ABSTRACT

This article explores why the "right to work" remains underdeveloped through an analysis of its theoretical origins and developmental path. First, the article explores specific content of the right to work, as well as the international legal instruments that generate that content. Second, the article examines the development of the right over time, and the debates that have shaped it. This discussion progresses into analysis of the different perspectives and approaches to the right to work emerging from the human rights and labor movements. The differences in approach between policy makers and those in the human rights sector, caused largely by developments in economic theories, is also examined to help explain the contemporary status of the right to work. Ultimately, the article discusses the challenges of bringing human rights dialogue to bear on economic decision-making, and concludes with recommendations for the future development of the right to work.

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I. INTRODUCTION: EXPLAINING THE STATE OF THE RIGHT TO WORK

Human rights do not develop steadily or along a linear path. While some conceive of the long-term development of human rights as a natural and even logical progression, actual advances or regressions in human rights protections cannot be separated from real world events. Such developmental paths see rights evolve in particular ways at specific times depending on what is happening in the world. A recent example of this process has been the reduction in the use of the death penalty in the United States. While this is a significant advancement of human rights, a crucial reason for fewer executions being carried out is economics—the price of keeping people on death row, litigating death penalty cases, and carrying out the death penalty are costs that US states are no longer as willing to endure.1 To assume this was a change based purely on the grounds of morality or public opinion would be overly simplistic; the role of shrinking budgets and increased fiscal responsibility must be acknowledged.

Recognizing the connection between real world events and developments in human rights, it stands to reason that major crises, catastrophes, tragedies, and other cataclysmic events have served to push and pull international and domestic regimes towards the recognition, solidification, and enforcement of human rights.2 In the last decade, 11 September 2001 had perhaps the most fundamental impact on human rights protection, not just in the US, but around the world. However, as the panic immediately following that event seems to have waned, human rights protections are again on the rise, though on a path still affected by that important event and its aftermath. In the coming decade, the major world event that will determine the development of the international human rights regime is not yet clear, but the financial difficulties that have led the world into the new decade may prove to be a strong candidate.

Developmental narratives of specific human rights have, in most cases, been carefully explored for most fundamental civil and political rights. These so-called first generation rights are still deemed by many to be at the apex of a hierarchy, and thus more worthy of protection relative to other rights. With these rights often dominating international discourse, the international community has unfortunately paid less attention to understanding the waxing and waning interest in social, economic, and cultural rights. These rights are still deemed by some to be second generation rights, positioned lower in the


hierarchy of rights and therefore of lesser importance. However, periods of major economic distress, such as the financial crisis and world-wide recession that began in 2008 and 2009, can temporarily alter the artificial human rights hierarchies and result in an increased focus on socioeconomic rights, just as political upheavals often inspire the devotion of more thought and attention to civil and political rights.

The right to work is a clear example of this process. This right is important because the fundamental value of work to the individual and collective experiences of people cannot be underestimated—work affects the human experience on a number of levels. Work is about the generation of income, but also about individual fulfillment, the constitution of one’s identity, and social inclusion. As such, work should surely be recognized as belonging to the sphere of human rights.3 Work provides individuals in a society with an element of human dignity as key contributors to that civilization, while also providing remuneration, which might allow them to secure an adequate standard of living.4 Perhaps it might best be stated that “[w]ork is a human right because it is a means to an end—human survival.”5

The right to work should also not be overlooked in its role as an enabler for other rights. Work is absolutely crucial for survival rights such as food, clothing, and housing. Work also directly affects the level of attainment an individual may reach for a host of other human rights, such as education, culture, and health.6 While most would argue that the right to work can never be truly guaranteed, as there will likely always be some level of unemployment, work continues to be “an essential part of the human condition,”7 and should clearly be considered within the context of rights-based discourse.

While the importance of work to individuals and societies would hardly seem debatable, the right to work remains controversial. This is because the right touches upon the “outcrop of often deeply submerged but sincerely held differences between reasonable people about the most fundamental questions of political philosophy, including the nature of liberty and the appropriate role of the State in preventing inequality.”8 While these differ-


ences in political philosophy do not necessarily change, during periods of depression or recession the right to work, as a concept, does gain greater prominence as the realities of widespread unemployment are impossible to ignore. At these times, the right has been successfully reintroduced through the human rights discourse into discussions on markets and economic policy. Conversely, during periods of sustained economic growth, there is a shift in focus to increasing rates of growth and preventing inflation, leaving many decision makers to discount the perceived value of human rights, including the right to work. Throughout these cycles, the right to work has never been firmly established as positive human rights law that creates very clear and specific obligations for nation-states.

Without any clear consensus on the right to work, especially one that is supported both during times of economic hardship and affluence, long-standing debate has continued during the past two decades. While there have been few points of general agreement, there have been shifts in the discussion. What was once a dialogue focused mainly on the need to seek "full employment," has now shifted to a debate on whether all members of society should be guaranteed an "unconditional basic income (BI) sufficient to support a modest but dignified existence." Basic income advocates argue that conventional ideas of the right to work focus too narrowly on wage employment. Rather than viewing the right to work as the right to obtain a paying job, they argue that it is a right to pursue an occupation of one's own choosing. There is a difference between "labor," which can be menial and extremely difficult, and "work," which involves using one's abilities to achieve in activities of one's choosing, which may include artistic accomplishments or teaching and caring for loved ones. As one scholar notes,

to conceive of work only as those activities through which a monetary consideration is obtained is to have a very limited idea of what work means, and it is even worse to rely on the market to determine what is and what is not work. Work can be defined as all those activities which combine creativity, conceptual and analytic thought and manual or physical use of aptitudes.

As unemployment has not been satisfactorily ameliorated by conventional means, many have advocated that having a basic income should be a right. This may seem like a radical concept to some, but the idea is certainly not a new one. Many societies, in fact, have already adopted basic income approaches for persons who cannot work due to advanced age. The basic logic behind these measures for the elderly—that those who are disadvantaged in the labor market and cannot find appropriate work or are simply unable to work need a basic income to sustain a sufficient standard of living—can be applied to society more generally. Some therefore believe that "what should be equalized in a good society of the 21st century is basic security, which encompasses basic income security. This should be a right." While certain scholars and activists have continued to develop the dialogue around the right to work, in reality the right is rarely discussed, let alone focused upon among policy makers or broader segments of society.

A number of explanations for this lack of engagement on the issue have been suggested. The inaccessibility of economic dialogue for rights-based language and the tense political context in which the treaties forming the legal basis for the right to work in international law were negotiated are perhaps the most common reasons cited to explain the limited attention paid to the right to work. These challenges do not, however, completely explain the lack of development of the right. The political tensions between capitalist and socialist nations did indeed affect the way in which the right was written into international law, but as that tension has been drastically reduced in recent years, there has been no substantial change in the approach by countries to the right to work. The tension between economics and human rights dialogue is certainly an important topic to be considered as well, but it is not a challenge unique to the right to work. All socioeconomic rights have been affected by this contrast in language and approach.

While the problems of politics and economics have contributed to the lack of attention being paid to the right to work, what has uniquely set back the development of the right has been a steady process of dividing the right to work into pieces. This segmentation introduced a hierarchy of rights within the divided right. Many theorists, activists, and governments have contributed to this division as they have approached the right to work with specific goals in mind. Several distinct aspects or components of the right to work have been identified, and specific actors have pushed for a hierarchy of importance within those pieces, on the basis of political or institutional objectives as opposed to a concerted effort to explore and develop the right itself. As a result of this process, contemporary perspectives on the right to work tend to conceive of a conglomeration of interrelated rights.

11. Id.
14. Id.
15. Standing, supra note 12, at 91.
There has therefore been no consensus built on what the core elements of the right are, and how the entire right should be developed and sustained. These differences have prevented even seemingly natural allies like the labor and human rights movements from working together to promote the right to work. While this maneuvering has resulted in careful consideration of certain aspects of the right, the right of every individual to a job has largely been neglected.

Challenges facing the establishment of a strong right to work also include debates that have surrounded all protected socioeconomic rights. Advocates often argue that constitutionalizing such rights makes them justiciable, in other words reviewable by the courts. Thus, opponents of socioeconomic rights argue that enforcement is problematic. They argue that courts should not have these types of review powers because they lack the necessary expertise and institutional competence to decide the relevant questions. Within the right to work, such a review would include determinations such as what standard of living is appropriate in a given society. These opponents further argue that having the interpreters of the law essentially become lawmakers, especially before the right to work has been clearly written into national laws, goes well beyond the mandates of a judge in most systems worldwide.

