship in this country.

THE FUTURE OF WORKPLACE RIGHTS AND RESPONSIBILITIES

Now a fourth and final line of inquiry into the future of workplace rights and responsibilities. It starts from recognizing the extraordinary changes that are taking place today in work in America and in the American workforce. This situation was once so stable that many common family names — Carpenter, Miller, Farmer, Smith — developed from the traditional pattern of sons moving into the jobs their fathers held. Today, however, change in the two key workplace


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factors is so accelerated — frenetic, almost kaleidoscopic — that when the Hudson Institute issued, in 1987, its projection for Workforce 2,000, the reactions were monetary disbelief, followed by sober reappraisal.

The most striking changes are demographic. Women made up 46% of the workforce in 1985; they will constitute 64% of the 25 million new workers (net) added by the year 2,000. Minority group employees were 10% of the workforce in 1985; They will be 20% of the new workers coming in. The converse is that native white men, who made up 47% of the labor force in 1985, will be only 15% of the new workers.

Perhaps even more significant changes are taking place in the nature of jobs. Two inextricably interrelated forces bear on this: the shift from an essentially production economy to one of primarily service and information; and an explosion of automation, computerization, and various forms of new technology. Among the consequences, over generalizing, are a rise in the number of skilled jobs and a sharp drop in the number that will be available to unskilled workers.

It is almost a century ago that Thorstein Veblen warned that the ultimate testing of the free society will be whether it can stand the stresses and strains between what he called “scientific invention and the human purpose.” It was in the 1920s that we saw Karel Capek’s “R.U.R.”, Rossum’s Universal Robots, whose competencies increased until they learned the art of their own reproduction. As the play closed, the curtains at the back and sides of the stage parted slightly and the robots came plodding stolidly in, then formed in solid phalanx and marched toward the audience. Just as they reached the front of the stage the lights went out and the play ended. Last year, O.B. Hardison’s instantly classic Disappearing Through the Skylight revived the prophecy of human abdication to a race of androids.

The futurists’ doomsdays have never yet come closer than the horizon. A discussion, furthermore, of conditions at the workplace would not properly ignore the degree to which scientific invention has made life more livable. It will be part of the role of law and lawyers to keep change as an ally in improving both the effectiveness of labor as an element of production, and the enhancement of work as a human value.

The Fair Labor Standards Act\textsuperscript{29} will have to be amended to recognize a decreasing need for people to work forty hours a week. The present unemployment laws must be modified; written fifty-five years ago to cover temporary reductions in force during a depression, they do not meet the problem of permanent losses of jobs to machines.

Women's increasing role in the workforce will mean heightened demands not only to eliminate all vestiges of gender discrimination but to increase the recognition of responsibility at the workplace. The "pay equity" and "glass ceiling" problems will be met. There will be new and broader legislation regarding parental leave and child care. Statutes encouraging flextime programs and part-time work where it is desired are bound to be introduced. The chances appear strong that women will use their expanding influence to press for legislation requiring employers to provide broader health care programs, and that employers' increasing difficulty in meeting these demands will then lead to one cautious step after another toward national health insurance.

Finally, though, I now turn to a sterner aspect of this changing prospect. To have been present at the drafting and enactment of Title VII of the Civil Rights Act of 1964 is to be especially sensitive to the issue of equal employment opportunities for members of minority groups. Those who drew up that legislation claim no credit for promoting women's entitlements; the word "sex" was added to Title VII on a motion on the floor of the House by an arch-conservative congressman from Virginia who thought this would help scuttle the bill. The administration's purpose and intent was focused on ending two centuries of racial bigotry.

This purpose remains at the center of concern and debate about workplace rights and responsibilities. Two years ago, the U.S. Supreme Court decided, by sharply divided votes, six cases, requiring twenty-one opinions, resulting, among other things, in placing a greatly increased burden of proof on plaintiffs in race and gender discrimination cases under Title VII of the Civil Rights Act of 1964.\textsuperscript{31} Last year, Congress passed by substantial majority votes, a bill — The Civil Rights Act of 1990 — which would have neutralized those 1989 Supreme Court decisions, making it easier for plaintiffs in discrimination cases to meet the required burden of proof.\textsuperscript{32} But the President vetoed the 1990 bill, and his veto was upheld by

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\item \textsuperscript{30} 29 U.S.C. § 207 (1988).
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one vote in the Senate. Now a new bill has been introduced by the Democratic majority in the House of Representatives, H.R. No. 1; and a new administration bill has also been put in the hopper.

I hope not to be misunderstood in expressing the view (i) that the Supreme Court decisions place an unbearable burden of proof on plaintiffs in Title VII cases; (ii) that the congressionally adopted Civil Rights Act of 1990 was, with one or two exceptions, sound; (iii) that the presidential veto was ill-advised; (iv) that the new administration bill is a mockery; but (v) that this frenetic debate at the highest level of all three branches of the federal government comes very close—so far as employment disadvantage among minority groups is concerned—to being a sham battle. The roots of that disadvantage reach far below the rules regarding the burden of proof in legal proceedings.

I mentioned earlier the fact that the percentage of applicants for work who came from minority groups—African American and Hispanic specifically—is rising now at a rate twice what it was a few years ago. Two accompanying statistics require thoughtful attention. Many of these minority group workers have been and are today employed in jobs that are rated technically in the two lowest skill categories—which included, in 1985, 40% of all jobs. But only 27% of the new jobs now being created are in these low-skilled categories. Doubling numbers of minority group members are now pursuing a rapidly dwindling number of jobs.