Discussions on the role of the judiciary in relation to socioeconomic rights are not at all one-sided; advocates for these rights have long argued that socioeconomic rights need to be justiciable in order to function like and with other rights. They assert that when the courts fail to adjudicate such rights, or fail to include socioeconomic rights in broadly framed civil and political rights, such as equality, life, or security of the person, they apply rights in a discriminatory manner by excluding from protection many of the most vulnerable groups. Some nations have recognized the importance of socioeconomic rights, such as India, which protects socioeconomic rights by viewing them as directive principles of state policy. But this type of action has not become sufficiently widespread as to represent a more cohesive international trend. Scrutiny around socioeconomic rights is often deflected by opponents with the argument that the protection of a right such as the right to work is dependent on the unique context of the country, especially in terms of the availability of resources. Without the resource capacity to ensure the protection of a right to work, it is meaningless to explicitly provide for such a right.

It is undeniable that any social legislation protecting the right to work has had to compete with government objectives to reduce state budgets and minimize government intrusion into the free market. However, the United Nations Committee on Economic, Social, and Cultural Rights has noted that:

In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

The primary aim of this article is to explore why the right to work remains underdeveloped through a careful analysis of its theoretical origins and developmental path. First, the article explores the specific content of the right to work as well as the international legal instruments that generate that content. Second, it examines the development of the right over time, as well as the debates that have shaped. Attempting to understand how the right has developed, or rather has remained underdeveloped, and how the right has been separated and dealt with in pieces by international actors is a critical part of the overall narrative.

One of the logical places to start exploring divisions over the right to work are the politicized discussions following World War II, which managed to produce a right to work that was ultimately a poorly constructed compromise between Western and socialist countries. This construction of the right, in...
which the right of every individual to a job was encased within a broader, multi-faceted right to work, is the origin of the theoretical and practical division of the right. This has had dire consequences for its development over time. Those early debates and the compromises that occurred have restricted the right's development and have left it constricted. This path needs to be understood to ensure that steps taken to reinforce and reinvigorate the right are able to overcome the historical difficulties limiting the right.

Following the discussion on the historical development of the right to work in international law, the article turns to a brief section on the right to work within several domestic systems. This illuminates the contemporary legacy of the original political debates which framed the early context of the right, and analyzes convergence on the issue of the right to work according to domestic policy. This discussion leads into analysis of the different perspectives and approaches to the right to work emerging from the human rights and labor movements. Examining how these two influential and complex movements approach the issue helps to explain the practical effect of a divided right to work.

The article also examines the differences in approach between policy makers and those in the human rights sector, caused largely by developments in economic theories, to help explain the contemporary status of the right to work. The challenges of bringing human rights dialogue to bear on economic decision-making have contributed to the alienation of the right to work from economic policy. Consideration of these topics introduces a narrative that allows for this article to conclude with recommendations on the future development of the right to work.

II. THE CONTENT OF THE RIGHT TO WORK

While on its face the right to work seems a fairly straightforward concept, many have noted that it is not really a single human right but rather "a complex normative aggregate... A cluster of provisions entailing equally classic freedoms and modern rights approaches as well as an obligations-oriented perspective made up of strictly enforceable legal obligations and political commitments." At first glance the right to work seems to refer to the right to a job for every individual, but, this is by many standards, a very narrow definition. Rather, the phrase “right to work” has been used to denote a conglomerate of rights, including issues such as the right to dignified work, equal access to work, etc. This construction of a multi-use right has ultimately obfuscated the core goal of the right: to ensure that every willing person is able to support themselves and provide a livelihood for their families through work. Some aspects of this aggregated right overlap with political rights such as freedom of association and non-discrimination, which is a point that will be returned to. While the process of shaping the right will be discussed later, it is important to discuss several theoretical interpretations of which rights are actually included under the mantle of the right to work.

The right to work is often divided into several distinct but interrelated rights. Different theorists have undertaken these divisions in slightly variant manners. A fairly simple way to approach the right is to split it into two main components, one qualitative and one quantitative. The quantitative element would refer to the fundamental requirement that there be enough jobs for every person seeking one. The qualitative aspect of the right refers to the need for jobs to qualify as decent or dignified work. Decent or dignified work is a term that is itself a collection of requirements, including fair wages, fair conditions, reasonable hours, etc. For many the right to dignified work also includes the requirement that work be productive. While the logical differentiation between quantitative and qualitative aspects of the right is convincing, some might criticize this formulation of the right for failing to include the rights of job seekers to freely choose their work. Often this right to freedom of choice or liberty is emphasized, as this aspect has more or less been presented to defend the right from sliding into an obligation to work or into an argument for a socialist planning system.

Taking into account these two criticisms of the simple two-fold view of the right to work, several theorists have instead introduced slightly more complex interpretations presenting at least three components to the right to work. These include the right to liberty, the right of individuals to work, and the right to dignified work. Roughly defined, liberty refers to the freedom of choice that all workers should have when selecting an occupation. The right of individuals to work is the concept that every person who wants work should have the opportunity to gain employment. The right to dignified work once again focuses on the conditions at work, including the requirements of fair wages and adequate working conditions, as well as the requirement that work be productive. Philip Harvey has suggested that the right to compete fairly for available jobs should also be part of the right. An additional as-

27. Branco, supra note 18, at 6.
29. Id., at 198.
30. Mundlak, supra note 3, at 192-93.
pect of the right to work that might be specifically included as one of the key points is the right to remuneration for work. In Malawi African Assoc. v. Mauritania, the African Commission held that "unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being." While some theorists might categorize this as being under the broader right to dignified work, to many this is a right that should stand on its own.

The free choice of employment and the access to employment comprise important elements of the right to work that are often somewhat misunderstood. "Free choice of employment" does not mean that the state must provide the exact job that any individual desires; rather, it guarantees each worker the full opportunity to be employed in a manner that is suitable to his or her skills. The range of opportunities available to individuals will obviously be limited by the requirements of a country's social and economic development. The right of free choice of employment prohibits forced labor and is a protection against excessive restrictions on the right to work. The right to free choice of employment also contains the right not to work or to refuse work.

The right of access to employment incorporates the obligation to work towards the objective of reaching full employment for every individual seeking to be employed. The achievement of full access to employment once again depends on multiple factors: the nation's economic climate, the nation's social policies, external constraints relating to international trade, availability of raw materials, etc.

While the various definitions of the right to work have much in common, the specific conception of the right remains somewhat vague. Despite this still-imprecise definition caused by variance in conceptions of what it ought to mean, the right to work is contained in various human rights instruments and is promoted actively by the International Labour Organization (ILO).

It is internationally recognized as "one of the most fundamental... socio-economic rights." The existence of the right to work as a conception of modern human rights law derives from the French Revolution. Later, debates over the efficacy of the 1848 Constitution in France revolved around whether the right to work should exist, and if so, how it could operate within a constitutional framework. In France, expectations were raised for a system of national workshops to provide work, but work provisions to the people ended up being shabby and undesirable, which discredited such a coordinated plan for decades thereafter. Revelations of high costs and waste did away with this important precedent for large-scale funding of workshops primarily designed to provide jobs and subsistence to victims of a political and economic crisis.

In international human rights law the right is found in several different instruments: the International Covenant on Civil and Political Rights (ICCPR); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention on the Rights of the Child; and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. The right to work has also been accepted by the United Nations General Assembly in the Declaration

42. See Giovanna Procacci, To Survive the Revolution or to Anticipate It?: Governmental Strategies in the Course of the Crisis of 1848, in EUROPE IN 1848: REVOLUTION AND REFORM 507, at 509 (Dieter Dowe et al. eds., 2001).
44. Id. at 37.
Article 6 of the ICESCR includes three elements of the right to work: the right of access to employment, the right to free choice of employment, and the guarantee against arbitrary dismissal. Furthermore, Article 6.2 places on states the responsibility to ensure the right to work, which includes providing training programs and policies that aim to achieve full and productive employment. Article 6.2 was meant to outline and elaborate on the conditions which were required for the full attainment of the right to work. Article 6 is less concerned with what is provided at work, such as remuneration or safety, but rather the value of employment itself.

In the drafting of Article 6, some UN members proposed that states should undertake to “guarantee” or “ensure” the right to work. However, Western states proposed that states should “promote conditions” under which the right to work may be realized. The two philosophies reached a compromise, and while Article 6 contains a bold statement in support of the right to work, it does not bind states to guarantee the right. There was a fear that guaranteeing full employment could bind states to a centralized system of government where all labor would be under the direct control of the state. Thus, states are only obliged to “recognize” the right to work, not to guarantee it.

Article 7 of the ICESCR expands on the concept of the right to work with general guidelines of rights at work. Article 7 provides that everyone has the right to just and favorable conditions of work, in particular, the right to safe working conditions.

General Comment 3 of the UN Committee on Economic, Social and Cultural Rights recognizes that there is an obligation on all state parties to the ICESCR to take steps, as individual states and through the assistance and cooperation of the international community, towards the full realization of the rights recognized therein.

The Committee on Economic, Social and Cultural Rights in 2005 released a general comment on the right to work. While it focused on Article 6 of the ICESCR and the right to work, it also reaffirmed that Articles 6, 7, and 8 are interdependent rights that should be read together. The comment tries to create a jurisprudential structure for the right to work. However, it still seems limited to reaffirming general principles that meet little opposition.
It is a largely non-controversial document that does not introduce specific substantive changes to the current system. In the comment, when the committee seeks to explain the specific obligations of states regarding the right to work, it states that “States parties have immediate obligations in relation to the right to work, such as the obligation to ‘guarantee’ that it will be exercised ‘without discrimination of any kind’ and the obligation ‘to take steps’ towards the full realization of Article 6.”

Reading the comment, one is struck by the lack of differentiation between the general legal requirements and specific legal requirements laid out in the comment. Attempts to offer greater details on state obligations results in a list of principles in Section III of the comment that once again seem to reinforce the right to work’s status as a progressive right as opposed to one that is creating immediate and significant obligations and protections.

While the comments made by the CESC are significant, the International Labour Organisation (ILO) has pioneered much of the contemporary law on the right and has attempted to set out the standards for remuneration and conditions of work. The ILO has drafted many instruments providing guidelines, both for rights to work and rights at work. ILO legislation predates the general international standards contained in the Universal Declaration and the ICESCR. It must be noted, however, that while ILO Conventions are important, they provide extensively for rights at work, but not as many express provisions for the right to work.

It must also be remembered that other rights also impact on the right to work. One such right is the freedom of association. This connection has existed at least since 1919 when the Allied powers expressed the “recognition of the principle of freedom of association” in part XIII (Labor) of the Treaty of Versailles, which later became the Constitution of the ILO. Additionally, the ILO adopted the landmark Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87) in 1948. Article 2 of that Convention states: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”

While the ILO introduced and promoted the right to freedom of association, it did not design supervisory mechanisms for enforcement and therefore lacks its own complaint mechanism. Nevertheless, the Convention can influence states because it clearly specifies the concept of “fundamental principles and rights at work” as well as restates for member states “the proposition that ILO membership implies an obligation to respect certain fundamental principles.”


The African Charter on Human and Peoples’ Rights is unique in that while it provides for the right (Article 15), it also provides for the duty of individuals to work. Article 29(6) provides, “[t]he individual shall also have the duty . . . (6) [t]o work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society.” A duty to work was not included in the ICESCR’s “right to work” because many nations thought that the two concepts were incompatible. Since work must be freely accepted, according to the ICESCR, there could not be a coexistent duty to work since that duty could not be enforced. Furthermore, as previously discussed, many have argued for the existence of a right to not work, which would protect against forced labor of any kind.
In this context, the right to work, especially when conceived of as including “minimum just and favorable conditions of work,” is “not unconditional since it depends as a consequence on the capacity of the state to create a situation of full employment such as to guarantee the right to work to every individual,” which, especially viewed with Article 6.2 of the Covenant in mind, means that “the right of access to work is guaranteed,” rather than “the right to work (in return for remuneration).” In private law, former president of the International Court of Justice Mohammed Bedjaoui’s conception of the guaranteed right of access to work is formalized and institutionalized as the right to work within employment contracts, which are usually attached to the related human rights protections regarding working conditions and the principle of non-discrimination in employment.

While it would be impractical for states to guarantee the right to work, a number of members on the UN Committee on Economic, Social and Cultural Rights clearly expect states to recognize the right to work and to guarantee its protection in state constitutions. A guarantee of the right to work seems to imply that the state should provide a job for every person who is available to work. This guarantee would oblige states to ensure that the type of work is well suited for each individual worker concerned.

To serve requirements of human dignity, each individual has the opportunity to refuse work. Even states that do “guarantee” a right to work generally add conditions to that guarantee based upon the needs of society, and introduce it as a long-term objective to be promoted, rather than a right that is ensured. The Committee, in general, has taken a more reserved approach. Rather than guaranteeing the right to work, the Committee has taken the approach that the right can only be implemented if work is available, and, thus, states should aim to achieve the availability of work over time. Attempting to incorporate a strict right to work has proven unenforceable.

The ICESCR Article 6(2) calls on states to pursue “policies and techniques to achieve . . . full and productive employment.” This suggests that the achievement of full employment is not what is required, but rather the implementation of policies that are created with the objective of working towards the full employment. According to the Committee, states are required to produce information on the “situation, level and trends of employment, unemployment, and underemployment.” It is understood that states will have the ability and opportunities to explain levels and the nature of unemployment, as well as explaining the status of vulnerable groups, such as women, disabled, younger persons, older persons, and indigenous groups. In some states, especially developing nations, unemployment may be difficult to measure, due to the large portion of the population that is either self-employed or not in wage-earning employment, and the lack of social security systems.

This expectation of information sharing is intended to monitor the economic and social policies of states that relate to unemployment, as states are required to enact policies that aim to ensure that there is work for all who are available and seek work. The focus is generally on those policies that are directed to combat unemployment and assist vulnerable groups. The Committee has not specified the precise nature of the policies they expect, but it makes frequent references to ILO standards, in particular the Employment Policy Convention of 1964, No. 122. Thus, the Committee looks at the rate of unemployment in its analysis as one measurement of whether a state is committed to a policy that creates high and stable levels of employment. Though there is no evidence that the Committee has established a “ceiling” above which unemployment should not rise, except in the most extreme circumstances, the Committee does apply a higher level of scrutiny as levels of unemployment increase. The Committee has recognized that any assessments require reference to trends and context to take on specific meaning.

The right of access to employment clearly implies the right of equal access to employment. Equal access to employment is a prohibition on discrimination. Some level of discrimination is permitted in many states. For example, political belief or national origin may be a considered factor for applicants in public service work in many states. In some states, women are discriminated against in the workforce. They are either admitted to only a few careers or they must obtain the permission of their spouse or guardian to enter a profession.
In the cases of Iran and Zaire, the Committee found violations of the ICESCR in the form of legal provisions that require women to seek permission from their husbands in order to work outside their homes. Even developed countries still have some discriminating practices in their access to employment. For example, many states have paternalistic approach to careers for women in the military.

Matthew Craven set out four guidelines by which distinctions based on sex, religion, race, national origin, and political persuasion may be legitimate. He argues that such distinctions should only be made in jobs that involve a special responsibility to contribute to the attainment of the wider social commitment to the promotion of equality. Second, the legitimacy of distinctions, especially with regard to sex, may change over time as prevailing social and moral norms change. Third, race or national origin distinctions may be legitimate for cultural purposes, when employment may be contingent on race or national origin for the purposes of authenticity. Lastly, restrictions on foreign nationals and of political persuasion may be legitimate for certain high civil service posts, where those restrictions bear some relation to the security of the state.

Also contained within the right of access to employment is the right of access to employment services and occupational training. The ILO first provided for this idea in its second Convention of 1919. The 1948 Convention No. 88 concerning the Organization of the Employment Service elaborated on the concept. The ILO imposes the obligation on states that support fee-charging agencies to ensure that there is an appropriate system of supervision. The European Social Charter in Article 1(3) likewise provides for the establishment and maintenance of employment services. However, the international community has remained divided on the use of private, fee-charging employment-finding agencies. The Committee, in its reporting guidelines, does not provide for the establishment and maintenance of such services. The ICESCR, Article 6.2 does provide for "technical and vocational guidance and training programmes." These services should be free or financially assisted in appropriate cases. If a state does provide such access, however, Article 6.2 together with Article 2(2) of the ICESCR prohibits discrimination with regard to access to vocational guidance and training.