Feeling strongly about these burden of proof questions, it seems to me imperative to get to the more basic causes of this problem. I find these causes reflected grimly in the sobering figures that are emerging regarding what is happening to children in America who start out at a severe disadvantage. The overall figure is not broken down by race; we know that it includes a good many more white than minority group children, but a sharply disproportionate percentage of the latter. It now appears that approximately 300,000 children in each one-year age group, which is one in every ten, will be going on to maturity without the means to be legally self-supporting. The impact is cumulative; most of those in this rut stay there for life. This means an eventual total of about 15 million people unequipped to cope, and an annual cost and loss estimated at $100 billion a year.

Behind these broad figures are some others: A child is born to a teen-age mother (and usually a teen-age father) every sixty-seven...
seconds; a boy or girl (usually a boy) is arrested for drugs every seven minutes; about two million children are arrested annually for offenses ranging from disorderly conduct to murder. These figures are not broken down by race. Some others, though, that come even closer to employability show that one out of every eleven males in the twenty to twenty-nine age group is in jail or on parole or probation; the figure for black males in this age group is one out of four.

But the racial distribution is important only in the context of talking about a law that is supposed to lead beyond the guarantee of equal employment opportunity regardless of race to actual employment parity. It becomes increasingly clear that equality of results will require taking three additional sets of steps involving, beyond what is required at the point of employment, affirmative action by the community at large.

The most obvious place to start is at the secondary school level. Unemployment is heavily concentrated among both high school dropouts and those who go directly from high school graduation to work. If secondary education were developed as fully around the needs of the half who are not going on to college, which includes a large percentage of minority group children, as the half who are, this problem would be at least reduced. If this is too general, I suggest, only illustratively, providing one career advisor and assistant for every twenty-five to thirty high school students not going on to college. An individual’s enjoyment of human privileges at work can and will indeed be affected by laws; it will be controlled even more by how much and how good an education that individual has had.

Second, there is increasing evidence that those who are going to encounter difficulty as employees and as citizens bring the seeds of that trouble with them when they come not just to the high-school but to the first-grade door. We are unfortunately sensitive about recognizing that the single largest factor contributing to both unemployment and citizen default is the weakening influence and support of family during children’s most formative years.

This is not something that can be approached by legal prohibitions. It will require shoring up childhood support systems in every way possible. The President’s veto of last year’s bill requiring twelve weeks of unpaid parental leave was unkind, ungentle, and unthinking. (The Swedish law provides for twelve months of paid parental leave.)

The Supreme Court recently upheld a local welfare agency’s turn of its back on a father’s extreme abuse of his four-year old son.

This may be present law, but it is destructive social policy. A recent report on a twenty year follow-up of 1,500 children — half of them victims of child abuse, half of them not — shows that the unemployment rate among the maltreated group is twice that among the control group. That four-year old boy will find hollow satisfaction in the provisions of Title VII when he tries, fifteen years later, to get a job.

A massive extension of Operation Headstart, though perhaps with provision for larger local direction, is only illustrative of the kind of affirmative preventive action that must be taken. With a childhood deprivation rate now of apparently about ten percent, local communities will advisedly see to it that any child born into circumstances that do not include the nurturing of responsible family is picked up at the earliest possible age by a mentoring program of one kind or another. There are in almost every community more people who want to help than there are children who need it. As we move toward the kind of youth and senior service program that most other nations have, this one-for-one mentoring potential will be given serious consideration.

Third, it is reasonable to hope that these figures showing almost half a million births to teenage parents each year — and suggesting the disproportionate place of both these children and their parents in subsequent unemployment and other disadvantage figures — will prompt looking into the sensitive but critical pre-birth and pre-pregnancy area. Any abbreviated discussion of this subject would risk unduly reactions ranging from religious heresy to genocide. But honesty does not permit leaving it off an agenda for further consideration in trying to achieve not just equality of opportunity — among those who have the advantage of family and education, and those who do not — but parity of results.

Too much said, but also too little, of the necessity for looking behind the employment transaction and relationship itself, and behind rules about burden of proof in judicial proceeding, for answers to the most serious issue of employment rights and responsibilities we currently face.

CONCLUSION

So we come to the end without the suggestion of any overall conclusion. You will have sensed a personal persuasion that the employment relationship is one of the most important and fascinating of those with which law deals. By referring to its critical balancing of individual and enterprise interests I have tried to suggest some of the
prospects — involving alternative methods of dispute resolution, the decline but not the fall of labor unions, world labor standards, the fallout from explosive change at the workplace — that appear relevant to the role of law and legal architects in perfecting this relationship.

It occurs to me that a good deal of what has been discussed here may have appeared to be on the debit side of any accounting of current affairs. This has not been intended. A working agenda must start from unfinished business. Perhaps on times' longer calendar we have been going through a kind of winter season for employee interests, especially those of individuals who start with fewer advantages than others. This is at least in part a consequence of the economy having gotten pretty badly out of kilter.

We have just seen, though, the reestablishment of our national self confidence in the world arena, and the restoration of people's essential trust in government. There seems reason to believe, at least legitimate basis for hope, that this reinvigoration of spirit can be directed now to meeting pressing domestic needs. If this happens, the prospect is clearly that the law of human rights and the recognition of responsibility at the workplace will grow at least as much in the period ahead as they have advanced in the sixty years since that student commentator in the Yale Law Journal pronounced his benediction on the start of all this. Writing even as the Depression of the 1930s was deepening, he nevertheless counted the future a good idea. So do we.