The right to work also contains the right of freedom from arbitrary dismissal. Inferred from the right to work necessarily is an element of security of tenure in such employment. Dismissals and termination are virtually inevitable in almost every state, and this right does not prescribe such dismissals from employment. The right attempts to ensure that states do not enact laws that might encourage individuals to arbitrarily hire and fire at will. Thus, it has been stated that "without a fundamental guarantee against arbitrary dismissal, the right to work would be meaningless." The ILO's Convention No. 158 of 1982 concerning Termination of Employment at the Initiative of the Employer provides for comprehensive protection for workers from arbitrary dismissal. Included in the Convention is a list of valid reasons for dismissals and procedures for appealing against a dismissal.

In recognizing the right to work and the importance of achieving minimum standards of living through work, it is implied that there must be a right to safety at work. Without requirements on the safety and health implications at work, the provision of sufficient pay will not equate to the attainment of a minimum standard of living in all cases. For some the right to safety at work and the general right to work may, at times, be at odds. After all, the potential outputs of available manpower can be maximized when states and employers disregard safety implications at work. Safety precautions can, in some cases, result in a reduction of production, but it will increase life expectancy and the quality of life. Introducing clear penalties for failure to meet safety requirements is specifically designed to increase the cost of ignoring the issue of worker well-being above cost of securing the workplace. Once again there is debate and a lack of clarity when classifying this right within a broader right to work. Some might suggest that the right to safety at work might fall under the broader right to dignified work, while others might also suggest that this needs to be a clearly separated and independent right.

Similarly, the right to rest is also implicated by the right to work. Article 24 of the Universal Declaration of Human Rights provides, "everyone has..."
the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." The 1921 ILO Convention No. 14 on Weekly Rest in Industry provides for the right to rest at work. Providing a set amount of hours in a work week has been, and continues to be matter of controversy with little consensus in the international community. The right to periodic holidays with pay has likewise been controversial, especially in poor regions. The African Charter does not provide for the right to rest or leisure. However, the African Child Charter does guarantee this right to children.

While there is no explicit right to be self-employed, there is also arguably such a right contained in the right to work. The right to be self-employed may also exist as an extension from the right to freedom from compulsory labor. There are some who might also include the right to join trade unions and bargain collectively within the right to work. The ICESCR expressly guarantees "the right of everyone to form trade unions and join the union of his choice . . . for the promotion and protection of his economic and social interests." The African Charter does not expressly provide for the right to join trade unions; however, the Charter does contain the right to freedom of association. It is possible to impute the rights of freedom of association and the right to work to provide for the right to unionize in pursuit of workers' common interests. The European Convention likewise guarantees the right to freedom of association, and that system links it with right to form and join trade unions for the protection of workers' interests. In National Union of Belgian Police v. Belgium, the European Court of Human Rights found that the right to form and join a trade union is a part of the general right to freedom of association. While there is clear legal precedent for stating that this right to bargain collectively exists, how exactly this right fits into a broader right to work is not entirely clear.

The right to work has a particular effect on refugees and non-nationals. The 1951 Convention for Refugees provides for the right of refugees to engage in wage earning employment, self-employment, and employment in the liberal professions. The right of refugees to engage in wage earning employment is "one of the most important [provisions] of the Convention." In October 1983, the UN High Commissioner for Refugees and the ILO agreed on a Memorandum of Understanding which recognized the right to work and other social and economic rights as important components of the international protection of refugees. Though Article 2(2) of the ICESCR requires "the Covenant to apply equally to nationals and non-nations," it is widely accepted that the ICESCR permits states to draw distinctions on the right to work of nationals and non-nationals, which is often based on economics. International labor conventions should, likewise, apply to refugees as far as they are workers. The International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families does not expressly provide for the right to work, but does have provisions for rights at work.

Clearly it is no small task to enumerate the various rights that are directly related to the right to work. There are various conceptions of which specific rights should be explicitly included in the broader right to work, how each component fits together, and whether there is a hierarchy contained within these rights. Having gone through each of these various elements that might be included within the right to work as well as the legal foundation for the more developed of these rights, the question now at hand is: with such an extensive list of relevant rights and a significant body of corresponding international law, how is it that one might refer to the right to work as being underdeveloped? In order to answer that question in full, first the question must be framed within a contemporary context. Discussing the potential importance and increasing prominence of the right within the context of economic crisis demonstrates the relatively limited relevance in practical terms which the right has achieved. In order to answer the question of why this is the case, the historical narrative of the development of and debate around right to work, as well as the main actors taking part in these debates must be explored in greater depth.

106. UDHR, supra note 46, art. 24.
107. ILO, ILO Convention No. 14, Weekly Rest in Industry, 1921; see supra note 4, at 301–02.
108. Supra note 4, at 302.
109. Id.
110. Supra note 5, at 190.
111. Id.
112. Supra note 4, at 295.
113. Id.
114. ICESCR, supra note 51.
115. Supra note 5, at 191.
116. Id.
117. Id.
118. Id. at 192.
120. Id. art. 18.
121. Id. art. 19.
122. Lester, supra note 7, at 351.
123. Id. at 331–32.
124. ICESCR, supra note 51, art. 2.2.
125. Lester, supra note 7, at 332.
126. Id. at 347.
Given the patterns of attention to the right to work that follow economic boom and bust cycles, the global financial crisis that came to head during 2008 and 2009 and the concurrent rise in unemployment indicate that discussions on the right to work are ripe for increased attention and discussion. The ILO predicted that the number of unemployed in the world would surpass 210 million by the end of 2009, an increase of more than 20 million in less than two years. The high rates of job loss have already resulted in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia. With the rise in social unrest resulting in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia. With the rise in social unrest resulting in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia. With the rise in social unrest resulting in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia. With the rise in social unrest resulting in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia. With the rise in social unrest resulting in increased activism on the issue of unemployment, with protests and unrest occurring across the world from Western Europe to China, from Russia to Colombia.

As governments are being forced into action on the issue of unemployment, rights based dialogue on issues of employment is also on the rise. In China the State Council presented its plan to reduce unemployment within its National Human Rights Action Plan. Within this plan a full page was dedicated to the right to work and clear targets were set. In the EU an employment summit held in Prague set clear action plans for EU member states on the issue of unemployment, and while the ideas were not entirely new, this summit framed economic policy entirely through the lens of employment, prioritizing the right to work over the desire for growth. In America,

against future crises, as well as prioritize the creation of social safety nets that might assuage the effects of a future recession or depression.

There is also a change in context being provoked by the ongoing march of globalization and the increasing importance of multi-national corporations. It is clear that the economic landscape has been developing in new and largely unexpected ways, but the debates over the right to work seem largely to reflect the same language and discussions that have taken place for decades.\(^\text{137}\)

By considering historical obstacles in the path of the development of a strong right to work, as well as the contemporary political and economic developments that have shaped the spheres in which discourse on socio-economic rights is taking place, this article will develop the argument about how the right to work might be repositioned to increase the level of scrutiny of decisions and policies that affect the labor markets, and also create more opportunities for the adjudication of right to work disputes.

### IV. AN ULTIMATELY UNSATISFACTORY COMPROMISE

The right to work, like many other rights, has not been left untouched by international politics and ideology. It has been deeply affected by discussions and negotiations on how to define and solidify the right taking place across a variety of forums. In order to understand how politics and the political discourse have limited effective action being taken to support the right of every individual to a job, it is useful to trace the modern development of the right, and understand the political context in which the international legal instruments creating a right to work were created. International politics creates the need for consensus, and consensus requires compromise. While in most cases the development of a consensus on a right should strengthen and support the development of that right, this has not proven to be the case with the right to work.

The human rights movement has long been driven by the building of broad consensus on rights based issues.\(^\text{138}\) In the case of the right to work however, the political nature of the debates resulted in what was, more or less, a compromise without consensus. The points relating to workers rights that were agreed upon in many respects avoided the fundamental issue, the right of every individual to a job, a subject on which no consensus could be obtained. As a result the right to work, as it is today, is an aggregation of several interrelated but ultimately separate rights, designed to obfuscate the lack of agreement on the vital discussions regarding the obligations for states in ensuring that every willing individual has a job.

It is difficult to find a clear starting point for a discussion on the historical development of the right to work. One starting point might be the French Constitution of 1793. Even at that stage the right created controversy and garnered attention because of its presumed relation to existing political ideologies. Political theory during the French revolution was focused on the independence of every man and the need to fight against tyranny and restrictions placed on freedoms.\(^\text{139}\) Within this political context the right to work was introduced in Article 21 of the Declaration of the Rights of Man and Citizen.\(^\text{140}\) Given the political emphasis on freedoms at that point, any discussion of rights that sounded too much like obligations was met with political opposition. The right to work was often criticized for giving the state the excuse to burden men with work and restricting their freedom. This argument was really less about the nature of the right to work so much as a chance for broader political attitudes to be expressed.

While right to work discussions may have begun earlier, from an international law perspective, the right to work did not truly emerge before the UN Charter. Articles 55 and 56 first suggested that states bore the obligation to promote "full employment."\(^\text{141}\) Within the context of the Charter full employment was taken to mean a job for every job seeker as opposed to some of the later formulations of full employment which take into account so called 'natural' rates of unemployment.\(^\text{142}\) In 1948 this right was codified in the UDHR stating that, "[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment."\(^\text{143}\) This formulation of the right to work seems somewhat ambiguous, especially as a right to protection against unemployment is also mentioned, implying that there is some difference between the two without clearly stating what the nature of that distinction is. Reading the article as a whole and taking into account the emphasis on the need to protect against unemployment rather than create employment seems to indicate that the right to work in this case means the right not to be prevented from working as opposed to the right to a job. In this way

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137. Adalberto Perulli, Globalisation and Social Rights, in Economic Globalisation and Human Rights 93, 100-02 (Wolfgang Benedek, Koen De Feyter, & Fabrizio Marrella eds., 2007).
139. Harvey, supra note 31, at 371-72, 392.
142. Harvey, supra note 31, at 373.
143. UDHR, supra note 31, art. 23.1.
the right to protection against unemployment might be similar, but clearly not identical to the right of every individual to a job.\textsuperscript{144} By formulating the right in this manner it is somewhat ambiguous and certainly unclear what obligations are created for states.

Despite the presence of a right to work in the UN Charter and the UDHR being clear, as is seen in the section on the content of the right, it was not until the International Covenant on Economic Social and Cultural Rights (ICESCR) was drafted that the exact nature of that right was more thoroughly debated and then codified. At the drafting meetings for the ICESCR extensive and often heated discussions took place in an attempt to delineate what exactly should be included within the articulated right.\textsuperscript{145} It is in this context that Article 6 of the ICESCR is dedicated to the right to work. In reading Article 6, the restraint of the drafters with respect to the right to work is clear. First, the use of the word “recognize” as opposed to “guarantee” is important as the word recognize is used so as not to imply a direct requirement for states to provide a job to their citizens. Furthermore, the inclusion of policies to promote economic development, as an action that fulfills the obligation of the state with respect to the right, has led some to suggest that the ICESCR offers a built in excuse to prioritize economic growth over job creation.\textsuperscript{146} The extent to which the right to work was marginalized by a lack of consensus is made even more apparent by the level of detail included in some rights and not others. Thus, there is a great deal of detail in Articles 7 and 8 on the right to trade unions and favorable working conditions, while Article 6 is brief and vague. This indicates the reality that, in debates on the document, the issues surrounding a broad right to work were left unresolved.

The limitations of the right to work written into the ICESCR and the ambiguities found in the UDHR and the UN Charter were certainly not the result of oversight. Debates on the right to work leading up to the drafting of the Covenant were intensely political and extremely rigorous. This was likely a result of the politics of this time, directly following World War II when so many debates over rights were taking place, and economic and social rights were proving to be a battleground between blocks of Western countries facing off against groupings of socialist countries.

On the right to work both sides argued that their approach to economics and politics should be reflected. While socialist countries proposed language that would require states to guarantee work to all its citizens, Western countries wanted language that focused more on guaranteeing that states would work to promote conditions in which employment would be high.\textsuperscript{147} In general these debates were used to argue against centralized planning or market based economies depending on the perspective of the negotiator.

With neither side willing to cave in, the final provision in the ICESCR essentially denotes a stalemate. The compromise on the right to work had two major outcomes. First, the right to work was formulated as a progressive right requiring that states only accept the responsibility of developing employment opportunities.\textsuperscript{148} States did not have to provide jobs for all their citizens directly, but did, at least in theory, commit to attempt to achieve full employment. Second, the drafters, more or less, shifted to the ILO the entire onus to develop an appropriate policy action to ensure compliance with these requirements.\textsuperscript{149}

This framing of the right to work, within the larger political and ideological context during the period when it emerged in international human rights discourse, had an enormous affect on the development of the right. States also had no coordinated view on what would constitute state action to fulfill the right. While China guaranteed work for all its citizens, it was criticized by the West for inefficient uses of human resources and massive restrictions on the freedom of workers to choose what job to have.\textsuperscript{150} While the US granted its citizens freedom of choice as far as jobs are concerned, and had high rates of worker productivity, their system was criticized as being exploitative and unbalanced because unemployment existed for millions of its inhabitants. Even before the economic crisis, more than 37 million Americans lived in poverty.\textsuperscript{151} Since the crisis at least 10 million Americans have lost their jobs.

The US approach to the right to work, or at least the theoretical underpinnings of that approach, was essentially set in 1908,\textsuperscript{152} when the Supreme Court provided that absent a contract “it cannot be . . . that an employer is under legal obligation . . . to retain an employee in his personal service.”\textsuperscript{153} Thus, while many other countries provide protections to workers from dismissal at will “[t]he employer's divine right to dismiss at any time, for any reason, and without notice has survived with vigor”\textsuperscript{154} as the very founda-

\begin{itemize}
  \item \textsuperscript{144} Wolfgang Benedek, \textit{The World Trade Organization and Human Rights}, in \textit{ECONOMIC GLOBALISATION AND HUMAN RIGHTS} 137 (Wolfgang Benedek, Koen De Feyter, & Fabrizio Marrella eds., 2007); Perulli, supra note 137, at 143.
  \item \textsuperscript{145} See Craven, supra note 6, at 195.
  \item \textsuperscript{146} Id. at 201.
  \item \textsuperscript{147} Id. at 195.
  \item \textsuperscript{148} Id. at 197.
  \item \textsuperscript{149} Id. at 207.
  \item \textsuperscript{152} See generally Derek C. Bok, \textit{Reflections on the Distinctive Character of American Labor Laws}, 84 Harv. L. Rev. 1394, 1404 (1971).
  \item \textsuperscript{153} Adair v. United States, 28 S. Ct. 277, 281 (1908).
\end{itemize}
tion of the free enterprise system.” Roughly stated this position suggested that the rights of any individual to work must ultimately be secondary to the freedom granted enterprises to seek profit and growth.

For decades following the formal introduction of the right to work into the modern human rights movement, debates that could have allowed for a progression and further development of the right were derailed by political tensions in the world which restricted meaningful and fruitful discussion on the issue. Different approaches saw the introduction of unique sets of standards around the world that states claimed would fulfill their requirements. With radically different standards being created and developed, and with reporting obligations set by the Committee on Economic Social and Cultural Rights largely limited to general trends in unemployment, there has been little or no development of a coordinated view of what the right means in the realms of practice and policy.

To examine the evolution of the right within different political systems the United States and China are used as case studies as they originally came from opposite ends of the political spectrum. The European Union is used to provide some perspective as far as a middle ground approach is concerned. A superficial review of the policy and practice in those examples, conducted using rhetorical stances and official positions, would seem to indicate that their positions have remained largely unchanged since the early debates on the right. A closer look, however, suggests that while the rhetoric might no longer match up, the actual policies adopted show some convergence on the concept of what the obligations of states are in protecting the right to work.

V. APPLYING THE RIGHT TO WORK

The discussions and debates held during the drafting of the UDHR and the ICESCR were not all in the abstract alone. The differing opinions that were being expressed were being applied in legal systems around the world. Thus, by looking at three illustrative cases it can be better understood how the right to work has been applied, and how it can, and does, work in practice.

Of the three case studies only China provides for the right to work in its constitution. The Chinese constitution goes even further than simply providing for the right. It also has a provision articulating an obligation to work. Article 42 of the 1982 Constitution states that “[w]ork is the glorious duty of every able-bodied citizen.” This obligation is not present in either the US or the EU. The Chinese position reflects the socialist approach to the right to work that was also espoused during ICESCR negotiations. There it was argued that there needed to be state obligations to supply jobs for all people who wanted to work.

In Europe the European Charter takes an entirely different approach to the right to work. Article 1 of the Charter states that “[e]veryone shall have the opportunity to earn his living in an occupation freely entered upon.” This formulation emphasizes the freedom to work, and the equality of opportunity, as opposed to any state obligation to ensure enough jobs are created. In the United States there is simply no federal legal instrument that guarantees a right to work which we can refer to.

Delving more deeply into the three case studies however, it is clear that there is some measure of convergence through the policy approaches adopted. In China the steady opening of the markets and slow process of privatization certainly has had an effect on the practical application of the right to work. The so-called “iron rice bowl” that had guaranteed work and food to all citizens under the socialist system was challenged by the reforms beginning at the end of the 1970s. While socially and economically the country continues to move away from a socialist economic model, the government remains ideologically socialist in nature - theoretically guaranteeing work to all citizens.

There is a significant tension between the realities of the market, in which there has been a growing number of unemployed since the reforms, and the governments’ ideological position.

Unemployment is one of the government’s greatest concerns. It fears that a guarantee of the right to work will cause instability if the government cannot actually meet this obligation. It is within this context that the 2009 Chinese National Human Rights Action Plan of China should be read. Here

156. CRAVEN, supra note 6, at 206.
158. CRAVEN, supra note 6, at 197.
161. This term is derived directly from the Chinese, 铁饭碗 (tiefanwan) and has long been used in China both formally and informally. Neil C. Hughes, CHINA’S ECONOMIC CHALLENGE: SMASHING THE IRON RICE BOWL 5 (2002).
165. See Michael Bristow, China Fears Grow Over Job Losses, BBC NEWS, 20 Nov. 2008.
the right to work no longer seems to imply that there will be zero unemployment. Instead the government sets a target of less than 5 percent urban unemployment as its standard.166 While most of the section devoted to the right to work in the Action Plan covers issues like a minimum wage, safety conditions, and the resolution of labor disputes, there are some measures specifically designed to ensure individual access to jobs. There is an insistence on the importance of vocational training as well as a pledge to allow labor mobility to an estimated 18 million migrant workers as well as newly graduated university students. Also included is a pledge to improve the functioning of the labor system by allowing collective contracts and increasing efficiency between the government, private sector, and workers.

These measures introduced to increase employment in China are not dissimilar to those announced following the May, 2009 EU employment summit. There employment mobility, increased training and skill development, and improved labor market efficiency were among the main issues agreed to.167 The major difference was the introduction of hard employment targets (5 percent urban unemployment) by China and a strong focus on employment services in Europe.168 In general, the strong difference in perspective from when the right to work was initially being negotiated has significantly decreased over time. This is certainly true since the demise of most central planning economies. The introduction of China's human rights action plan seems to be an admission that the economic climate and other issues have created great challenges to the protection of socioeconomic rights that had been guaranteed for so long. This concern echoes the views those expressed by Western states in 1950 when they debated the right to work. Already then they suggested that the provision of the right depended too much on the economic climate, balance of trade, natural resources, and other issues outside of the control of a national government.169

Today it might seem that it is not socialist states that are outliers on the issue of the right to work, but rather the United States. It is in the here that the right to work seems to have remained the most underdeveloped. There have been occasions where legislators have toyed with legislating the right and thought about incorporating it into the US legal system. In 1944 FDR called for a new bill of rights which would include the right to a "useful and remunerative job."170 In 1978 the Full Employment and Balanced Growth Act was introduced in Congress. It would have set full employment as a stated goal of the government.171 Both of these efforts died in the legislature. Today the right of every individual to a job is rarely mentioned in the US.172

One of the major reasons for the lack of growth of the right to work in the United States has been the struggle over compulsory trade unionism. In the US, "right to work" has become a legal term-of-art that refers specifically to state statutes that permit non-trade unionists equal access to work as those who join trade unions.173 Here, the right to work is interpreted as the right to equal access to jobs as opposed to something more significant creating an obligation for job creation. In this context, the right to work is associated with the decline of unionism and collective bargaining and not the elimination of unemployment. This association is so prominent that it has essentially crowded out discussions on other perspectives of the right to work.

Another important reason why the United States has not had a more developed dialogue on the right to work has been its unabashed embrace of the notion of self-regulating markets. Market theory and a faith in the economic markets to regulate and balance themselves have resulted in a political philosophy wherein governments limit their economic intervention.174 It is believed that governments should create conditions for growth and support the creation of a sustainable pro-business environment, but should not intervene into the markets directly. This position has been shaken somewhat by the recent global economic crisis which has seen the government intervene more directly than it has for decades. Nevertheless, this philosophy in the past left little scope for government employment interventions that might have disrupted market balances.175 In fact this approach was often used to sideline rights based dialogue during discussions on economic policy. This was the case as it was believed that over engagement or regulation by government would "distort" the market and make it less efficient.176 Furthermore introducing rights and protections that might create opportunities for litigation on policy decisions has been a concern for many governments.177 In the United States especially there have been clear efforts to keep policy debates far removed from the judiciary.

167. Employment Summit, supra note 132.
169. Caven, supra note 6, at 195.
170. Zannoni & McKenna, supra note 134.
172. Zannoni & McKenna, supra note 134, at 555.
177. Michel Addo, Justiciability Re-examined, in ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, supra note 160, at 93.
VI. ECONOMICS AND THE RIGHT TO WORK

An issue clearly raised by the right to work in the United States is the relationship between the right and economic theory. One of the greatest challenges to the right to work has been neo-classical economic theory and its strong influence on economic policy makers. Theorists have given significant attention to the past struggles of human rights proponents and economic theorists to constructively engage each other. A number of explanations might be offered for this gap between the two fields. These include the lack of a shared language, and the normative nature of human rights, as compared to the positive science approach of most economists. Perhaps the most important limitation to constructive engagement is the inability of both sides to balance the utilitarian perspective of economic models with the focus on the individual espoused by human rights theorists. There are however economists working from assumptions and parameters that might suit integration with human rights dialogue. However, the dominant strain of economics over the last half century, being that of neoclassical and neoliberal theory, has not effectively engaged with, or included rights based dialogue, in its models. While there are contemporary theories being presented which argue for improved collaboration between the rights based and economic thinkers, generally these ideas are novel and have not yet been translated into action on specific rights. When considering the right to work, the two economic models that have most affected perspectives on the right of every individual to a job have been the natural rate of unemployment thesis and the accelerationist hypothesis. But, theories on welfare and state interventions in economic markets have also pushed policy makers away from engaging the right to work during policy discussions.

In the 1950s when the ICESCR was being negotiated the drafters did not share the same assumptions and perspectives on unemployment as many policy makers do now. After World War II the fear about the spread of communism saw the argument against the right to work being focused on the ineffectiveness of centralized planning economies. Today however it is the fear of inflation, an emphasis on growth, and other important neo-classical indicators that are raised. These indicators have each been used with significant success to argue against the use of full employment as a reasonable goal for governments to set.

It must be remembered that those drafting the ICESCR were diplomats and not economists. So when drafting the right to work the meaning of full employment was not really considered. While today different types of unemployment are identified, the drafters at the time did not consider all the theoretical complexities surrounding unemployment. Since then, extensive thought has been dedicated to the nature of unemployment and categories of unemployment are now commonly discussed including seasonal unemployment, frictional unemployment, cyclical unemployment, structural unemployment, etc. Each of these types of unemployment has specific and distinct causes. Not all of them are indicative of a poorly performing economy. Fluctuations in demand and supply, market imperfections, the time it takes for searching out an appropriate job all contribute to what has been called the "natural rate of unemployment." This thesis states that there will always be unemployment occurring in a healthy market and that it cannot always be considered. Some economists have gone so far as to calculate an exact number for the natural rate of unemployment. Suggesting that there is a natural rate of unemployment that might be impossible to remove without massive expenditure immediately calls into question the viability of a right to work which creates obligations for states to ensure all people find work.

Adding further to the distancing of policy making from the right through economic rationalizations has been the accelerationist hypothesis. This theory added to the concept of a "natural rate" of unemployment by warning that any government attempting to drive unemployment below the natural rate would cause inflation. If these ideas are accepted, the prospective costs of reducing unemployment below a certain point become massive. These costs have even come to be used as a justification for welfare by many economists. This is the case as there is a point in every state when adding one more job costs more than the marginal benefit of adding one more worker to the economy. This thesis presumes that once employment reaches the level where it becomes too costly to add more jobs, welfare becomes the most efficient solution available. With all these theories

183. Crain, supra note 6, at 195.
184. Id. at 206.
186. Zannoni & McKenna, supra note 134, at 556.
188. Zannoni & McKenna, supra note 134, at 556-57.
together, for some, economic theory seems to present a strong argument against the creation of full employment as a right.

Taking these theories at face value does not always translate into effective and appropriate approaches to the real world. Neoclassical models present clear arguments based on simple models that illustrate the fundamental workings of economic forces, but they cannot accurately reflect the way the world really works and the manner in which people experience that world. Ultimately, none of these theories are able to consider the negative externalities of unemployment effectively. There are a myriad of quantifiable costs associated with unemployment, and specifically rising unemployment, such as an increase in crime, and a decrease in long-term employability. While these costs can be introduced into more complex economic models, they require significant expertise in economics to be effectively applied. Additionally, there are a whole host of costs that are very difficult to quantify. These include increases in suicides, the disruption of family patterns, the loss of pride, an increase in depression, and mental anxiety. All of these negative externalities can be triggered by sustained unemployment that has not been effectively included in economic models.

The shortcomings of economic models in adequately valuing the human costs of unemployment are not surprising. What is a surprise is the extent to which these limitations have not been sufficiently considered by policy makers. The prominence of neoclassical and neoliberal economic thought has resulted in a steady retreat of governments from economic markets and decreased regulation with concomitant results. The decreasing power of the state as a regulator is a process intimately tied to the rise of globalization and the internationalization of domestic economies. As multi-national companies spread across the globe and increasingly trade within themselves, they have largely become self-regulating instead of being regulated by the countries where they operate. Some argue that this has caused a trend where states compete to attract multi-nationals through de-regulation, at times with dire results for individual workers. As such companies become more mobile, the labor markets remain fairly restricted. So it is not only states moving towards domestic policy making approaches that remove the government from the markets, but the international economy is also moving towards deregulation or structures which avoid existing regulation. It is in these deregulated environments that the aforementioned ramifications of unemployment or undignified employment bear on the lives of actual people.

As these processes have developed there has been a lack of a coordinated civil society response on the issue of the right to work beyond periodical protests against the World Trade Organization and G8 that rarely achieve the communication of meaningful positions. If there is to be movement advocating for the right, states have to be put under some sort of pressure so that they suffer an increase in the political costs of not regulating the labor markets more effectively. This is the role of activists and civil society leaders. They need to increase the transparency by states on these issues and impose costs for those that continue to conduct themselves in ways that violate human rights. In this regard, human rights law has an important role to play by introducing such costs. However, on the issue of the right to work these elements remain undeveloped. The right remains only loosely defined, and civil society remains divided, much like the states that were divided during the early negotiations some decades ago. Consideration of the theoretical divisions of the right and the corresponding affect on the human rights and labor movements will undoubtedly lead to a more effective consideration about the way in which the right to work might be brought to bear more directly on policy decisions in the future.

VII. HUMAN RIGHTS AND LABOR ACTIVISTS AT ODDS

As discussed, variations in understandings of what constitutes the right to work reflect the different backgrounds of those involved in the arguments. Human Rights activists approaching the right to work have featured most prominently in addressing the right to compete fairly for jobs. This aspect of the right to work has been closely linked to broader campaigns against discrimination. By focusing on fair competition separately from the other aspects of the right to work, the issue can be framed as a civil or political right as opposed to only a socioeconomic right. Given the historical tendency of the international human rights regime to emphasize civil and political rights, and their corresponding strength in monitoring and enforcing such

193. Perulli, supra note 137, at 99.
195. Id. at 15.
196. Perulli, supra note 137, at 99-100.
199. Leary, supra note 17, at 24.
rights at the expense of socioeconomic rights, this focus on discriminatory hiring practices is hardly surprising.

Similarly, actors aligned closer to the labor movement have, over time, carved out a specific focus on the right to work. For them the causes of rights at work and the right to dignified work best fit into their objectives. Labor groups have generally made issues of pay, safety at work, and fair treatment for workers the cornerstone of their movement. Again this focus makes sense for them as these issues are of primary and immediate interest to workers who are the main constituents of labor organizations. Considering these differentiated approaches to the right to work among labor and human rights actors, perhaps the most interesting study might be on the right to work as linked to the right to liberty.

The discourse on the right to freedom of choice in employment is quite easily traced back to the Abolitionists operating in the nineteenth century. While there are clear legacies connecting the anti-slavery movement and the anti-slavery treaties to the contemporary international human rights movement, the relationship between the organized labor movement and the abolitionists was far more complicated. Bernard Mandel has argued that the early labor activists in the United States did not join with the abolitionist movement immediately due to distrust of the mostly middle class abolitionists. Instead labor activists in the North rationalized their anti-slavery stance based on the belief that slavery undermined their collective power and prevented worker solidarity. Having entered into the anti-slavery fight for different reasons, it is understandable how these two movements could proceed with separate paths and different methods despite sharing similar goals.

This distrust between labor and human right activists was not limited to the anti-slavery period. In twentieth century discourse on the right to work in the United States, labor and rights activists were at odds because of their different approaches to the right to work. As described earlier, a rights based approach to the right to work has tended to emphasize equal opportunities to obtaining employment while the labor approach has favored efforts to use collective bargaining to improve working conditions. These two movements have been in direct opposition to each other on the issue of compulsory trade unionism. The debate over compulsory trade unionism dominates right to work dialogue in the US and so called “right to work laws” refers specifically to laws banning compulsory trade unionism.

These laws, which might be described from a human rights perspective as laws protecting against discriminatory hiring practices, are often linked to the decline of unionism and collective bargaining in the United States.

While these specific examples from the abolitionist movement and the debate around compulsory trade unionism seem only to apply within the context of the United States, the difference in approach taken by human right and labor activists demonstrated within them is a challenge that creates friction internationally as well. Essentially, human rights activists approached the problem through the lens of individual rights, but the labor movement has always had a strong utilitarian streak. Labor power is collective power, and so workers’ causes are framed in exactly that manner. The fundamental importance of individual rights and the human rights movement’s strong commitments to combating coerced labor has at times even been a hindrance to the development of the right of all individuals to a job. This focus has caused concerns among human rights activists that calling for full employment might eventually develop into an obligation to work, potentially limiting the right to freely choose one’s work. A general tension among human rights actors with utilitarian approaches has actually led at least some to shy away from labor rights due to their close links with neo-liberal economic theory. Utility theory underlies most neo-liberal economic models that are brought to bear on economic policy decisions.

The discourse within the labor movement tends to align more closely with economic concepts that rights based ideas as collective action and bargaining are emphasized over the rights on the individual workers.

Beyond differences in approach and priorities, the domestic orientation of most labor organizations for some also makes them ill-equipped to participate in internationally oriented human rights discussions. This situation is made worse by the international focus of much human rights activism. The growth of the human rights regime has taken place mostly through the development of international consensus on rights based issues. A truly global labor movement, outside of the ILO itself, is something that only started to develop with the onset of globalization and more open labor markets. However, presenting the labor and human rights movements as

204. Hogler, supra note 173, at 102.
205. Leary, supra note 17, at 22.
209. Mundilak, supra note 3, at 190.
entirely different in their approach and structure is not entirely accurate. Both movements essentially move on both the domestic and international levels. While the basic similarity in the two tiered construction of these movements is clear, in the past the labor movement has been driven more by domestic entities. Given the extreme variations in conditions being faced by workers in the West and in other areas of the world, there are great challenges in creating a coordinated platform that are equally relevant for workers worldwide.212 While human rights conditions are also extremely varied across the globe, the construction of human rights tends to start from basic principles that can be universally applied; labor organizations tend to develop with specific tangible goals focused on improving the conditions within their country or region. While Western human rights activists actively engage in promoting human rights standards abroad, Western labor actors are fighting for improved conditions in their home countries.

Because of this stratification of the labor movement, most cases in which human rights and labor actors intersect are at the ILO, which plays the consensus building role on international labor standards. The ILO was historically intended to be the international coordinator for the labor movement that would help the cause by developing standards and advocating internationally for labor causes.213 However, given the disparate nature of labor conditions in different countries and the domestic focus of labor activists, the coordination aspect has not effectively developed and genuine consensus has been difficult to achieve. In fact, it has been argued that the ILO has been more effective at constructing an international united front of employers rather than bringing workers groups together.214 Without the ability to bind labor movements together, the ILO has become a law making body which attempts to create standards that can be used by domestic movements to legitimize their claims, but adoption of those standards by member states remains entirely voluntary.215

Thus, the ILO can be viewed as leading the international labor movement closer to the human rights model in which standards are set and then worldwide campaigns designed to promote those values. The 1998 Declaration on Fundamental Principles of Rights at Work might be viewed in this light. In this document the ILO set core principles of labor law in an attempt to make it more accessible and focused in order to promote genuine international coordination.216 Critics have argued however that these fundamental principles will tend towards promotional and education campaigns as are common among human rights activists, but lack the legal strength that most human rights principles have developed. It has been suggested that focusing more on increasing the justiciability of labor standards would be far more effective than simply trying to water labor law down to make them more universally acceptable.217

While the 1998 Declaration covers important issues, it only covers the aspect of the qualitative aspect of the right to work. Unfortunately, the right of every individual to a job did not make the core list. When considering the narrowly conceived right to work, analysis of why the labor and human rights regimes have not always coordinated or cooperated on the issue of the right to work only tells part of the story. These two regimes have not only divided up the defense and promotion of the right to work, but have also focused on the qualitative aspects of the right and not the quantitative aspects. The obligation to ensure that there are a sufficient number of jobs for willing workers, has inspired neither coordinated campaigns nor sustained engagement from either the labor or human rights movements.218

While in the previous section this omission has been partly attributed to the natural affinity of the labor movement for the cause of Rights at Work and the human rights movement's preoccupation with civil and political rights, another explanation might lie in the predisposition of both movements to strive towards consensus building at the international level. The initial reason why the right to work was divided into sections is found in the fact that during ICESCR negotiations there was no consensus on the right of every individual to a job. Compromises were made which saw freedoms of choice, equal opportunity and the right to dignified work being agreed upon, and thus the international focus has been on those aspects of the right. So while the movements against coerced work and the promotion of adequate working conditions feature prominently in the international discourse, the right of every individual to employment is still considered by many as a progressive right. It has therefore not been sufficiently focused upon, and has little or no jurisprudence helping its development.219

VIII. CONCLUSION

With the global financial crisis of 2008 and 2009 there have been renewed attempts to ensure that economic issues are not simply left to market forces.

214. Id.; Ross, supra note 212, at 78.
215. Langille, supra note 207, at 419.
217. Id.
219. Mundlik, supra note 3, at 194.
The dire results of this non-regulation were certainly a major cause of what occurred. With the large numbers of people that have lost their jobs during this time there has been an increase in civil society activism on the issue of unemployment. There have also been calls by policy makers for increased regulation of economic markets worldwide.

In this context, progress on securing and developing the right to work is opportune and necessary. However, for progress to be made the three major obstacles need to be overcome: the lack of unity among civil society actors on the right to work, the lack of international consensus on the issue of full employment, and economic policy making trends that sideline a rights based dialogue.

In order to unify labor and human rights activists as well as galvanize public support for the right to work, the onus for change seems to rest equally with human rights and labor institutions. While the ILO and CESCR have generated international law on issues relating to the right to work, they do not have the institutional capacity and reach to initiate broad rights based campaigns like the United Nations. Nonetheless both the ILO and CESCR can, and should, play a critical role. For example, the CESCR could reexamine its General Comment of 2005 to ensure that there is not simply a continuation of the status quo with no discourse on the intersection of the right to work and economics. There is a need to update the theories that are behind the right. For example the obligation placed on states to fulfill the requirements on the right to work are roughly stated as: (1) adopting a national policy on the right to work, (2) providing some form of unemployment compensation and employment services, (3) implementing plans to counter unemployment, (4) the implementation of technical and vocational training plans, and (5) building awareness of the right to work. While these are by no means the only specifics contained in the comment, they serve as an illustrative example of how little this General Comment changes the overall standing of the right. The assumptions of neoclassical economics should be questioned, and assessed from a rights based perspective. There is a need to make sure judicial remedies are available to citizens and an affirmation that the right to work is a progressive right. There is therefore a need for more drastic change on the issue of the right to work by improving and refining international law governing the right.

Without involving as broad a range of actors who have contributed to the dividing and limited of the effect of the right to work the ultimate affect will not be significant. Unless human rights activists are engaging with labor activists, economists, policy makers as well as legal institutions the divisions that have stunted the growth of the right to work will persist. The combination of these actors will be able to discuss more specific measures to ensure the protection of the right to work than was possible within the CESCR itself.

A key player in moving the cause forward should be the Office of the High Commissioner for Human Rights. It will have to move past its soft touch on economic, social, and cultural rights. Definitive campaigns on the right to work during this time of growing unemployment and widespread dissatisfaction with the status quo will lay the path for broader change. This galvanized support for the issue of the Right for Work will need to be focused if long term effects will be felt.

Worldwide there needs to be a greater call for increased domestic and international regulation of economic markets. This has been one of the major obstacles to the implementation of the right to work. As global plans are made to increase the review of financial and trade markets, there needs to be a consistent effort to inject a rights-based dialogue on the issue of employment into these debates. While the GATT and WTO agreements make reference to ‘full employment’ in their preambles, that language has been lost in negotiations and discussions that have occurred.221 As an extensive revision of the Bretton Woods agreement is considered, human rights and economics must dialogue and be brought to bear on the negotiations.

The adoption on 10 December 2008 of the Optional Protocol to the ICESCR222 by the United Nations General Assembly comes at an opportune time. This Protocol is designed to allow the CESCR to field complaints and communications from states, individuals, and organizations in such a way to strengthen the ICESCR regime.223 If ratified by a sufficient number of states, this might be a significant tool to increase human rights oversight of economic policy making. While the exact nature of how the CESCR is going to receive such complaints remains to be seen, for it to develop the right to work there will need to be more guidance and guidelines on what constitutes a violation of the right to work. Despite the recent issuing of the General Comment on the right to work it would seem that the economic crisis and the large amount of job loss around the world justify a revisiting

221. Benedek, supra note 144, at 143.
of that right. This would help to ensure that once the Optional Protocol takes effect the Committee will be able to act quickly and effectively to institute a more exhaustive and meaningful review of member state performance on the right to work.

As changes to political and economic thought take shape it is clear that the context for debate on the right to work is changing. The major obstacles that remain to strengthen the right seem to be the weaknesses within the human rights movement to operate collaboratively with other actors approaching the issue from a non-rights based approach. The current economic crisis provides the opportunities for advancement of the cause of the right to work, but taking advantage of those opportunities will require human rights advocates and others to engage more constructively with the challenges of economics and policy.

Advancing Transgender Family Rights through Science: A Proposal for an Alternative Framework

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ABSTRACT

This article examines the impact of the scientific revolution on the family rights of transgender individuals from an international human rights perspective. It reviews how the European Court of Human Rights has responded to quandaries arising in this context and observes the inequalities that surface at the intersection between law, gender identities, culture, and science with regard to transgender family relations. To close the gaps, the article suggests pursuing family rights from a different venue: a relational approach to the universal right to enjoy scientific progress and its application under Article 15 of the International Covenant on Economic, Social, and Cultural Rights.

I. INTRODUCTION

Scientific technologies have changed the landscape of the family. In addition to the creation of family units in circumstances that wouldn't have been possible otherwise, medical developments have also enabled the alteration

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